# NEW YORK CHILDREN'S LAWYER

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# What Child Welfare Attorneys Need to Know about Shaken Baby Syndrome*

By Katherine Judson – March 25, 2015**

Shaken baby syndrome (SBS), now more commonly called abusive head trauma (AHT), is a frightening diagnosis, evoking scenes of an angry parent or caregiver violently shaking a baby back and forth, causing serious brain damage. It is a devastating abuse charge against a parent in family court. While it is indisputable that some children are abused, and some abuse results in head injuries, that is not the general understanding of the term "abusive head trauma." Instead, the term is typically applied to cases in which subdural hematoma, retinal hemorrhage, and cerebral edema are present, either separately or in some combination, with or without other injuries, and with or without external findings. This diagnosis is often incorrect because there are no standard diagnostic criteria, the medical findings are nonspecific, and the mechanism is unknown. It is necessary to seek a medical second opinion and consult with experts, particularly if the child has a history of illness or ongoing health problems, or the caregiver reports a possible alternative, like a fall or other accident.

Incorrect allegations of child abuse based on medical misdiagnosis harm children in two ways. First, if the diagnosis is incorrect, the real causes of a child's symptoms may be masked or ignored, leading to delayed care for other medical issues. If, for example, a metabolic disorder is mistaken for child abuse, the child will not receive proper care for the underlying disorder, potentially leading to more serious harm or a progression of the disease. Second, if the allegations are false, the child is wrongly deprived of a loving parent or caregiver (and so, potentially, are other children, like siblings or other family members). It is crucial, therefore, to carefully examine claims of child abuse based solely or largely on medical opinion.

### What Findings Does the Child Have, and What Do They Mean?

Allegations based solely or largely on medical diagnoses are problematic because diagnoses of all kinds can be incorrect. A 2012 article published in the *Journal of the American Medical Association* (*JAMA*) stated that "[c]ases of delayed, missed, and incorrect diagnoses are common, with an incidence in the range of 10% to 20%." Mark L. Graber et al., "Bringing Diagnosis into the Quality and Safety Equations," 308 *JAMA* 1211, 1211 (2012). No standardized diagnostic criteria for child abuse exist, and there are no objective medical tests to determine abusive causation. As a result, diagnoses are based on a combination of medical findings and patient history.

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Medical findings themselves can be misidentified. For example, in one notable case, the improper administration of a CT scan caused physicians to believe an infant had a fracture where none existed. *See* Valari Hyatt, "Painful Memories Persist for Parents," *Pekin Daily Times*, Oct. 17, 2012; Valari Hyatt, "Spreading the Word: Family Speaks Out about Unfounded Abuse Claims," *Pekin Daily Times*, Mar. 19, 2011. Patient history can be elusive and is often subject to opinions about whether the interviewee is being truthful, rather than objective fact. In a fairly common SBS/AHT scenario, a caregiver brings an ailing child to the hospital. Medical personnel find subdural hematoma, retinal hemorrhage, and cerebral edema. The caregiver reports an accident, like a fall, or simply claims to not know what is wrong with the child. This might then be characterized as an "inconsistent history," and used later to solidify a case for abuse. Statements like these could certainly be lies. But they might instead be entirely true.

**Illnesses and Other Nontraumatic Causes**

The subdural hematoma, retinal hemorrhage, and cerebral edema often associated with SBS/AHT can be caused by a number of illnesses and natural causes. The alternative causes of these medical findings are diverse and complex. They include congenital malformations, childhood stroke, coagulopathies, metabolic disorders, infectious disease, vasculitis, autoimmune conditions, cancers, poisons and toxins, complications from medical and surgical procedures, birth injuries, and genetic conditions. *See, e.g.*, Andrew P. Sirotnak, "Medical Disorders that Mimic Abusive Head Trauma," *in Abusive Head Trauma in Infants and Children: A Medical, Legal, and Forensic Reference* 191 (Lori Frasier et al. eds., 2006). While many conditions that mimic these findings have been identified, some certainly remain unknown, and some are extremely rare and require extensive and unusual testing, increasing the possibility that they might be missed in a routine work-up. In one case, an infant suffered repeated incidents of subdural bleeding and retinal hemorrhages over a period of years during which abuse was investigated but ruled out; all routine blood tests were normal, as were other, more complicated tests. Marc De Leeuw et al., "Delta-Storage Pool Disease as a Mimic of Abusive Head Trauma in a 7-Month-Old Baby: A Case Report," 20 *J. Forensic Leg. Med.* 520 (2013). Eventually, researchers discovered a rare disease using platelet aggregation and electron microscopy—testing that is rarely done. Unsurprisingly, parents whose children have undiagnosed illnesses cannot tell a doctor or social worker "what happened."

**Accidents**

The constellation of findings associated with SBS/AHT has been seen in accidents of widely varying apparent severity; these findings have multiple mechanisms. Similar findings have been seen in falls from toys, falls down stairs, falls from playground equipment, and falls from furniture. *See* Scott Denton & Darinka Mileusnic, "Delayed Sudden Death in an Infant Following an Accidental Fall: A Case Report with Review of the Literature," 24 *Am. J. Forensic Med. & Pathology* 371 (2003); Patrick E. Lantz & Daniel E. Couture, "Fatal Acute Intracranial Injury, Subdural Hematoma, and Retinal Hemorrhages Caused by Stairway Fall," 56 *J. Forensic Sci.* 1648 (2011); John Plunkett, "Fatal Pediatric Head Injuries Caused by Short-Distance Falls," 22 *Am. J. Forensic Med. & Pathology* 1 (2001). Crush injuries have been known to cause similar findings, including a report of an infant who was crushed when his mother fell while carrying him in a carrier on the front of her body, a toddler who was crushed when a television fell on top of him, and an infant who was crushed when an older child fell on him as he was lying on the floor. *See* P.E. Lantz et al., "Perimacular Retinal Folds from Childhood Head Trauma," 328 *BMJ* 754 (2004); Gregg T. Leuder et al., "Perimacular Retinal Folds Simulating Nonaccidental Injury in an Infant," 124 *Archives Ophthalmology* 1782 (2006); Patrick Watts & Ebube Obi, "Retinal Folds and Retinoschisis in Accidental and Non-Accidental Head Injury," 22 *Eye* 1514 (2008). Closed head injuries and fractures occur in stair falls, crib falls, falls from shopping carts, falls from infant seats, and falls from infant carriers. *See* Richard A. Greenberg et al., "Infant Carrier-Related Falls: An Unrecognized Danger," 25 *Pediatric Emergency Care* 66 (2009); Elaine S. Yeh, "Injuries Associated with Cribs, Playpens, and Bassinets among Young Children in the US, 1990–2008," 127 *Pediatrics* 479 (2011); Ashley E. Zielinski et al., "Stair-Related Injuries to Young Children Treated in US Emergency Departments, 1999–2008," 129 *Pediatrics* 721 (2012); "Baby Seats Recalled for Repair by Bumbo International Due to Fall Hazard," *Consumer Product Safety Commission* (Aug. 15, 2012); "Falls from Shopping Carts Cause Serious

Head Injuries to Children," *Consumer Product Safety Commission* (last visited Mar. 16, 2015).

It can be very difficult, if not impossible, to tell whether an injury was inflicted or accidental by looking at the injuries alone. Lawyers must be cautious when facing a claim that certain injuries *could not* have been caused by accident, especially when a parent or caregiver describes exactly that. It is crucial to examine the medical record closely and consult with appropriate experts, which may include physicians and engineers. Accidents are not always benign and abuse is not always fatal; simply because an injury is serious does not mean that it was inflicted.

**Determinations about Possible Perpetrators**

Sometimes the claim is made that certain injuries must have been inflicted with intent to injure or kill and that a child suffering from them would be immediately or almost immediately comatose, so the person with the child at the time of collapse can readily be identified as the perpetrator. Science and medicine do not support such an unequivocal claim.

The time between an injurious event and collapse is often called a "lucid interval." When the medical findings are the result of disease and not trauma, the term "lucid interval" is largely meaningless, because there is no single causative event. In cases like this, disease onset may be sudden and severe, or it may evolve over time, perhaps appearing better or worse at times, possibly culminating in collapse.

In accident and abuse cases, where trauma is the cause of the neurological findings, the lucid interval phenomenon is well-documented, and symptoms vary between individuals. Lucid intervals can be short or lengthy. Some patients experience severe symptoms right away, others do not. Some studies show intervals of 72 hours or more between injury and symptoms in cases that were serious enough to result in death. *See, e.g.*, M.G. Gilliland, "Interval Duration Between Injury and Severe Symptoms in Nonaccidental Head Trauma in Infants and Young Children," 43 *J. Forensic Sci.* 723 (1998). Even concerned caregivers who are closely watching for symptoms of brain injury following a fall may not see them. In fact, the signs and symptoms of brain injury can be so subtle that children with them present as lucid even to experienced health care providers. In one notable case, an injured child was under medical supervision for over 12 hours following her head injury but before her collapse, during which time she was evaluated and treated by physicians, none of whom recognized the seriousness of her situation. During this time, she was described as "fussy" and "clingy" but was awake and interactive; none of her doctors or nurses recognized her grave head injury. Robert W. Huntington, "Symptoms Following Head Injury," 23 *Am. J. Forensic Med. Pathology* 105 (2002).

**Violent Shaking as a Mechanism of Injury**

Shaking is an unlikely mechanism for the injuries often attributed to it. Biomechanical studies using models, laboratory animals, and computer simulations consistently show that shaking, even violent shaking of an infant by an adult, is an unlikely mechanism for the injuries often attributed to it, particularly when there is no external injury. The biomechanical research also makes it clear that, while violent shaking cannot be good for a child, the requisite forces would produce serious and obvious injury to the neck and cervical spine long before producing any brain injuries, but such neck injuries are rarely, if ever, seen. Shaking has not been corroborated or scientifically well-supported as a cause of subdural hematoma, retinal hemorrhage, and cerebral edema. It is important to remember that all of the concerns outlined above apply regardless of whether the claimed mechanism is shaking, impact, or blunt force trauma, or when no mechanism is named at all, or when the claim is simply that the findings are "abuse" or "nonaccidental."

**Conclusion**

SBS/AHT diagnoses are complicated, fraught with errors, and rest on an uncertain foundation. When faced with an abuse case that rests entirely or largely on a medical diagnosis, it is crucial to:

1. understand the basis for the diagnosis and recognize that medical findings often attributed to abuse can have many other causes;

2. understand that medical diagnoses of all kinds can be incorrect and that diseases and accidents can be mistaken for abuse;

3. recognize that it is usually not possible to

tell, from medical findings alone, whether a particular injury is the result of abuse or accident; and

4. recognize that diagnoses of abuse based on ambiguous or uncertain medical findings require second opinions.

Given the complicated nature of SBS/AHT allegations, the related scientific ambiguity, and the irreversible damage a false accusation can inflict on a family, it is vitally important for practitioners for all parties to carefully examine the medical evidence in a case of alleged SBS/AHT.

**Keywords:** litigation, children's rights, shaken baby syndrome, abusive head trauma, child abuse, medical misdiagnosis, false accusations



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

# NEWS BRIEFS

**SECOND DEPARTMENT NEWS**

**Continuing Legal Education Programs**

Save the Date! The ***Fall Mandatory Seminar*** for the panels in **Kings, Queens, and Richmond Counties** has been scheduled for **October 19, 2015**, and will be held at Brooklyn Law School from 5:30 p.m. to 8:30 p.m. The ***Fall Mandatory Seminar*** for the panels in **Westchester, Orange, Dutchess, Putnam and Rockland counties** has been scheduled for **October 23, 2015**, to be held at the Westchester County Supreme Court from 9 a.m. to 4 p.m. The ***Fall Mandatory Seminar*** for the panel in **Nassau County** has been scheduled for **November 12, 2015**, to be held at Hofstra University Law School from 6 p.m. to 9 p.m. The ***Fall Mandatory Seminar*** for the panel in **Suffolk County** has been scheduled for **November 17 , 2015**, to be held at the Suffolk County Supreme Court from 6 p.m. to 9 p.m. Further details for the above mentioned seminars to follow by e-mail.

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

On June 9, 2015, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, and the Kings County Integrated Domestic Violence Court co-sponsored ***Cultural Competency in Domestic Violence Response.*** The speakers were Sujata Warrier, Ph.D, Battered Women's Justice Project; Wendy Lau, J.D., Asian Pacific Islander Institute on Domestic Violence; Patricia Moen, Casa de Esperanza; Liberty Aldrich, J.D., Center for Court Innovation; and Robyn Mazur, J.D., Center for Court Innovation. This seminar was held at the Kings County Supreme Court, Brooklyn, New York.

On June 22, 2015, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, and the Kings County Integrated Domestic Violence Court sponsored ***Trauma and Children and the Effects on the Brain***. The presenter was Jordan Greenbaum, MD, Stephanie Blank Center for Safe and Healthy Children: Children's Healthcare of Atlanta. The moderator was the Hon. Patricia Henry, Kings County Supreme Court. This seminar was held at Kings County Supreme Court, Brooklyn, New York.

On July 9, 2015, the Appellate Division, Second Judicial Department, Hon. Randall T. Eng, Presiding Justice, and the Office of Attorneys for Children co-sponsored introductory training on the ***Crossover Youth Practice Model.*** The presenters were Krista Larson, LCSW, Director, Center on Youth Justice at the Vera Institute of Justice and Angela Conti, Esq., Attorney in Private Practice. This seminar was held at the Richmond Family Court, Staten Island, New York.

**Tenth Judicial District (Nassau County)**

On May 28, 2015, the Appellate Division, Second Judicial Department, the Office of Attorneys for Children, and the Nassau County Family Court Liaison Committee co-sponsored ***Representing Children with School Suspension Issues*** as a part of their ***Lunch and Learn Series***. This presentation was given by Hon. Robin M. Kent, Judge, Nassau County Family Court, and was held at the Nassau County Family Court, Westbury, New York.

On June 15, 2015, the Appellate Division, Second Judicial Department and the Office of Attorneys for Children co-sponsored ***Seeking Special Findings: Context, Nuts and Bolts, and the Judicial Perspective***. The presenters were Hon. Edmund Dane, Supervising Judge, Nassau County Family Court, and Professor Theo Liebmann, Director, Hofstra Law Clinic. This seminar was held at the Maurice A. Deane School of Law at Hofstra University.

**Please contact Gregory Chickel at gchickel@nycourts.gov to obtain copies of the accompanying handouts for any of the above mentioned programs.**

*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

### Annual Panel Re-Designation Application for 2016

Pursuant to Rules of the Appellate Division, Third Department, 22 NYCRR § 835.2, all panel members are required to submit to the Office of Attorneys for Children annually **by October 1st** a Panel Re-Designation Application in order to be eligible for re-designation on January 1st of each year. In an effort to make this process more convenient for you, we have changed the form from requiring a notary to an affirmation, and we request that you please return the completed form, together with a sample of your billing records, to our office **by email**, instead of regular mail, on or before October 1, 2015.

Included with the application is a waiver authorizing the Committee on Professional Standards for any Judicial Department to share information with the Office of Attorneys for Children. Additionally, we have added a form letter for you to submit on your office letterhead to the attorney grievance committee for the jurisdiction in which you maintain your principal law office, together with a stamped envelope addressed to the Office of Attorneys for Children.

Once your completed application has been received by this office, including billing records and the letter from attorney grievance, you will receive an email confirmation from our office. If you submit your application and do not receive a confirmation, you should contact our office immediately in order to ensure that your re-designation is not jeopardized.

If you were added to the panel in the calendar year 2015, you do not need to file this application until October 1, 2016.

### Liaison Committees

The Liaison Committees for the Third, Fourth and Sixth Judicial Districts met on Thursday, May 7, 2015 in Lake Placid. The committee meetings provide a means of communication between panel members and the Office of Attorneys for Children. The next Liaison Committee meeting will be held on Friday, October 30, 2015 at the Office of Attorneys for Children located at 286 Washington Avenue Extension in Albany, NY. If you would like any information about the last meeting or if you have any issues that you would like brought up at the next meeting, please contact your county's representative whose names can be found in our Administrative Handbook, pp. 18-22, nycourts.gov/ad3/oac.

### Training News

Training dates are available on the web page at nycourts.gov/ad3/oac, link to CLE and Seminar Schedule. You may wish to make note of the upcoming training dates:

**Fall 2015**

*Introduction to Effective Representation of Children*
Thursday, September 10 & Friday, September 11, 2015
Latham, NY

*Children's Law Update 2015*
Friday, September 25, 2015
Binghamton, NY

*Permanency Mock Hearing*
Wednesday, October 14, 2015
(half-day)
Albany, NY

*DV Conference* in collaboration with Association of Family & Conciliation Courts (AFCC)
Friday, October 23, 2015
Albany, NY

*Children's Law Update 2015*
Friday, November 6, 2015
Latham, NY

Additional seminar dates and agendas will be posted on the program's web page when available.

**Know the Law**

An *Appellate Practice* segment (1.5 CLE credits) has been added to the "Know the Law" series which is available through the CLE link on our web page, nycourts.gov/ad3/oac. The information provided includes an online video entitled "Handling Appeals as the AFC", with faculty members Cynthia Feathers, Esq., George J. Hoffman Jr., Esq., and Appellate Court Clerk, Jessica Whiting, providing a basic overview of appellate court practice in the Third Judicial Department. Written materials include a sample "AFC Responding Brief".

## FOURTH DEPARTMENT NEWS

### 2014 Honorable Michael F. Dillon Awards

Congratulations to the recipients of the 2014 Hon. Michael F. Dillon Awards. Each year two attorneys from each Judicial District in the Fourth Department are chosen to receive this award for their outstanding advocacy on behalf of children. The 2014 Awards were presented to the recipients by Presiding Justice Henry J. Scudder at a ceremony at the M. Dolores Denman Courthouse on June 23, 2015. The recipients are as follows:

**FIFTH JUDICIAL DISTRICT**

William Bartholomae, Onondaga County
John Amuso, Oneida County

**SEVENTH JUDICIAL DISTRICT**

Lisa Maslow, Monroe County
Jennifer Donlon, Steuben County

**EIGHTH JUDICIAL DISTRICT**

Sean Connolly, Chautauqua County
Leigh Anderson, Erie County

## UNTIMELY VOUCHERS

The 2014-15 fiscal year closes on September 14. Please send any untimely vouchers to the court, together with a "90-day" affirmation, immediately. This is **mandatory** for vouchers where the case ended on or before March 31, 2014.

## SEMINARS

You are not considered registered for a seminar until you have received a confirming e-mail from our office. If you do not receive a confirming e-mail within 3 business days from the date you registered, please call Jennifer Nealon at 585-530-3177.

### Fall Seminar Schedule

**September 10-11, 2015**

Fundamentals of Attorney for the Child Advocacy
Clarion Hotel/Century House
Latham, NY

**October 2, 2015**

Update
Location TBA
Olean, NY (half-day, not taped)

**October 8, 2015**

Update
Embassy Suites
Syracuse, NY (full-day, taped)

**October 30, 2015**

Topical - Trends in Custody
Clarion Hotel
Batavia, NY (full-day, taped)

# RECENT BOOKS AND ARTICLES

**ADOPTION**

Andrea B. Carroll, *Breaking Forever Families,* 76 Ohio St. L. J. 259 (2015)

Shohreh Davoodi, *More Than a Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates,* 90 Chi.-Kent L. Rev. 703 (2015)

Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare,* 66 Ala. L. Rev. 715 (2015)

**CHILD WELFARE**

Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors,* 93 N.C. L. Rev. 1281 (2015)

Naomi Cahn & June Carbone, *Growing Inequality and Children,* 23 Am. U. J. Gender Soc. Pol'y & L. 283 (2015)

Tara Grigg Garlinghouse & Scott Trowbridge, *Child Well-Being in Context,* 18 U. Pa. J. L. & Soc. Change 105 (2015)

Eliza Hirst, *How Social Security Benefits Can Help Youth In Care Achieve Permanency and Stability,* 34 No. 6 Child L. Prac. 81 (2015)

Corey Jessup & Monica K. Miller, *Fear, Hype, and Stereotypes: Dangers of Overselling the Amber Alert Program,* 8 Alb. Gov't L. Rev. 467 (2015)

Ellen Marrus, *Education in Black America: Is it the New Jim Crow?,* 68 Ark. L. Rev. 27 (2015)

**CHILDREN'S RIGHTS**

Joshua C. Albritton, *Intersexed and Injured: How* M.C. v. Aaronson *Breaks Federal Ground in Protecting Intersex Children From Unnecessary Genital-Normalization Surgeries,* 24 Tul. J. L. & Sexuality 163 (2015)

Anastasia M. Boles, *Centering the Teenage "Siren": Adolescent Workers, Sexual Harassment, and the Legal Construction of Race and Gender,* 22 Mich. J. Gender & L. 1 (2015)

Elizabeth A. Hohenstein, *The Supreme Court's* Chevron *Deference Misstep on Posthumously Conceived Children and Their Entitlements to Survivor Benefits,* 25 Geo. Mason U. Civ. Rts. L. J. 379 (2015)

Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools,* 68 Ark. L. Rev. 55 (2015)

**CHILD SUPPORT**

Tonya L. Brito et. al., *"I Do For My Kids": Negotiating Race and Racial Inequality in Family Court,* 83 Fordham L. Rev. 3027 (2015)

Stacy Brustin & Lisa Vollendorf Martin, *Paved With Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time,* 48 Ind. L. Rev. 803 (2015)

Deborah Lolai, *"You're Going to be Straight or You're Not Going to Live Here": Child Support for LGBT Homeless Youth,* 24 Tul. J. L. & Sexuality 35 (2015)

**CONSTITUTIONAL LAW**

J. Ravindra Fernando, *Three's Company: A Constitutional Analysis of Prohibiting Access to Three-Parent In Vitro Fertilization,* 29 Notre Dame J. L. Ethics & Pub. Pol'y 523 (2015)

Tracy Law, King v. Governor of New Jersey: *Does the First Amendment Allow Counselors to Provide Harmful Therapy to Minors?,* 24 Tul. J. L. & Sexuality 215 (2015)

Kaylee Niemasik, *Teen Pregnancy in Charter Schools: Pregnancy Discrimination Challenges Under the Equal Protection Clause and Title IX,* 22 Mich. J. Gender & L. 55 (2015)

**COURTS**

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Hon. Fernando Camacho, *Sexually Exploited Youth: A View from the Bench,* 31 Touro L. Rev. 377 (2015)

Sarah J. Kniep, *What Do Courts Do Now?: The Effects and Potential Solutions in the Aftermath of* Chafin v. Chafin, 133 S. Ct. 1017 (2013), 93 Neb. L. Rev. 750 (2015)

Yvette McGee Brown & Kimberly A. Jolson, *Chief Justice O'Connor's Juvenile Justice Jurisprudence: A Consistent Approach to Inconsistent Interests,* 48 Akron L. Rev. 57 (2015)

**CUSTODY AND VISITATION**

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Luis E. Insignares & Brian J. Kruger, *The Gay Divorcee: Marriage Equality in Florida and the Nation,* 89-JUN Fla. B. J. 98 (2015)

Carlyn S. McCaffrey McDermott, *The Use of Trusts to Structure Divorce Settlements,* 27 J. Am. Acad. Matrim. Law. 29 (2014 - 2015)

**DOMESTIC VIOLENCE**

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Michele Berger, *We Need More Than Locks: A Call for Intimate Partner Violence Education, Training, and Reform in the Workplace,* 49 U.S.F. L. Rev. 215 (2015)

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Courtney Lauren Anderson, *The Disparate Impact of Shuttered Schools,* 23 Am. U. J. Gender Soc. Pol'y & L. 319 (2015)

Cari Carson, *Rethinking Special Education's "Least Restrictive Environment" Requirement,* 113 Mich. L. Rev. 1397 (2015)

Ruth Colker, *Blaming Mothers: A Disability Perspective,* 95 B. U. L. Rev. 1205 (2015)

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Janet R. Decker & Kari A. Carr, *Church-State Entanglement at Religiously Affiliated Charter Schools,* 2015 B.Y.U. Educ. & L. J. 77 (2015)

Rebekah Elliott, *The Real School Safety Debate: Why Legislative Responses Should Focus on Schools and not on Guns,* 57 Ariz. L. Rev. 523 (2015)

Neelam Takhar, *No Freedom in a Ship of Fools: A Democratic Justification for the Common Core State Standards and Federal Involvement in K-12 Education,* 26 Hastings Women's L. J. 355 (2015)

Natasha M. Wilson & Robert N. Strassfeld, *Turnaround in Reverse:* Brown, *School Improvement Grants, and the Legacy of Educational Opportunity,* 63 Clev. St. L. Rev. 373 (2015)

**FAMILY LAW**

Deborah L. Brake, *On Not "Having it Both Ways" and Still Losing: Reflections on Fifty Years of Pregnancy Litigation Under Title VII,* 95 B. U. L. Rev. 995 (2015)

John A. Lynch, Jr., *Military Law: Time to Mandate Best Interests of the Child to Restrict Deployments of Parents That Affect Preschool Children,* 55 Santa Clara L. Rev. 131 (2015)

**FOSTER CARE**

DeLeith Duke Gossett, *Take off the [Color] Blinders: How Ignoring the Hague Convention's Subsidiarity Principle Furthers Structural Racism Against Black American Children,* 55 Santa Clara L. Rev. 261 (2015)

**INTERNATIONAL LAW**

Joseph O'Rourke, *Education for Syrian Refugees: The Failure of Second-Generation Human Rights During Extraordinary Crises,* 78 Alb. L. Rev. 711 (2014-2015)

**JUVENILE DELINQUENCY**

Erin M. Heidrich, *Re-Examining Juvenile Seizures in Light of* Roper, Graham, *and* J.D.B., 42 N. Ky. L. Rev. 89 (2015)

Shani King et. al., *Cost-Effective Juvenile Justice Reform: Lessons From the Just Beginning "Baby Elmo" Teen Parenting Program,* 93 N.C. L. Rev 1381 (2015)

Tracy A. Rhodes, *Cruel and Unusual Before and After 2012:* Miller v. Alabama *Must Apply Retroactively,* 74 Md. L. Rev. 1001 (2015)

Tara Schiraldi, *For They Know Not What They Do: Reintroducing Infancy Protections for Child Sex Offenders in Light of* In Re B. W., 52 Am. Crim. L. Rev. 679 (2015)

Brenda V. Smith, *Boys, Rape, and Masculinity: Reclaiming Boys' Narratives of Sexual Violence in Custody,* 93 N.C. L. Rev. 1559 (2015)

**TERMINATION OF PARENTAL RIGHTS**

Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents With Mental Disabilities,* 26 Stan. L. & Pol'y Rev. 307 (2015)

# FEDERAL COURTS

**"Settled" Defense Demonstrated Under Article 12 of the Hague Convention**

Petitioner father and defendant mother met in Poland in 1996. They married in 2003 in Brooklyn, so that defendant's mother, who lived in New York, could attend the wedding. Soon afterwards they returned to Poland. Sons K.G. and M.G. were born in 2004 and 2008. Defendant alleged that petitioner became abusive and controlling, and often hit her. Petitioner admitted that their relationship had problems but vehemently denied hitting or abusing defendant. Because the factual picture was murky given the lack of supporting documentation, the District Court declined to decide whether the relationship was marred by physical abuse. Defendant left Poland with the children in 2011 and moved in with her mother. Defendant did not inform petitioner that she was taking the children, or obtain his consent to do so. Defendant filed for divorce in 2012. On competing petitions, Family Court granted defendant legal and physical custody and granted petitioner visitation in the United States. The District Court denied petitioner's application under the Hague Convention and International Child Abduction Remedies Act to return to Poland with the children. The children's removal from Poland likely contravened petitioner's custody rights under Polish law. However, even if the removal was wrongful, defendant established that the children were "settled" in the United States under Article 12 of the Hague Convention. It was undisputed that the Hague Convention petition was filed almost three years after defendant's removal of the children from Poland. Defendant met her burden of demonstrating by a preponderance of the evidence that the children were settled in their current environment. The children had a stable home environment, a solid group of friends, and they regularly attended school and church. Despite some uncertainty about defendant's financial stability and about the children's future immigration status, all other factors pointed to the fact that the children had become so settled in their new environment that repatriation was not in their best interest.

*Gwiazdowski v Gwiazdowska*, ___ FSupp3d ___, 2015 WL 1514436 (EDNY 2015)

**Summary Judgment Granted Where Defendants Breached Duty to Assist Disabled Young Woman in Transition From Foster Care to Adult Placement Facility**

Plaintiff The Judge Rotenberg Educational Center, Inc. (JRC) sought payment from defendants Suffolk County and Suffolk County Department of Social Services (SCDSS) for educational and housing services that the JRC provided to RP, a disabled young woman. Approximately six months before RP aged out of foster care, the JRC and SCDSS filed paperwork with the New York State Office of Persons with Developmental Disabilities (OPWDD), seeking funding for adult services for RP. OPWDD services for RP were denied at multiple levels of review. RP aged out of the foster care system five days after the OPWDD's denial of services in its last step review. Thereafter, the New York Office of Mental Health (OMH) notified the JRC and SCDSS that no housing currently was available for RP through OMH. After an administrative hearing, RP was denied Medicaid eligibility to receive adult residential placement and treatment services through OPWDD. The SCDSS caseworker subsequently instructed JRC staff to take RP to a homeless shelter. Instead, RP remained at the JRC's facilities until defendants located suitable housing for her. Defendants stated that they did not anticipate a final discharge to a homeless shelter and that the Suffolk County Adult Protective Services would have opened a case for RP and begun the process of obtaining an OMH placement with the adult services program. The District Court granted plaintiff's motion for summary judgment, finding that defendants' breach of their duty to assist RP in her transition from foster care to an adult placement facility created an emergency situation that the JRC mitigated. Under the terms of the Agreement for Purchase of Foster Care For Children, defendants owed RP, a third-party beneficiary of the agreement, a duty to prepare for her transition out of foster care. Defendants breached this duty by failing to provide RP with an adequate permanency discharge plan; issue written notice of discharge ninety days prior to RP's discharge from foster care; appoint a community resource person to assist RP with her transition from foster care; and provide RP with proper post-discharge supervision. Given RP's history of aggression and

violent behavior, defendants should have engaged in more thorough planning to assure that RP was supervised in a manner that would not endanger her safety and the safety of those around her. Defendants violated Social Services Law § 398 by failing to submit a report to the Council on Children and Families on RP's needs for adult services after she reached the age of twenty-one. Defendants violated requirements regarding "APPLA," which was a "permanency planning goal to assist foster care youth in their transition to self-sufficiency by connecting the youth to an adult permanency resource, equipping the youth with life skills and, upon discharge, connecting the youth with any needed community and/or specialized services." 18 NYCRR § 430.12(f). Defendants were prohibited from discharging RP from foster care to a shelter, single room occupancy hotel or any other housing situation that was not reasonably expected to last for more than one year. Defendants' decision to discharge RP to a shelter, even if for a brief period, was a direct violation of their duty under APPLA.

*The Judge Rotenberg Educational Center, Inc. v. Blass*, ___ FSupp3d ___, 2015 WL 1412634 (EDNY 2015)

**Hague Convention Petition for Son's Return to Greece Denied Where Father Consented to Move and Age and Maturity Exception Applied**

Petitioner was a U.S. and Greek citizen who lived in the United States in the 1990s. Respondent was a Canadian citizen of Greek heritage who moved to New York in 1968. The parties met in the 1990s when respondent's daughter was two or three years old, and married in Greece in 2001. They decided to relocate with respondent's daughter to Greece after the events of September 11, 2001. The parties' son, D.A., was born in Greece in 2002, and lived there until respondent brought him to the United States in 2013. For most of the time that he was living in Greece, D.A. lived with his mother, father and sister in the town where many of petitioner's family members resided. Petitioner, however, often stayed in Athens instead, because his business was located there. D.A. had few friends, and he did not spend much time with the relatives on his father's side. Beginning in fourth grade, as it became increasingly more difficult for D.A. to learn in Greek, he developed anxiety about going to school. As a result, he was absent from school for about one month in fourth grade. Around that time, D.A. and his parents began discussing the possibility of D.A. going to school in the United States. Respondent repeatedly raised the topic of moving, and petitioner told her several times that respondent and the child could move. Respondent recorded one such conversation out of fear petitioner might change his mind. In the summer of 2013, respondent began planning the move in earnest. In December 2013, respondent and D.A. left Greece to travel to the United States. By that time, the house was almost empty. Petitioner was at the home so that he could say goodbye. There was no discussion about whether respondent and D.A. would be returning to Greece. In January 2014, petitioner filed a complaint pursuant to Article 13 of the Hague Convention, which sought D.A.'s return to Greece. The District Court denied the petition. A preponderance of credible evidence established that petitioner consented to D.A. moving with his mother and sister from Greece to the United States, and to his retention in the United States thereafter. This evidence included the testimony of respondent, D.A., and D.A.'s sister, as corroborated by the audio recording of petitioner stating that he had given permission for them to move. Further, the evidence about respondent's substantial preparations for the move, including the sale of numerous household items and furniture, and packing of numerous boxes, contradicted petitioner's claim that he had no idea respondent was planning to move to the United States with D.A. Furthermore, the District Court found that the age and maturity exception applied to permit the Court to refuse to order D.A.'s return to Greece. The Court's finding was based largely on its interview of D.A. D.A.'s reasons for wanting to remain in the United States were rational and well-considered.

*Matter of Adamis v Lampropoulou*, ___ FSupp3d ___, 2015 WL 2344079 (EDNY 2015)

**School District Not Compelled to Contract With Non-approved School to Provide FAPE**

A parent brought an action against the New York City Department of Education under the Individuals with Disabilities Education Act, contending that the student, who had been diagnosed with autism, was denied access to a Free and Appropriate Public Education (FAPE). The student had a history of volatile conduct at school. She fled from schools, and on one occasion,

had an altercation on a school bus that resulted in a police officer handcuffing her arm, resulting in injury. Because the student had Ehlers-Danlos Syndrome, she could not be restrained without risking her health. The student was also suspended from school multiple times. After a due process hearing initiated at the parent's request, the Impartial Hearing Officer (IHO) ordered that the student should be referred to the Central Based Support Team for the consideration of all options for the student's placement, including non-approved, non-public schools. The IHO decision observed that existing placements had been inappropriate for the student, and that the student was ultimately very difficult to instruct and very difficult to place. The IHO decision noted that courts had wide discretion to ensure that students received a FAPE, and agreed with the parent that any school search should include non-public schools that were not state-approved. The State Review Officer (SRO) reversed the portion of the IHO decision concerning the student's placement, concluding that the IHO did not have authority to direct defendant to identify a non-approved, non-public school as a potential placement. The SRO decision noted that under New York law, school districts were authorized to contract only with non-public schools that had been approved by the Commissioner of Education. The SRO decision also observed that although a parent may unilaterally place a student in a non-approved, non-public school, and then seek reimbursement or direct funding from the district, there was no legal basis to direct the district to prospectively identify a non-approved placement. The District Court granted defendant's motion for summary judgment. *Florence County School District Four v Carter ex rel. Carter*, 510 U.S. 7, did stand for the proposition that a school district could be mandated to identify and place a student in a non-approved, private school. Carter acknowledged the reimbursement remedy in the event that the student was denied a FAPE and the parent unilaterally chose a placement for a student. *Antkowiak v Ambach*, 838 F.2d 635, and the related statutes and regulations govern school districts' options as part of the efforts to provide placement. The fact that a school district could consider placement in a private school did not mean that it could place the student at any private school, including one that did not meet the Commissioner's approval standards. The SRO properly concluded that *Carter* did not overrule *Antkowiak*.

*Z.H. v. New York City Dept. of Educ.*, ___ FSupp3d ___, 2015 WL 3414965 (SDNY 2015)

# COURT OF APPEALS

**Respondent Uncle Through Marriage Was Person Legally Responsible for Niece**

Respondent was the uncle of the subject child through marriage, and the father of three children. The Administration for Children's Services (ACS) filed petitions against respondent alleging that, according to statements made by the subject child, respondent forcibly attempted to have sexual intercourse with the subject child, who was 11 years old at the time of the incident. Respondent moved to dismiss the petition for lack of jurisdiction, arguing that he was not a person legally responsible (PLR) as defined in Family Court Act Section 1012 (g). Family Court denied respondent's motion. The matter proceeded to a hearing, and Family Court held that respondent abused the child by committing an act of attempted sexual abuse in the second degree, and found that, as a result, he had derivatively neglected his own children. The Appellate Division affirmed. A four-Judge Court of Appeals majority also affirmed. Under FCA § 1012 (g) and *Matter of Yolanda D.,* 88 N.Y.2d 790, respondent was a PLR for his niece. With respect to the frequency and nature of the contact, and the duration of the respondent's contact with the child, under *Yolanda D.*, the child had informed the responding police officer that she had been staying at respondent's home for a week prior to the incident. In addition, the child's mother testified that before this incident, the child had visited respondent's home eight or nine times and four of those occasions were overnight visits. There was also testimony that respondent and the child interacted at family functions such as family reunions, holidays and birthday parties. Thus, the total contacts between respondent and the child were significant. As to the nature and extent of the control exercised by respondent over the child's environment, this incident occurred in respondent's home during an overnight visit, and he was the only adult present at the time. The child's mother testified that she expected her sister to care for the child, but if the sister was not there, then respondent was expected to care for the child. Finally, in considering respondent's relationship to the child's parents, respondent was related to the child through marriage. Respondent's wife's sister was the child's mother. Although the existence of a familial relationship was not dispositive, it was appropriately considered in determining whether a respondent was a PLR. The partial dissent asserted that the record was not clear as to the contacts between respondent and the child, and the majority's analysis failed to consider respondent's actual responsibilities for the child's care, or the nature of the interactions during the times when they were supposedly in contact. The Court unanimously upheld the derivative neglect findings with respect to respondent's own children, ages 11, 10 and 2. At the time of the abuse, respondent's two daughters were present in the home and one was within earshot.

*Matter of Trenasia J.*, 25 NY3d 1001 (2015)

**Admission of Statement Not Harmless Beyond a Reasonable Doubt Where the Improper Admission of Statement Undermined, If Not Eviscerated, Respondent's Justification Defense**

The 11-year-old respondent was charged in Family Court with the commission of acts that, if done by an adult, would constitute, among other things, assault in the first degree and third degree, and attempted assault in the first, second and third degrees. The charges arose out of an altercation respondent had with the 12-year-old complainant, during which the complainant was stabbed. Respondent moved to suppress a statement that he made to the police officers who responded to the scene, as well as a knife recovered from respondent's apartment. When the officers responded to the location of the incident, they saw the complainant and a crowd of people, including respondent's adult sister. The sister stated that respondent had been bullied by the complainant, that the two boys had fought and that respondent had stabbed the complainant. The sister took the officers to respondent's apartment. Without administering *Miranda* warnings, one of the officers asked respondent "what happened?" Respondent responded, in sum and substance, that he got into a fight with the complainant, who was bothering him, that he went to find his brother but could not find him, and that he came back with a knife and stabbed the complainant. Family Court denied the suppression motion, noting that respondent's adult sister invited the police into the home, and took the lead with respect to recovery of the knife. After the

*Matter of Delroy S.*, 25 NY3d 1064 (2015)

fact-finding hearing, at which respondent interposed a justification defense, Family Court adjudicated him a juvenile delinquent and placed him on probation for a period of eighteen months. The Appellate Division held that respondent's statement should have been suppressed on the ground that it was the product of a custodial interrogation without *Miranda* warnings because, under the circumstances, a reasonable 11-year-old would not have felt free to leave. However, the Appellate Division concluded that admission of the statement was harmless beyond a reasonable doubt. The Appellate Division modified the order of disposition only to the extent of vacating the findings as to petit larceny and criminal possession of stolen property and dismissing those counts. The Court of Appeals reversed. There was no basis to disturb the Appellate Division's holding that respondent was subject to a custodial interrogation and that his statement should have been suppressed. However, the Appellate Division erred in concluding that admission of the statement was harmless beyond a reasonable doubt. The complainant, who was older, taller, heavier and stronger than respondent, entered respondent's building and seized a scooter from respondent that he thought was his. After the boys engaged in a tug-of-war fight over the scooter, the complainant left the building. He returned with his twin brother and nine or ten friends and started a second fight by yelling at respondent, with his friends cheering him on. While the complainant had his hands above respondent's chest on his neck, the group was yelling "get him." Respondent did not use the knife until after this potentially deadly force was used on him. Even if respondent had, as claimed by the prosecution, escaped and stepped some feet away from the complainant, that would not have proved that the complainant was done with beating on the much smaller respondent, especially given the crowd that was cheering on the combating boys. Thus, there was not overwhelming evidence that respondent knew that, with complete personal safety, he could have retreated. Given that there were two separate fights, and that the police officer's summary of respondent's statement appeared to conflate the fights and created the impression that respondent paused in the course of one fight to secure a knife with which to stab the complainant, the improper admission of the statement undermined, if not eviscerated, respondent's justification defense.

# APPELLATE DIVISIONS

**ADOPTION**

**Father's Consent to Children's Adoption Not Required**

Family Court, upon a fact-finding and disposition order, found that respondent father's consent to adoption was not required and transferred custody and guardianship of the children to petitioner agency and ACS for the purpose of adoption. The Appellate Division affirmed. The court properly determined that the father's consent was not required for the children's adoption because he did not provide the children with financial support. He failed to demonstrate that he provided any support for the children's care, except for a few toys and minimal clothing, even though he was employed intermittently and had relatively few living expenses. It was in the best interests of the children to be adopted. There was no indication that the father was capable of caring for the children and they were thriving in their long-term, preadoptive kinship home and had developed strong bonds with their foster mother.

*Matter of Clarence Davion M.,* 124 AD3d 469 (1st Dept 2015)

**Father Adequately Preserved His Right to Contest Adoption of His Child**

Family Court dismissed petitioner adoptive parents' application for adoption of subject child, granted biological father's application for custody and ordered petitioners to give the subject child to her father. The Appellate Division affirmed. Here, the biological parents resided together in South Carolina but later separated and the mother moved to New York City. She discovered she was 35 weeks pregnant but did not advise the father, and was referred to a private adoption agency, where she executed an extrajudicial surrender in which she declined to identify the father. Two days after the child's birth, the child was placed by the agency with petitioners. One month later, the mother disclosed to the father of her pregnancy and the birth of the child and a few days later she advised the agency she wanted to revoke her surrender but the agency refused to return the child. Later that same month, petitioners filed an application seeking approval of the adoption. Two months later, the father filed a pro se petition for paternity and later, he filed a second application for custody. Family Court initially issued a consent order on the adoption application, but one month later, issued a final order dismissing the adoption petition and granting custody to the father. The agency's appeal of the order was expedited due to the compelling emotional implications for the parties but its request for a stay of the initial adoption consent order was denied. Although there were some errors in compilation of the record and appeal, the Appellate Division deemed it had the discretion to treat the notice of appeal as valid "despite the notice being premature or containing an inaccurate description of the order being appealed". *Matter of Fifield v Whiting,* 118 AD3d 1072, 1073 (2014). The merits of the adoption-consent order were reviewed as well. Although the record did not contain the transcript of the consent order because of the poor recording quality, the agency did not contest the court's factual findings and the father did not indicate his position would be prejudiced by the absence of the transcript. The agency sole argument was that Family Court's legal analysis was flawed. Generally, a father of a child born out-of-wedlock is entitled to full protection of his relationship with the child, including the right to deny consent to an adoption at birth only if "he asserts his interest promptly and manifests his ability and willingness to assume custody". *Matter of Gionna L.*, 33 AD3d 1169, 1168 (2006). Evaluation of a father's conduct includes, among other things, his public acknowledgment of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child and other factors. In this case, the father had paid 90% of the household expenses when the parties resided together, the mother was not visibly pregnant when she resided with him nor did she realize she was pregnant. The father was not advised of her pregnancy and therefore could not contribute to any pregnancy related expenses. The agency made no reasonable efforts to notify the father, and in fact, urged the mother not to identify the father. Once the father became aware of the child, he pursued legal action, despite the fact he lived in another state and was unrepresented by counsel. Once he learned of child, he submitted an affidavit stating he was making arrangements to pay the uncovered costs related to the child's birth.

Furthermore, he had a job and residence and was able to take immediate custody of the child. Based on these factual findings and the relevant proof in the record, the court did not err in determining the father had adequately preserved his right to contest the adoption of his child.

*Matter of Isabella TT.,* 127 AD3d 1330 (3d Dept 2015)

**CHILD ABUSE AND NEGLECT**

**Court Properly Deemed Respondent in Default**

Family Court, upon a fact-finding order, found that respondent sexually abused his daughter and derivatively neglected her brother. The Appellate Division dismissed the order because it was upon default and thus nonappealable. Respondent failed to appear on the second date of the fact-finding hearing and the court continued the hearing as an inquest. The court properly deemed respondent in default because his trial counsel did not state that she wished to proceed in his absence and was authorized to do so. Respondent failed to preserve his ineffective counsel claim, and, in any event, it was unavailing.

*Matter of Iyana W.*, 124 AD3d 418 (1st Dept 2015)

**In-Camera Review of Child's Medical Records Did Not Show Evidence of Mental Health Issues Reflecting on Credibility**

Family Court, after a fact-finding hearing, determined that respondent father derivatively abused his elder son and derivatively neglected his younger son. The Appellate Division had held the appeal in abeyance and remanded the matter for an in camera review of the elder son's mental health records so the court could determine whether the records were relevant to the issue of the child's credibility, before making a disclosure ruling. The court conducted the review and found no evidence that the child had fabricated the allegations of abuse, that he had been coached, or that he had mental health issues that affected his ability to tell the truth. The court concluded that the interests of justice did not outweigh the child's need for confidentiality and denied the father's motion to subpoena and review the mental health records. The Appellate Division, upon its review of the record and the mental health records, affirmed. The findings of abuse and derivative neglect were supported by a preponderance of the evidence. The testimony of the elder son regarding the father's sexual abuse of him on multiple occasions was detailed and specific and, other than blanket denials, the father presented no evidence to refute it.

*Matter of Dean T.,* 124 AD3d 548 (1st Dept 2015)

**Order Modified; Respondent Boyfriend Derivatively Abused Mother's Four Children**

Family Court found, among other things, that respondent mother neglected her child Lucy and derivatively neglected her four other children, respondent mother's boyfriend abused and neglected Lucy, and denied petitioner's applications for additional findings of derivative abuse against the mother's other four children. The Appellate Division modified by finding that the mother's boyfriend derivatively abused the mother's other four children. The court properly determined that the mother's boyfriend was a legally responsible person who abused Lucy and, respectively, neglected and derivatively neglected her and the other four children. However, the court should have found that the boyfriend also derivatively abused the other four children. The findings of derivative neglect against both respondents with respect to Lucy and the other children were proper. The boyfriend's abuse of Lucy while the other children were in the room, and the mother allowing the boyfriend back in the house after learning of his abuse, placed all five children at risk.

*Matter of Lucy T.,* 125 AD3d 466 (1st Dept 2015)

**Respondent Mother Neglected Two-Year-Old Child by Leaving Him Alone For One Hour**

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The finding of abuse was supported by a preponderance of the evidence. The evidence established that respondent left her then two-year-old son alone in her apartment for an hour and that he was discovered in the hallway outside the apartment while she was out. This conduct placed the child in imminent danger of physical or emotional harm and constituted

neglect, even though the child was unharmed.

*Matter of Malachi H.*, 125 AD3d 478 (1st Dept 2015)

**Parents Failed to Substantially Comply With ACD**

Family Court determined that respondent parents failed to substantially comply with an ACD and granted petitioner agency's motion to restore the matter for a fact-finding hearing on the underlying neglect petition. The Appellate Division affirmed. The parents' objections to the untimeliness of the proceedings were not preserved. Although the AD was concerned about the amount of time the case took, the record contained some explanation for the delay and the parents did not object to the adjournments. The court properly found that the parents failed substantially to observe the terms and conditions of the ACD order. The caseworker testified that the mother failed to complete services and the foster mother and caseworker testified that the father violated an order of protection.

*Matter of Tristen O.*, 125 AD3d 525 (1st Dept 2015)

**Court Erred in Dismissing Petition**

Family Court dismissed a petition alleging that respondent parents neglected the subject child by failing to exercise a minimum degree of care in providing the child with proper supervision and guardianship. The Appellate Division reversed, granted the petition, and remitted for a dispositional hearing. A preponderance of the evidence demonstrated that the father was convicted upon his guilty plea of attempted sodomy in the first degree and that he was a level two sex offender. The father admitted that the conviction arose from an incident where he placed his penis in the mouths of his six-year-old son and nine-year-old niece. After he was released from prison, the father attended a sex offender program where he admitted he pled guilty, but denied committing the acts. At the fact-finding hearing, the father testified that he regretted pleading guilty because he did not have sexual contact with his son or niece and it resulted in his registry as a sex offender. The father's failure to accept responsibility for his sex offenses posed an imminent risk to the subject children. Although 10 years had passed since the conviction, the adjudication of neglect was warranted because the father failed to show that his proclivity for abusing children had changed. The mother acknowledged that she was aware the father had a sex offense conviction and that he was a registered sex offender, but she nevertheless allowed the father to be the child's sole caretaker and to have unsupervised access with the child.

*Matter of Cashmere S.*, 125 AD3d 543 (1st Dept 2015)

**Father Neglected Child by Reason of DV Against Mother**

Family Court determined that respondent father neglected the subject child. The Appellate Division affirmed. The court properly found that petitioner met its burden of demonstrating by a preponderance of the evidence that the father engaged in domestic violence against the mother in the child's presence and that this conduct was detrimental to the child's physical and emotional health.

*Matter of Tanveer L.*, 125 AD3d 556 (1st Dept 2015)

**Respondent Neglected Children by Storing Illegal Guns Where Children Had Access**

Family Court determined that respondent mother neglected the subject children. The Appellate Division modified by vacating the neglect finding with respect to the child Moises because he had turned 18 years old. The court's finding of neglect was supported by a preponderance of the evidence, which established that the mother was storing illegal guns in the home where the children, including two teenagers, had access to them. Respondent admitted that she kept guns in the home, her brother testified that he saw the mother taking a gun he believed to be loaded from four men to store in the home while three of the children were present, and the teenage daughter made out-of-court statements that her mother stored guns in the home, which made her feel unsafe, and that her mother did not object when she held one of the guns. The court properly drew the strongest possible negative inference from respondent's failure to testify or offer any evidence.

*Matter of Ninoshka M.*, 125 AD3d 567 (1st Dept 2015)

**Child Found Neglected Based Upon Mother's Abuse of Other Child**

Family Court denied respondent mother's application challenging the remand of the subject child. The Appellate Division affirmed. Actual injury was not a condition of finding imminent risk and proof of the neglect or abuse of one child was admissible evidence on the issue of abuse or neglect of another child. Here, the court properly found that the child was at risk of imminent harm based upon the caseworker's testimony that the mother locked the child's older sister out of the house on cold and snowy days, with only a light jacket, that she withheld food as a form of punishment, and that there was a prior neglect finding against the mother based upon the same conduct directed at the child's older brother. Further, the mother refused to consent to mental health and occupational therapy to improve the child's functioning and behavior despite the efforts of school personnel.

*Matter of Jackie B.*, 126 AD3d 412 (1st Dept 2015)

**Derivative Abuse of Child Based Upon Finding of Abuse of Other Child**

Family Court granted petitioner ACS's motion for summary judgment, finding that respondent mother derivatively abused the subject child. The Appellate Division affirmed. Petitioner made a prima facie showing of derivative abuse with respect to the subject child, based upon prior findings of abuse as to her older children, including a finding that she abused her then one-year-old daughter who suffered severe head trauma consistent with violent shaking. The findings, entered less than two years before the filing of the instant petition, which was brought five days after the subject child's birth, were sufficiently close in time to support the conclusion that respondent's parental judgment remained impaired. The entry of the abuse finding, which was entered on consent, constituted proof that the older child was abused, and was admissible on the issue of derivative abuse. There was no triable issue of fact regarding an amelioration of the conditions that led to the prior finding. The two older children had not been returned to respondent based upon findings that their continued placement was required to further their best interests and safety needs.

*Matter of Jayden C.*, 126 AD3d 433 (1st Dept 2015)

**Finding of Neglect Supported by Evidence of Intentional Deprivation of Shelter and Care**

Family Court determined that respondent mother neglected her son by failing to provide for his shelter and care and derivatively neglected her daughter. The Appellate Division affirmed. A preponderance of the evidence supported the court's finding that the mother neglected her son by intentionally depriving him of shelter and care. The evidence established that the mother refused to bring her then 16-year-old son home from the hospital, had him arrested without basis upon his return, and refused to go to Criminal Court to pick him up, which resulted in an order of protection that effectively rendered him homeless. Her conduct manifested an intention to abdicate her parental responsibilities, which placed the child in imminent risk. Further, her conduct demonstrating such a flawed understanding of her parental responsibilities, supported the findings of derivative neglect with respect to her daughters.

*Matter of Jason G.*, 126 AD3d 489 (1st Dept 2015)

**Respondent Abused and Neglected Her Child by Causing the Child to Sustain Burns to Feet**

Family Court, upon a fact-finding determination that respondent mother abused and neglected her daughter and derivatively abused and neglected her sons, placed the children in the custody of petitioner until completion of the next permanency hearing. The Appellate Division affirmed. Petitioner demonstrated by a preponderance of the evidence that respondent abused and neglected her daughter by causing the child to sustain second degree immersion burns to both feet. The testimony of the pediatrician who examined and treated the child when she was brought to the emergency room on the evening of the incident, established that the injuries were not sustained accidentally and that the injuries were not sustained as suggested by respondent. In light of the severity and nature of the abuse and neglect inflicted by respondent upon her daughter, the finding of derivative neglect as to the other children was proper, even without direct evidence that respondent had actually abused and neglected them.

*Matter of Kaiyeem C.,* 126 AD3d 528 (1st Dept 2015)

**Mother's Mental Illness Created Imminent Risk to Child**

Family Court, upon a fact-finding order, found that respondent mother neglected her child. The Appellate Division affirmed. The finding of neglect was supported by a preponderance of the evidence. Respondent's untreated mental illness created an imminent risk of harm to the child. Although respondent and the child were living in an apartment with broken windows, cabinets and drawers, and no working gas, respondent refused access to the landlord or the utility company to make repairs, resulting in squalid living conditions and the eventual eviction of respondent and the child from the apartment. Also, respondent's mental condition rendered her unable to provide the child with adequate supervision and guardianship resulting in the child being late to school excessively, which hindered his education and caused him to be depressed, anxious, and angry.

*Matter of Joele Z. F.*, 127 AD3d 641 (1st Dept 2015)

**Mother Failed to Protect Children From Boyfriend's Excessive Punishment**

Family Court, after a hearing, determined that respondent mother neglected her six children. The Appellate Division affirmed. A preponderance of the evidence supported the finding that respondent's boyfriend inflicted excessive corporal punishment on three of respondent's children and that respondent knew or should have known about the abuse but failed to take action to protect the children. The children's out-of-court statements were cross-corroborated by each other's statements and by the caseworker's observation of an injury sustained by one of the children. The caseworker testified that respondent acknowledged knowing about incidents where the boyfriend punched one child in the mouth, and that she did not address the situation. Further, respondent's behavior towards the three children who were subject to the excessive punishment demonstrated a sufficiently faulty understanding of her parental duties to warrant an inference of ongoing danger to all the children.

*Matter of Gabriel J.,* 127 AD3d 667 (1st Dept 2015)

**Exclusion of Mother from Courtroom During Child's Testimony Did Not Violate Mother's Right to Due Process of Law**

The Family Court's finding that the mother neglected the subject child was affirmed. Contrary to the mother's contention, the record of the fact-finding hearing supported the Family Court's determination that the mother neglected the subject child by inflicting excessive corporal punishment. Additionally, the mother's contention that the Family Court erred in excluding her from the courtroom during the child's testimony was without merit. The Family Court reasonably concluded that the child would suffer emotional trauma if compelled to testify in front of her mother. After properly weighing the respective rights and interests of the parties, the court providently exercised its discretion in directing the mother to watch the child's testimony via a live television feed. The mother's attorney was present during the child's testimony and cross-examined her on the mother's behalf. Under these circumstances, the mother's right to due process of law was not violated by her exclusion from the courtroom during the child's testimony.

*Matter of Vany A.C.*, 125 AD3d 650 (2d Dept 2015)

**Evidence Did Not Support Finding That Father Neglected Child by Engaging in Acts of Domestic Violence Against Mother in Child's Presence**

The Family Court's finding that the father neglected the subject child was reversed. The record did not support the Family Court's determination that the petitioner established, by a preponderance of the evidence, that the father neglected the subject child by engaging in acts of domestic violence against the mother in the child's presence which created an imminent risk of impairment to the child's physical, mental, or emotional condition. The testimony presented by the petitioner at the fact-finding hearing did not demonstrate, by a preponderance of the evidence, that the father neglected the child, who was five weeks old at the time of one of the incidents and seven months old at the time of the other, by engaging in acts of domestic violence against the mother. The evidence presented at that hearing demonstrated that these incidents occurred either outside of the presence of the child or in such a way that the child's physical, mental, and emotional

condition was not impaired or in imminent danger of becoming impaired as a result of the incident.

*Matter of Harper F.-L.*, 125 AD3d 652 (2d Dept 2015)

**Evidence Insufficient to Establish Causal Connection Between Mother's Mental Illness and Actual or Potential Harm to Child**

The Family Court's finding that the mother neglected the subject child was reversed. The petitioner failed to establish, by a preponderance of the evidence, the existence of a causal connection between the mother's mental illness and actual or potential harm to the subject child. There was no evidence that the mother ever failed to properly care for the child or provide the child with adequate food, clothing or shelter. Rather, the evidence indicated that the child was a healthy, active and intelligent two year old. Although there was evidence that the mother stopped taking medication after her discharge from an overnight stay at a hospital, the evidence was insufficient to establish that the mother was unable to care for the child during that period. Testimony from the mother's treating psychiatrist that "it would be difficult" for the mother to care for others without medication, given that "she was not functioning at optimum," did not satisfy the petitioner's burden of proof. Moreover, there was insufficient evidence that the mother's discontinuance of the medication prescribed to her at the hospital constituted an unequivocal refusal to comply with treatment. The evidence adduced at the fact-finding hearing otherwise demonstrated that the mother attended hospital appointments and complied with treatment.

*Matter of Nialani T.*, 125 AD3d 672 (2d Dept 2015)

**Record Supported Determination That Overnight Parental Visitation Did Not Pose Imminent Risk of Harm to Children**

The Appellate Division affirmed an order of the Family Court which directed the petitioner to commence overnight parental visits and thereafter, except for good cause, to temporarily release the subject children to the parent' custody. The Commissioner of the Administration for Children's Services (ACS) filed a petition, alleging that the parents abused their 10-month-old child, who had suffered a subdural hematoma while in their care, and that the parents derivatively abused their five-year-old child. The children were remanded to the custody of the Commissioner of ACS. Reports of the foster care agency monitoring the case, which were submitted to the Family Court, indicated that the parents were compliant with the service plan designed for them. ACS did not object to the children having unsupervised parental visitation, but objected to overnight parental visitation prior to a fact-finding hearing on the cause of the injuries to the 10-month-old child. The Appellate Division found that the record supported the Family Court's determination that allowing overnight parental visitation did not pose an imminent risk of harm to the children (*see* FCA § 1028). The parents had addressed the need for greater vigilance in monitoring their children's activities, and were otherwise compliant with their service plan. ACS did not meet its burden of establishing that the subject children should have remained in its custody. Accordingly, pending the final determination of the petition, the Family Court properly directed ACS to commence overnight parental visits and thereafter, except for good cause, to temporarily release the subject children to the parents' custody.

*Matter of Matthew W.*, 125 AD3d 677 (2d Dept 2015)

**Error to Vest Therapist with Authority to Decide When Therapeutic Visitation Should Commence**

The father appealed from an order of fact-finding, which, found that he neglected the subject children by exposing them to domestic violence, and an order of disposition, which, remanded the children to their mother's custody under the supervision of the New York City Administration for Children's Services (ACS) for a period of 12 months. The order of disposition also directed, inter alia, that the father and the children were to separately engage in counseling, and directed that therapeutic visitation be arranged by ACS at such time that the therapists for the father and children believed that therapeutic visitation was safe and appropriate, and upon obtaining the children's consent. Contrary to the father's contention, a preponderance of the evidence established that he neglected the subject children by, inter alia, engaging in certain acts of domestic violence in the children's presence that impaired, or created an imminent danger

of impairing, their physical, mental, or emotional condition. The father correctly argued, however, that the Family Court erred in vesting his or the children's therapist with the authority to decide when therapeutic visitation should commence. Accordingly, the order of disposition was modified to direct ACS to arrange for therapeutic visitation, provided that the father attend individual therapy.

*Matter of Briana A.-C.*, 125 AD3d 859 (2d Dept 2015)

**Respondent Failed to Protect Child Despite Having Knowledge of Mother's Mental Illness**

The evidence adduced at the fact-finding hearing demonstrated that, although respondent knew the mother suffered from a mental illness that placed the subject child in actual or imminent risk of harm, he failed to take the necessary steps to protect the child. This evidence was sufficient to prove, by a preponderance of the evidence, that respondent neglected the subject child (*see* FCA §§ 1012 [f] [i] [A]; 1046 [b] [I]).

*Matter of Ethan A.H.*, 126 AD3d 699 (2d Dept 2015)

**Mother's Refusal to Consent to Medical Treatment or Non-Invasive Testing Supported Finding of Neglect**

The mother's refusal to consent to the course of medical treatment proposed by mental health professionals did not, by itself, have justify a finding of medical neglect. Nonetheless, the credible evidence established that the mother did not merely disagree with the course of medical treatment proposed for the child J., but also refused to cooperate in formulating any appropriate treatment for J. The credible evidence established that the mother opposed not only invasive testing, but noninvasive testing as well, and she discounted or denied the seriousness of the child's symptoms, which included hallucinations and a desire to harm himself. The mother's conduct put the child in imminent danger of impairment. Under these circumstances, the Family Court's determination that the mother neglected J. was supported by a preponderance of the evidence. Further, the mother's medical neglect as to J. supported a determination of derivative neglect as to the child, A.

*Matter of Jaelin L.*, 126 AD3d 795 (2d Dept 2015)

**Order Denying Motion to Vacate Fact-finding Affirmed**

The Family Court denied the respondent's motion pursuant to FCA § 1061 to vacate the fact-finding order on the ground that it lacked the authority to vacate the finding of neglect because the case had been closed. This was error. FCA § 1061 does not include a time limit, and a finding of neglect does not expire with an order but rather constitutes "a permanent and significant stigma which might indirectly affect [a person's] status in future proceedings". However, the evidence adduced at the fact-finding hearing established, by a preponderance of the evidence, that the respondent neglected the subject child by inflicting upon her excessive corporal punishment. Thus, the Family Court properly denied the respondent's motion to vacate the order of fact-finding, albeit for a different reason than that stated by the court.

*Matter of Josephine G.P.*, 126 AD3d 906 (2d Dept 2015)

**Record Did Not Support Explanations Given by Respondents for Child's Injuries**

The record of the fact-finding hearing supported the Family Court's determination that the respondents abused A. A medical expert testified that the explanations the respondents gave for A.'s injuries were inconsistent with those injuries, and that there was no explanation for A.'s various injuries other than abuse. The court credited this testimony, and did not credit the explanations offered at the hearing by the respondents. Here, the court's credibility determinations were supported by the record. The record of the hearing also supported the Family Court's determination that the respondents neglected the infant K. by failing to exercise a minimum degree of care "in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (*see* FCA §1012 [f] [i] [B]). While the respondents and a caseworker offered differing versions of what happened when the caseworker attempted to remove the children from the respondents' custody, the court's decision to credit the caseworker's testimony was supported by the

record.

*Matter of Angelica A.*, 126 AD3d 965 (2d Dept 2015)

**Father Admitted He Encouraged Mother's Illegal Drug Use While She Was Pregnant**

Contrary to the father's contention, the Family Court's determination that he neglected the subject children was supported by a preponderance of the evidence (*see* FCA §§ 1012 [f] [i]; 1046 [b] [i]). The evidence adduced at the hearing established that the father and the mother of the subject children engaged in acts of domestic violence against each other while the children were nearby. Based upon this evidence, as well as upon the combination of circumstances revealed in the record, including the father's admitted encouragement of the mother's illegal drug use while she was pregnant, and the adverse inference correctly made against the father based upon his failure to testify, the Family Court properly determined that the petitioner established the father's neglect by a preponderance of the evidence.

*Matter of Honesti H.*, 126 AD3d 972 (2d Dept 2015)

**Record Supported Finding of Neglect Based on Failure to Meet Children's Educational Needs**

The order appealed from, after fact-finding and dispositional hearings, found that the father neglected the subject children, and released the subject children to the custody of the father with supervision by the Administration for Children's Services (ACS) for a period of three months. The portion of the order of fact-finding and disposition pertaining to the release of the children was dismissed as academic, as that portion of the order expired by its own terms. Contrary to the father's contention, the Family Court's finding of neglect based on his failure to meet the children's educational needs up to the date of the petition was supported by a preponderance of the evidence. The unrebutted evidence submitted at the fact-finding hearing established that both children suffered excessive school absences and tardiness without reasonable justification. However, since the petition did not allege that the father neglected the children by failing to complete the paperwork necessary for the subject child J. to be placed in a special private school at the start of the 2012/2013 school year, and the petition was not properly amended in accordance with FCA § 1051 (b), the Family Court's finding that the father neglected the subject children on that ground was improper. Accordingly, the order of fact-finding and disposition was modified.

*Matter of Justin R.*, 127 AD3d 758 (2d Dept 2015)

**Child Subjected to Multiple Medical Examinations as a Result of Mother's Repeated Unfounded Allegations of Abuse Against Father**

The order appealed from, after a hearing, found that the mother neglected the subject child. The Appellate Division affirmed. The Family Court's determination that the mother neglected the subject child was supported by a preponderance of the credible evidence (*see* FCA §§ 1012 [f] [i] [B]; 1046 [b] [i]). The evidence offered at the hearing established that the mother made repeated unfounded allegations of abuse against the father, necessitating that the young child undergo multiple medical examinations and interviews by police officers and caseworkers regarding intimate issues. Under the circumstances existing at the time, the mother's repeated allegations presented an imminent danger of emotional or mental impairment to the child and did not meet the minimum degree of care required of a "reasonable and prudent parent". The mother's motion on appeal to strike a portion of the brief of the attorney for the child, on the ground that it referred to matter dehors the record was granted, and that portion of the brief was not considered in the determination of the appeal.

*Matter of Ava M.*, 127 AD3d 975 (2d Dept 2015)

**Removal of Subject Child Improper**

In 2011, following a serious injury to one of the parents' children, all three of their children were removed from the parents' custody, and remanded to the custody of the New York City Administration for Children's Services (ACS). After a fact-finding hearing, the Family Court determined that the parents abused the injured child, and that the other two children were thereby derivatively abused. The mother and the father were ordered to complete individual counseling, and required to have all visitation with the children supervised. The

court further issued orders of protection against both parents and provided for supervised visitation. There was no dispute that the mother successfully completed counseling and was discharged by her therapist, that she had consistently visited the children, and that she had completed a parenting course. The father, however, failed to complete the services required, and a subsequent order of protection was issued against him, prohibiting any contact between him and the children. In 2014, the mother gave birth to the subject child, and ACS filed a petition alleging derivative abuse based on the earlier injury to the subject child's sibling. In the order appealed from, after a hearing pursuant to FCA § 1027, the Family Court determined that release of the subject child to the mother's custody would place him at imminent risk of harm, and remanded him to the custody of ACS, pending the outcome of the derivative abuse proceeding. The Appellate Division reversed. The Family Court's determination that remand of the subject child to his mother's custody would have placed him at imminent risk of harm was based upon mere speculation that the mother would not enforce the order of protection as against the father. The mother testified during the § 1027 hearing that she lived apart from the father and that she would enforce the order of protection. In addition, ACS admitted that its caseworkers had visited the mother on two occasions at the shelter where she resided, confirming with the shelter's caseworkers that the mother resided alone. The record further established that the mother successfully completed one course of therapy, and her therapist had opined that the three children removed in the prior proceeding should have been returned to her. Furthermore, ACS conceded that the mother had consistently attended supervised visitation with the children. In addition, the supervised visitation coordinator opined that the mother fully engaged each of the children during visits, despite their different ages and problems, that she was attentive and loving, and consistently brought food, despite her limited resources. The supervised visitation coordinator further noted that the mother managed to nurse the subject child while managing to engage the other children. On this record, the Family Court should have developed a plan whereby the subject child could have been released to his mother's custody, under the supervision of ACS.

*Matter of Baby Boy D.*, 127 AD3d 1079 (2d Dept 2015)

**Record Supported Finding of Neglect Based upon Excessive Corporal Punishment and Failure to Provide Adequate Food**

Contrary to the mother's contention, the Family Court's finding that she neglected the subject children by inflicting excessive corporal punishment upon them was supported by a preponderance of the evidence (*see* FCA § 1012 [f] [i] [B]). The subject children's out-of-court statements that their mother, on more than one occasion, struck them with her fist and other objects such as an electric cord, wire hangers, and a broomstick were corroborated by caseworkers' personal observations of injuries sustained by one of the children, medical records documenting that child's injuries, and their own cross-corroborating statements. The Family Court's further finding that the subject children were neglected as a result of the mother's failure to exercise a minimum degree of care in supplying them with adequate food (*see* FCA § 1012 [f] [i] [A]) was also supported by a preponderance of the evidence.

*Matter of David H.*, 127 AD3d 1084 (2d Dept 2015)

**Motion to Vacate Fact-finding and Disposition Properly Denied**

The father moved pursuant to FCA § 1042 to vacate the order of fact-finding and the order of disposition, and, thereupon, to reopen the fact-finding hearing. The Family Court denied the motion, and the father appealed. The Appellate Division affirmed. The Family Court providently exercised its discretion in denying the father's motion as the record supported the conclusion that the father's failure to appear at the fact-finding hearing was willful, and that he failed to establish a potentially meritorious defense to the amended petition (*see* FCA § 1042).

*Matter of Samantha P.*, 127 AD3d 1094 (2d Dept 2015)

**Record Supported Finding of Sexual Abuse**

Contrary to the father's contention, at the fact-finding hearing, the petitioner established by a preponderance of the evidence that he sexually abused the subject child, J. The record supported the Family Court's determination that the testimony of the petitioner's child

sexual abuse expert, who concluded that J. exhibited behavior indicative of sexual abuse, as well as the testimony of an Administration for Children's Services caseworker, sufficiently corroborated J.'s out-of-court statements of sexual abuse. Any inconsistencies in J.'s statements were insufficient to render the central details of his account unworthy of belief.

*Matter of Joshua J.P.*, 127 AD3d 1200 (2d Dept 2015)

**Children's Out-of-Court Statements Sufficiently Corroborated**

A preponderance of the evidence supported the Family Court's finding that the father neglected the children L. and J. by inflicting excessive corporal punishment upon them. Contrary to the father's contention, the children's out-of-court statements were sufficiently corroborated by the testimony of a caseworker with the Administration for Children's Services and their cross-corroborating statements. Evidence that J. may have recanted some of his prior allegations did not mandate that the finding be set aside. Although the father, and the mother of the subject children disputed the allegations, the Family Court's determination that they lacked credibility was entitled to deference and was fully supported by the record.

*Matter of Luis N.P.*, 127 AD3d 1201 (2d Dept 2015)

**Appeal Not Moot Since Neglect Finding Creates Permanent and Significant Stigma**

Family Court found respondent parents had derivatively neglected the subject child. The Appellate Division affirmed. Although both respondents had executed judicial surrenders during the pendency of the appeal, the appeal was not moot since the finding of neglect created a permanent and significant stigma that would adversely affect respondents in future proceedings. Derivative neglect exists where the evidence demonstrates an impairment of parental judgment to the point it creates a risk of substantial risk of harm for any child left in that parent's care and the prior neglect determination is sufficiently proximate in time to reasonably conclude the problems continue to exist. Here, the mother's prior severe neglect determination in 2008 involved, among other things, repeatedly refusing to seek medical treatment for a child and banging that child against a wall. The father's neglect determination in 2009 was based upon, among other things, his acts of domestic violence against his paramour in the child's presence and not properly feeding or caring for the child. Both respondents had failed to complete necessary services and suffered from mental illnesses. Additionally, both respondents missed scheduled visits with the child and failed to provide reasons for missing the visits. When they did visit the child, they often argued to such an extent that the person supervising the visits had to intervene. Giving due deference to Family Court's credibility determinations, there was a sound and substantial basis in the record for the court's determination.

*Matter of Neveah AA.,* 124 AD3d 938 (3d Dept 2015)

**"Merely Possible" Danger Insufficient to Establish Neglect**

Family Court determined respondent mother had neglected her children, ages six and four. The Appellate Division reversed. Here, respondent returned home with her older child after attending a Christmas party where, based on her testimony, she only consumed one alcoholic beverage. After being dropped at home with the older child, she testified she feel asleep since she had been up since 5:30 a.m., had a sore throat and was tired from the day's activities. The younger child was with her father, but the father, believing he had to return her to respondent by 7:30 p.m. that evening instead of 7:30 a.m. the next morning, brought her to respondent's apartment. He found respondent sleeping and a little "buzzed", but left the younger child with respondent. Within half an hour, respondent's upstairs neighbor, whom the children called "Grammy Dale", came to respondent's apartment for a visit, found her asleep and took both children to her apartment. Meanwhile, the younger child's father had second thoughts about leaving her with respondent and returned with a Sergeant from the Sheriff's department to pick up the child. It was difficult to awaken respondent who appeared to be intoxicated. She indicated she did not know where the children were. Respondent and the child's father began to argue and both were arrested by the Sergeant. Although there was testimony that respondent pressured the older child to take a sip of an alcoholic beverage while at the party, the child did not testify. The out-of-court repetition of

the child's statement did not provide sufficient corroboration and should not have been considered by Family Court as part of the testimony. While there was conflicting proof as to whether respondent was intoxicated, giving due deference to the court's credibility determinations, there was sufficient proof she was impaired. However, the proof did not reflect she was highly intoxicated nor did it show she had attempted a dangerous activity with the child. Respondent and the older child received a ride to her apartment where they settled in for the evening. Although the younger child ended up in her care, within a short time both children were in the care of someone who was a grandmother figure to them. While respondent's conduct was far from ideal, the record failed to establish the children were in imminent danger and "merely possible" danger is insufficient to establish neglect.

*Matter of Cadence GG.,* 124 AD3d 952 (3d Dept 2015)

**No Statutory Basis to Determine Respondent-Boyfriend Severely Abused Child**

Family Court determined grandmother's live-in boyfriend had severely abused the subject child based upon his sexual abuse of the child. Grandmother was the legal custodian of the child. While the Appellate Division found there was sufficient evidence in the record to support the court's finding of abuse and neglect, since respondent was not a parent, he could not be found to have severely abused the child. SSL§ 384-b(8) limits severe abuse findings to a child's parent, unlike the neglect/abuse definitions contained in FCA § 1012(a), where "other person[s] legally responsible for a child's care" are included.

*Matter of Tiarra D.,* 124 AD3d 973 (3d Dept 2015)

**While Respondent's Behavior Was Improper and Irresponsible, it Did Not Qualify as Neglect**

Family Court adjudicated the subject children to be neglected. The Appellate Division reversed. Here, the neglect findings were based on two specific incidents. One incident involved respondent's conviction for disorderly conduct and harassment based on an incident arising from a verbal argument she had with her then 13-year-old daughter. After the argument, respondent complained loudly about the incident to her neighbors and cursed in the street. The second incident resulted from respondent leaving her 13-year-old daughter in charge of her siblings, who were nine and three. In this instance, respondent also gave the 13-year-old child permission to sleep over at a friend's house the same night, and during the night someone fired two shots into respondent's home. When the police went to investigate, they found the nine and three-year- old children home alone at 3:00 a.m. With regard to the first incident, although respondent's behavior was inappropriate, the record did not show the children were actually harmed or in danger of impairment due to witnessing respondent's behavior. Likewise with the second incident, the agency failed to show the children were in danger of impairment when respondent left them alone overnight. Although one police officer testified the children were visibly upset, the record was unclear if it was as a result of being left alone or due to the shooting. Although leaving the children alone overnight showed respondent's behavior was improper and irresponsible, this behavior did not qualify as neglect without a showing of imminent, rather than merely possible, danger of impairment of the two children.

*Matter of Javan W.,* 124 AD3d 1091 (3d Dept 2015)

**Sound and Substantial Basis in the Record to Support Neglect Determination**

Family Court determined respondent mother had neglected the then three-year-old subject child and during the dispositional phase, granted Article 10 custody of the child to the maternal aunt. The Appellate Division affirmed. There was a sound and substantial basis in the record for a neglect determination. In this case, the testimony showed that during the early morning hours the mother was found lying face down and passed out on a grassy area between a city street and sidewalk with the child crying in a stroller for about 45 minutes. The police officer who awakened respondent testified respondent smelled of alcohol, was agitated, incoherent and slurred her speech and characterized her as highly intoxicated. Respondent had several other children, however none of them were in her care. Based on the evidence, the aunt established there were extraordinary circumstances. It was in the child's best interests to

award custody to the aunt. Respondent had a history of mental illness and substance abuse and she had previously been the subject of indicated reports and neglect proceedings due to these conditions. Additionally, she had failed to complete treatment or continue treatment for these issues and disregarded medical advice by consuming alcohol while taking medication for epilepsy. She had a history of engaging in violent behavior, sometimes in the presence of her children, failed to take responsibility for her actions or follow through with services. The aunt had custody of the subject child's half-sibling and was able to provide a stable home. According due deference to the court's credibility determinations, the record fully supported the court's decision.

*Matter of Devon EE.,* 125 AD3d 1136 (3d Dept 2015)

**Father's Spanking of Two-Year-Old Was Not Maltreatment**

This was a proceeding pursuant to CPLR Article 78 from a determination by OCFS that the father had engaged in maltreatment. Here, while bathing his then 2-year-old son, the father spanked the child for eating soap. The spanking left a bruise on the child's buttock and the next day, the father explained what happened to the child's daycare provider who then reported the incident to CPS. Thereafter, the father was "indicated" for excessive corporal punishment and an administrative hearing was held, pursuant to SSL § 422 (8). The Administrative Law Judge determined the maltreatment allegation was supported by a fair preponderance of the evidence. The Appellate Division annulled the determination. A determination of maltreatment must be established by a showing that the child's "physical, mental or emotional condition has been impaired or is in imminent danger of being impaired as a result of the parent's failure to exercise a minimum degree of care". The father testified that after he spanked the child, the child cried briefly and then the family went on with their normal activities. The father further explained the impression on the child's buttock was exacerbated by the hot bath water and the child did not appear to be harmed in any manner by the spanking. Additionally, the record showed the father was remorseful and cooperated with the agency, attended all the required parenting and anger management programs and agreed he needed to find age-appropriate methods of discipline. Furthermore, the father's spouse testified she had never observed the father use corporal punishment and their normal discipline was a "time out". A parent is "entitled to use reasonable physical force to promote discipline" and although a single incident can support a finding of maltreatment, in this case, the record lacked substantial evidence demonstrating the father's conduct impaired the child's condition.

*Matter of Maurizio XX.,* 125 AD3d 1174 (3d Dept 2015)

**Since Respondent Was Not Child's Biological Father, He Cannot Have Severely Abused Her**

Supreme Court properly amended a prior order of severe abuse to abuse and determined since respondent was not the biological parent of the subject child, he could not have severely abused her within the meaning of SSL §384-b(8)(a)(ii). The court's finding was consistent with both the statute and case law. Additionally, the challenges to the court's determination of derivative severe abuse, abuse and neglect of the subject child's half-sibling had been resolved by a hearing during the pendency of the instant appeal, and therefore those issues were rendered moot.

*Matter of Makaya H.*, 125 AD3d 1263 (3d Dept 2015)

**Not an Abuse of Discretion to Allow Agency to Amend its Pleadings**

Family Court determined respondent's three children were neglected. The Appellate Division affirmed. Here, the oldest subject child was removed from respondent's care after the child's father broke her arm and neither respondent nor the child's father sought medical attention for the child. The father was convicted of assault and later, when he committed acts of domestic violence against respondent, he was incarcerated. Respondent and the three children moved in with respondent's new boyfriend, and soon after, the parties became involved in repeated acts of domestic violence resulting in both of them being arrested. The neglect petitions were initially based on allegations of domestic violence, and thereafter the court allowed the agency to amend its petitions to conform to the proof by adding allegations of poor hygiene and uncleanliness.

Evidence showed respondent repeatedly became involved with abusive individuals and remained in abusive situations and failed to protect the children from witnessing acts of domestic violence. Although the boyfriend was mostly the initial aggressor, respondent failed to protect the children from witnessing the violence and also committed violent acts against him. She also failed to cooperate to limit the boyfriend's access to the children via a protective order or pressing charges. Additionally, the court did not abuse its discretion by allowing the agency to amend its pleadings. Testimony from witnesses showed the apartment where respondent resided with the children was in a very unclean condition. Among other things, there was food, dirt, cigarette butts and ashtrays on the floor, clothes thrown throughout the apartment, the youngest child was in a sleeper encrusted with food, bottles were filled wtih curdled milk, diapers on all the children needed changing and smelled so badly they were characterized as "atrocious". Furthermore, there was proof the children needed early intervention services and arrangements had been made for such but respondent failed to take reasonable steps to keep the children in the services for a period of six months. Viewing the totality of the evidence and deferring to the court's credibility determinations, there was sufficient proof to support its determination.

*Matter of Hailey XX.,* 127 AD3d 1266 (3d Dept 2015)

**Biological Relationship is Necessary for a Finding of Severe Abuse**

Supreme Court granted the agency's motion for summary judgment and determined respondent boyfriend had abused and neglected one subject child and derivatively committed the same acts against the other two children. The Appellate Division affirmed. Here, respondent, who had been left alone to babysit the mother's youngest infant child, became upset when the infant began to cry while he was playing a video game. Respondent grabbed the infant by his ribs, violently shook him and slammed him to the floor and later, the infant died as a result of the injuries inflicted upon him by Respondent. Respondent was convicted of manslaughter in the first degree and the agency moved for summary judgment, relying upon respondent's guilty plea. However, the court properly denied the agency's request for severe abuse and derivative severe abuse findings since respondent was not the child's parent and could not be found to have severely abused the child within the meaning of SSL §384-b(8)(a)(I). The Appellate Division noted that while respondent's conduct was "beyond reprehensible", his depravity did not overcome the lack of a biological relationship with the mother's children, which was necessary for a severe abuse finding.

*Matter of Brett DD.,* 127 AD3d 1306 (3d Dept 2015)

**Out-of-Court Statements of Abuse by One Child Showed Proof of Abuse of Another**

Family Court determined respondent parents had abused and severely abused their three older children, two boys then aged 11 and 9 and one girl then aged 7, and derivatively severely abused and/or derivatively abused the then two infant children, and terminated their parental rights. The record supported the court's determination that respondent father had abused and severely abused the three elder children. The bulk of the evidence against both parents were out-of-court statements of the children, and the out-of-court statements of one child showed proof of abuse of another child. The older girl's disclosures and advanced sexual knowledge were consistent with those of a child victim of sexual abuse and the additional expert opinion that the scarring inside the older girl's vagina and the size of the opening of her rectum more than corroborated those findings. The older boy's account that he observed the father having sexual intercourse with the older girl corroborated the girl's account of this and the middle boy's statement that he witnessed the father put his tongue inside the older girl corroborated the girl's statement that the father had put his mouth on her privates. All three children volunteered they had been filmed having sexual intercourse, described the "red" camera used to make such recordings and also stated where the films were kept. Thus corroborated, the father's actions were sufficient to support that he committed felony sex acts against the three older children and the record amply supported the court's determination that the three older children were directly and severely abused by the father. However, the record did not support severe abuse finding against the mother with regard to the two older boys. Although the mother did not have physical sexual contact with the children, the boys stated that on some occasions, the

mother was present when the children were directed by the father to have sex with one another and at least on one occasion, the mother directed the children to do so. The middle boy also indicated the mother took pictures of the children having sexual intercourse. With regard to the older girl, the record did support a finding of severe abuse against the mother. The middle boy reported the mother was present when the father put his tongue inside the older girl. This statement, which was corroborated, supported a finding the mother directly severely abused the girl by knowingly allowing the father to commit a criminal sexual act in the first degree against the older girl. Furthermore, there was no reason to disturb the court's findings that respondents had derivatively severe abused the baby boy and baby girl. Based on the evidence, the court did not err in terminating respondents' parental rights.

*Matter of Destiny C.,* 127 AD3d 1510 (3d Dept 2015)

**Court Exercised Proper Discretion in Excluding Respondent From Courtroom During Child's Testimony**

Family Court determined that respondent father of three children and the stepfather of one child had abused, severely abused and neglected the four children. The Appellate Division affirmed. Three of the children disclosed that respondent had sexually abused them and also used excessive corporal punishment. The step-daughter testified about the abuse in-court but did so outside the presence of respondent. Although she was unable to recall the exact dates of abuse, she consistently described "horrific acts of sexual abuse" against her which had occurred years earlier, and was able to set forth " a variety of contextual details that served to provide a general time period of abuse". Among other things, the child testified the abuse occurred during the period when one of her siblings was of a certain age and her mother was pregnant with another. She also stated the abuse stopped when respondent went to prison. These time periods corresponded to the times when respondent was living with the children and when he was incarcerated. Moreover, exact dates were not necessary in order for the agency to sustain its burden of proof. A child's ability to recall details, including date and time, goes to credibility and weight given to a child's disclosures and the court's findings are entitled to great deference especially where the critical evidence is testimonial. Since the record contained corroborated allegations of the "horrendous, repeated acts of sexual and physical abuse" that respondent committed against all the children, the court's findings were sufficiently proven. Additionally, the court exercised proper discretion by excluding respondent from the courtroom during the step-daughter's testimony. Although respondent was entitled to due process, within the context of Article 10 proceedings, the court had to balance the due process right of the accused with the mental and emotional well-being of the child and respondent's attorney was present to question the child.

*Matter of Aleria KK.,* 127 AD3d 1525 (3d Dept 2015)

**Mother Abused and Neglected Her Child**

After the child was hospitalized for, among other things, multiple rib fractures, a partially collapsed lung, and eye and ear injuries, petitioner commenced this proceeding. Family Court determined that the subject child was abused and neglected by respondent mother. The Appellate Division affirmed. The court erred in admitting the child's medical records from the child's treatment at two hospitals without a proper certification as required by the Family Court Act because the certification was not accompanied by the necessary delegation of authority. However, the error was harmless. Even excluding the medical records from consideration, the court's finding of abuse was supported by a preponderance of the evidence. The record contained detailed testimony from two physicians who examined the child and described the child's extensive injuries. Further, other testimony established that the mother twice forcibly squeezed the child's chest, which was consistent with the non-accidental nature of the child's injuries. The court was permitted to draw the strongest negative inference against the mother for her failure to testify. The record established that, viewed in the totality of the proceedings, the mother received meaningful representation.

*Matter of Bentleigh O.*, 125 AD3d 1402 (4th Dept 2015)

**Petitioner Failed to Establish Mother's Neglect of Child**

Family Court determined that respondent mother neglected her child. The Appellate Division reversed and dismissed the petition. Petitioner failed to show that the child's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired and that the actual or threatened harm to the child was a consequence of the failure of respondent to exercise a minimum degree of care in providing the child with proper supervision or guardianship. The evidence established that the mother left the child with appropriate caregivers, who she had been living with and who agreed to care for the child for several days; the mother left the State for approximately 24 hours without providing medical authorization in case of emergency; the male caregiver was unable to reach the mother during a confrontation with the child's grandmother while the mother was away, but that the mother borrowed a telephone and remained in contact with the caregivers each day she was away. The evidence also established that the mother was an inexperienced parent and that the couple with whom she lived assisted her with parenting skills and in obtaining appropriate housing and medical and other benefits. Petitioner failed to present any evidence connecting the mother's alleged mental health condition to any actual or potential harm to the child.

*Matter of Lacey-Sophia T.-R.*, 125 AD3d 1442 (4th Dept 2015)

**Finding of Educational Neglect Affirmed**

Family Court determined that the subject child was neglected by respondent mother. The Appellate Division affirmed. Petitioner presented unrebutted evidence from the school district that the child had not attended a single day of school in the 2011-2012 and 2012-2013 school years. Thus, the court could properly conclude that the mental condition of the child was in imminent danger of becoming impaired. The mother failed to present evidence that the child was attending school and receiving required instruction in another place to establish a reasonable justification for the absences and therefore failed to rebut the prima facie evidence of educational neglect.

*Matter of Aijianna L.*, 126 AD3d 1353 (4th Dept 2015)

**Admission of Neglect is Order on Consent**

Family Court found that the subject children were neglected by respondent mother and placed the children with petitioner. The Appellate Division affirmed. The mother's challenge to the finding of neglect was not reviewable because it was premised on the mother's admission, and therefore was an order on consent. Because the mother did not move to vacate or withdraw her consent to the order, her contention that her consent was not knowing, voluntary and intelligent was not properly before the AD. The court's dispositional order was supported by a sound and substantial basis in the record.

*Matter of Martha S.*, 126 AD3d 1496 (4th Dept 2015)

**Aggravated DWI Supports Derivative Neglect Finding**

Family Court determined, among other things, that the subject child was derivatively neglected by respondent father. The Appellate Division affirmed. Petitioner presented evidence that respondent neglected the other subject child, he violated an order of protection issued for the benefit of the other subject child, and he was convicted upon his guilty plea of aggravated DWI. Although the one-year-old passenger in the vehicle the father was driving while intoxicated was not a subject of the instant petition, in this case, the circumstances surrounding the neglect of the other child showed fundamental flaws in the father's understanding of the duties of parenthood, which justified the finding that the father derivatively neglected the subject child.

*Matter of Alexia J.*, 126 AD3d 1547 (4th Dept 2015)

**CHILD SUPPORT**

**Magistrate Not Bound to Determine Support Obligation Solely on Tax Return**

Family Court denied respondent mother's objections to a cost-of-living adjustment and modifying an order of support to set her monthly child support obligation, plus one-half of the children's college costs. The Appellate Division affirmed. The court properly determined

respondent's child support obligation based upon the greater of the children's needs or standard of living because there was insufficient evidence to determine her gross income for child support purposes. The court did not err in declining to use income tax return evidence when determining respondent's income for child support purposes inasmuch as the Magistrate was not required to solely rely on such records because respondent's child support obligation was based upon her ability to provide for her children, not necessarily her current economic situation.

*Matter of Alexis D. F. v Noelle P.,* 125 AD3d 428 (1st Dept 2015)

**Case Remitted Given Discrepancy in Father's Attributable Income in Two Proceedings**

Supreme Court, among other things, denied respondent mother's motion seeking an upward modification of child support. The Appellate Division modified and remitted for recalculation of the child support award. Plaintiff mother met her burden to show that a modification of the child support award was warranted. In a prior Family Court proceeding, the parties consented to an award of $153 per week for the parties' two children based upon the defendant father's adjusted annual income of $30,000. In opposition to plaintiff's application in this proceeding, however, he submitted a net worth statement and tax return disclosing at least $75,000 in adjusted gross income. Plaintiff submitted evidence that she and the children were receiving food stamps and that she had substantial outstanding bills for household necessities and the children's expenses. In light of the discrepancy between the evidence of defendant's income in the Family Court proceeding and in this proceeding, the court erred in concluding that the amount agreed upon in Family Court was appropriate.

*Finn v Piesco,,* 127 AD3d 525 (1st Dept 2015)

**Father Barred from Litigating Issue of Arrears**

In seeking a retroactive downward modification of his child support obligation going back to October 30, 2004, together with a reduction of support arrears, the father argued that there had been a change of circumstances, as the parties' daughter had been emancipated on October 30, 2004, by virtue of her marriage on that date. The Support Magistrate dismissed the father's petition, and the Family Court denied the father's objections to the Support Magistrate's order of July 11, 2012. The father appealed. The Appellate Division affirmed. The Family Court properly denied the father's objections to the order of the Support Magistrate which dismissed his petition for the retroactive modification of his child support obligation, and the reduction of arrears. FCA § 451 provides that the court "shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section." The father petitioned for a downward modification of his child support obligation after the arrears accrued. Thus, any modification was prohibited. In any event, the Family Court properly concluded that the father was barred from relitigating the amount of arrears owed. The order dated July 11, 2012, which fixed the amount of arrears that the father owed, and provided the basis for the entry of the money judgment against him, was entered on his consent. On appeal, a party may not collaterally attack an order entered on his or her consent. Moreover, the father had a full and fair opportunity, beginning on October 30, 2004, to raise the issue of the emancipation of his daughter, and thus prevent the accrual of additional arrears between that date and June 12, 2008, the date that his support obligation terminated, yet he did not do so. Thus, the court properly determined that the father was barred from litigating or relitigating the issue of arrears.

*Matter of Cadwell v Cadwell*, 124 AD3d 649 (2d Dept 2015)

**Income Properly Imputed to Father Based upon Financial Support from His Family**

Pursuant to FCA § 413 (1) (b) (5) (iv) (D), the Family Court is entitled to impute income to a parent based upon various factors, including "money, goods, or services provided by relatives and friends" . Here, the Family Court properly determined that the father had access to, and received, financial support from his family. Considering, among other things, the father's employment history, his monthly expenses, and the resources provided to him by his own father over a number of years, the Family Court providently exercised its discretion in imputing income to the father in the sum of $30,000 per year for the purpose of

calculating his child support and child care obligations.

*Matter of Recco v Turbak*, 124 AD3d 900 (2d Dept 2015)

**Seizure of Father's Tax Refund Did Not Satisfy Financial Support Requirement of DRL § 111 (1) (d)**

The petitioner appealed from an order of the Family Court which granted the respondent father's motion for a determination that his consent was required for the subject children's adoption pursuant to DRL § 111 (1) (d). The Appellate Division reversed. The Family Court's finding that the father satisfied the financial support requirement of DRL § 111 (1) (d) was based upon evidence that a portion of his tax refund was seized and applied towards his unpaid child support arrears. The legislative history of DRL § 111 (1) (d) indicates that the intent of the statute was to accord the right to veto adoptions to those fathers of children born out-of-wedlock who manifested a significant interest in their children. In this case, the father's tax refund was seized because of failure to make any child support payments, despite being told to do so by court order. The Appellate Division found that it would contrary to the intent of the statute to allow the father to rely on the seizure of his assets as a manifestation of his interest in the subject children.

*Matter of Jeremyah G.*, 125 AD3d 655 (2d Dept 2015)

**Provision of Parties' Stipulation of Settlement Governing Parental Contributions to Children's College Costs Properly Construed**

The plaintiff appealed from an order of the Supreme Court, which, granted the defendant's cross motion to direct him to pay his pro rata share of the out-of-pocket college costs of the parties' oldest child, pursuant to the terms of the parties' stipulation of settlement. The Appellate Division affirmed. Contrary to the plaintiff's contention, the Supreme Court properly construed the provision of the parties' stipulation of settlement governing parental contributions to their children's college costs. Having found that the language of the subject provision ambiguous, the court was entitled to rely upon, inter alia, the language of the entire agreement and the circumstances surrounding its execution in construing the provision. The parties expressly acknowledged that their son would likely attend college, and they stated their mutual intention to contribute to his college expenses up to their pro rata shares of the so-called "SUNY cap." However, while the defendant advocated an interpretation of the stipulation provision that would achieve that intention, the plaintiff proposed an interpretation that would render the parental contribution obligation largely illusory by first deducting the son's financial aid award, scholarships, grants, and student loans from the SUNY cap amount rather than from the total amount of the son's college expenses. The Supreme Court correctly adopted the defendant's proffered interpretation of the provision to require that all financial aid awarded to the son be applied first to reduce the son's total college costs before reducing the SUNY cap parental obligation. This construction of the provision gave effect to all of the agreement's provisions, was consistent with the parties' intentions, and accorded the language of the subject provision a sensible and practical meaning.

*Springer v Springer*, 125 AD3d 842 (2d Dept 2015)

**Father's Testimony Regarding Financial Situation Not Credible**

The father appealed from an order of the Family Court which denied the father's objections to a prior order of that court, and directed him to pay child support in the sum of $2,438.70 per month. The Appellate Division affirmed. The father's financial disclosure affidavit, tax returns, and testimony at the hearing did not contain adequate information for the Support Magistrate to determine his income and assets. Therefore, the Support Magistrate did not err in basing the father's support obligation on the needs of the children pursuant to FCA § 413 (1) (k), and the record supported the Support Magistrate's finding that the father's testimony regarding his financial situation was not credible. Furthermore, the Support Magistrate's questioning of the father was proper as she asked questions only in order to clarify the father's testimony regarding his financial situation. Contrary to the father's contention, the Support Magistrate did not unduly interfere with the presentation of the father's case, or indicate any partiality or bias which would have warranted a reversal.

*Matter of Toumazatos v Toumazatos*, 125 AD3d 870 (2d Dept 2015)

**Father's Failure to Pay Support Constituted Prima Facie Evidence of Willful Violation**

The Family Court properly found that the father willfully violated the child support and spousal support provisions of a prior order of that court. Evidence of the father's failure to pay support as ordered constituted prima facie evidence of a willful violation (*see* FCA § 454 [3] [a]). The burden then shifted to the father to offer competent, credible evidence of his inability to make the required payments. The father failed to sustain his burden. Moreover, in light of the father's willful violation of the child support and spousal support provisions of the prior order, the court properly directed the entry of money judgments in favor of the mother and against him for child support arrears in the sum of $11,209.39 and spousal support arrears in the sum of $5,350.

*Matter of Saraguard v Saraguard*, 125 AD3d 982 (2d Dept 2015)

**Court Not Bound by Party's Reported Income**

Contrary to the defendant's contentions, the Supreme Court properly denied his application to modify his child support obligations for the years 2011 and 2012 to reflect his salary as reported on his tax returns. As the Supreme Court noted, courts are not bound by a party's reported income in enforcing a child support obligation, and may consider, among other things, a party's ability to provide support or a party's demonstrated earning potential. Moreover, the defendant failed to establish that there was a substantial change in circumstances warranting modification.

*Angelova v Ruchinsky*, 126 AD3d 828 (2d Dept 2015)

**Increase in the Defendant's Parenting Time Did Not Constitute Substantial and Unanticipated Change in Circumstances**

The Supreme Court's denial of the defendant's motion which sought to modify his child support obligation was affirmed. The Supreme Court properly determined that the defendant failed to meet this burden of showing a substantial and unanticipated change in circumstances since the time he agreed to pay the child support provided for in the parties' stipulation. The defendant relied entirely upon the fact that he had a considerably greater amount of parenting time with the subject child than the "minimum" parenting schedule set forth in the stipulation. However, since the stipulation contemplated "liberal and flexible" parenting time to the defendant, and indicated that the schedule set forth therein was a minimum schedule, the increase in the defendant's parenting time did not constitute a substantial and unanticipated change in circumstances.

*DelGaudio v DelGaudio*, 126 AD3d 848 (2d Dept 2015)

**Significant Increase in Mother's Income Warranted New Determination**

The Support Magistrate did not improvidently exercise her discretion in declining to rely on the father's account of his finances in determining that he failed to establish a substantial change of circumstances warranting a modification based on a decrease in his income. However, the Support Magistrate's determination failed to acknowledge evidence demonstrating a significant increase in the mother's income since the entry of the original order of support, which warranted a new determination of the parties' respective child support obligations. Thus, the Family Court erred in denying the father's objections to the Support Magistrate's order which denied his petition for modification of the parties' respective child support obligations. Accordingly, the order was modified and the matter was remitted for a new hearing and determination.

*Matter of Baumgardner v Baumgardner*, 126 AD3d 895 (2d Dept 2015)

**Defendant Failed to Show Substantial and Unanticipated Change in Circumstances**

The Appellate Division affirmed the Supreme Court's denial of the defendant's motion to modify the child support provision of the parties' stipulation of settlement which provided that the defendant would not receive any award of child support. The Supreme Court properly determined that the defendant, who earned

approximately $250,000 per year, failed to meet his burden of showing a substantial and unanticipated change in circumstances since the time he had agreed he would not receive any child support. Furthermore, the defendant did not argue on appeal that the needs of the children were not being met.

*Gribbin v Gribbin*, 126 AD3d 938 (2d Dept 2015)

**Stipulation of Settlement Failed to Comply with DRL § 240**

The Supreme Court properly determined that the parties' stipulation of settlement failed to comply with DRL § 240 (1-b) (h), and that the provisions of the stipulation relating to child support and child support add-ons were invalid. Thus, the court properly granted the plaintiff's motion seeking to vacate those provisions as well as any orders or money judgments enforcing those provisions.

*Ntourmas v Ntourmas*, 126 AD3d 957 (2d Dept 2015)

**Father's Testimony Regarding Income and Expenses Lacked Credibility**

Contrary to the father's contention, the Family Court properly determined that he willfully violated a prior order directing him to pay child support. The proof of the father's failure to pay child support as ordered constituted prima facie evidence of a willful violation of that order (*see* FCA § 454 [3] [a]). The father, who the Support Magistrate found lacked credibility in testifying regarding his income and expenses, failed to offer competent, credible evidence of his inability to make the required support payments. The Appellate Division could discern no basis upon which to disturb the court's determination.

*Matter of Hicks v Hicks*, 126 AD3d 975 (2d Dept 2015)

**Statutory Monthly Minimum Child Support Obligation Upheld**

The mother and the father had one child, who lived with the mother. In April 2012, the father petitioned for a downward modification of his child support obligation on the ground that his unemployment benefits had run out. At a hearing, the father testified that he was unemployed, living with his mother, and receiving public assistance. The Support Magistrate found that the father had no income, while the mother, who was gainfully employed, had an annual income of $134,806.77. In an order dated April 18, 2013, the Support Magistrate, among other things, directed the father, on the mother's consent, to pay child support in the sum of $25 per month. The father filed an objection arguing that he should not have been required to pay $25 per month since the mother earned a substantial income, while his only resources came from public assistance. The Family Court denied the objection, and the father appealed. The Appellate Division affirmed. The record revealed that the father was residing rent-free with a relative who was covering his living expenses. Under these circumstances, the Family Court providently exercised its discretion in not departing from the statutory $25 per month minimum amount of child support, notwithstanding the disparity in the parents' incomes.

*Matter of Paderno v Shvetsova*, 126 AD3d 982 (2d Dept 2015)

**Court Erred in Calculating Father's Pro Rata Share of Child Care Expenses**

For the purposes of making a child support award, the Supreme Court properly determined that the parties' combined parental income was $489,937 based on the parties' earnings in 2012, and that the father had earned 90% of that sum. However, in determining the amount of child support, the court failed to articulate its reasons for applying the statutory percentage of 17% to the combined parental income over the statutory cap of $136,000. The Supreme Court properly determined that the mother incurred $425 in child care expenses each week. However, the court erred in calculating the amount of child care expenses to be paid by the father. Since the child care provider cared for both the subject child, as well as the mother's son from a previous relationship, the child care expenses should have been divided equally between the two children. Thus, the actual cost of caring for the subject child was $212.50 per week, and the father's corrected pro rata share of the child care expenses was $191.25 per week. As to the child's educational expenses, the evidence established that attendance at a private school was the best option for the child when she was in preschool. However,

there was no evidence in the record to suggest that, upon the conclusion of the preschool period, the education provided by the public schools was going to be inferior to that provided by the private school. Thus, absent proof that it was in child's best interests to continue attending private school, the father's obligation to pay for the child's tuition should have ceased once she was old enough to enter the public school system.

*Matter of Pittman v Williams*, 127 AD3d 755 (2d Dept 2015)

**Record Did Not Support Determinations of Child Support Obligation and Arrears**

The parties were married on August 21, 2004, and had one child. On September 1, 2009, the plaintiff commenced an action for divorce and ancillary relief. After the commencement of the action, the defendant continued to live in the marital residence with the plaintiff and the child. During that time, pursuant to a pendente lite order entered January 14, 2010, the defendant was directed to pay all carrying charges for the residence, and 66% of child care costs and unreimbursed health care costs for the child. However, on June 8, 2010, the defendant was directed to leave the marital residence, and to pay child support in the sum of $1,500 per month, in addition to the carrying charges for the residence. Prior to the trial, a neutral forensic accountant was appointed by the court to analyze the defendant's income stream from five businesses and to determine the defendant's income for purposes of calculating the parties' respective child support obligations. In the report of his findings, the forensic accountant concluded that the defendant's annual income was $150,000, which the trial court later adjusted to $132,000 based on the accountant's testimony that he double-counted certain income received by the defendant. The court then determined that the defendant's pro rata share of basic child support and statutory add-ons was 54%, and that the defendant's monthly child support obligation was $1,879. The court further directed the defendant to pay child support arrears in the sum of $6,443, representing the difference between the child support obligation contained in the order dated June 8, 2010, and the child support obligation determined after trial. The defendant appealed from the determinations of his child support obligation and child support arrears. The Appellate Division reversed the judgment insofar as appealed and remitted the matter to recalculate the defendant's child support obligation and child support arrears. In calculating child support arrears, the trial court erred in failing to credit defendant for the amount that he paid for the carrying costs of the marital residence pursuant to the order dated June 8, 2010, as well as for the 12% of add-on expenses and forensic accountant's fees that he had overpaid pursuant to the pendente lite order entered January 14, 2010. In calculating the defendant's child support obligation, the trial court further erred in failing to account for child support "actually paid" by the defendant, pursuant to a judgment of divorce, on behalf of his four children from a prior marriage (*see* DRL § 240 [1-b] [b] [5] [vii] [D]). The court incorrectly concluded that there was no evidence in the record that the defendant had actually made such child support payments.

*Spiegel-Porco v Porco*, 127 AD3d 847 (2d Dept 2015)

**Objections to NonFinal Order Properly Denied**

The father appealed from an order of the Family Court dated January 10, 2014. The order denied the father's objections to an order of that court dated August 14, 2013, which, after a hearing, determined that he was in willful violation of a prior order of support. The Appellate Division affirmed. In an order dated September 13, 2013, the Family Court confirmed the determination of willfulness and thereupon issued an order of commitment, which committed the father to the custody of the Department of Correction for a period of six months, weekends only. The father's contentions regarding the willfulness finding and the setting of arrears were not properly before the Appellate Division on this appeal, because, with respect to those issues, the father failed to pursue his sole remedy, which was to appeal from the order of commitment dated September 13, 2013, entered upon confirmation of the Support Magistrate's determination. Since the father improperly filed written objections to the nonfinal order of the Support Magistrate, the Family Court correctly denied the father's objections on procedural grounds.

*Matter of Henry v Greenidge*, 127 AD3d 1192 (2d Dept 2015)

**No Reason to Disturb Court's Willful Violation Determination**

Family Court found respondent was in willful violation of a prior order of child support and sentenced him to a period of incarceration. The Appellate Division affirmed. Respondent's challenge to his incarceration was moot, since the term of commitment had expired. Additionally, respondent did not dispute that petitioner had made a prima facie showing of willfulness and he failed to offer credible testimony regarding his inability to make payments. Although he testified he was a self-employed laborer who was periodically unemployed, the court noted that even during the periods of time when he was employed, he failed to make payments as required. According due deference to the credibility assessments of the Support Magistrate, there was no reason to disturb the court's determination.

*Matter of St. Lawrence County Support Collection Unit (Crystal U.) v Chad T.,*124 AD3d 1031 (3d Dept 2015)

**No Appeal Lies From an Order Entered Upon Consent**

Respondent admitted to willful violation of a prior order of support. Thereafter, he was sentenced to a period of incarceration. Since there was no right of appeal from an order entered on consent, respondent's challenge to the wilfulness determination was dismissed. Additionally, since he had already served his period of incarceration, his challenge to the sentence imposed was moot.

*Matter of St. Lawrence County Support Collection Unit (Elizabeth V.) v Chad T.,* 124 AD3d 1032 (3d Dept 2015)

**Award of Child Support Based on Imputation of Income Not an Abuse of Discretion**

Among other things, including ordering equitable distribution of the parties' marital property, Supreme Court imputed income to the parties and ordered respondent husband to pay a certain sum per month towards child support. The Appellate Division affirmed. The amount imputed to respondent was not excessive. Although respondent testified his antique business took a downward turn in 2008, with his earnings declining from $190,000 per year to $16,000 in 2009, the court did not find his testimony to be credible. Respondent continued to maintain a high standard of living without incurring further debt. Additionally, he was able to retain his antique business as separate property and the wife testified respondent engaged in various cash transactions. Furthermore, the amount of income imputed to the wife was not too low. At the time of marriage, the wife was gainfully employed as a fashion designer earning $68,000 per year. After the parties' relocated to Albany, the wife stayed at home to raise the parties' child and thereafter had limited success as a realtor and other part-time positions. The court's decision to impute $20,000 to the wife based on a job offer she received from a retail store, which she later declined and which offered pay at the rate of $10 per hour, was not an abuse of discretion. The wife was an experienced fashion designer who had made considerable effort to obtain work in her field of expertise.

*Matter of Ceravolo v DeSantis,* 125 AD3d 113 (3d Dept 2015)

**Support Magistrate Erred in Limiting the Duration of Petitioner Agency's Ability to Receive Child Support**

Family Court denied petitioner agency's objections to an order issued by the Support Magistrate, which limited the duration of petitioner's ability to receive child support to the period of time the mother would receive temporary assistance. The Appellate Division reversed. Initially, the Court found the Support Magistrate erred in determining the mother needed to be present at the hearing. Pursuant to FCA §571(2), the mother was not a party to the proceeding nor was she joined as a necessary party to the proceeding. Additionally, pursuant to FCA §571(3)(a), support orders issued in favor of an agency as assignee continued unless the person or family, who no longer received public assistance, requested the discontinuance.

*Matter of Broome County Department of Social Services v Kelley,* 125 AD3d 1187 (3d Dept 2015)

**Supreme Court Failed to Articulate Reasons for Deviating From CSSA**

Supreme Court erred by failing to articulate the reasons for its determination that application of the CSSA would be unjust or inappropriate pursuant to DRL §240(1-b)(f), and issued an award of child support which deviated from the statutory amount. After a review of the record, the Appellate Division modified the child support obligation. Here, the parties combined parental income of $343,568 exceeded the then-applicable statutory cap of $136,000. The non-custodial father's share of child support for the minor child, using the CSSA, would have resulted in a weekly obligation of $1,044.83. The Court noted the parties' financial situations were not similar since the evidence showed the father was in a much better financial position than the mother and his income was substantially greater. Furthermore, the child had no special needs nor did the father have other children. Based on all these factors, the Court determined that application of the CSSA statutory cap would be unjust and inappropriate and increased the father's weekly child support obligation by $608.08.

*Petersen v Petersen,* 125 AD3d 1234 (3d Dept 2015)

**Amount of Child Support Ordered Was Inadequate to Meet Child's Needs**

After a trial on equitable distribution of property, maintenance and child support, Supreme Court issued a decision and order. The Appellate Division modified the order by, among other things, increasing the amount of child support. Although the monthly child support of $2,700 issued by the court on behalf of the one child was higher than the statutory cap, it was still inadequate. The record showed the father's gross income in 2011 was $902,77 and the child had special needs and emotional health issues which required additional resources and which consumed a considerable amount of the mother's time. Additionally, when the parties lived together, the child had enjoyed going on trips, recreational and instructive activities, and had lived a comfortable lifestyle. The child support amount needed to be increased in order for the child to keep the standard of living he would have enjoyed had the marriage continued. Based on all these circumstances, the father's support obligation was raised to $5000 per month, which the Court noted reflected an addition of about 5% of the husband's income over the cap amount of $136,000.

*Vantine v Vantine,* 125 AD3d 1259 (3d Dept 2015)

**Family Court Has Discretion to View Per Diem Payments as Income**

Parties entered into a consent order which provided they would "contribute to their daughter's college education as provided in their separation agreement and/or judgment of divorce". However, they failed to make any specific direction relative to the child's college expenses in either the separation agreement or judgment of divorce. Thereafter, when the child was ready to apply for college, the mother filed a modification petition seeking contribution from the father for the child's anticipated college expenses and the court, among other things, determined the father's share of such expenses was 70% of the total cost. The Appellate Division affirmed. The clear language of the prior documents showed the parties considered the child's college expenses, intended to contribute to such expenses and contemplated a later determination of the amount to be shared. The mother's petition should have been viewed as an enforcement rather than a modification petition, and as such there was no need for a showing of unusual or unanticipated change in circumstances. The court's inclusion of the father's weekly per diem payments, including the $1,200 he received from his employer for commuting expenses, as part of the father's income was not an abuse of discretion. Family Court was not limited to a parent's taxable income but could include meals, lodging and other monetary contributions provided to the father as part of his compensation for employment. Additionally, the father failed to submit any documentation to show his employer limited his per diem payments to business expenses and therefore the court was not bound by the father's own account of his financial situation. Furthermore, Family Court did not err by failing to reduce the father's basic child support amount. While a court may exercise its discretion to reduce a parent's basic support obligation based on the amount of the parent's college contribution, the record showed the child would continue to live in her mother's home during school vacations and breaks and the mother testified the support payments would be used

towards the child's needs.

*Matter of Covington v Boyle,* 127 AD3d 1393 (3d Dept 2015)

**Court Erred in Calculation of Combined Parental Income**

Supreme Court entered a judgment of divorce ordering defendant to pay child support, among other things. The Appellate Division modified and remitted for further proceedings. The court erred in its calculation of the combined parental income pursuant to Domestic Relations Law Section 240 (1-b) (c) (1) by deducting the amount of maintenance from defendant's gross income without providing for an adjustment in child support upon the termination of maintenance, and by adding the amount of maintenance to plaintiff's income. Plaintiff's imputed net income was $6,000; defendant's imputed net income was $2,000,000. The combined parental income was $2,006,000, and the pro rata shares were 0.3% from plaintiff, and 99.7% from defendant. Therefore, defendant's child support obligation was increased to $46,101.28 per year, or $3,841.77 per month. Plaintiff's contention was rejected that the court abused its discretion in not applying the Child Support Standards Act to the combined parental income in excess of the statutory cap up to $350,000. The record established that the court considered the appropriate factors in applying an income cap of $272,000, rather than $350,000.

*Lazar v Lazar*, 124 AD3d 1242 (4th Dept 2015)

**Fugitive Disentitlement Theory No Longer Applied to Respondent**

Family Court applied the fugitive disentitlement doctrine to respondent. The Appellate Division reversed and remitted for further proceedings. The Appellate Division previously dismissed respondent's appeal from an order of dismissal entered by the court upon declining to sign an order to show cause seeking to vacate two orders entered on respondent's default. One of the orders determined that respondent was in willful violation of a child support order, and the other order committed him to a term of six months of incarceration. The court also issued a warrant for respondent's arrest. The Appellate Division determined that the fugitive disentitlement theory applied to both respondent's order to show cause and to the subsequent appeal. Nonetheless, it granted respondent leave to move to reinstate his appeal upon the posting of an undertaking in the amount of $25,000. Respondent timely posted the undertaking and his motion to reinstate the appeal was granted. By posting an undertaking in the amount of the child support arrears, respondent demonstrated that he was not flouting the judicial process and provided a means of enforcement of the court's order determining the amount of child support arrears in the event that the court's determination was unchanged. Thus, the fugitive disentitlement theory no longer applied to respondent.

*Matter of Shehatou v Louka*, 124 AD3d 1335 (4th Dept 2015)

**Order Reversed; Child Not Emancipated**

Family Court denied the objections of petitioner to the order of the Support Magistrate, who determined that respondent father was relieved of his support obligation because the father established that the child was emancipated. The Appellate Division reversed and remitted for further proceedings to determine the amount of retroactive support. The father failed to meet his burden to show that the child was emancipated. During the relevant time period, the father was no longer the custodial parent when the child became eligible for public assistance. The child had lived with his mother for years before he moved into his own apartment and started receiving public assistance. The father failed to present any evidence that the child had abandoned a relationship with him during the relevant time period; rather, the record established that the father gave the child monetary support after the child moved out of the mother's home and that the father spoke to the child throughout the proceedings.

*Matter of Oneida County Dept. of Social Servs. v Christman*, 125 AD3d 1409 (4th Dept 2015)

**Child Support Order Affirmed**

Family Court denied the objections of respondent father to the order of the Support Magistrate. The Appellate Division affirmed. Although the father contended that he should not have to pay bills that were already paid

by him or were not medical bills, he failed to identify any particular bill or receipt for which reimbursement should not be ordered, and therefore his objections lacked requisite specificity. Further, the father did not contend in his written objection that the mother's proof was not competent or that she had not paid the bills for which she sought reimbursement, and therefore his contentions to that effect were not properly before the appellate court.

*Matter of Farruggia v Farruggia*, 125 AD3d 1490 (4th Dept 2015)

**No Error in Requiring Court Order For Medical Income Execution**

Family Court denied the objection of petitioner County Department of Health and Human Services to the order of the Support Magistrate, who determined that, among other things, if health insurance benefits became available to either respondent parent, DSS or either party could file a modification petition seeking a court order obligating a party to provide health insurance benefits for the child and a medical income execution could not be issued without such court order. Petitioner's contention that it was error to include in the order that medical income execution could not be issued without court order because the CPLR provided that petitioner could issue a medical income execution to a new employer of the parent without going to the court, was misplaced. The statute was not applicable, because here, neither parent provided health insurance coverage for the child at the time the order was issued, whereas the statute applied where the parent initially provided coverage and then changed employment. Contrary to petitioner's further contention, a medical income execution could be issued only where a court had ordered a parent to provide health insurance benefits, and that had not occurred here inasmuch as the Support Magistrate determined that such benefits were not available.

*Matter of Chautuaqua County Dept. of Health and Human Servs. v Matteson*, 126 AD3d 1338 (4th Dept 2015)

**Matter Remitted Where Court Failed to Make a Clear Custody Determination and Child Support Calculation Flawed**

Supreme Court entered a judgment of divorce ordering plaintiff to pay child support, among other things. The Appellate Division modified and remitted for further proceedings. The court failed to make a clear custody determination with respect to the two children, thus hindering meaningful review of the child support award. In its decision, the court stated that the older child was living with plaintiff, and that the younger child was rotating between both houses equally. However, at trial, both parties testified that they had a week-on, week-off child custody arrangement relative to both children. The court apparently accepted plaintiff's unsubstantiated assertion in his post-hearing submission that the older child had moved in with him, and would not be returning to defendant's house. With respect to the younger child, the judgment stated that, by stipulation and agreement, the parties shall share custody, with defendant designated as the primary residential parent for school purposes. No such stipulation appeared in the record. The older child was not referenced in the judgment at all. Even assuming, arguendo, that the court made an implicit custody determination, the child support calculation was flawed. The court failed to explain its application of the precisely articulated, three-step method for determining child support pursuant to the Child Support Standards Act (CSSA). The court failed to set forth the combined parental income, the parties' pro rata shares of the child support obligation, and failed to determine whether to award child support for the amount of combined parental income in excess of the statutory cap. The record was insufficient to determine the appropriate amount of child support. Therefore, the matter was remitted and the court was directed to make a custody determination with respect to both children, and to recalculate child support pursuant to the CSSA.

*Murphy v Murphy*, 126 AD3d 1443 (4th Dept 2015)

**CUSTODY AND VISITATION**

**Sound and Substantial Basis For Award of Custody to Father**

Supreme Court granted the petition of father to modify the parties Texas divorce decree, awarded the father sole physical and legal custody of the parties' children with supervised visitation to respondent mother,

allowed petitioner to relocate the children to Texas, and denied respondent's cross-petition for custody. The Appellate Division affirmed. The court properly considered all the circumstances and the best interests of the child in awarding plaintiff sole legal custody. There was a sound and substantial basis for the court's determination that there was a change in circumstances following the parties' divorce. Respondent interfered with petitioner's visitation with the children and undermined his relationship with them. Respondent repeatedly made allegations against petitioner of physical violence toward her and sexually inappropriate conduct with the parties' daughter, all of which were found to be false. The record demonstrated that respondent's inability to care for the children was negatively impacted by her misuse of prescription drugs and alcohol. The court properly determined that pending respondent's completion of one year of negative drug testing, her visits with the children should be supervised. Petitioner's relocation with the children to Texas was in the children's best interests. Petitioner established that commuting back and forth to Texas was not practical and would be detrimental to his business, which was the sole income source for the children. In contrast, although respondent's family resided in New York State, she did not have significant ties to New York City. Further, petitioner was committed to fostering a relationship between children and respondent and the liberal visitation schedule would allow for a meaningful relationship. While the court erred in allowing respondent to be cross-examined about having an abortion, the error did not impact the court's decision.

*Manuel John M. v Lisa Rossi M.,* 125 AD3d 407 (1st Dept 2015)

**Custody to Father Affirmed**

Family Court granted the father's petition for sole legal and physical custody of the parties' child. The Appellate Division affirmed. A preponderance of the evidence supported the court's determination that it was in the child's best interest to award custody of the child to the father. The father was better able to identify and address the child's educational and emotional needs, and to provide a stable and healthy home environment for the child. Although the mother had been the primary caretaker and had temporary custody of the child during the pendency of the custody hearing, that factor was not determinative, especially since the eight-year-old child had lived with the father for significant periods before the temporary custody order and since the father had always been actively involved in the child's daily life. The record showed that the child was bothered by the mother's frequent arguments with her boyfriend, that the child's behavioral problems manifested after she began living with her mother, and that the father had a less stressful home environment. Although keeping children together was an important factor for the court to consider, it was not an absolute requirement, particularly where, as here, the half-siblings did not grow up together. Also, the child advised the AFC that she had adequate contact with her half sister in the current custody/visitation arrangement.

*Matter of Dedon G. v Zenhia G.,* 125 AD3d 419 (1st Dept 2015)

**Court Did Not Err in Failing to Appoint AFC; Only Jurisdictional Issues Addressed**

Family Court denied respondent mother's motion to dismiss the father's petition for modification of an order of visitation. The Appellate Division affirmed. The court properly denied the mother's motion. Pursuant to the Domestic Relations Law, NY State maintained exclusive, continuing jurisdiction over the prior child custody determination it made pursuant to Domestic Relations Law § 76. The relevant order expressly designated that New York retained exclusive home state jurisdiction. Even in the absence of such provision, the majority of courts have held that the state where the initial decree was entered had exclusive, continuing jurisdiction to modify the decree if one of the parents continued to reside in the decree state and the child continued to have some connection to the decree state, such as visitation. While appointment of an AFC is appropriate and helpful to the court, the court did not err here in failing to appoint an AFC because only jurisdictional issues were addressed.

*Matter of Milton A. v Tracy H. A.,* 125 AD3d 476 (1st Dept 2015)

**Denial of Custody/Visitation of Child to Grandmother Affirmed**

Family Court denied grandmother's petition for custody and motion for visitation with the subject child. The Appellate Division affirmed. There was no presumption that it was in the child's best interest for custody to be awarded to a relative. The sole issue in a custody proceeding was the best interests of the child. Here, the court properly found that it was not in the child's best interests to award the grandmother custody because the grandmother failed to appreciate the danger to the child in allowing the mother access. The mother had viciously beat the child's five-year-old brother and failed to provide him with medical assistance for four days, until he died. The grandmother refused to acknowledge the mother's role in the death and testified that her daughter was an "excellent" mother. The court properly found that the grandmother established the right to be heard based upon her testimony concerning her relationship with the child and also properly concluded that visitation was not in the child's best interests because of the grandmother's flawed understanding of the child's brother's death and the testimony of the foster mother that following visitation, the child became defiant and aggressive, and the child's therapists' reports that the visits were detrimental to the child.

*Matter of Albertina C. v Administration of Children's Servs.,* 125 AD3d 483 (1st Dept 2015)

**Sole Custody of Children to Mother Affirmed**

Family Court awarded petitioner mother sole legal and physical custody of the subject children with visitation to respondent father. The Appellate Division affirmed. The order of protection against the father impeded his ability to obtain physical custody of the children, and there was an inability on the parents' part to put aside the acrimony and distrust resulting from the father's domestic violence. The record showed that the mother was the children's primary caretaker and she had demonstrated an ability to properly care for them and provide for their needs.

*Matter of Miriam D. v Adama D.,* 126 AD3d 474 (1st Dept 2015)

**Sound and Substantial Basis For Award of Custody to Father**

Family Court, after a dispositional hearing and upon a finding of neglect against respondent mother upon consent, awarded custody of the subject child to the nonparty father. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that it was in the child's best interests to award custody to the father. The court-appointed expert psychologist found that respondent, who suffers from recurrent major depression and intermittent explosive behavior, has poor judgment and limited insight into her mental health issues. Additionally, the mother had just recently obtained suitable housing after living in multiple shelters across New York State, while the father was employed and had maintained a home upstate with an extended family. Although at one time the mother had an order of protection against the father due to domestic violence, there was evidence that the mother also physically assaulted the father, and there was no indication that the father had continued violent behavior.

*Matter of Calvin J.,* 126 AD3d 509 (1st Dept 2015)

**Connecticut More Convenient Forum**

Family Court granted respondent mother's motion to dismiss the father's modification of custody petition on forum non conveniens grounds. The Appellate Division affirmed. The father, who lived in Pennsylvania, commenced this proceeding to modify a NY order granting sole custody of the parties' child to the mother about 12 days after the mother moved to Connecticut with the child. Contrary to the AFC's argument on appeal, the court continued to have exclusive, continuing jurisdiction when the petition was filed. Although the court incorrectly stated that Connecticut was the child's home state, its determination that New York was an inconvenient forum was based upon a consideration and balancing of the factors listed in Domestic Relations Law §76-a (1) (a) and, to the extent that further factors were not mentioned, the record was sufficient for the Appellate Division to consider them. There was a sound basis for the court's finding that Connecticut was the more convenient forum to decide the petition. Substantial evidence was no longer available in New York about the child's care,

protection, training and personal relationships, because the child's school, doctors, and residence were all located in Connecticut.

*Matter of Luis F. F.. v Jessica G.,* 127 AD3d 496 (1st Dept 2015)

**Order Reversed; Primary Physical Custody Properly to Mother**

Family Court, upon the mother's petition for modification of a child custody award granting the parties joint physical and legal custody of the parties' child, awarded respondent father primary physical custody with access to the mother. The Appellate Division reversed and awarded primary physical custody to the mother. The award of sole custody to the father lacked a sound and substantial basis in the record. The Referee's determination was primarily based upon the fact that the father recently moved from Austin, Texas to Kaufman, Texas, near his sizable extended family, whereas the mother had a very small family. The Referee also found that the father was more stable than the mother because he was gainfully employed and was able to rent an apartment for himself and the child, whereas the mother had no income and lived with her boyfriend, who had no obligation to support her and the child. The Referee failed to consider that the mother was in a long-term relationship with her boyfriend, and that the home they lived in for over two years was the only stable home the five-year-old child had ever known. Further, the child was born in New York and had lived here consistently for the first part of her life; was very close to her maternal grandmother, who lives in New York; had close friends here; and was accepted into a kindergarten with a French dual-language program. Additionally, the Referee noted that the other, who had supported the father financially for more than a year during their short marriage, had credentials to find employment and would "always find a way" to provide for the child. Significant weight should have been given to the father's failure to comply with court orders to return the child from Texas to the mother on two occasions. The father had not expressed any concern that the mother, if awarded primary physical custody, would not provide him with access to the child.

*Matter of Nia Dara B. v Jonathan B. ,* 127 AD3d 518 (1st Dept 2015)

**Custody Dispute Not Subject to Arbitration**

The parties entered into an agreement pursuant to which they agreed to arbitrate all marital issues between them before a rabbinical arbitration tribunal, the Beth Din Kollel Avreichem and Yeshiva (Badatz) (hereinafter the Beth Din). Thereafter, the Beth Din issued a decision, inter alia, awarding the parties joint legal custody of the parties' children, awarding the mother residential custody, awarding the father certain visitation, and determining the father's child support obligation. The mother commenced this proceeding pursuant to CPLR 7510 to confirm the Beth Din award. In an order dated September 12, 2012, the Supreme Court granted those branches of the petition which were to confirm the award of custody and visitation, and the award of the father's child support obligation. Although the parties consented to arbitration of custody and visitation matters, they had no power to do so. "Disputes concerning child custody and visitation are not subject to arbitration as 'the court's role as parens patriae must not be usurped' ". Accordingly, that branch of the petition which was to confirm the custody and visitation provisions of the arbitration award should have been denied. As to the father's child support obligation, an arbitration award concerning child support may be vacated on public policy grounds if it fails to comply with the Child Support Standards Act (*see* DRL § 240 [1-b]) and is not in the best interests of the children. Here, the father failed to demonstrate that the award of child support was incompatible with the objectives of the Child Support Standards Act and that it was not in the best interests of the children.

*Matter of Goldberg v Goldberg*, 124 AD3d 779 (2d Dept 2015)

**Record Supported Release of Child to Father's Custody**

The mother appealed from an order of disposition of the Family Court, which, after a hearing, released the subject child to the custody of the father and directed the entry of an order of protection requiring the mother to stay away from the subject child, except for supervised visitation. The Appellate Division affirmed. At a dispositional hearing, the Family Court's

disposition must be made "solely on the basis of the best interests of the child" with "no presumption that such interests will be promoted by any particular disposition" (*see* FCA § 631). Here, the credible evidence established that the mother, from whose custody the child had been removed when the mother was hospitalized for psychiatric treatment, had significant mental health problems which interfered with her ability to provide appropriate care for the child and to obtain appropriate services for his severe autism. The evidence also raised concerns that the mother might have been subjecting the child to unnecessary medical evaluations and treatments, and an overly restrictive diet. In contrast, once the child was placed in his custody, the father enrolled the child in a school which could provide appropriate special education services, arranged for the child to receive applied behavior analysis therapy, a recognized therapy for autism, and arranged for the child's home health aides to provide services at his home. Accordingly, the Family Court's determination that releasing the child to the custody of the father was in the child's best interests had a sound and substantial basis in the record. Furthermore, in light of the mother's disruptive behavior during visits and her admitted unwillingness or inability to comply with court directives regarding her interactions with the child, the court properly directed that the mother's visitation with the child be supervised.

*Matter of Bobby J.C.* 124 AD3d 648 (2d Dept 2015)

**Evidentiary Hearing Required on Issue of Supervised Visitation**

In December 2011, the subject child's maternal grandmother petitioned for custody of the subject child. The child's mother, who had a well-documented history of mental illness and psychiatric hospitalizations, subsequently petitioned for visitation with the child. The Family Court, without conducting a hearing, granted the grandmother's petition for custody and granted the mother's petition for visitation, to be supervised by the grandmother or "any adult family member with the maternal grandmother's consent." On appeal, the attorney for the child argued that the Family Court's determination to allow the mother to have visitation supervised only by the grandmother or any other adult family member approved by the grandmother lacked a sound and substantial basis in the record, since no evidentiary hearing was conducted and no forensic evaluation was performed. The Appellate Division agreed. Under the circumstances of the case, the Family Court improvidently determined, without conducting a full evidentiary hearing, that the mother's visitation with the child should be supervised by the grandmother or "any adult family member with the maternal grandmother's consent". Moreover, that determination should not have been made without a forensic evaluation of the mother. Accordingly, the matter was remitted for a full evidentiary hearing on the mother's petition, including the completion of a full forensic evaluation of the mother, to determine, inter alia, who should supervise the mother's visitation with the child, and for a new determination of the mother's visitation petition thereafter. Additionally, the Appellate Division directed, in view of certain remarks made on the record by the Family Court Judge which suggested that the Judge was dismissive of the position of the attorney for the child, that further proceedings should be held before a different Judge.

*Matter of Sanchez v Russo*, 124 AD3d 904 (2d Dept 2015)

**Order Denying Incarcerated Father's Petition for Visitation Reversed**

The father, who was incarcerated, petitioned for visitation with the subject child. The Family Court granted the father's petition for visitation only to the extent of awarding him visitation by means of letters, cards, gifts, and telephone calls, but effectively denied him visitation with the child in person. The father appealed. Upon reviewing the record, the Appellate Division found that the mother and the attorney for the child failed, by a preponderance of the evidence, to rebut the presumption that visitation with a noncustodial parent is in the best interests of a child, even when that parent is incarcerated. The evidence demonstrated that the father had established a relationship with the child prior to being charged with the offenses for which he was then incarcerated, that the father made some efforts, despite resistance by the mother, to maintain contact with the child thereafter, and that the prison in which the father was housed was located less than one hour away by car from the county in which the child resided. Further, the mother and the

attorney for the child did not offer any specific evidence as to how periodic visitation with the father in person would be harmful to the child's welfare. Under these circumstances, the Family Court improvidently exercised its discretion in granting the father's petition only to the extent of awarding him visitation by means of letters, cards, gifts, and telephone calls, and effectively denying him visitation with the child in person. Accordingly, the order was reversed and the matter was remitted to the Family Court for further proceedings to establish an appropriate in-person visitation schedule for the father.

*Matter of Torres v Pascuzzi-Corniel*, 125 AD3d 675 (2d Dept 2015)

**Visitation Order Failed to Clearly Specify Drop-Off Location**

The mother appealed from an order of the Family Court which granted the father's petition to hold the mother in contempt for violating the visitation provisions of a prior order of that court, and suspended all visitation between the mother and the subject children, except for supervised weekly visits. The Appellate Division reversed. Upon reviewing the record, the Appellate Division found that the Family Court's determination was not supported by clear and convincing evidence. Notwithstanding that the mother's conduct in returning the children late was problematic, the language of the visitation order was not clear and unambiguous, insofar as it failed to specify that the drop-off location should be within the same vicinity as the pick-up location, and did not contain any geographic restrictions. Significantly, the Family Court acknowledged that the order was not "clear" that the places of pick-up and drop-off should have been reasonably within the same locale. Under those circumstances, it could not be said that the mother violated a clear and unequivocal mandate of the court.

*Matter of Wright v McIntosh*, 125 AD3d 771 (2d Dept 2015)

**Mother Seeking Modification to Visitation Not Entitled to Assigned Counsel**

Contrary to the mother's contention, she was not entitled to assigned counsel in her capacity as the petitioner seeking to modify her visitation with the subject child. Further, her petition was properly denied without a hearing as she failed to allege a sufficient change of circumstances between the issuance of the prior order and the filing of the petition.

*Matter of Ali v Hines*, 125 AD3d 851 (2d Dept 2015)

**Grandmother Failed to Establish Extraordinary Circumstances**

Upon reviewing the record, the Appellate Division found that the Family Court's determination that the grandmother failed to establish extraordinary circumstances was supported by a sound and substantial basis in the record. Contrary to the grandmother's contention, she failed to establish extraordinary circumstances by virtue of an extended disruption of custody pursuant to DRL § 72 (2). Moreover, the grandmother failed to show that either the father of two of the children or the father of the third child provided unstable and unsafe living situations for the children. A parent cannot be displaced merely because another person would do a "better job" of raising the child, or because the child has bonded psychologically with the nonparent. The grandmother's contention that she was deprived of a fair hearing by the Family Court's failure to direct forensic evaluations or to hold in camera interviews with the children was unpreserved for appellate review. Nevertheless, the Appellate Division found that the Family Court possessed sufficient information to enable it to render its determination without forensic evaluations or in camera interviews.

*Matter of Bailey v Carr*, 125 AD3d 853 (2d Dept 2015)

**Evidentiary Hearing Required to Determine Best Interests**

Upon reviewing the record, the Appellate Division found that the Family Court erred in granting the father's motion for summary judgment, denying the mother's cross motion for visitation, and dismissing the father's petition for modification. In light of controverted allegations, it could not be concluded that the Family Court possessed sufficient information to render an informed determination as to the best interests of the child without the benefit of an

evidentiary hearing. Accordingly, the matter was remitted to the Family Court for an evidentiary hearing on the issues of custody and visitation, and a new determination thereafter of the father's petition and the mother's cross motion for visitation.

*Matter of Boyke v Charles*, 125 AD3d 854 (2d Dept 2015)

**Father Granted Limited Unsupervised Visitation with Child**

The mother appealed from an order of the Family Court which awarded the father limited unsupervised visitation with the subject child and imposed certain conditions upon those visits. The Appellate Division affirmed. The record revealed that the 11-year-old child repeatedly expressed her desire to have unsupervised visitation with the father. The attorney for the child recommended that the father and child have some unsupervised visitation. Critically, there was nothing in the record which would give rise to the conclusion that some limited unsupervised visitation would have been detrimental to the child. Further, the requirements imposed by the order of visitation, including prohibiting the father from taking the child to his home, prohibiting him from disparaging the child's foster mother, and requiring that the child be picked up and dropped off at the agency, were tailored to protect the child while permitting the parent-child bond to grow in a more natural setting. Thus, the Family Court providently exercised its discretion in awarding limited unsupervised visitation between the father and the subject child.

*Matter of Anthony M.P. v Ta-Mirra J.H.*, 125 AD3d 868 (2d Dept 2015)

**Evidentiary Hearing Not Required**

The plaintiff appealed from an order of the Supreme Court, which was entered without having held a hearing, granting the defendant's motion for sole legal and physical custody of the parties' two children. The Appellate Division affirmed. Although a custody determination generally may only be made following a full and comprehensive evidentiary hearing, no hearing is necessary where the court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest. Here, the parties' affidavits and the report prepared by the court-appointed forensic evaluator demonstrated that the plaintiff admitted the defendant's allegations regarding her emotionally destructive and sometimes violent behavior toward him and the parties' two children. Moreover, the forensic evaluator, who interviewed the parties and the subject children, concluded that the defendant was the more stable parent, and that the defendant was able to make sound parenting decisions for the children. Additionally, the attorney for the children supported the award of custody to the defendant.

*S.L. v J.R.*, 127 AD3d 682 (2d Dept 2015)

**Father's Role in Estrangement from Child Not Properly Considered**

The Supreme Court's determination to award the father sole legal and physical custody of the subject child was not supported by a sound and substantial basis in the record. Insufficient weight was given to the undisputed fact that the father voluntarily ceased all contact with the child during the two-year period preceding the date of the order appealed from. Although the child's estrangement from the father was due, in part, to the mother's own conduct, the father also played a role in the estrangement, including, among other things, his voluntary two-year absence from the child's life and his rejection of repeated offers to engage in therapeutic visitation to reconcile his relationship with the child. While the child's school performance and behavior had declined from when the prior order was entered, and may well have been caused, at least in part, by the acrimony that characterized the state of the parties' relationship, no competent evidence was presented that the decline was due to how the mother interacted with the child. Furthermore, the Supreme Court gave undue weight to the court-appointed forensic evaluator's report, which was prepared nearly 18 months prior to when the Supreme Court rendered its decision, with the last interview conducted almost two years prior. Moreover, the Supreme Court failed to accord sufficient weight to the child's need for stability and the impact of uprooting him from the mother's residence. Rather, the evidence demonstrated that it was in the best interests of the child, who had been in the primary physical custody of the mother since birth, to remain

with the mother. Accordingly, the order was reversed.

*Matter of Connolly v Walsh*, 126 AD3d 691 (2d Dept 2015)

**Court Lacked Exclusive Continuing Jurisdiction**

Although the father lived in New York, because the child had not maintained a significant connection with New York, and substantial evidence was no longer available in New York concerning J.'s "care, protection, training, and personal relationships" (*see* DRL § 76-a [1] [a]), the Family Court correctly determined that it lacked exclusive continuing jurisdiction pursuant to DRL § 76-a [1] with respect to the child J. Accordingly, the Family Court properly granted the mother's motion which was to dismiss the father's petitions alleging a violation of an existing order of custody and visitation with respect to J.

*Matter of Tamari E. v Auther L.*, 126 AD3d 697 (2d Dept 2015)

**Record Supported Court's Order of Protection Issued in Conjunction with Order Awarding Custody to Mother**

Contrary to the father's contentions, the Family Court's determination as to the best interests of the child, made after a hearing in which the court heard testimony from a number of witnesses, including the parties, had a sound and substantial basis in the record. Moreover, the father's contention that there was no basis for the Family Court's issuance of an order of protection against him was without merit. Pursuant to FCA § 656, the Family Court may issue an order of protection in conjunction with any other order issued pursuant to FCA Article 6. Here, the court issued the order of protection in connection with its order awarding the mother legal and physical custody of the subject child. The evidence presented, which showed that the child feared the father, provided an ample basis for issuance of the order of protection.

*Matter of Lyons v Knox*, 126 AD3d 798 (2d Dept 2015)

**Court Was Not Required to Hold a Separate Hearing on Father's Petition to Modify Custody at the Conclusion of a Family Offense Proceeding**

The mother appealed from an order of the Family Court which granted the father's petition to modify a prior order of custody so as to award him sole legal and physical custody of the subject child. The Appellate Division affirmed. The record revealed that immediately following the conclusion of a family offense proceeding in which the mother's inappropriate conduct toward the subject child and others, and the father's positive parental relationship with the child, were amply demonstrated at a hearing, the Family Court granted the father's petition to modify custody without conducting an additional hearing. Contrary to the mother's contention, a separate hearing and the submission of additional forensic evidence was unnecessary under the circumstances of this case, since the Family Court had adequate relevant information, including the testimony adduced at the hearing in the family offense proceeding and the report of a forensic evaluator, to enable it to render a provident and informed determination. Moreover, the Family Court's determination as to custody and visitation has a sound and substantial basis in the record.

*Navarrete v Navarrete*, 126 AD3d 801 (2d Dept 2015)

**Court Lacked Jurisdiction over Non-Minor Child**

The Appellate Division affirmed the Family Court's order which dismissed the father's petition for custody and visitation. Contrary to the father's contention, the Family Court was not authorized to retain jurisdiction to determine his petition for custody and visitation after the subject child reached the age of 18 (*see* FCA§§ 119, 651 [b]).

*Matter of Batista v Gaton,*126 AD3d 895 (2d Dept 2015)

**Court Properly Declined to Exercise Jurisdiction**

The order appealed from declined to exercise jurisdiction over the parties' child access issues. A court may decline to exercise jurisdiction if it determines, after an evaluation of statutory factors, that New York is an inconvenient forum and that another state provides a more appropriate forum *(see* DRL § 76-f). The record revealed that the father resided in California, and the mother and children had moved to Maryland in November 2012. Accordingly, the

Supreme Court, after considering the statutory factors set forth in DRL § 76-f (2), properly declined to exercise jurisdiction over the issues concerning the father's access to the children.

*Pelgrim v Pelgrim*, 127 AD3d 710 (2d Dept 2015)

**Order Granting Father's Petition for Modification Affirmed**

The mother appealed from an order of the Family Court, which, after a hearing, granted the father's petition to modify an order of custody to award him physical custody of the subject child and sole custody with respect to all issues relating to education. The Appellate Division affirmed. Here, there was evidence that the relationship between the mother and the 14-year-old child had deteriorated, and that the child wished to reside with the father. In addition, there was evidence that the child's school performance, including completion of homework, improved while he was with the father. Contrary to the mother's contention, the Family Court's determination awarding the father physical custody and sole custody with respect to all issues relating to education had a sound and substantial basis in the record.

*Matter of Cannella v Anthony*, 127 AD3d 745 (2d Dept 2015)

**Record Supported Award of Custody to the Father**

The Family Court properly considered the totality of the circumstances, and its determination awarding the father sole custody of the parties' child was supported by a sound and substantial basis in the record. Any error in failing to set forth the facts in the order appealed from did not constitute grounds for reversal or modification, since the record contained a sound and substantial basis for the Family Court's determination, and was sufficient for the Appellate Division to conduct an independent review of the evidence.

*Matter of Thomas v Wong*, 127 AD3d 769 (2d Dept 2015)

**Mother Offered Sufficient Proof to Warrant a Hearing on Motion for Modification**

The order appealed from denied, without a hearing, the mother's motion to modify the custody and support provisions set forth in the stipulations of settlement between the parties so as to award her sole custody of the parties' children. The Appellate Division reversed. The mother offered sufficient proof to warrant a hearing on her motion for modification of the custody provisions of the stipulations. Most importantly, the mother offered sufficient evidence that the parties' ability to cooperate with each other with respect to their parental obligations had become so impaired that the children were being harmed. Accordingly, the order was reversed, and the matter was remitted to the Supreme Court for the appointment of an attorney to represent the interests of the children, and thereafter for a hearing and a new determination.

*Franco v Franco*, 127 AD3d 810 (2d Dept 2015)

**Children's Preference and Position of Attorney for the Children Properly Considered**

Contrary to the contentions of the father and the attorney for the children, there was nothing in the record to warrant supervision of the mother's visitation with the subject children. While the children's preference and the position of the attorney for the children are factors to be considered and are entitled to some weight, they are not determinative and do not usurp the judgment of the trial judge. However, under the circumstances of this case, the Family Court should have granted that branch of the father's petition which was to require the mother's three weeks of summer visitation to occur only in the State of New York. Accordingly, the order was modified.

*Matter of Blazek v Zavelo,* 127 AD3d 854 (2d Dept 2015)

**Grandfather Failed to Demonstrate That Mother Frustrated His Visitation with Grandchildren**

The order appealed from denied a petition for grandparent visitation. The Appellate Division affirmed. The Family Court properly determined that the grandfather lacked standing to seek visitation with the grandchildren as the grandfather failed to demonstrate that the mother frustrated his visitation with the grandchildren. The record revealed that it was

undisputed that the mother had asked the grandfather to visit with the grandchildren, and that he only refused because the mother did not want the grandmother to accompany him. While the grandmother had standing to seek visitation with the grandchildren, there was a sound and substantial basis in the record to support the Family Court's conclusion that visitation with the grandmother was not in the best interests of the grandchildren.

*Matter of Troiano v Marotta*, 127 AD3d 877 (2d Dept 2015)

**Record Did Not Support Family Court's Finding of Willful Violation**

The father appealed from an order of the Family Court, entered on November 3, 2013, which granted the mother's petition for a finding that he wilfully violated a prior order of that court, entered December 17, 2012, and directed him to "transport the subject children to and from Hebrew School" during his access time with the children. The record revealed that the parties' stipulation of settlement provided that their two children would be raised in the Jewish faith, including attendance at religious school. The November 3, 2013 order was silent as to any parental obligation to transport either child to and from Hebrew School. Thus, the Family Court erred in concluding that the father wilfully violated that order in failing to transport the parties' children to and from Hebrew School. Accordingly, the order was modified, and the parties were directed that going forward, during the time when the subject children are enrolled in Hebrew School, the parent having physical custody of the children on any day when they are scheduled to attend Hebrew School shall be responsible for transporting the children to and from that school.

*Matter of Genitrini v Grill*, 127 AD3d 970 (2d Dept 2015)

**Maternal Great Aunt's Petition for Guardianship Properly Dismissed**

The order appealed from, which was entered after a hearing, dismissed a petition filed by the maternal great aunt (hereinafter aunt) seeking guardianship of the subject child. The Appellate Division affirmed. The record provided a sound and substantial basis for the Family Court's conclusion that it was in the best interests of the child to remain in her foster home and to be freed for adoption by her foster parents. At a hearing held on September 23, 2013, the evidence established that the aunt, who was certified as a foster parent, made persistent efforts to be considered a resource for the child, had been visiting with the child regularly since December 2012, and was beginning to form a loving bond with the child. Nevertheless, the aunt was previously investigated as a resource for the child, and it was determined for stated reasons that the child should remain in her foster home. The evidence at the hearing also established that the child, who was then 19 months old, had resided with her foster parents for almost her entire life and had formed significant bonds with them, and that the child was happy, healthy, well provided for, and thriving in that home environment. Under these circumstances, the Family Court properly dismissed the guardianship petition of the child's maternal great aunt.

*Matter of Quida H. v Sara H.*, 127 AD3d 971 (2d Dept 2015)

**Order Directing Supervised Visitation Affirmed**

The order appealed from, dated January 14, 2014, made upon granting the father's petition to modify an order of custody and visitation of the Family Court, dated June 30, 2005, directed that his visitation with the subject child be supervised. The Appellate Division affirmed. The evidence established that the subject child, who was 11 years old at the time of the fact-finding hearing, had serious physical and mental health challenges, had very little contact with his father since 2008, and became agitated when he saw his father. Accordingly, the Family Court did not improvidently exercise its discretion in directing that the father's visitation with the child be supervised.

*Matter of Lopez v Lopez*, 127 AD3d 974 (2d Dept 2015)

**Record Supported Determination That Relocation with Mother to London, England Was in the Children's Best Interests**

The record provided a sound and substantial basis for

the Supreme Court's determination which denied the father's motion to enjoin the mother from relocating with the children to London. The mother established by a preponderance of the evidence that the relocation to London was in the children's best interests. She demonstrated that the move was economically necessary, that the children's lives would be enhanced emotionally and educationally by the relocation, that the move would not have a negative impact on the quality of the children's future contact with the father, and that it was feasible to preserve the relationship between the father and the children through a suitable visitation schedule. Although the mother's relocation would have an impact on the father's ability to spend time with the children, a liberal visitation schedule, including extended visits during the summer and school vacations, would allow for the continuation of a meaningful relationship between the father and the children. Additionally, the Supreme Court's determination was in accordance with both the children's stated preference and the position of the attorney for the children. Under the circumstances of this case, the Supreme Court possessed adequate relevant information to enable it to make an informed and provident determination, without a hearing, as to whether it was in the children's best interests to relocate with the mother to London.

*Lecaros v Lecaros,* 127 AD3d 1037 (2d Dept 2015)

**Record Supported Denial of Mother's Petition; Allegations Were Unsubstantiated and Conclusory**

The order appealed from, dismissed, without a hearing, the mother's petition to modify the custody provisions of the parties' judgment of divorce to award her custody of the parties' children. The Appellate Division affirmed. A party seeking such a modification is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing. Here, the mother's allegations were unsubstantiated and conclusory, and did not allege a material change in circumstances. To the extent that the mother's petition was predicated upon difficulties she allegedly encountered in scheduling appointments for therapeutic supervised visitation with the service provider designated in the parties' judgment of divorce, it was noted that the judgment permitted the parties to mutually agree upon another service provider.

*Matter of Besen v Besen*, 127 ADd3d 1076 (2d Dept 2015)

**Petition to Relocate with Child to North Carolina Denied**

The Appellate Division affirmed the Family Court's order which denied the mother's petition for permission to relocate with the child to North Carolina, and granted the father's petition to modify the custody provision of the parties' judgment of divorce so as to award him sole custody of the child. The mother failed to show by a preponderance of the evidence that relocating from New York to North Carolina would enhance the subject child's life economically, emotionally, and educationally, and justify uprooting the subject child, who was then 11 years old, from a school district where she had attended school since kindergarten and where she was thriving. Further, the evidence demonstrated that the subject child had lived with the father since June of 2011, and the father was actively involved in her education and daily life. Thus, the Family Court's determination had a sound and substantial basis in the record.

*Matter of Melgar v Sevilla*, 127 AD3d 1092 (2d Dept 2015)

**Hearing Necessary on Issue of Incarcerated Father's Visitation**

The mother petitioned for sole legal and physical custody of the parties' children while the father was incarcerated. In the order appealed from, the Family Court, without a hearing, granted the mother's petition and awarded the father visitation only to the extent as agreed upon by the parties. Contrary to the father's contention, the Family Court possessed adequate relevant information to enable it to make an informed determination, without a hearing, as to whether it was in the subject children's best interests to grant the mother's petition for sole legal and physical custody. However, the Family Court erred in, without having held a hearing, awarding the father visitation only to the extent as agreed upon by the parties. Visitation with a noncustodial parent is presumed to be in the best interests of a child, even when that parent is incarcerated. That presumption may be rebutted, however, by demonstrating, by a preponderance of the

evidence, that "under all the circumstances visitation would be harmful to the child's welfare, or that the right to visitation has been forfeited". Here, the Family Court did not possess adequate relevant information to enable it to make an informed determination as to the children's best interests so as to render a hearing unnecessary on the issue of the father's visitation. Accordingly, the order was modified and the matter was remitted to the Family Court for an evidentiary hearing to determine the best interests of the children and a new determination regarding the father's visitation with the children.

*Matter of Bell v Mays*, 127 AD3d 1179 (2d Dept 2015)

**Court Erred When it Failed to Follow Procedures Mandated by DRL § 75**

The mother appealed from an order of the Family Court, dated January 10, 2014, which, confirmed the report of a Judicial Hearing Officer, dated November 18, 2013, and dismissed the mother's petition to modify a New Jersey custody and visitation order on the ground that the Family Court lacked subject matter jurisdiction over the matter. The Appellate Division reversed. Here, the Family Court erred in determining the jurisdictional issue without following the procedure mandated under the Domestic Relations Law. Although the record indicates that the Family Court engaged in certain communication with the New Jersey court, the Family Court nevertheless failed to create a record of that communication or provide the record to the parties (*see* DRL § 75-i [4]). The Family Court also failed to afford the parties an opportunity "to present facts and legal arguments before a decision on jurisdiction is made" (*see* DRL § 75-i [2]). Under these circumstances, the order was reversed, and the matter was remitted to the Family Court for further proceedings in accordance with DRL §§ 75-i and 76-e (2), and thereafter, for a new determination.

*Matter of Frankel v Frankel*, 127 AD3d 1186 (2d Dept 2015)

**Mother Established a Sufficient Change of Circumstances to Warrant a Hearing**

The mother appealed from an order of the Family Court, which, without a hearing, granted the father's motion to dismiss the mother's petition to modify the custody provisions of a stipulation of settlement, and to hold the father in contempt for the willful violation of that stipulation. The Appellate Division reversed. Upon reviewing the record, the Appellate Division found that the mother presented sufficient evidence of a change of circumstances to warrant a hearing, and that the Family Court did not possess sufficient information to make an informed determination with respect to the best interests of the child. Additionally, the issue of the father's alleged contempt also should have been resolved by a hearing, since a factual dispute existed as to whether the father denied the mother access in violation of the terms of the parties' stipulation which could not be resolved on the papers alone. Accordingly, the matter was remitted to the Family Court for a hearing to determine whether a modification of custody was in the best interests of the subject child and, whether to hold the father in contempt for his alleged willful violation of the stipulation of settlement.

*Matter of Ruiz v Sciallo*, 127 AD3d 1205 (2d Dept 2015)

**Record Did Not Support Limited Frequency and Duration of Visitation Awarded to Mother**

Contrary to the mother's contention, there was sufficient evidence in the hearing record both to demonstrate the requisite change in circumstances and to support the Family Court's determination which modified the custody order by awarding custody to the father. While it would have been preferable for the court to consider forensic evaluations of the parties and the child in reaching its custody determination, under the particular circumstances of this case, there was ample testimony and documentary evidence upon which the court could determine the best interests of the child. Thus, the custody determination had a sound and substantial basis in the record. However, the limited frequency and duration of the visitation awarded to the mother was not supported by the record. The evidence adduced at the hearing did not warrant the narrowly circumscribed visitation schedule awarded to the mother. A more liberal schedule of visitation would have fostered the best interests of the child by permitting the continued development of a meaningful, nurturing relationship between the mother and the child. Accordingly, the matter was remitted to the

Family Court for an expedited hearing and a new determination limited solely to the issue of the mother's visitation. In view of the passage of time since the issuance of the orders appealed from, the Appellate Division directed that the hearing and determination should be preceded by updated forensic evaluations of the parties and the child.

*Matter of Stones v Vandenberge*, 127 AD3d 1213 (2d Dept 2015)

**Family Court Erred in Conducting "Modified" Lincoln Hearing**

Family Court dismissed petitioner mother's application to relocate with the subject children. The Appellate Division affirmed. However, Family Court incorrectly dismissed the petition based on its finding of insufficient change in circumstances, since no such showing was required since the planned move itself met the requirement. Upon consideration of the necessary factors in relocation cases, the evidence was sufficient to show that the mother did not meet her burden of proving it would be in the children's best interests to relocate. Although the mother testified the move to Texas would allow her to be near her family and discontinue her need for public assistance, since she would work at her family business, she was unable to state what her salary would be. Additionally, though the maternal grandfather said he would be able to help the mother obtain a college degree if she moved to Texas, he was unable to explain why he could not assist her if she remained in New York. Even though the mother liked the schools the children would attend in Texas, she failed to show how they compared to the schools in New York or why they could offer better educational opportunities for the children. Although the mother stated the father could visit the children in Texas and phone or Skype with them, she was reluctant to permit the children to visit him in New York. The father had consistent weekly contact with the children. Even if the move would allow the children to have a closer relationship with the mother's family, it would take them away from their paternal relatives and they had a close relationship with the paternal grandmother. Finally, Family Court erred in holding a "modified" Lincoln hearing, in which the court allowed the parties' attorneys to be present during the Lincoln and failed to seal the transcript of the hearing. A child who is explaining the reasons for his or her preference in a custody or visitation proceeding should not be placed in the position of having that relationship jeopardized by having to publicly talk about the difficulties faced or have to openly choose between the parents. The court's primary role in such proceedings is to protect the welfare and interests of the child and its paramount obligation to maintain the child's confidentiality.

*Matter of Julie E. v David E.,* 124 AD3d 934 (3d Dept 2015)

**It Was in Child's Best Interests to Award Sole Custody to Father**

Family Court modified a prior order of sole custody to the mother and granted sole custody of the child to the father. The Appellate Division affirmed. Here, after the entry of the prior custody order, the mother ended her relationship with her paramour and moved to her friend's home with the child. Thereafter, the mother left the child with the friend for two weeks and went to Tennessee for a modeling job but got into a car accident in Ohio. Thereafter, she came back to New York for one day and took the child to Ohio despite an order issued by the court prohibiting her from removing the child from the State. The mother was apparently unaware of the order and stayed in Ohio for 10 days and ended up married to someone she had met. She petitioned to relocate with the child but thereafter, realized her marriage was a mistake and moved back in with her paramour. The child missed his scheduled visitation with his father and two weeks of school due to his stay in Ohio. These factors constituted a sufficient showing of a change in circumstances. It was in the child's best interests for the father to have sole custody. Both parties agreed their ability to communicate with each other was poor. Additionally, the mother's life was unstable and she created instability in the child's life. The father however, had steady employment and resided with his family. Although he had a reading disability, he was able to help the child with other school work and projects and the paternal grandmother helped the child with reading. Despite some shortcomings, the father offered greater stability for the child than the mother.

*Matter of Sherwood v Barrows,* 124 AD3d 940 (3d Dept 2015)

**Re-location in Child's Best Interests**

Family Court modified a prior order of custody and granted the mother's petition to relocate with the subject child to Camp LeJeune, North Carolina. The Appellate Division affirmed. Here, after the prior order of custody had been issued, the mother, who had been living with her parents, married a Marine corporal whom she had been dating for more than a year. The record showed the move would afford the child, who had an extremely close relationship with his mother, emotional and economic stability. Although the mother 's husband was placed in service in Japan, he was deemed involuntarily separated from his family and this circumstance allowed the mother to receive a housing allowance and health insurance if residing in North Carolina since the husband was assigned to serve in North Carolina. However, if the mother were forced to remain in New York, she would lose the housing allotment. Additionally, the move to a warmer climate would help the child avoid contracting ear infections which increased in frequency in cold weather. Moreover, the child would have access to an education in a military school and would be eligible to receive college tuition due to the husband's military service. Although the relocation would impact the father's parenting with the child, the court's expanded visitation schedule for the father along with six consecutive weeks with the child in the summer, vacation weeks, holidays and other times helped to promote the father-child relationship.

*Matter of Adams v Robertson,* 124 AD3d 946 (3d Dept 2015)

**Family Court Erred in Modifying Joint Legal and Physical Custody**

Family Court found the father had violated a prior order of custody and modified the joint legal and shared parenting time order to sole legal and physical custody to the mother. The Appellate Division determined there was no basis to modify joint legal custody to sole legal custody and due to the time that had elapsed since the entry of the order and lack of evidence regarding the parties' financial and other living situations, the matter was remitted to the court to issue an appropriate order regarding physical custody and parenting time schedule. The record as a whole failed to show the parties' had demonstrated a change in circumstances warranting a change of joint legal custody. The court's violation determination was based on the father's refusal to return the child home to the mother pursuant to the terms of the prior custody order and there was no reason to disturb this finding. However, the record failed to establish the parents' relationship had become so acrimonious that sole legal custody was warranted. Although the father had failed to return the child to the mother pursuant to the terms of the prior custody order, his decision was based on the mother's release from an inpatient psychiatric facility as well as after discussions regarding this matter with his attorney and the attorney for the child. The father's basis for seeking sole custody stemmed from his concerns about the mother's stability based on her mental health and alcohol dependency issues. Even though the father arbitrarily imposed a two-week notice requirement when the mother wanted additional visitation with the child, he was properly admonished for this behavior. Furthermore, the father testified he and the mother had amicably discussed issues regarding the child's medical appointments, vacation schedule and school enrollment and the mother's testimony showed the parents' relationship had not deteriorated to a point where they were unable to maintain "a modicum of communication and cooperation" for the sake of the child. Moreover, the mother never petitioned for sole legal custody of the child.

*Matter of Dornburgh v Yearry,* 124 AD3d 949 (3d Dept 2015)

**Sound and Substantial Basis in the Record to Award Father Sole Legal and Physical Custody**

Family Court awarded sole legal and primary custody of the subject child to the father, with parenting time to the mother. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's decision. Here, the record showed the father was employed full time as an engineer while the mother had a history of part-time work as a waitress and was unemployed at the time of the hearing relying on public assistance for financial support. Additionally, following the parties' break up, the mother had attempted suicide and her driver's license was suspended due to alcohol-related driving convictions. A third arrest had occurred during the time the case was

pending before the court. Although the mother's driver's license was suspended, she admitted to driving illegally. Furthermore, she had set fire to clothing in the father's house while the child was present and another time, she had intentionally started driving away when the father was in the process of putting the seat belt on the child. The mother was verbally and physically abusive towards the father. Although the child had half-siblings who lived with the mother, he had half-siblings at the father's home as well and the child was close to all his half-siblings.

*Matter of Adam MM. v Toni NN.,* 124 AD3d 955 (3d Dept 2014)

**Mother Placed Her Own Interests Above Those of Children**

Family Court modified a prior custody order and transferred legal and physical custody of the subject children from the mother to the father. The Appellate Division affirmed. Here, the mother wilfully violated the prior court order by denying the father his visitation rights with the children for approximately three months based on her own desires rather than the children's wishes. Her actions showed she placed her own interests above those of the children. The record also supported the court's conclusion that the father would be more likely than the mother to foster a relationship between the children and the other parent.

*Matter of Harlost v Carden,* 124 AD3d 968 (3d Dept 2015)

**Family Court Erred by Failing to Hold Hearing and Misconstrued Parties' Separation Agreement**

The parties entered into a separation agreement, which was incorporated but not merged into their judgment of divorce. The agreement provided for joint legal custody, almost equal parenting time and stated, among other things, that the subject child would attend school in the district where the mother resided if the child no longer attended St. Pius, which was located in Albany. Thereafter, the mother moved to Malta, NY with the intent to enroll the child in public school there. The father filed to modify the prior agreement and the mother moved to dismiss his petition. Without holding a hearing, Family Court partially modified the order and directed that the child could attend public school in the district where the mother had relocated. The Appellate Division determined the court erred by failing to hold a hearing and additionally, the court misconstrued the parties' separation agreement. The parties' intent, when they entered into the agreement, was that the child would attend school in the mother's district if he no longer attended St. Pius, which had no high school. Until that time, because the parties had joint legal custody, the decision as to which high school he would attend needed to be based on their mutual agreement. Furthermore, if the father's allegations were construed liberally, sufficient facts were set forth which if proven at a hearing, would have afforded a basis for the relief requested.

*Matter of Brennan v Kestner,* 124 AD3d 980 (3d Dept 2015)

**Mother Was Not Aggrieved Party Since Order Entered on Consent**

Upon consent by the parties, Family Court issued an order, including a provision that "the residence of the child [shall] not be relocated out of state by either party with out written consent of the other...". Thereafter, the mother appealed arguing that such provision was not part of the agreement. The Appellate Division dismissed the mother's appeal determining she was not an aggrieved party since the order was entered with the mother's consent. Her recourse would have been to make a timely application in Family Court to vacate the order. The Appellate Division noted that even without this provision, the mother would have the same burden of proof if she wished to relocate.

*Matter of Barnes v Abrams,* 124 AD3d 1000 (3d Dept 2015)

**Family Court Should Have Allowed Father to Amend His Pleading to Conform to Evidence**

The Appellate Division determined that Family Court properly dismissed the father's custody modification application for sole legal custody of the children, but found the court erred by not allowing the father to amend his pleadings to conform to the proof so that he could have been provided some contact with the children. Here, neither party disputed that their failure

to comply with the prior order constituted a change in circumstances. However, the father failed to satisfy his burden of demonstrating that modification was in the children's best interests. The record showed the father did not exercise parenting time with the children for five-years. Thereafter, he reconciled with the mother and began living with her and the children but committed acts of domestic violence against the mother and at least one of the children, forcing her and the children to flee to a DV shelter. However, the court should have allowed the father to amend his pleadings based upon his testimony regarding contact with the children. Doing so would not have been unduly prejudicial to the mother, based on lack of notice, since the legal standard for determining custody and visitation modification applications is basically the same. The prior order allowing the father supervised access with the children, with the paternal grandparents acting as the supervisors, was no longer feasible since the grandparents were now deceased and the mother and children's current location was undisclosed. Additionally, the mother's testimony that it was up to her then 8- and 10- year old children to decide whether or not they wanted telephonic or electronic contact with their father was disturbing.

*Matter of Chris X. v Jeanette Y.,* 124 AD3d 1013 (3d Dept 2015)

**Dismissal of Grandparents' Custody Petitions Neither Altered Mother's Circumstances or Affected Her Legal Rights**

The mother's appeal of a Family Court order dismissing the maternal grandparents' application for custody of the subject children was dismissed. Here, the court had previously determined that the mother had neglected her children, and on appeal, the order had been affirmed by the Appellate Division. Thereafter, the permanency plan for the children was changed from reunification with the mother, to adoption. Subsequently, the subject children's grandparents filed for custody of the children but after a hearing, their applications were dismissed. The mother's appeal stemmed from this dismissal and since pursuant to CPLR § 5511 she was not an aggrieved party as she was not the custodial parent, her appeal was dismissed.

*Matter of Joseph A. v Laurie G.,* 124 AD3d 1090 (3d Dept 2015)

**Given the Economic Benefits to Child Together With Measures Taken to Address Contact Between Child and Non-Custodial Parent, it Was in Child's Best Interest to Allow Relocation**

Family Court granted the mother's petition to relocate with the subject child. The Appellate Division affirmed determining the order was supported by a sound and substantial basis in the record.`
Here, the evidence showed the mother's reason for relocating was to reside with her new husband, who was employed by the government in the state of Virginia. While both parents were loving and attentive, the mother was more involved in the child's daily life, school activities, religious instruction and medical appointments. There was evidence that relocation would substantially improve the child's quality of life by, among other things, going from a high-crime neighborhood in which the mother and child currently lived, to a calmer and more secure environment and health insurance benefits would be available to the child through the husband's employment. Additionally, the mother's relatives lived in Virginia and this would allow the child to have contact with them although the child would have less contact with the father's relatives and the maternal grandmother, who lived in New York. The father could continue to maintain a relationship with the child through expanded summer visits, alternate holidays with the child and Skype contact. Based on the evidence showing increased economic benefits to the child together with the measures taken to address the father's ability to maintain meaningful contact, it was in the child's best interests to allow relocation.

*Matter of Spaulding v Stewart,* 124 AD3d 1111 (3d Dept 2015)

**Sound and Substantial Basis in the Record to Limit Father's Visits With Child**

Family Court modified the father's parenting time with the subject six-year old child from two hours of supervised visits per week to four hours unsupervised visitation on weekends and alternating holidays. The Appellate Division affirmed. Family Court's issuance of a subsequent order did not make the father's appeal

moot since the father was not present at the hearing on the matter and the subsequent order did not alter the duration of father's visitation from the order which he was currently appealing. The evidence showed the father did not have contact with the child since May 2010 due to his drug use and subsequent incarceration. Additionally, the father had failed to complete the required program to address his drug addiction and mental health issues. At the time of the hearing, he was living in a supportive living facility for adults in recovery for substance abuse. Additionally, the father was not forthright about his living situation or the fact that his girlfriend, who was also a recovering addict, was present during the visitation periods. Giving due deference to the court's credibility determinations and based on the child's young age, there was a sound and substantial basis for the court's decision.

*Matter of Wagner v Wagner,* 124 AD3d 1154 (2015)

**Instability in Mother's Life and Voluntary Separation From Children Supported Custody to Father**

Family Court modified an order of custody awarding sole legal custody to the father and parenting time to the mother. The Appellate Division affirmed. The record showed the children were living with the mother in New York, but she allowed the children to go with their father to Colorado and they stayed with him for over a year and attended school in Colorado. Thereafter, the mother traveled to Colorado to retrieve the children. The father unsuccessfully moved for a Colorado court to obtain temporary emergency jurisdiction, and the father's application to modify was heard in New York. The court properly found there had been a change in circumstances. The mother's life had become unstable around the time of the children's departure for Colorado, she and the children had been separated for a year and the children had adapted well to the Colorado environment. Prior to these proceedings, the mother and children had been living with the maternal grandmother for approximately five years, but due to disputes with the grandmother, she and the children were asked to leave the grandmother 's home and the grandmother obtained an order of protection against the mother. Subsequently CPS had become involved in the mother's life and as part of a safety plan, the mother and children had moved in with the mother's sister before the children left with their father for Colorado. As a result of a dispute with the sister the mother was again asked to leave. After the mother retrieved the children from Colorado, she and the children moved back in with the grandmother, but the grandmother testified she allowed this to protect the children from the mother's paramour who had threatened the mother in the children's presence. It was in the children's best interests for custody to be awarded to the father. The children had a stable lifestyle with the father and his fiancee and the father was in the process of buying a three-bedroom home. The father testified the mother had issues with alcohol, and the maternal aunt and grandmother testified that some of the men the mother associated with were unsafe for the children. Testimony showed the older subject child had done well academically while residing with his father and the younger subject child, who had special needs, was receiving all the necessary assistance and had made significant academic and behavioral progress. Additionally, the subject children had formed a close bond with the fiancee's children, and the father supported the children's relationship with their mother. Considering the evidence as a whole, the court's decision was supported by a sound and substantial basis in the record.

*Matter of Colona v Colona,* 125 AD3d 1123 (3d Dept 2015)

**Sound and Substantial Basis in the Record to Award Sole Custody to Father**

There was a sound and substantial basis in the record for Family Court's award of sole custody to the father and liberal parenting time to the mother. Here, the father was disabled and unemployed but he maintained a stable home within close proximity to the paternal grandmother. He testified he was consistently engaged in the child's educational activities whereas the mother was not. Although the father did admit to using marihuana for pain, there was no showing he had endangered the child in any manner. He did have a history of psychiatric treatment but his condition was now stable and his mental health history did not affect his ability to care for the child. On the other hand, the mother was involved in a relationship where there was domestic violence, and the mother and boyfriend testified to an incident where both were heavily

intoxicated but neither could remember the details, and the mother had ended up with a severe black eye. The mother did not intend to leave her boyfriend even if she were granted custody and despite a court issued temporary order of protection which prohibited the boyfriend from being in the child's presence. The mother's contention that the father would not foster a relationship between herself and the child was found to be not credible. Based on these circumstances and according due deference to the court's credibility determinations, it was in the child's best interests to award custody to the father.

*Matter Kayla Y. v Peter Z.,* 125 AD3d 1126 (3d Dept 2015)

**Squalid and Fetid Conditions of Mother's Home Supported Custody to Father**

Family Court modified a prior order of custody by continuing joint legal custody but transferred primary, physical custody to the father. The Appellate Division affirmed, finding there was a sound and substantial basis in the record to support the court's decision. There was more than sufficient proof to show there had been a change in circumstances. Here, the record showed the seven-year-old child had been living in "squalid and fetid conditions" and was removed by CPS from the mother's home, a "filthy rundown trailer littered with animal feces". The trailer was overrun with multiple dogs, cats and rabbits, overflowing with litter boxes and infested with flies and cockroaches. The agency caseworker testified the trailer smelled of urine and feces and the child's room, which was also the bedroom of the mother and her boyfriend, was "crowded with rabbit cages and reeked of a foul odor". Although the child had her own bed, neither her nor her mother's bed had any sheets. The father testified the child would appear for visits in stained, mismatched clothes with her hair " tangly and in knots", and smelling of kerosene. It was in the child's best interests to live with the father. The maternal grandparents also resided in the mother's two-bedroom trailer, and the grandparents cared for the child while the mother and her boyfriend were at work. The child's maternal grandfather was a convicted sex offender. Additionally, the child was engaged in various forms of self harm while she was in her mother's care and missed 44 days of school, was tardy 34 times and left school early 17 times. Although the father had little contact with the child prior to being awarded visitation three years earlier, he had exercised visitation regularly from that point on. Furthermore, the father had a stable home and a full time job. Since living with the father, the child had only missed three days of school and was seeing a counselor to address her behavioral issues and the father indicated a willingness to foster a positive relationship between the child and the mother.

*Matter of Palmatier v Carman,* 125 AD3d 1139 (3d Dept 2015)

**Court's Credibility Determinations Afforded Due Deference**

Family Court awarded sole legal custody to the mother with parenting time to the father. The Appellate Division affirmed. Here, the parties met online five-years earlier when the mother, who was living in Michigan, was 15 and the father was 17. The father moved to Michigan and the parties began an unstable relationship, frequently separating and reconciling and eventually had a child. The father moved back to New York taking the child with him. Ten months later the mother moved to New York to live with the father and a few days later, without informing him, returned with the child to Michigan. The father initiated custody proceedings in New York. Family Court determined joint legal custody was not feasible because the parties had a history of blocking each other's access to the child and were unable to communicate effectively about the child or agree on anything regarding the child. While both parents loved the child and had parental strengths, both also had significant weaknesses including their youth, unstable history and lack of education. Although the father had appropriate housing, a job, family support and was pursuing his GED, there were concerns about his emotional health including medication overdoses, violent and angry outbursts and threats to use violence against the mother. Family Court found the mother to be more credible and due deference was given to the court's credibility determinations. The mother's testimony showed the father exhibited controlling and violent behavior towards her and had threatened, intimidated and manipulated her. The mother was living in a stable home with her other children and her husband, who she had recently married. The husband was employed and earned a

sufficient amount to allow the mother to stay at home and care for the children. Furthermore, the mother's extended family lived nearby and both parties agreed the mother had always been the child's primary caregiver. While the mother testified she wanted a good relationship between the father and child, the father testified he would be reluctant to allow the mother to have unsupervised access to the child since he mistrusted her. Although the mother had deceived the father by telling him she wanted to reconcile with him in order to regain custody of the child, she was devoted to the child and had made repeated efforts to get her child back. Her actions were due to her youth and inexperience. However, the father's misconduct in keeping the child away from her were for his own reasons and not for concern over the child. Considering the record as a whole, there was no basis to disturb the court's order.

*Matter of Benjamin v Lemasters,* 125 AD3d 1144 (3d Dept 2015)

**Court Erred When it Sua Sponte, Terminated Father's Parenting Time**

Family Court properly determined the father had violated, but not willfully, a prior order of custody by not attending court ordered parenting classes and failing to comply with a no contact order between the father's paramour and the child. However, the court erred when it sua sponte, terminated the father's parenting time since the father did not have notice that his parenting time would be at issue and the mother's petition did not include such a request.

*Matter of Barbara L. v Robert M.,* 125 AD3d 1148 (3d Dept 2015)

**Mother Was Entitled to Meaningful Parenting Time**

Family Court awarded the father sole legal and physical custody of the subject child. The Appellate Division affirmed the award of custody but remitted the issue of parenting time to the mother. Here, the mother abruptly and without warning to the father, relocated with the child to North Carolina. The father filed for custody and the mother cross-petitioned for same. Since this was an initial custody petition, the primary concern was the child's best interests, with relocation an important factor, among others, to consider. While the mother had been the child's primary caregiver, the father had also provided significant care for the child and since the mother's departure, the father had graduated from college, obtained steady employment and had an appropriate home for the child. Additionally, the paternal grandmother as well as the father's extended family were a great source of support to the parties. The mother however, had no family support in North Carolina. She had a poorer job history than the father and relied upon the maternal grandfather for financial support. Furthermore, the mother's abrupt departure for North Carolina raised concerns about her commitment to encouraging a relationship between the father and child. Giving due deference to the court's credibility determinations, there was a sound and substantial basis for the court's order. However, the court's direction that the mother could have parenting time one weekend per month in New York and two weeks of summer in North Carolina was not appropriate given the mother's financial constraints and extended but less frequent visit would be more conducive to meaningful parenting time.

*Matter of Bush v Lopez,* 125 AD3d 1150 (3d Dept 2015)

**Whether Mental Health Evaluation Should Be Conducted Lies Within Sound Discretion of Court**

Family Court dismissed the father's custody modification petition, which sought sole legal custody of the child. The Appellate Division affirmed. Here, the mother had been awarded sole legal custody and the father's parenting time, which had been supervised, had been modified only six months earlier to unsupervised on alternating Fridays and Saturdays as well as other times as the parties could agree. At the hearing, the father produced one witness, whom the court found not credible and who testified the mother's home was unsanitary and she lacked parenting skills. While the evidence showed the father was exercising parenting time more consistently than before, the parties were still unable to communicate and cooperate with one another effectively. Therefore, giving due deference to the court's credibility determinations, the father failed to prove a change in circumstances. Additionally, the court's refusal to direct the mother to undergo a mental health evaluation was not an abuse of discretion, since

such a determination lay within the sound discretion of the court. Furthermore, the court did not err in ordering the father to participate in a domestic violence monitoring program. The father acknowledged that a program for domestic violence had been recommended for him and he had not yet completed it.

*Trimble v Trimble,* 125 AD3d 1153 (3d Dept 2015)

**Child was Emotionally Abused by Mother**

After a hearing, Supreme Court modified a prior order of custody issued by Family Court, and awarded the father sole legal custody of the children. The Appellate Division affirmed. Here, the prior Family Court order was based on a stipulation between the parties, providing for joint legal custody and primary, physical custody with the mother. Supreme Court did not abuse its discretion by allowing the testimony of the father's psychiatrist concerning the child's out-of -court statements, which was not hearsay but admissible in the custody dispute since the statements related to abuse or neglect, and provided corroboration of other evidence. The psychiatrist testified the older child disclosed that every time after the child saw his attorney, his mother and her paramour questioned him at length about what was discussed "until usually he crie[d]". On one occasion after visiting with his attorney, the mother took away his toys. Another time, the mother told him "not to wake her up for anything...after saying that their dog might die in the night of a brain hemorrhage." This so frightened the child, he urinated while speaking with his father on the phone. Additionally, the mother requested the older child's records from the psychiatrist and subsequently confronted him about specific things he had told the psychiatrist, such as that he loved his mother 10% and his father 110%. This evidence showed the older child was being emotionally abused by the mother. Additionally, the father demonstrated there had been a change in circumstances. The parties were unable to communicate or agree on anything including a medication plan for their children, who both suffered from ADHD. Additionally, the mother interfered with the father's relationship with the children by removing his name from the emergency contact and guardianship lists at the children's school, cut short his visitation time with the children and would not allow one child to attend the other child's baseball games so that the father was unable to spend time with the non-participating child. Considering the totality of the circumstances, it was in the children's best interests to award sole custody to the father.

*Heather B. v Daniel B.,* 125 AD3d 1157 (3d Dept 2015)

**Relocation Would Benefit Mother, Not Children**

Family Court denied the mother's application to relocate with the children from Greene County to Ulster County. The Appellate Division affirmed determining the order was supported by a sound and substantial basis in the record. Here, as part of their divorce action, the parties had previously stipulated to an order of joint legal custody with primary, physical custody to the mother, parenting time to the father and a provision that the children would attend a certain school in Greene County until "further order of the court". Family Court erred in determining the mother needed to show a change in circumstances since relocation itself is a change in circumstances. The only issue before the court was whether relocation was in the children's best interests and upon a review of the record, the court considered the relevant factors in making such a determination. The mother testified the relocation would allow her to live rent-free with her fiancé in a home where the children would have larger bedrooms and the children would attend private schools. Additionally, the mother had accepted a job as a registered nurse in a hospital and the move would also reduce her travel time to her medical appointments in New York City. Furthermore, the children would be able to spend more time with their maternal grandmother and aunt. The father objected since the parties had just recently consented to the stipulation and the move would uproot the children from their school where they were doing well both academically and socially, and the children, who were then 11 and 13-years-old, needed consistency in their lives especially after the parties' divorce. Although the mother argued the father didn't exercise all his parenting time with the children, the father indicated this was due to destruction of the roads and bridges caused by Hurricane Irene and the children did not want to endure long drives on weekdays. While both parents were actively involved in the children's lives and although the mother was willing to drive halfway, the move was really a benefit for her not the children since it would cause the children to lose their academic and social pursuits and

leave established friendships, which were vital at the ages of these two children.

*Matter of Gates v Petosa,* 125 AD3d 1161 (3d Dept 2015)

**Sole Custody Appropriate Given Parties' Different Parenting Styles and Domestic Violence Issues**

After a hearing, Family Court awarded sole legal and primary custody to the mother. The Appellate Division affirmed. Here, the parties were residing together in New York until the child was two-years old, at which point the mother took the child to California without informing the father. The father initiated custody proceedings in New York, hired an investigator who located the mother and the mother returned with the child. The mother showed remorse for having removed the child and resumed her former employment in New York. The evidence showed the father had engaged in acts of domestic violence towards the mother and denied or minimized his behavior. The mother testified she left New York due to the father's angry and violent behavior, including violent outbursts, jealous confrontations and incidents where he kicked family pets. He had also directed obscene expletives towards her as well as his parents, which the court determined, revealed a longstanding family pattern of dealing with conflict in an aggressive manner. While both parents loved the child, were employed, had appropriate caregivers for the child and were fit parents, there were differences in their parenting styles which led to disagreements between them. This issue along with the domestic violence supported the court's award of sole legal custody. Although the subject child has a close relationship with his half-brother, the father's child from a previous relationship, the liberal parenting time afforded the father allowed ample time for the siblings to be together. Giving due deference to the court's credibility determinations and based on the evidence, there was a sound and substantial basis in the record for the court's decision.

*Matter of Brown v Akatsu,* 125 AD3d 1163 (3d Dept 2015)

**Evidence Supported Court's Order Awarding Grandmother Custody**

Family Court determined the maternal grandmother had demonstrated extraordinary circumstances and awarded her custody of the then three-and-one-half years old subject child. The Appellate Division affirmed. Here, due to the parents' criminal activities and subsequent periods of incarceration, poor parenting skills, substance abuse problems, and the father's acts of domestic violence, the grandmother had been the child's primary caregiver since his birth. Additionally, the grandmother had a close and nurturing relationship with the child and was supportive of both parents' access to the child. Furthermore, the child had speech and other developmental delays as well as behavior issues which required intensive therapeutic intervention. The grandmother, who had been a full-time special education teacher for 20 years, pursued recommended speech therapy and other therapy for the child, actively participated in such therapy, followed up and reinforced the required tasks with the child and was able to offer the structure the child needed to progress. The father did not understand or refused to understand the severity of the child's needs. This evidence amply supported the court's finding of extraordinary circumstances. It was in the child's best interests to live with the grandmother. The mother was incarcerated and the father, who was on parole, lived with his girlfriend and her children from a previous relationship. The girlfriend worked full-time and the father had a variety of factory and construction jobs. The father was "hostile in his attitude" towards the mother and grandmother and it would be unlikely he would nurture a relationship between them and the child. There was also a high level of stress in the father's home which raised concerns as to whether the child's needs would be met if he were to reside there.

*Matter of Curless v McLarney,* 125 AD3d 1193 (3d Dept 2015)

**Change of Circumstances Based on 15-Year-Old's Express Wish to Live With Father**

Family Court continued a prior order of joint legal custody but modified the parenting time to afford the parties an opportunity to work cooperatively to make scheduling adjustments, when necessary. There was a

sound and substantial basis for the court's decision. Here, the change of circumstances was based on the 15-year-old subject child's expressed desire to live with his father due to, among other things, the obligation placed on him to care for his younger sibling at the mother's home while the mother worked during evenings and overnight hours. The court continued primary, physical custody with the father "for school purposes" but ordered the mother would have physical custody on days she would not have to work overnight shifts as well as on those that she did, provided she had a responsible adult present . The court further directed that the subject child should not have to babysit the younger child "except for brief periods of time and with the [subject] child's consent". The court emphasized that in constructing the parent's times with the child, the primary focus was on the child's best interests.

*Matter of Kent v Ordway,* 125 AD3d 1203 (3d Dept 2015)

**Court Justified in Restricting Mother's Visitation**

Within the course of an initial custody proceeding, Family Court directed the attorney for the child to file a neglect petition against mother and determined the mother had neglected the then two-year-old child based on medical neglect. The order was affirmed by the Appellate Division. Thereafter, Family Court resolved the custody matter and awarded the father sole legal custody with restricted parenting time to the mother. The Appellate Division affirmed. The court's decision was based on a sound and substantial basis in the record. Here, the mother showed a disturbing failure to understand the basis for the neglect finding. The mother continued to remain uncooperative with the child's medical providers, evidenced by, among other things, an incident where she refused to provide a sample of birdseed to the child's allergist so that he could test whether it was a source of the child's serious allergic reaction. She gave the child treats, intended as gifts, knowing that such food would trigger an allergic reaction in the child. The parties were not able to agree on issues concerning the child. The child had gained weight since being placed in the father's care, was enrolled in preschool, had developed bonds with extended family members and the father encouraged a relationship between the child and the mother. The provisions restricting the mother's visitation were justified. The mother was limited to visits in the county where the child resided since the mother was a permanent resident of Canada and had previously threatened to abscond with the child. Additionally, barring the mother from taking the child to see the maternal grandfather was proper since, although he was currently incarcerated, he was given to violent tendencies and criminal activity and the maternal grandparents had previously harbored unsavory individuals in their home.

*Rosetta BB. v Joseph DD.,* 125 AD3d 1205 (3d Dept 2015)

**More Visitation With Father of Little Benefit to Child Based on Father's Poor Character and Criminal Behavior**

Supreme Court modified an order of custody and visitation issued one year earlier, and awarded the incarcerated father visitation with the five-year-old subject child once every four months, supervised by the maternal grandmother, for so long as the father remained in the current facility which was an hour drive from the child's home. The Appellate Division affirmed. Here, the father's incarceration constituted the change in circumstances and the only issue was whether given the presumption that visitation with a non-custodial parent is in the child's best interests, more visitation should have been allowed. More visitation in this case was of little benefit to the child given the father's "poor character and poor criminal behavior" and there was not an established relationship between the father and child. Furthermore, given the distance the child had to travel to see his father and the fact that the father had not exercised regular visitation with the child when he had the opportunity to do so, the court's decision was supported by a sound and substantial basis in the record.

*Matter of Lapham v Senecal,* 125 AD3d 1210 (3d Dept 2015)

**Unclear if Child Would Benefit Academically From Relocation**

Family Court determined it was not in the child's best interests to relocate and dismissed the mother's petition. The Appellate Division affirmed. Here, the mother

who had physical custody of the subject child, petitioned to relocate from Otsego County to Onondaga County, where her husband resided. She wanted the subject child and her two other children to live with her husband and she argued the child would benefit financially, medically and academically. After the fact-finding hearing, the mother moved to submit additional proof regarding the child's medical condition. The court's denial of her request was proper since Family Court was vested with the discretionary powers in such matters. In making its determination, the court had to consider whether the movant had provided a sufficient offer of proof, whether the opposing party would be prejudiced and whether there would be significant delay in the completion of the hearing if the motion were granted. The subject child in this matter had longstanding health concerns. Aside from stating there were new developments in the child's medical condition, the mother failed to explain what those developments were or how they were relevant to the issue of relocation. Additionally, she ignored the father's offer to stipulate to the evidence coming directly from the child's medical providers. The child was well established in the Otsego area and had a good relationship with both parents, both of whom were gainfully employed. While the mother would benefit somewhat financially if she moved, she agreed the subject did not currently lack for opportunities due to insufficient income. Additionally, it was unclear if the subject child would benefit academically from the move since the mother was not sure if she would ultimately reside in the Syracuse area. Furthermore, the move would cause the child to abandon her longtime health care providers and it would deprive the father of valuable parenting time with the child. Considering the totality of the circumstances, there was a sound and substantial basis in the record for the court's decision.

*Matter of Cook-Lynch v Valk,* 126 AD3d 1062 (3d Dept 2015)

**Father's Claims of Mother's Unfitness Unsupported by Record**

Supreme Court dismissed the father's petition to modify a prior custody order, which awarded the mother sole legal custody of the child and parenting time to the father. The Appellate Division accorded due deference to the court's credibility determinations and found there was a sound and substantial basis for the court's determination. Here, the father filed for sole custody based upon allegations of the mother's unfitness. He claimed there were bruises on the child due to the mother's use of excessive corporal punishment, and he stated she had failed to provide proper medical care for the child's skin rashes. The father also claimed he was concerned about the child's hygiene and his school attendance. The mother denied all the allegations and the child's first grade teacher testified she had no concerns about the child's attendance or hygiene and could not recall ever seeing any bruises on him. The school nurse similarly
testified she was unaware of any injuries to the child except on one occasion where he fell on the playground.

*Matter of Eller v Eller,* 126 AD3d 1242 (3d Dept 2015)

**Incarcerated Father Granted Visits With Child Despite Child's Belief Mother's Husband is Father**

Family Court awarded incarcerated father visits with the subject child at a facility two hours away from the mother's residence, ordered the mother to arrange visitation and the father to pay for the mileage expense. The Appellate Division affirmed, determining the court's order was supported by a sound and substantial basis in the record but reduced the number of yearly visits provided to the father. Here, the parties lived together for a little over one year after the child's birth. Thereafter, they separated and the parties consented to an award of sole custody to the mother with parenting time to the father. However, their interactions became volatile and multiple reports were made to the police and child protective services and orders of protection were issued. The father was periodically incarcerated during this time period and when the child was two-year-old, the father was incarcerated for 16 years and a one-year, no contact order of protection was issued against him on behalf of the mother and child. The mother married and had two children with her husband and the subject child believed the husband was his father and this belief was reinforced by the mother. When the child was four-years old, the father commenced this proceeding. Although the mother was strongly opposed to the visits, this was not sufficient to deny the father's request. While the attorney for the child supported the mother's position, this was a factor

to be considered but not determinative. Even though the psychologist who evaluated the child testified visitation would be detrimental to the child since he had no attachment to the father, and would be traumatized by being told the husband was not his father, he evaluated the child solely for purposes of litigation. Additionally, the court determined the father had established the mother had not provided the psychologist with an accurate history of his relationship with the child and the mother had made efforts to thwart any contact between the father and the child. There was no abuse of discretion in the court's determination that visitation was in the child's best interests. Although the court concluded the child may initially have difficulties, it was in his best interests to discover who his father was and the order provided for counseling for the child and gradual contact. However, the court's order directing 12 visits per year was excessive given the child's age, his lack of any memory of his father, the length of the father's sentence and the child's lack of any recent experiences with visits at a correctional facility, and this issue was remitted to Family Court.

*Matter of Kadio v Volino,* 126 AD3d 1253 (3d Dept 2015)

**Although Separated From Each Other, It Was in Children's Best Interests to Reside With Non-Parents**

Family Court determined it was in the two subject children's best interests to continue living with non-parents. The Appellate Division affirmed. Here, due to the parents ongoing substance abuse problems and periods of incarceration, the parents agreed to the appointment of two guardians. One child was placed with the maternal aunt and the other was placed with the paternal grandmother. Thereafter, the mother filed for custody of the children. Giving due deference to the court's credibility determinations, the court properly concluded extraordinary circumstances existed to confer standing upon the non-parents. The maternal aunt testified that in the two years she had cared for the older child, it was not uncommon for the mother to oversleep and arrive late to exercise scheduled parenting time with the child. The evidence showed the mother had not taken an active role in the older child's daily life, including failing to respond when the child had medical needs and failed to be engaged in the child's educational and social pursuits. Additionally, the grandmother testified that after the younger child moved in with her, he was diagnosed and treated for ADHD, which required an IEP. The mother refused to acknowledge or make efforts to understand the child's special needs. Moreover, despite the mother's completion of the substance abuse program, parenting program and counseling, she failed to appreciate her parental responsibilities to the extent necessary for the children to be returned to her care, she had made no attempt to obtain a job or means of transportation and intended to rely on public assistance for financial support. Additionally, she had also violated the terms of her probation by traveling out-of-state to visit her brother, who was waiting to be sentenced for a drug offense. It was in the children's best interests to remain in their current homes although separating siblings was not ideal. Both children were able to see each other during monthly visits and both were benefitting from their respective home environments where their unique needs were being addressed.

*Sweeney v Sweeney,* 127 AD3d 1259 (3d Dept 2015)

**Family Court's Order Was Overall in Child's Best Interests**

Family Court denied the father's modification petition for sole legal and physical custody, continued joint legal custody and shared physical custody of the parties' one child, but modified the order slightly by, among other things, issuing a safety plan to protect the subject child from the mother's wife's adult daughter. The Appellate Division affirmed. Here, after the parties divorced, the mother remarried and she and her adult son from another relationship, moved in with her wife and the wife's adult daughter, who had a history of mental illness. The father's petition stemmed from an incident where the adult daughter, during a "random act of a delusional child", struck the mother on the head from behind with a broom handle as the mother was doing yard work. Family Court was well acquainted with the parties and issued an order which provided safeguards for the child. Despite the parties' litigious history and differing perspective on the subject child's need for counseling, their relationship had not deteriorated to the point where they were unable to maintain even a modicum of communication and

cooperation for the sake of their child. Furthermore, both parents were fit and loving parents and both resided in households with adult children. Although the father's concerns for the subject child were understandable, extensive testimony from the mother, her wife and the adult daughter's mental health professionals detailed her current medication and treatment plan and since the incident, a safety plan had been instituted. The adult daughter had not experienced any delusional incidents since the prior incident and her medication had been adjusted. The daughter's therapist did not view her as a public threat nor had the daughter made any kind of threatening comment regarding the child. Under these circumstances and granting deference to the court's credibility determinations, there was a sound and substantial basis in the record for the court's order which was overall in the child's best interests.

*Bailey v Blair,* 127 AD3d 1274 (3d Dept 2015)

**Family Court Deprived Mother of Full and Comprehensive Hearing**

Family Court deprived the mother of her right to a hearing and the matter was remitted for further proceedings not inconsistent with the Court's decision. Here, both parents of one child filed to modify the prior order of joint legal and shared physical custody. The mother failed to appear at the commencement of the fact-finding hearing and the court dismissed her petition, but continued the hearing with regard to the father's application for sole custody. Thereafter, the mother appeared and the parties agreed to a modified order of joint legal custody with each parent having physical custody on alternating weeks. The mother then indicated to the court she would have trouble putting the child on the school bus every morning due to her work schedule and the court responded by ordering sole legal custody to the father and restricted the mother's parenting time to alternating weekends. Subsequently, the court issued a written decision. Article 6 modification applications require full and comprehensive hearings where parents should be afforded a full and fair opportunity to be heard. Family Court deprived the mother of this by preventing her from cross-examining the father or allowing her to submit her own proof before imposing a custody arrangement to which she had not consented.

*Matter of Richardson v Massey,* 127 AD3d 1277 (3d Dept 2015)

**Court Properly Dismissed Mother's Enforcement Petition Due to Lack of Jurisdiction Pursuant to UCCJEA**

Family Court granted a motion by the attorney for the child to dismiss the mother's custody enforcement petition on the grounds that New York did not retain exclusive, continuing jurisdiction over the matter or, in the alternative, New York was an inconvenient forum. The Appellate Division affirmed. Here, the parties' divorce judgment awarded the mother sole custody, with parenting time to the father. Thereafter, in 2011, the daughter went to visit her father in Georgia and the mother gave permission for the child to remain there for the following school year and from then on the child remained with the father although the mother alleged she had repeatedly asked for the child's return. Family Court did not err in relying on Title II of the UCCJEA, entitled "jurisdiction," rather than Title III, entitled "enforcement," in rendering its decision. Title III is not limited to enforcement of our-of-state custody determinations and its "mechanisms...are presumptively available in any enforcement action". Simply because the mother's petition sought enforcement rather than modification, that did not mean the title addressing enforcement had to be relied upon independently and exclusively. The court could apply both jurisdiction and enforcement portions of the UCCJEA where it was applicable. Here, family court determined the child no longer had significant contact with this state and substantial evidence was no longer available in New York. The child had lived in Georgia with her father for more than two years, all of her educational and medical providers were in Georgia and substantial evidence regarding the child was in Georgia. While the mother and other family members resided in New York, the child had not returned to New York for any purpose during the two year period and neither the child nor the father had significant connections with New York. Based on the evidence, the court properly dismissed the mother's petition for lack of jurisdiction.

*Matter of Wengenroth v McGuire*, 127 AD3d 1278 (3d Dept 2015)

**Considering Totality of Circumstances, it Was in Children's Best Interests to Award Physical Custody to Father**

Family Court granted the parties joint legal custody of the children with primary, physical custody to the father and parenting time to the mother. The Appellate Division affirmed and found the record amply supported the court's decision. Although the mother had been the primary caregiver of the children, her parental judgment and fitness were an issue. Testimony was presented that the mother shoplifted while the children were in her care and she sometimes used them to help her with the illegal activity. When the mother was caught shoplifting from a store, instead of calling someone to care for the children, she chose to expose them to her arrest. The mother also engaged in other criminal conduct that led to a number of arrests and several convictions which occurred before the custody hearing, and she disobeyed a prior court order prohibiting her from removing the children from the State. Additionally, the father testified the mother regularly screamed at the children when they misbehaved and had several angry outbursts in their presence. When the father was given temporary, physical custody of the children, the mother acted in a hostile attitude towards the father and made a number of accusations against him, including a hotline call to CPS, which was later deemed unfounded. Furthermore, the mother was unemployed and remained financially dependent upon her parents. The father however, had maintained steady employment and was able to offer a stable home for the children. The paternal grandparents lived near the father and were able to care for the children when he was at work. While it was true the father had a prior prescription drug dependency and had other lapses in judgment, considering the totality of the circumstances and deferring to the court's credibility determinations, it was in the children's best interests to reside with the father.

*Matter of Daniel TT. v Diana TT.,* 127 AD3d 1514 (3d Dept 2015)

**Mother's Toxic Influence on Children Regarding Father Per Se Raised Strong Probability She Was Unfit to be Custodial Parent**

Litigious parents of three children, two sons and one daughter, adhered to the wishes of their 16- and 14-year old sons, and each assumed physical custody of one son and a trial ensued with regard to their ten- year-old daughter. The mother's custody modification application was based on, among other things, her relocation 100 miles from where she had previously resided. After a hearing, Family Court dismissed her petition. The Appellate Division affirmed. A parent seeking to modify an existing order has the burden of proving a sufficient change in circumstances. Here, the prior order had been issued upon stipulation by the parties and was entitled to less weight than one issued after a full hearing. The daughter openly expressed her desire to live with the mother and the mother's request was also supported by a psychologist who had conducted a court-ordered evaluation of the child. Based on these factors, there was a sound and substantial basis in the record to support the finding of a change in circumstances. The court properly determined it was not in the child's best interest to award physical custody to the mother. Although the child wished to live with her mother, she had a good relationship with both parents. However, the mother's toxic influence on the children regarding the father was so inconsistent with their best interests that it per se, raised a strong probability that the mother was unfit to act as custodial parent. Giving due deference to the court's credibility determinations, the record fully supported the court's analysis.

*Dykstra v Bain,* 127 AD3d 1516 (3d Dept 2015)

**Father Demonstrated Superior Ability to Promote Stability in Child's Life**

Family Court denied the mother's request to relocate with the child and awarded the parents joint legal custody of the then 3-year-old, with primary physical custody to the father. The Appellate Division affirmed. Relocation itself met the requirement of a showing a change in circumstances and the only issue before the court was the child's best interests. Here, the mother moved from Ulster County to Brooklyn, NY due to concerns that she would be laid off by the hospital where she was working was as a nurse's aid. However, she offered little evidence of her efforts to find work locally. The maternal grandmother, who was from Uzbekistan, also lived in Brooklyn and the mother testified she was financially better off in Brooklyn

since she lived with the grandmother and shared expenses with her. The record showed the mother was earning the same amount in Brooklyn as she had earned in Ulster County and she also conceded she was financially dependent on the grandmother, who could elect to move back to Uzbekistan anytime since the grandmother's husband and other children lived there. Additionally, the child's kindergarten teacher said he was thriving at school. Furthermore, allowing the child to move to Brooklyn would substantially curtail the father's contact with the child. While both parents enjoyed a positive and loving relationship with the child and were able to provide him with extracurricular activities, appropriate health care and both had extended families near their home, the mother's work schedule required her to put the child in an after-school program. On the other hand, the father, who did not work due to a disability, would be able to care for the child when he was not at school and the child's teacher testified the father was substantially involved with the child's education. Based on these factors, the court correctly found it was in the child's best interests to award physical custody to the father since he "demonstrated a superior ability to promote stability in the child's life".

*Lodge v Lodge,* 127 AD3d 1521 (3d Dept 2015)

**Sole Custody to Mother Affirmed**

Family Court granted sole custody of the parties' children to petitioner mother. The Appellate Division dismissed as moot the appeal from the order insofar as it concerned the parties' older daughter, who had attained the age of 18, and affirmed. With respect to the issue of custody of the younger child, assuming, arguendo, that the Judicial Hearing Officer's prehearing statement, i.e., that she saw no other outcome for the case than to award custody to the mother, was improper, the record was sufficient for the Appellate Division to exercise its authority make a best interests determination. It was in the child's best interests to award custody to the mother. The mother established that she was more likely to provide stability and continuity for the child, and was better able to provide financially for the child, among other things. In addition, the mother presented evidence of domestic violence committed by the father, and the Attorney for the Child indicated that the child, who was now 16 years of age, wished to live with her mother.

*Matter of Caughill v Caughill*, 124 AD3d 1345 (4th Dept 2015)

**Award of Primary Physical Custody to Father Supported By Record**

Family Court modified a prior custody order by awarding respondent father primary physical custody of the parties' child, with visitation to petitioner mother. The Appellate Division affirmed. Under the prior order, the parties shared residential custody of the child, with the child moving from one parent to the other on Wednesdays. That schedule was no longer practical upon the child's attainment of school age. The court did not abuse its discretion in awarding the father custody of the child during those days of the week when school was in session. There was no basis to disturb the court's determination inasmuch as it was based on the court's credibility assessments of the witnesses and was supported by a sound and substantial basis in the record. The mother failed to submit any expert testimony or evidence establishing that it was in the child's best interests to attend school in the Town of Clinton and, instead, presented only her own speculative testimony.

*Matter of Biagini v Parent*, 124 AD3d 1368 (4th Dept 2015)

**Affirmance of Award of Sole Custody of Children to Father**

Family Court modified a prior custody order entered upon consent of the parties by awarding sole custody of the children to petitioner father, with visitation to respondent mother. The Appellate Division affirmed. Although the court did not expressly identify a change in circumstances, the record demonstrated unequivocally that a significant change in circumstances occurred since the entry of the consent order. Moreover, the record supported the court's determination that it was in the children's best interests to award sole custody to the father. The mother's contention was rejected that the court placed undue emphasis on her failure to comply with discovery orders. The court did not abuse its discretion with respect to the emphasis placed on the mother's

noncompliance as a factor in the best interests analysis, and the discovery sanction imposed did not adversely affect the children's right to have issues affecting their best interests fully explored. Moreover, the court properly transferred temporary custody to the father before conducting the custody hearing inasmuch as the father demonstrated the necessary exigent circumstances warranting the temporary transfer. Even assuming, arguendo, that the court erred in transferring temporary custody, reversal was not required because the court subsequently conducted the requisite evidentiary hearing, and the record fully supported the court's determination following the hearing.

*Matter of Morrissey v Morrissey*, 124 AD3d 1369 (4th Dept 2015)

**Petition Properly Dismissed**

Family Court dismissed petitions filed by respondent father. The Appellate Division affirmed. The court did not err in sua sponte dismissing, in the interests of justice and without a hearing, the father's final petition to modify custody and visitation. That petition was supported solely by an affidavit already before the court. The allegations contained in that petition, including allegations of a change of circumstances, were duly reviewed, argued and considered by the court in the context of petitioner mother's motion to dismiss.

*Matter of Sierak v Staring*, 124 AD3d 1397 (4th Dept 2015)

**Joint Custody in Children's Best Interests; Mother's Request to Relocate Children to Netherlands Properly Denied**

Supreme Court awarded the parties joint custody of the subject children and denied defendant mother's request to relocate the children to the Netherlands. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that joint custody was in the children's best interests because although there was some acrimony between the parties, they were not so embattled and embittered as to effectively preclude joint decision making. The court did not err in denying the mother's request to relocate with the children to the Netherlands. Because this case involved an initial custody determination, it was not a relocation case to which the *Tropea* factors applied. Here, the effect of relocation as part of a best interests analysis was but one factor among many in the custody determination. The court properly determined that the children's relationship with the father would be adversely affected by the proposed relocation because of the distance between Erie County and the Netherlands. The court did not err in refusing to allow the testimony of one of the children's therapists because the AFC did not consent to the disclosure of confidential communications between the child and therapist.

*Forrestel v Forrestel*, 125 AD3d 1299 (4th Dept 2015)

**Family Court Party Need Not Show Actual Prejudice to Prevail on Ineffective Assistance of Counsel Claim**

Family Court, among other things, designated the location of respondent father's supervised visitation with the subject child to be in North Tonawanda. The Appellate Division affirmed. There was no basis to disturb the court's determination that supervised visitation with the subject child would better serve the child's best interests if it was located in North Tonawanda, rather than in Buffalo where the father had requested it be located. In reviewing the father's contention that he was denied effective assistance of counsel, the Appellate Division noted that the Family Court Act afforded protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal cases and, therefore, actual prejudice need not be shown to prevail on a claim of ineffective assistance of counsel. Any prior decisions to the contrary were no longer to be followed. Nevertheless, here, the father failed to show the absence of strategic or other legitimate explanations for counsel's alleged shortcomings at the hearing.

*Matter of Brown v Gandy*, 125 AD3d 1389 (4th Dept 2015)

**Relocation Not in Child's Best Interests**

Family Court denied the cross petition of respondent mother seeking to relocate with the parties' child to Tennessee. The Appellate Division affirmed. The court properly determined that relocation was not in the best

interests of the child after considering all the relevant *Tropea* factors, and the mother failed to meet her burden to show that the proposed relocation was in the best interests of the child. The court properly determined that the child's relocation would have a negative effect on the child's relationship with her father and that the child's life would not be enhanced economically, emotionally and educationally by the relocation. Although the mother mainly relied upon economic necessity as the basis for her request, she failed to establish that the employment she was offered would last for a significant period and she also failed to show that she did not have similar opportunities in New York.

*Matter of Hill v Flynn*, 125 AD3d 1433 (4th Dept 2015)

**Mother Showed Changed Circumstances; Supervised Visitation to Father Affirmed**

Family Court directed that respondent father have supervised visitation with the parties' child. The Appellate Division affirmed. Petitioner mother established a sufficient change in circumstances that reflected a genuine need for modification. The mother established that the father was engaged in an altercation with the child's grandmother in the presence of the child, resulting in police intervention, and that the father fired a shot from a BB gun that narrowly missed the child while she was trying to set up a target. Although the court erred in considering the fathers 2010 mental health evaluation, rather than a more recent one, the error was harmless because even absent consideration of either evaluation, there was a sound and substantial basis for the supervised visitation determination.

*Matter of Rice v Cole*, 125 AD3d 1466 (4th Dept 2015)

**Relocation in Children's Best Interests**

Family Court granted the mother permission to relocate with the parties' child to Massachusetts. The Appellate Division affirmed. The court properly considered the *Tropea* factors in determining that relocation was in the best interests of the child. The mother established that the relocation was justified by economic necessity. The mother's husband, who was in the Coast Guard, was transferred to Massachusetts and although he chose to remain in the Coast Guard, that choice provided stability in employment in an economically turbulent time, as well as benefits including health insurance for his family. Both the mother and her husband testified that they expected substantial salary increases after the transfer. Although the transfer will affect the frequency of the father's visitation, the mother agreed to maintain and facilitate a visitation schedule that will afford the father extensive contact with the child.

*Matter of Newman v Duffy*, 125 AD3d 1474 (4th Dept 2015)

**Not in Child's Best Interests to Visit Incarcerated Father**

Family Court granted petitioner father supervised visitation with the parties' child. The Appellate Division reversed and dismissed the petition. The court's determination lacked a sound and substantial basis in the record. Contrary to the AFC's contention, the court did not err in denying the motion to dismiss the father's petition before holding a hearing on the child's best interests. The AFC was correct, however, that the court abused its discretion in granting the petition for visitation. The presumption in favor of visitation where a parent is incarcerated was rebutted by a preponderance of the evidence that such visitation would be harmful to the child. Here, the parties married while the father was incarcerated and he was still incarcerated at the time of the child's birth. The father admitted that he did not have a relationship with the child; he testified that he believed his sister or mother might drive the child to the prison; the trip required three hours of driving in total; and the child did not have a relationship with the sister or mother. The father admitted to engaging in domestic violence against the mother and the mother testified that the father choked her during one fight when she was pregnant with the subject child. Further, the father admitted that he violated an order to stay away from the mother; that he had been in a fight with another inmate while in prison; and that he went "on the run" from parole officers.

*Matter of Carroll v Carroll*, 125 AD3d 1485 (4th Dept 2015)

**No Error in Grant of Joint Custody Where Mother Did Not Oppose Joint Custody**

Family Court awarded the parties joint legal and shared physical custody of the subject child. The Appellate Division affirmed. Because the mother, at the end of the trial, informed the Referee that although she was seeking primary physical custody, she was not opposed to the parties having joint legal custody, she should not now complain that the Referee erred in failing to award her sole legal custody. There was a sound and substantial basis for the Referee's determination inasmuch as the parties were not so embattled and embittered to effectively preclude joint decision making. Although the Referee abused his discretion in refusing to allow the child's maternal grandmother to testify as a fact witness at trial, the error was harmless because the grandmother did testify on rebuttal, and the mother failed to specify what testimony the witness could have given on direct that the mother did not offer herself. Although the AFC contended that the case should be remitted for further proceedings in light of events after entry of the order on appeal, the Appellate Division concluded that those events would be more properly considered by the court on a petition to modify custody based upon a change in circumstances.

*Matter of Mayes v LaPlatney*, 125 AD3d 1488 (4th Dept 2015)

**Nonparent Failed to Establish Extraordinary Circumstances**

Family Court awarded sole custody of the subject child to petitioner father. The Appellate Division affirmed. Respondent, a nonparent, failed to meet her burden to establish extraordinary circumstances. In view of respondent's repeated failures to appear, the court did not err in refusing to adjourn the hearing when respondent failed to appear. The court properly took judicial notice of its own prior proceedings with respect to the father's paternity.

*Matter of Wilson v McCray*, 125 AD3d 1512 (4th Dept 2015)

**Court Erred in Conditioning Joint Custody on Mother's Participation in Counseling**

Family Court adjudged that petitioner mother willfully violated a court order and sentenced her to six weekends in jail and ordered the parties to enroll in therapeutic counseling. The Appellate Division modified by striking the provision conditioning continued joint custody of the child with petitioner on her participation in therapeutic counseling. The court erred in conditioning the mother's continued joint custody of the child with petitioner on her participation in therapeutic counseling. A court may include a directive to obtain counseling as a component of a custody or visitation order, but the court does not have authority to order such counseling as a prerequisite to custody or visitation. The court properly determined that there was a sufficient change in circumstances to warrant a determination concerning the best interests of the child. However, although the court's determination that the mother engaged in parental alienation raised a strong probability that she was an unfit parent, the court failed to make explicit findings concerning the relevant factors that must be considered in making a best interests determination in order to resolve the petition and cross petition. Thus, the matter was remitted for specific findings and a hearing, if necessary.

*Matter of Avdic v Avdic*, 125 AD3d 1534 (4th Dept 2015)

**Mother Willfully Violated Order of Custody**

Family Court determined that petitioner mother willfully violated a stipulated order of custody that, among other things, granted respondent father visitation with the parties' children during the first three weekends of each month. The Appellate Division affirmed. The mother presented evidence at trial that the children did not want to visit the father because they were afraid of him owing to fist fights with his girlfriend, his physical aggression toward the children, and the father's drug use. The mother's contention was rejected that her violation of the order was not willful inasmuch as she was justified in not subjecting the children to such an environment. The father presented evidence that, after conducting an investigation, caseworkers from the Department of Social Services found his home to be safe for the children. Further, the

father testified that what the children thought to an illegal drug in his home was actually flavored tobacco from the smoke shop that he owned. The father also provided evidence that the domestic violence to which the mother referred was actually just one incident in 2009 during which he had an argument with his girlfriend, and that, contrary to the mother's testimony, it was the mother's own house that was unfit for the children because of her history of drug use. Given the conflicting nature of the evidence, whether the mother's violation was willful distilled to a credibility determination. Deference to the court's determination was not disturbed because there was a sound and substantial basis in the record for its findings.

*Matter of DeJesus v Haymes*, 126 AD3d 1352 (4th Dept 2015)

**Reversal of Award of Custody to Grandparents**

Family Court awarded petitioners, the paternal grandparents of the subject child, joint legal custody with respondent father, with primary physical custody to the grandparents and visitation to the father and respondent mother. The Appellate Division reversed. While the mother allowed petitioners to have primary physical custody of the child for a prolonged period, there were no other factors to show the existence of extraordinary circumstances. The record established that the child was psychologically attached to both petitioners and the mother, and there was no evidence that removing the child from petitioners' primary custody would result in psychological trauma grave enough to threaten the destruction of the child. The record as a whole supported the conclusion that the child was stressed because of the family conflict, and would not suffer if the mother had custody of the child. Petitioners and the AFC contended that Domestic Relations Law Section 72 (2) did not require a showing that the parent relinquished "all" care and control of the child, and the AFC further contended that cases should not be relied on that predate the 2003 amendment to the statute. However, the standard of extraordinary circumstances remained the same as was set forth in *Bennett v Jeffreys,* 40 NY2d 543. Therefore, the AFC's implicit contention was rejected that Domestic Relations Law Section 72 (2) (b) in any way eased a grandparent's burden of showing extraordinary circumstances, and *Bennett* and cases decided thereafter remained good law. In light of the high standard, and in view of the mother's consistent contact with the child and petitioners' constant communication with the mother and reliance on her permission to make decisions about the child, petitioners did not demonstrate extraordinary circumstances sufficient to deprive the mother of custody of her child.

*Matter of Suarez v Williams*, 128 AD3d 500 (4th Dept 2015)

**Mother Unfit to be Custodial Parent**

Family Court granted sole legal and physical custody of the parties' child to petitioner father and supervised visitation to respondent mother. The Appellate Division affirmed. The AFC's contention was rejected that the mother's appeal was moot in its entirety because, while the appeal was pending, a new custody proceeding was held and the paternal grandfather was awarded sole legal and physical custody of the subject child. The court found that the mother's judgment was impaired to a degree that made her unfit to be a custodian of the child, a finding that may have enduring consequences for the parties. Therefore, the mother's challenge to the court's determination with respect to her fitness to act as a custodial parent was not moot. Nevertheless, the mother's challenge was rejected on the merits. The mother suffered from bipolar disorder, and schizophrenia with psychosis, she received Social Security disability income, and her mental health hospitalization required her relatives to travel to Puerto Rico to prevent the child from being placed in protective custody. The mother stopped obtaining treatment through psychiatric services and medication because, in her view, such treatment was more hurtful than helpful. Without treatment, there was no basis for the court to conclude that a relapse or further hospitalization would be unlikely. Therefore, there was a sound and substantial basis in the record for the court's determination that, in light of her untreated mental health condition, the mother was unfit to act as a custodial parent. Moreover, the court properly considered the mother's willingness to reside with the father of her other children as a factor weighing against her fitness to act as a custodial parent. The father of the other children had pleaded guilty to a charge stemming from his sexual abuse of his oldest daughter, and was the subject of an indicated Child Protective Services

report for inadequate guardianship because he had attempted to touch his younger daughter inappropriately.

*Matter of Donegan v Torres*, 126 AD3d 1357 (4th Dept 2015)

**Dismissal of Custody and Visitation Petition Reversed**

On motion of the AFC, Family Court dismissed the father's amended petition seeking to modify an existing custody and visitation order. The Appellate Division reversed, reinstated the amended petition, and remitted the matter to Family Court. To survive a motion to dismiss, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child. The amended petition alleged that there had been a change in circumstances inasmuch as the prior order provided that there would be such and further visitation with the subject child as the parties may mutually agree, but respondent mother refused the father all visitation with the child. Therefore, the father made a sufficient evidentiary showing of a change in circumstances to require a hearing.

*Matter of Gelling v McNabb*, 126 AD3d 1487 (4th Dept 2015)

**Family Court Erred in Failing to Set a Schedule for Supervised Visitation**

Family Court awarded petitioner father sole custody of the subject children, with supervised visitation to respondent mother. The Appellate Division modified, and remitted the matter to Family Court to determine the duration of the mother's visitation. The court did not abuse its discretion in limiting the mother's visitation. There was a sound and substantial basis in the record for the court's determination that the mother filed false reports with Child Protective Services regarding the father and repeatedly violated prior court orders regarding visitation. However, the court set no minimum time period for the mother's monthly visitation, and left the duration of visitation "up to a maximum of eight hours," to be determined solely based on the availability of "any authorized agency that supervised visitation." Consequently, the court erred in failing to set a supervised visitation schedule, implicitly leaving it to the supervisor to determine the duration of each visit. Furthermore, although a court may include a directive to obtain counseling as a component of a custody or visitation order, the court did not have the authority to order such counseling as a prerequisite to custody or visitation. Therefore, the court's order was further modified by vacating the requirement that the mother show substantial compliance with the terms of a prior order concerning drug and alcohol evaluations, mental health evaluations, and a parenting skills training program as a prerequisite for a future application to modify visitation, and by providing instead that the mother comply with those terms as a component of supervised visitation.

*Matter of Ordona v Cothern*, 126 AD3d 1544 (4th Dept 2015)

**Award of Visitation to Grandmother Upheld**

Family Court granted petitioner maternal grandmother a minimum of six hours of visitation with the subject children one weekend day per month. The Appellate Division affirmed. Conditions existed in which equity saw fit to intervene. The record supported the court's determination, which was based in part upon the credibility of the witnesses.

*Matter of Richardson v Ludwig*, 126 AD3d 1546 (4th Dept 2015)

**Award of Custody to Aunt and Uncle Affirmed**

Family Court awarded respondents, the subject child's maternal aunt and uncle, primary physical custody of the child. The Appellate Division affirmed. Petitioner grandmother's contentions were rejected that she was denied due process based on cumulative errors by the court. Specifically, the court properly exercised its discretion in permitting the telephonic testimony of an expert who resided in another state. The grandmother had failed to preserve for appellate review her challenge to the medical evaluations of the child by the expert by moving to strike the expert's testimony on the grounds asserted. In any event, the grandmother lacked standing to object to those evaluations as violative of her own due process rights. The allegedly unauthorized

evaluations implicated the child's due process rights, as opposed to the due process rights of the grandmother, and generally, a litigant did not have standing to raise rights belonging to another. The grandmother's further contention was rejected that the court erred in failing to find that respondents willfully violated a prior court order. At the time of the alleged violation, the oral direction of the court had not been reduced to a written order, and it was unclear on the record whether respondents were aware of the existence of the oral direction of the court. Although unpreserved for review, the grandmother's contention was without merit that the court erred by not analyzing the matter as a relocation case. Moreover, respondents established the requisite change in circumstances to warrant an inquiry into the best interests of the child given the changes in the child's school schedule since the entry of the prior order, and the extraordinarily acrimonious nature of the parties' relationship. The court properly exercised its power, in the interests of justice, to sua sponte conform the petition to the evidence adduced at the fact finding hearing with respect to post-petition conduct that established a significant change in circumstances. The court properly determined that it was in the child's best interests to award primary physical custody to respondents. The record established that respondents were able to provide for the child's educational and therapeutic needs, was well as her nutritional and health needs. The record further established that respondents were in excellent physical health and were better able to handle the stress involved in raising a child than was the grandmother.

*Matter of Rodriguez v Feldman*, 126 AD3d 1557 (4th Dept 2015)

**FAMILY OFFENSE**

**Insufficient Evidence of Family Offense**

Family Court dismissed the family offense petition. The Appellate Division affirmed. The motion to dismiss was properly granted because the factual allegations set forth in the petition, as amplified by the bill of particulars, were insufficient to support a finding that respondent engaged in conduct constituting the family offenses of harassment in the second degree or disorderly conduct. Accepting as true petitioner's allegations that respondent threatened to have her evicted and emotionally abused her through threats and rituals, and according them the benefit of every reasonable inference, there was no basis for finding that respondent's conduct constituted harassment or that he intended to cause public inconvenience, annoyance or alarm or that his conduct in the private residence created such risk.

*Matter of Christine P. v Machiste Q.,* 124 AD3d 531 (1st Dept 2015)

**Respondent's Threats Supported Family Offense and Order of Protection**

Family Court determined that respondent committed the family offense of harassment in the second degree. The Appellate Division affirmed. A fair preponderance of the evidence supported the Referee's finding that respondent committed the family offense of harassment in the second degree, warranting the issuance of a two-year order of protection against him. Petitioner, respondent's sister, testified that respondent, while living with her and her family, threatened to kill her on multiple occasions and told her he was going to poison her family's food and set fire to the apartment. Respondent's intent to harass, annoy or alarm petitioner can be inferred from his threats. Respondent was properly ordered to stay away from petitioner's home and her child because his threats involved the home and the child.

*Matter of Ramona A. A. v Juan M. N.,* 126 AD3d 611 (1st Dept 2015)

**Insufficient Evidence of Family Offense**

Family Court determined that respondent committed the family offenses of harassment in the second degree and disorderly conduct and granted petitioner a one-year order of protection. The Appellate Division modified by vacating the finding of harassment in the second degree because the findings that respondent committed acts that constituted that crime were improperly predicated upon facts not alleged in the petition. A fair preponderance of the evidence did support the Referee's finding that respondent committed the family offense of disorderly conduct. Petitioner testified that on two occasions, while she was outside her apartment building in a public place, respondent screamed

obscenities and insults at her in an abusive manner.

*Matter of Sasha R. v Alberto A.,* 127 AD3d 567 (1st Dept 2015)

**Order of Protection Reversed**

The respondent's father-in-law filed three petitions in which he alleged that the respondent violated the terms of an order of protection issued by the Family Court on February 15, 2013. That order of protection directed the respondent to refrain from engaging in acts including "communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means with [J.K.] . . . directly or indirectly regarding litigation in any Court" and also to refrain from harassment and aggravated harassment of her father-in-law. In his petitions, the father-in-law alleged that the respondent had violated the order of protection, by, among other things, having a third party send emails to members of the father-in-law's community discussing the litigation between the parties. After a fact-finding hearing, the Family Court found that the subject communications were initiated in a manner likely to cause annoyance or alarm, and, thus, it determined that the respondent violated the February 15, 2013, order of protection by committing acts constituting aggravated harassment in the second degree (PL § 240.30 [1]). The Family Court further determined that the respondent violated the provision of that order of protection directing her to refrain from communicating with her father-in-law either "directly or indirectly regarding litigation in any Court." On October 1, 2013, after a dispositional hearing, the Family Court issued the order of protection appealed from, which, among other things, directed the respondent to stay away from the father-in-law for a period of two years. Upon reviewing the record, the Appellate Division found that the respondent could not have violated the order of protection by committing acts constituting aggravated harassment in the second degree pursuant to PL § 240.30 (1) as that section of the Penal Law had been ruled as unconstitutionally vague and over broad by the Court of Appeals. Moreover, contrary to the determination made by the Family Court in the order of fact-finding, the competent evidence adduced at the fact-finding hearing did not establish that the respondent willfully violated the provision of the subject order of protection that directed her to "refrain from communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means with [J.K.]. . . directly or indirectly regarding litigation in any Court" (*see* FCA § 846-a). Accordingly, the order of protection was reversed, the petitions were denied, and proceeding was dismissed.

*Matter of Kakwani v Kakwani*, 124 AD3d 658 (2d 2015)

**Respondent Was Not Coerced into Foregoing Opportunity to Cross-Examine Petitioner**

The petitioner filed a petition against the respondent alleging that he committed certain family offenses. Upon the respondent's failure to timely appear for the fact-finding hearing, the court denied his counsel's request to adjourn or second call the case. Upon the respondent's default and the petitioner's testimony, the Family Court made a finding that the respondent committed the family offenses of forcible touching, disorderly conduct, and harassment in the second degree. Although the respondent's counsel was present at the fact-finding hearing, he did not cross-examine the petitioner or present any evidence. Before the hearing was adjourned, the respondent appeared in court, and his counsel asked the Family Court to set aside the findings made on default and to proceed with a new fact-finding hearing. The court advised the respondent's counsel that he was free to make a formal written motion to set aside the default and the fact-finding or that his client could proceed by testifying in court and not cross-examining the petitioner. After the respondent conferred with his counsel off-the-record, both he and his counsel acknowledged that they agreed to accept the option that the court would reopen the fact-finding hearing to allow the respondent to testify with the understanding that the respondent would not cross-examine the petitioner. Under the circumstances of this case, the Appellate Division rejected the respondent's contention that he was coerced to forgo his opportunity to cross-examine the petitioner, and affirmed the order of protection.

*Matter of Candia v Cruz*, 125 AD3d 774 (2d Dept 2015)

**Record Did Not Support Finding That Mother Committed Family Offense of Assault in the Third Degree**

The father commenced a family offense proceeding on the child's behalf, alleging that the mother physically abused the child on multiple occasions. Following a fact-finding hearing, the Family Court found that the mother committed the family offenses of assault in the third degree, menacing in the third degree, disorderly conduct, and harassment in the second degree, and issued an order of protection remaining in effect through January of 2016, directing the mother to stay away from the child. The mother appealed. The Appellate Division reversed. The Family Court improperly rejected the mother's request that it take judicial notice of the determination in the parties' prior custody proceeding, in the same court, in which the father admittedly made false allegations. That proceeding, and the court's findings therein regarding the father, were relevant to the court's assessment of the father's credibility in this matter. Additionally, the Family Court erred in drawing a negative inference based on the mother's failure to call the child's maternal grandmother as a witness. The court sua sponte drew a negative inference based on the mother's failure to call the grandmother as a witness, and failed to advise the mother that it intended to do so. The mother, therefore, lacked the opportunity to explain her failure to call the grandmother as a witness, or to discuss whether the grandmother was even available to testify or under her control. Contrary to the Family Court's finding, the evidence proffered at the hearing was insufficient to establish by a fair preponderance of the evidence that the mother committed the family offense of assault in the third degree. No evidence was presented that the child's physical condition was impaired, and there was insufficient evidence to establish that the child suffered substantial pain. Accordingly, the order of protection was reversed, that branch of the petition alleging that the mother committed the family offense of assault in the third degree was dismissed, and the matter was remitted to the Family Court for a new hearing and determination of the remaining branches of the petition. Pending the new determination, the order of protection remained in effect as a temporary order of protection.

*Matter of Spooner-Boyke v Charles*, 126 AD3d 907 (2d Dept 2015)

**Mother Held in Contempt for Disobeying So-Ordered Stipulation**

The father met his burden of establishing all of the aforementioned elements of civil contempt by clear and convincing evidence. Specifically, the father showed, by clear and convincing evidence, that the mother, while having full knowledge thereof, violated a so-ordered stipulation, which, inter alia, unequivocally mandated that the parties and the subject children engage in, cooperate with, and attend family therapy. The violation of the stipulation by the mother resulted in prejudice to the father. Thus, the Family Court properly granted the father's petition to hold the mother in contempt for disobeying the stipulation. Moreover, the Family Court properly granted the father's separate petition to modify a prior order of custody and visitation, to award him sole custody of the subject children, with visitation to the mother. Additionally, the Family Court's determinations that there had been a change in circumstances based upon issues stemming from parental alienation, and that a transfer of sole custody to the father was in the children's best interests, had a sound and substantial basis in the record.

*Matter of Halioris v Halioris*, 126 Ad3d 973 (2d Dept 2015)

**Intimate Relationship Established Notwithstanding Lack of Common Household**

The respondent appealed from an order of protection of the Family Court, which, after a hearing, found that the respondent committed the family offense of disorderly conduct, and directed the respondent to stay away from the petitioner and the petitioner's daughter. The Appellate Division affirmed. At the fact-finding hearing, the petitioner described herself as the fiancée of the respondent’s ex-husband (hereinafter the ex-husband). The ex-husband is the father of one of the petitioner's children and has custody of the respondent’s children. The ex-husband and his children live in the same household as the petitioner and her children. The petitioner functioned as stepmother to the respondent's children, and helped to arrange for the respondent's visitation with her children. The hearing evidence established that the respondent engaged in a public disturbance regarding the conditions of her visitation with her children outside of the home shared by the

petitioner and the ex-husband. At the hearing, the petitioner acknowledged that she and the respondent did not live together, and that they did not spend time together as a family. However, when the respondent made an application to dismiss the proceeding for lack of subject matter jurisdiction, the Family Court concluded that it had jurisdiction over the controversy since the parties "have an ongoing relationship by virtue of the children" and the respondent's children were residing with the petitioner. At the conclusion of the fact-finding hearing, the Family Court found that the respondent had committed the family offense of disorderly conduct. The respondent appealed, and the Appellate Division affirmed. Frequency of contact is a significant factor in determining whether there is an "intimate relationship" within the meaning of FCA § 812 (1) (e). Here the record showed that there was frequent contact between the petitioner and the respondent in order to arrange for the respondent's visitation with her children. Permitting the petitioner to proceed with this matter in Family Court was consistent with the purpose of a family offense proceeding, which is to end family disruption and obtain protection (*see* FCA § 812 [2] [b]). Accordingly, the Family Court properly concluded that it had subject matter jurisdiction over this proceeding.

*Matter of Winston v Edwards-Clarke,* 127 AD3d 771(2d Dept 2015)

**Petition Properly Dismissed For Lack of Jurisdiction**

Family Court dismissed the father's petition for lack of jurisdiction. The Appellate Division affirmed. The father conceded that respondent mother moved with the children to Florida more than six months before the filing of the petition, and there was no evidence that they ever returned to New York. The record established that the children no longer had a significant connection with New York and that substantial evidence was no longer available in this State concerning the children's care, protection, training, and personal relationships, and the father failed to submit any evidence to the contrary.

*Matter of Brown v Heubusch*, 124 AD3d 1396 (4th Dept 2015)

**Order of Protection Reversed Where Finding Based on Violation of Unconstitutional Statute**

Family Court determined that respondent father committed the family offense of aggravated harassment in the second degree against petitioner mother. The Appellate Division reversed. The Court of Appeals determined that Penal Law Section 240.30 (1), which proscribes communications made in a manner likely to cause annoyance or alarm was unconstitutionally vague and overbroad. Thus, the statute could not serve as the basis for a finding that respondent committed a family offense.

*Matter of Fisher v Hofert*, 126 AD3d 1391 (4th Dept 2015)

**JUVENILE DELINQUENCY**

**Respondent's Justification Defense Disproved**

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 assault in the second degree, criminal possession of a weapon in the fourth degree (two counts), assault in the third degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for 14 months. The Appellate Division affirmed. The court's fact-finding determination was based upon legally sufficient evidence and was not against the weight of the evidence. The evidence, including testimony that respondent stabbed an unarmed person who was walking away from an altercation, disproved respondent's justification beyond a reasonable doubt.

*Matter of Esmeldyn P.*, 124 AD3d 542 (1st Dept 2015)

**Court Properly Denied Respondent's Motion to Convert JD to PINS Proceeding**

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 criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and placed him on probation for 12 months. The Appellate Division

affirmed. The court properly exercised its discretion in adjudicating respondent a juvenile delinquent and placing him on probation, rather than ordering an ACD. Given the seriousness of the underlying conduct, respondent needed the supervision that would be provided by the 12-month term of probabtion.

*Matter of Daniel C.*, 124 AD3d 545 (1st Dept 2015)

**Court Properly Denied Suppression Motion**

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 and criminal possession of stolen property in the fifth degree, and upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, sexual abuse in the first and third degrees, grand larceny in the fourth degree, and criminal possession of stolen property in the fifth degree, and placed him on enhanced supervision probation for 18 months. The Appellate Division affirmed. The court properly denied respondent's suppression motion. The lineup was not unduly suggestive. The differences in age and facial hair between respondent and the lineup fillers were not so noticeable that respondent was singled out. The victim's awareness that the police had a suspect in custody did not render the lineup unduly suggestive. The fact-finding determination was based upon legally sufficient evidence. Respondent's sexual conduct toward the victim was intended to obtain sexual gratification and his guilt of criminal possession of stolen property was established under the theory of accessorial liability, even though only respondent's accomplice actually possessed the stolen phone. Given the seriousness of respondent's conduct in the two incidents, the disposition was the least restrictive alternative consistent with his needs and the community's need for protection.

*Matter of Jonathan W.*, 125 AD3d 410 (1st Dept 2015)

**Petition Dismissed; No Effort to Notify Respondent's Mother of Fact-Finding Proceeding**

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of grand larceny in the fourth degree, and placed him on probation for 15 months. The Appellate Division reversed and dismissed the petition. Respondent's admission was defective because there was no indication that a reasonable and substantial effort, or any effort, was made to notify respondent's mother of the fact-finding proceeding where the admission was made. Although the mother had a history of absence, there was nothing to show that she was notified of the court appearance, which occurred the day after respondent was returned on a warrant. Respondent's uncle's presence was insufficient because nothing indicated that he was a person legally responsible for respondent's care or that he was an acceptable substitute. Even if the uncle's presence had satisfied the statutory criteria, the court failed to obtain a proper allocution from him regarding the rights respondent was waiving.

*Matter of Alexander B.*, 126 AD3d 533 (1st Dept 2015)

**Mother's Seating 7 ½ Feet From Defense Table Did Not Prejudice Respondent**

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 first degree, attempted assault in the second degree, criminal possession of a weapon in the fourth degree, menacing in the second degree (two counts), criminal facilitation in the fourth degree, criminal mischief in the fourth degree and harassment in the first degree, and placed him on level two probation for 15 months. The Appellate Division affirmed. The court fully complied with the Family Court Act when it allowed respondent's mother to be present, even though she was not seated at the defense table. There was nothing in the statute that restricted a court's general discretion regarding courtroom seating arrangements and decorum. Further, respondent's mother sat only 7 ½ feet from the defense table and was accorded ample opportunity for consultation. Respondent did not establish that he was prejudiced in any way by the seating arrangement.

*Matter of Tyrik W.*, 126 AD3d 567 (1st Dept 2015)

**Respondent's Actions Constituted Forcible Taking**

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 (two counts), and placed him on probation for 12 months. The Appellate Division affirmed. Respondent waived his right to challenge the adjournment beyond the prescribed 60-day period because he consented to the adjournment. The petition was not jurisdictionally defective. The allegations in the petition that respondent and a companion tugged and grabbed at the victim's book bag and reached into the victim's pockets until one of the assailants finally said, "let him go," sufficiently alleged an attempted forcible taking.

*Matter of Stephauan P.*, 126 AD3d 639 (1st Dept 2015)

**Court Properly Denied Suppression Motion; Sister Gave Consent to Search Apartment**

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 criminal possession of a weapon in the second and fourth degrees, criminal possession of a firearm, and possession of pistol or revolver ammunition, and also committed the act of unlawful possession of a weapon by a person under 16 (two counts), and placed him with ACS for 18 months. The Appellate Division affirmed. The court properly denied respondent's suppression motion. Petitioner established by clear and convincing evidence that respondent's sister, an adult with authority over the premises who had prior experience with law enforcement, voluntarily invited the police to enter her apartment to look around and voluntarily signed a consent form authorizing the police to search the apartment. There was no threatening behavior by the police and the atmosphere was not unduly coercive.

*Matter of Jaquan C.*, 126 AD3d 650 (1st Dept 2015)

**18 Months Probation Least Restrictive Alternative**

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of sexual abuse in the second degree, and placed him on probation for 18 months. The Appellate Division affirmed. Given the seriousness of the underlying sex crime against a very young child and the need for a treatment program that could not be completed within the duration of an ACD, probation was the least restrictive alternative consistent with respondent's needs and the community's need for protection.

*Matter of Kiano R.*, 127 AD3d 432 (1st Dept 2015)

**Court Properly Denied Motion to Suppress Statements**

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of sexual abuse in the first degree, and placed him on probation for 12 months. The Appellate Division affirmed. The court properly denied respondent's motion to suppress his statements to police. Respondent was not questioned until after the police gave *Miranda* warnings to him and his mother. The evidence established that respondent's waiver of those rights was knowing, intelligent and voluntary because, in the presence of his mother, he clearly and unequivocally stated that he understood each right and gave no indication to the contrary. Evidence of respondent's difficulties with comprehension at school did not warrant a different result, especially because the interrogating detective had respondent state and write that he understood each warning before proceeding to the next one. Regardless whether the best practice would have been to read from the juvenile version of *Miranda* warnings, the detective's failure to do so did not render respondent's waiver involuntary. The 12-month period of probation was the least restrictive dispositional alternative consistent with respondent's needs and the community's protection given, among other things, respondent's sexual conduct towards a very young child, his misbehavior in school, his struggles with acceptance of responsibilities, and the recommendation of the Probation Department.

*Matter of Steven F.*, 127 AD3d 536 (1st Dept 2015)

**Court Properly Denied Suppression Motion; Mother and Aunt Gave Consent to Search Apartment**

Respondent was adjudicated a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would have constituted the crime of criminal possession of a weapon in the second degree, and placed him with ACS for 18 months. The Appellate Division affirmed. The court properly denied respondent's suppression motion. Petitioner established by clear and convincing evidence that the initial entry was made pursuant to respondent's mother's hand gesture inviting the police into the apartment and thereafter respondent's aunt, the lessee of the apartment, gave her voluntary and uncoerced consent to a search by signing a consent form. The aunt was expressly informed that she was not required to consent.

*Matter of Gilbert M.*, 127 AD3d 642 (1st Dept 2015)

**Sexual Misconduct Count Dismissed**

The respondent was adjudicated a juvenile delinquent upon a fact-finding hearing determination that the respondent had committed acts which, if committed by an adult, would have constituted the crimes of criminal sexual act in the first degree, sexual abuse in the first degree, and sexual misconduct; and placed him on probation for a period of 12 months (*see* FCA § 352.2). The court's finding was not against the weight of the evidence. However, the sexual misconduct count was dismissed as an inclusory concurrent count of the criminal sexual act in the first degree count (*see* CPL 300.30 [4]; 300.40 [3] [b]). Accordingly, the order was modified.

*Matter of Damian S.*, 124 AD3d 667 (2d Dept 2015)

**Respondent not entitled to ACD**

The respondent was adjudicated a juvenile delinquent, placed on probation for a period of 12 months, and directed to pay the sum of $356 in restitution. The Appellate Division affirmed. The evidence adduced at the fact-finding hearing was legally sufficient to support the determinations that the respondent committed acts which, if committed by an adult, would have constituted the crimes of petit larceny and criminal possession of stolen property in the fifth degree. Upon further review of the record, the Appellate Division found that the determinations of the Family Court were not against the weight of the evidence. Contrary to the respondent's contention, he was not entitled to an adjournment in contemplation of dismissal merely because this was his first encounter with the law, or in light of the other mitigating circumstances to which he cited.

*Matter of Deandre Mc.*, 124 AD3d 786 (2d Dept 2015)

**Respondent Placed in Nonsecure Detention upon Determination That He Violated Probation**

The Family Court adjudicated the respondent a juvenile delinquent upon his admission that he committed acts which, if committed by an adult, would have constituted the crime of robbery in the third degree, and placed him on probation. The Family Court subsequently determined that the respondent violated the terms and conditions of his probation, vacated the order of disposition, and entered a new order of disposition placing the respondent in a nonsecure detention facility. Contrary to the respondent's contention, the Family Court providently exercised its discretion in placing him in a nonsecure detention facility for a period of up to 18 months. Under the circumstances of the case, the disposition was the least restrictive alternative consistent with the best interests of the respondent and the needs of the community in view of the seriousness of the underlying acts, a finding that he committed similar acts which constituted a statutory violation of his probation (*see* FCA § 353.2 [4]), his poor school attendance, and several violations of the terms and conditions of his probation (*see* FCA § 352.2 [2] [a]).

*Matter of Nysaiah L.*, 125 AD3d 776 (2d Dept 2015)

**Evidence Sufficient to Establish Elements of Robbery and Menacing**

The Family Court adjudicated the a juvenile delinquent and placed him on probation for a period of 18 months. The Appellate Division found that the evidence was legally sufficient to establish, beyond a reasonable doubt, that the respondent committed acts which, if committed by an adult, would have constituted the

crimes of robbery in the second degree, menacing in the third degree, criminal possession of stolen property in the fifth degree, and grand larceny in the fourth degree (*see* FCA § 342.2 [2]). Upon further review of the record, the Appellate Division found that the Family Court's determination was not against the weight of the evidence.

*Matter of Dillon R.*, 125 AD3d 781 (2d Dept 2015)

**Detention by Police Not Unlawful**

The Family Court adjudicated the respondent a juvenile delinquent based upon the finding that she committed acts, which, if committed by an adult, would have constituted the crimes of robbery in the second degree (two counts), assault in the second degree, grand larceny in the fourth degree, and criminal possession of stolen property in the fifth degree. The Appellate Division affirmed. In denying the respondent's motion to suppress evidence, the Family Court properly found that the showup procedure at which the respondent was identified was not unduly suggestive. The respondent was detained approximately 15 minutes after the commission of the subject offenses, a few blocks away from where they were committed. She was then immediately returned to the crime scene, where a subway booth clerk, who had witnessed the commission of the offenses, identified her as one of the perpetrators. Contrary to the respondent's contention, the showup was not rendered unduly suggestive merely because the respondent was handcuffed or because the witness knew that the police had a suspect or suspects in custody. Contrary to the respondent's contention, her detention by the police was not unlawful. The evidence demonstrated that the police had reasonable suspicion that the respondent and the three individuals accompanying her were the individuals described in a radio report as the perpetrators of a robbery which had been committed only a few minutes prior to the stop of the respondent and her companions. The police were justified in stopping and detaining the respondent and the three other individuals based on the similarities between them and the individuals described over the radio, including the number of individuals, their ages and clothing, the close proximity of the individuals to the site of the crime, and the short passage of time between the commission of the crime and the observation of the four individuals. Furthermore, the police detention of the respondent, during which she was transported to the crime scene for a showup procedure, permitting the subway booth clerk to identify her as one of the perpetrators of the subject offenses, did not constitute an arrest.

*Matter of Madeline D.*, 125 AD3d 965 (2d Dept 2015)

**Evidence Supported Elements of Obstructing Governmental Administration**

The Family Court adjudicated the respondent a juvenile delinquent and placed him on probation. The Appellate Division affirmed. The evidence adduced at the fact-finding hearing was legally sufficient to support the finding that the respondent had committed acts which, if committed by an adult, would have constituted the crimes of obstructing governmental administration in the second degree and attempted assault in the third degree. Further, the Family Court's determination was not against the weight of the evidence.

*Matter of Darnell G.*, 125 AD3d 969 (2d Dept 2015)

**Motion to Dismiss Petition Properly Denied**

The Family Court adjudicated the respondent a juvenile delinquent and placed him in the custody of the New York State Office of Children and Family Services for placement in a limited secure facility for an indeterminate period of 6 to 18 months, with credit for only two months of pre-disposition detention. The order of fact-finding, insofar as appealed from, denied the respondent's motion to dismiss the petition or, in the alternative, to strike certain testimony, and, after a hearing, found that he had committed acts which, if committed by an adult, would have constituted, inter alia, the crime of criminal possession of a weapon in the second degree. Contrary to the respondent's contention, the Family Court properly denied his motion to dismiss the juvenile delinquency petition or, in the alternative, to strike the testimony of a particular witness. In support of his motion, the respondent failed to establish that the presentment agency violated his rights under *Brady v Maryland* (373 US 83 [1963]). The Family Court properly determined that giving the respondent credit for the entire time that he spent in detention pending disposition would not have served his needs and best interests or the need for the

protection of the community (*see* FCA § 353.3 [5]). Under the circumstances of this case, the court properly determined that the respondent should only receive a credit of two months for the time that he served in detention prior to disposition.

*Matter of Christopher F.*, 126 AD3d 970 (2d Dept 2015)

**Failure to Comply with FCA § 330.2 (2) Required Preclusion of Identification Evidence**

The presentment agency appealed an order of the Family Court which dismissed the juvenile delinquency petition with prejudice. The record revealed that the presentment agency conceded that its original voluntary disclosure form, which was directed at both the respondent and another juvenile, gave notice only of the identification procedure that the presentment agency intended to present at the fact-finding hearing with respect to the other juvenile, and not of the identification procedure the presentment agency intended to present at the fact-finding hearing with respect to the respondent. Accordingly, the Family Court properly determined that the presentment agency's failure to comply with FCA § 330.2 (2) required preclusion of the identification evidence with respect to the respondent, without regard to whether the respondent was prejudiced by the lack of notice (*see* § 330.2 [2]; CPL 710.30 [1] [b]). Since the presentment agency would not have been able to prove its case without the identification testimony, the Supreme Court properly dismissed the juvenile delinquency petition.

*Matter of Justin G.*, 126 AD3d 971 (2d Dept 2015)

**Respondent Not Deprived of His Right to a Speedy Fact-Finding**

The order appealed from adjudicated the respondent a juvenile delinquent and placed him in the custody of the New York City Administration for Children's Services for placement in a nonsecure facility for a period of up to 18 months. The Appellate Division affirmed. The respondent's sole contention on appeal was that he was deprived of his right to a speedy fact-finding hearing. FCA § 340.1 (2) provides that where a juvenile respondent is not in detention after his or her initial appearance, "the fact-finding hearing shall commence not more than sixty days after the conclusion of the initial appearance." However, pursuant to FCA § 340.1 (4), the Family Court may adjourn the fact-finding hearing "for good cause shown for not more than thirty days." Here, the presentment agency was not ready to proceed on "day sixty," the date stipulated for purposes of the speedy fact-finding hearing (*see* FCA§ 340.1 [2]), because its primary witness, the complainant, failed to appear. The assistant corporation counsel had issued a subpoena to the complainant's mother about one month prior to the date scheduled for the fact-finding hearing, and followed up just a few days prior to the hearing. Nonetheless, the complainant's mother misunderstood the date scheduled for the hearing, and failed to bring him to court that day. Thus, the presentment agency made its first and only request for an adjournment in order to secure the attendance of the complainant. Under these circumstances, the Family Court providently exercised its discretion in finding good cause for adjourning the fact-finding hearing for not more than thirty days (*see* FCA § 340.1 [4] [a]).

*Matter of Jallah J.,* 127 AD3d 972 (2d Dept 2015)

**Motion to Suppress Identification Testimony Properly Denied**

The respondent was adjudicated a juvenile delinquent and placed on probation for a period of 12 months. He appealed the denial of his motion to suppress identification testimony, and an order of fact-finding, which, after a hearing, found that the respondent had committed acts which, if committed by an adult, would have constituted the crime of attempted robbery in the second degree. The Appellate Division affirmed. The Family Court properly declined to suppress the complainant's in-court identification of the respondent. The testimony adduced at the hearing established that the complainant had multiple opportunities to observe the respondent at close range during the commission of the crime, which took place during daylight hours, for a period of up to two minutes. The description of the respondent that the complainant gave the police was sufficiently specific to establish his ability to observe the respondent at the time of the crime. Under these circumstances, the presentment agency met its burden of demonstrating by clear and convincing evidence that the complainant's in-court identification of the respondent was based on the complainant's independent

observation, and not a challenged showup identification. The evidence was legally sufficient to establish, beyond a reasonable doubt, the respondent's identity as one of the perpetrators of the committed acts. Moreover, the Family Court's finding was not against the weight of the evidence.

*Matter of Jamal G.*, 127 AD3d 1081 (2d Dept 2015)

**Restrictive Placement Proper**

Family Court adjudicated respondent to be a juvenile delinquent based upon the finding that he committed acts that, if committed by an adult, would constitute the crimes of rape in the first degree, criminal sexual act in the first degree, and sexual abuse in the first degree. Respondent was placed in the custody of the New York State Office of Children and Family Services for a period of three years. The Appellate Division affirmed. The court properly determined that respondent required a restrictive placement. The court properly considered the seriousness of the crime, respondent's need for therapy in conjunction with his failure to admit to his actions in the instant case, respondent's lack of support and adequate supervision at home, the need to protect the community in light of respondent's aggressive and inappropriate sexual behavior towards others at school, and his series of mental hygiene arrests. Thus, the order of disposition reflected an appropriate balancing of the needs of respondent and the safety of the community.

*Matter of Amir S.*, 124 AD3d 1391 (4th Dept 2015)

**JD Petitions Properly Dismissed in the Interests of Justice**

Family Court dismissed the juvenile delinquency petitions against respondent. The Appellate Division affirmed. Contrary to petitioner's contention, the court neither exceeded its authority nor abused its discretion in dismissing the petitions. The record supported the court's determination, upon its examination and consideration of the relevant statutory factors, that a finding of delinquency or a continuation of the proceeding would result in injustice.

*Matter of Cory J.S.,* 125 AD3d 1272 (4th Dept 2015)

**Court Erred in Failing to Consider Least Restrictive Available Alternative**

Family Court adjudicated respondent to be a juvenile delinquent based upon the finding that he committed acts that, if committed by an adult, would constitute the crimes of petit larceny and criminal possession of stolen property in the fifth degree. Respondent was placed in the custody of the Department of Social Services for a period of twelve months. The Appellate Division modified by vacating the disposition. The evidence presented at the dispositional hearing and the predispositional and probate update reports prepared in conjunction with that hearing established that respondent's home environment was toxic, and he suffered from mental health issues that required treatment. The update to the original report indicated that respondent was staying with a family friend who had known him since birth, and that the friend had petitioned for custody of respondent, and that there had been no new arrests during that time. The update also indicated that the friend was able to devote significant time to supervising respondent, and that the friend resided with a woman who managed a residential home. Both the family friend and the woman with whom he resided testified at the dispositional hearing that they could help with respondent's supervision. Therefore, the court erred in failing to consider the least restrictive available alternative in fashioning an appropriate dispositional order, and the matter was remitted for a new dispositional hearing.

*Matter of Jacob A. T.*, 126 AD3d 1550 (4th Dept 2015)

**PATERNITY**

**Petitioner Equitably Estopped From Denying Paternity**

Family Court granted respondent mother's motion to dismiss the petition seeking to vacate an acknowledgment of paternity. The Appellate Division affirmed. The court properly determined that it was in the four-year-old child's best interests to estop petitioner from denying paternity. Although petitioner testified that he had questioned whether he was the father of the child shortly before the child's birth and again about six months later when he learned that respondent had sexual relations with another man, he

continued to treat the child as his own and developed a parent-child relationship. Petitioner held himself out to be the father, provided the chid with support, and gave him gifts. It was not until the child was four years old and a younger sibling had been born, that petitioner commenced this proceeding seeking to vacate his acknowledgment of paternity, while recognizing the younger sibling as his child. Petitioner also failed to make a prima facie showing of fraud, duress or material mistake of fact that warranted vacating his acknowledgment of paternity after the statutory deadline for rescinding the acknowledgment had passed.

*Matter of Jesus R. C. v Karen J. O.*, 126 AD3d 445 (1st Dept 2015)

**Reliable Medical Explanation Regarding Gestation Period Required**

The petitioner argued that it was possible for him to be the child's father based upon the last date the parties had sexual intercourse, and that the Family Court should have directed a genetic marker test. An acknowledgment signed by the mother and another man named John M. was noted by the Family Court during the hearing. John M. did not testify at the hearing, and no evidence was presented that he had a relationship with the child or provided any financial support to the child. The petitioner testified that he gave the mother $1,000 to purchase baby supplies in advance of the child's birth. Based upon the acknowledgment of paternity form and its conclusion that the gestational period alleged by the petitioner was not medically possible, the Family Court denied the petitioner's application for a paternity test and dismissed the petition. The Appellate Division reversed. The petitioner alleged that 303 days (43 weeks and two days) elapsed between the last date of sexual intercourse with the mother and the birth of the child. It has been generally accepted by the appellate courts that the period of gestation is between 38 and 40 weeks. The Appellate Division noted that any material deviation from the generally accepted average period of gestation must be explained with a reliable medical opinion. As to the acknowledgment, it was unknown to the petitioner, and therefore was not a bar to his claim of paternity. Accordingly, the matter was remitted and in the event that the petitioner presents reliable medical evidence that a 303-day gestation period is scientifically possible, the Family Court must determine whether the ordering of a DNA or genetic marker test is in the child's best interest pursuant to FCA §§ 532 [a]; 516-a [b].

*Matter of Jose M.*, 124 AD3d 892 (2d Dept 2015)

**Petitioner Failed to Comply With Terms of Substituted Service**

Family Court granted petitioner's motion to initiate paternity and custody proceedings through court-ordered service of process pursuant to CPLR § 308(5), and permitted him to establish specific alternate methods of personal service. Thereafter, the court determined that petitioner had failed to conform to the prescribed methods of service and dismissed the petitions. The Appellate Division affirmed. Here, although petitioner's counsel created the terms of substituted service, the record showed he failed to comply with the terms. While neither due process nor the FCA required proof of actual receipt of notice of proceedings, the affidavit of email service failed to state whether the documents were in fact delivered to respondent in PDF format. Additionally, and of greater concern, was the manner in which service by text was sent as it failed to state, as expressly required in the court's order, "that respondent should access her email accounts to review the documents that had been served in PDF format by email and that the text message was being sent by virtue of the Family Court order".

*Matter of Keith X. v Kristin Y.,* 124 AD3d 1056 (3d Dept 2015)

**Court Erred in Applying Res Judicata to Claims in Cross Petition**

Family Court dismissed petitioner's cross petition seeking a determination that he was the biological father of the subject child. The Appellate Division reversed and remitted. Respondent signed an acknowledgment of paternity with respect to the child when the child was born in 2000. DNA testing, however, later established that petitioner was in fact the child's biological father. Petitioner filed a custody petition and, by default order, the court awarded petitioner custody of the child. Respondent

subsequently filed a petition seeking modification of that order to permit visitation of the child with respondent and the half brother of the child, and petitioner filed a cross petition seeking an order vacating respondent's acknowledgment of paternity, determining that petitioner was the child's biological father, and directing that an amended birth certificate be filed. The court erred in applying the doctrine of res judicata to petitioner's claims in the cross petition. In matter concerning filiation, it was the child's best interests which were of paramount concern. It was in the child's best interests to permit petitioner to be heard on his claims in the cross petition. Petitioner had been the child's legal, full-time caregiver and provider since 2011, and respondent also recognized petitioner as the child's biological father.

*Matter of Frost v Wisniewski*, 126 AD3d 1305 (4th Dept 2015)

**PERMANENCY**

**Order Dismissing Agency's Permanency Plan Was Not Supported by Sound and Substantial Basis in the Record**

Family Court's order dismissing petitioner agency's application to approve a permanency plan and modified the plan on behalf of the subject children was not supported by a sound and substantial basis in the record. Here, the agency sought to modify the permanency plan from return to the father, who was incarcerated for his involvement in an illegal drug trade, to placement with a fit and willing relatives, specifically, the paternal aunt and uncle. The court expressed its displeasure at not having been consulted on this change and modified the plan to adoption and directed the agency to file a petition seeking TPR. The aunt and uncle had a strong relationship with the children and were fully capable of caring for them. Although they waited for a substantial period of time before seeking placement of the children in their home, there was uncontradicted proof that they were not aware the children remained in foster care and once they learned of this, promptly reached out to the agency. Additionally, the aunt advised the court she would obey all directives issued by the agency. In a footnote, the Appellate Division noted while not dispositive, Family Court failed to engage in any "age-appropriate consultation" with the children beyond considering what the attorney for the child asserted on their behalf. However, in light of the significant amount of time that had elapsed since the issuance of the court's order as well as respondent's relapse from prison, the matter was remitted.

*Matter of Alexus SS.,* 125 AD3d 1141 (3d Dept 2015)

**PERSON IN NEED OF SUPERVISION**

**Court's Failure to Advise Respondent of His Rights Constituted Reversible Error**

Family Court's failure to advise respondent of his rights constituted reversible error. Here, based on respondent's violation of an order of protection issued on behalf of his mother, a JD petition was filed again him alleging he had committed criminal contempt in the second degree pursuant to PL §215.30. Thereafter, the parties agreed to convert the matter to a PINS and after consenting to a finding, respondent was placed on probation. Respondent subsequently violated the terms of probation multiple times. After obtaining a comprehensive diagnostic evaluation of respondent and having a dispositional hearing, the court placed him in the agency's custody for one year. While the PINS petition itself was sufficient, the court failed to advise respondent both at the initial appearance of the PINS proceeding and at the PINS dispositional hearing, that he had the right to remain silent and be represented by counsel of his choosing. Additionally, the court's colloquy prior to accepting respondent's consent was inadequate since the court failed, at the least, to state and admit the precise act or acts which constituted respondent's admission, failed to make respondent aware, on the record, of the consequences, failed to advise him of his dispositional alternatives or recieve assurance that respondent was not coerced and failed to ensure he had consulted with counsel.

*Matter of Aaron UU.,* 125 AD3d 1155 (3d Dept 2015)

**TERMINATION OF PARENTAL RIGHTS**

**Respondent Mother Permanently Neglected Children**

Family Court found that respondent mother

permanently neglected the subject children. The Appellate Division affirmed. Although the court erred in admitting certain agency progress notes that were not made at the time of the events reported or within a reasonable time thereafter, any error was harmless, in light of the clear and convincing evidence of permanent neglect in the remaining progress notes and the testimony adduced at the fact-finding hearing. The evidence established, among other things, that petitioner referred respondent to a drug treatment program and scheduled visitation, but respondent failed to consistently visit the children, continued drug use, and relocated multiple times without providing the agency with her address.

*Matter of Ramel Anthony S.*, 124 AD3d 445 (1st Dept 2015)

**TPR Affirmed Based Upon Mother's Long-Term Drug Addiction**

Family Court terminated respondent mothers' parental rights to the subject child upon a finding of permanent neglect. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to overcome her long-term drug addiction. Although respondent participated in at least three detoxification programs, she repeatedly relapsed. Her addiction also caused her to be drowsy at numerous visits with the children and her testimony established that she failed to appreciate how her addiction adversely affected her child. It was in the child's best interests to terminate respondent's parental rights. Since shortly after birth, he had resided in the home of his pre-adoptive foster parents, who loved him and wished to adopt him. The child never lived with respondent and, after four years, he should not have to wait any longer to obtain permanency.

*Matter of Jayden S.*, 124 AD3d 488 (1st Dept 2015)

**TPR Based Upon Permanent Neglect Affirmed**

Family Court terminated respondent father's parental rights upon findings of permanent neglect and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption. The Appellate Division affirmed. The record demonstrated by clear and convincing evidence that the agency made diligent efforts to strengthen respondent's parental relationship with his children by scheduling regular visitation, providing respondent with drug referrals, referrals for domestic violence programs and parenting skills classes and conducting meetings and case conferences with respondent. The agency and caseworkers attempted to work with respondent to help him secure permanent housing, a public assistance budget, and employment so he could care for the subject children, as well as three other children in his custody. Respondent, however, failed for over a year after the children entered foster care to plan for their return by securing steady employment or appropriate permanent housing. Further, respondent failed to comply with random blood testing on a consistent basis, abide by an order of protection, complete a domestic violence program in a timely manner, and to visit the children regularly. It was in the children's best interests to terminate respondent's parental rights. They had been in foster care for approximately seven years and required permanency.

*Matter of Charles Jahmel M.,* 124 AD3d 496 (1st Dept 2015)

**Respondent Mother Permanently Neglected Children**

Family Court determined that respondent mother permanently neglected the subject children and, in a separate order, determined that respondent father was a notice father only as to two of the children, A and R, and in the alternative that he permanently neglected them and that he abandoned another of the children, J. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence of mother's failure to plan for the children's future, notwithstanding the agency's diligent efforts. Although the mother was given referrals for a comprehensive mental health evaluation, she refused to comply for several years, despite the fact that the court suspended visitation until she complied. Further, after completing a domestic violence program, the mother admitted to continuing to engage in relationships involving domestic violence and continued to have angry outbursts and exhibit inappropriate behavior in front of the children. The father admitted that he failed to support A and R according to his means before he

was incarcerated and he provided no support after he was incarcerated. He also had limited contact with A and R after his incarceration. The court properly found that the father abandoned J because he admitted that he had no contact with the child in the six months prior to the filing of the petition.

*Matter of Jamie S.*, 125 AD3d 449 (1st Dept 2015)

**Respondent Parents Permanently Neglected Children**

Family Court, upon a fact-finding of permanent neglect, terminated respondents' parental rights to the subject child. The Appellate Division affirmed. The findings of permanent neglect were supported by clear and convincing evidence. The agency made diligent efforts to strengthen the parents' relationship with the child by, among other things, scheduling regular visitation and referring them for therapy to address the conditions that led to the child's removal. However, respondents were uncooperative. The father was verbally abusive during visitation and the mother failed to engage with the child. Both parents continued to deny the conditions that led to the child's removal and failed to gain insight into reasons for the child's removal. It was in the child's best interests to terminate respondents parental rights. The child, who has special needs, was well cared for by the foster parents and was thriving in the stable and loving home they provided.

*Matter of Marissa Tiffany C-W.*, 125 AD3d 512 (1st Dept 2015)

**Father Abandoned and Permanently Neglected Child**

Family Court found that respondent father abandoned and permanently neglected the subject child. The Appellate Division affirmed. The finding of abandonment was supported by clear and convincing evidence that the father failed during the relevant time period to visit with the child, although he was able to do so and was not discouraged from doing so by the agency. The agency advised the father that it would help make arrangements and pay for the father's visits to the child's school. The father's minimal contacts with the agency and school were insufficient and the grandmother's communications with the school and agency were not attributable to the father. The finding of permanent neglect was supported by clear and convincing evidence. The agency made diligent efforts by, among other things, encouraging the father to maintain contact with the child through letters and telephone contact, as well as offering financial assistance to facilitate visitation. Despite these efforts, the father failed to maintain contact or plan for the child's future. The father failed to obtain suitable housing, demonstrate understanding of the child's special needs, or respond to the agency's requests for authorization for medical and dental care for the child, which resulted in the child's failure to receive such care.

*Matter of Jaylen Derrick Jermaine A.*, 125 AD3d 535 (1st Dept 2015)

**Parents Severely Abused and Neglected Their Child**

Family Court found that respondent mother and father severely abused, and abused and neglected, their child. The Appellate Division affirmed. There was clear and convincing evidence that both parents severely abused the subject child on the basis that the father caused her injuries under circumstances evincing a depraved indifference to human life, and the mother recklessly allowed such injuries to be inflicted under circumstances evincing a depraved indifference to human life. Expert testimony established that the then three-month-old infant's four fractured ribs, fractured collarbone, fractured femur and subdural hematomas resulted from being squeezed, shaken and possibly thrown. It was undisputed that the father was her primary caretaker, as the mother worked outside the home, and that the child needed emergency assistance while in his care. The father's failure to testify warranted drawing the strongest inference against him. The father's prior plea of guilty to manslaughter for recklessly killing his two-month -old son under similar circumstances established that he was aware of and consciously disregarded the risk that shaking the baby could seriously injure her. The court properly found that diligent efforts should be excused with respect to the father in light of his manslaughter conviction and inability to explain the child's injuries. The court also properly concluded that diligent efforts to reunite mother and child were no longer necessary because the mother refused to believe that the father posed a risk to

the child and she continued to leave the child in the father's sole care.

*Matter of Vivienne Bobbi-Hadiya S.*, 126 AD3d 545 (1st Dept 2015)

**TPR in Child's Best Interests**

Family Court found that respondent mother permanently neglected the subject children. The Appellate Division affirmed. The finding of permanent neglect was supported by clear and convincing evidence that, despite the agency's diligent efforts, the mother failed for the relevant time period to visit the child regularly, complete the required service plan, and address the problems that led to the child's placement, such as domestic violence by the child's father. Termination of the mother's parental rights was in the child's best interests. The caseworker testified that the foster mother wanted to adopt the child and that the child was happy in the foster home, where he had lived his entire life.

*Matter of Javon Lawrence M.*, 126 AD3d 617 (1st Dept 2015)

**Respondent Failed to Comply With Terms of Suspended Judgment**

Family Court found that respondent mother substantially failed to comply with the terms of a suspended judgment, terminated her parental rights with respect to the subject child, 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. A preponderance of the evidence supported the finding that the mother violated the terms of the suspended judgment. Although respondent made efforts to comply with some of the terms of the suspended judgment, she failed to obtain suitable housing or maintain a steady income, refused to take a drug test on one occasion, and tested positive for alcohol on three occasions. A preponderance of the evidence supported the determination that it was in the child's best interests to terminate parental rights, given, among other things, the mother's alcohol addiction and the length of time the child had been in foster care.

*Matter of Davontay Peter H.*, 127 AD3d 405 (1st Dept 2015)

**Respondent Mother's Due Process Rights Not Violated by Court's Refusal to Allow Her to Testify Via Telephone**

Family Court determined that respondent mother permanently neglected the subject child, 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. There was clear and convincing evidence that the agency made diligent efforts to reunite the mother with the child. A caseworker testified that she provided the mother with referrals for services, scheduled and conducted conferences to assist the mother in complying with the service plan, offered to provide the mother with a bus ticket to visit the child after she moved out-of-State, and was repeatedly reminded of what was necessary in order to have the child returned to her. The mother's due process rights were not violated by the court's decision denying her permission to testify via telephone. The right to be present at a hearing was not absolute and the court properly determined that the mother's credibility would be difficult to determine via telephone. The court had previously provided the mother with a two-month adjournment at her request to enable her to obtain bus fare to attend the proceedings and even indicated a willingness to consider, as an alternative, letting the mother testify via video conferencing from a local library or other location. The mother was allowed to listen to the proceedings by telephone and she was represented by counsel, who actively participated in the proceedings.

*Matter of Neamiah Harry-Ray M.*, 127 AD3d 409 (1st Dept 2015)

**Mother Failed to Establish a Reasonable Excuse for Default**

The order appealed from denied the mother's motion to vacate a prior order of fact-finding and disposition of that court, which found that she had permanently neglected the subject children, terminated her parental rights, and freed the children for adoption. The record revealed that the Family Court conducted a fact-finding

and dispositional hearing, at which a caseworker of the petitioner agency testified. The mother was present, but refused to testify. Thereafter, she was arrested and incarcerated, and failed to appear on the second day of the hearing. In an order of fact-finding and disposition, entered upon the mother's failure to appear, the court found that the mother had permanently neglected the subject children, terminated her parental rights, and freed the children for adoption. The mother moved to vacate the order of fact-finding and disposition, and the court denied the motion. The determination whether to relieve a party of a default is a matter left to the sound discretion of the Family Court. In seeking to vacate her default, the mother was required to show that there was a reasonable excuse for her failure to appear and that she had a potentially meritorious defense (*see* CPLR 5015 [a] [1]). The Family Court providently exercised its discretion in denying the mother's motion, made seven months after she defaulted, as she failed to establish a reasonable excuse for her failure to appear. The mother's failure to appear on the second day of the hearing due to her incarceration was not a reasonable excuse for her default, because she did not explain why she failed to notify her attorney or the court of her imprisonment. In addition, the mother failed to set forth a potentially meritorious defense. Accordingly, the order was affirmed.

*Matter of Deyquan M.B.*, 124 AD3d 644 (2d Dept 2015)

**Respondent Parents Failed to Plan for Children's Return Despite Petitioner's Diligent Efforts**

The Family Court properly determined, based on clear and convincing evidence, that the respondent mother permanently neglected the subject children by failing to plan for their return during the four-year period following their placement into foster care. The record demonstrated that the petitioner made diligent efforts to help the mother comply with her service plan, which required her to complete a course of psychotherapy and attend substance abuse therapy. The record established that, at the time of the filing of the petitions, the mother had yet to complete either a course of psychotherapy or substance abuse therapy. The Family Court also properly determined, based on clear and convincing evidence, that the respondent father permanently neglected one of the subject children by failing to plan for that child's return following his placement into foster care. The record established that the petitioner made diligent efforts to assist the father in complying with his service plan, which required him to regularly visit that child and to file for custody. Although the petitioner repeatedly counseled the father on how to file for custody, he did not file his custody petition until after the termination petition was filed. The record further established that, during the pendency of the termination proceeding, the father plead guilty to a felony drug crime and was awaiting sentencing by a drug diversion court. In light of the mother's failure to complete the required programs and the father's impending sentencing, the Family Court properly denied the application for a suspended judgment. The Family Court also properly determined that termination of the parental rights of both the mother and the father was in the children's best interests.

*Matter of Angel M.R.J.*, 124 AD3d 657 (2d Dept 2015)

**Father Failed to Complete Sex Offender Treatment Program Despite Petitioner's Diligent Efforts**

The Family Court properly found that the father failed to adequately plan for the children's future. The petitioner established by clear and convincing evidence that it made diligent efforts to assist the father in planning for the children's future by referring him to a sex offender treatment program, and repeatedly advising him that he had to attend and complete the program. In failing to complete the sex offender treatment program and refusing to acknowledge his guilt, the father was unable to gain insight into his previous abusive behavior. Moreover, the Family Court properly determined that termination of the father's parental rights, rather than the entry of a suspended judgment, was in the children's best interests (*see* FCA § 631).

*Matter of Hason-Ja M.*, 124 AD3d 894 (2d Dept 2015)

**Mother Failed to Complete Numerous Mental Illness and Drug Treatment Programs Despite Petitioner's Diligent Efforts**

The Family Court properly found that the petitioner established by clear and convincing evidence that the mother permanently neglected the subject children (*see*

SSL§ 384-b [7] [a]). The petitioner presented evidence that it made diligent efforts to encourage and strengthen the parental relationship by facilitating visitation, repeatedly providing the mother with referrals to various mental illness and controlled-substance abuse treatment programs, monitoring her progress in these programs, and repeatedly advising her that it was necessary to complete such programs. Despite these efforts, the mother failed to plan for the children's future by completing any of the numerous mental illness and drug treatment programs to which she was referred. Furthermore, the Family Court properly determined that it was in the best interests of both subject children to terminate the mother's parental rights and free them for adoption (*see* FCA § 631).

*Matter of Nicholas A.N.*, 124 AD3d 896 (2d Dept 2015)

**Family Court Did Not Err in Deferring to Opinion of Court-Appointed Psychologist**

Contrary to the mother's contentions, the court-appointed psychologist's findings were not contradicted by those made by a psychiatrist who interviewed the mother approximately two months before the hearing, and the Family Court did not err in deferring to the opinion of the court-appointed psychologist. The Family Court properly found that there was clear and convincing evidence that the respondent mother was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child (*see* SSL § 384-b [4] [c]). A court-appointed psychologist, who interviewed the mother and reviewed relevant records, including medical records, testified that the mother had a long history of psychiatric problems and suffered from chronic bipolar disorder, and that her condition would likely persist into the foreseeable future. That psychologist opined that, if the subject child had been returned to the mother, the child would have been at risk of being neglected due to the nature of the mother's illness.

*Matter of Prince X.R.*, 124 AD3d 899 (2d Dept 2015)

**Father's Partial Compliance with Service Plan Insufficient to Preclude Finding of Permanent Neglect**

After fact-finding and dispositional hearings, the Family Court determined that the father had permanently neglected the subject child, terminated his parental rights, and transferred guardianship and custody of the child to the county's Department of Social Services for the purpose of adoption. The father appealed. The Appellate Division affirmed. The Family Court correctly determined that the petitioner demonstrated by clear and convincing evidence that it had exercised diligent efforts to strengthen the parental relationship, and that the father's partial and belated compliance with the service plan provided by the agency was insufficient to preclude a finding of permanent neglect. Likewise, the Family Court's determination that it was in the child's best interests to terminate the father's parental rights and free the child for adoption by her foster parents was supported by a preponderance of the evidence. Contrary to the father's contention, a suspended judgment was not warranted, despite the father's recent progress and efforts to avail himself of the services offered to him, because the child had bonded with the foster parents, who had consistently provided for her special needs.

*Matter of Kayla S.-G.*, 125 AD3d 980 (2d Dept 2015)

**DSS Not Required to Make Additional Diligent Efforts to Facilitate Communication Between Mother and Children**

The mother appealed from an order of the Family Court which denied her application to direct the petitioner to make additional diligent efforts to facilitate communication with her children. The Appellate Division affirmed. The Family Court providently exercised its discretion in directing that the county's Department of Social Services (DSS) provide the mother visitation with the children D. and J. only at the request of the subject children, and denying the mother's application to direct DSS to make additional diligent efforts to facilitate communications and visitation between her and the subject children. At the time of the first permanency hearing at issue here, one of the subject children was over the age of 18 and the other was near her 18th birthday, and both had elected to remain in foster care (*see* FCA § 1055 [e]). The record demonstrated that both children were capable of contacting their caseworker or the mother to arrange for visitation, and the mother had the means to contact both children.

*Matter of Dashawn N.*, 127 AD3d 976 (2d Dept 2015)

**Termination of Father's Parental Rights Not in Best Interests of the Children**

The father appealed from an order of fact-finding and disposition which found that the father had permanently neglected the subject children and terminated his parental rights. The Appellate Division modified the order of fact-finding and disposition. The record supported the Family Court's finding that the father permanently neglected the subject children (*see* SSL § 384-b [7] [a]). However, the Family Court improvidently exercised its discretion in terminating the father's parental rights. The record showed that the father made sufficient progress toward strengthening his relationship with the subject children. The older child was residing at a residential treatment center for children with emotional and behavioral issues, and there was no indication that he had any prospects for foster placement or adoption. Although the younger child resided with a foster family, the foster parents had indicated that they did not wish to adopt him out of concern that they could not handle him. Thus, there was no indication that termination of the father's parental rights would have increased the subject children's opportunities for adoptive placement. Under these circumstances, the Family Court's termination of the father's parental rights was not in the best interests of the children and, instead, the court should have suspended judgment for one year. Accordingly, the Appellate Division remitted the matter for a new dispositional hearing, and a new disposition thereafter.

*Matter of Javon J.*, 127 AD3d 1088 (2d Dept 2015)

**Mother Failed to Plan for Child's Future Despite Petitioner's Diligent Efforts**

The mother appealed from an order of fact-finding and disposition which found that the mother had permanently neglected the subject child and terminated her parental rights. The Appellate Division affirmed. The Family Court properly found that the mother permanently neglected the subject child. The petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (*see* SSL § 384-b [7]). These efforts included scheduling and facilitating visitation, referring the mother to parenting classes and drug rehabilitation programs, monitoring the mother's participation in the rehabilitation programs, meeting with the mother to review the service plan, and explaining the importance of complying with the plan. Despite these efforts, the mother failed to make a realistic and feasible plan for the child's future, including a plan for how she would care for the child in her home. Contrary to the mother's contention, the record contained clear and convincing evidence that, during the relevant statutory period, she failed to substantially and continuously plan for the child's future, although physically and financially able to do so (*see* SSL § 384-b [7] [a]). The child came into the petitioner's care and custody when she was less than one month old, after she was born prematurely with a positive toxicology. There was no dispute that the mother had a substance abuse problem and used crack cocaine while pregnant with the child. Although the mother was enrolled in a residential drug treatment program when the child was removed from her care, she discontinued her participation in that program. Thereafter, to her credit, the mother completed a parenting class and an outpatient substance abuse treatment program, and she remained in treatment at the time of the fact-finding hearing. However, during that same time period, the mother was arrested while on probation for a pre-petition offense. Moreover, she participated in only three hours per week of unsupervised visitation with the child which provided a very limited view of her parenting abilities and her relationship with the child. Further, the Family Court properly determined that it was in the child's best interests to terminate the mother's parental rights and free her for adoption by the foster mother, with whom the child had lived since she was approximately 3 1/2 months old (*see* FCA § 631).

*Matter of Sarah C.*, 127 AD3d 1181 (2d Dept 2015)

**Sound and Substantial Basis in the Record to Revoke Suspended Judgment**

Family Court revoked a suspended judgment and terminated respondent's parental rights. The Appellate Division affirmed determining the court's order had a sound and substantial basis in the record. Suspended judgments are given to provide parents "a brief grace period within which to become a fit parent with whom

the child can be safely reunited". Here, the record showed despite the requirement that respondent needed to be punctual for his visits with the child, he failed to do so on more than one occasion. Additionally, his attendance at counseling meetings was erratic although the child's counselor made continual efforts to reschedule and accommodate respondent's needs. Respondent also failed to schedule a family counseling session after being reminded numerous times to do so. Even if respondent did not understand the reasons for, or agreed with, the terms and conditions in the suspended judgment, this did not render the provisions anything less than compulsory. Moreover, respondent made no meaningful efforts to address the issues that led to the child's placement in foster care in the first instance and failed to take appropriate steps to have the child returned to his custody. It was in the child's best interest to terminate respondent's parental rights. The child struggled emotionally when respondent was inconsistent with his visits, he had bonded with his foster parents and siblings and his foster home provided him with a safe, stable and caring environment.

*Matter of Michael HH.,* 124 AD3d 944 (3d Dept 2015)

**Family Court Properly Terminated Respondent's Parental Rights**

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner met its burden of showing diligent efforts were made to strengthen the parent-child relationship. However, despite petitioner's efforts, respondent, who was incarcerated for raping a 12-year-old child, failed to adequately plan for the subject children's future and failed to maintain contact with them. Petitioner's caseworker, among other things, sent letters to respondent regarding the children and informed her of her rights and also advised her she would accept collect calls to discuss the situation. Additionally, when respondent suggested the children's uncle as a possible placement resource, petitioner contacted the uncle but received no response. Respondent was provided with biweekly visitation with the children when she was in jail, but when she was moved to a correctional facility six hours away, the court did not require visitation due to the distance and upon advice of the children's therapists. Thereafter, the caseworker encouraged respondent and the children to communicate via letters and drawings. Respondent's plan was for the children to remain in foster care indefinitely, throughout respondent's three-year incarceration period and for a period of time thereafter, so that she could find suitable living arrangements. She had plans to move in with a boyfriend she had met a few months earlier while in prison, whom the children had never met. She also testified she needed to get to know the boyfriend better. Furthermore, respondent failed to adequately address the issues that had led to the removal of the children and waited months to participate in sex offender treatment, and her reasons for waiting were not consistent or compelling. It was in the children's best interests to terminate respondent's parental rights. The court also properly issued orders of protection prohibiting respondent from contacting the children until they reached the age of majority. The older child expressed a desire not to see her and became upset at hearing her letters despite his weekly therapy sessions. The younger child, who was only two-year-old when she was placed in foster care, had severe developmental delays and had bonded with the foster parents.

*Matter of Britiny U.,* 124 AD3d 964 (3d Dept 2015)

**Respondent Failed to Address Issues That Led to Children's Removal**

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. The agency complied with its obligation to provide diligent efforts to strengthen the parent-child relationship. The obstacles preventing reunification were respondent's mental health issues, limited parenting skills, domestic violence and unstable housing. Respondent was diagnosed earlier with bipolar disorder. The agency referred her to a psychologist for evaluation where it was determined she had borderline personality disorder, and the agency provided her with the recommended cognitive therapy. Additionally, among other things, the agency developed a service plan, provided case management, prevention and family services and later enrolled her in a program designed to help families affected by mental illness. There was clear and convincing evidence that respondent failed to benefit from the services or address the issues that led to the children's removal thus she failed to plan for their future. Although respondent participated in the home-based parent education program, she cancelled many

visits, failed to complete homework assignments and stated she already possessed the skills in question. Even though respondent attended most supervised visits, at times she appeared disinterested and stared at the wall and had to be prompted to engage with the children. She also acted inappropriately by shoving a spoon into the mouth of one of the children when the child did not want to eat and generally made very little progress. Furthermore, her attendance at therapy was so poor that she was in danger of being discharged. It was in the children's best interests to terminate respondent's parental rights. At the time of the dispositional hearing, respondent had lost her apartment, had been living with a friend in homeless shelters, been discharged from programs that provided her with mental health services, had not obtained new services and failed to notify the agency of her whereabouts, therefore a suspended judgment would not have been in the children's best interests. The children were living together in a pre-adoptive home where they had spent almost all their lives. Viewing the record as a whole, there was a sound and substantial basis in the record to support the court's decision.

*Matter of Aniya L.,* 124 AD3d 1001 (3d Dept 2015)

**Petitioner's Noncompliance With Terms of Suspended Sentence Supports TPR**

Family Court revoked respondent mother's suspended judgment and terminated her paternal rights. Here, respondent consented to an order of permanent neglect and was directed to comply with the terms of the suspended judgment. She was required to, among other things, cooperate with caseworker counseling, parenting services, homemaker services, anger management counseling, family counseling and mental health services. The proof at the hearing showed respondent's pattern of noncompliance with the court-ordered services during the period of the suspended judgment. Her noncompliance and poor attendance resulted in her inability to make progress in the court-ordered programs, and most importantly, several months had passed since she had any contact with the child. Additionally, it was in the child's best interests to terminate respondent's parental rights. The record showed the child had been in the agency's custody for over two years and was thriving in a pre-adoptive foster home.

*Matter of Cody D.,*127 AD3d 1258 (3d Dept 2015)

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

Family Court's determination that respondent permanently neglected the children was supported by a sound and substantial basis in the record. The Agency made diligent efforts to strengthen the parental relationship. Here, the father who was incarcerated for most of the children's lives, was informed of the children's progress and well being, regular visitation was arranged for him, he was given photographs of the children and the agency caseworker inquired about his participation in court-ordered programs related to substance abuse, domestic violence, job skills and parenting. However, respondent failed to develop a realistic plan for the children. He failed to complete the necessary programs, had no plans for obtaining employment or suitable housing when released from prison and his suggested placement resource for the children refused to care for them. Family Court did not err in terminating respondent father's parental rights and freeing the children for adoption. During the dispositional hearing, respondent was once again waiting to be sentenced to prison for another criminal matter. He was unwilling to complete the necessary programs to address his substance abuse issues and had no viable plans for caring for the children in the future. Although it was not certain whether the children's foster parents intended to adopt them, the lack of such intention was not determinative.

*Matter of Jayden XX.,* 127 AD3d 1286 (3d Dept 2015)

**Revocation of Suspended Judgment Was Supported by Sound and Substantial Basis in the Record**

Family Court revoked respondent parents suspended judgment and terminated their parental rights. The Appellate Division affirmed. Here, one of the terms of the suspended sentence required the parents to maintain appropriate housing, but, at the time of the dispositional hearing, the father was still living in a shelter and the mother was sharing a home with a registered sex offender and both respondents were unemployed. Although financial difficulties prevented respondents from finding affordable housing, both admitted they did not ask for the caseworker's help although she indicated

she could do so. While both respondents participated regularly in visits, the visits could not be conducted in their homes and the visits never progressed from supervised to unsupervised. They continued to need prompting to discipline the children, to attend to their safety and to provide them with care such as diaper changes. Respondents failed to cooperate with the agency in developing and implementing a parenting plan and failed to maintain contact with the caseworker by failing to respond to his emails and phone calls. The respondents failed to apprise the caseworker of their whereabouts as required and neither fully participated in or completed the required programs. Although some of these issues were caused by transportation difficulties, they did not take advantage of the agency's offer of transport. Based on the evidence, the court's order was supported by a sound and substantial basis in the record.

*Matter of Sequoyah Z.,* 127 AD3d 1518 (3d Dept 2015)

**Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent father's parental rights with respect to respondents' daughter, and terminated respondent mother's parental rights with respect to respondents' daughter and the mother's two sons. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and her children. Petitioner developed a service plan for the mother that included parenting classes, supervises visitation, assistance by a parent aide, domestic violence counseling, couples counseling, mental health counseling and several home visits. Petitioner engaged in meaningful efforts with respect to the mother's unstable housing situation, but she was not receptive. Indeed, the mother continued to move in and out of the father's house, which was unsuitable for the children because of its overall filth and the presence of several large, aggressive dogs. Moreover, the mother failed to plan adequately for the future of her children, although physically and financially able to do so. Although the mother completed two domestic violence programs, she admitted that she continued to engage in acts of domestic violence against the father. She also participated in other counseling services, but failed to make progress. The mother conceded that her living arrangements were unstable, and that she moved in and out of the father's house about "fifty times," despite its unsuitability for her children. The evidence showed that the mother had some income, and was able to apply for additional support. Although the mother completed a parenting class and regularly attended supervised visits with her children, those visits had to be reduced from two 20-minute visits per week to a single, hour-long visit per week, and yet the mother continued to be overwhelmed by her three children, resulting in at least one instance of physical violence against one of the children. Although unpreserved for review, the father's contention was without merit that the court violated his due process rights by conducting the fact-finding and dispositional hearings in his absence. A parent's right to be present for fact-finding and dispositional hearings was not absolute. The father had been made aware of the scheduled fact-finding hearing but failed to appear, despite an explicit warning from the court that the hearing would proceed in his absence. Although the father told his attorney and a caseworker that he did not appear because he had a flat tire, he told his mother that he did not appear because he overslept. The father's attorney fully represented his interests at the fact-finding hearing and thus the father failed to demonstrate that he suffered any prejudice as a result of his absence. Similarly, the father's attorney represented his interests at the dispositional hearing and the father failed to demonstrate that he suffered any prejudice as a result of his absence. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and his child. Despite petitioner's efforts, the father failed to participate meaningfully in counseling, failed to attend service plan review meetings, rarely used his full visitation time, and, although he made some alterations to his home, failed to make it suitable for children. The father failed to plan adequately for the future of the child. He refused to attend individual counseling sessions, request that his weekly visits be reduced to biweekly visits because he was "too busy," and ultimately, attended only 5 of 24 scheduled visits. The father also failed to contact his child's daycare for progress reports or attend service plan review meetings, among other things. Despite no apparent physical or financial limitations, the father failed to remedy the unsuitable living conditions of his home.

*Matter of Dakota H.*, 126 AD3d 1313 (4th Dept 2015)

**Termination of Parental Rights on Ground of Mental Illness Affirmed**

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of mental illness. The Appellate Division affirmed. The testimony of petitioner's witnesses, including a court-appointed psychologist, established that the mother was so disturbed in her behavior, feeling, thinking and judgment that, if her child was returned to her custody, her child would be in danger of becoming a neglected child. Further, the mother's testimony substantiated the psychologist's opinion that the mother's condition would not improve in the foreseeable future.

*Matter of Dorean G.*, 126 AD3d 1384 (4th Dept 2015)

**Affirmance of Termination of Parental Rights on the Ground of Permanent Neglect**

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Although the court erred in admitting hearsay testimony from one of petitioner's witnesses, any error in the admission of those statements was harmless because the result reached would have been the same even had such statements been excluded. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the children. Despite her participation in some of the services afforded her, the mother did not successfully address or gain insight into the problems that led to the removal of the children and continued to prevent the children's safe return. The mother did not request a suspended judgment at the dispositional hearing, and thus failed to preserve for review her contention that the court erred in failing to grant that relief. However, the record established that any progress that the mother made was not sufficient to warrant any further prolongation of the children's unsettled status.

*Matter of Kyla E.*, 126 AD3d 1385 (4th Dept 2015)

**Termination of Parental Rights Proper Where Father Abandoned Children**

Family Court terminated respondent father's parental rights with respect to the subject children on the ground of abandonment. The Appellate Division affirmed. Petitioner established abandonment by the requisite clear and convincing evidence, by establishing that the father evinced an intent to forego his parental rights and obligations for the six-month period before the filing of the instant petition. Among other things, the father did not make any visits to the children during the first five months of the six-month period prior to commencement of the abandonment proceeding despite having a right to weekly visitation. During such time frame, the father availed himself of other travel and vacations, but elected not to see his children. Although the father was incarcerated for the final month of the six-month period and of course was not able to visit the children at that time, he was still presumed able to communicate absent proof to the contrary. Petitioner established that the father did not communicate with the children or their foster parents during the final month of the six-month period. The conflicting testimony of the father and the caseworker presented a credibility issue for Family Court to resolve, and its resolution of credibility issues was entitled to great weight. The father's payment of partial child support arrears, under the circumstances of this case, did not constitute communication with the children or petitioner sufficient to defeat an otherwise viable claim of abandonment.

*Matter of Anthony C.S.*, 126 AD3d 1396 (4th Dept 2015)