NEW YORK CHILDREN'S LAWYER

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Please follow the link below to access an ABA article on raising the age for criminal prosecutions, which includes a discussion on the "teen brain difference."

http://www.abajournal.com/magazine/article/adult_prosecution_juvenile_justice

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SECOND DEPARTMENT NEWS

Continuing Legal Education Programs

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

On November 15, 2016, the Appellate Division, Second Judicial Department, and the Office of Attorneys for Children co-sponsored an introduction to the ***Strong Starts Initiative, a New Approach to Article 10 Child Protective Proceedings, Targeting Children under Three Years Age***. The speakers were Susan Chinitz, Psy.D., Strong Starts Initiative, and Kate Wurmfeld, Esq., Senior Staff Attorney, Domestic Violence Program, Center for Court Innovation. This seminar was held at the Queens County Bar Association, Jamaica New York.

On November 30, 2016, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, and the New York State Unified Court System Child Welfare Court Improvement Project co-sponsored ***Identifying Implicit Bias in Article 10 Cases: Bias in Medical Decision Making***. The speakers were Rachel D. Godsil, JD, Director of Research and Co-Founder of Perception Institute, and Eleanor Bontecou, Professor of Law at Seton Hall University Law School. This seminar was held at the Queens County Bar Association, Jamaica, New York.

On February 1, 2017, the Appellate Division, Second Judicial Department, and the Office of Attorneys for Children co-sponsored ***Part 36 Rules of the Chief Judge, What the Attorney for the Child Needs to Know***. The speaker was Michele Gartner, Esq., Special Counsel for Surrogate and Fiduciary Matters, Office of Court Administration. This seminar was held at the Office of Attorneys for Children, Brooklyn, New York. All panel members who are approved for Part 36 Private Pay are required to view this program which is available online. Please contact Gregory Chickel at gchikel@nycourts.gov to obtain access to this program.

Tenth Judicial District (Nassau County)

On November 28, 2016, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Family Court Liaison Committee co-sponsored ***Shades of Grey; 22 NYCRR § 7.2 and Client Directed Representation***. The speakers were Barbara Kopman, Esq., Attorney in Private Practice, Patricia Latzman, Esq., Attorney in Private Practice, and John Zenir, Esq., Attorney in Private Practice. This seminar was held at the Nassau County Family Court, Westbury, New York.

On December 14, 2016, the Appellate Division, Second Judicial Department, the Attorneys for Children Program, and the Family Court Liaison Committee co-sponsored ***New Strategies for Representing Parents in Article 10 Child Protective Proceedings***. The speaker was John Zenir, Esq., Attorney in Private Practice. This seminar was held at the Nassau County Family Court, Westbury, New York.

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

THIRD DEPARTMENT NEWS

John T. Hamilton, Jr., Esq. Award For Excellence in the Legal Representation of Children

On April 28, 2017, the Appellate Division, Third Department will present the John T. Hamilton, Jr., Esq. Award For Excellence in the Legal Representation of Children to **Ronile Lawrence, Esq.** of Hamilton County. The Hamilton Award is presented each year to a Third Department attorney for the child who demonstrates a commitment to outstanding legal representation of children and to the well-being of child clients. The award commemorates the distinguished service of John T. Hamilton, Jr., Esq. of Delhi as a long-time attorney for children and member of the Advisory Committee for the Third Department. It is our great honor and privilege to present this award to Ronile in recognition of her outstanding work and exemplary service to the many children she has represented for over 30 years. The award ceremony will take place during the lunch hour at the upcoming seminar on

Friday, April 28, 2017 at the Radisson Hotel Wolf Road, in Colonie. We extend our warmest congratulations to Ronile.

New Policy on Extensions on Appeals

Please be advised that a new policy regarding **requests for extensions** on appeals will take effect in the Appellate Division, Third Judicial Department beginning **April 1, 2017**. Specifically, extensions on responding briefs will be limited to a maximum of 3 weeks beyond the original due date. Additionally, the consent of the appellant will be required for every extension. Any request for time longer than 3 weeks or where the appellant is unwilling to consent (or both) will require an application to the Court. If you have any questions, please contact the Clerk's Office at 518-471-4777.

Essex County Children's Law Office

The Office of Attorneys for Children of the Appellate Division, Third Judicial Department, in consultation with Essex County Family Court, is pleased to announce that as of December 1, 2016, Cheryl Indelicato, Esq. is the Chief Attorney in the newly established Essex County Children's Law Office. The Children's Law Office will serve approximately 80% of the child clients appearing before the Family, Supreme and Surrogate's Courts of Essex County, in all types of proceedings where representation by an attorney for the child is authorized by law. The office is currently located at 103 Hand Avenue, Suite 1 - 2nd Floor, Elizabethtown, NY 12932.

Liaison Committees

We are very pleased to announce that Nancy Sutin, Esq. is the new liaison representatives for Saratoga County. As you may know, the Liaison Committee provide a means of communication between panel members and the Office of Attorneys for Children. A department-wide Liaison Committee meeting was held on Friday, November 4, 2016 at the Office of Attorneys for Children in Albany and will be held again on Friday, May 4, 2017 at the Crowne Plaza Resort in Lake Placid. If you have any questions about the meetings, or have any issues of concern that you wish to be on the meeting agenda, kindly contact your liaison committee representative, whose name can be found in our Administrative Handbook, pp.18-22 and can be accessed by going to our website: http://www.nycourts.gov/ad3/oac/.

Web page

The Office of Attorneys for Children web page located at nycourts.gov/ad3/oac includes a wide variety of resources, including E-voucher information, online CLE videos and materials, New York State Bar Association Representation Standards, the latest edition of the Administrative Handbook, Administrative Forms, Court Rules, Frequently Asked Questions, seminar schedules and agendas, and the most recent decisions of the Appellate Division, Third Department on children's law matters, updated weekly. Check out the *News Alert* feature which includes recent program information.

Training News

REMINDER TO MARK YOUR CALENDERS! Training dates for Spring and Fall 2017 CLE programs are listed below and agendas for these programs will become available as the CLE date nears. You can find this information on the Third Department OAC web page located at: http://www.nycourts.gov/ad3/oac/Seminar_Schedule.html. Our ability to provide high quality live training at no cost to the panel is dependent on the numbers of attorneys who attend.

Spring 2017

Introduction to Effective Representation of Children
Thursday, April 6 & Friday, April 7, 2017
Rochester, NY

Parental Alienation: Controversies & Conundrums
For the Attorney for the Child
Friday, April 28, 2017
Radisson Hotel, Wolf Road, Albany

Children's Law Update 2017
Friday, May 5, 2017
Crowne Plaza Resort, Lake Placid

Child Protective Proceedings: Before, During & After
Practical and Necessary Information for the AFC
Friday, June 16, 2017
The Saratoga Hilton, Saratoga Springs

Fall 2017

Children's Law Update 2017
Friday, September 15, 2017
Holiday Inn, Binghamton

Introduction to Effective Representation of Children
Thursday, October 19 & Friday, October 20, 2017
The Century House, Latham

Collaborative CLE with NYSBA for Educators and AFCs
October 27, 2017
The Sagamore Resort, Bolton Landing

Children's Law Update 2017
Friday, November 17, 2017
The Century House, Latham

FOURTH DEPARTMENT NEWS

New Liaisons

Welcome and thanks to new County Liaisons, Sherene Pavone, Onondaga County, Beth Ratchford, Monroe County, Lydia Evans, Chautauqua County, and Kristie DeFreze, Genesee County. Many thanks to past liaisons, Judge Michael Sullivan, Chautauqua County, Kim Weisbeck, Monroe Country, Cathy Monachino McClurg, Genesee County, and Lisa Fahey, Onondaga County. The liaison program was created by the Attorneys for Children Advisory Committee to solicit suggestions and feedback from panel members on an annual basis. Additionally, the Director and Assistant Director depend on the liaisons to bring issues regarding attorneys for children to the attention of the Program and to disseminate information of interest to attorneys for children in their counties. There is an annual meeting of the Liaisons following the Michael F. Dillon awards each year.

Appeals

Substitution Request Reminder - When sending Linda Kostin a letter requesting substitution on an appeal, you must "cc" parties' counsel and pro se parties. With your letter of substitution, you also must include copies of the notice of appeal, affirmation of service if you served a notice of appeal, order appealed from, and decision, if any.

Motion Fees Reminder - AFC are exempt from motion fees, see Matter of Celene C.P., 204 AD3d 1072; CPLR 8017.

Late Spring Seminar Schedule

Fundamentals of Attorney for the Child Advocacy Seminars

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

April 6-7, 2017

Introduction to Effective Representation of Children
East Avenue Inn & Suites
Rochester, NY

April 28, 2017

AFC Update
Center for Tomorrow
Buffalo, NY

May 12, 2017

AFC Update
Holiday Inn
New Hartford, NY

Tentative Fall Seminar Schedule

September 28, 2017

Update
Quality Inn and Suites
Batavia, NY

October 13, 2017

Update
Genesee Grande
Syracuse, NY

October 27, 2017

Collaborative CLE with NYSBA
The Sagamore Resort
Bolton Landing

October 31, 2017

Update (Half-day)
Valley Oak Event Center
Geneseo, NY

Introduction to Effective Representation of Children

October 19-20, 2017

Century House
Latham, NY

RECENT BOOKS AND ARTICLES

ADOPTION

Sally Terry Green, *The Law Demands Process for Rehomed Children,* 69 Ark. L. Rev. 729 (2016-2017)

CHILD WELFARE

Nekketta Archie, *Red Light, Green Light: The Evil Yet Ever-Existing Intersection of Domestic Minor Sex Trafficking and the Foster Care System,* 42 T. Marshall L. Rev. Online 1 (2017)

Rakesh Beniwal, *Implicit Bias in Child Welfare: Overcoming Intent,* 49 Conn. L. Rev. 1021 (2017)

Janet Howe, *De-Junking MSBP Adjudication,* 59 Ariz. L. Rev. 201 (2017)

Sofia Iqbal, *Reforming New Jersey Resource Family Licensing: Placing Children in the Care of Their Undocumented Family and Friends,* 40 Seton Hall Legis. J. 435 (2016)

Lauren Meads, *Fulfilling the Safe Harbor Promise: Enhancing Resources for Sexually-Exploited Youth to Create a True Victim-Centered Approach,* 35 Law & Ineq. 105 (2017)

Benjamin D. Wasserman, *Searching for Adequate Accountability: Supervisory Priests and the Church's Child Sex Abuse Crisis,* 66 Duke L. J. 1149 (2017)

CHILDREN'S RIGHTS

Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution,* 12 Duke J. Const. L. & Pub. Pol'y 179 (2017)

Dr. Anna High, *Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class,* 69 Ark. L. Rev. 787 (2016-2017)

Michelle Page, *Forgotten Youth: Homeless LGBT Youth of Color and the Runaway and Homeless Youth Act,* 12 NW J. L. & Soc. Pol'y 17 (2017)

Christina Stripp, *Romeo and Juliet: Tragedy in the Information Age,* 44 Rutgers L. Rev. 73 (2016-2017)

CONSTITUTIONAL LAW

Aleaha Jones, *Schools, Speech, and Smartphones: Online Speech and the Evolution of the* Tinker *Standard,* 15 Duke L. & Tech. Rev. 155 (2017)

Perry L. Moriearty, *Implementing Proportionality,* 50 U.C. Davis L. Rev. 961 (2017)

Meredith S. Simons, *Giving Vulnerable Students Their Due: Implementing Due Process Protections for Students Referred From Schools to the Justice System,* 66 Duke L. J. 943 (2017)

Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs,* 18 Federalist Soc'y Rev. 90 (2017)

Emily M. Steiner, *When Psychology Answers Constitutional Questions: The Eighth Amendment and Juvenile Sentencing,* 46 U. Balt. L. Rev. 353 (2017)

COURTS

Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent,* 76 Md. L. Rev. 405 (2017)

Rosemary Deck, *Grown-Up Justice Isn't Child's Play: The Case for a Data Driven Reassessment of Civil Commitment for Juvenile Sex Offenders,* 48 U. Pac. L. Rev. 371 (2017)

Shamala Florant, *A Chance for Positive Change: Exploring the Legal Hurdles Putative Fathers Face in the 21st Century,* 19 Scholar: St. Mary's L. Rev. & Soc. Just. 57 (2017)

Hannah Hicks, *It's All in the Family: LGBT Youth Homelessness and Family Conflict Intervention,* 7 Ala. C. R. & C. L. L. Rev. 311 (2016)

Maria D. Kroeger, *Too Many Solutions: A Cross-Cultural Perspective of Neonatal Abstinence Syndrome and the Current Legal Approaches in the United States,* 55 U. Louisville L Rev. 81 (2017)

Kathleen M. McRoberts & Deborah Hillier-LaSalle, *The Custody and Disposition of Frozen Embryos: Ice, Ice, Baby?,* 60-APR Advocate (Idaho) 36 (2017)

Bob Zhao, *Mitochondrial Replacement Therapy and the Regulation of Reproductive Genetic Technologies in the United States,* 15 Duke L. & Tech. Rev. 121 (2017)

CUSTODY AND VISITATION

Ashley Milspaw & Hilary Vesell, *Co-Parenting vs. Parallel Parenting: Outcomes in Custody Cases With a History of Domestic Violence,* 39-FEB Pa. Law. 32 (2017)

DOMESTIC VIOLENCE

Monika Dargis & Michael Koenigs, *Witnessing Domestic Violence During Childhood is Associated With Psychopathic Traits in Adult Male Criminal Offenders,* 41 Law & Hum. Behav. 173 (2017)

Ryan D. Davidson & Connie J. A. Beck, *Using Couple-Level Patterns of Intimate Partner Violence to Predict Divorce Outcomes,* 23 Psychol. Pub. Pol'y & L. 85 (2017)

EDUCATION LAW

Alexandra Abend, *Achieving the Promise of Assistive Technology: Why Assistive Technology Evaluations Are Essential for Compliance With the Individuals With Disabilities Education Act,* 38 Cardozo L. Rev. 1171 (2017)

Elizabeth A. Beal, *Not Just Horsing Around: Providing a Free and Appropriate Public Education by Deeming Hippotherapy to be the "Basic Floor of Opportunity" for Children With Cerebral Palsy,* 9 Ky. J. Equine, Agric. & Nat. Resources L. 101 (2016-2017)

Amanda Harmon Cooley, *The Impact of Marijuana Legalization on Youth & the Need for State Legislation on Marijuana-Specific Instruction in K-12 Schools,* 44 Pepp. L. Rev. 71 (2016)

Sydney Hawthorne, *People or Place: Which Approach is Superior When it Comes to Addressing Education Reform Through Community Development and Housing Policy?* 52 Gonz. L. Rev. 109 (2016-2017)

Priya Konings, *Protecting Immigrant Children's Right to Education,* 36 No. 2 Child L. Prac. 36 (2017)

James S. Liebman & Michael Mbikiwa, *Every Dollar Counts: In Defense of the Obama Department of Education's "Supplement not Supplant" Proposal,* 117 Colum. L. Rev. Online 36 (2017)

Steven L. Nelson, *Racial Subjugation by Another Name? Using the Links in the School-to-Prison Pipeline to Reassess State Takeover District Performance,* 9 Geo. J. L. & Mod. Critical Race Persp. 1 (2017)

Joan P. Vestrand, *A Better Way, Empowering Youth to Build Character and Community in Our Schools,* 64-FEB Fed. Law. 62 (2017)

FAMILY LAW

William V. Fabricius & Go Woon Suh, *Should Infants and Toddlers Have Frequent Overnight Parenting Time With Fathers? The Policy Debate and New Data,* 23 Psychol. Pub. Pol'y & L. 68 (2017)

Lorie S. Goshin et. al., *An International Human Rights Perspective on Maternal Criminal Justice Involvement in the United States,* 23 Psychol. Pub. Pol'y & L. 53 (2017)

Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement,* 91 Tul. L. Rev. 473 (2017)

Courtney Hodge, *Is the Indian Child Welfare Act Losing Steam?: Narrowing Non-Custodial Parental Rights After* Adoptive Couple v. Baby Girl, 7 Colum. J. Race & L. 191 (2016)

Jesse Krohn & Jamie Gullen, *Mothers in the Margins: Addressing the Consequences of Criminal Records for*

Young Mothers of Color, 46 U. Balt. L. Rev. 237 (2017)

FOSTER CARE

Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care,* 19 U. Pa. J. L. & Soc. Change 207 (2016)

IMMIGRATION LAW

Cristina Ritchie Cooper, *A Guide for State Court Judges and Lawyers on Special immigrant Juvenile Status,* 36 No. 2 Child L. Prac. 25 (2017)

Andrew Tae-Hyun Kim, *Immigrant Passing,* 105 Ky. L. J. 95 (2016-2017)

INTERNATIONAL LAW

Shauna Carmichael, *The Persecutor Bar, Former Child Soldiers & Lessons From Research on Child Development,* 18 Scholar: St. Mary's L. Rev. & Soc. Just. 381 (2016)

Hannah Loo, *In the Child's Best Interests: Examining International Child Abduction, Adoption, and Asylum,* 17 Chi. J. Int'l L. 609 (2017)

Alvina Swati, *Child Labor: The Price is Low, but the Cost is High,* 18 Rutgers Race & L. Rev. 95 (2017)

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Hayley M. D. Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice,* 23 Psychol. Pub. Pol'y & L. 118 (2017)

Matthew Drecun, *Cruel and Unusual Parole,* 95 Tex. L. Rev. 707 (2017)

Adam Fine, *And Justice for All: Determinants and Effects of Probation Officers' Processing Decisions Regarding First-Time Juvenile Offenders,* 23 Psychol. Pub. Pol'y & L. 105 (2017)

Adam Fine et. al, *Is the Effect of Justice System Attitudes on Recidivism Stable After Youths' First Arrest? Race and Legal Socialization Among First-Time Youth Offenders,* 41 Law & Hum. Behav. 146 (2017)

Mary Ann Lee, *Digging Out of The Hole: Arguments Against the Use of Juvenile Solitary Confinement in Kentucky,* 105 Ky. L. J. 151 (2016-2017)

Sarah McCormick et al., *The Role of Mental Health and Specific Responsivity in Juvenile Justice Rehabilitation,* 41 Law & Hum. Behav. 55 (2017)

Carina Muir, *Protecting America's Children: Why an Executive Order Banning Juvenile Solitary Confinement is Not Enough,* 44 Pepp. L. Rev. 151 (2016)

Jenadee Nanini, *A Tribe's Future: Native American Youth and the Right to Counsel in Juvenile Justice Systems,* 9 Geo. J. L. & Mod. Critical Race Persp. 77 (2017)

FEDERAL COURTS

Exhaustion of IDEA's Procedures Not Necessary Where Gravamen of Petitioner's Suit Was Something Other Than Denial of "Free Appropriate Public Education"

Petitioner E.F., a child with a severe form of cerebral palsy, had a trained service dog that assisted her with various daily life activities. Officials at her elementary school refused to grant permission for E.F.'s service dog to join her in Kindergarten. Under E.F.'s existing individualized education program (IEP), a human aide provided E.F. with one-on-one support throughout the day, which, according to school officials, rendered the service dog superfluous. E.F.'s parents began homeschooling E.F. The parents filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR), claiming that the exclusion of E.F.'s service animal violated her rights under Title II of the Americans with Disabilities Act (Title II) and § 504 of the Rehabilitation Act (§ 504). OCR agreed, and school officials invited E.F. to return with her service dog. But petitioners, concerned about resentment from school officials, instead enrolled E.F. in a different school that welcomed the service dog. Petitioners then filed suit in federal court against the local and regional school districts and principal, alleging that they had violated Title II and § 504. The District Court granted the school districts' motion to dismiss, holding that § 1415(*l*) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 140 et seq., required that petitioners first exhaust the IDEA's administrative procedures. The Sixth Circuit affirmed, concluding that § 1415(*l*) applied if the injuries alleged related to the specific substantive protections of the IDEA, and that because the alleged harms were generally "educational" - the court noted that the service animal's absence "hurt [the child's] sense of independence and social confidence at school" - petitioners had to exhaust the IDEA's procedures. The Supreme Court vacated and remanded to the Sixth Circuit for further proceedings consistent with its opinion. The IDEA's goal was to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her "unique needs." By contrast, Title II of the ADA and § 504 of the Rehabilitation Act covered people with disabilities of all ages inside and outside schools, and promised nondiscriminatory access to public institutions. There was some overlap in coverage, but a complaint brought under Title II and § 504 might seek relief for simple discrimination, and exhaustion of the IDEA's procedures was not necessary when the gravamen of the petitioner's suit was something other than the denial of the IDEA's core guarantee of a "free appropriate public education." Here, the complaint alleged only disability-based discrimination, without making any reference to the adequacy of the special education services the child's school provided. Still, the court below should establish whether petitioners invoked the IDEA's dispute resolution process before bringing this suit, and, if they started down that road, the court should decide whether their actions revealed that the gravamen of their complaint was indeed the denial of a FAPE, thus necessitating further exhaustion.

Fry v. Napoleon Community Schools, ___ US ___, 2017 WL 685533 (2017)

Under IDEA, School Must Offer IEP Reasonably Calculated to Enable Child to Make Progress Appropriate In Light of Child's Circumstances

Petitioner Endrew F. was diagnosed with autism at age two. He attended school in respondent Douglas County School District from preschool through fourth grade. Each year, Endrew's individualized education program (IEP) team drafted an IEP addressed to his educational and functional needs. By Endrew's fourth grade year, however, his parents had become dissatisfied with his progress. Although Endrew displayed a number of strengths, he still exhibited multiple behaviors that inhibited his ability to access learning in the classroom. Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress towards his aims. In April 2010, the school district presented Endrew's parents with a proposed fifth grade IEP that was, in their view, essentially the same as his past IEPs. His parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specialized in educating children with autism. Firefly developed a behavioral intervention plan for

Endrew. Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school. In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the school district. The district presented a new IEP. Endrew's parents considered the new IEP no more adequate than the one proposed in April, and rejected it. In February 2012, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew's tuition at Firefly. Endrew's parents contended that the final IEP proposed by the school district was not reasonably calculated to enable Endrew to receive educational benefits, and that Endrew had therefore been denied a free appropriate public education (FAPE). An Administrative Law Judge disagreed and denied relief. Endrew's parents sought review in Federal District Court. The District Court affirmed. The Tenth Circuit Court of Appeals affirmed. The Supreme Court vacated and remanded. In *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 US 176 (1982), the Court held that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 140 et seq., established a substantive right to a "free appropriate public education" for certain children with disabilities. The Court had declined at that time to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. The Court now held that to meet its substantive obligation under the IDEA, a school was required to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. This fact-intensive exercise would be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act. An IEP was not a form document. It was constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. For most children, a FAPE would involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. If that was not a reasonable prospect, a child's IEP did not need to aim for grade level advancement. But his or her educational program was required to be appropriately ambitious in light of his or her circumstances, just as advancement from grade to grade was appropriately ambitious for most children in the regular classroom.

Endrew F. ex rel. Joseph F. v. Douglas County School District RE–1, ___ US ___, 2017 WL 1066260 (2017)

Father's Petition Seeking Return of Child Pursuant to Hague Convention Denied Where Returning Child Would Put Child At Grave Risk of Psychological Harm

Respondent mother was born in Denmark and raised in New York. She was a citizen of the United States and the United Kingdom. Petitioner father was born in and was a citizen of the United Kingdom. The parties were married in 2006 and lived in New York, the Bahamas and various other international locales. In June 2008, they moved to the Caribbean island of St. Martin. In 2012, the parties' son, K.D., was born in French St. Martin. On July 18, 2016, the mother left St. Martin with K.D. for New York, without the father's knowledge or consent. Prior to that time, K.D. never resided anywhere other than French St. Martin. The mother and K.D. resided with the mother's parents in Croton-on-Hudson at the time of the trial. The District Court denied the father's petition seeking an order directing the return of K.D. to French St. Martin pursuant to the Hague Convention, as implemented by the International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001-9011. The parties stipulated that K.D. was a habitual resident of French St. Martin. They also stipulated to sufficient facts to support a finding by a preponderance of the evidence that K.D.'s removal from French St. Martin was wrongful. The father had custodial rights under French law and at the time of removal he was exercising those rights, and the mother took the child with her to the United States without first informing or seeking the father's consent. Accordingly, the father established his prima facie case for the return of K.D. to French St. Martin. However, the mother established by clear and convincing evidence that returning K.D. to French St. Martin would put K.D. at grave risk of psychological harm. A psychiatrist testified that the mother was a victim of a particularly severe kind of domestic violence, which included strangulation, and had a severe case of Post-Traumatic Stress Disorder of a

dissociative type; that the child witnessed a great deal of violence and was subject to violence himself; that returning the child to a place where the abuse had occurred and to the care of somebody who had abused the mother would set off a tremendous traumatic reaction in the child; that domestic violence often escalated after a separation; and that the criminal actions threatened or commenced by the father against the mother in St. Martin suggested there was a high risk of domestic violence continuing or escalating in the near future. The court concluded that both the mother and K.D. were victims of severe domestic violence and that K.D. was at serious risk of trauma and developmental delay if he were to be permitted to continue to experience and witness the abuse. Moreover, St. Martin was incapable of adequately protecting the child. It was not possible to ensure the safety of the mother and the child in St. Martin because of the inability to obtain an order of protection in a timely manner, especially in a case involving little evidence of physical harm, and because of the father's demonstrated willingness to lie and his belief that the law did not apply to him. Furthermore, there were no ameliorative measures that could reduce the grave risk of harm to the child.

Davies v. Davies, ___ F.3d ____, 2017 WL 361556 (SDNY 2017)

Injunction Granted Barring Imposition on Juvenile Detainees of 23-Hour Disciplinary Isolation and Requiring All Eligible Juveniles to Be Afforded Educational Instruction and Special Education Services

Plaintiffs sought declaratory and injunctive relief under 28 U.S.C. §§ 2201-02 and 42 U.S.C. § 1983 on behalf of themselves and a putative class of fellow 16-and 17-year-olds detained at the Onondaga County Justice Center. The Justice Center was a 671-bed correctional facility located in downtown Syracuse that housed pre-trial detainees, convicted individuals serving prison sentences, and technical parole violators. Although its primary function was to hold an adult inmate population, the Jail was also used to house approximately 30 juveniles at any one time. Approximately 90% of those juveniles were pre-trial detainees. The Justice Center's disciplinary policies drew no distinction between adult and juvenile inmates. An inmate who did not behave in accordance with the rules and regulations was subject to disciplinary action that included several forms of solitary confinement. The Justice Center appeared to reply primarily on isolation as the preferred method of discipline for juveniles, even for minor misbehavior. Solitary confinement amounted to being locked in a minimally furnished cell measuring about 8 by 10 feet for approximately 23 hours a day. Juveniles in solitary confinement were not permitted to attend even the limited educational instruction provided by on-site school district personnel. Instead, teachers prepared and distributed to juveniles in solitary confinement "cell packets" that typically included newspaper clippings, crossword puzzles, and problem worksheets. According to the school district, the contents of these packets were sometimes modified for juveniles who needed special education services. The packets were distributed only sporadically, and the students in solitary confinement rarely returned completed cell packets for grading or other meaningful evaluation. Plaintiffs challenged defendants' routine imposition of solitary confinement, a practice which allegedly violated the Eighth and Fourteenth Amendments. Plaintiffs also challenged the denial of the minimum educational instruction guaranteed by state law in violation of the Fourteenth Amendment, and the denial of procedural protections and special education services guaranteed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 140 et seq. The District Court granted plaintiffs' motion for class certification, and plaintiffs' motion for a preliminary injunction. The injunction barred defendants from imposing 23-hour disciplinary isolation; required defendants to afford all eligible juveniles with the educational instruction to which they were entitled under New York State's laws and regulations, and special education services and other protections required under the IDEA; and required that discipline must include meaningful social interaction with others, including other juveniles, and no discipline could be imposed that directly harmed a juvenile's psychological condition. The Court noted that there was a general presumption of irreparable harm when there was an alleged deprivation of constitutional rights; and that plaintiffs had submitted substantial, convincing evidence that defendants' continued use of solitary confinement would put juveniles at serious risk of short-and long-term psychological damage, and that

the related deprivation of education services hindered important aspects of their adolescent development.

V.W. v. Conway, ___ F.3d ____, 2017 WL 696808 (NDNY 2017)

APPELLATE DIVISIONS

ADOPTION

Father Not Entitled to Notice and Not Consent Father

Family Court determined that respondent putative father was not entitled to notice and that his consent was not required for the child's adoption. The Appellate Division affirmed. Respondent did not meet the statutory requirements for notice of the TPR proceeding. His consent to the adoption was not required because he failed to contribute to the child's financial support in any meaningful way and failed to maintain regular contact with the child or his custodians. His incarceration did not absolve him of his parental obligations.

Matter of Jaden Blessing R., 143 AD3d 540 (1st Dept 2016)

Mother's Consent to Adoption Not Required

Family Court determined the biological mother's consent was not necessary for the adoption of the child. The Appellate Division affirmed. Here, the father had been awarded sole legal custody of the child and the mother had no visits with the child after her incarceration in 2012. Two years later the mother filed for visitation and the wife filed to adopt the child. Family Court dismissed the mother's visitation petition and issued an order finding the mother had evinced an intent to forgo her parental rights and thus her consent to the adoption of the child by the father's wife was unnecessary. The Appellate Division affirmed. Here, the mother agreed her last visit with the child was in 2012 and she also admitted she had not provided any financial support for the child since that time. Although the mother stated she had tried to communicate with the child by sending letters to the paternal grandmother to forward to the child, no corroborative evidence was provided and the paternal grandmother testified she had not received any letters from the mother. Additionally, the father and the wife testified they had not received any cards or letters from the mother. Given that the mother had means to communicate with the child and had failed to take any steps to do so, and giving due deference to the courts credibility determinations, there was no need to disturb the court's order.

Matter of Amanda EE. v Nicholas FF., 144 AD3d 1427 (3d Dept 2016)

Family Court Erred in Dismissing Father's Application for Post-Adoption Contact Without Conducting Evidentiary Hearing

Without an evidentiary hearing, Family Court dismissed the biological father's petition, filed on June 2015, for enforcement of a post-adoption contact agreement pursuant to DRL § 112-b. The Appellate Division reversed. Here, ten year earlier, the father had surrendered his rights to the subject child who was then adopted. The post adoption contact agreement allowed the father to have two visits per year with the child. The father alleged he had not had contact with the child since 2011. While there were three appearances in court at which time the interested parties made factual representations, primarily through counsel, and legal arguments on the merits of the petition, no testimony was taken and no documentary evidence was admitted for consideration as to whether visits with the father would be in the child's best interests. The adoptive parents and the attorney for the child opposed the enforcement of the agreement and any contact between respondent and the child due to the lapse in contact between the father and the child. Additionally, although the adoptive parents were present for and participated in the proceedings and were represented by counsel, they were not named as parties and since their interests could be adversely or inequitably affected by an order enforcing the agreement, they should have been named as parties (*see* CPLR 1001[a]).

Matter of Lynn X, 145 AD3d 1291 (3d Dept 2016)

Consent of Biological Father Not Required

Family Court determined that respondent was not a father whose consent to the adoption of the subject children was required. The Appellate Division affirmed. Section 111 (1) (d) of the Domestic Relations Law provided that a child born out of wedlock may be adopted without the consent of the child's biological father, unless the father showed that he maintained substantial and continuous or repeated contact with the child, as manifested by: (I) the payment by the father toward the support of the child...,

and either (ii) the father's visiting the child at least monthly when physically and financially able to do so..., or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so. Respondent testified that, at the time of the hearing, he had been incarcerated for more than two years and had provided the children with no support during that time. He also testified that he had not communicated with the children for at least seven months prior to the hearing. Respondent was not relieved of his responsibility to provide financial support while he was incarcerated absent a showing of insufficient income or resources. His testimony that he sent letters to the caseworker was contradicted by the testimony of the caseworker. Thus, the court properly determined that respondent was a notice father whose consent was not required for the adoption of the children. Because respondent failed to appeal from the order settling the record, his contention that the court erred in excluding certain transcripts from the record was not addressed.

Matter of Nickie M. A., 144 AD3d 1576 (4th Dept 2016)

CHILD ABUSE AND NEGLECT

Children at Imminent Risk of Harm Due to Mother's Mental Illness

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence inasmuch as the children were harmed and at imminent risk of harm because of the mother's mental condition. The mother had an extensive history of irrational conduct, resulting in numerous hospitalizations and arrests. On one occasion she drove with the children during the night, refusing to tell the children's father's where they were for three days, and then left the children in a CVS pharmacy, hungry, dirty, dazed and reeking of urine. She also absconded with 1 ½-year-old Turi from her babysitter, and ran into oncoming traffic while holding Turi under her arm, which led to her arrest.

Matter of Zariah O., 143 AD3d 494 (1st Dept 2016)

Mother Inflicted Excessive Corporal Punishment on Child

Family Court determined that respondent mother neglected the subject child by inflicting excessive corporal punishment on him. The Appellate Division affirmed. The record supported the court's determination. The social worker testified that the child reported that the mother beat him with a belt with spikes "all the time," the mother admitted beating him, and the child appeared to afraid of her. The child's out-of-court statements were corroborated by the bruises the social worker observed on the child's body and the statements the child made to the detectives.

Matter of Ricardo M. J., 143 AD3d 503 (1st Dept 2016)

Grandmother Abused Children by Failing to Address Children's Sexual Conduct With Each Other

Family Court determined that respondent adoptive mother and biological grandmother abused the subject children. The Appellate Division affirmed. The evidence showed that although she knew the children were engaging in sexual conduct with each other, respondent failed to implement adequate measures to protect them from further harm and failed to ensure that they obtained appropriate treatment. The children's out-of-court statements concerning the sexual conduct and respondent's lack of concern when they complained about the oldest child's conduct were detailed and consistent and thus served to cross-corroborate each other. The children's use of explicit and age-inappropriate vocabulary also supported the finding that they were engaging in sexual conduct. Further, respondent admitted that a treating therapist informed her that the oldest child had reported sexual conduct among the children. Despite this knowledge, respondent failed to ensure that the three oldest children attended their therapy and continued to allow an adult male to be present in the home at night. Respondent also acknowledged that she continued to allow the children's biological mother to care for them after learning that the oldest child reported that she watched pornography with the biological mother.

Matter of Sania S., 143 AD3d 545 (1st Dept 2016)

Children Not Aggrieved by Derivative Neglect Finding Against Respondent

Family Court determined that respondent derivatively neglected appellant children. The Appellate Division dismissed the appeal. Appellant children were not aggrieved by the finding that respondent derivatively neglected them. To the extent that the children were aggrieved by that part of the order that prohibited respondent from living with them for one year, its terms had expired.

Matter of Geovany S., 143 AD3d 578 (1st Dept 2016)

Children Neglected by Witnessing Father's Domestic Violence Against Mother

Family Court found that respondent father neglected the subject children. The Appellate Division affirmed. The determination that the father neglected the children was supported by a preponderance of the evidence, which showed that the father had committed acts of domestic violence against respondent mother in the children's presence and had inflicted excessive corporal punishment on the children. The evidence included the detailed testimony of the mother concerning multiple instances where the father acted violently toward her in front of the children, including dragging her by the hair and kicking her. The caseworker testified concerning out-of-court statements by the children with respect to the incidents of domestic violence and excessive corporal punishment, including pulling the children's hair and hitting them with his hands and a belt. Those statements were amply corroborated inasmuch as each child's account of the father's conduct was essentially similar to the other children's accounts, as well as to the mother's testimony and the father's admissions concerning his punishment of the three older children by pulling their hair and ears.

Matter of Matthew L., 143 AD3d 645 (1st Dept 2016)

Respondent Was Person Legally Responsible For Child

Family Court determined that respondent was a person legally responsible for the child M.W. and that he neglected her and derivatively neglected the other subject children The Appellate Division affirmed. Respondent testified that he cared for the younger children every workday by taking them to school and picking them up, preparing meals, cleaning the home, preparing the children's clothing, grocery shopping, and providing financial assistance to the home. The school social worker and respondent testified that the child M.W. lived in the home on the date the incident took place. Although respondent changed his testimony regarding M.W.'s residence, the court properly credited his initial statement and found that he was a person legally responsible for M.W. Respondent contributed to the functioning of the household of which M.W. was a part and he had frequent contact with her. The court properly concluded that M.W.'s out-of-court statement to the social worker that respondent made a sexually threatening comment to her was corroborated by his criminal history of pleading guilty to raping two girls a year or two younger than M.W. and the determination that he was a level three violent sex offender at a high risk of recidivism.

Matter of Keniya G., 144 AD3d 532 (1st Dept 2016)

Father Failed to Protect Children From Mother's Drug and Alcohol Abuse

Family Court found that respondent father neglected his child and the two children for which he was legally responsible by failing to protect them from respondent mother's drug and alcohol abuse, and derivatively neglected them by failing to complete a sex offender program as mandated by two court orders. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that respondent knew or should have known that the mother was drinking to the point of intoxication while she was caring for the children. He testified that he would see the mother at least three times per week during the same period the court determined that the mother was drinking to the point of intoxication almost every day, and his testimony made clear that he was either unwilling or unable to recognize the danger she posed to the children. Respondent also failed to accept responsibility for his actions and lacked understanding of his behavior by failing to complete a sexual rehabilitation program in violation of court orders. It was of no moment that the finding that he sexually abused another sibling when she was ten years old and entrusted to his care occurred over thirteen years before the instant petitions were filed. Petitioner made a prima facie showing that respondent neglected and derivatively neglected the youngest child based upon a 2014 finding

of neglect regarding the other children inasmuch as it was entered against him only fifteen days after the youngest child's birth.

Matter of Essence J., 144 AD3d 593 (1st Dept 2016)

Mother Neglected Children By Leaving Them With Grandmother For Ten Days

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the mother neglected the subject children by leaving them with their grandmother who agreed to care for them for one day, and then failing to return for the next ten days, at which point the grandmother left the children in the hallway outside another relative's home. The caseworker's testimony that the mother told her she had not seen the children for those ten days, despite having asked the grandmother to watch them for one day, was admissible as a statement against interest. The mother made no offer of proof concerning the remainder of her statement to the caseworker, which she sought to elicit under the rule of completeness; therefore, the issue was not preserved for review. The court was entitled to draw the strongest negative inference against the mother for her failure to testify.

Matter of Nassair S., 144 AD3d 604 (1st Dept 2016)

Mother Neglected Child by Abusing PCP

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding. The evidence established that respondent tested positive for PCP three times in her last trimester of pregnancy and that she had a history of PCP abuse. She failed to successfully complete a drug treatment program and maintained after her positive testing during pregnancy that she did not have a drug problem. Under these circumstances, lack of actual harm to the child was irrelevant.

Matter of Yisrael R., 145 AD3d 491 (1st Dept 2016)

Child at Imminent Risk of Harm Due to Mother's Drug Use And Mental Illness

Family Court found that respondent mother neglected the subject child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence inasmuch as the child was at imminent risk of harm because the mother suffered from mental illness, misused drugs and alcohol, and had a prior neglect finding. She had been diagnosed with antisocial personality disorder with borderline traits, a cluster B personality disorder, bipolar 1 disorder, and substance induced mood disorder. She demonstrated aggressive, violent behavior on numerous occasions and refused to accept mental health treatment. Additionally, respondent admitted to using "Molly," Ecstasy, marijuana and alcohol, and had been hospitalized for using drugs. Respondent also was found to have neglected an older child and her rights to that child were terminated.

Matter of Unique T., 145 AD3d 551 (1st Dept 2016)

Parents Defaulted And, in Any Event, Neglected Their Children

Family Court found that respondent parents neglected the subject children. The Appellate Division dismissed the appeals. The parents defaulted in appearing at the continued fact-finding hearing and did not move to vacate. In any event, respondents neglected the children. The father, who had a long-standing history of mental illness, left his son in a stroller unattended for half an hour, exposing him to risk of imminent harm. The mother refused to comply with orders of protection barring the father from the home, continued to leave the children in his custody, did not acknowledge that he posed a danger to the children, and refused to cooperate with ACS supervision.

Matter of Daleena T., 145 AD3d 628 (1st Dept 2016)

Children's Statements About Father's Alcohol Abuse Supported Neglect Finding

Family Court found that respondent father neglected the subject children. The Appellate Division affirmed. The children's corroborated statements to the caseworker about the father's alcohol abuse and its effects on them were appropriately considered as evidence of neglect. They established by a preponderance of the evidence the presumption that the father neglected the children, obviating the need to establish the children's risk of

impairment. The father failed to rebut the presumption. He did not testify or present any evidence to support his statement that he was voluntarily and regularly participating in a recognized rehabilitative program. His failure to testify permitted the court to draw the strongest inference against him.

Matter of Jeremy M., 145 AD3d 637 (1st Dept 2016)

Father Neglected Older Child and Derivatively Neglected Younger Child

Family Court determined that respondent father neglected the subject children. The Appellate Division affirmed. A preponderance of the evidence demonstrated that the father posed an imminent danger to the children's emotional well-being. On numerous occasions he acted aggressively and angrily toward agency staff, causing the older child to cry in distress. He was disruptive and verbally violent toward personnel at the hospital where he was visiting the newborn younger child, resulting in being escorted from the hospital and barred from further visits. On one occasion, respondent screamed at the children's mother, grabbed her phone, and pushed her into an elevator in the presence of the caseworker and older child. On one of his unsupervised visits with the older child, he allowed the mother, who was allowed only agency-supervised visits with the children, to have access to the child.

Matter of Genesis R., 145 AD3d 640 (1st Dept 2016)

Record Supported Finding That Mother Medically and Educationally Neglected Child

Contrary to the mother's contention, the petitioner met its burden of establishing that the mother medically and educationally neglected the subject child (*see* FCA § 1046 [b] [i]). The evidence at the fact-finding hearing established that the mother, inter alia, failed to timely seek appropriate psychiatric treatment for the child, gave him prescription psychotropic medication that had not been prescribed to him by a doctor, and failed to enroll him in any school or home-school program or to seek out services for him through the Department of Education Committee for Special Education. Accordingly, the Family Court properly determined that the child was neglected.

Matter of Agam B., 143 AD3d 702 (2d Dept 2016)

Record Supported Finding That Father Neglected Subject Children by Perpetrating Acts of Domestic Violence Against Mother in Their Presence

The father is a person legally responsible for the care of T., and the biological parent of N. and S. (hereinafter collectively the subject children). On July 1, 2015, the petitioner filed a petition alleging that the father neglected T. by inflicting excessive corporal punishment on her, and that he neglected all of the subject children by perpetrating acts of domestic violence against the nonrespondent mother in the presence of the subject children. A fact-finding hearing was held on February 24, 2016. At the hearing, the mother testified that in June 2015, the father began an altercation with her wherein the father threw a cup with something in it at her and S. The mother further testified that, during the altercation, T. tried to intervene to protect her, but the father pushed T. out of the way, and that thereafter, the father punched the mother in the head, causing her to lose consciousness while all of the children were present. The mother testified that after she regained consciousness, T. told her that the father had choked her and that N. also told her that the father hit the mother. The mother was thereafter taken to the hospital. The mother's medical records from the night of the incident were admitted as evidence at the hearing. The records indicate that on the day of the incident, the mother told the attending physician that she sustained her injuries from an altercation with the father during which the father had also hit T. The petitioner's progress notes, which were also admitted as evidence, described a conversation between T. and a caseworker regarding the altercation with her father. The notes indicated that T. informed the petitioner's caseworker that, on the day of the incident, the father entered the family's home and shouted in S.'s face, scaring her, and proceeded to throw a cup of soda in the faces of S. and the mother. The notes reflected that T. told the caseworker that she tried to intervene by pushing the father, at which point the father pushed her up against a wall and choked her. The father did not appear at the hearing or present any evidence. At the close of the hearing, the petitioner asked the Family Court to find that the father neglected the subject children and to draw a negative inference from the father's failure to appear and testify. The attorney for the subject children likewise argued that the court should enter a finding of neglect.

After the fact-finding hearing, the Family Court found that the petitioner failed to establish that the father neglected the subject children, and dismissed the petitions. The petitioner appealed. The Appellate Division reversed. Contrary to the Family Court's determination, the mother's testimony and medical records provided sufficient corroboration to support the reliability of T.'s out-of-court statements that the father choked her and, together with the petitioner's progress notes, established the allegation, by a preponderance of the evidence, that the father inflicted excessive corporal punishment on T. Further, the court should have drawn a negative inference from the father's failure to testify. Accordingly, the petitioner established, by a preponderance of the evidence, that the father neglected T. by inflicting excessive corporal punishment on her. The petitioner also established, by a preponderance of the evidence, that the father neglected all of the subject children by perpetrating acts of domestic violence against the mother in their presence. Contrary to the Family Court's determination, this evidence was sufficient to establish that the father's acts of domestic violence against the mother in the subject children's presence impaired, or created an imminent danger of impairing, the subject children's physical, mental, or emotional condition. Accordingly, the Appellate Division found that the Family Court improperly dismissed the petitions, reversed the order, reinstated the petitions, entered a finding of neglect, and remitted the matter to the Family Court for a dispositional hearing and determination.

Matter of Nakia B., 143 AD3d 703 (2d Dept 2016)

Evidence Demonstrated That Father Regularly Abused Alcohol, and Physically Abused Mother in Presence of Children

Two neglect petitions, one as to each child, were filed against the mother and father shortly after an incident in which the mother was hospitalized for alcohol poisoning. The agency thereafter amended the petitions to include allegations that the father misused alcohol, inadequately supervised the children, acted violently towards the mother in the presence of the children, and acted violently towards the children themselves. The Family Court granted the mother an adjournment in contemplation of dismissal (*see* FCA § 1039). After the fact-finding and dispositional hearings, the Family Court, inter alia, entered a finding of neglect against the father. The father appealed. The Appellate Division affirmed. A preponderance of the evidence adduced at the fact-finding hearing demonstrated that the father regularly abused alcohol to the extent of intoxication, physically abused the mother in the presence of the children, and left the children under the supervision of intoxicated caretakers, resulting in actual or imminent physical and emotional harm. Upon reviewing the record, which included testimony, documentation, and corroborated out-of-court statements from the children concerning specific incidents and behavioral patterns, the Appellate Division rejected the father's contention that the evidence was too vague to support a finding of neglect. The father's contention that there was no evidence of actual physical harm to the children was also unavailing. The record established by a preponderance of the evidence that, at the very least, the father's actions placed the children in imminent danger of impairment to their physical and emotional condition.

Matter of Pawel S., 143 AD3d 724 (2d Dept 2016)

Record Did Not Support Finding of Derivative Abuse

The petitioner, Administration for Children's Services (hereinafter ACS), filed an abuse petition against the respondent alleging that he sexually abused his girlfriend's child F. ACS also filed a petition against the respondent alleging that he derivatively abused his biological son, S., based on his sexual abuse of F. After a fact-finding hearing, the Family Court issued an order of fact-finding dated April 21, 2015, finding that the respondent had sexually abused F. and that he derivatively abused S. On May 11, 2015, the court issued an order of disposition with respect to F., which released F. to her biological father, and issued a final order of protection against the respondent. On that same date, the court issued an order of disposition with respect to S., which released him to his maternal grandmother until the next permanency hearing on November 23, 2015, placed the respondent under ACS supervision, ordered him to complete sex offender counseling, and awarded him visitation. The respondent appealed from the order of fact-finding and portions of the order of disposition relating to S. Contrary to the respondent's contention, the evidence adduced at the fact-finding hearing, including the sworn testimony of F., was sufficient to prove by the requisite preponderance of the evidence that the respondent sexually abused that child. As to the finding

of derivative abuse, under the circumstances of this case, the preponderance of the evidence did not support a finding of derivative abuse with respect to the child S. The evidence adduced at the hearing demonstrated that S. did not move to the United States from Haiti until October 2013, which was 20 months after the respondent's abuse of F. had ended, and that in January 2014, F. moved out of the home she shared with her mother, the respondent, and S., to live with her father. Moreover, the record indicated that S. has been living in Haiti since October 2015.

Matter of Verdul S., 143 AD3d 977 (2d Dept 2016)

Record Supported Finding of Neglect Based upon Misuse of Drugs and/or Alcohol

Contrary to the mother's contention, the Family Court's finding of neglect ws supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [I]). At the fact-finding hearing, the child's maternal grandfather testified that on September 24, 2014, the child, who was then nine years old, called him in a "panic" and told him that the mother was sick, had vomited, and would not wake up. He went to the mother's home and found the child alone with the mother, who was unconscious on the couch. He woke the mother, who began "screaming cursing and kicking," and then went into convulsions. He took the mother to the hospital, where she remained for five days. The doctor who examined the mother at the hospital testified that tests showed that her blood-alcohol level was elevated, though she denied having consumed alcohol. On September 30, 2014, the mother refused to submit to a court-ordered hair follicle test, although the Family Court warned her that it could draw a negative inference from her refusal. On November 14, 2014, she agreed to take the test, which came back negative for the 30-day period before the test, but positive for opiates, codeine, and hydrocodone in the 30- to 60-day period and the 60- to 90-day period before the test. Here, the evidence established that the child's emotional condition was impaired as a result of the mother's failure to exercise a minimum degree of care in providing the child with proper supervision and guardianship by misusing drugs and/or alcohol to the extent that she lost self-control of her actions (*see* FCA § 1012 [f] [i] [B]).

Matter of Grace F., 144 AD3d 680 (2d Dept 2016)

Mother Failed to Exercise a Minimum Degree of Care and Supervision

Contrary to the mother's contention, the determination that she neglected the child L. was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i] [B]; 1046 [b] [I]). The hearing evidence included the testimony of a police officer who, while searching an apartment pursuant to a search warrant, found a loaded gun on the floor within "arm's length" of L. Under these circumstances, the Family Court correctly determined that the mother's failure to exercise a minimum degree of care in providing L. with proper supervision or guardianship created an imminent danger that the child's physical, mental, and emotional health would be harmed (*see* FCA § 1012 [f] [i] [B]). Furthermore, the mother's neglect of L. demonstrated a fundamental defect in her understanding of her parental duties sufficient to support the finding of derivative neglect with respect to the child S. (*see* FCA § 1046 [a] [I]).

Matter of Samiha R., 144 AD3d 690 (2d Dept 2016)

Order Granting Father Unsupervised Visitation Reversed

The record revealed that the Family Court issued an order of fact-finding dated May 8, 2014, in which it found that the father sexually abused the subject child, and that the child was an abused child as defined by FCA § 1012. In an order of disposition dated July 18, 2014, the court, inter alia, released the child to the custody of the mother and awarded the father supervised visitation as directed by the petitioner, Administration for Children's Services (hereinafter ACS). The court also directed the father to complete a sex offender treatment program, and to attend individual psychotherapy and cooperate with such therapy until successfully discharged. The court ordered a 12-month period of ACS supervision of the father, which period was subsequently extended for an additional 12 months. In February 2016, the father sought unsupervised visitation with the child. The Family Court, upon hearing a sworn narrative statement of the mother, and upon conducting a brief allocution of the father, granted the father's application to the extent of modifying the order of disposition so as to award him one supervised visit per week and one unsupervised visit "in the community" per week, with the child to be picked up and dropped off at an ACS office. ACS appealed. The

Appellate Division reversed. The Family Court improvidently exercised its discretion in awarding the father unsupervised visitation, under the circumstances presented. In a child protective proceeding, the best interests of the children determine whether visitation should be permitted to a parent who has committed abuse or neglect. Pursuant to FCA § 1061, the court may modify any order issued during the course of a child protective proceeding for good cause shown. As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record. Here, the father did not show good cause for the modification, since, inter alia, ACS reports that were submitted to the Family Court showed that the father engaged in certain inappropriate conduct during supervised visitation in the period prior to his application and did not accept responsibility for the conduct that formed the basis of the abuse finding. Accordingly, the court improvidently exercised its discretion in awarding the father unsupervised visitation with the child.

Matter of Tito T., 144 AD3d 813 (2d Dept 2016)

Record Supported Finding of Derivative Neglect

The order of fact-finding and disposition found that the father derivatively neglected the subject children and awarded custody to the mother. The father appealed. The Appellate Division affirmed. The petitioner established by a preponderance of the evidence (*see* FCA § 1046 [b] [i]) that the father derivatively neglected the subject children (*see* FCA § 1012 [f] [i] [B]). The evidence established that the father had sexually abused the children's mother, from the time she was eight years old until she was 18, while he lived with her in her mother's home, and acted as a stepfather to her. In addition, there was evidence that the father had previously been imprisoned after pleading guilty to the attempted sexual abuse of a 14-year-old girl. Given the father's refusal to admit any wrongdoing, despite his guilty plea, and his failure to establish that he attended any treatment to address his proclivity for sexually abusing children, an adjudication of derivative neglect was appropriate, as there was a fundamental defect in the father's understanding of the duties of parenthood.

Matter of Iris G., 144 AD3d 908 (2d Dept 2016)

Mother's Mental State Did Not Support Finding of Neglect

The petitioner commenced a neglect proceeding alleging, inter alia, that the mother exhibited bizarre and delusional behavior that impaired her ability to care for the subject child. After a fact-finding hearing, the Family Court found that the mother had neglected the child because her behavior indicated that she suffered from a mental illness that placed the child at risk of emotional harm. The mother appealed. The Appellate Division reversed. In a neglect proceeding, the petitioner has the burden of proving by a preponderance of the evidence that the subject child was neglected (*see* FCA § 1046 [b] [I]). A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship. Although a finding of neglect may be predicated upon proof that a child's mental, physical, or emotional condition is in imminent danger of becoming impaired as a result of a parent's mental illness, proof of mental illness alone will not support a finding of neglect. Here, the Family Court's finding of neglect was not supported by a preponderance of the evidence (*see* FCA § 1046 [b] [i]). The petitioner failed to sustain its burden of proving that the child's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of the mother's behavior. To the contrary, the evidence showed that the child was healthy, athletic, and doing well in school while in the mother's care.

Matter of Justin L., 144 AD3d 915 (2d Dept 2016)

Record Did Not Support Dismissal of Neglect Petition Against Father

The order appealed from, after a fact-finding hearing, and upon a finding that the petitioner failed to establish that the father neglected the subject children, dismissed the neglect petitions insofar as asserted against the father. The petitioner appealed. The Appellate Division reversed. A preponderance of the evidence established that the father neglected the children M.S. and L.J., and derivatively neglected the child D.S.J., by engaging in a

pattern of domestic violence against the mother in the children's presence that created an imminent danger of impairing the children's physical, mental, or emotional condition. The evidence at the fact-finding hearing established that the father stated in the presence of a case supervisor that he "always hit" the mother because she was "always saying stupid stuff." Further, a caseworker testified that one of the children told her that the father and mother fought in the children's presence, and the children's foster mother testified that the same child told her that her "poppy was fighting her mommy." In a child protective proceeding, unsworn out-of-court statements of the subject child may be received and, if properly corroborated, will support a finding of abuse or neglect. The child's out-of-court statements were corroborated by, inter alia, the father's admission to striking the mother, evidence that the mother sustained bruising, and the foster mother's observations that the father's hands were scratched, which the father attributed to "boxing." Moreover, under the circumstances, it was appropriate to draw a negative inference against the father for his failure to testify at the fact-finding hearing.

Matter of Elio S., 144 AD3d 926 (2d Dept 2016)

Record Supported Finding of Derivative Abuse

In 2011, the mother's 19-month-old son suffered a fractured skull while in the mother's care, and all three of her children were removed from her custody and remanded to the custody of the Administration for Children's Services (hereinafter ACS). In July 2012, following a fact-finding hearing, the Family Court determined, inter alia, that the mother abused the injured child, and that her other two children were derivatively abused. In May 2014, the mother gave birth to the subject child, and ACS filed a petition alleging derivative abuse based, inter alia, on the earlier injury to the subject child's sibling. After the fact-finding hearing, the Family Court found that the mother derivatively abused the subject child. The mother appealed. The Appellate Division affirmed. Contrary to the mother's contention, the Family Court's finding that she derivatively abused the subject child was supported by a preponderance of the evidence adduced at the fact-finding hearing (*see* FCA § 1046 [b] [I]). ACS demonstrated, inter alia, that the mother, who was diagnosed with paranoid personality disorder, failed to re-engage in therapy as directed by an April 2013 dispositional order until nearly 13 months later, shortly before the filing of the derivative abuse petition. ACS further demonstrated that the conduct that formed the basis of the most recent abuse finding was sufficiently proximate in time to the derivative abuse proceeding such that it could reasonably be concluded that the condition still existed. The case planner supervisor assigned to the mother's case testified at the fact-finding hearing that she spoke with the mother about the prior abuse finding and that the mother stated that "[s]he doesn't believe that she did anything wrong", or "that she'd do anything differently." The mother, who chose not to testify at the fact-finding hearing, failed to rebut ACS's prima facie case or establish that the condition could not reasonably be expected to exist currently or in the foreseeable future.

Matter of Baby Boy D., 144 AD3d 1026 (2d Dept 2016)

History of Psychiatric Problems and Mental Illness Supported Finding of Neglect

Contrary to the mother's contention, the petitioner established a prima facie case of neglect with respect to the subject children (*see* FCA § 1012 [f] [i]). The evidence established that the mother had a history of ongoing psychiatric problems and mental illness, including paranoid schizophrenia. The finding of neglect was supported by a preponderance of the evidence, which demonstrated that the children were at imminent risk of harm as a result of the mother's mental illness. Order affirmed.

Matter of Mia C.W.D., 144 AD3d 1028 (2d Dept 2016)

Doctrine of Collateral Estoppel Applicable Where Father Was Convicted of Manslaughter in the 2nd Degree

On March 14, 2013, N. died from a head injury caused by blunt force trauma. K. and F. were immediately placed in the custody of the petitioner, the county's Department of Social Services (hereinafter the DSS). The father was subsequently arrested and charged with, inter alia, murder in the second degree and manslaughter in the first degree. On the same day, the DSS filed petitions alleging that N. was abused, neglected, and severely abused, and that K. and F. were derivatively abused and neglected. On April 6, 2015, the father pleaded guilty to manslaughter in the second degree for recklessly causing Natalia's death. Based on the father's plea, the DSS moved for summary

judgment on the petitions. The Family Court granted the motion, and the father appealed. The Family Court properly granted the motion of the DSS for summary judgment on the issue of the father's abuse, neglect, and severe abuse of N., and the derivative abuse and neglect of K. and F., since DSS met its prima facie burden of showing that the doctrine of collateral estoppel was applicable. A criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct. The father's conviction of manslaughter in the second degree in violation of PL § 125.15 (1) established, prima facie, that N. was abused, neglected, and severely abused (*see* FCA § 1012 [e], [f]; SSL § 384-b [8] [a] [iii] [A]), and that K. and F. were derivatively abused and neglected (*see* FCA § 1012 [e] [i]). In opposition, the father failed to raise a triable issue of fact.

Matter of Clarence T., 145 AD3d 889 (2d Dept 2016)

Child's Out-of-Court Statements Sufficiently Corroborated

A preponderance of the evidence supported the Family Court's finding that the father neglected the child O. by inflicting excessive corporal punishment on her. Contrary to the father's contention, O.'s out-of-court statements were sufficiently corroborated by the testimony of the caseworker employed by the Administration for Children's Services, as well as by the testimony of the child E. Additionally, the court properly considered evidence that the father regularly used marijuana in the home and was not participating in a rehabilitative program. Moreover, the court properly drew a negative inference from the father's voluntarily absenting himself from the hearing and not testifying. Finally, the evidence establishing that the father used excessive force to discipline O. and had regularly used marijuana was sufficient to support the Family Court's determination that the father derivatively neglected the child E. (*see* FCA § 1046 [a] [i]).

Matter of Emmanuel O., 145 AD3d 895 (2d Dept 2016)

Recorded Supported Denial of Mother's § 1028 Application

The petitioner commenced a neglect proceeding against the mother in June 2015. In October 2015, the subject child was removed from the mother's custody. The mother then moved to have the child returned to her custody pursuant to FCA § 1028. After a hearing, the Family Court denied the mother's motion. The mother appealed. The Family Court must grant an application pursuant to FCA § 1028 for the return of a child who has been temporarily removed unless it finds that the return presents an imminent risk to the child's life or health (*see* FCA § 1028 [a]). In making its determination, the Family Court must weigh whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal, balance that risk against the harm removal might bring, and determine factually which course is in the child's best interests. Here, the record provided a sound and substantial basis for the Family Court's determination to deny the mother's application for the return of the subject child to her custody pursuant to Family Court Act § 1028.

Matter of David L.S., 145 AD3d 901 (2d Dept 2016)

Record Supported Determination of Neglect Based upon Excessive Corporal Punishment

Contrary to the father's contention, the determination that he neglected the subject children was supported by a preponderance of the evidence. The credible evidence adduced at the fact-finding hearing established that the father committed acts of domestic violence against the mother in the children's presence, thereby impairing, or creating an imminent danger of impairing their physical, emotional, and mental conditions. This established the father's neglect by a preponderance of the evidence (*see* FCA § 1046 [b] [i]). Furthermore, the Family Court's determination that the child M. was also a neglected child based upon excessive corporal punishment against her was supported by a preponderance of the evidence. The petitioner established, by a preponderance of the evidence, that the father's conduct, which included hitting M. with a belt and belt buckle, impaired her mental or emotional well-being, or placed her in imminent danger of such impairment (*see* FCA § 1012 [f]). Accordingly, the Family Court properly found that the father neglected M. Further, the father's neglect of M. evinced a flawed understanding of his duties as a parent and impaired parental judgment sufficient to support the Family Court's finding of derivative neglect of the children I. and R.

Matter of David D., 145 AD3d 1003 (2d Dept 2016)

Sound and Substantial Basis in The Record

Father's rights to six of his nine children were terminated. Thereafter, the agency commenced a proceeding on behalf of the father's four-month-old subject child and after a hearing, Family Court determined the child's mother had neglected the child and the father had derivatively neglected the child. The Appellate Division affirmed. Derivative neglect can be established if it is shown that a parent's judgment is so impaired it creates a substantial risk of harm to any child left in the parent's care and the prior neglect determination is sufficiently proximate in time to reasonably conclude that the parent's problems still existed and there is still no "bright-line temporal rule". Here, the father, who had prior criminal convictions and had been incarcerated for committing sex offenses against teenaged girls, was repeatedly told to undergo substance abuse counseling and treatment. Although he made some progress, he frequently tested positive for marihuana, including on the date of the dispositional hearing. Although his status as a risk level three sex offender did not constitute per se neglect, it was still an important factor to consider when reviewing the father's understanding of his parental responsibilities. In this case, while the father acknowledged his sex offender behavior and had completed sex offender treatment, his explanation for his sexual encounters with the girls was that he was a 20-year-old man in the ninth grade and the girls were part of his social circle, which showed a lack of insight into the magnitude of his offense, even after the termination of his parental rights with respect to six of his other children. Moreover, the court properly found the mother had neglected the child. She was fully familiar with the father's criminal convictions and his child protective history; and she knew he was a registered sex offender. The mother testified she had spoken to one of the father's victims and she refused to believe the father would hurt the child. She also indicated she never left the child alone with the father because she wanted to protect the father from interference by child protective services. Viewing the totality of the circumstances, there was a sound and substantial basis in the record for the court's order.

Matter of Warren RR., 143 AD3d 1072 (3d Dept 2016)

Mother's Untreated Mental Health and Substance Abuse Issues Supported Court's Neglect Determination and Article 6 Placement of Children With Non Parents

Family Court adjudicated three of the mother's five children to be neglected and awarded Article 6 custody of two of the children, the oldest and the youngest, to the maternal aunt and the middle child to a family friend. The mother's other children, who were not the subjects of these proceedings, had previously been adjudicated neglected. The Appellate Division affirmed. Here, shortly after her birth, the oldest of the three subject children was placed in the custody of the child's maternal aunt due to concerns about the mother's ongoing mental health issues. The mother consented to the placement. Thereafter, beginning in 2009, the mother repeatedly applied to gain custody of the oldest child. During this period, the mother had two more children. She consented to placement of the older of these two children (the middle child), with a family friend who later filed for custody of the middle child; and the aunt filed for custody of both the oldest and youngest child. The agency filed neglect and derivative neglect petitions on behalf of the two younger children. After a hearing, Family Court dismissed the mother's petition for custody of the oldest child, determined there were extraordinary circumstances and awarded Article 6 custody of the oldest and youngest child to the aunt; and custody of the middle child to the mother's friend. The mother was afforded supervised visitation with the children. The mother's argument that she was denied effective assistance of counsel was dismissed since the record showed the mother's counsel provided her with zealous representation and made every effort to safeguard her wishes. The evidence showed the mother's failure to address her substance abuse or mental health issues, and her failure to maintain substantial or continuous contact with the oldest child supported a finding of extraordinary circumstances. The mother had left the oldest child with the aunt when the child was about one-month-old. Although the child had been returned to the mother for one year, the aunt had regained custody of the child soon thereafter, and the child had continuously lived with the aunt. The mother had limited contact with the child and only engaged in supervised visits on a sporadic basis. The mother failed to attend any of the child's school conferences or activities, rarely communicated with her and allowed two years to elapse without seeing her. Moreover, based upon the record as

a whole, the nine-year-old's best interests were served by remaining in the aunts' custody. As to the two younger children, the evidence showed the neglect petitions filed on their behalf were based upon a prior finding of neglect against the mother on behalf of the mother's other older children, not involved in this matter, and supported by evidence of the mother's failure to successfully address her ongoing mental health and substance abuse issues and the prior neglect determination was sufficiently proximate in time to reasonably conclude the issues that resulted in such adjudication still affected the mother.

Matter of Evelyn EE., 143 AD3d 1120 (3d Dept 2016)

No Exception to Mootness Doctrine Where There is No Factual Finding of Neglect

Family Court determined the agency had established a prima facie case for neglect against the father based on his history of substance abuse and his admission to consuming "70 beers and snort[ing] an eight ball of cocaine." The father appealed but during the pendency of the appeal, the agency filed a petition against respondent alleging abandonment of the one-year-old child (*see* SSL § 384-b), and thereafter respondent's parental rights were terminated rendering the appeal moot. Although there is an exception to the mootness doctrine where there is a finding of neglect based on the stigma such a finding creates, here there were no factual findings and therefore the exception did not apply.

Matter of Ariez T., 143 AD3d 1212 (3d Dept 2016)

Prima Facie Case of Child Abuse

Family Court determined respondent father had abused and neglected the three-year-old subject child and had derivatively abused and neglected his other two children, aged five and one. The Appellate Division affirmed. A prima facie case of child abuse or neglect is established when there is proof that a child's injuries "would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child" (*see,* FCA §1046[a][ii]). Here, the evidence showed the three-year-old had sustained skull fractures; and although respondent argued the court erred in allowing the physician to testify about the X rays of the child's skull fracture since the X rays were not admitted into evidence, no objections were made to limit the physician's testimony and thus this issue was not preserved. Additionally, the physician opined the skull fracture sustained by the child was likely caused by nonaccidental trauma and neither parent had a plausible explanation as to it could have happened. Moreover, there were increased "social risk factors in the home, such as domestic violence". The evidence also established that respondent was the child's caretaker at the time the injury occurred. Given the evidence, the respondent's actions showed a fundamental flaw in his understanding of the duties of parenthood and therefore the derivative abuse and neglect findings were also appropriate.

Matter of Avery KK., 144 AD3d 1429 (3d Dept 2016)

No Exception to Mootness From Temporary Orders

Family Court awarded custody of the subject child to a relative. Respondent mother continued to harass the relative and eventually the cousin relinquished legal custody of the child. That same day, the agency filed for temporarily removal of the child and respondent appealed. However, during the pendency of the appeal, respondent executed an unconditional surrender of her parental rights which rendered the appeal moot. Since the appeal was from a temporary order, there was no finding of wrongdoing and carried no stigma and thus there was no exception to the mootness doctrine.

Matter of Neveah A., 144 AD3d 1431 (3d Dept 2016)

Neglect Determination Reversed

Family Court adjudicated the subject newborn child to be derivatively neglected by respondent father. The Appellate Division reversed. Here, the evidence relied on by the court in making such a determination were two indicated hotline reports, one in 1999 and the other in 2010 and both reports involved other children. The 1999 report was made against the biological parents of the child who was the subject of the report, as well as the respondent who was then 18-years-old and temporarily residing with the parents of the child. Additionally, the report did not conclusively establish which of the three adults had engaged in the conduct giving rise to the indicated finding. Furthermore, the 2010 report was indicated against respondent and his then paramour and was based on the children witnessing domestic violence, which did not necessarily constitute neglect.

Matter of Choice I., 144 AD3d 1448 (3d Dept 2016)

Good Cause Existed For Imposition of the Suspended Sentence

Upon respondent mother's consent, in May of 2014, Family Court adjudicated the two subject children to be neglected and placed respondent under the supervision of the agency. Thereafter, in 2015, the agency filed a violation petition and respondent admitted to willful violation. The court imposed a sanction of 90 in jail, suspended the sentence and the order of supervision was extended. Subsequently, respondent continued to appear for compliance conferences and thereafter, without a formal hearing, Family Court imposed the previously suspended sentence of incarceration for willful violations of orders of protection and supervision. The Appellate Division affirmed. Although there is case law arguably suggesting that, under FCA § 1072, a previously suspended sentence cannot be imposed without a hearing, respondent was afforded sufficient due process. Here, at an October 2015 compliance conference, respondent was expressly advised of the requirement "to report daily … for … urine [screens] at her own expense," which was consistent with the terms of the 2014 orders of supervision and protection. Thereafter, at a December 2015 conference, petitioner advised the court that respondent had failed to report for a scheduled urine screen at 8:00 a.m. on December 8, 2015. Thus, good cause existed for imposition of the suspended sentence.

Matter of Isaiah M., 144 AD3d 1450 (3d Dept 2016)

Respondent's Acts Created Unreasonable Risk of Harm to Child

After a fact-finding hearing, Family Court determined respondent father had neglected the 15-year-old subject child based on his actions which created an unreasonable risk of harm to the child. The Appellate Division affirmed finding a sound and substantial basis in the record for the court's order. Here, the father, who had been drinking, began to berate the mother for several hours in their mobile home; the child was also in the home inside her bedroom. The argument became a physical altercation and respondent tried to rape the mother, struck her repeatedly in the head and poured wine over her. The mother ran into the child's room followed by respondent and the mother told the child to call 911. Respondent stopped this by grabbing the child's hand, shoving her against the wall and taking away the phone. Both the mother and the child ran out of the home, followed by respondent who tried to drag the mother back by her hair into the mobile home. He then chased the child, who ran to a neighbors home. The police were called and later the mother obtained medical treatment for a concussion. The caseworker who interviewed the child testified the child's description of the events comported with the mother's version. The child also stated she could hear her mother "whimpering" as she struggled with respondent and stated she was scared and crying during the incident; the child had bruising on her wrists in the area where respondent grabbed her. While respondent's description of the events was vastly different from than what had been stated by the child and the mother, the Appellate Division deferred to the court's credibility determinations.

Matter of Cori XX., 145 AD3d 1207 (3d Dept 2016)

Child's Injuries Consistent With Being Grabbed

After X rays revealed that the two-year-old subject child had sustained a spiral fracture to her radial bone and mid-shaft fracture to her ulna bone, the agency commenced Article 10 proceedings against respondent father. After a hearing, Family Court adjudicated the child to be neglected by respondent. The Appellate Division affirmed. Here, the emergency room physician testified the child's injuries appeared to be consistent with being "grabbed by a thumb, a hand grip," and that the fractures occurred at the same time and were caused by either a direct hit to the forearm or a forceful grab, pull and twist of the child's arm. The child's mother testified she noticed the injuries to the child after the child was left alone with respondent and her estimate of when the injury occurred was consistent with the physician's testimony. The mother testified respondent had admitted to pulling on the child's arm and the agency offered into evidence Facebook messages between the mother and respondent, in which respondent took responsibility for the child's injuries. This proof gave rise to the rebuttable presumption that respondent neglected the child and respondent did not offer any proof to rebut the presumption.

Matter of Gabriella UU., 145 AD3d 1365 (3d Dept 2016)

Contention That AFC Had Conflict Unpreserved

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. Petitioner met its initial burden by establishing that the mother's home was unsafe and unsanitary and that the mother failed to follow up with the physician of one of the children as instructed by hospital emergency department providers after the child was examined for an alleged incident of sexual abuse. There was a sound and substantial basis for the court's ultimate determination that the children were neglected as a result of the mother's failure to exercise a minimum degree of care. The mother 's contention that the AFC had a conflict was raised for the first time on appeal and was therefore unpreserved for review.

Matter of Mary R. F., 144 AD3d 1493 (4th Dept 2016)

Determination of Permanent Derivative Neglect Based On Evidence That Other Children Neglected Affirmed

Family Court determined that respondent mother derivatively neglected the subject child. The Appellate Division affirmed. The court properly determined that the child was derivatively neglected based upon evidence that the mother's four other children were determined to be neglected children, including evidence that the mother failed to address the mental health issues that led to those neglect determinations and the placement of those children with petitioner. Moreover, the neglect finding with respect to the other four children was entered only two days before the subject child was born and thus the prior finding was so proximate in time to the instant proceeding that it could reasonable be concluded that the condition still existed.

Matter of Amyn C., 144 AD3d 1690 (4th Dept 2016)

Mother's Drug Use Created Presumption of Neglect

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. The court properly applied the presumption of neglect where a person repeatedly misused drugs, which would ordinarily have the effect of producing in the user a substantial state of stupor or intoxication or a substantial impairment of judgment, as prima facie evidence that a child of that person is neglected, eliminating the need that petitioner present evidence establishing actual impairment or a risk of impairment. Here, there was evidence that the mother had been prescribed morphine for fibromyalgia; that she admitted to a caseworker that she had been taking more than prescribed; that she often slurred her speech; that she fell asleep at a time when the two-year-old child was awake and she was his sole caretaker; that the father did not believe that the child was safe alone with the mother overnight; and that she once bought and smoked marijuana to deal with the effects of morphine withdrawal.

Matter of Anthony L., 144 AD3d 1690 (4th Dept 2016)

Court Properly Determined That Subject Children Were Neglected as Result of Mother's Mental Illness

Family Court adjudged that respondent mother neglected her two youngest children as the result of her mental illness. The Appellate Division affirmed. The mother's contention was rejected that her mental illness was not causally related to any actual or potential harm to the children. While there was conflicting testimony whether the subject children were present during the mother's episodes of paranoid delusions, the statements of the mother's two older children describing the harmful emotional impact they experienced as a result of the mother's behavior during her delusions demonstrated the risks faced by the subject children should they be similarly exposed to such behavior. Furthermore, the evidence established that the subject children had been present during a prior incident in which the mother called the police with a complaint of footprints outside her home, but no such footprints were found by the police. The mother engaged in bizarre and paranoid behavior toward the older children and such behavior took place in the presence of the subject children at times, thereby exposing them to an imminent danger of their physical, mental or emotional condition becoming impaired. Moreover, the mother displayed a lack of insight into the effect of her illness on her ability to care for the subject children.

Matter of Matigan G., 145 AD3d 1418 (4th Dept 2016)

Mother Neglected Child by Exposing Her to Deplorable Living Conditions

Family Court determined that respondent mother

neglected the subject child. The Appellate Division affirmed. Petitioner presented evidence establishing that the child was in imminent danger because she was exposed to unsanitary and deplorable living conditions, including floors covered in animal feces and ankle-deep piles of garbage. The evidence also established that the mother's residence did not contain a bed or diapers for the child. Any error in receiving petitioner's exhibits in evidence was harmless because the record otherwise contained ample admissible evidence to support the court's determination that the mother neglected the child.

Matter of Danaryee B., 145 AD3d 1568 (4th Dept 2016)

Affirmance of Finding of Educational Neglect

Family Court determined that respondent mother neglected the subject children and awarded custody of them to nonparty father. The Appellate Division affirmed. Proof that a minor child was not attending a public or parochial school in the district where the parent resided made out a prima facie case of educational neglect pursuant to Section 3212 (2) (d) of the Education Law. Unrebutted evidence of excessive school absences was sufficient to establish educational neglect. The testimony of the caseworker established that two of the children had a combined number of approximately 150 unexcused absences during the most recent school year. The mother failed to rebut that evidence. In addition, petitioner established the presumption of neglect by presenting the testimony and notes of the caseworker, who testified that the mother admitted to using heroin and failed to take meaningful action to treat her addiction, and that the mother's drug use impaired her ability to function. The mother presented no evidence to rebut the presumption of neglect.

Matter of Kenneth C., 145 AD3d 1612 (4th Dept 2016)

Father Abused One Child and Derivatively Abused Other Children

Family Court determined that respondent father abused the subject child Kordell and derivatively abused the other subject children. The Appellate Division affirmed. Petitioner presented a prima facie case of child abuse. Medical testimony of a child abuse physician established that Kordell sustained second-degree burns on his back, left side and upper arm, in a pattern that did not fit any of the histories that were given and was inconsistent with Kordell inflicting the burns on himself. It was undisputed that respondent was the sole caregiver for the child at the time the burns were inflicted. Respondent failed to rebut the presumption that he was culpable. Further, Kordell's statements that the father burned him were sufficiently corroborated by the medical testimony and the caseworker's observations of the injuries. To the extent that respondent contends that Kordell's statements were consistent with his own descriptions of the incident, the court specifically found that the father's statements were internally inconsistent and were not corroborated by the medical testimony.

Matter of Charity M., 145 AD3d 1615 (4th Dept 2016)

CHILD SUPPORT

Parties' Agreement Required Father to Pay Child's College Expenses

Supreme Court declared that defendant father was not entitled to any credit against his child support payments toward his youngest son's college expenses. The Appellate Division affirmed. The parties' agreement was clear that defendant was responsible for the college expenses, including room and board, for the parties' youngest son. Defendant was not entitled to a credit against his obligation to pay the child's room and board expenses in the amount of his child support statement because no such credit was contemplated by the agreement.

Goldberg v Goldberg, 144 AD3d 475 (1st Dept 2016)

Father Required to Pay 100% of College Expenses; SUNY Cap Not Applicable

The order appealed from (a) denied the defendant's motion which was to modify the parties' stipulation of settlement so as to require the plaintiff to pay 100% of the college expenses of the parties' eldest child above the amounts available in certain custodial accounts, or, in the alternative, for a determination that his pro rata share of those expenses was 78% and the plaintiff's pro rata share was 22%, and (b) granted the plaintiff's cross motion which was for a determination that the defendant's pro rata share of those expenses was 100%. The Appellate Division affirmed. Contrary to the defendant's

contention, the Supreme Court properly concluded that he did not establish any basis to modify the stipulation or the judgment of divorce. Further, the Appellate Division could find no reason to disturb the court's determination that the plaintiff sufficiently complied with the terms of the stipulation requiring the parties to meet and jointly discuss the selection of college for each child and, with input from the child, agree on the selection of a college for each child. Contrary to the defendant's contention, the Supreme Court did not err in rejecting his request to impose a SUNY cap on his obligation because neither the stipulation nor the judgment of divorce made reference to a SUNY cap.

Friedman v Friedman, 143 AD3d 665 (2d Dept 2016)

Evidence Demonstrated That Father Made Diligent Good Faith Efforts to Obtain New Employment

The parties are the parents of a four-year-old boy (hereinafter the subject child), who resides in New York with his mother. The father resides in Pennsylvania with his four other children from his marriage to another woman. In an order dated October 21, 2013, the Family Court directed the father to pay support in the sum of $1,406 per month for the subject child. In March 2015, the father filed a petition seeking a downward modification of his support obligation for the subject child alleging, as a substantial change in circumstances, that his income had been reduced due to a loss of employment. At the hearing on his modification petition, the father presented documentary evidence which showed that on March 18, 2013, he was laid off from his employment with Talon Air, where he had worked in the field of aviation electronics. Although in August of 2013 the father accepted a job in his field in New Castle, Delaware, he left that position shortly afterward because it was several hours away from his home in Pennsylvania, and his wife, who had commenced a divorce proceeding, refused to relocate to Delaware with their four children. An October 31, 2013, order in the Pennsylvania divorce proceeding found that the father had made a diligent effort to obtain employment in the aviation electronics field, but there was no such work available locally. An email from an aviation recruitment company working with the father also stated that there were no aviation maintenance opportunities available for him within a 100-mile radius of his Pennsylvania residence. The father subsequently found employment in Pennsylvania as a correctional officer earning approximately $31,500 to $35,000 per year, which was substantially less than his salary at Talon Air. In June 2014, he obtained full custody of the four children of his marriage. In an order dated June 19, 2015, issued at the conclusion of the hearing, the Support Magistrate denied the father's modification petition, finding that he voluntarily left his Delaware employment. The father filed an objection to the order, contending that he was compelled to leave the Delaware job to obtain custody of his four other children, and that he had diligently sought re-employment in Pennsylvania. The Family Court denied his objection, and the father appealed. The Appellate Division reversed. The evidence presented at the hearing demonstrated that the father lost his employment at Talon Air through no fault of his own, and that he made diligent good faith efforts to obtain new employment in the field of aviation electronics before accepting a position as a correctional officer. Further, under the circumstances of this case, the father's decision to leave his subsequent employment in Delaware does not preclude a finding that he diligently sought employment in his field. The evidence further demonstrated that the father left his Delaware employment because his former wife refused to relocate with their four children to that state, and his employment in Delaware would have prevented him from exercising parenting time with the children while seeking custody of them in the Pennsylvania divorce proceeding. The father's evidence regarding his loss of employment, his unsuccessful efforts to obtain comparable employment, and his obtainment of new employment at a lesser salary, demonstrated a substantial change of circumstances warranting downward modification of his support obligation. Accordingly, the Family Court should have granted the father's objection to the order of the Support Magistrate, and granted the petition for a downward modification.

Matter of Smith v McCarthy, 143 AD3d 726 (2d Dept 2016)

Hearing Required to Determine Whether New Calculation of Father's Income Was Warranted

The Family Court correctly denied the father's objection to the Support Magistrate's determination that he failed to establish a change in circumstances that would warrant a downward modification of his child support obligation. Contrary to the father's contention, he failed to establish

that his financial situation had deteriorated between the issuance of the judgment of divorce and the time he filed his modification petition, or a substantial improvement in the mother's financial condition warranting a reduction in child support. However, the Family Court should have granted the father's objection to the Support Magistrate's order granting the mother's petition to the extent of remanding the matter to the Support Magistrate for a hearing and a new calculation of the father's income which excluded the amount of any bonuses. The father argued in his objections that the amount of income used by the Support Magistrate in her calculation of his increased child support obligation included a bonus, which should have been excluded from the calculation pursuant to the modification provision in the stipulation. The stipulation provides for an increase in child support based on an increase in the father's salary "by any amount other than by an increase based upon a bonus." The documentary evidence introduced by the father during the hearing raised a question as to whether part of his income included a bonus, which warranted a hearing to determine whether a new calculation of the father's income was required.

Matter of Kolodny v Perlman, 143 AD3d 818 (2d Dept 2016)

Record Supported Determination to Grant Mother's Petition for Upward Modification

The order appealed from denied the father's objections to an order of that court, dated July 22, 2015, which, after a hearing, granted the mother's petition for an upward modification of the father's child support obligation. The Appellate Division affirmed. Contrary to the father's contention, the evidence adduced at the hearing regarding, among other things, the father's significant increase in income, increases in costs relating to the subject child, including additional expenses incurred as a result of the child's special needs, and the father's failure to make the substantial noneconomic contributions contemplated by the parties' stipulation, was sufficient to warrant an upward modification of child support based on a substantial change in circumstances resulting in a concomitant need. Furthermore, upon remand, the Support Magistrate properly awarded child support in the sum of $3,000 per month, for the reasons articulated by her pursuant to the factors set forth in FCA § 413 (1) (f).

Matter of O'Connor-Gang v Munoz, 143 AD3d 825 (2d Dept 2016)

Mother Deemed the "Custodial Parent" for Purposes of Child Support

The father appealed from an order of the Family Court, dated August 28, 2015. The order denied the father's objections to an order of that court dated March 24, 2015, which dismissed his petitions to modify the parties' child support obligations. The Appellate Division reversed. The record revealed that as a result of an order issued in 2013, and a stipulation entered into by the parties thereafter, it was undisputed that the parties had equal parenting time, including an alternating holiday schedule and equal amounts of vacation. The parties further stipulated to their respective incomes based upon their 2013 W-2 forms. The mother had a gross income of $251,989.52, whereas the father had a gross income of $159,213.56. Since the mother's income exceeded that of the father, she should have been deemed the noncustodial parent for child support purposes. Contrary to the mother's contention, she could not be considered the custodial parent for child support purposes merely because she had sole legal custody of the subject child. The "custodial parent" within the meaning of the Child Support Standards Act is the parent who has physical custody of the child for the majority of the time. Where neither parent has the child for a majority of the time, the parent with the higher income, who bears the greater share of the child support obligation, should be deemed the noncustodial parent for the purposes of child support. Therefore, the father's objections to the Support Magistrate's order dated March 24, 2015, should have been granted, and his petitions to terminate his child support obligation and for child support from the mother should have been granted.

Matter of Conway v Gartmond, 144 AD3d 795 (2d Dept 2016)

Father Directed to Pay 50% of College Costs

Contrary to the defendant's contention, the Supreme Court did not err in directing him to pay 50% of the college costs for the parties' daughter after deduction of monies awarded to the daughter in the form of grants, aid, or student loans. The finding of the court that the defendant's account of his income and contention that he could not afford to contribute toward that child's college

costs was incredible was supported by the record. Additionally, the defendant argued that Supreme Court erred in awarding the plaintiff arrears in the sum of $107,891.36, which accrued under a pendente lite order dated December 15, 2009. Contrary to the defendant's contention, the court did not improvidently exercise its discretion in declining to credit him for certain payments that he allegedly made, as he provided no documentation in support of such payments, or the payments constituted voluntary payments made by a parent for the benefit of the children, which could not be credited against amounts due pursuant to the judgment of divorce.

Horn v Horn, 145 AD3d 666 (2d Dept 2016)

Father Not Entitled to Offset His Child Support Obligation

The father argued on appeal that the Family Court erred in enforcing the support provision in the parties' stipulation of settlement because it was based on the Supreme Court's erroneous finding that the parties' son was emancipated when, in actuality, the son was living with him and he was supporting the son. However, the Family Court has no power to review a Supreme Court judgment determining the issue of child support or to determine the issue of child support de novo where the issue already has been determined by the Supreme Court and set forth in a judgment. To the extent the father argued that after he entered into the stipulation of settlement, the parties' son moved in with him and returned to high school and, therefore, he was entitled to offset his child support obligation by the money he expended to support his son, the father did not file a petition seeking a downward modification of his child support obligation prior to the accumulation of arrears. Since the father failed to obtain a court order permitting him to reduce or eliminate his child support payments prior to the accumulation of the arrears, the mother was entitled to a judgment for child support arrears. The father's contention that he was entitled to a credit against his child support obligation because he gave the parties' daughter $1,000 in cash in December 2012 was without merit. Voluntary payments made by a parent for the benefit of his or her children and not pursuant to a court order may not be credited against amounts due under the order. While the father alleged that the mother kept the $1,000 for herself, he did not dispute that it was intended as a gift to his daughter. Since the father voluntarily gave his daughter $1,000 as a gift, the Support Magistrate properly found that the father was not entitled to a credit against the amount owed.

Byrnes v Javino, 145 AD3d 718 (2d Dept 2016)

Mother's Objections Properly Denied as Untimely

In March 2015, the father filed a petition to terminate his obligation to pay child care expenses. In an order dated May 13, 2015, after a hearing, the Family Court granted that branch of the father's petition. In August 2015, the mother filed a petition for an upward modification of the father's child support obligation. In an order dated September 10, 2015, after a hearing, the court denied the mother's petition. In the order appealed from, the court denied the mother's objections to the orders dated May 13, 2015, and September 10, 2015. The mother appealed. Objections to an order of a Support Magistrate must be filed within 35 days after the date on which the order is mailed to the objecting party (*see* FCA § 439 [e]). Here, the Family Court properly denied, as untimely, the mother's objections to the order dated May 13, 2015. Furthermore, the Family Court properly denied the mother's objections to the order dated September 10, 2015. The Support Magistrate properly determined that the mother failed to establish a substantial change in circumstances warranting an upward modification of the father's child support obligation (*see* FCA § 451 [3] [a]).

Redd v Burrell, 145 AD3d 786 (2d Dept 2016)

Support Magistrate Properly Imputed Income to Mother

Contrary to the mother's contention, the Support Magistrate properly imputed income to the mother based upon her prior and current income, and her savings account assets (*see* FCA § 413 [1] [b] [5] [iv]). In assessing the mother's credibility, the Support Magistrate properly considered the fact that the mother's stated monthly expenses were more than three times greater than her stated monthly income, and she did not submit any evidence to show that these monthly expenses were not being paid in a timely manner. Accordingly, the Family Court properly denied the mother's objections to the Support Magistrate's findings.

Scheppy v Kelly-Scheppy, 145 AD3d 903 (2d Dept 2016)

Father Failed to Submit Competent Medical Evidence of His Alleged Disability

The record supported the Support Magistrate's determination that the father failed to establish a sufficient change in circumstances. Specifically, the father failed to submit competent medical evidence of his alleged disability, and he did not show that he had diligently sought re-employment commensurate with his qualifications and experience. Accordingly, the Support Magistrate properly denied the father's petition for a downward modification of his child support obligation, and the Family Court properly denied the father's objections to the order denying his petition.

Zaveckas v Senat, 145 AD3d 908 (2d Dept 2016)

Mother Properly Directed to Pay Her Share of Add-On Expenses

In 2010 the parties executed a stipulation that was incorporated but not merged into their judgment of divorce, which required them to share the costs of certain add-on expenses for the subject children. In 2015 the father filed an enforcement petition alleging that the mother had failed to pay her share of the add-on expenses. After a hearing, the Support Magistrate granted the enforcement petition and directed the mother to pay the father the sum of $5,140 through the Child Support Collection Unit. In the order appealed from, the Family Court denied the mother's objections to the Support Magistrate's order granting the father's petition. Here, the Support Magistrate's finding that the mother failed to pay the father her share of the add-on expenses, as required by the parties' stipulation, was based upon an assessment of the parties' credibility and was supported by the record. Accordingly, the Family Court properly denied the mother's objections to the Support Magistrate's order.

Schildwachter v Schildwachter, 145 AD3d 1017 (2d Dept 2016)

Record Supported Suspension of Father's Obligation to Make Future Child Support Payments

Contrary to the mother's contention, the evidence adduced at the hearings justified a suspension of the father's obligation to make future child support payments. There was evidence that the mother deliberately frustrated the court-ordered therapeutic visitation in many ways, including unnecessarily canceling a number of sessions, discussing the court proceedings and the therapeutic visits with the children and telling the son that it was up to him as to whether he participated in the therapeutic visits, and referring negatively to the father in the presence of the children. These deliberate efforts by the mother influenced the children to view visitation with the father negatively and contributed to the failure of therapeutic visitation. The mother further failed to make an effort to have a therapist address the children's negative feelings toward their father and made no effort to assist the children in restoring their relationship with the father. Thus, the evidence supported the finding that the mother, by her example, her actions, and her inaction, manipulated the children's loyalty, encouraged the estrangement of the father and children, and deliberately frustrated visitation. Under these circumstances, it was appropriate to suspend the father's current child support obligations pending the mother's active participation in restoring the parental access rights of the father.

Sullivan v. Plotnick, 145 AD3d 1018 (2d Dept 2016)

Record Supported Court's Imputation of Income

Contrary to the defendant's contention, the Supreme Court's determination on the issue of child support was supported by the record. A court is not bound by a party's account of his or her own finances, and where a party's account is not believable, the court is justified in finding a true or potential income higher than that claimed. This is particularly true when the record supports a finding that the defendant's reported income on his or her tax return is suspect. Here, the court's imputation of income to both the plaintiff and the defendant was a provident exercise of discretion.

Rosenberg v Rosenberg, 145 AD3d 1052 (2d Dept 2016)

Record Did Not Support Application of Statutory Percentage to the Combined Parental Income over the Statutory Cap

Contrary to the father's contention, the Support Magistrate properly relied on his 2014 federal income tax return to determine his income from employment at a car dealership and from an S-corporation of which he was the

sole shareholder. The Support Magistrate also properly considered that the father received an average of $700 per month in rental income. Further, the Support Magistrate did not improvidently exercise her discretion by imputing income to the father based upon his testimony that the S-corporation paid for his automobile and other personal expenses. Accordingly, the Support Magistrate properly determined the amount of the father's income for the purposes of making a child support award. However, the reasons articulated by the Support Magistrate for applying the statutory percentage to the combined parental income over the statutory cap of $141,000 were not supported by the record (*see* FCA § 413[1] [c][2],[3]). In describing the parties' respective financial situations, the Support Magistrate noted the mother's student loan obligations, but did not consider the monthly debts and expenses burdening the father (*see* FCA § 413 [1] [f] [1], [7]). Although the Support Magistrate correctly observed that, at the time of the hearing, the father resided with his girlfriend and their newborn daughter, she did not adequately consider the father's expenses with respect to his second child (*see* FCA § 413 [1] [f] [8]). Notably, there was testimony that, for a period of time, the father's girlfriend was not working in order to care for the newborn child and the father was having trouble covering all of the household expenses. Additionally, the Support Magistrate did not consider the other types of support that the father provided to the subject child (*see* FCA § 413 [1] [f] [5]), including health insurance coverage and college savings contributions. Further, there was unrefuted testimony that the child was with the father approximately 100 days out of the year, and that he paid for all of her expenses when she was with him. When determining an appropriate amount of child support, a court should consider a child's actual needs and the amount required for him or her to live an appropriate lifestyle. Here, the Support Magistrate's conclusory determination that the subject child was in need of the full measure of child support was belied by the record. The mother's own testimony demonstrated that the child attends public school and has no special needs or learning disabilities (*see* FCA § 413 [1] [f] [2]). Moreover, the mother testified that she had no childcare expenses, she lived rent-free at her parent's house, she spent about $50-70 per week on food for the child, and there were no extraordinary expenses. Under these circumstances, applying the statutory factors, the Appellate Division found that it would have been appropriate to apply the statutory percentage to the statutory cap of $141,000, with no further child support obligation based on the combined income over that amount.

Peddycoart v MacKay, 145 AD3d 1081 (2d Dept 2016)

Family Court Erred in Dismissing Objections Based on Untimeliness

Family Court dismissed the mother's objections to an order of support issued by the Support Magistrate on the ground that it was not filed in a timely manner. The Appellate Division reversed. Here, Family Court dismissed the mother's objections because they were filed after the statutory deadline date (*see* FCA §439 [e]). The evidence showed the mother attempted to file on the final day the objections were due and arrived at the courthouse at 4:45 p.m. She had checked the NYS Unified Court System website (NYSUCS), which listed the courthouse as being open from 9 a.m. to 5 p.m. However, the courthouse was closed at 4:30 p.m. Since the untimeliness of the filings was due to inaccurate information provided by NYCUCS, and since the court had discretion to overlook minor failures to comply, the merits of the mother's objections should have been considered.

Matter of Hobbs v Wansley, 143 AD3d 1138 (3d Dept 2016)

Court Did Not Abuse Discretion in Imputing Maintenance Payments in Determining Wife's Income

Supreme Court granted the parties a divorce and among other things, ordered the husband to pay child support on behalf of the two subject children, in the amount of $795 every two weeks. The Appellate Division affirmed finding there was no abuse of discretion in its award of child support. Supreme Court properly relied upon the income provided by the husband to determine his net income was $156,215; and imputed $50,000 to the wife for the maintenance she received making her income $86,000. The imputation of income was proper given the wife's impressive educational background, earning capacity and her undisputed failure to seek employment. Since the combined parental income exceeded the statutory cap of $141,000, the court considered and properly analyzed the statutory factors to determine whether some or all of the excess income should be used for child support purposes (*see* DRL §240[1-b][c],[f]).

Macaluso v Macaluso, 145 AD3d 1295 (3d Dept 2016)

Court Erred in Determining Amount of Children's College Expenses

Family Court denied the respective objections of the parties to the order of the Support Magistrate. The Appellate Division modified by granting some objections and vacating other ordering paragraphs. Paragraph 40 of the parties' judgment of divorce provided that the parties shall pay for that portion of the children's college tuition charges which were not covered by the college tuition benefit program (CTBP) through the mother's employment, including tuition, room and board for a maximum of four years, in proportion to their respective incomes, regardless which college the children attended. This provision was ordered by the court and because no issue was raised about it on the father's prior appeal, the father was precluded from raising the issue whether the court erred in ordering him to pay college expenses on this appeal. Because the mother was no longer employed at Hamilton College and the children were therefore no longer eligible to receive the CTBP, the court erred in reducing the college expenses by that benefit. However, the court properly denied the mother's objection to the court's further reduction of the college expenses by the amount contributed by the grandparents as a gift to the children. The court did not err in denying the mother's objection to the determination that the father did not willfully violate paragraph 40, particularly considering the uncertainty about the actual amount of college expenses and further did not err in denying the father's objection to the determination that the father willfully failed to disclose to the mother his 2012 and 2013 income. The court erred in denying the father's objection to the determination that obligated him to pay college expenses for one of the children after he turned 21, inasmuch as there was no agreement to that effect. A prior order provided that the father would continue the children on his health plan and be responsible for 100% of the health insurance premiums and the mother would be responsible for all uncovered medical expenses. The court erred, therefore, in denying the father's objection to the determination that modified the prior order by ordering the father to pay his pro rata share of the unreimbursed medical expenses.

Matter of Lewis v Lewis, 144 AD3d 1659 (4th Dept 2016)

Support Arrears Time-Barred

Family Court denied petitioner mother's objection to the order of the Support Magistrate. The Appellate Division affirmed. The Support Magistrate erred in determining that the six-year limitations period in CPLR 213 (1) applied to a 1986 judgment against the father for child support arrears. The judgment was governed by the 20-year period of limitations in CPLR 211 (b). However, even under the 20-year limitations period, the proceeding to enforce the judgment was untimely. The court did not err in confirming the Support Magistrate's finding that the statute of limitations was not tolled pursuant to CPLR 207 inasmuch as the record supported the finding. Although the mother claimed the father was absent from the state for periods of time, the father testified and submitted evidence establishing that her resided in New York during the relevant period. The court did not err in confirming the finding of the Support Magistrate that the father's conduct did not restart the statute of limitations.

Matter of Gibbs v Gibbs, 144 AD3d 1669 (4th Dept 2016)

Court Properly Denied Father's Request For Reduced Child Support Obligation

Family Court denied petitioner father's objections to the order of the Support Magistrate that denied his request for a reduction of his child support obligation. The Appellate Division affirmed. The Support Magistrate did not err in directing the father to apply to the Social Security Administration for a change in the representative payee of the subject children's social security disability (SSD) benefits from the father to petitioner mother. The evidence in the record established that the mother had primary physical custody of the subject children, and that their needs were best served by having their SSD benefits paid to her. Because those payments were to be used for the benefit of the children and the father failed to establish that he had done so, the Support Magistrate did not err in directing that he pay to the mother the amount of those benefits that he received after the mother filed the petition seeking those payments for the benefit of the children. The Support Magistrate did not award those funds to the mother as support arrears. Instead, the Support Magistrate directed the father to provide the mother, the children's primary custodian, with funds that were for the children's social security payment that the father received and did not give to the mother, and that he

failed to establish were used for the children's benefit. Family Court also properly denied the father's objection to that part of the Support Magistrate's order that rejected his request for a reduction of his child support obligation. The fact that the Support Magistrate directed the father to request that the Social Security Administration designate the mother as the children's representative payee, together with the father's resulting loss of the use of that money, did not provide a basis for a downward modification of the father's child support obligation.

Matter of Holeck v Beyel, 145 AD3d 1600 (4th Dept 2016)

Family Court Properly Denied Respondent's Application to Vacate Order Entered Upon His Default That Determined He Willfully Violated Child Support Order

Family Court denied respondent father's application to vacate an order entered upon his default that determined he willfully violated a child support order. The Appellate Division affirmed. Although default orders were disfavored in cases involving the custody or support of children, that policy did not relieve the defaulting party of the burden of establishing a reasonable excuse for the default or a meritorious defense. Even assuming, arguendo, that the father established a reasonable excuse for his failure to appear for the trial based upon allegedly confusing correspondence from petitioner mother's attorney with respect to whether the mother had withdrawn her petition, the father failed to establish a meritorious defense. The father repeated arguments in his affidavit that had been unsuccessful in prior support proceedings, i.e., that he received Social Security benefits and that he was unable to work. The father failed to establish his inability to work, and his conclusory assertions were not sufficient to establish a meritorious defense.

Matter of Shehatou v Louka, 145 AD3d 1533 (4th Dept 2016)

Supreme Court Properly Declined to Set Aside Child Support Provisions of Parties' Judgment of Divorce

Supreme Court declined to set aside the child support provisions of the parties' judgment of divorce. The Appellate Division affirmed. The court properly determined that defendant father failed to meet his burden of establishing that the parties' 2009 Property Settlement and Separation Agreement (the Agreement) was procured by fraud on the part of plaintiff mother. The evidence established that the parties agreed to use the 2003 income information to expedite the divorce and that defendant carefully read the Agreement before he signed it. Defendant raised for the first time on appeal his contention that the child support provisions of the judgment should be vacated on the ground that those provisions did not comply with the requirements of the Child Support Standards Act (*see* Domestic Relations Law Section 240 [1-b] [b], [h]), and thus that contention was beyond appellate review. Although plaintiff properly conceded that the court erred in precluding defendant from questioning plaintiff's former attorney regarding certain factual matters, the error was harmless inasmuch as follow-up questions would have necessarily involved confidential communications made for the purpose of giving or obtaining legal advice. Furthermore, there was no allegation that the communication between plaintiff and her former attorney was made in furtherance of a fraudulent scheme, or an alleged breach of fiduciary duty or an accusation of some other wrongful conduct. Thus, the crime-fraud exception did not apply.

Bryant v Carty, 145 AD3d 1543 (4th Dept 2016)

CUSTODY AND VISITATION

Court Properly Ordered Unsupervised Visitation With Conditions

Family Court awarded petitioner mother unsupervised visitation on specified conditions. The Appellate Division affirmed. The court's determination had a sound and substantial basis in the record. The court properly considered the testimony of the then 12-year-old child, who testified in camera and in open court, as well as that of the mother, and concluded that the child preferred to remain in New York with her father, with unsupervised visitation with her mother in Florida. The court was entitled to give weight to the wishes of the child, who had demonstrated insight and maturity. The conditions in the visitation order were not unreasonable or inappropriate. The prior history of domestic violence was a factor to be considered in connection with the award of sole custody to the father and had been reviewed and affirmed as being in the child's best interests.

Matter of Melissa G. v John W., 143 AD3d 406 (1st Dept 2016)

Relocation in Children's Best Interests

Family Court granted the mother's application for relocation with the subject child to Florida. The Appellate Division affirmed. Respondent mother demonstrated by clear and convincing evidence that a move to Florida would improve the quality of life for the six-year-old child and that she would continue to foster a relationship between petitioner father and the child. Although the relocation would have an impact on the father's ability to spend time with the child, the visitation schedule set by the court would allow for the child to continue to have a meaningful relationship.

Matter of Christopher E. C.. v Ivana K. S., 143 AD3d 420 (1st Dept 2016)

Sole Legal and Physical Custody to Father in Child's Best Interests

Family Court awarded petitioner father sole legal and residential custody of the parties' child, with visitation to respondent mother. The Appellate Division affirmed. The court had sufficient information to determine, without a plenary evidentiary hearing, that it was in the child's best interest to reside with the father during the pendency of this matter. The record showed that the mother tested positive for drugs when the child was under her care and she admitted to drug use in open court. There was also a neglect proceeding involving the mother's other child. The determination that awarding custody to the father was in the child's best interests was supported by a sound and substantial basis in the record. The father had parented the child appropriately, provided a loving and stable home environment, and made sure to obtain the services the child required.

Matter of Luis H. v Latima P., 143 AD3d 469 (1st Dept 2016)

Sole Legal and Physical Custody to Father in Child's Best Interests

Family Court awarded petitioner father sole legal and residential custody of the parties' child, with visitation to respondent mother. The Appellate Division affirmed. Although the mother was the children's primary caretaker until 2013, the children had lived with the father in a stable and loving home where they had thrived since that time. The evidence established that the father lived continuously in the same apartment, was gainfully employed and financially supported the children, had been active in their education, medical care and daily care, and had addressed their special needs. The record was replete with concerns about the mother's lack of judgment and parenting skills, and the children's needs had suffered in her care. In contrast to the mother, the father had placed the children's needs above his own. In making its determination, the court considered the appropriate factors, including the court-ordered forensic expert's testimony and recommendation in favor of granting the father custody, the children's preferences, and evidence that the mother undermined and thwarted the children's relationship with the father.

Matter of Karim R. v Salamatou S., 143 AD3d 471 (1st Dept 2016)

Sound and Substantial Basis For Denial of Visitation to Father

Family Court denied petitioner father's request for visitation with the subject children. The Appellate Division affirmed. There was a sound and substantial basis for finding that the father should be denied in-person physical visitation with the children. The father had a history of violence against the mother and there was an extant order of protection in favor of the mother and children. The father made no effort to foster and maintain a relationship with the children during the extended period of time the children lived with relatives abroad, an arrangement that the father proposed. The court encouraged the father to repair his relationship with the children by, among other things, communicating with them by electronic or telephonic means, and sending them gifts. The court ordered the mother to encourage such contact and ordered that the children be enrolled in therapy for the purpose of attempting to foster a relationship with the father. The court also recommended that the father participate in therapy to address his anger issues and learn to engage with the children in a positive manner. The limitation on the father's contact was in line with the children's strong preferences.

Matter of Harry S. v Olivia S. A., 143 AD3d 531 (1st

Dept 2016)

Grandfather Showed Extraordinary Circumstances Existed

Family Court denied the petition of the father for custody of the subject child, continued a prior order granting custody to the paternal grandfather, and granted supervised visitation to the father. The Appellate Division affirmed. The grandfather showed by a preponderance of the evidence that extraordinary circumstances existed and that it was in the child's best interests that he retain custody. The evidence showed that the father was an unfit parent who had persistently neglected the child and had relinquished his parental rights to the grandfather. The father's contact with the child had been sporadic since he lost custody in 2009; he had an extensive history of violence; and there was evidence that he sexually molested a child. In contrast, the evidence showed that the grandfather and the child had a loving bond and that the grandfather took excellent care of the child.

Matter of Jamal S. v Kenneth S., 143 AD3d 555 (1st Dept 2016)

Court Erred in Dismissing Mother's Petition Without Meeting With Child

Family Court granted respondent father's motion to dismiss the mother's amended petition for a modification of custody without a hearing. The Appellate Division reversed. Petitioner mother relinquished custody of the parties' children to respondent father because she was medically unable to care for them. The father then brought a petition to modify the existing custody order to grant him sole custody. Petitioner, appearing pro se by phone, consented to custody order, with visitation to be worked out by the parties. About one year later, petitioner, acting pro se, moved to enforce visitation and requested assignment of counsel in connection with challenging the custody order. After counsel was appointed, the mother moved to amend her petition to seek modification of the custody order based on changed circumstances, including the expressed preference of the younger child, then 13 years old, to resume living with her. The father consented to the motion to amend and cross moved to dismiss the amended petition on the ground that the mother had not shown evidence of changed medical condition. In response the mother submitted evidence of the child's preference and his growing apprehension about staying with the father, and the father's maltreatment of the child. She also submitted evidence that she was addressing the mental health concerns that led to her initial consent to relinquish custody and evidence that she sought treatment for issues relating to a history of domestic violence and that she had obtained new living quarters for herself and the child. The child supported the petition and asked for an in camera hearing. Without meeting the child or considering the sworn allegations of domestic abuse, the court granted the motion to dismiss. Petitioner presented sufficient evidence to warrant a plenary hearing to determine whether modification of the custody order was warranted. The child's wishes should be considered in making the determination.

Matter of Athena H. M. v Samuel M., 143 AD3d 561 (1st Dept 2016)

Grandfather Failed to Demonstrate Extraordinary Circumstances

Family Court dismissed the maternal grandfather's petition for custody of the subject child. The Appellate Division affirmed. The court properly found that the grandfather failed to demonstrate extraordinary circumstances. Although the mother had prolonged absences, none of which amounted to 24 continuous months, it was undisputed that the mother made clear that she intended to retrieve the child after she established a household in Indiana and maintained contact for part of the time she was out of state. The court did not find the testimony concerning the mother's drug use to be credible inasmuch as the grandparents contradicted each other, she had no history of child protective or criminal proceedings, and her older child was well cared for.

Matter of Juan J. R.. v Krystal R., 143 AD3d 568 (1st Dept 2016)

Grandmother Demonstrated Extraordinary Circumstances

Family Court awarded sole legal and physical custody of the subject child to petitioner grandmother. The Appellate Division affirmed. The grandmother demonstrated extraordinary circumstances. Petitioner cared for the child on a daily basis beginning in his

infancy and the child resided in her home for more than 10 years, nearly his entire life. Respondent mother's 28-month incarceration for selling drugs, during which time the child resided with the grandmother, was sufficient alone to constitute extraordinary circumstances. It was in the child's best interests to be in the grandmother's custody. The child was fully bonded with the grandmother and she had provided excellent care for the child. The court gave the appropriate weight to the testimony of the grandmother and the child's social worker, the reports of the forensic evaluator, and the child's wishes, in making its determination.

Matter of Sharon B. v Tiffany P., 143 AD3d 573 (1st Dept 2016)

Sole Custody to Father in Child's Best Interests

Supreme Court granted defendant father sole legal and physical custody of the subject child, with therapeutic supervised visitation to plaintiff mother. The Appellate Division affirmed. The court's determination had a sound and substantial basis in the record. It considered the appropriate factors in making its determination. The record showed that the mother had a lack of insight into her parenting deficiencies and failed to engage in recommended mental health services leading to findings of educational and medical neglect against her and release of the child to the father. Although the father was also found responsible for the medical and educational neglect, he ultimately addressed the child's needs and the child thrived in his care. The child progressed from exhibiting fairly severe behavioral problems and social delays to being a functioning member of a third grade classroom, with friends and extracurricular activities. The court properly determined that continuation of supervised therapeutic visitation with the child was in the child's best interests.

Michelle R. v Alexander R., 143 AD3d 583 (1st Dept 2016)

Appeal Dismissed - Respondent Waived Right to Appeal

Family Court, upon consent, granted a final order of custody to nonparty father of the subject children. The Appellate Division dismissed the appeal. Respondent consented to the dispositional order and no appeal lies from an order entered on consent. In any event, the record showed that the parties engaged in a discussion devoted to appellate waivers, and the court made clear that the appellate waiver was separate and apart from other rights at issue. Also, respondent's counsel conferred with and explained the waiver to respondent, in open court, and several times, on the record, respondent indicated that she understood she was waiving her right to appeal.

Matter of Shaniyah D. C., 143 AD3d 608 (1st Dept 2016)

Father's Failure to Appear Did Not Constitute Default

Family Court dismissed respondent father's motion to vacate the court's earlier order granting custody of the subject children to petitioner mother upon the father's default. The Appellate Division reversed, granted the father's motion, and remitted to a different judge for a full hearing on the mother's modification of custody petition and the court's temporary award of custody to the mother with visitation to the father. The father was deprived of his statutory right to assigned counsel. After the court dismissed the father's assigned counsel, it conducted several hearings in the custody matter and granted a final order of custody to the mother, without the father's presence and without reassigning him counsel. Reversal was also required because the court improperly determined that the father defaulted on his vacatur motion. Although the father was not in court when the motion was called, the motion was scheduled for an earlier time and his former assigned counsel, who was notified of the hearing, relayed that he believed the father was in the bathroom. Additionally, the court allowed counsel to argue the motion in the father's absence. Although the court did not reach the merits of the father's vacatur motion, the Appellate Division did. The father provided a reasonable excuse for his failure to appear. He contended that he was not served with the mother's refiled petition and the AFC conceded that there was no affidavit of service in the record. The father moved promptly to vacate the default, there was no showing of his intent to abandon the action, and there was no showing of prejudice to the mother. The father also set forth a meritorious defense inasmuch as the oldest child had been hospitalized on three occasions while in the mother's care and had never been hospitalized while she was living with him.

Matter of Melinda M. v Anthony J. H., 143 AD3d 617 (1st

Dept 2016)

Dismissal of Father's Petition Seeking Exchange of Children at Police Precinct Affirmed

Family Court, among other things, dismissed the father's petition to modify an order of visitation. The Appellate Division affirmed. The court's dismissal of the father's modification petition, which sought an order directing that the exchange of the child take place at a police precinct, had a sound and substantial basis in the record. The court credited the mother's testimony that requiring her to bring the child to the precinct would be a hardship on the mother, and would not be in the child's best interests. The finding that the father committed the family offenses of harassment in the second degree and disorderly conduct was supported by a fair preponderance of the evidence, including the testimony of the mother that the father came to her place of employment and, when asked to leave, struck her in the chin, and that he frequently threatened violence against her.

Matter of Antoine R. A. v Tiffany P., 143 AD3d 573 (1st Dept 2016)

Father Did Not Forfeit Right to Visitation

Family Court denied the father's petition for visitation with his daughters. The Appellate Division reversed. Petitioner is the father of 13-year-old twins born in 2003. Initially, he had no contact with the children. In 2005, he began to pay child support pursuant to court order and in 2006 he filed a petition for visitation. After several adjournments the petition was dismissed because petitioner was unable to locate and serve respondent who had moved and had not given him her forwarding address. Over the next seven years, petitioner did not see the children, but in 2013 he petitioner for visitation again. After respondent was located by an investigator hired by petitioner, respondent cross-moved for custody. Initially, the court directed petitioner to contact the children by letter and he wrote them many letters, which were characterized by the AFC as "very appropriate." Thereafter, the court ordered supervised visitation and the social worker who supervised reported that although the children were ambivalent about petitioner, they were becoming more receptive. After a court ordered unsupervised visit, the AFC made application to suspend visitation because the children found the visits stressful. After an in camera hearing the court determined that it was not in the children's best interests to have visitation with petitioner and that petitioner had forfeited his right to visitation. The presumption that petitioner and the children should visit was not rebutted. Such visitation did not place the children in physical danger and there was no substantial evidence that visitation would produce serious emotional strain. There were no exceptional circumstances to support the finding that petitioner forfeited his right to visitation. Although he did not establish a relationship with them, he supported them financially for 10 years and his initial efforts to establish visitation were frustrated by his inability to locate them. Moreover, petitioner had matured and remarried and wanted to establish a relationship with the children and the children to establish a relationship with their half-siblings. The court placed too much weight on the expressed wishes of the children. The reasons the children gave at the in camera hearing about their interactions with petitioner were insufficient to terminate visitation. At most, they showed the need for more therapeutic support and perhaps more time to help petitioner gain the children's trust and affection.

Matter of Ronald C. v Sherry B., 144 AD3d 545 (1st Dept 2016)

Supervised Visitation With Father Affirmed

Supreme Court modified an order of visitation to grant the father agency-supervised visitation with the subject children to be paid by the father. The Appellate Division affirmed. The court's determination that supervised visitation was in the children's best interests had a sound and substantial basis in the record. The court relied on the mother's testimony, a prior order of protection for the mother and children against the father, and prior incidents during supervised visits where the father was volatile, insistent, and intimidating when challenged, all of which demonstrated that the father posed a risk to the children's emotional well-being if visits were unsupervised. There also was a sound basis for the court's determination that an agency, and not the children's paternal grandmother, should supervise visits, as evidenced by the father's statements on social media regarding his evasion of a prior court order. It was appropriate to direct the father to pay for agency-supervised visitation because there was no statutory basis for directing the city to pay for that cost once all proceedings had concluded.

Matter of Arcenia K. v Lamiek C., 144 AD3d 610 (1st Dept 2016)

Custody to Father Reversed

Family Court awarded sole legal and primary physical custody of the parties' child to petitioner father, with liberal parenting time to respondent mother. The Appellate Division reversed, awarding primary physical and sole legal custody to the mother, with parenting time to the father. For the first three years of the subject child's life she lived with the mother. The father was not present when the child was born in 2007, did not visit the child for the first six months of her life, and had limited contact with her thereafter. In 2010, when the mother was pregnant with her youngest child, she stopped taking her psychiatric medication and was hospitalized. During her hospitalization, the father obtained an order granting him temporary custody of the child and requiring that the mother's visitation be supervised. Since the father was granted temporary custody, the paternal grandmother acted as the child's primary caretaker. While the father adequately provided for the child financially, and the paternal grandmother ensured that the child was fed and clothed, their relationship with the child was not warm or affectionate. After the mother was discharged from the hospital in 2010, she and the child's half brothers and sister went to live with the mother's sister in Connecticut, and in 2012, the mother obtained her own apartment where she resides with her other children. The mother regularly visited with the child from 2011 until the time of trial. It is undisputed that the mother was an excellent, warm and responsive parent, as the father himself testified. The forensic evaluator concluded that the child's bond with the mother would foster the child's emotional growth and maturity, her good feelings about herself, and her connectiveness with others, while the relationship the child had with her father and paternal grandmother would fail in nurturing the child's emotional development to the same degree. The court erred in awarding custody to the father. First, it gave too much weight to the temporary order of custody. Second, it gave too much weight to the parties' financial circumstances. Third, there was no support for the court's finding that the neutral forensic evaluator made a superficial assessment of the parties at the beginning of the evaluative process, cast his lot with the mother, and worked from that point to present findings in her favor. Fourth, the court's focus on the possibility that the mother might experience a mental health relapse was speculative and not supported by the record. Fifth, the child's close relationship to her siblings, all of whom resided with the mother, weighed in favor of awarding custody to the mother. Finally, the court improperly considered this a relocation case. Even if the case were considered a relocation case, the distance between the parties' homes was not great.

Matter of Michael B., 145 AD3d 425 (1st Dept 2016)

Monthly Psychiatric Monitoring of Father as Component of Visitation Affirmed

Family Court placed petitioner father on probation and directed him to comply with conditions of probation, including monthly psychiatric monitoring for a two-year period, as a component of visitation. The Appellate Division affirmed. Contrary to the father's contention that he did not consent to have the matter determined by a JHO, the father signed a consent form in the underlying custody proceeding that included his consent to a determination by JHO in any supplementary proceeding. The court previously affirmed the determination that monthly psychiatric monitoring of the father as a component of visitation was appropriate and the father failed to present any evidence of a change in his mental health status warranting elimination of this component of visitation.

Matter of Jamel W., 145 AD3d 433 (1st Dept 2016)

Court Properly Granted Cross-motion to Dismiss Father's Visitation Hearing Without a Hearing

Family Court denied petitioner father's motion for a forensic evaluation and granted the cross motion of the AFC to dismiss the petition seeking to modify a judgment of divorce to provide for visitation with the subject child. The Appellate Division affirmed. In 2008, petitioner stabbed respondent mother seven times with a kitchen knife and repeatedly punched her in the presence of the child. He was convicted of assault in the first degree and endangering the welfare of a child and sentenced to 11 years in prison. A 19-year order of protection was issued prohibiting him from having any contact with the child, except by order of the court. The subsequent judgment of divorce granted custody of the child to the mother and adjudged that petitioner had no visitation rights pursuant

to the order of protection. Petitioner failed to make any evidentiary showing of changed circumstances. His claim that he completed an anger management program in prison was unsubstantiated, and his belief that enough time had passed so that the child should be emotionally prepared to see him was contradicted by a social worker's affidavit submitted in opposition. Because petitioner failed to establish his entitlement to a hearing, and in view of the evidence of the child's continuing symptoms and desire not to see petitioner, the court providently exercised its discretion in denying his motion for a forensic evaluation.

Matter of Kent D., 145 AD3d 441 (1st Dept 2016)

Custody to Mother in Children's Best Interests

Supreme Court awarded sole legal custody and primary physical custody of the parties' children to plaintiff mother, with parenting time to defendant father. The Appellate Division affirmed. The determination that awarding the mother primary physical custody would serve the children's best interests was supported by the record. The court thoughtfully assessed the evidence and the credibility of witnesses and recommendations of the forensic evaluator. The record showed that the mother was more likely to support and encourage the children's relationship with the father than the father was to facilitate a relationship between the mother and children. The court properly weighed the father's history of making unsubstantiated claims to the police, ACS and hospital personnel.

Karlsson v Karlsson, 145 AD3d 639 (1st Dept 2016)

Father Failed to Demonstrate a Change in Circumstances Warranting Modification

An order of custody and visitation entered in May 2013 awarded the father sole legal and physical custody of the parties' child, with certain visitation to the mother. That order of custody and visitation required the father to drop the child off for the mother's visitation at a specified location near his and the mother's workplaces in Manhattan, and to pick up the child at a specified location near the mother's residence in Queens. In February 2015, the father moved to modify the order with respect to the parties' responsibility for, and the location of, the pickups and dropoffs. He contended that in light of certain changed circumstances, the amount of travel time had increased and become more burdensome. He sought modification of the provisions of the order to require the mother, among other things, to pick up the child in Connecticut, where he resides. The Family Court denied the father's motion on the ground that the father had failed to demonstrate a change in circumstances warranting modification. The father appealed. The Appellate Division affirmed. A party seeking modification of an existing custody or visitation order must demonstrate that a change in circumstances has made modification of the existing order necessary to protect the best interests of the child. In making a determination as to modification after a hearing, the Family Court must evaluate the credibility of the witnesses and the character and sincerity of all the parties involved. Here, the Family Court's findings had a sound and substantial basis in the record.

Matter of Islam v.Lee, 143 AD3d 715 (2d Dept 2016)

Paternal Great Aunt Awarded Permanent Guardianship

The order appealed from, after a hearing, granted the paternal great aunt's petition to be appointed permanent guardian of the subject child. The Appellate Division affirmed. The Family Court properly determined that the paternal great aunt sustained her burden of demonstrating extraordinary circumstances. The court was presented with evidence that the mother had left the child with the paternal great aunt for days at a time without checking in on the child. For the past three years, the child had lived with the maternal grandmother, who became ill, thus prompting the filing of the subject petition. There also was evidence that the mother failed to establish a stable household and did not support or make important decisions for the child. The father was incarcerated and not involved in the child's life. Moreover, the court's determination that an award of guardianship to the paternal great aunt was in the best interests of the subject child was supported by a sound and substantial basis in the record.

Matter of Laura M. v Nicole N., 143 AD3d (2d Dept 2016)

Maternal Grandmother Awarded Sole Physical Custody of Child and Final Decision-making Authority

In April 2013, approximately a month after the subject child was born, the mother was arrested. This arrest resulted in a misdemeanor conviction of possession of heroin and a sentence of probation. Six months later, the maternal grandmother (hereinafter the grandmother) filed a petition seeking custody of the child. In an order dated March 27, 2014, upon the mother's consent, the Family Court awarded the mother and the grandmother joint custody of the child. A few days later, on April 1, 2014, after receiving a phone call from the Orange County Child Protective Services, the grandmother went to the mother's house to pick up the child, took the child to the doctor, and returned home with the child. The child has resided with the grandmother since that time. A week after the grandmother took the child into her physical custody, the mother was arrested and charged with violation of probation. The mother was eventually transferred from a jail in Orange County to Pike County Correctional Facility in Pennsylvania. The grandmother visited the mother while she was incarcerated, placed money in her commissary account, and took the child to visit the mother approximately once per month. In September 2014, the grandmother filed a petition to modify the custody order so as to award her sole custody of the child with supervised visitation to the mother. In support of her petition, the grandmother alleged that, upon a request of the Department of Social Services, she began caring for the child a week before the mother's incarceration, and that the mother needed to stop using drugs before regaining custody of the child. After counsel was assigned for all parties, the mother moved to dismiss the petition for failure to state a cause of action. In an order entered April 15, 2015, the Family Court denied the motion. Thereafter, the Family Court held a hearing on the petition, at which the grandmother, the mother, and the maternal grandfather testified. After the hearing, in an order entered April 23, 2015, the court granted the grandmother's petition to the extent of modifying the custody order so as to award her sole physical custody of the child and final decision-making authority, but not sole legal custody. The order further directed, inter alia, that the mother have "daily access to the child," to be supervised by the grandmother or a third party approved by the grandmother. The mother appealed. The Appellate Division affirmed. Upon reviewing the record, the Appellate Division found that the Family Court erred in failing to make the threshold determination of extraordinary circumstances in determining the grandmother's custody petition. Nevertheless, the record was sufficient to enable the Appellate Division to find that the requisite extraordinary circumstances existed. Among other things, the hearing testimony demonstrated that the grandmother supported and cared for the child for a substantial portion of the child's life, including at times when the mother was incarcerated, and that the child had developed a strong emotional bond with the grandmother. Further, although the mother, who was still incarcerated at the time of the hearing, admitted that she was addicted to heroin, she failed to proffer a certificate or other evidence that she had successfully completed a course of treatment for her addiction. Moreover, the mother would not have a job or a vehicle upon her release from prison. Where extraordinary circumstances are present, the Family Court must then consider the best interests of the child in awarding custody. Here, the Family Court's determination that the best interests of the child were served by an award of sole physical custody and final decision-making authority to the grandmother, with liberal supervised visitation to the mother, was supported by a sound and substantial basis in the record.

Matter of Lewis v Speaker, 143 AD3d 822 (2d Dept 2016)

Record Supported Determination to Award Father Sole Custody of Children

The mother and the father, who were never married, have two sons and a daughter. In October 2013, the mother moved out of the family home. After the mother moved out, the parties' three children remained in the care of the father, living with him in the family home. The father subsequently petitioned for sole custody of the children. The children continued to live with the father and remained in his custody throughout the pendency of the proceeding. After a hearing, the Family Court awarded sole custody of the children to the father. The mother appealed. The Appellate Division affirmed. The record revealed that both parents loved the subject children, but that the father was better situated to provide for the children's overall well being. The father had been the primary caregiver for all of the children since the mother moved out of the family home. He had provided a stable home for the children and had been more effective than the mother in taking care of their educational, emotional, and behavioral needs. Accordingly, the Family Court's determination that the children's best interests were served by awarding sole custody to the father had a sound

and substantial basis in the record.

Matter of Recher v Velez, 143 AD3d 828 (2d Dept 2016)

Family Court Improperly Delegated to Child's Therapist Sole Authority to Determine Father's Future Contact with the Child

The parties separated in March 2011, and in March 2012, the father filed a petition for visitation with the parties' child, who was then living with the mother. The Family Court ordered a forensic evaluation of the parties, which was completed on August 29, 2012. A hearing on the father's petition was scheduled to begin on March 29, 2013. On that date, however, the parties consented to the entry of an order directing, in relevant part, "that the father shall participate with the child's therapy as recommended by the child's therapist"; "that the father's therapist and the child's therapist may communicate with each other"; and "that there shall be no contact between the father and the child except as recommended by the child's therapist." On or about August 15, 2014, the father petitioned the Family Court to vacate or modify the order dated March 29, 2013, alleging that it was unenforceable as drafted, and that a change in circumstances warranting a modification of the order had occurred. The mother moved to dismiss the father's petition. The father cross-moved, inter alia, for a custody hearing and for visitation with the subject child, and made a separate application for, among other things, temporary custody of the child. The Family Court granted the mother's motion and dismissed the father's petition, and denied the father's cross motion and application. The father appealed. The Appellate Division modified. The father's factual assertions in support of an alleged change in circumstances were unsubstantiated and conclusory. Thus, he failed to make the requisite showing of a change in circumstances. There was merit, however, to the father's legal argument that the order dated March 29, 2013, as drafted, improperly delegated to the subject child's therapist sole authority to determine whether the father would be permitted to have any future contact with the subject child. Therefore, the Family Court should have granted that branch of the father's petition. It is for the Family Court, not the child's therapist, to exercise its own discretion to determine how, when, and under what terms and conditions the father's visitation with the subject child should resume. Noting that since the entry of the order dated March 29, 2013, there had been no visitation between the father and the subject child, the parties, together with the Attorney for the Child, were given 45 days from the date of the Appellate Division's decision and order, to agree on the terms of a detailed plan to reintroduce the subject child to the father. The agreed upon plan would then be submitted for the approval of the Family Court, and entered as a modification of the order dated March 29, 2013. In the event that the parties were unable to agree to a plan, the Appellate Division directed the Family Court to make such determination, after receiving written submissions from the parties and the attorney for the child and after a hearing. Additionally, the Family Court could solicit input from the child's therapist or other mental health professionals to assist it in determining the best interests of the child.

Matter of Rogan v Guida, 143 AD3d 830 (2d Dept 2016)

Record Supported Dismissal of Grandparents' Visitation Petition

The order appealed from, without a hearing, granted the father's motion to dismiss the maternal grandparents' petition pursuant to DRL § 72 for grandparent visitation. The maternal grandparents appealed. The Appellate Division affirmed. DRL § 76 provides that a court of this state has jurisdiction to make an initial child custody determination, inter alia, where "(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and (ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships" (*see* DRL § 76 [1] [b]). Here, the record revealed that, since October 2014, the child had resided with her father in Connecticut, where she was enrolled in school and involved in various extracurricular activities. There was no evidence that the child still had a close connection with New York (*see* DRL § 76 [1] [b]), and jurisdiction to entertain a visitation proceeding could not be predicated solely upon the mere presence of the petitioners within the State. Under these circumstances, the father's motion to dismiss the petition pursuant to DRL § 72 was properly granted.

Matter of Reilly v Mann, 143 AD3d 901 (2d Dept 2016)

Record Supported Determination That Relocation to the State of Georgia with Mother Was in the Child's Best Interests

On May 29, 2014, the mother filed a petition seeking to relocate with the child to Georgia. The father opposed the petition and on July 23, 2014, he filed a cross petition for physical custody of the child. Following a hearing on the petition and cross petition, the Family Court granted the petition and denied the cross petition. The father appealed only to the extent that the court granted the mother's petition to relocate with the child to Georgia. The Appellate Division affirmed. Contrary to the father's contentions, the mother established by a preponderance of the evidence that her relocation was in the best interests of the child. The mother demonstrated that relocation was the result of economic necessity and that it would enhance the child's life economically, educationally, and emotionally. The evidence demonstrated that the mother was the child's primary care giver and that she was committed to meeting the child's needs, whereas the father demonstrated little involvement in the child's daily life and exhibited a lack of understanding with respect to the child's behavioral and mental health issues. Moreover, although relocation would have an inevitable impact on the father's ability to spend time with the child, a liberal visitation schedule, including extended summer visits and visits during school vacations, would allow for a continuation of a meaningful relationship between the father and the child.

Matter of Rivera v Cruz, 143 AD3d 902 (2d Dept 2016)

Record Did Not Support Determination to Award Sole Legal and Physical Custody to Mother

The parties, who were never married, are the parents of two children, a son and a daughter. The parties lived together with the children from approximately 1998 until 2010, when they were evicted from their apartment. The father and the son moved into the paternal grandmother's residence, and the mother and the daughter moved into a shelter. In September 2010, the mother filed a petition for sole legal and physical custody of both children. In December 2010, the father filed a petition for sole legal and physical custody of the son. In April 2012, the father filed a separate petition for sole legal and physical custody of the daughter. Following a hearing, the Family Court awarded sole legal and physical custody of the daughter to the mother, with specified visitation to the father, and awarded sole legal and physical custody of the son to the father, with specified visitation to the mother. The father and daughter separately appealed. The Appellate Division reversed. The Family Court's award of custody of the daughter to the mother lacked a sound and substantial basis in the record. The court explained some of its reasoning for disregarding the court-appointed forensic evaluator's recommendation, including that there was an insufficient basis in the record to find that the sleeping arrangements in the father's home were more suitable than the sleeping arrangements in the mother's home. However, there was evidence in the record sufficient to support the forensic evaluator's opinion that custody of the daughter should be awarded to the father. Further, the court failed to give sufficient weight to some of the mother's actions that undermined her ability to provide appropriate parental guidance, including engaging in a physical altercation with the father's girlfriend in front of the children. The court's finding that the mother demonstrated an ability to provide the daughter with the support necessary for her educational development was not supported by the record. The mother failed to acknowledge or address the daughter's overall poor grades in school, and while the daughter's excessive school latenesses had improved, the mother provided no explanation for the daughter's continued periodic lateness. In contrast, the father demonstrated a greater ability and willingness to both anticipate and provide for the daughter's social and intellectual needs. The forensic evaluator's opinion that the father would foster a healthier relationship between the daughter and the mother than the mother would foster between the daughter and the father was also supported by the record. In addition, the court failed to give sufficient weight to the fact that awarding the mother custody of the daughter separated her from her older brother, with whom she had a good relationship, and with whom she had lived during the first few years of her life. Accordingly, the Family Court should have granted the father's petition for sole legal and physical custody of the daughter, and should have denied that branch of the mother's petition which was for sole legal and physical custody of the daughter.

Matter of Wilson v Bryant, 143 AD3d 905 (2d Dept 2016)

Father Demonstrated a Change in Circumstances Warranting a Modification

In a settlement agreement dated June 21, 2005, which was incorporated but not merged into the parties' judgment of divorce dated August 26, 2005, the parties agreed to share joint legal custody of their child, with residential custody to the mother and visitation to the father. The father subsequently commenced a proceeding to modify the settlement agreement so as to award him residential custody of the child. The Family Court granted the father's petition, and the mother appealed. The Appellate Division affirmed. Viewing the totality of the circumstances, there was a sound and substantial basis for the Family Court's determination that there was a change in circumstances such that a modification of custody was necessary to ensure the best interests and welfare of the child. Particularly relevant in this case was the clearly stated preference of the child, a mature 13 year old at the time of the hearing, the relative credibility of the witnesses' testimony, and the child's relationship with the mother as compared to the child's relationship with the father.

DeVita v DeVita, 143 AD3d 981 (2d Dept 2016)

Record Supported Determination to Award Father Sole Custody of the Child

In October 2013, after learning from the mother's family members that the mother's fiancé had allegedly been abusive toward the child and that the mother intended to move to the State of Washington with the child, the father filed a petition to modify the visitation order, so as to award him sole custody of the child. At that time, the child was residing with the father. The mother then filed a petition for sole custody. With the parties' consent, the Family Court deemed the father's petition to be an initial custody petition, and conducted a hearing on both petitions. After the hearing, the Family Court issued an order granting the father's petition, in effect, for sole custody of the child, and denied the mother's petition for sole custody. The mother appealed. The Appellate Division affirmed. The record demonstrated that the father provided a loving and stable home environment, supported the child's emotional and intellectual development, promoted the child's relationship with his mother, was financially able to provide for the child, and had a strong familial support system full of family members who loved the child. On the contrary, the record indicates that the mother, who clearly loved the child, often placed her own interests before those of the child. Accordingly, the Family Court properly granted the father's petition and denied the mother's petition.

Matter of Klein v Theus, 143 AD3d 984 (2d Dept 2016)

Record Supported Determination That Supervised Visitation Was in the Best Interests of the Children

The Supreme Court's determination that supervised visitation with their father was in the best interests of the subject children had a sound and substantial basis in the record. The court relied upon the mother's testimony, a prior order of protection for the mother and children against the father, and prior incidents during supervised visits where the father was volatile, insistent, and intimidating when challenged. All of these demonstrated that the father posed a risk of having a negative impact on the girls' emotional well-being if the visits were not supervised. Moreover, there was a sound basis in the record for court's determination that an agency, and not the paternal grandmother, supervise the visits, as evinced by the father's statements on social media regarding his evasion of a prior court order. Contrary to the father's contention, supervised visitation is not a deprivation of meaningful access to a child. That branch of the order directing the father to pay for agency-supervised visitation was an appropriate exercise of the trial judge's discretion as there was no statutory basis for directing the city to pay the cost of agency-supervised visitation once all proceedings are completed, as County Law § 722-c only authorizes the payment of investigative and other services while a proceeding is pending.

Arcenia K. v Lamiek C., 144 AD3d 610 (2d Dept 2016)

Record Supported Determination to Award Sole Legal Custody to the Mother with Full Decision-Making Authority

The order appealed from, after a hearing, granted the defendant's motion to modify the parties' judgment of divorce, entered February 15, 2012, inter alia, to award her sole legal custody of the parties' child, and denied the plaintiff's cross motion to modify the parties' judgment of divorce to, among other things, award him sole legal and physical custody of the parties' child. The Appellate

Division affirmed. The record demonstrated that there had been a change in circumstances such that a modification of the existing custody arrangement was necessary in order to ensure the continued best interests of the child. The parties' deteriorating relationship and the father's persistent refusal to follow the terms of the settlement agreement negatively affected the child's well-being and the mother's ability to provide the child with treatment for his medical conditions. Contrary to the father's contention, the record contained ample evidence to support the Supreme Court's conclusion that the parties could not effectively co-parent and that awarding sole legal custody to the mother with full decision-making authority was in the best interests of the child. The court's determination modifying the terms of the existing custody and visitation agreement had a sound and substantial basis in the record, and there was no basis to disturb it. The father's contention that the Supreme Court committed reversible error when it precluded him from presenting the testimony of approximately eight of the child's current and former medical treatment providers was without merit. Whether evidence should be excluded as cumulative is a matter that rests within the sound discretion of the trial court. Here, the father sought to present the testimony of these medical providers on the sole ground that such testimony would demonstrate that the parties were unable to communicate effectively with each other. In light of, among other things, the fact that both parties repeatedly acknowledged that there had been a breakdown in communication between them, indeed, this was one of the primary grounds cited by the mother in support of her motion, the court did not improvidently exercise its discretion in precluding the father from calling the medical providers to testify for that purpose.

Greenberg v Greenberg, 144 AD3d 625 (2d Dept 2016)

Defendant Judicially Estopped from Arguing That Plaintiff Was Not a Parent for the Purpose of Visitation

The Supreme Court erred in finding that the plaintiff lacked standing to seek visitation with the subject child. The defendant was judicially estopped from arguing that the plaintiff was not a parent for the purpose of visitation. First, by asserting in her child support petition that the plaintiff was chargeable with support for the subject child, the plaintiff assumed the position before the Family Court that the plaintiff was the subject child's parent, as it is parents who are chargeable with the support of their children (*see* FCA § 413 [1] [a]). Next, based on her assertion that the plaintiff was chargeable with the subject child's support, the defendant successfully obtained an order compelling the plaintiff to pay child support for the subject child. Under that order, the plaintiff was required to pay child support for his children, including the subject child. Furthermore, the record did not support the court's finding that the defendant unequivocally waived the right to child support. Therefore, the defendant was judicially estopped from arguing that the plaintiff was not a parent for the purpose of visitation. Accordingly, the order was reversed and the matter was remitted to the Supreme Court for completion of the trial with respect to visitation.

Paese v Paese, 144 AD3d 770 (2d Dept 2016)

Record Supported Determination That Award of Custody to Maternal Aunt Was in the Children's Best Interests

The subject children were found to be neglected, were removed from the care of their mother and father, and placed in the care of their maternal aunt. Subsequently, the father petitioned for custody of the children. After a hearing, the Family Court determined that the maternal aunt established extraordinary circumstances and that it would be in the best interests of the children to award sole custody to her. As between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness,or other like extraordinary circumstances. Where extraordinary circumstances are present, the court must then consider the best interests of the child in awarding custody. The burden of proof is on the nonparent to prove such extraordinary circumstances. Contrary to the father's contention, the Family Court properly determined that the maternal aunt sustained her burden of demonstrating extraordinary circumstances. Moreover, the court's determination that an award of custody to the maternal aunt was in the best interests of the subject children was supported by a sound and substantial basis in the record.

Matter of Negron v Medina, 144 AD3d 804 (2d Dept 2016)

Mother Unable to Establish Basis for Family Court to Invoke Temporary Emergency Jurisdiction

The parties have one child together. They resided together in Los Angeles, California, until December 2014, when the mother came to New York with the child. The mother filed a petition in the Family Court seeking custody of the child and obtained a temporary order of custody. The mother conceded that California was the child's home state, but argued that the Family Court should exercise temporary emergency jurisdiction pursuant to DRL § 76-c. The father filed a custody petition in the Superior Court of California, County of Los Angeles (hereinafter the California court), and moved in the Family Court to dismiss the mother's custody petition. On May 26, 2015, the California court entered an order finding that it had jurisdiction over custody matters. In an order dated June 16, 2015, the California court awarded sole custody to the father. The father made an application in the Family Court for registration of the June 16, 2015, California order. The Family Court communicated with the California court pursuant to DRL § 76-c (4), and then held a hearing on the issue of whether it had a basis to exercise temporary emergency jurisdiction. After the hearing, the Family Court determined that the mother had not established a basis to invoke temporary emergency jurisdiction and, in an order dated August 20, 2015, dismissed the mother's petition for lack of subject matter jurisdiction. In a second order dated August 20, 2015, the Family Court directed the mother to produce the child in court. Thereafter, in an order dated August 24, 2015, the Family Court directed the mother to turn over the child to the custody of the father in accordance with the June 16, 2015, California order. The mother appealed. Subsequently, the child was released to the father, and the father and the child returned to California. The assertion of temporary emergency jurisdiction over custody matters requires, among other things, that the child be present in this State (*see* DRL § 76-c [1]). Since the child was no longer present in this State, even if the Family Court had a basis to exercise temporary emergency jurisdiction at the time it issued the orders appealed from, it no longer had jurisdiction to entertain the mother's custody petition. Therefore, the rights of the parties would not be directly affected by the determination of the appeals from the order dismissing the mother's custody petition, the order directing the mother to produce the child in court, or the order directing the mother to turn over the child to the custody of the father. Under these circumstances, the Appellate Division dismissed the appeals as academic.

Matter of Yadgarova v Yaacov Chai Yonatanov, 144 AD3d 830 (2d Dept 2016)

Record Supported Determination to Award Father Primary Residential Custody and Final Decision-Making Authority

Contrary to the mother's contention, the Family Court did not err in awarding the father primary residential custody of the child and final decision-making authority. The continued deterioration of the parties' relationship to the point that they could only communicate by email or text message was a change in circumstances warranting a change in the joint custody arrangement. Viewing the totality of the circumstances, there was a sound and substantial basis for the Family Court's decision that it was in the child's best interests for the father to be awarded primary residential custody, and final decision-making authority.

Matter of Zall v Theiss, 144 AD3d 831 (2d Dept 2016)

Mother's Petition for Custody and Relocation Denied

The parties are the married parents of three children, born in 2001, 2003, and 2009, respectively. In 2011, the mother moved to Florida with the two younger children, and the oldest child remained in New York with the father. In August 2013, the two younger children returned to New York to reside with the father. Although the mother came back to New York to live with the father and the children in November 2013, she returned alone to Florida in February 2014. In April 2014, the father filed a petition for custody of the children. In October 2014, the mother filed a petition for physical custody of the children and to relocate with them to Florida. After a hearing, the Family Court awarded the parties joint legal custody, with physical custody to the father. The mother appealed. The Appellate Division affirmed. The father has been actively involved in the children's education and daily lives and was in the best position to provide for their emotional and intellectual development. Moreover, the mother failed to establish how the proposed relocation would have been in the children's best interests. Accordingly, the court's determination was supported by a sound and substantial basis in the record.

Matter of Gadsden v Gadsden, 144 AD3d 1035 (2d Dept 2016)

Father Was Not Deprived of His Right to a Fair Fact-Finding

The parties are married and are the parents of five children. On February 28, 2013, the mother left the marital home with the children and relocated to a domestic violence shelter. The parties both filed petitions for custody and, following a fact-finding hearing, the Family Court awarded custody to the mother, with visitation to the father. The father appealed. The Appellate Division affirmed. The father did not dispute that the award of custody to the mother was supported by a sound and substantial basis in the record. Instead, he argued, among other things, that he was deprived of his right to a fair fact-finding hearing. The father's contention that the judge, who presided over the matter prior to the fact-finding hearing, was biased against him was without merit. When a claim of bias is raised, the inquiry on appeal is limited to whether the judge's bias, if any, unjustly affected the result to the detriment of the complaining party. Here, the record of the proceedings before the judge contained no evidence of such bias. The father's contention that he was deprived of a fair hearing because the Family Court took on the function of an advocate by excessively intervening in the fact-finding hearing also was without merit. While the Family Court actively participated in questioning the witnesses at the hearing, the court's conduct did not operate to deprive the father of a fair hearing.

Matter of Yehudah v Yehudah, 144 AD3d 1046 (2d Dept 2016)

Mother's Motion for Leave to Renew Properly Denied

In May 2015, the mother filed a petition seeking visitation with the parties' child. This petition was subsequently dismissed by the Family Court. Thereafter, the mother filed a motion, in effect, for leave to renew her petition for visitation. The mother also filed two separate motions seeking various relief against the father. The court denied all three of the motions and enjoined her from filing any future motions, petitions, or supplemental petitions unless by order to show cause. The mother appealed. A motion for leave to renew must be based upon new facts, not offered on the prior motion, that would change the prior determination, and the party seeking renewal must have a "reasonable justification" for the failure to present such facts on the original motion (*see* CPLR 2221 [e]). Here, the Family Court providently exercised its discretion in denying the mother's motion, in effect, for leave to renew, since the motion failed to contain a reasonable justification as to why the additional facts the mother offered upon seeking leave to renew were not presented in the petition for visitation. Additionally, the Family Court did not improvidently exercise its discretion in enjoining the mother from filing any future motions, petitions, or supplemental petitions unless by order to show cause. While public policy mandates free access to the courts, a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will. Here, the court's determination was supported by its familiarity with the parties, the repeated motions made by the mother, and the court's conclusion, which was supported by the record, that the mother's continued litigation had become abusive and vexatious.

Matter of Graham v Rawley, 145 AD3d (2d Dept 2016)

Record Supported Award of Primary Physical Custody to the Father

The parties have one child in common, who was born in September 2008. In November 2012, the father filed a writ of habeas corpus for the mother to produce the child and a petition seeking custody of the child, based on allegations that the mother removed the child from New York without his permission on October 29, 2012. The mother appeared in court with the child on January 30, 2013, and the father was awarded temporary custody. Thereafter, the mother also filed a petition for custody. After a hearing, the Family Court awarded the parties joint legal custody of the child, with primary physical custody to the father and regularly scheduled visitation to the mother. The mother appealed. In considering questions of child custody, the primary consideration is the best interest of the child. Here, the record established that both parents loved the child and were able to adequately care for him. However, giving deference to the Family Court's credibility determinations, the record supported a finding that in October 2012, while the child was residing primarily with the father, the mother took the child to Pennsylvania without the father's permission, refused to tell the father where she was living, and

refused to allow the father to visit with the child. These circumstances, among others, supported the court's determination that the child's best interests were served by an award of primary physical custody to the father.

Matter of Sahadath v Andaverde, 145 AD3d (2d Dept 2016)

Mother's Decision to Homeschool the Children Was Not an Overriding Factor in the Court's Determination

The parties have three children in common. In March 2012, the father filed a petition seeking custody of the subject children. Thereafter, the mother petitioned for custody. At the conclusion of the custody trial on both petitions, the Family Court awarded sole legal and physical custody to the father, with visitation to the mother, and denied the mother's petition. The mother appealed. Contrary to the contentions of the mother and the attorney for the children, the court did not place undue emphasis on the mother's decision to homeschool the children. Rather, the court properly considered all of the relevant factors and concluded that the father was better suited to promoting the children's intellectual development. This conclusion was supported by the record. While the evidence showed that both parents loved the children, the father was better suited to provide for their overall well-being, providing the children with structure and a generally stable home environment. In contrast, there was significant evidence that the mother's home lacked stability, structure, and supervision.

Matter of Clarke v Wiltshire, 145 AD3d 776 (2d Dept 2016)

Relocation to State of Missouri Not in Children's Best Interests

The parties were married in July 2000, and are the parents of three children. The parties separated in January 2011, and in a custody order entered January 27, 2012, upon the parties' consent, the Family Court awarded them joint legal custody, with physical custody to the mother. The custody order provided the father with visitation every weekday and on Sundays. The order further provided that the mother was to have final decision-making authority after full and meaningful discussion with the father. On or about March 23, 2015, the father filed a petition to modify the prior custody order so as to award him physical custody of one of the children. On March 27, 2015, the mother relocated with the three children to Missouri without discussing it with the father or the children, and without seeking the permission of the Family Court. Thereafter, on or about April 1, 2015, the father filed an emergency application to have the children returned to New York. After a court appearance on April 24, 2015, the court directed the mother to return the children to New York. The mother returned the children to the father in New York on May 1, 2015. Thereafter, the mother filed a petition to relocate with the children to Missouri. The father then filed an amended petition, seeking to modify the prior custody order so as to award him primary physical custody of all three children. After a hearing, the Family Court denied the mother's petition and granted the father's petition. The mother appealed. The Family Court's determination that relocation was not in the best interests of the children was supported by a sound and substantial basis in the record. Willful interference with a noncustodial parent's right to visitation is so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party is unfit to act as a custodial parent. The mother's conduct in this case, in relocating with the children to Missouri, without discussing it with the children or the father, or seeking permission of the court, raised a strong probability that she was unfit to continue to act as the custodial parent. The mother also failed to show that the children's lives would be enhanced economically, emotionally, and educationally by the move. Any potential benefit in relocation did not justify the drastic reduction in the father's visitation, and did not justify uprooting the children who had always attended school in the same school district, where they were thriving academically and socially. Moreover, the opinion of the mental health evaluator, that relocation was not in the children's best interests, was not contradicted by the record.

Matter of Detwiler v Detwiler, 145 AD3d 778 (2d Dept 2016)

Family Court Properly Dismissed Mother's Petition for Lack of Subject Matter Jurisdiction

The mother, a United States citizen, and the father, an Italian citizen, were married and had two children. The parties and the children lived in Italy, beginning in

January 2006. The children are dual citizens of Italy and the United States. In September 2010, the parties entered into a separation agreement, which provided, inter alia, that the parties would have joint custody of the children and that the father would pay the mother spousal maintenance and child support for the children. The September 2010 separation agreement was ratified by an Italian court. In April 2012, after the father failed to make several child and spousal support payments, the mother came to New York with the children. The father thereafter filed a petition in the Italian court to modify the custody provisions of the parties' separation agreement so as to award him sole custody of the children. In July 2012, the father also commenced a proceeding in the United States District Court for the Eastern District of New York under the Hague Convention seeking the return of the children to Italy. On November 22, 2012, the Italian court issued an order, inter alia, modifying the parties' separation agreement by awarding the father sole custody of the children. Three days later, the federal District Court denied the father's Hague Convention petition. The father appealed to the United States Court of Appeals for the Second Circuit and moved before that court to supplement the record to include the newly issued Italian custody order. The Second Circuit denied the father's motion to supplement the record and affirmed the District Court's determination. In February 2013, the father filed an application for registration of the Italian custody order in the Richmond County Family Court (hereinafter the Family Court), pursuant to Domestic Relations Law § 77–d (1), and the Family Court issued a certification of registration of the Italian custody order. The mother timely filed various objections to the registration of the Italian custody order pursuant to Domestic Relations Law § 77–d (4). The mother also filed a petition in the Family Court for sole custody of the children. The father subsequently filed a cross petition for sole custody in the same court. In an order dated May 29, 2015 (hereinafter the first order), the Family Court determined that the Italian custody order remained registered but unconfirmed and, therefore, not "enforced," as no hearing had yet been scheduled to resolve the objections raised by the mother. In a separate order, also dated May 29, 2015 (hereinafter the second order), the court, inter alia, dismissed the mother's custody petition without prejudice for lack of subject matter jurisdiction. Under the circumstances here, the Appellate Division dismissed the mother's appeal from the first order as premature. The mother argued that her timely objections to the confirmation of the Italian custody order should have been granted, however, those objections had not been determined because no hearing had yet taken place. Thus, contrary to the mother's contention, the first order, which merely states that the Italian custody order "remains registered but not confirmed and therefore not enforced," did not adversely determine any of her objections pursuant to Domestic Relations Law § 77–d(4), which remained pending and undecided. As to the second order, the Family Court properly dismissed, without prejudice, the mother's petition for custody for lack of subject matter jurisdiction. The initial child custody determination awarding the parties joint custody of the children was made in a separation agreement, which was ratified by the Italian court at a time when the parties and the subject children all resided in Italy. The Italian court later issued an order modifying the custody provisions of the separation agreement and awarding the father sole custody of the children. While the validity of the Italian court's most recent order for purposes of enforcement pursuant to Domestic Relations Law § 77-d (4) had yet to be determined, the Italian court's exclusive, continuing jurisdiction to issue that order was not in doubt, as the father continued to reside in Italy and the Italian court did not make a determination that a New York court would be a more appropriate forum (*see* Domestic Relations Law § 76-b). Contrary to the mother's contention, the denial of the father's Hague Convention petition did not confer subject matter jurisdiction on the Family Court under the Uniform Child Custody Jurisdiction and Enforcement Act.

Matter of Gallagher v Pignoloni, 145 AD3d 781 (2d Dept 2016)

Permanent Guardianship of Children Awarded to Maternal Aunt

The record revealed that the mother sent her two daughters, K. and S., to stay with the maternal aunt. Thereafter, the maternal aunt filed petitions to be appointed the guardian of the children. In two orders dated April 17, 2014, the Family Court appointed the maternal aunt the permanent guardian of K. and the temporary guardian of S., respectively. The mother then filed petitions seeking to modify the guardianship orders so as to appoint the maternal aunt the temporary guardian of K. and to terminate the maternal aunt's temporary guardianship of S. After a hearing, the court, inter alia,

granted the maternal aunt's petition to be appointed permanent guardian of S. and denied the mother's petitions. The mother appealed. Intervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child. It is only on such a premise that the courts may then proceed to inquire into the best interest of the child and to order a custodial disposition on that ground. The burden of proof is on the nonparent to prove such extraordinary circumstances. Once there is a finding of extraordinary circumstances, a best interests determination is triggered. Here, there was a sound and substantial basis in the record for the Family Court's determination that the maternal aunt established the existence of extraordinary circumstances. The maternal aunt presented evidence that, inter alia, the mother continued to reside with her husband after he was arrested for domestic violence committed against her, the mother's husband was verbally abusive towards her and the children, and the mother failed to adequately attend to the children's psychological and physical health. Moreover, it was established on this record that, viewing the totality of the circumstances, it was in the best interests of the children to award permanent guardianship of them to the maternal aunt.

Matter of Goldie M.-Elizabeth C., 145 AD3d 787 (2d Dept 2016)

Supervised Visitation with Children Suspended

Following findings of abuse against the mother as to two children and neglect as to one child, the mother was awarded supervised visitation with the children. Thereafter, the petitioner moved to suspend the mother's visitation following her hostile and violent behavior against the children during their visits in December 2014. The Family Court, after a hearing, granted the motion and indefinitely suspended the mother's visitation. The mother appealed. The Appellate Division affirmed. A parent's visitation, even if supervised, should not be suspended unless there is substantial evidence that the visitation would be detrimental to the welfare of the child. The determination to suspend a parent's visitation is within the sound discretion of the trial court based upon the best interests of the child, and its determination will not be set aside unless it lacks a sound and substantial basis in the record. Contrary to the mother's contention, the Family Court's finding that there was substantial evidence that visitation would be detrimental or harmful to the children's welfare and contrary to their best interests, had a sound and substantial basis in the record.

Matter of Anise C., 145 AD3d 882 (2d Dept 2016)

Record Did Not Support Dismissal of Maternal Grandfather's Petition

The record revealed that following the death of the subject children's mother, the petitioner, the children's maternal grandfather, commenced a proceeding seeking visitation with the children, who lived with their father. A fact-finding hearing was held, at which, since the petitioner had automatic standing to seek visitation (*see* DRL § 72), the only issue was whether visitation with the petitioner would have been in the children's best interests. At the close of the petitioner's case, the Family Court granted the motion of the father and the attorney for the children pursuant to CPLR 4401 for judgment as a matter of law and dismissed the petition on the basis that the petitioner failed to establish a prima facie case. The petitioner appealed. The Appellate Division reversed. The petitioner was correct in his contention that the Family Court improvidently exercised its discretion in precluding him from presenting the testimony of the children's maternal aunt, with whom the children resided after their mother became ill, on the basis that the testimony was irrelevant. Generally, evidence is relevant and admissible if it has any tendency in reason to prove the existence of any material fact. Here, the maternal aunt's testimony was relevant with respect to establishing the relationship between the petitioner and the children. In any event, even absent the maternal aunt's testimony, the petitioner demonstrated, prima facie, that it would have been in the children's best interests to have visitation with him. The petitioner established that he had a loving and meaningful relationship with the children, who had lived with him and their mother before the mother became ill, and whom he continued to see during the period of the mother's illness when they visited the mother. After the mother's death, the petitioner promptly commenced this proceeding in order to continue that relationship, and also maintained telephone contact and communication with the older child via Facebook. The record did not support

the contention of the father and the Attorney for the Children that the petitioner's motivation in commencing this proceeding was not to obtain visitation with the children, but to antagonize the father. Further, although the record demonstrated some animosity between the petitioner and the father, this was not a proper basis for denial of visitation to the petitioner. Finally, to the extent that the father and the attorney for the children opposed the petition due to the petitioner's refusal to share a visitation period with his former spouse, it was unreasonable for them to insist that the petitioner do so. Accordingly, the Appellate Division reversed the order dismissing the petition and remitted the matter to the Family Court for a continued fact-finding hearing to determine whether visitation with the petitioner would be in the best interests of the children and for a new determination of the petition thereafter.

Matter of Cavalry v Simpson, 145 AD3d 885 (2d Dept 2016)

Family Court Properly Determined That Father Willfully Violated Order of Visitation

In an order dated February 5, 2015 (hereinafter the order of visitation), the father was awarded sole custody of the parties' child and the mother was awarded visitation. In March 2015, the mother filed a petition alleging that the father had violated the order of visitation. Thereafter, the Family Court conducted an inquest upon the father's failure to appear on the date scheduled for the hearing, followed by an in camera interview with the child. In an order dated August 17, 2015, the court determined, inter alia, that the father had willfully violated the order of visitation by alienating the child from the mother and interfering with her visitation. Thereafter, the father filed a petition seeking, in effect, to vacate the order dated August 17, 2015, and to modify the order of visitation. In the order appealed from, the Family Court denied the petition. The Family Court properly denied the father's petition which was, in effect, to modify the order of visitation. The father's modification petition failed to sufficiently allege a change in circumstances since the entry of the order of visitation that would warrant modification of that order.

Matter of Harris v Thurmond, 145 AD3d 888 (2d Dept 2016)

Father's Petition for Modification Properly Denied

The Family Court did not err in dismissing the family offense petition, in which the father alleged that the mother had committed an offense constituting harassment in the first or second degree (*see* PL §§ 240.25, 240.26). There was no evidence that the mother had committed such an offense. The mother was not at home when the subject incident occurred, in which her boyfriend allegedly caused physical injury to the parties' son. The Family Court also did not err in denying the father's petition to modify the order of custody and visitation entered March 7, 2011, so as to award him sole legal and physical custody of the parties' two children. The parties previously shared joint custody of the children, but their relationship had deteriorated to the point where joint custody was no longer appropriate. The father failed to demonstrate that, under the totality of the circumstances, a transfer of custody to him alone was in the best interests of the children. There was no basis to disturb the court's determination that the father's testimony was not credible. The court considered the relevant factors in determining the best interests of the children, including the quality of the home environment and the parental guidance the custodial parent provided for the children, the ability of each parent to provide for the children's emotional and intellectual development, the financial status and ability of each parent to provide for the children, the overall relative fitness of the parties, and the willingness of the custodial parent to assure meaningful contact between the children and the other parent. The court also gave appropriate weight to the expressed wishes of the children, whose ages and maturity made their input particularly meaningful.

Matter of Keener v. Pollaro, 145 AD3d 891 (2d Dept 2016)

Family Court Properly Vacated All Prior Orders Directing Parental Access for the Father

The father appealed from an order of the Family Court, which, inter alia, denied his petition to modify prior custody and visitation orders so as to award him sole custody of the parties' daughter. The father argued that the mother alienated the daughter from him. The record supported the Family Court's finding that the mother, by her example, her actions, and her inaction, manipulated the daughter's loyalty, encouraged the estrangement of the

father and the daughter, and deliberately frustrated visitation. While one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child, here, the child's bond to the alienating parent, and her alienation from the father, was so strong, with, among other factors, both parents having contributed to the deterioration of that relationship, that a change of custody would have been harmful to her. Thus, there was no basis to disturb the Family Court's determination, made after a hearing and an in camera interview with the child, that a change of custody would not have been in the child's best interests. Further, giving due consideration to the wishes, age, and maturity of the parties' daughter, it was a provident exercise of the Family Court's discretion to decline to mandate visitation with the father where the child, who was 14 years old at the time of the court's determination, had a strained relationship with the father, and was vehemently opposed to any form of visitation with the father. Thus, the court properly vacated all prior orders directing parental access for the father.

Matter of Sullivan v Plotnick, 145 AD3d 1018 (2d Dept 2016)

Although Award of Sole Legal Custody was Supported by a Sound and Substantial Basis in the Record, Family Court Erred in Allowing the Child's Social Worker To Testify About Confidential and Privileged Matters

Family Court modified a prior order of joint legal custody and awarded sole legal custody of the subject children, then 16 and 12-years of age, to the father and carefully structured a parenting time schedule for the mother. The attorney for the children appealed. Giving due deference to the court's credibility determinations, and given the mother's inability to foster a positive relationship between the children and the father, the Appellate Division found there was a sound substantial basis in the record for the court's determination that joint legal custody was not appropriate in this case. The appeal was limited to the younger child since the older one had turned 18 during the pendency of the appeal. Since the prior order was based on a stipulation, the court did not have to give the order as much weight as an order based upon a full hearing and the court was authorized to consider evidence dating back to the stipulation. Contrary to the attorney for the children's position, there was an adequate showing of a change in circumstances. The parties' inability to communicate effectively and the ongoing conflict between them made joint legal custody unworkable. Additionally, the court's award of custodial access to each parent was in the children's best interests. The evidence showed the mother regularly disparaged the father and denigrated him in Facebook communications with the daughter. The mother's relationship with the daughter was more like a "teenage friendship th[a]n a parental one," and she often exchanged text messages with the daughter during the father's parenting time, commenting about what was happening in the father's house. However, the court erred in permitting the father to call the daughter's counselor, a licensed clinical social worker, to testify about confidential,
privileged matters in the absence of a knowing waiver from the daughter, notwithstanding the absence of any objection by the attorney for the children.

Matter of Rutland v O'Brien, 143 AD3d 1060 (3d Dept 2016)

Court Did Not Abuse Discretion in Issuing Order of Protection Directing Father to Stay Away From Mother Until Youngest Child Turned 18

Family Court modified a prior order of custody by awarding sole legal custody to the mother, and determined it was in the children's best interests to minimize contact between the parties and directed exchanges of the children, for parenting time purpose, take place at a relative's home. Furthermore, the court issued an order of protection against the father directing that he stay away from the mother until the youngest child turned 18. The father appealed arguing that Family Court erred in awarding the order of protection since there were adequate safeguards in the custody order. The Appellate Division affirmed. Here, the record showed the parties, who had separated and re-united many times in the past, had a well-documented history of conflict and domestic violence. There had been 30 to 40 domestic violence incidents, three of which had resulted in arrests as well as CPS investigations leading to indicated reports against both parents. At the time of the hearing, the father was on probation for violating a prior protective order on behalf of the mother. Additionally, both parties testified to multiple acts of violence perpetrated against them by the other. 144Based on the evidence presented, the

court's determination to extend the order of protection was not a an abuse of discretion.

Matter of Jennifer WW. v Mark WW., 143 AD3d 1063 (3d Dept 2016)

Purpose of Lincoln Hearings is to Corroborate Evidence Adduced at Trial and Ascertain Child's Preferences and Concerns

Family Court properly modified a prior custody order and limited the mother's visitation with the child to a joint counseling format, which the mother agreed was in the child's best interest given their difficult relationship and the mother's past alcohol abuse issues. The court also directed the father to enroll the child in counseling with the goal of reunification with the mother. However, the court erred by making further visitation between mother and child contingent upon the success of the child's counseling and the father's approval. By doing so, the court improperly delegated its authority to structure a visitation schedule and the matter was remitted to Family Court to determine whether a resumption of visits with the mother would be in the child's best interests and if so, under what conditions. Additionally, the mother's argument that the court erred in holding a Lincoln hearing prior to the commencement of the fact-finding hearing, which she argued allowed the court a preconceived notion of the child's circumstances without the benefit of having heard all the evidence, was dismissed. Although a Lincoln hearing generally should be held during or at the conclusion of a fact-finding hearing, since the purpose of the Lincoln hearing is to corroborate evidence adduced during the fact-finding hearing, the fundamental purpose of a Lincoln hearing is to ascertain the child's preferences and concerns. There was very little contact between the child and the mother for several years prior to the commencement of the fact-finding hearing, and thus a limited need to corroborate disputed events. Furthermore, the mother acknowledged that her relationship with the child was strained due to the mother's own conduct.

Matter of Christine TT. v Dino UU., 143 AD3d 1065 (3d Dept 2016)

Family Court Erred in Having the Child Testify as a Fact Witness

Family Court modified a prior order of custody and awarded the father primary physical custody with parenting time to the mother. The Appellate Division affirmed finding there was a sound and substantial basis in the record for the court's decision. Here, the evidence showed the mother's fiancé struck the child on the back of the head after accusing the child of touching the television screen and later raised his fist at the child and threatened to punch him. The child testified that although the fiancé had never raised a fist at him before, he had "kicked him in the butt more than 10 times" and had called him derogatory names. This evidence was sufficient to establish a change in circumstances. While both parents were capable and loving parents, it was in the child's best interest to reside with the father. The mother minimized and made excuses for her fiance's behavior and she blamed the child for the court's involvement and the legal fees associated with the litigation. Furthermore, the father was more willing than the mother to support a relationship between the child and the other parent. However, Family Court erred in having the child testify as a fact witness instead of holding a Lincoln hearing. Even if the child had consented to his testimony being shared with his parents, a child should not be put in the "position of having [his or her] relationship with either parent further jeopardized by having to publicly relate [his or her] difficulties with them or be required to choose between them". Moreover, the mother had corroborated the father's hearsay account of the incident between the child and the fiancé and there was no reason to have called the child as a witness.

Matter of John V. v Sarah W., 143 AD3d 1069 (3d Dept 2016)

Court Erred in Delegating Visitation Between Incarcerated Father and Children to the Mother

Family Court awarded sole legal custody of the children to the mother and limited incarcerated father's parenting time to telephone contact or visits as agreed upon between the parties. The Appellate Division reversed finding that such an order was tantamount to a denial of visitation, and found the record lacked a sufficient basis for this limitation on the father's access to the children. The law presumes that visitation is in the child's best interests and this presumption applies with equal force to incarcerated parents, unless it is rebutted by evidence that visitation would be harmful to the child. The court can

no more delegate the noncustodial parent's access to the children to one of the parties than it can to a child. Here, an appropriate order would have directed a schedule of visits at the local correctional facility, with transportation arrangements to be the father's responsibility, and established a method and schedule for consistent telephone communication, together with the mail contact privileges. However, as substantial time had passed since the fact-finding hearing and there were anticipated changes in the father's incarceration status, the matter was remitted for a new hearing.

Matter of Staff v Gelunas, 143 AD3d 1077 (3d Dept 2016)

Court Erred in Granting Mother's Summary Judgment Motion To Dismiss Father's Petition

Family Court erred by granting the mother's summary judgment motion and dismissing the father's custody modification petition. Here, the father alleged, among other things, that the mother had failed to supervise the children adequately and had used excessive corporal punishment. The mother responded by submitting a letter from OCFS stating the allegations of maltreatment had been deemed unfounded, and also a FCA §1034 report from the county agency finding there were no current safety concerns. However, the issue sought by the report was whether an Article 10 proceeding should be initiated, and not whether there were triable issues of fact as to whether there had been a change in circumstances sufficient to inquire whether it was in the children's best interests to modify the existing custody arrangement.

Matter of Robert OO. v Sherrell PP., 143 AD3d 1083 (3d Dept 2016)

Mother's Unresolved Mental Health Issues Supported Supervised Visitation With Child

Family Court denied the mother's petition to modify visitation with the 6-year-old subject child from supervised to unsupervised. The Appellate Division affirmed finding there was a sound and substantial basis in the record to support the court's order. Here, the father was awarded sole legal custody due to the mother's ongoing mental health and alcohol abuse issues. Thereafter, the mother completed a seven-month in-patient program and enrolled in an out-patient program. While the mother's sobriety established a change in circumstances, the record reflected she still had many serious unresolved mental health issues that impacted her ability to have unsupervised visits. The evidence showed she had cancelled of many of her therapy appointments, had outbursts, anger control issues and yelled and complained about her problems with the father in front of the child.

Matter of Christine TT. v Gary VV., 143 AD3d 1085 (3d Dept 2016)

Sound and Substantial Basis to Award Sole Custody to Father and Supervised Parenting Time to Mother

Family Court modified a prior custody order and awarded sole legal custody of the subject child to the father and supervised parenting time to the mother. The Appellate Division affirmed finding there was a sound and substantial basis for the court's order. Here, the child's out-of-court statement that he had found hypodermic needles on his bed in his mother's home was corroborated by the mother's testimony that she was using heroin during the time period the child said he saw the needles; and a caseworker who interviewed the mother during this period testified she saw needle tracks on the mother's arms. This evidence was sufficient to meet the burden of a change in circumstances. Custody to the father was in the child's best interests. The mother admitted to using heroin, her home environment was "extremely unstable" and she had been arrested for prostitution. She had also been found to have neglected her other child and had only agreed to participate in drug rehabilitation program after neglect proceedings were initiated against her.

Matter of Hamilton v Anderson, 143 AD3d 1086 (3d Dept 2016)

Father's Documented History of Domestic Violence and Indicated CPS Reports Supports Award of Supervised Parenting Time

After a fact-finding hearing, Family Court continued joint legal custody with primary, physical custody of the subject child to the mother, but modified the father's parenting time to supervised.
The Appellate Division affirmed. Here, the father's now ex-girlfriend testified to an earlier incident where the father had entered the bedroom where she and the subject

child had been sleeping, started a physical alteration with her and told her it would be easy to shoot her; then, he demanded she have oral sex with him- all in the presence of the child. Later, the father told the child "nothing happened", to which she replied "No daddy, nothing happened....We don't need anybody but you and I, daddy. That's all we need." The ex-girlfriend further testified she persuaded the father tried to let her drive when he tried to leave her home with the child, because he was intoxicated, and on route, she stated the father berated her, blocked her view and stabbed her with a screwdriver. Although the father denied these allegations, there was additional testimony form an agency caseworker who had spoken to the child following this incident. The caseworker testified the child had informed her the father and the girlfriend fought in her presence on more than one occasion and had engaged in sexual activity when they were sleeping in the same bed with her. The child also told the caseworker the father had screamed at her and threatened to "get rid of her pets" for speaking to agency officials, and had previously tried to get her to make false allegations of maltreatment against the mother. Based on the evidence as a whole, including the father's documented history of domestic violence and indicated child protective reports, there was no basis to disturb the court's order.

Matter of Lynn TT. v Joseph O., 143 AD3d 1089 (3d Dept 2016)

Family Court Properly Struck Mother's Testimony in Full For Failure to Appear at Fact-Finding Hearing

Both parties filed to modify custody. The mother failed to appear at the continuation of the fact-finding hearing despite knowing that her last minute request to adjourn the hearing had been denied and her testimony had not been completed. Family Court struck her testimony in full and dismissed her petition. Thereafter, the court heard the remainder of the testimony and after a Lincoln hearing, awarded sole legal and primary physical custody to the father and specified parenting time to the mother. The Appellate Division affirmed. Here, Family Court found the father and paternal grandmother's testimony credible and noted the mother's testimony would not have been credited had it been considered. The father afforded a stable home for the child and was employed for nearly 10 years with the same employer. He denied the mother's allegations that he was abusive to her and the children and used illegal substances. His denials were supported by numerous child protective reports which deemed the allegations unfounded. In contrast, the evidence showed the mother displayed questionable judgment by limiting the father's time with the children, behaved aggressively towards the parental grandmother during visitation exchanges and repeatedly failed to transport the older child to school on time. Based on the evidence, there was a sound and substantial basis in the record for the court's decision.

Matter of Joseph A. v Gina ZZ., 143 AD3d 1098 (3d Dept 2016)

No Abuse of Discretion in Denying Visitation to Incarcerated Father

After the child's birth, the father was in and out of various correctional facilities for a period of five years and the mother would periodically bring the child to visit the father. Thereafter, the father returned to live with the mother and the child until his re-incarceration. The mother refused to bring the child to visit the father in prison. The father filed for visitation and the mother filed for sole legal custody and also applied for an order of protection. The father consented to a two-year order of protection on behalf of the mother. After a hearing, all custody/visitation petitions were dismissed including a temporary order of visitation which allowed the father to write letters to the child. The Appellate Division affirmed. Although family court misapplied the law by requiring the father to demonstrate that visitation would be in the child's best interests instead of requiring the mother to rebut the presumption that visitation was in the child's best interests, the court did not abuse its discretion in denying visitation to the father. Although the evidence showed the father had an established relationship with the child, he had been incarcerated for six of the child's nine years of life, and during the time he had resided with the child, he had been working out of town "for several weeks" at a time. The evidence also showed he had serious anger management issues. He had sent letters to the mother repeatedly threatening her life and although he stated he was frustrated when he wrote the letters, there was no credible evidence that his violent tendencies were under control. Furthermore, the child was "bothered" by prison visits and he was old enough to be impacted by the negative prison environment.

Matter of Leary v McGowan, 143 AD3d 1100 (3d Dept 2016)

Mother's Alienating Behaviors Supports Sole Legal Custody to Father

Family Court properly granted the custody modification petition of the father, who lived in North Carolina, and awarded him sole legal custody of the 10-year-old child. The record contained a sound and substantial basis to support the court's order. Here, the mother alleged the father had physically abused the child and the father alleged the mother had coached the child to hate and fear him. The forensic evaluator opined the child had been "brainwashed, coached and rehearsed" by the mother. Examples of this included the child's unwillingness to acknowledge any positive experiences she had with the father, and the child had a "laundry list" of complaints against the father which the psychologist found irrational. When asked to give an example of one of the very strict rules, the child explained she was not allowed to hit her brothers. Additionally, the child indicated she had told the employees of the school she attended of the father's abuse but they contradicted the child's claims and stated she had not disclosed any abuse to them. Moreover, the mother had no evidence to support her allegations of abuse by the father. Although she stated she didn't know she could report abuse because she wasn't aware of the existence child protective services hotline, such a statement was found not credible by the psychologist. Considering the evidence as a whole, there was no error in the attorney for the child's decision to advocate for a position contrary to the child's wishes, since doing so would likely result in a substantial risk of imminent, serious harm to the child.

Matter of Zakariah SS. v. Tara TT., 143 AD3d 1103 (3d Dept 2016)

12-Year-Old Was Old Enough to Have His Wishes Considered

Family Court modified a prior joint custody order and awarded sole legal custody of the parties two children, a 12-year-old son and a 11-year-old daughter, to the mother; and ordered four visits per year between the son and the father, who was incarcerated. The mother appealed. The Appellate Division affirmed. Visitation with a non custodial parent is presumed to be in the best interests of the child unless rebutted by a preponderance of the evidence. Here, the father had been convicted of rape and was serving an eight-year prison sentence. The father testified he had always had consistent contact with his son and that the mother had brought the son to visit him in prison when he had been incarcerated earlier for another matter. The child's paternal aunt, who brought the son for visits with his father, testified the son cried when visits with the father ended. The aunt stated she would help out with transportation costs so that the child could have contact with the father. Although the social worker, who had worked with the son previously in an anger management group, testified the son had behavioral issues including abusive attitudes towards females and visiting his father in prison could set back his progress and worsen his aggression, the court determined the son was old enough to have his wishes considered.

Matter of Robert SS. v Ashley TT., 143 AD3d 1193 (3d Dept 2016)

10-Year-Son's Position Just One Factor to Consider Among Others in Determining Child's Best Interests

Since 2010, there had been numerous petitions filed by both parties and at least five temporary orders were issued. In 2014 the father was awarded temporary supervised visitation with the two subject children, a 12-year-old daughter and 10-year-old son. Thereafter, the father applied to modify visitation and after fact-finding and Lincoln hearings and a FCA §1024 investigation by DSS, Family Court awarded the father unsupervised visitation on alternate weekends and holidays. The Appellate Division affirmed. Here, the mother's allegations included a history of verbal and physical abuse of the son by the father, domestic violence and an unfit home due to lack of running water and no bathroom. The father alleged the mother had deprived him of contact with the children. The record showed a history of conflict between the parents and the court heard a taped argument between the parties and the children which became heated and led to police intervention and later, resulted in the child protective investigation. Since the children had differing positions, with the daughter supporting unsupervised visitation and the son strongly opposing unsupervised visitation, two AFCs were appointed. The evidence showed the children had a contentious relationship and often fought with each other, and neither parent was able to appropriately discipline

them. While the agency report "indicated" both parents, it also stated supervised visitation by the father was not necessary in order to ensure the children's safety. Although the son wanted supervised visitation, his wishes were just one factor for the court to consider and not determinative. Based on the totality of circumstances and giving due deference to the court's credibility determinations, there was a sound and substantial basis in the record to support the court's decision.

Matter of Tina RR. v Dennis RR., 143 AD3d 1195 (3d Dept 2016)

Appeal Rendered Moot

After the mother relocated to Connecticut, the parties entered into a stipulation which continued joint legal custody between them but changed physical custody of the child from the mother to the father. The stipulation was reduced to an order, and the father was ordered to obtain Medicaid insurance for the child as soon as possible and also enroll the child in counseling. Thereafter, the mother filed a violation petition and a petitions to modify custody alleging, among other things, that the father had failed to comply with the provisions regarding health insurance and counseling. Family Court dismissed the petitions but imposed monetary sanctions against the father. The mother appealed but by the time the appeal was heard, subsequent proceedings had taken place in Family Court replacing all prior custody orders, which rendered the appeal moot.

Matter of Lamphere v Lamphere, 143 AD3d 1204 (3d Dept 2016)

Court's Error in Revealing Substance of Child's Statements Made at Lincoln Hearing Does Not Justify Reversal

After a fact-finding and Lincoln hearing, Family Court modified a prior order of sole custody to the mother and awarded the parties joint legal custody of the child with primary physical custody to the father. The Appellate Division affirmed. Contrary to the mother's argument, there was an adequate basis for the court's finding of a change in circumstances. Since the entry of the prior order, the child had been absent from school on 45 occasions and only 11 of those were excused absences. Additionally, the child was failing two subjects and the evidence established the mother was withholding visitation to the father. Furthermore, although the father's medical condition had previously made him unable to care for the child, his condition had since become stabilized so it no longer affected his ability to provide primary care to the child. And although not dispositive, the 13-year-old child preferred to live with the father. While the court erred in revealing the substance of the child's statements made at the Lincoln hearing, such error did not justify reversal.

Matter of Holleran v Faucett, 143 AD3d 1205 (3d Dept 2016)

Ample Showing of a Change in Circumstances

Both parties filed custody modification petitions. After an in camera interview with the child and a fact-finding hearing, which was held on the same day, Family Court awarded the mother primary physical and legal custody of the child, with parenting time to the father. The Appellate Division affirmed. Here, there was ample showing of a change in circumstances warranting a need for consideration of the child's best interests. The evidence showed there had been a breakdown in the parties' ability to communicate and the father had been the subject of a CPS report for his discipline of his girlfriend's child; and the father described himself as a strict disciplinarian.

Matter of Thomas FF. v Jennifer GG., 143 AD3d 1207 (3d Dept 2016)

Court Erred in Determining New York Was an Inconvenient Forum

Father was sentenced to 23 years in prison for his role in the death of his girlfriend's child. Thereafter, he was awarded six visits per year with his eight-year-old biological child and the mother, without telling the father, relocated with the child to Georgia. The father filed a violation petition and the mother successfully moved to dismiss, contending that New York was an inconvenient forum. The Appellate Division reversed. Family Court abused its discretion in finding that New York was an inconvenient forum. Family Court has continuing jurisdiction (see DRL §76-a) until it finds, upon a consideration of factors, that another state is a more appropriate forum. Here, although the court articulated

its consideration of each of the statutory factors before finding New York was an inconvenient forum, it erred in the amount of weight it accorded certain factors. Moreover, having presided over the proceedings that resulted in the prior order, it was more familiar with the case than the Georgia courts were likely to be.

Matter of Snow v Elmer, 143 AD3d 1217 (3d Dept 2016)

Children's Best Interests to Have Sole Legal Custody Awarded to Father

Based on the complete breakdown in the parties' relationship, Family Court determined that joint legal custody of the daughter was no longer workable and awarded sole legal custody of the daughter to the mother, who had relocated, but continued sole legal custody of the son with the father. The Appellate Division agreed that joint legal custody was not workable in this situation but found that it was in the daughter's best interest for the father to have sole legal custody of both children. Here, aside from the preference for keeping siblings together, neither of the psychologists (one retained by the mother and the other by the father) recommended separation of the siblings, and the psychologist retained by the father recommended against it, stating that awarding the mother primary physical custody of only the daughter could result in the son feeling "alienated and abandoned" by the mother and cause the daughter to act out in "dangerous" ways after being uprooted from her routine and friends. Additionally, the daughter had recently been discharged from an outpatient treatment program for her increasing depression, presentation of psychotic symptoms and history of engaging in self-harm, and the father and his spouse were actively involved and supportive of the daughter throughout the program, while the mother had minimal involvement and did not present any evidence, aside from her brief testimony that she had researched medical providers, to demonstrate that she had identified appropriate doctors to address the daughter's mental health issues. Furthermore, the court's decision failed to consider the impact on the daughter from having to relocate with the mother 100 miles from the father's residence.

Matter of Angela N. v Guy O., 144 AD3d 1343 (3d Dept 2016)

Father Has No Right To Transcript of Lincoln Hearing

After a fact-finding and Lincoln hearing, Family Court determined the father had failed to establish a change in circumstances warranting the elimination of supervision of his visitation with the subject child, but upon consent of the parties, modified the order to increase the father's parenting time with the child. The Appellate Division affirmed. The father failed to show that his allegation regarding the child's behavior problem had not existed prior to the entry of the previous order, and he failed to offer credible evidence for his allegations that the mother moved frequently during the pertinent period. Additionally, the court did not abuse its discretion in denying the father's request for a transcript of the Lincoln hearing. The father erroneously contented that the child's sexual abuse allegation against him overcame the child's right to confidentiality during the Lincoln hearing because he had a due process right to learn the substance of her communications to the court. Unlike the adversarial relationship that might exist in an article 10 proceeding where a child's testimony may be the sole basis for finding abuse or neglect, in an article 6 proceeding, the parent's constitutional rights are not implicated and the Lincoln hearing is not primarily evidentiary; instead it assists the court in determining what serves the child's best interests.

*Matter of Heasley v. Morse***,** 144 AD3d 1405 (3d Dept 2016)

Although Family Court Erred in Allowing Recording of Child's Phone Call Into Evidence, There Was Substantial Basis to Award Sole Legal Custody to Father Due to Mother's Alienating Behaviors

Family Court modified a prior order of joint legal and sole physical custody to the mother, and awarded the father sole legal custody of the 10-year-old subject child with limited supervised parenting time to the mother. The Appellate Division affirmed. Here, the court found that the mother's "systemic and devious conduct to alienate the child from the [f]ather, spann[ed] more than two years" and the mother had not shown regard for what "the effects of her behavior may have on the child." Among other things, the evidence showed the mother had encouraged the child to refuse visitation with the father. However, Family Court erred in allowing the admission

of a recording of a phone conversation between the mother and the child into evidence. Here, the child made a phone call to her AFC using the mother's cell phone. The AFC's answering service answered and although the child thought the call had ended, the connection was not terminated. The recording of the phone call was disclosed by the AFC to the parties' attorneys and the AFC provided a compact disc of the recording to the attorneys. Family Court erroneously allowed the recording to be admitted into evidence although there was no evidence that the recording was the complete and unaltered conversation between the mother and the child, there was no proof regarding who recorded the conversation or how it was recorded, or the chain of custody. Despite this error, there was a substantial basis in the record for the court's order. Furthermore, there was no error in Family Court's refusal to conduct a Lincoln hearing although the AFC indicated that the child wished to testify. The court was properly concerned about the undue influence the parties would have on the child prior to the Lincoln hearing.

Matter of Williams v. Rolf, 144 AD3d 1409 (3d Dept 2016)

Visitation With Incarcerated Father in Child's Best Interests

Family Court awarded sole legal custody to the mother and directed she transport the child to prison so that the father could have parenting time twice per year at the correctional facility as long as the facility was within 50 miles of the city of Schenectady. The Appellate Division affirmed, but modified the order by directing the father arrange for the child's transportation to and from the correctional facility with a suitable individual approved by the mother, or in the alternative, share one half of the transportation costs incurred by the mother in bringing the child to and from prison visits. Here, the father had been incarcerated since the child's birth in 2010 and the mother had consistently brought the child to visit the father until the spring of 2014. The mother's argument to rebut the father's right of visitation, namely the father's history of addiction, his admitted use of illicit substances twice while he was incarcerated and the child's fear of prisons, was insufficient to show that visitation with the father would be harmful to the child. The evidence showed the father had developed a positive relationship with the child and when the mother stopped bringing the child to visit, he tried to maintain his relationship with the child by sending her cards and letters. Additionally, the father testified he was never under the influence of illegal substances when he visited with the child and he had taken anger management course and attended a drug treatment program while in prison. Moreover, the only instance the child had expressed fear in prison was when a correction officer had yelled at her for running towards a closing gate.

Matter of Samuels v Samuels, 144 AD3d 1415 (3d Dept 2016)

Child's Preference to Reside With Mother

Family Court modified a prior order of joint legal custody with physical custody to the mother and awarded sole legal custody of the 12-year-old child to the father and parenting time to the mother. The Appellate Division affirmed the award of physical custody to the father, but given that the parents were able to communicate effectively, reversed the sole legal custody determination. Here, after the mother's ex-boyfriend was charged with sexually abusing the child, the mother let him back into the home and the two of them spent the evening consuming alcohol. Thereafter, when the father dropped the child off at the mother's home after visitation, the child discovered the ex-boyfriend was in the house and returned to the father's car. The agency had also indicated the mother for inadequate guardianship. Additionally, at another time, the child and the maternal grandmother had found the mother passed out, overdosed on a combination of alcohol and prescription medication and the mother had written a suicide note to the child. Based on this, there was sufficient proof to establish a change in circumstances. It was in the child's best interests to award custody to the father. The mother minimized her alcohol abuse problems, denied that she attempted to commit suicide and stated the child was not supposed to home on the day she was found with her ex-boyfriend. In contrast, the father's testimony was "highly credible"and he was the parent more likely to foster a positive relation between the mother and the child. He was able to offer the child a safe and stable environment which was significant since the child had been hospitalized for cutting herself during the pendency of the court proceedings. Although the child's preference was to reside with the mother, this was one of the factors to take into account but not a dispositive factor.

Matter of Bradley D.v Andrea D., 144 AD3d 1417 (3d Dept 2016)

Appeal Rendered Moot

Family Court modified a prior order of visitation. The mother appealed and during the pendency of the appeal, the mother filed a custody petition in Family Court, which resulted in a consent order rendering the appeal moot.

Matter of Daniels v Jones, 144 AD3d 1420 (3d Dept 2016)

Family Court's Errors Results in Reversal

Family Court dismissed the father's petition to modify custody and continued, what the court believed to be, a prior order of joint legal custody with primary physical custody to the mother. The Appellate Division reversed. Here, the unexplained death of the subject child's half sibling, who was in the care of the mother and her spouse when he died, supported a finding of a change in circumstances. However, the court failed to review or articulate the relevant factors in making a best interests determination, either orally or in writing, when it dismissed the father's petition. Additionally, the court made erroneous statements to the mother regarding the nature of the proceeding which may have impacted the proof put on by the mother and the court mistakenly assumed the parties had joint legal custody under the terms of the prior order.

Matter of Joseph Q. v Jessica R., 144 AD3d 1421 (3d Dept 2016)

Family Court Inappropriately Incorporated Portions of the Attorney for the Child's Closing Statement as Factual Findings

After a fact-finding hearing, Family Court awarded custody of the children to the father and parenting time to the mother. The Appellate Division reversed. Here, the court erroneously relied on a FCA §1034 report in making its determination. The mother objected to the report and argued it was hearsay; although the report was not admitted into evidence, the court considered it in making its ultimate determination and such error was not harmless. Additionally, the court inappropriately adopted and incorporated in its decision part of the summation written by the attorney for the child. By doing so, the court's findings did not reflect the record evidence but put forth the position of the attorney for the child. Specifically, the summation statement adopted by the court stated the mother had repeatedly lost her housing although she had the ability to pay rent, and that she used illicit drugs. However, the mother was never questioned about her ability to maintain housing nor was she asked why could not pay rent. Moreover, the source of these findings originated from the agency's report which was never admitted into evidence.

Matter of Timothy V. v Sarah W., 144 AD3d 1423 (3d Dept 2016)

Mother's Hindrance of Father's Parenting Time With Child Supports Sole Legal Custody to Father

Family Court awarded sole legal custody to the father and parenting time to the mother. The Appellate Division affirmed finding there was a sound and substantial basis in the record for the court's determination. Here, the evidence showed the father was able to provide a more stable environment for the child than the mother. The four-year-old child had speech disabilities and the mother's multiple relocations after separating from the father had a negative impact on the child. Additionally, the evidence showed the mother had hindered the father's visitation with the child. Although the father had anger management issues, he was addressing this through counseling and the evidence showed the father did not lose his temper with the child. Given the parties' volatile relationship and their inability to communicate effectively, and giving due
deference to the court's credibility determinations, sole legal custody to the father was in the child's best interests.

Matter of Smithey v McAbier, 144 AD3d 1425 (3d Dept 2016)

Mother's Continuing Issues With Illegal Substance Supports Court's Order To Limit Unsupervised Parenting Time With the Children

Family Court modified a prior order of visitation by expanding the mother's supervised visitation times and granting her one unsupervised dinner visit with the two subject children once night per week. The Appellate Division affirmed finding the order was in the children's

best interests. The evidence showed that while the mother had made strides in overcoming her substance abuse and anger management issues, she had a history of relapse and the evidence showed the mother, at various points, had continued to abuse substances. The mother had a long standing substance abuse history and her claim of sobriety was recent; and, given her history, it was best to proceed slowly with unsupervised visits. Giving due deference to the court's credibility determinations, there was a sound and substantial basis for the court's decision.

Matter of Williams v Patinka, 144 AD3d 1432 (3d Dept 2016)

Court Properly Accorded Greater Weight Upon Rights and Needs of Children Over Impact on Mother in Allowing Father to Relocate

Family Court granted the father's petition to relocate with the two subject children, aged nine and five, and awarded parenting time to the mother. The Appellate Division affirmed. Here, the evidence showed the children enjoyed a close and loving relationship with both parents. Although the father should have provided the mother more advance notice of his relocation to the village of Endicott, which was 76 miles away from the city of Oneonta, where the mother lived, he did offer to help with transportation for the mother's parenting time. The father had been the children's primary caregiver for over two years and he testified that relocation would improve his economic status, his overall housing costs would be reduced and there was a school near his new residence which would provide for the children's specific educational needs. The children had more family in Endicott and they had a half sibling who resided with their father's fiancé in this area. Although the mother argued the move would effectively eliminate her weekday parenting time, she admitted she had failed to exercise such weekday parenting time in the past and she had refused the father's offer to help with transportation. While the court recognized not having the children nearby would impact the mother, it correctly focused on the "rights and needs of the children" and "accorded the greatest weight" this factor. Based on a review of the record, there was a sound and substantial basis for the court's decision.

Matter of Hempstead v Hyde, 144 AD3d 1438 (3d Dept 2016)

Court's Award of Primary Physical Custody to Mother Supported By a Sound and Substantial Basis in the Record

Family Court modified a prior consent order of joint legal and physical by awarding primary physical custody of the four-year-old child to the mother and parenting time to the father. The Appellate Division affirmed but significantly increased the father's parenting time with the child. Here, the parties had always been able to communicate effectively and co-parent the child although they lived one hour away from each other. At the time of the hearing, the mother resided with her boyfriend, their child and the maternal grandmother in a four-bedroom farmhouse. The mother was enrolled in nursing school and also helped with chores on her boyfriend's dairy farm. The subject child was under the boyfriend's health insurance and the grandmother helped with child care. The father was also employed and he helped on his mother's dairy farm. The attorney for the child took no position since the child was close to both parents and spent a significant amount of time with each of them. The child's approaching school age supported the finding of a change in circumstances. Although the court's custody order seemed to have penalized the father for the paternal grandmother's alleged discussion of adult matters with the child, upon an independent review of the record, the court's award was supported by a sound and substantial basis in the record. The mother had greater flexibility in her schedule and it was also less demanding than the father's schedule. Additionally, the mother had extended family who lived close by and the subject child would be residing with his half sibling.

Matter of Austin v Smith, 144 AD3d 1467 (3d Dept 2016)

Use of Excessive Force Against Children Supports Finding of a Change in Circumstances

Family Court modified a prior order of joint legal custody order with primary physical custody to the mother and awarded the father primary physical custody. The Appellate Division affirmed. Here, the evidence supported a finding of a change in circumstances. There were two indicated reports against the mother's boyfriend for using excessive force against the children. The agency advised the mother to keep the boyfriend away from the children but the mother failed to comply with the

instructions. Thereafter, both the mother and the boyfriend hit the middle child causing him to experience "suicidal ideation" and both were indicated for inadequate guardianship; and a FCA §1034 report produced "credible evidence" of inadequate guardianship against them due to excessive force. The court found the boyfriend had hurt the children and left "marks on them" despite his agreement on previous occasions not to use physical force. Additionally, there was testimony from an agency employee regarding the boyfriend's use of excessive force. The mother and the boyfriend's testimony was self serving and the evidence showed the mother had consistently put her own needs before the children's needs. It was in the children's best interests to grant custody to the father since he was able to meet the children's needs; he was willing to resolve parenting time issues with the mother, he had obtained medicaid coverage for the children and sought counseling referrals for the two older children. Additionally, the father had steady employment and lived with the paternal grandmother, who was able to help care for the children. Giving due deference to the court's credibility determinations, there was a sound and substantial basis in the record to support the order.

Matter of Andrew S. v Robin T., 145 AD3d 1209 (3d Dept 2016)

Court Erred in Modifying Order Without Holding Evidentiary Hearing

The mother filed to modify a joint legal and physical custody order and sought sole legal custody on the grounds that the father had become intoxicated and threatened to kill her and take the child. Without conducting an evidentiary hearing, Supreme Court modified the order by directing the father's girlfriend to transport the child between the parties, set a parenting time schedule for the child but otherwise continued the order. The Appellate Division reversed. Here, the mother raised sufficient allegations against the father to warrant an evidentiary hearing. The mother alleged the intoxicated father had made threatening text messages and phone calls to her. The mother called the police and while the police were in her home, the father called again and threatened to harm a police officer. The father then drove to the mother's house and upon his arrival he was arrested. Although the father alleged this was an isolated incident, given the nature of the allegations, the court erred in making a determination without holding a hearing.

Matter of Pollock v Wakefield, 145 AD3d 1274 (3d Dept 2016)

Appeal Not Proper

The parties entered into a settlement modifying a prior order of custody and upon their consent, the terms of the agreement were reduced to a written order. Thereafter, the mother appealed arguing that her consent was involuntary and the product of duress and coercion. The appeal was dismissed. The mother should have moved to vacate the order or set aside the stipulation but even if the challenged order was properly before the Court, the Appellate Division determined the mother's appeal would not have been successful since the record showed she knowingly and voluntarily agreed to the consent order and was apprised of its terms and implications.

Matter of Stopper v Stopper, 145 AD3d 1329 (3d Dept 2016)

Sound and Substantial Basis for Court's Decision

Family Court modified a prior joint legal and physical custody order, continued joint legal custody of the child but awarded the father physical custody and limited the mother's parenting time to every other weekend. The Appellate Division affirmed. Here, the change of circumstances was due to the mother's relocation 55 miles from the father's residence and the parties' five-year-old daughter was about to start kindergarten which required that she have a primary residence for school purposes. In terms of assessing best interests, the evidence showed that the mother had moved several times in the recent years and the home she had recently purchased with her fiancé was in need of repair. On the other hand, the father lived with the paternal grandparents in a two story house where he and the child had their own bedrooms. The grandparents were close to the child and the child became distraught when she had to go to see her mother and the mother's fiancé. Although the mother stated the child had a great relationship with the fiancé, the fiancé did not testify and the court noted it was unclear how the fiancé felt about the child. Additionally, the mother raised issues of suspected child abuse by the father but a court-ordered investigation showed there were "no... concerns

in either home." Moreover, the father had strong family support and giving due deference to the court's credibility determinations, there was a sound and substantial basis to support the court's order.

Matter of Colvin v Polhamus, 145 AD3d 1350 (3d Dept 2016)

Mother's Alienating Behaviors Supports Restriction of Her Parenting Time With Child

In a prior order, Family Court granted sole legal and physical custody of the child to the father, limited the mother's parenting time and also directed she engage in therapy to address her "parental alienation syndrome". Thereafter, the father filed to further limit the mother's parenting time to supervised visits only with the 12-year old child. Family Court granted the father's request and the Appellate Division affirmed. Here, the change of circumstances was based on evidence of the child's threat to harm himself after a weekend visit with the mother as well as the child's generally distraught and emotional state after visitation with the mother. It was in the child's best interest to limit the mother's visitation. There was proof the mother had attempted to force the child to make false allegations of abuse against the father, which negatively impacted the father's relationship with the child. Moreover, there was an indicated CPS report against the mother and the attorney for the child also argued that supervised visitation with the mother was in the child's best interests.

Matter of Hoyt v Davis, 145 AD3d 1353 (3d Dept 2016)

Mother Better Able to Foster a Relationship Between Child and Non-Custodial Parent

Family Court modified a prior order of shared legal and physical custody and awarded sole legal and physical custody of the five-year-old child to the mother and awarded the father parenting time. The Appellate Division affirmed. Here, the child was starting school full time and the evidence showed there was a sound and substantial basis in the record that custody to the mother was in the child's best interests. The mother had a stable job, she sometimes worked from home and the child had his own room in the mother's home. On the other hand, the father was trying to start his own business and had just received an eviction notice with regard to his residence. Although he had known about the eviction for three months, the father had yet to find housing. Evidence showed the parties were unable to communicate effectively and this problem was primarily due to the father, who despite the mother's efforts to communicate, admitted he "kept his head down and did not speak to the mother." Based on the parents ongoing conflicts and inability to communicate, joint legal custody was not feasible and the mother was better able to provide a stable home for the child and better able to foster a relationship between the child and the non-custodial parent.

Matter of Berenzny v Raby, 145 AD3d 1356 (3d Dept 2016)

No Error in Precluding Mother From Allowing Certain Witnesses to Testify

After fact-finding and Lincoln hearings, Family Court properly granted sole legal custody to the father and visitation to the mother based on the mother's alcohol abuse and the father's ability to provide a stable home for the child. Additionally, the court did not err by precluding the mother from allowing certain witnesses to testify based on the mother's failure to comply with a scheduling order. The parties were required to provide a witness list one week before the trial date, which the mother failed to do. The subject child had a right to have all issues fully explored which would have been impeded if the mother had presented witnesses without providing the father and the attorney for the child the court-ordered notice. Moreover, the court specifically credited the mother's testimony regarding the underlying issue of her recovery and ongoing sobriety and any error, if committed, would be harmless.

Matter of Jesse E. v Lucia F., 145 AD3d 1373 (3d Dept 2016)

Court Erred in Granting Mother's Motion to Dismiss Father's Modification Petition

Family Court granted the mother's motion to dismiss the father's modification petition at the close of the father's proof. The Appellate Division reversed and determined the proof proffered by the father was enough to support a finding of a change in circumstances sufficient to warrant a revisit of the terms of the prior order. Since the father's petition was resolved by granting the mother's motion to

dismiss, the court had to accept the father's evidence as true, afford him the benefit of any favorable inference and resolve all credibility questions in his favor. Here, under the terms of the prior order, the father was awarded supervised visitation with the subject child and the supervisor was to be one of three named individuals or any person mutually agreed upon by the parties. The father testified he was unable to take full advantage of his parenting time with the child due to problems stemming from finding appropriate supervisors. Although this was not the mother's fault, the father did propose a new supervisor with whom the mother refused to communicate. Additionally, the father testified the mother failed to allow him to have contact with the child by telephone and when she did do so, the calls were on speaker phone. Given the proof presented and affording it the benefit it deserved, the mother's motion to dismiss should have been denied.

Matter of Abram v Abram, 145 AD3d 1377 (3d Dept 2016)

Record Insufficient to Award Joint Legal and "Split Down the Middle" Physical Custody

While Family Court properly determined that the mother's interference with the father's parenting time with the subject child was sufficient to determine there had been a change in circumstances, the record was insufficient to determine whether the award of joint legal and "split right down the middle" physical custody was in the two-year-old child's best interests. The evidence showed the parties' relationship was at times contentious and litigious and the record was unclear as to whether they would be able to work together for the child's benefit in order to make joint legal custody feasible. Additionally, although both parents were gainfully employed, there was no testimony regarding, among other things, their living situations, the composition of their households, the availability of child care providers or other family resources, the parties' financial abilities, plans for preschool or health care options for the child, or the ability of the parents to effectively co-parent or foster a meaningful relationship between the child and the other parent.

Matter of Crystal F. v Ian G., 145 AD3d 1379 (3d Dept 2016)

Family Court's Erred in Dismissing Mother's Request for Unsupervised Visitation

After a hearing, Family Court dismissed the mother's petition for unsupervised visitation with the child based on its "many years of experience in Drug Court", the implications of the mother's treatment with Subonxone and/or the sufficiency of the drug testing procedures. The Appellate Division reversed. Here, the mother admitted to using heroin but testified, without contradiction, that she had completed a detox program, was actively engaged in group therapy and a community-based support group which she attended three to four times per week. She had a sponsor and was also participating in a Suboxone treatment program. Additionally, the mother testified that she was subject to regular drug testing, which had all came back negative, was successfully maintaining a full-time job and at the time of the hearing, had been "clean" for more than one year. Such proof was sufficient to establish a change in circumstances. The mother testified the current supervised arrangement did not allow her to have time to bond with the child, and given the child was now in school, she could spend time with the child three hours per day after school, prepare dinner for her and engage in activities. Given this proof, unsupervised visitation with the mother was in the child's best interests. Moreover, the Appellate Division determined the court erred in sua sponte taking judicial notice of certain facts after the conclusion of the fact-finding hearing, and the error was not harmless

Matter of Beeken v. Fredenburg, 145 AD3d 1394 (3d Dept 2016)

Court Did Not Have Jurisdiction To Entertain Motion to Dismiss

After completing an in-patient rehabilitation program, the father filed to modify a prior sole legal custody which suspended his visitation rights, and sought joint legal custody of the child and parenting time. The mother moved for disclosure of the father's patient records and the father failed to reply. Thereafter, he sent a faxed letter to Family Court seeking to withdraw the petition without prejudice. Family Court granted his request. The Appellate Division reversed. The faxed letter should have been treated as a motion for voluntary discontinuance pursuant to CPLR § 3217(b), and the father's failure to comply with the CPLR provisions for

service of his motion papers deprived the court of jurisdiction to entertain the motion. The father failed to follow up the fax with a mailed copy of the letter. Additionally, mother's counsel specifically indicated that faxing could not be used for service purposes.

Matter of Gabriel v. Morse, 145 AD3d 1401 (3d Dept 2016)

Mother Alienated Children From Father

Family Court awarded petitioner father sole custody of the parties' children and supervised visitation with respondent mother. The Appellate Division affirmed. The court made sufficient findings of fact and its determination had a sound and substantial basis in the record. The evidence established that the mother was alienating the children from the father. She made it apparent during her testimony that she did not want the children to have a relationship with the father. She denied or obstructed the father's visitation with the children and would not cooperate with the visitation supervisors. The court's order did not require the mother to complete a parenting program and comply with mental health counseling as a prerequisite to filing a petition for modification of custody or visitation. The order stated that the mother's completion of such a program and compliance with mental health counseling as ordered by the court would constitute a substantial change in circumstances for any future modification petition. The court properly ordered the mother to attend mental health counseling as part of its order granting her visitation.

Matter of Cramer v Cramer, 143 AD3d 1264 (4th Dept 2016)

Petition Properly Dismissed Without Hearing

Family Court granted respondent father's motion to dismiss the mother's petition to modify a prior order that granted the father sole legal and physical custody of the parties' daughter. The Appellate Division affirmed. The court did not err in deciding the father's motion on the same day it was filed and served. The mother was not prejudiced by the timing of the father's motion. The contention of the mother and the AFC that the court erred in dismissing the petition without a hearing was rejected. The mother failed to make a sufficient evidentiary showing of a change of circumstances to require a hearing.

Matter of Noble v Paris, 143 AD3d 1288 (4th Dept 2016)

Court Erred in Ordering Counseling as a Prerequisite to Mother's Visitation

Family Court awarded respondent father sole custody of the parties' children. The Appellate Division modified by striking the provision in the order requiring petitioner mother to participate in counseling as a prerequisite for seeking visitation. The court erred in requiring the mother to actively engage in individual counseling before seeking visitation with the children. A court may include a directive to obtain counseling as a component of a custody or visitation order, but does not have the authority to order such counseling as a prerequisite to custody or visitation. The mother failed to demonstrate that she was denied effective assistance of counsel.

Matter of Mickle v Mickle, 143 AD3d 1289 (4th Dept 2016)

Court Properly Denied Grandmother's Custody Petition

Family Court, among other things, denied the subject child's grandmother's petition for custody of the child. The Appellate Division affirmed. Assuming, arguendo, that petitioner County Department of Health and Human Services (DHS) failed to fulfill its statutory duty to locate the subject child's relatives and inform them of the pendency of the TPR proceeding with respect to the child's father, the provisions of article 10 has an explicit best interests standard of review for review of petitions seeking placement of a child with a relative. On the father's prior appeal, his contention that the child's best interests would have been served by awarding custody of the child to petitioner, rather than the DHS so the child could be adopted by her foster parents, was rejected. For the reasons stated on the father's appeal, petitioner's contention that the best interests of the child would be served by awarding custody to her was rejected. The mother failed to demonstrate that she was denied effective assistance of counsel because her attorney failed to move to vacate a prior order of placement at the same time the attorney filed the instant petition for custody. Because the court properly determined that the best

interests of the child were served by awarding custody to DHS, there was little or no chance that such motion would have been successful.

Matter of Lundyn S., 144 AD3d 1511 (4th Dept 2016)

Mother's Allegations of DV Not Proved

Family Court awarded respondent father primary physical custody of the parties' children with visitation to petitioner mother, and granted the mother secondary decision-making authority regarding the children's health, education and welfare. The Appellate Division affirmed. The mother's contention that the court did not give proper consideration to her allegations of domestic violence and its alleged negative impact on the children, was rejected because the allegations were not proven by a preponderance of the evidence. The court did not err in granting primary physical custody to the father, even though the grandmother cared for the children while the father worked. The record supported the determination that the father assumed greater responsibility for the children's care since the parties separated and that the children benefitted from the care they received from the grandparents. The record also supported the determination that the father's work schedule at his family-owned business could be altered to care for the children as needed.

Matter of Chyreck v Swift, 144 AD3d 1517 (4th Dept 2016)

Mother's Objection to Reappointment of AFC Properly Denied

Family Court granted sole custody of the subject children to petitioner father. The Appellate Division affirmed. The court properly dismissed the mother's cross petition seeking custody because she failed to show a change in circumstances. The court's determination to grant in part the father's petition and to modify visitation had a sound and substantial basis in the record. The mother's objection to reappointment of the AFC was properly denied. Contrary to the mother's contention, there was no support in the record that the AFC was biased against the mother and, therefore, there was no reason for the court to appoint a new AFC.

Matter of Trombley v Payne, 144 AD3d 1551 (4th Dept 2016)

Grandmother Established Extraordinary Circumstances

Family Court granted custody of the subject children to petitioner grandmother, with supervised visitation to the mother. The Appellate Division affirmed. The grandmother met her burden of proving extraordinary circumstances. The record established that the mother suffered from ongoing and chronic mental health issues that she failed to address adequately. The mother also had a history of alcohol abuse and a history of persistently neglecting the children's health and well being. The evidence also established that the mother's issues resulted in an unfortunate and involuntary disruption of custody over an extended period of time.

Matter of Thomas v Armstrong, 144 AD3d 1567 (4th Dept 2016)

Court Properly Dismissed Father's Petition Seeking Visitation With Children

Family Court dismissed the father's petition seeking visitation with his children and imposed two conditions precedent to any attempt by the father to file another petition. The Appellate Division modified by vacating that part of the order imposing conditions precedent. The court did not err in granting the AFC's motion to dismiss the petition. At the time the petition was filed, respondent was incarcerated in Michigan, and he admitted he had 10 more years of incarceration before he would be released. Before he was incarcerated, the children were removed from his care while a neglect proceeding was commenced against him. Respondent admitted that he had engaged in appropriate behavior with the children's half-sister, and an order of protection preventing communication between respondent and the children expired in February 2012. Even after the order of protection expired, respondent had little or no contact from the children. Thus, despite the presumption in favor of visitation, an evidentiary hearing was not required because the court possessed sufficient information to render an informed determination consistent with the children's best interests. Respondent's constitutional rights were not violated because he was not present at the proceedings inasmuch as he was represented by an attorney who participated in the

proceedings. The court attempted to secure respondent's presence electronically at court appearances, but on one occasion was unable to do so when prison officials failed to answer any of the four calls placed by the court to the facility. Respondent was provided meaningful and competent representation.

Matter of Otrosinka v Hageman, 144 AD3d 1609 (4th Dept 2016)

Aunt and Uncle Established Extraordinary Circumstances

Family Court granted custody of the subject children to the children's aunt and uncle. The Appellate Division affirmed. Respondent mother violated an order of protection directing her not to allow respondent father to have unsupervised contact with the children by allowing such conduct on numerous occasions. The court properly found that there were extraordinary circumstances justifying an inquiry whether the aunt and uncle could obtain custody of the children as against the mother, and it properly determined that it was in the children's best interests to be placed with the aunt and uncle.

Matter of Tristyn R., 144 AD3d 1611 (4th Dept 2016)

Court Properly Denied Respondent's Motion For Recusal

Family Court modified a prior order by requiring respondent's visitation with the children to be supervised. The Appellate Division dismissed the appeal, with the exception of respondent's challenge to the denial of his motion for recusal, which was affirmed. The record established that during the hearing on the mother's petition, the father discharged his assigned counsel, advised the court that he was proceeding pro se, and failed to appeal for the remainder of the hearing. Thus, because the order was entered upon default, no appeal lay. Even assuming, arguendo, that the order was not entered upon the father's default, the court did not err in modifying the prior order of visitation inasmuch as the court' determination was supported by a sound and substantial basis in the record. The father's contention that the court should have recused itself was without merit. The court did not abuse its discretion in denying the father's motion for recusal because he failed to set forth any evidence of bias or prejudice on the part of the court.

Matter of Rottenberg v Clarke, 144 AD3d 1627 (4th Dept 2016)

Sound and Substantial Basis For Court's Award of Custody to Father

Family Court awarded the parties joint custody of the subject child with primary physical residence with respondent father. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination that awarding the father primary physical residence of the child was in the child's best interests. Although the court found that both parents were fit and that the mother had been the child's caretaker since birth, the record supported the court's determination that the father had the financial resources to support the child, had a stable residence with a room for the child, and had the convincing edge in fostering a relationship between the child and mother.

Matter of Honsberger v Honsberger, 144 AD3d 1680 (4th Dept 2016)

Sole Custody of Child to Father Affirmed; Mother Neglected Child

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division affirmed. Although the court failed to articulate specific findings to support its conclusion that there had been a change in circumstances, the finding that respondent mother neglected the child based upon the conditions in her home, constituted a change in circumstances that warranted a determination whether the joint custody arrangement was in the child's best interests. The child's best interests were served by awarding the father sole custody. Although ordinarily sibling relationships should not be disturbed, that rule was not absolute and here the court properly concluded that it was in the child's best interests that she be separated from her siblings.

Matter of Curry v Reese, 145 AD3d 1475 (4th Dept 2016)

Request For Visitation With Child at Correctional Facility Properly Denied

Family Court denied the father's petition for visitation with the child at the correctional facility where he was incarcerated. The Appellate Division affirmed. It was generally presumed to be in a child's best interests to have visitation with his or her noncustodial parent, and the fact that a parent was incarcerated would not, by itself, render visitation inappropriate. Nevertheless, where, as here, domestic violence was alleged, the Referee must consider the effect of such domestic violence upon the best interests of the child. Furthermore, petitioner presented no plan to accomplish the requested visitation, and the record established that none of his friends or family members offered to facilitate transportation of the child. The record supported the Referee's determination that respondent did not have a driver's license or the financial resources to provide transportation for the child. The denial was not premised merely on an arbitrary opposition to visitation or its cost and inconvenience but, rather, on the unavailability of any appropriate arrangement to accomplish physical visitation under the circumstances.

Matter of Smith v Stewart, 145 AD3d 1534 (4th Dept 2016)

Reversal of Order Continuing Physical Residency of Subject Child With Paternal Grandmother

Family Court directed that the subject child shall continue to reside with respondent paternal grandmother. The Appellate Division reversed, reinstated the petitions, and remitted. The court erred in failing to make a determination whether extraordinary circumstances existed to warrant an inquiry into the best interests of the child. As between a parent and a nonparent, the parent had a superior right to custody that could not be denied unless the nonparent established that the parent had relinquished that right because of surrender, abandonment, persistent neglect, unfitness or other like extraordinary circumstances. The nonparent had the burden of proving that extraordinary circumstances existed, and until such circumstances were shown, the court could not reach the issue of the best interests of the child. The foregoing rule applied even if there was an existing order of custody concerning a child, unless there was a prior determination that extraordinary circumstances existed. There was no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the mother of her superior right to custody. Because the hearing transcript, which was transcribed from an audio recording, was riddled with unintelligible gaps in the testimony, the record was insufficient for the Court to make its own determination with respect to whether extraordinary circumstances exist.

Matter of Wolfford v Stephens, 145 AD3d 1569 (4th Dept 2016)

Affirmance of Order Modifying Custody by Granting Father Primary Physical Residency

Family Court continued joint parental custody of the parties' child, but changed the primary residential parent from respondent mother to petitioner father. The Appellate Division affirmed. A change in circumstances was shown to have occurred since the entry of the prior order, specifically, the mother's refusal to abide by her prior agreement with the father that the child would, beginning with the seventh grade, attend school in the district in which the father resided. There was a sound and substantial basis in the record for the determination that it was in the child's best interests to change her primary physical residence from the mother's house to the father's house in connection with that long-anticipated change of schools.

Matter of Stevenson v Smith, 145 AD3d 1598 (4th Dept 2016)

Sole Custody of Child to Father Reversed

Family Court awarded plaintiff father sole custody of the subject children. The Appellate Division reversed and remitted the matter to the Supreme Court for further proceedings on the issue of custody. Defendant appealed from the order of Family Court granting the father's petition for sole custody of the parties' children. Because the order was incorporated but not merged in Supreme Court's subsequent judgment of divorce, the Appellate Division treated the appeal as having been taken from the final judgment of divorce. Family Court erred in granting the father's petition in the absence of a hearing to determine the best interests of the children without articulating which factors were material to its

determination and the evidence supporting its decision.

Matter of King v King, 145 AD3d 1613 (4th Dept 2016)

Primary Physical Placement to Father Affirmed

Family Court awarded the parties joint custody of the subject child, with primary physical placement to respondent father and visitation to petitioner mother. The Appellate Division affirmed. The fact that the mother was the child's primary caretaker prior to the parties' separation was not determinative, and the record established that the child was comfortable in both homes and had strong relationships with members of her extended family who lived with the father, i.e., her paternal grandparents and a cousin who was born the same year as the subject child. In addition, the evidence showed that, when the parties separated, the mother moved with the child more than an hour away from the father's home, and denied the father access to the child for over a month. Therefore, the record supported the court's finding that the father was the more willing of the parties to foster the other parent's relationship with the child. The mother's contention was rejected that the award of primary physical placement to the father was in effect an award of custody to the paternal grandmother. Although the father worked as a truck driver and had a demanding schedule, the record established that he returned home each day, usually by 5:30 p.m., and that he took cake of the child himself whenever he was at home, thereby demonstrating that he was an active and capable parent notwithstanding his work schedule.

Matter of Owens v Pound, 145 AD3d 1643 (4th Dept 2016)

No Abuse of Discretion in Denying Motion to Vacate Order Entered Upon Default

Family Court denied respondent father's motion to vacate an order, entered upon his default, that awarded petitioner mother sole custody of the parties' children and ended the father's visitation with the children. The Appellate Division affirmed. The record established that the notice Family Court mailed to the father was not returned, and that the father had actual knowledge of the hearing. The court did not abuse its discretion in denying the father's motion inasmuch as he failed to offer either a reasonable excuse for this default or a meritorious defense. The father's remaining contentions were not properly before the Court in that no appeal could be taken from an order entered on default.

Matter of Neupert v Neupert, 145 AD3d 1643 (4th Dept 2016)

No Abuse of Discretion in Denying Father's Request for Adjournment and Proceeding With Hearing in His Absence

Family Court awarded petitioner mother sole custody of the subject children and respondent father supervised visitation. The Appellate Division affirmed. The father's contention was rejected that Family Court abused its discretion in denying his request to adjourn the evidentiary hearing. The grant or denial of a motion for an adjournment for any purpose was a matter resting within the sound discretion of the trial court. The father had not appeared at the pretrial conference or the date scheduled for a hearing. The medical excuse that the father sent to the court was vague and failed to show why he was unable to attend the hearing. Therefore, the court did not abuse its discretion in denying the father's request for an adjournment and proceeding with the hearing in his absence.

Matter of Biles v Biles, 145 AD3d 1650 (4th Dept 2016)

FAMILY OFFENSE

Finding of Aggravated Circumstances Not Supported by Record

Family Court granted petitioner mother's motion for summary judgment, finding that respondent father committed the family offense of harassment in the second degree and that aggravating circumstances existed, and issued a two-year order of protection against the father. The Appellate Division modified by striking the finding of aggravated circumstances. The father's criminal conviction of harassment in the second degree served as conclusive proof of the underlying facts in the family offense proceeding. The father participated in both the family and criminal proceedings and therefore had ample notice of the correct date of the conduct at issue, and ample opportunity to defend himself against the allegations. The children, who were named in the family offense petition and represented by an AFC at the family

offense proceeding, were properly named in the order of protection. The finding of aggravated circumstances based on the harassment in the second degree conviction was not supported by the sparse record in this proceeding. The Criminal Court made no such finding and it acquitted the father of attempted assault in the third degree, menacing, attempted criminal possession of a weapon, and attempted endangering the welfare of a child, suggesting that it may not have credited the allegations that could have constituted aggravating circumstances. Moreover, there was insufficient evidence in this record to otherwise support the finding.

Matter of Melissa H. v Shameer S, 145 AD3d 472 (1st Dept 2016)

Family Offense Petition Properly Dismissed

Family Court dismissed the petition seeking an order of protection. The Appellate Division affirmed. The offense of disorderly conduct was necessarily dismissed because none of the acts alleged occurred in public, were intended to cause a public inconvenience, annoyance or alarm, or recklessly created such risk. In terms of the offense of harassment in the second degree, petitioner failed to adduce evidence that supported a finding that respondent engaged in a course of conduct or repeatedly committed acts that alarmed or seriously annoyed petitioner. Petitioner's testimony that respondent banged on the door because he was locked out did not establish conduct that served no legitimate purpose and respondent's use of foul and disparaging language, while immature and inappropriate, did not rise to the level of harassment.

Matter of Thelma U. v Miko U, 145 AD3d 527 (1st Dept 2016)

Record Supported Denial of Motion to Dismiss

The petitioner filed a family offense petition in Family Court seeking an order of protection against the respondent, who was her adult son. Following a fact-finding hearing, the Family Court determined that the respondent had committed the family offenses of aggravated harassment in the second degree and harassment in the second degree, and issued an order of protection, directing the respondent to stay away from the petitioner until and including October 7, 2017. Contrary to the respondent's contention, the Family Court properly denied his motion, made at the close of the case, to dismiss for failure to establish a prima facie case. Accepting the evidence proffered by the petitioner in support of her petition as true and giving it the benefit of every reasonable inference, the petitioner established, prima facie, that the respondent committed the family offenses of aggravated harassment in the second degree (*see* PL § 240.30 [2]), and harassment in the second degree (*see* PL § 240.26 [3]). Furthermore, the Family Court properly credited the petitioner's testimony and determined, based upon a fair preponderance of the evidence, that the respondent committed acts which constituted the family offenses of aggravated harassment in the second degree and harassment in the second degree (*see* FCA §§ 812 [1]; 832; Penal Law §§ 240.30 [2]; 240.26 [3]), warranting the issuance of the two-year order of protection (*see* FCA § 841). The evidence established that from November 2014 to March 2015, the respondent repeatedly called the petitioner and demanded money from her. During the calls, he would scream at her. The respondent admitted that the petitioner had told him to stop calling her and to stop asking her for money, yet he persisted in doing both. This course of conduct, which continued despite his knowledge that the calls were unwanted, demonstrated his intent to harass and annoy and established that the calls were made for no legitimate purpose. The court's determination was therefore supported by the record.

Matter of Acevedo v Acevedo, 145 AD3d 773 (2d Dept 2016)

Reasonable and Necessary to Issue Stay Away Order on Behalf of the Minor Children

Family Court properly determined respondent father had committed the family offense of harassment in the second degree and issued a one-year stay away order of protection on behalf of the mother and the two subject children. Harassment in the second degree requires proof that an individual "with intent to harass, annoy or alarm another person . . . engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" *(see* PL§ 240.26). Here, the mother testified that respondent called her incessantly, sometimes late at night, from known or blocked telephone numbers, yelled profanities at her and called her vulgar names. Respondent also threatened he would be "aggressive"

toward the mother, told her he would "get her" and warned her she "wouldn't get away with this." As a result of respondent's actions, the mother felt "nervous, shook up and.. couldn't sleep." Additionally, it was reasonable and necessary for the court to include the children in the stay away order. The mother testified the children became upset and distraught after respondent's phone calls and they were "shook up by his behavior."

Matter of Marianna K. v David K., 145 AD3d 1361 (3d Dept 2016)

JURISDICTION

Court Had Subject Matter Jurisdiction to Conduct Permanency Hearing After Neglect Petition Dismissed

Family Court, after dismissing DSS's petition alleging that respondent mother neglected the subject child, conducted a permanency hearing and continued placement of the child with petitioner. The Appellate Division affirmed. On November 10, 2014, the court directed the temporary removal of respondent's one-week-old child from her care pursuant to Family Court Act § 1022. Petitioner commenced an article 10 proceeding against the mother, alleging that the child was at imminent risk of harm because of the mother's alleged inability to provide proper care due to a lack of housing and her inability to care for her own medical needs. After a permanency hearing in June 2015, the court continued placement until the next permanency hearing and directed that the mother continue under the supervision of petitioner. The fact finding hearing on the neglect petition was held in December 2015. The court denied petitioner's application to amend the petition and to conform the pleadings to the proof and determined that any offer of proof beyond November 10, 2014, would not be relevant in the fact-finding, but could be relevant at the permanency planning hearing and/or dispositional hearing. Thereafter, the court dismissed the petition on the ground, among other things, that the one week the child was in the mother's care, petitioner failed to prove that the child's physical, mental or emotional condition was impaired or in danger of being impaired. The mother then sought an order dismissing the permanency petition and vacating the temporary order placing the child with petitioner. The application was opposed by petitioner, the AFC, and the child's father, on the ground that the court had jurisdiction to conduct the permanency hearing pursuant to Family Court Act §1088. The court denied the application and, at the next permanency hearing, the mother consented to continuing placement of the child with petitioner, but reserved her right to challenge the court's exercise of subject matter jurisdiction to conduct a permanency hearing after the neglect petition had been dismissed. The court retained jurisdiction to conduct the permanency hearing despite dismissal of the neglect petition. Under the plain language of the provisions of article 10, the court obtained jurisdiction as a result of the child's placement pursuant to section 1022, and it was required to make a determination whether to return the child to the parent based upon the best interests and safety of the child. The mother's contention that her substantive due process rights were violated by continuing placement of the child in the absence of a finding of neglect was not properly before the Appellate Division because the order was entered on consent. Moreover, the evidence at the hearing showing that the child would be at risk of abuse or neglect if returned to the mother constituted "overriding necessity," and thus the mother's due process rights were not violated. The dissent would have held that the court lacked subject matter jurisdiction.

Matter of Jamie J., 145 AD3d 127 (4th Dept 2016)

JUVENILE DELINQUENCY

Court Properly Denied Motion to Convert JD to PINS Petition

Respondent was adjudicated a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would have constituted the crime of criminal mischief in the fourth degree, and placed her on probation for 12 months. The Appellate Division affirmed. The court properly exercised its discretion in denying respondent's motion to convert the delinquency petition to a PINS petition. The record demonstrated that the underlying incident had a violent component; respondent had a history of arrests, juvenile delinquency adjudications and noncompliance with supervision; she used drugs and alcohol; she was frequently truant; and she often broke curfew. Those factors outweighed recent improvements in respondent's behavior. The JD adjudication was necessary to ensure respondent's compliance with treatment.

Matter of Kaylynn M., 143 AD3d 413 (1st Dept 2016)

Admission of Evidence of Respondent's Pre-trial Silence Not Preserved

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and jostling, and placed him on probation for 18 months. The Appellate Division affirmed. The determination was not against the weight of the evidence. Respondent did not preserve his claim that the court erred in admitting evidence of his pretrial silence. In any event, the record demonstrated that the court was aware that pretrial silence was inadmissible and its general refusal to receive such evidence. Thus, there was no reason to conclude that the allegedly offending question influenced the court's fact-finding determination.

Matter of Michael T., 143 AD3d 584 (1st Dept 2016)

Respondent's Admission Was Knowingly, Voluntarily and Intelligently Made

Respondent was adjudicated a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would have constituted the crimes of burglary in the third degree and criminal trespass in the third degree and placed him with the Close to Home program for 12 months. The Appellate Division affirmed. Respondent's admission was made knowingly, intelligently and voluntarily. The court adequately explained the rights being waived, as well as the possible dispositional alternatives, and respondent's mother's allocution sufficiently incorporated respondent's allocution by reference. There was no conflict of interest on the mother's part that would warrant vacatur of the admission. The court was under no obligation to ask respondent why he no longer wanted a fact-finding hearing.

Matter of Chris R, 145 AD3d 467 (1st Dept 2016)

ACD Not Warranted

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would have constituted the crime of criminal possession of a firearm, and committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for 12 months. The Appellate Division affirmed. The court properly exercised its discretion in imposing a period of enhanced supervision probation, which was consistent with the least restrictive dispositional alternative consistent with respondent's needs and the community's need for protection. A six-month ACD would not have provided a long enough period of supervision, given the seriousness of the offense, which involved possession of a revolver under circumstances indicating that respondent may have been involved in additional criminal activity while acting in concert with others, and his poor record in school and in custody.

Matter of Pedro H., 145 AD3d 563 (1st Dept 2016)

Court Erred in Denying Respondent's Motion to Preclude Identification Evidence

Respondent was adjudicated a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would have constituted the crimes of attempted robbery in the second degree and assault in the second degree, and placed him on probation for 18 months. The Appellate Division reversed, granted respondent's motion to preclude identification testimony, and dismissed the petition. In a voluntary disclosure form, the presentment agency informed respondent that the complainant identified him inside a restaurant. The arresting detective testified at the suppression hearing that he saw respondent and two companions enter the restaurant, that the complainant arrived at the scene, and that despite the officer's instruction for the complainant to wait outside, the complainant entered the restaurant after the detective did and there identified respondent. The court denied suppression, finding that the identification was a spontaneous or unarranged identification. However, when the complainant testified at the fact-finding hearing, he testified that he never entered the restaurant, but rather that he identified respondent after the detective brought the three boys out of the restaurant and lined them up against a wall. The discrepancy between the two accounts of the identification was not inconsequential, but rather indicated that the disclosure form provided inadequate notice of the evidence the presentment agency intended to present at the fact-finding hearing. Therefore, the court

should have granted the motion to preclude the identification evidence, which was made after the complainant testified regarding the identification outside the restaurant. This conclusion was not altered by the fact that the presentment agency orally disclosed to respondent's counsel on the day of the suppression hearing that the arresting detective recalled the identification occurring outside the restaurant. Not only was that disclosure untimely, in light of the suppression testimony it did not change the presentment agency's representations regarding the evidence intended to be offered at the fact-finding hearing.

Matter of Deavan W., 145 AD3d 569 (1st Dept 2016**)**

Judgment Order Did Not Conform with Court's Decision

Although the Family Court's decision on the record correctly determined that the respondent committed an act which, if committed by an adult, would have constituted the crime of grand larceny in the fourth degree, its order of fact-finding and order of disposition each contained a provision incorrectly stating that the respondent committed an act which, if committed by an adult, would have constituted the crime of robbery in the third degree. A judgment or order must conform strictly to the court's decision. Where there is an inconsistency between a judgment or order and the decision upon which it is based, the decision controls. Accordingly, the subject provisions of the orders were modified.

Matter of Richard H., 144 AD3d 799 (2d Dept 2016)

Matter Was Moot Since No Adjudication Existed Affecting Respondent's Legal Rights

Upon consent of the parties, Family Court ordered an adjournment in contemplation of dismissal (ACD) that did not require respondent to make any admissions, but directed him to comply with certain terms and submit to probation supervision. The case was restored to the calender when it became clear that respondent's father was obstructing the efforts of the probation department and the order was extended by two months. Respondent appealed the extension of the ACD but by the time the matter was heard, the relevant time had elapsed and the underlying petition was dismissed. Under these circumstances, the matter was moot since no adjudication existed that could affect respondent's legal rights.

Matter of Nicholas SS., 143 AD3d 1208 (3d Dept 2016)

Respondent's Admission to Underlying Act Not Defective

Family Court adjudicated respondent a juvenile delinquent. The Appellate Division affirmed. In appeal No. 1, respondent appealed from an order of disposition that placed her in the custody of the Office of Children and Family Services for a period of one year. In appeal No. 2, respondent appealed from an order adjudicating her a juvenile delinquent based upon a finding that she committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree (Penal Law Section 145.00 [1]). Inasmuch as the appeal from the order of disposition brought up for review the underlying fact-finding order adjudicating her a juvenile delinquent, the appeal from the fact-finding order in appeal No. 2 was dismissed. Respondent's contention in appeal No. 1 was rejected that her admission to the underlying act was defective because Family Court failed to comply with Family Court Act Section 321.3 (1). Respondent was not required to preserve her contention for review inasmuch as the requirements of Family Court Action Section 321.3 were mandatory and nonwaivable. The record established that, in its allocution with respondent and her mother, the court properly advised them of respondent's right to a fact-finding hearing, and the court ascertained that respondent committed the act to which she was entering the admission, that she was voluntarily waiving her right to a fact-finding hearing, that her mother did not object to the admission and waiver, and that they were aware of the possible specific dispositional orders.

Matter of Celina D., 145 AD3d 1634 (4th Dept 2016)

ORDER OF PROTECTION

Father Violated O of P by Sending Child Written Communications

Family Court found, after a hearing, that respondent willfully violated a two-year order of protection, and committed him to the New York City Department of Corrections for a term of six months. The Appellate

Division affirmed. The evidence demonstrated beyond a reasonable doubt that respondent willfully violated the order of protection by sending the child written communications. A police detective testified that respondent told him he had written two letters and mailed them to the child. The agency's interception of the letters before the child could read them did not alter the conclusion that respondent violated the order of protection. The court did not violate the best evidence rule by admitting photostatic copies of the letters because the content of the letters was not at issue. Respondent's claim that the order of protection was not served on him was not a basis for reversal inasmuch as the evidence showed that respondent consented to the issuance of the order after he was allocuted by the court regarding his understanding of its terms. Respondent's contention that petitioner never made clear the punishment he could face in the event he was convicted was without merit. Respondent's counsel argued on the first day of the hearing that respondent should not be incarcerated during the proceeding because petitioner was seeking a six-month term.

Matter of Kessiah A., 143 AD3d 526 (1st Dept 2016)

No Statutory Authority to Direct That OP Remain in Effect until Children, Not Related to Respondent by Blood or Marriage, Reached the Age of 18

The Family Court issued orders of protection against the respondent, directing him, inter alia, to stay away from A.A. and S.A. until each of these children reached her 18th birthday. A.A. and S.A. are not related to the respondent by blood or marriage. However, they are members of the same household as the respondent's biological son, C. The respondent correctly argued that, under the plain language of FCA § 1056 (1) and (4), the Family Court was not authorized to direct that the subject orders of protection remain in effect until A.A. and S.A. each reached the age of 18, because the respondent is related by blood to C., a member of the household wherein A.A. and S.A. reside (*see* FCA Act § 1056 [1], [4]). The orders of protection should have been in place for the duration of the article 10 dispositional order which was July 5, 2016. Thus, the orders were modified.

Matter of Richard V., 143 Ad3d 700 (2d Dept 2016)

Record Did Not Support Findings That Respondent Committed Family Offenses of Attempted Assault and Menacing

The order of protection appealed from, upon a finding that the respondent committed certain family offenses, made after a hearing, directed the respondent, among other things, to stay away from the petitioner until and including July 17, 2017. The respondent appealed. A fair preponderance of the evidence adduced at the fact-finding hearing supported a finding that the respondent committed the family offense of harassment in the second degree (*see* FCA § 812 [1]; PL § 240.26 [3]). The evidence demonstrated that the respondent, with the intent to harass, annoy, or alarm the petitioner, engaged in a course of conduct, consisting of threatening to call the police and make false accusations against the petitioner, cursing at the petitioner, shoving the petitioner, and throwing his personal belongings, which alarmed or seriously annoyed the petitioner and served no legitimate purpose. The Supreme Court's findings of additional family offenses, however, were not supported. There was insufficient evidence to establish, by a fair preponderance of the evidence, that the respondent committed the family offense of attempted assault in the second degree (*see* PL §§ 120.05 [1]; 110.00), as there was no evidence that she intended to cause a serious physical injury to the petitioner (*see* PL § 10.00 [10]), or attempted assault in the third degree (*see* PL §§ 120.00 [1]; 110.00), as there was no evidence that she intended to cause physical injury to the petitioner (*see* PL § 10.00 [9]). Further, the petitioner failed to establish, by a fair preponderance of the evidence, that the respondent committed the family offense of menacing in the second degree, as there was no evidence that she engaged in a "course of conduct" or repeatedly committed acts which placed or attempted to place the petitioner "in reasonable fear of physical injury, serious physical injury or death" (*see* PL § 120.14 [2]). Similarly, the petitioner failed to establish, by a fair preponderance of the evidence, that the respondent committed the family offense of menacing in the third degree, as there was no evidence that she intentionally placed or attempted to place him in fear of death, imminent serious physical injury, or physical injury (*see* PL § 120.15). Accordingly, the Appellate Division vacated the findings that the respondent committed the family offenses of attempted assault and menacing, and affirmed the finding that the respondent committed the

family offense of harassment in the second degree.

Frimer v Frimer, 143 AD3d 895 (2d Dept 2016)

PATERNITY

Petitioner Equitably Estopped From Claiming Paternity

Family Court denied petitioner's motion for genetic testing and dismissed the paternity petition. The Appellate Division affirmed. The court properly found that it was in the children's best interests to equitably estop petitioner from claiming paternity. He waited nearly four years after the birth of the older child before commencing this proceeding and failed to communicate with the children or provide financial support. Petitioner also indicated that he did not wish to assume a parental role in the children's lives, and declined to interfere with their adoptions. The children had formed attachments with their adoptive parents, with whom they had lived for most of their lives.

Matter of Samuel O.M. v Patricia Mari Daniella B., 145 AD3d 548 (1st Dept 2016**)**

Reversal of Order Vacating Acknowledgment of Paternity

Family Court vacated the acknowledgment of paternity signed by Gerald S. and Jennifer L., among other things. The Appellate Division reversed, reinstated the acknowledgment of paternity, custody order, and petition for modification of custody, among other things, and remitted. Petitioner in the first proceeding was the biological mother of a child born in October 2012. A week after the child's birth, the mother and respondent in the first proceeding, Gerald S., signed an acknowledgment of paternity. The mother was unable to care for the child because of her own mental health issues, and custody was granted to Gerald. Approximately one year later, Family Court issued a consent order granting the mother and Gerald joint custody with Gerald having primary physical residency. Less than two months later, in December 2013, the mother filed the petition in the first proceeding to vacate the acknowledgment of paternity. Gerald then filed the petition in the second proceeding to modify custody by seeking sole custody of the child. In the third proceeding, the child's maternal grandmother filed a petition seeking custody of the child. In the fourth proceeding, in March 2014, the mother filed a paternity petition against Shane C. The mother and Shane appeared before the court on the paternity petition, and Shane, who had no involvement in the child's life to that point, expressed in no uncertain terms that he wanted nothing to do with the child. Nevertheless, the court, without notification to Gerald, ordered a genetic marker test, which indicated a 99.99% probability that Shane was the child's father. At the conclusion of the hearing on the mother's petition to vacate the acknowledgment of paternity, the court, among other things, granted the mother's petition, dismissed Gerald's modification petition with prejudice, vacated the custody order, implicitly granted the mother's paternity petition with respect to Shane by declaring Shane the father of the child, and removed Gerald as a party in the grandmother's proceeding. The court should have considered paternity by estoppel before it decided whether to test for biological paternity. That did not occur because Gerald was not a named party in the paternity proceeding and did not otherwise appear when the court ordered Shane to submit to a genetic marker test. Gerald did not have the opportunity to raise the doctrine of estoppel. The court should have joined Gerald in that proceeding or otherwise notified him before it ordered the test. Gerald was not only the acknowledged father of the child, but was the custodial parent of the child, and the court was well aware of those facts inasmuch as it had issued the custody orders. However, the court made it clear in its decision that even if Gerald had made a timely objection and raised the defense earlier, the court nevertheless would have ordered the test because the child was young and "the truth (was) important." That was contrary to both the plain language of the statute and statements of law by the Court of Appeals. Even though the genetic marker test had already been conducted, the court was still authorized to consider the estoppel issue. Although the court held a hearing, its decision showed that it had little regard for the doctrine estoppel. Gerald was denied a fair hearing on the issue of equitable estoppel. Owing to the passage of time since the entry of the order on appeal, which directed Gerald to immediately turn the child over to the mother, pending a new determination, the maternal grandmother was to retain physical custody of the child.

Matter of Jennifer L. v Gerald S., 145 AD3d 1581 (4th Dept 2016)

TERMINATION OF PARENTAL RIGHTS

Mother Failed to Cooperate With Agency

Family Court determined that respondent mother abandoned and permanently neglected the subject children. The Appellate Division affirmed. The finding of abandonment was supported by clear and convincing evidence, including petitioner agency's case record and the testimony of its caseworker, which showed only minimal and sporadic attempts by the mother to visit and communicate with the children or the agency or otherwise inquire about the children's care and well-being during the relevant time period. The children were also permanently neglected. The agency made diligent efforts to strengthen the parent-child relationship by formulating a service plan that included individual and group counseling, substance abuse and domestic violence counseling, submission to mental health evaluations, maintaining a stable household and income, as well as regular visits with the children. The mother continuously failed to cooperate with the agency and comply with the service plan. She failed to regularly attend or benefit from the programs, failed to appear for many visits with the children, and failed to engage with the children when she did attend.

Matter of Jahnel B., 143 AD3d 416 (1st Dept 2016)

In Children's Best Interests to be Adopted

Family Court determined that respondent father violated the terms of a suspended judgment entered on a finding of permanent neglect, terminated his parental rights, and transferred custody of the children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. A preponderance of the evidence supported the court's determination that it was in the best interests of the oldest child to terminate respondent's parental rights, given the father's acknowledged failure to comply with the terms of the suspended judgment, including twice testing positive for cocaine during the reopened dispositional hearing. Although the child was 11 years old and expressed a strong preference to be reunited with his father, who had continued to visit him regularly, the child's preference was not dispositive. Because the child had indicated a willingness to be adopted if he could not be reunited with his father, adoption was a possibility after parental rights were terminated.

Matter of Anthony R. L. O., 143 AD3d 475 (1st Dept 2016)

Father Failed to Continually Maintain Contact or Plan For Future of Children

Family Court, upon a finding of permanent neglect, terminated the father's parental rights to the subject children, and transferred custody and guardianship of the children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The agency expended diligent efforts to reunite the father with his children by providing referrals for random drug tests, scheduling regular visitation with the children, providing the father with transportation funds to ensure his attendance at visits and drug screenings, notifying him of the children's medical appointments, and counseling him about the importance of complying with the service plan. Despite those efforts, the father failed to substantially and continuously maintain contact with or plan for the future of the children. He also failed to comply with the service plan. It was in the children's best interests to terminate the father's parental rights to facilitate adoption by the foster parents, with whom the children had lived since 2014 and developed close relationships.

Matter of Tracy B., 143 AD3d 499 (1st Dept 2016)

Mother Failed to Plan For Children's Future

Family Court, upon a fact-finding determination that respondent mother permanently neglected the subject children, terminated her parental rights, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency exercised diligent efforts to encourage and strengthen the mother's relationship with the children by discussing with the mother what she needed to do to complete her service plan; attempting to locate kinship resources for the children; referring her to mental health treatment, domestic violence counseling, anger management, and parental skills training; assistance in seeking housing;

monitoring her while the children were temporarily discharged to her care on 2010; and scheduling visitation. Additionally, clear and convincing evidence demonstrated that the mother failed to plan for the children's future inasmuch as she failed to complete a mother-child program, mental health services and anger management as required by her service plan, never gained insight into the reason the children were placed in foster care or advanced a realistic, feasible plan for their future care. It was in the children's best interests to terminate the mother's parental rights and free them for adoption.

Matter of Desiree M., 143 AD3d 512 (1st Dept 2016)

Parents Failed to Make Sufficient Progress to Enable Children's Return

Family Court, upon findings of permanent neglect, terminated respondent parents' parental rights and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to strengthen and encourage the parent-child relationship, but respondents failed to plan for the children's future. The agency formulated a service plan tailored to respondents' needs, including the father's cognitive limitations. The plan included supervised visitation, counseling, several programs and drug testing. Despite those efforts the mother did not make sufficient progress to enable the children to return to her. She continued to plan with the father, who wholly failed to comply with the plan in significant respects, including addressing his drug abuse and anger management issues. They did not attend any educational and medical appointments for the children, attend counseling consistently or find suitable housing. They also failed to submit to drug screens regularly and the father tested positive for illicit substances. Given the children's lengthy placement in suitable preadoptive homes, where their special needs were addressed, as well as substantial concerns about respondents' continued failure to address the problems that led to the children's removal, termination of respondents' parental rights was in the children's best interests.

Matter of Joseph P., 143 AD3d 529 (1st Dept 2016)

Suspended Judgment Not Warranted

Family Court, upon a fact-finding determination of permanent neglect, terminated respondent mother's parental rights and transferred custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to strengthen and encourage the parent-child relationship by developing an individualized plan for the mother, including domestic violence counseling, a parenting skills program, individual counseling, visitation, and random drug testing. Despite these efforts, the mother failed to attend or benefit from the services offered to her and continued to deny responsibility for the conditions that led to the child's removal. Further, the mother failed to appear for visitation, including an extended time of more than six months, despite her awareness of the visitation schedule and the toll her absence was having on the child. A preponderance of the evidence supported the determination that it was in the child's best interests to terminate respondent's parental rights. The child was in a stable and loving foster home for several years, all of his basic needs were met, and the foster parents wished to adopt him. A suspended judgment was not warranted because although respondent had completed her service plan at the time of the dispositional hearing, she testified that she learned nothing from her parenting course and the child displayed no interest in seeing her.

Matter of Jayden Isaiah O., 144 AD3d 465 (1st Dept 2016)

TPR Affirmed

Family Court found that respondent mother permanently neglected the subject children, terminated her parental rights and transferred custody of the subject children to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts to strengthen and encourage the parent-child relationship by scheduling visits between the mother and children, providing her with referrals for court-ordered programs, and advising her of the importance of complying with the court's directives. The evidence also

showed that caseworkers monitored the mother's progress with obtaining housing and that her case with the Department of Homeless Services was closed because she failed to attend her appointments. Despite the agency's efforts, the mother failed to consistently visit the children during the relevant time period, which alone was sufficient to support the finding of permanent neglect. Additionally, the mother failed to plan for the children's future inasmuch as she never competed mental health treatment, a parenting class, or a drug treatment program. A preponderance of the evidence supported the determination that it was in the children's best interests to terminate respondent's parental rights inasmuch as the mother failed to ameliorate the conditions that led to the children's removal.

Matter of Angelica S., 144 AD3d 484 (1st Dept 2016)

Parents Permanently Neglected Child

Family Court found that respondent parents permanently neglected the subject child, terminated their parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence demonstrated that the agency made diligent efforts to strengthen the parent-child relationship by establishing a visitation schedule and referring respondents to individual counseling, drug treatment programs, parenting skills classes, and assigning a visiting coach when they had issues with visitation. The agency also referred respondent mother to an anger management program and twice attempted to have respondent father speak with the child's therapist to assist him in understanding why the child was refusing to see or speak with him, but he refused to do so. Despite the agency's diligent efforts, the mother failed to complete a drug treatment program before the child had been in foster care for at least one year; she tested positive for drugs; refused to submit to drug screenings during the statutory look-back period; and failed to address her anger issues. Although the father completed many of the services required by his service plan, he failed to adequately plan for the child's future. He did not gain insight into his parenting problems and consistently refused to separate from the mother, who actively used drugs and caused the removal of the child. A preponderance of the evidence supported the determination that it was in the child's best interests to terminate respondents' parental rights inasmuch as the child had been in and out of foster care her whole life and wanted to be adopted by her foster parents.

Matter of Mya Malaysha W., 144 AD3d 569 (1st Dept 2016)

Mother Had No Realistic Plan For Child

Family Court found that respondent mother permanently neglected the subject child, terminated her parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. A preponderance of the evidence supported the determination that it was in the child's best interests to terminate respondent's parental rights, who had been in foster care his entire life and needed permanency. The child had bonded and thrived with his foster parents, who were able to address his special needs. A suspended judgment was not warranted because respondent had not made significant progress in overcoming the problems that led to placement of the child. Even if respondent continued on a path to recovery from substance abuse, there was no showing that it would be in the child's best interests to be returned to her care inasmuch as there was no evidence that she had a realistic plan to provide an adequate and stable home for the child.

Matter of Saiah Isaiah C., 144 AD3d 585 (1st Dept 2016)

Mother Permanently Neglected Child

Family Court, upon a finding of permanent neglect by respondent mother, terminated her parental rights and committed custody and guardianship of the child to petitioner agency for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence supported the court's finding that the mother, despite the diligent efforts of the agency in referring her for mental health counseling, parenting skills programs, drug treatment programs and random drug screens, domestic violence programs, and anger management, failed to cooperate and thus permanently neglected the children by failing to plan for their return. The finding that termination of the mother's parental rights was in the children's best interests was supported by a preponderance of the evidence.

Matter of Mia Veronica B., 145 AD3d 438 (1st Dept 2016)

Father Permanently Neglected Child

Family Court, upon a finding of permanent neglect by respondent father, terminated his parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The record showed that the agency made diligent efforts to encourage and strengthen the parental relationship, including developing an appropriate service plan and monitoring the father's compliance, and meeting regularly with the father. The agency was not obligated to seek modification of the orders of protection prohibiting visitation or contact by the father. The father failed to plan for the child's future. Although he complied with the recommended service plan, he failed to gain insight into the issues that caused the child's placement. Adoption was in the child's best interests. She was happy in her foster home and desired adoption, while the father continued to be aggressive and deny responsibility for his harmful conduct.

Matter of Yasmine F., 145 AD3d 455 (1st Dept 2016)

Father Permanently Neglected Child

Family Court, upon a finding of permanent neglect by respondent parents, terminated their parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of ACS for the purpose of adoption. The Appellate Division affirmed. The determination that the child was permanently neglected by her biological parents was supported by clear and convincing evidence. The agency engaged in diligent efforts to encourage and strengthen respondents' relationship with the child by developing an individualized plan tailored to their respective needs, including multiple referrals for domestic violence counseling, parenting skills, individual counseling, visitation and random drug testing. Despite these efforts, the parties failed to attend or benefit from the services and continued to deny responsibility for the conditions that led to the child's removal. The record belied the mother's claim that she was afforded ineffective assistance of counsel. The agency was under no obligation to treat the father more favorably because he was incarcerated for an extended period during the relevant period. The finding that termination of the respondents' parental rights was in the child's best interests was supported by a preponderance of the evidence

Matter of Zaya Faith Tamarez Z., 145 AD3d 459 (1st Dept 2016)

Mother Permanently Neglected Child

Family Court, upon a finding of permanent neglect by respondent mother, terminated her parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. Clear and convincing evidence supported the court's finding that the mother, despite the diligent efforts of the agency in referring her for mental health services and parenting skills classes and offering to escort her to a required mental health examination, failed to plan for the child's return in failing to complete the mental health evaluation necessary to tailor services to her needs. The finding that termination of the mother's parental rights was in the child's best interests was supported by a preponderance of the evidence. The child was well cared for by his foster mother, who attended to his special needs and hoped to adopt him.

Matter of Joe J. R. L., 145 AD3d 496 (1st Dept 2016)

Court Properly Denied Mother's Motion to Vacate Her Default

Family Court denied respondent mother's motion to vacate her default at a hearing to determine if she violated the conditions of a suspended judgment. The Appellate Division affirmed. The Appellate Division declined to reach the mother's contention, raised for the first time on appeal, that ICWA applied to the child. If it had reached it, it would have found that the mother failed to show that she or the child was a member or was eligible for membership in an Indian Tribe. The Appellate Division also declined to reach the mother's contention, raised for the first time on appeal, that her counsel was ineffective by failing to participate in the hearing and that her due process rights were violated by proceeding in her absence. If it considered those arguments, it would have found them unavailing inasmuch as the mother's attorney

made the prudent strategic choice to preserve for her the opportunity to move to vacate the default.

Matter of Landyn M., 145 AD3d 520 (1st Dept 2016)

Mother Unable to Demonstrate a Change in Her Ability to Care for or to Adequately Provide for Child's Future

The County's Department of Social Services (hereinafter the agency) commenced a proceeding pursuant to SSL § 384-b to terminate the parental rights of the mother on the basis of permanent neglect and to terminate the parental rights of the father on the basis of permanent neglect and abandonment. After fact-finding and dispositional hearings, the Family Court found, inter alia, that the mother permanently neglected the subject child and that the father permanently neglected and abandoned the subject child. It then terminated their parental rights and transferred guardianship and custody of the subject child to the agency for the purpose of adoption. The mother and the father separately appealed. The Appellate Division affirmed. The mother was not aggrieved by the finding that she had neglected the subject child, because she consented to the finding. Therefore, that portion of her appeal was dismissed. Contrary to the mother's contention, the agency established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen her relationship with the subject child. These efforts included, inter alia, making referrals to parenting services, arranging a mental health evaluation, and facilitating visitation. Despite these efforts, the mother failed to plan for the child's future and failed to visit the child on a regular, consistent basis. Although the mother participated and completed a parenting course and underwent a mental health evaluation, those acts were not sufficient to preclude a finding of permanent neglect, since there was no real change in her ability to care for her child or to adequately provide for his future. In addition, the evidence adduced at the fact-finding hearing established, by clear and convincing evidence, that the father abandoned the subject child during the six-month period before the filing of the petition (*see* SSL § 384-b [4] [b]; [5] [a]). Thus, the Appellate Division did not address the father's contention that he did not permanently neglect the subject child. Further, the Family Court did not err in declining to grant the father a suspended judgment. A suspended judgment is not a permissible disposition in a proceeding pursuant to SSL § 384-b (4) (b).

Matter of Tyshawn S., 143 AD3d 990 (2d Dept 2016)

Mother Failed to Plan for the Children's Future by Failing to Participate in Mental Health Services Despite Agency's Diligent Efforts

The Family Court properly found that the mother permanently neglected the subject children. The petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the parental relationship by facilitating weekly visitation with the children, providing several referrals to mental health programs, encouraging the mother to participate in mental health treatment and to comply with random drug testing, emphasizing the importance of compliance with the service plan, and informing her of the children's progress in services (*see* SSL § 384-b [7]). Despite these efforts, the mother failed to plan for the children's future by failing to participate in mental health services, comply with the required drug screenings, and maintain consistent and appropriate visitation with the children (*see* SSL § 384-b [7] [c]). The Family Court also properly determined that it was in the best interests of the children to terminate the mother's parental rights and to free the children for adoption, rather than to enter a suspended judgment (*see* FCA § 631). Accordingly, the orders of fact-finding and disposition were affirmed.

Matter of Vaughn M.S., 144 AD3d 811 (2d Dept 2016)

Record Supported Revocation of Suspended Judgment

The mother appealed from two orders of disposition of the Family Court (one as to each child), both dated January 16, 2015. The orders of disposition, after a hearing, revoked an order of suspended judgment of that court dated January 15, 2013, terminated the mother's parental rights, and transferred custody and guardianship of the subject children to the Jewish Child Care Association of New York and to the Commissioner of Children's Services of the City of New York for the purposes of adoption. The Appellate Division affirmed. The Family Court properly found, by a preponderance of the evidence, that the mother failed to comply with several of the conditions of her suspended judgment. Contrary to the mother's contention, the Family Court

providently exercised its discretion in determining that a separate dispositional hearing was not required before terminating her parental rights. The court had presided over prior proceedings from which it became acquainted with the parties, and the record showed that the court was aware of and considered the children's best interests.

Matter of Hypnotic L. D., 145 AD3d 720 (2d Dept 2016)

Father Failed to Plan for the Future of His Children Despite Agency's Diligent Efforts

Contrary to the father's contention, the evidence presented at the fact-finding hearing established that the presentment agency made diligent efforts to assist him in planning for the future of his children (*see* SSL § 384-b). These efforts included locating and contacting the father, who was incarcerated under a false name, advising him of the children's progress, encouraging him to participate in planning for the children, and exploring the alternative custodial resources identified by the father. Visitation would not have been in the children's best interests in light of their ages, the visitation conditions at Rikers Island, their expressed anxiety and concern about visitation, and the recommendation of their therapist. Moreover, the finding of permanent neglect was supported by clear and convincing evidence that the father failed to provide a realistic alternative to foster care, as each of the suggested alternative caregivers proved not to be a viable custodial resource or would not accept custody of all the children, for whom remaining together was a priority. The Family Court properly determined that the best interests of the children were served by terminating the father's parental rights and freeing the children for adoption by the foster parents (*see* FCA § 631).

Matter of Jose C., 145 AD3d 883 (2d Dept 2016)

Mother Failed to Maintain Contact with Children Despite Petitioner's Diligent Efforts

The record revealed that the primary obstacle to reuniting the mother with the subject children was her failure to visit them consistently. The record demonstrated that, although the petitioner scheduled more than 100 visits for the mother during the 16-month period at issue, the mother attended fewer than half. The Family Court found that the mother failed to provide a credible explanation for her absences at the vast majority of those missed visits. In addition, the record supported the court's conclusion that the petitioner made diligent efforts to assist the mother in attending her visitation. The mother's failure to maintain contact with the children despite the petitioner's diligent efforts was sufficient to support a finding of permanent neglect (*see* SSL § 384-b [4], [7] [a]). At a dispositional hearing after a finding of permanent neglect, the Family Court must make its determination based upon the best interests of the children (*see* FCA § 631). Here, the evidence at the dispositional hearing established, by a preponderance of the evidence, that it was in the subject children's best interests to terminate the mother's parental rights and free them for adoption by their foster parents, who expressed a desire to adopt them.

Matter of Carmen Enid G., 145 AD3d 893 (2d Dept 2016)

Record Supported Determination That Father Abandoned Child During Relevant Statutory Period

In September 2014, the county's Department of Social Services (hereinafter DSS) filed a petition seeking to terminate the father's parental rights on the ground of abandonment. After a hearing, the Family Court found that the father abandoned the subject child, terminated his parental rights, and transferred guardianship and custody of the child to DSS for the purpose of adoption. The father appealed. An order terminating parental rights may be granted where the petitioner has established, by clear and convincing evidence, that the parent abandoned the subject child for the six-month period before the petition was filed (*see* SSL § 384-b [3] [g] [i]; [4] [b]). An intent to abandon a child is manifested by the parent's failure to visit the child or communicate with the child or the agency although able to do so and not prevented or discouraged from doing so by the agency. The burden rests on the parent to maintain contact, and the agency need not show diligent efforts to encourage the parent to visit or communicate with the child. Here, the Family Court properly determined that DSS established, by clear and convincing evidence, that the father abandoned the child by failing to visit or maintain contact with him, or DSS, for the six-month period preceding the filing of the petition to terminate his parental rights (*see* SSL § 384-b [5] [a], [b]) Contrary to the father's contention, the testimony of DSS's witnesses, which the court credited,

did not support a finding that, during the six months prior to the filing of the petition, DSS did anything to prevent or discourage him from contacting the child. Accordingly, the court properly determined that the father abandoned the child.

Matter of Nyshawn R. V. S., 145 AD3d 902 (2d Dept 2016)

Family Court Properly Determined That Termination of Father's Parental Rights Was in Best Interest of the Children

In 2007, the Administration for Children's Services (hereinafter ACS) filed neglect petitions against the mother with respect to three of her children, who were initially removed from their intact family based upon allegations that the mother, who suffered from mental illness, threatened to harm them. The Family Court released the children to the custody of the father, who was not charged with neglect. An order of protection was issued, barring the mother from the home. When it was discovered that the father had allowed the mother into the home, neglect petitions were filed against him, and the children were removed from his care. In 2010, the three children were returned on a trial basis to the parents based on findings that the mother had been compliant with mental health services, but were removed again only a short time later, in September 2010, after one of the children, while in the mother's care, sustained burns so severe that she was hospitalized for two weeks and required skin graft operations and subsequent home care and therapy. The fourth child, who was born in September 2010, was removed from the parents on October 1, 2010. All four of the children have remained in foster care since they were removed from the parents in September and October 2010. A service plan was put in place after the removals, and, in 2011, neglect findings were entered against both the mother and the father. The father was directed to visit with the children regularly and cooperate with all ACS referrals. In December 2011, the mother filed a family offense petition against the father, alleging domestic violence. On April 17, 2012, more than 1½ years after the children were removed, the father was arrested and incarcerated for allegedly violating a temporary order of protection relating to the mother. Approximately two months later, in June 2012, he was deported to Mexico. The domestic violence charges were subsequently dismissed, on the merits. On July 24, 2012, approximately one month after the father was deported, the petitioner, Edwin Gould Services for Children and Families, commenced proceedings pursuant to SSL § 384-b to terminate the parental rights of both parents on the ground of permanent neglect. The petitions against the mother were eventually dismissed after she and the petitioner reached an agreement, under which the mother conditionally surrendered her parental rights to the four children under SSL § 383-c in exchange for post-adoption visitation with them. The proceedings, however, continued as to the father. The petitions alleged that after the four children were placed with the petitioner in 2010, the father, for a period of more than a year, had failed substantially and continuously or repeatedly to maintain contact with them or plan for their future, despite the petitioner's diligent efforts to encourage and strengthen the parental relationship. On October 15, 2014, after a fact-finding hearing, the Family Court found that the father had permanently neglected the children. The court then held a dispositional hearing, at which the father testified by telephone. Following that hearing, the court found that it was in the children's best interests that they be freed for adoption. By four orders of fact-finding and disposition dated September 2, 2015 (one as to each child), the Family Court, inter alia, terminated the father's parental rights and transferred guardianship and custody of the children to the petitioner and ACS for the purpose of adoption. The father appealed. The Appellate Division affirmed. The record supported the Family Court's determinations that the petitioner established by clear and convincing evidence that the children were permanently neglected children. The Family Court properly found that the petitioner met its burden of establishing that it made diligent efforts to encourage and strengthen the parental relationship with respect to the father. These efforts included reasonable attempts to assist, develop, and encourage a meaningful relationship between the father and the children, by scheduling family team conferences to review the service plan with the father and formulate a feasible plan for reunification, discussing the importance of compliance with the service plan, facilitating visitation between the father and the children, and referring the father to individual therapy, parenting skills classes, and domestic violence counseling (*see* SSL § 384-b [7]). The record also supported the Family Court's findings that, despite the petitioner's diligent efforts, the father failed to realistically plan for the children's future. Here, the court properly found that the father, despite being physically and financially able to comply with the service plan the

petitioner had established for him, failed to do so. Under the initial service plan, the father was required not only to visit the children regularly, but also to complete individual therapy and a parenting skills course. The father completed neither the therapy nor the course, even though the petitioner provided multiple referrals and attempted to accommodate his work schedule. As to the final month of the statutory period, between the father's deportation in June 2012 and the filing of the petitions in July 2012 (*see* Social Services Law § 384-b [7]), the Family Court noted that the father did not get in contact with the children, even though his sister remained in New York and she had some contact with them. The father himself admitted that he had not reached out to the case planner after he was deported. The record further revealed that by the time of the dispositional hearing, the father had a home in Mexico for the children. He presented a "Socioeconomic Report" from a local office of the Mexican "Office of the Attorney for Advocacy of Children, Women and Family Affairs," which found his arrangements for the children suitable as of March 3, 2015. Nevertheless, the evidence also established that the father had had only infrequent and irregular contact with the children after he was deported. The case planner testified that the three oldest children, who had been in the foster mother's care for almost five years, since September 2010, did not want to go to Mexico and did not want any contact with the father. Further, there was evidence at the dispositional hearing that the three older children had significant educational issues that continued at least through 2014. Although the father established that he could provide schooling for the children, he did not address the children's special needs. Finally, the children had bonded with the foster parent, with whom they had lived for five years and who desired to adopt them. Further, the foster parent was supportive of continuing the visitation that the children enjoyed with the mother. Under these circumstances, the Family Court properly determined that it was in the best interests of the children that the father's parental rights be terminated and that the children be freed for adoption by the foster parent. In a dissenting opinion, the Hon. Sylvia Hynds-Radix, respectfully disagreed with her colleagues and voted to reverse the orders of fact-finding and disposition.

Matter of Elias P., 145 AD3d 1066 (2d Dept 2016)

Sound and Substantial Basis for Court's Determination

Family Court adjudicated the subject child to be permanently neglected and terminated respondents' parental rights. The Appellate Division affirmed, finding a sound and substantial basis in the record for the court's decision. Contrary to the parents' position, the court did not err in failing to impose an alternative disposition of a suspended judgment. Here, the child had been removed from her parents' care two weeks after her birth in violation of a safety agreement between the agency and the parents. The father had violated the agreement by moving in with the mother, who was a registered sex offender previously convicted of sexually abusing one of her older children, and had allowed unsupervised contact between the mother and the child.. The record showed that although the mother acted appropriately during supervised visits with the child, she had failed to complete the mandated sex abuse treatment program. Her lack of progress was due to a sexual abuse charge brought against her one year earlier, during the pendency of which she was discharged from the program. The mother had failed to achieve her treatment goals despite her attendance and cooperation. Additionally, the mother admitted to sexually abusing five of her other children, and she only made the admission because the children had reported the abuse. Furthermore, there was a 10 year order of probation against the mother which prohibited her from having unsupervised contact with minors. As to the father, there was no evidence to show that he was a "protective ally" for the child. Despite his participation in a specified parent education program, the program's administrators testified he had not benefitted from the program. Although the father admitted he knew the mother was a registered sex offender, he resisted obtaining a residence separate from the mother. Moreover, the father allowed the mother and the mother's son, another known sex offender, to have unsupervised contact with his children; and at the time of the dispositional hearing, the father had not completed the mandated anger management program, which showed his lack to commitment to reunification with the child.

Matter of Merinda MM., 143 AD3d 1095 (3d Dept 2016)

Respondent Denied "Some" Opportunity to Participate in Meaningful Way

Family Court adjudicated the five-year-old subject child

to be abandoned and terminated respondent father's parental rights. The Appellate Division reversed finding that respondent had been denied "some opportunity to participate in a meaningful way" in the hearing. Here, the child had been removed by DSS from her parents' care less than four months after his birth. Thereafter, the parties engaged in permanency mediation to work out the terms of a conditional surrender and an agreement was reached; however, the matter was set down for a trial. Respondent was a resident of North Carolina and he appeared by telephone for the mediation and the first court appearance. Thereafter, respondent's counsel was served with notice of the trial date but the notice did not indicate it would be a trial, and counsel believed the court date was for a pretrial conference. On the day of trial, respondent's counsel attempted to be relieved and advised the court he had not informed respondent about the trial. However, the court denied his application, stated it would reserve decision for 30 days and proceeded with the hearing; the agency went on to present its case. At no time during the hearing were efforts made to reach respondent by telephone, and when respondent's counsel moved for an adjournment to permit respondent to appear and present his case, the court denied his motion. A parent has a due process right to be present at a hearing to terminate his parental rights although that right is not absolute and needs to be balanced with the child's right to a "prompt and permanent adjudication" *Matter of Eileen R.,* 79 AD3d 1482 (2010). In this case, a brief adjournment to allow respondent to participate would not have significantly impinged upon the child's right to a prompt hearing, especially since he would have been the only witness to show that he had attempted to contact the child during the relevant period.

Matter of Chloe N., 143 AD3d 1114 (3d Dept 2016)

Appeals From Fact-Finding and Dispositional Orders Dismissed

Family Court adjudicated the three-year-old subject child to be permanently neglected and terminated respondent mother's parental rights. The Appellate Division affirmed. Here, the subject child was removed by DSS upon her birth because she was born addicted to drugs. Respondent later consented to a neglect finding. Thereafter, the permanent neglect petition was filed and respondent failed to appear for the court appearance. Family Court issued a warrant for her arrest and respondent was brought to the court and advised that her failure to appear at the fact-finding hearing could result in the matter proceeding without her. However, respondent failed to appear at the fact-finding hearing although her counsel appeared on her behalf. Family Court reached respondent by telephone but respondent failed to explain why she was unable to get a ride to the courthouse, and declined the court's offer to pause the proceedings in order for respondent to get a ride from a relative. The court found respondent in default and continued with the fact-finding hearing. After a dispositional hearing, where once again respondent failed to appear, the court terminated her parental rights. Respondent appealed from both the fact-finding and dispostional hearings. The Appellate Division dismissed her appeal. As to the fact-finding determination, there is no appeal as of right from a nondispositional order in a permanent neglect proceeding; and there is no right to appeal from an order entered upon default. As for the dispositional order, respondent's counsel offered no explanation for respondent's failure to appear at the dispositional hearing. Furthermore, respondent's counsel indicated she had been unable to reach respondent and counsel did not participate in the hearing nor make any motions on respondent's behalf.

Matter of Adele T., 143 AD3d 1202 (3d Dept 2016)

Clear and Convincing Evidence that Agency Made Diligent Efforts

Family Court adjudicated the seven-year-old subject child to be permanently neglected and terminated respondent father's parental rights. The Appellate Division affirmed. There was clear and convincing evidence the agency met its burden of showing it made diligent efforts to encourage and strengthen the relationship between respondent and the child. Here, respondent was incarcerated and did not live with the child prior to his incarceration. The agency encouraged contact between respondent and the child by keeping respondent apprised of the child's well being and encouraged written communication between them. However, respondent was not in contact with the child after his incarceration began. He never spoke with the child by telephone and he did not have visits with her due to the distance between the child's residence and the prison, although there were two face-to-face visits when he was incarcerated near the child's home. Additionally, the agency showed

respondent failed to plan for the child's future. At respondent's suggestion, the agency investigated relative resources but the individuals were unwilling or failed to timely assume responsibility for the child. Respondent then suggested the child be placed with a relative in South Carolina, who had never met the child and who had not sought custody or placement of the child. Additionally, it was not in the child's best interests for the court to have entered a suspended judgment. The child and her half brother had lived with the same foster family for some time and the child had a strong bond with all of them. Moreover, given the child's positive living situation, the absence of a relationship between the child and respondent and the uncertainty of when respondent would be release from prison, the court's decision was appropriate.

Matter of Jazmyne II., 144 AD3d 1459 (3d Dept 2016)

Failure to Comply With Terms of Suspended Judgment Supported TPR

After respondent parents failed to comply with certain conditions of a suspended judgment, Family Court terminated respondents' parental rights. The Appellate Division affirmed finding there was a sound and substantial basis in the record to support the court's order. "The purpose of a suspended judgment is to provide a parent who has been found to have permanently neglected his or her child with a brief period within which to become a fit parent with whom the child can be safely reunited" *Matter of Clifton ZZ.*, 75 AD3d 683, 683 (2010). Here, respondents participated in the necessary programs, such as financial budgeting classes, but made minimal progress. Additionally, they failed to provide a safe and stable home for the subject children. Specifically, respondents' home continued to be cluttered with garbage and urine and a dead mouse was seen on the floor. There were cigarette butts scattered around the house, dried blood on the toilet seat, vomit in the bathtub, bird feces, mouse excrement and other unsanitary sights. Moreover, the children had been living in the foster home for the majority of their lives and termination of respondents parental rights served the children's best interests.

Matter of Dominique VV., 145 AD3d 1124 (3d Dept 2016)

Family Court Deprived Respondent Mother of Her Due Process Right to a Full and Fair Hearing

Family Court determined respondent mother had abandoned the 12-year-old subject child and terminated her parental rights. The Appellate Division reversed finding that Family Court had deprived respondent of her due process right to a full and fair hearing. Here, the parties stipulated that the child had contact during the relevant time with respondent through Facebook, and that the child was the sender of Facebook messages transmitted under his name. However, Family Court erroneously determined that respondent had not established a foundation for the admission into evidence of a print-out of the Facebook messages, and precluded her testimony regarding the frequency of her communications with the subject child using her adult son's Facebook account. Respondent testified she was present when her counsel printed the Facebook messages at his office and that she reviewed the entire document to ensure it was a full and complete copy. The parties' stipulation and respondent's testimony, when combined with her adult son's testimony confirming that he had provided respondent with his account information, password and permission to use the account for communication with the child, constituted a sufficient foundation for the admission into evidence of the printed messages and respondent's related testimony.

Matter of Colby II., 145 AD3d 1271 (3d Dept 2016)

Mother Failed to Engage Meaningfully in Treatment Necessary to Address Her Parental Failings

Family Court terminated respondent mother's parental rights to the subject child on the ground of permanent neglect and freed the child for adoption. The Appellate Division affirmed. There was clear and convincing evidence that petitioner made diligent efforts to encourage and strengthen the relationship between mother and child. The evidence established that petitioner, among other things, facilitated visitation between the mother and child, arranged for parenting classes and monitored the mother's progress, conducted service plan reviews, and referred the mother to mental health services. Despite those efforts, the mother failed to plan substantially for the child's future. Although she participated in some of the services offered by petitioner, she failed to comply with the requirement that she consistently attend mental

health counseling and thus the court properly concluded that the mother refused to engage meaningfully in treatment necessary to address her failure to place the child's needs before her own.

Matter of Kendalle K., 144 AD3d 1670 (4th Dept 2016)

Court Erred in Denying Respondent's Recusal Request

Family Court terminated respondent father's parental rights. The Appellate Division vacated the disposition, granted respondent's motion for recusal, and remitted for a new dispositional hearing. At the conclusion of the fact-finding hearing, the court made a finding of permanent neglect and scheduled a dispositional hearing. The day after the finding, the father made a death threat against the court, the AFC, the caseworker and the police. The father was thereafter charged with making a terroristic threat and an order of protection was issued against the father in favor of the court. Under these circumstances, and particularly in view of the order of protection, the court abused its discretion in denying the father's recusal motion and in presiding over the dispositional hearing.

Matter of Trinity E., 144 AD3d 1680 (4th Dept 2016)

No Error in Court's Denial of Respondent's Request For Adjournment

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The court did not err in denying the father's request to adjourn the hearing so he could contact unnamed witnesses inasmuch as he failed to demonstrate that the need for the adjournment to subpoena the witnesses was not based upon a lack of due diligence on the part of him or his attorney. The court did not abuse its discretion in denying the father's repeated requests to adjourn the hearing to allow him to retain counsel or to allow his allegedly retained counsel to appear. When the father initially sought an adjournment in the midst of the hearing to retain new counsel, the court indicated that the father could hire an attorney but that counsel must appear at the next adjourned date. Although on the next court dated the father indicated that he had retained counsel, counsel did not appear at the hearing or contact the court. The court then denied the father's request for another adjournment. Under the circumstances here, including the six-year period during which the permanent neglect proceeding was pending and the children's status remained unsettled, and in light of the father's repeated groundless requests for adjournments, the court did not err in determining that the father's request was merely another delaying tactic.

Matter of Latonia W., 144 AD3d 1692 (4th Dept 2016)

YOUTHFUL OFFENDERS

Supreme Court Erred in Determining That Defendant Was Not Eligible Youthful Offender Status

On December 4, 2013, the defendant pleaded guilty to manslaughter in the first degree. After entering his plea, the defendant moved to be adjudicated a youthful offender. At sentencing, the Supreme Court denied the defendant's motion, finding that he was not eligible for youthful offender treatment pursuant to CPL 720.10 (3) because there were no mitigating circumstances bearing directly upon the manner in which the crime was committed. CPL 720.20 (1) requires that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain. The first step in making a youthful offender determination requires determining whether the defendant is an "eligible youth" (*see* CPL 720.10 [2]). The second step in making a youthful offender determination requires determining whether "the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years" (*see* CPL 720.20 [1] [a]). Here, the defendant was eligible for youthful offender status because he was 18 years old at the time of the subject offense, and had no prior criminal convictions (*see* CPL 720.10 [1], [2]). Although a youth convicted of an armed felony is eligible for youthful offender status only where the court determines that there are mitigating circumstances bearing directly upon the manner in which the crime was committed, or that the defendant's participation in the crime was relatively minor (*see* CPL 720.10 [3]), here, the defendant was convicted of manslaughter in the first degree, which is not an armed felony (*see* CPL 1.20 [41]). Since the defendant was not convicted of an armed felony, the Supreme Court erred in determining that the defendant was not an eligible youth pursuant to CPL 720.10 (3) because there were no mitigating circumstances bearing directly upon the

manner in which the crime was committed, and in failing to determine whether the interest of justice would be served by adjudicating the defendant a youthful offender. Accordingly, the defendant's sentence was vacated, and the matter was remitted to the Supreme Court for resentencing after a determination as to whether the defendant should be afforded youthful offender status.

People v. Dhillon, 143 AD3d 734 (2d Dept 2016)

Supreme Court Failed to Place on the Record Any Reason for Not Adjudicating the Defendant a Youthful Offender

In May 2013, the defendant was convicted, upon his plea of guilty, of manslaughter in the first degree. On a prior appeal by the defendant, the Appellate Division determined that the Supreme Court had failed to consider whether the defendant should be treated as a youthful offender. Therefore, the judgment was modified by vacating the defendant's sentence, and the matter was remitted to the Supreme Court for resentencing after a determination by that court as to whether the defendant should be adjudicated a youthful offender. At resentencing, however, the Supreme Court failed to place on the record any reason for not adjudicating the defendant a youthful offender, and the record did not reflect that the court independently considered youthful offender treatment instead of denying such treatment because it was not part of the plea agreement. CPL 720.20 (1) requires that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea bargain. Compliance with CPL 720.20 (1) requires the sentencing court to actually consider and make an independent determination of whether an eligible youth is entitled to youthful offender treatment. Accordingly, the defendant's resentence was reversed and the matter was remitted to the Supreme Court for resentencing after a determination as to whether the defendant should be adjudicated a youthful offender.

People v McEachern, 145 AD3d 741 (2d Dept 2016)