Office of Attorneys for Children
Appellate Division, Fourth Department

Case Digest 2017

Covers January-December 2017 Decision Lists

ADOPTION

Consent of Biological Father Not Required

Family Court determined that respondent was not a father whose consent to the adoption of the subject children was required. The Appellate Division affirmed. A child born out of wedlock may be adopted without the consent of the child's biological father, unless the father showed that he maintained substantial and continuous or repeated contact with the child, as manifested by: (I) the payment by the father toward the support of the child..., and either (ii) the father's visiting the child at least monthly when physically and financially able to do so..., or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so. Here, it was undisputed that the biological father made no child support payments since 2012, despite an order directing him to pay at least $50 per month, and that he was thousands of dollars in arrears. Thus, regardless whether he regularly communicated and visited with the child the court properly determined that he was a notice father. Further, the court's determination that the father failed to visit or communicate with the child regularly was supported by clear and convincing evidence.

Matter of Kolson (Janna A. – Michael T.), 154 AD3d 1665 (4th Dept 2017)

Abandonment of Child Not Established by Clear and Convincing Evidence

Family Court dismissed a petition filed by the father and his spouse seeking to adopt the child together, and awarded the mother visitation with the child. The Appellate Division affirmed. A parent's consent to adoption was required unless that parent evinced an intent to forego his or her parental rights and obligations by failing for a period of six months to visit the child, or to communicate with the child or the person having legal custody of the child, although able to do so. Where the person having custody of the child thwarts or interferes with the noncustodial parent's efforts to visit or communicate with the child, a finding of abandonment was inappropriate. The mother testified that she repeatedly sent messages to the father and his spouse seeking to reestablish her relationship with the child and that, each time she did so, they ignored her messages or the father merely insisted that she agree to the adoption. Inasmuch as the evidence established that the father and his spouse thwarted or interfered with the mother's efforts to visit or communicate with the child, abandonment of the child was not established by clear and convincing evidence.

Matter of Lydia A.C. v Gregory E.S., 155 AD3d 1680 (4th Dept 2017)

CHILD ABUSE AND NEGLECT

Affirmance of Finding of Neglect Where Respondent Father's Drug Use Simultaneously With Mother's Drug Use Contributed to Mother's Use of Drugs

Family Court adjudged that respondent father neglected the subject child. The Appellate Division affirmed. A finding of neglect could be appropriate even when a child had not been actually impaired, in order to protect that child and prevent impairment. The subject child was born with a positive toxicology for crack cocaine and marihuana and, based upon the testimony adduced at the hearing, the court properly found that the father's drug use simultaneously with the mother's use contributed to the mother's use of illegal drugs, which was harmful to the child. The positive toxicology, together with the father's substance abuse history, his failure to submit to drug screenings as requested, and his mental health issues, for which he failed to take his prescribed medication and failed to attend mental health appointments, supported the finding of neglect on the ground that the child was placed in imminent danger. To the extent that the positive toxicology may not have been the basis for the court's finding of neglect, the Appellate Division was not precluded from affirming the order based in part on that finding, inasmuch as the authority of the Court to review the facts was as broad as that of Family Court.

Matter of Baby B.W., 148 AD3d 1786 (4th Dept 2017)

Court Erred in Disposing of Matter Based on Mother's Purported Default

Family Court determined that respondent mother neglected the subject child. The Appellate Division reversed and remitted. The court erred in disposing of the matter on the basis of the mother's purported default. A respondent who failed to appear personally in a matter but nonetheless was represented by counsel who was present when the case was called was not in default in that matter. Moreover, inasmuch as the mother's counsel objected on ten occasions during the inquest, this was not a situation where a default could be found based, at least in part, upon counsel's election to stand mute during the inquest. Furthermore, the court abused its discretion in denying the mother's counsel's request to adjourn the hearing. The request was based on the fact that the mother was unable to attend the hearing owing to illness. The record demonstrated that the mother contacted her counsel and petitioner prior to the hearing to report her illness, that the proceedings in the matter were not protracted, that the mother personally appeared at all prior proceedings, and the request for an adjournment was the mother's first. Accordingly, the matter was remitted for a new fact-finding hearing and, if necessary, a new dispositional hearing.

Matter of Cameron B., 149 AD3d 1502 (4th Dept 2017)

Ample Evidence Supported Court's Determination That Father Neglected Subject Child

Family Court determined that respondent father neglected his child. The Appellate Division affirmed. The court's finding was supported by a preponderance of the evidence. According to the undisputed evidence, the father abused illicit substances, including heroin. Although the evidence established that the father had voluntarily begun a rehabilitative program, the evidence did not support a finding that he was regularly participating in that program. Rather, the evidence established that he attended only a third of his appointments. Moreover, the fact that the father tested positive for drug use while participating in the program established imminent risk to the child's physical, mental and emotional condition. In addition, the finding of neglect was supported by evidence that the father was aware of the mother's drug use during the time she was responsible for the child's care, and that he failed to intervene. A sample of the mother's breast milk tested positive for morphine, codeine, and heroin metabolites. The father's failure to intervene to prevent the mother from nursing the child was further evidence of neglect. The father's challenge to the admission of hospital records that allegedly contained inadmissible hearsay was unpreserved for appellate review. However, even if the court erred in admitting the alleged hearsay evidence, the error was harmless inasmuch as the record otherwise contained ample evidence supporting the court's determination.

Matter of Brooklyn S., 150 AD3d 1698 (4th Dept 2017)

No Basis to Disturb Family Court's Conclusion That Children's Best Interests Warranted Their Continued Placement

Family Court entered four orders concerning the five subject children. In appeal No. 1, an order, entered after an evidentiary hearing, denied respondent mother's motion seeking the return to her custody of three of the children, i.e., Emily W., Evan W., and Kaylee W. In appeal No. 2, an order, entered after a hearing, extended placement of Kaylee W. with her biological father, a nonparty. In appeals Nos. 3 and 4, orders, entered after a hearing, extended the placement of Ava W. and Michael S., Jr. The Appellate Division affirmed all four orders. The mother's appeals were not moot inasmuch as new findings in each appeal may have enduring consequences for the parties. Contrary to the contentions of the Attorneys for the Children in appeals Nos. 2 through 4, whether the order of fact-finding and disposition had expired was immaterial inasmuch as the permanency hearing orders on appeal have superceded that order. With respect to appeal No. 1, the mother failed to carry her burden of proving that it would be in her children's best interests to return them to her custody. The mother had maintained regular contact with the respondent father of Michael S., Jr. (the father), and it appeared from the record that such contact had only reinforced and continued the tumultuous relationship that gave rise to the domestic violence underlying the neglect proceeding. Furthermore, the mother had prolonged the relationship with the father even though one of her children sought counseling owing to the emotional trauma it caused, and in spite of the father's failure to complete any of the items on his service plan. Although the mother had completed certain counseling and parenting services, the record established that no progress had been made to overcome the specific problems which led to the removal of the children. Thus, there was no basis to disturb

the court's conclusion that the children's best interests warranted their continued placement. Similarly, with respect to appeals Nos. 2 through 4, the mother's contention was rejected that the court abused its discretion in extending placement for Kaylee W., Ava W., and Michael S., Jr. The mother's regular interactions with the father indicated that her completion of domestic violence training was a formality that did not result in any meaningful change to her lifestyle. Indeed, the mother admitted to having consented to the modification of an order of protection in her favor and against the father so that they could "be together." The fact that the mother presented conflicting evidence to the court did not require a different result.

Matter of Emily W., 150 AD3d 1707 (4th Dept 2017)

Affirmance of Finding of Neglect Where Respondent Father Should Have Known of Respondent Mother's Substance Abuse

Family Court adjudged that respondent father neglected his daughter. The Appellate Division affirmed. A single incident where the parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm could sustain a finding of neglect. Petitioner established by a preponderance of the evidence that the father neglected the child because he should have known of respondent mother's substance abuse and failed to protect the child. Although the father denied knowledge of the mother's substance abuse, where, as here, issues of credibility were presented, the hearing court's findings were accorded great deference, and there was no reason to reject the court's credibility determinations. The father appealed from a further order in which the court, among other things, awarded custody of the subject child to the nonparty maternal grandmother. The Appellate Division dismissed the appeal. The orders placing the child with her maternal grandmother were issued upon the father's consent. The father's challenges to the dispositional provisions of those orders were not properly before the Court because no appeal lied from that part of an order entered on consent.

Matter of Lasondra D., 151 AD3d 1655 (4th Dept 2017)

Finding of Neglect Supported By Preponderance of Evidence

Family Court determined that respondent mother neglected her daughter. The Appellate Division affirmed. The court's finding was supported by a preponderance of the evidence. The undisputed evidence at the fact-finding hearing established, among other things, that the mother left the then-seven-month-old child in the care of a person who she knew to be an inappropriate caregiver, she violated her probation on a felony conviction by smoking marihuana while she had custody of the child, and she had not complied with substance abuse or mental heath treatment on a consistent basis. In addition, the psychologist who evaluated the mother on behalf of petitioner testified that, based upon the combination of the mother's significant substance abuse problems and mental health diagnoses, she was incapable of caring for the child without treatment for those conditions and, in any event, her ability to care for herself and the

child was marginal even if she was engaged in such treatment.

Matter of Monica M., 151 AD3d 1705 (4th Dept 2017)

Court Erred in Issuing Orders of Protection That Did Not Expire Until Children's 18th Birthdays

Family Court determined that respondent Wilbert J. was a parent substitute who was responsible for the subject children's care and further determined that he neglected the children. After a dispositional hearing, the court issued orders of protection in favor of the children until their 18th birthdays. The Appellate Division modified. The court properly found that respondent was a person legally responsible for the care of the children. The testimony at the hearing established that respondent was at respondent mother's residence on at least a regular basis, if not actually living there. However, the court erred in issuing orders of protection that did not expire until the children's 18th birthdays. Pursuant to Family Court Act Section 1056 (1), the court may issue an order of protection in an article 10 proceeding, but such order of protection shall expire no later than the expiration date of such other order made under that part, except as provided in subdivision four of that section. Subdivision (4) allowed a court to issue an order of protection until a child's 18th birthday, but only against a person who was a member of the child's household or a person legally responsible..., and who was no longer a member of such household at the time of the disposition and who was not related by blood or marriage to the child or a member of the child's household. Respondent was found to be a person legally responsible for the children and, at the time of the dispositional hearing, he no longer lived with the mother. He was also not related by blood or marriage to the children, but he was related to a member of their household. Petitioner's caseworker testified at the dispositional hearing that respondent was the father of the mother's recently-born child, who lived in the mother's home. Subdivision (4) was therefore inapplicable on its face. Inasmuch as the only other dispositional orders issued with respect to the children at the time the court issued the orders of protection had an expiration date of March 26, 2015, the orders of protection issued in the proceedings were modified to expire on that same date.

Matter of Nevaeh T., 151 AD3d 1766 (4th Dept 2017)

Mother's Paramour Was Person Legally Responsible for Care of Children

Family Court adjudged that respondents, the mother of the subject children and the mother's paramour, neglected the subject children. The Appellate Division affirmed. The court properly determined that the mother's paramour was a person legally responsible for the care of the children, and as such, was a proper party to the child protective proceeding, notwithstanding the fact that he was the father of none of the children. The mother's paramour's further contention was rejected that the court erred in determining that he neglected the children.

Matter of Jayla A., 151 AD3d 1791 (4th Dept 2017)

Order Granting Custody to Grandmother Reversed

Pursuant to Family Court Act Section 1055-b, Family Court granted to the grandmother a final order of custody under Family Court Act article 6, and ordered that no further review was required on the neglect petition. The Appellate Division reversed and remitted. Petitioner commenced the neglect proceeding against respondent father and respondent mother, and the mother admitted neglecting the child. The father failed to appear at multiple court appearances and, although his attorney appeared at the fact-finding hearing, she elected not to participate. The grandmother thereafter filed petitions for custody against the father and mother, but then withdrew the petition against the father. At a hearing on petitioner's neglect petition and the grandmother's custody petition, the mother consented to custody being granted to the grandmother, but the father's counsel objected. The father's contentions were rejected that the finding of neglect should be vacated because he was denied effective assistance of counsel based on his counsel's failure to participate in the hearing, and he did not have notice of the hearing. Those contentions were not reviewable inasmuch as the finding of neglect was made upon the father's default. However, the court erred in granting custody to the grandmother without first determining whether extraordinary circumstances existed. Pursuant to Family Court Act Section 1055-b, in an article 10 proceeding a court could grant custody to a relative but, if any parent failed to consent to granting the petition for custody, the court must have found, among other things, that the relative demonstrated that extraordinary circumstances existed that supported granting such an order of custody. Here, the court made no such finding.

Matter of Nevaeh D.J., 151 AD3d 1867 (4th Dept 2017)

Respondent Not Person Legally Responsible For Child

Family Court found that respondent neglected the subject child. The Appellate Division reversed and dismissed the petition. Even giving deference to the court's credibility determinations, petitioner's witnesses established that respondent and the mother of the child had been living together for an unspecified period of time, but there was nothing more to show that respondent acted as the functional equivalent of a parent in a familial or household setting. There was no testimony that respondent, the mother, and the child, were living as a family or that respondent provided childcare or financial support, or performed any household duties.

*Matter of Kameron V.,*153 AD3d 1623 (4th Dept 2017)

Neglect Finding Based Upon Inadequate Care of Child's Minimal Needs Vacated

Family Court, among other things, adjudged that respondent father neglected the subject child. The Appellate Division modified by vacating the finding that respondent failed to address the child's minimal needs while the mother was away. The finding of neglect by excessive corporal punishment was supported by a preponderance of the evidence. The court was presented with substantial credibility issues that it resolved

against the father and there was no reason to disturb the court's resolution of the issues. The subject child's out-of-court statements that the father caused his bruises and scratches by pushing him to the ground and dragging him to bed were sufficiently corroborated by the caseworker's and his mother's observations of his injuries, the out-of-court statements of his siblings who had seen or heard the altercation, and photographic evidence of the injuries. Petitioner established that the child was in imminent danger of injury or impairment because of the father's behavior. The child's mother testified that the child was hysterical and cried uncontrollably when asked about the incident of excessive corporal punishment, and there was considerable testimony that the child became upset on other occasions because of the father's verbal threats. The court erred, however, in finding that he neglected the child by inadequately caring for his minimal needs when the mother was absent from the home.

Matter of Bryan O.,153 AD3d 1641 (4th Dept 2017)

Family Court Properly Determined That Mother Neglected Subject Children By Virtue of Her Drug Use

Family Court determined that the mother neglected the two subject children by virtue of her drug use. The Appellate Division affirmed. Contrary to the contention of the Attorney for the Children, the appeal was not rendered moot by the subsequent entry of a consent order that granted custody of the children to the maternal grandmother. The finding of neglect constituted a permanent and significant stigma that might indirectly affect the mother's status in future proceedings. The court's finding of neglect was supported by the requisite preponderance of the evidence. By submitting overwhelming evidence of the mother's repeated misuse of cocaine and heroin, petitioner established a prima facie case of neglect pursuant to Family Court Act § 1046 (a) (iii) and, therefore, neither actual impairment of the children's physical, mental or emotional condition nor specific risk of impairment needed to be established. Petitioner was not required to present additional specific evidence to establish the common-sense proposition that repeated, multi-year abuse of cocaine and heroin would *ordinarily* have had the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality [emphasis in the original]. The mother's further contention was rejected that the presumption of neglect embodied in Family Court Act § 1046 (a) (iii) was inapplicable given her purported participation in a recognized rehabilitative program. Even assuming, arguendo, that the methadone replacement program in which the mother was enrolled constituted a recognized rehabilitation program within the meaning of section 1046 (a) (iii), her 18 separate positive drug tests and admitted continued drug use while enrolled in the program established that she was not voluntarily and regularly participating therein.

Matter of Carter B.,154 AD3d 1323 (4th Dept 2017)

Finding of Neglect Sustained Where Record Established That Mother's Judgment Was Strongly Impaired and Children Were Exposed to Risk of Substantial Harm

Family Court adjudicated that respondent mother neglected the subject children. The Appellate Division affirmed. The court properly determined that the children were neglected as the result of an incident that took place in the early morning of October 18, 2014. The testimony of petitioner's witnesses established that the police were dispatched at approximately 5:22 a.m. to respond to a report that a female was yelling at her children in front of a residence and that the children were crying. Upon arriving at the scene, a police officer observed the mother and her five-and-a-half year old daughter and 11-year-old son standing in front of a residence. The children were dressed in light coats, pajamas, and sneakers in weather conditions that the officer described as being 45 degrees with moderate rain. Based on his training and experience, the officer suspected that the mother was under the influence of a narcotic. The children reported that the mother had engaged in bizarre behavior that morning, including waking them up, telling them that they had to leave their residence because of an emergency, and instructing them to carry a cardboard box filled with various items. Those statements were corroborated by the officer's observations. The mother was arrested for endangering the welfare of the children and for appearing in public under the influence of narcotics. According to the officer, the children were cold and wet, and they were placed in a patrol vehicle for the dual purpose of removing them from the weather conditions and transporting them to the police station. The police discovered that the mother, who was placed in another patrol vehicle, was in possession of a box of suboxone, which was used to treat opiate dependence. The box was missing 22 doses even though the mother's prescription was issued only five days prior, and the medication was to be taken only twice daily. The mother's physician documented that the mother had previously reported a tendency to increase the dosage of suboxone on her own, and the physician testified that the misuse of suboxone could have untoward side effects such as sedation, dysphoria and mood changes, and may affect a person's cognitive abilities. The court properly found that petitioner established by a preponderance of the evidence that the children were neglected inasmuch as they were in imminent danger of physical, emotional or mental impairment as a consequence of the mother's failure to exercise a minimum degree of parental care in providing the children with proper guardianship. The incident of October 18, 2014 was sufficient by itself to sustain the finding of neglect inasmuch as the record established that the mother's judgment was strongly impaired and the children were exposed to a risk of substantial harm. The mother's contention was rejected that the court erred in concluding that petitioner established, by a preponderance of the evidence, that the mother also neglected the children by abandoning them following her arrest. The evidence at the hearing established that the mother evinced an intent to forgo her parental rights and obligations as manifested by her failure to visit the children or to communicate with the children or petitioner, although she was able to do so in the days following her arrest and was not prevented or discouraged from doing so by petitioner. The statute made clear that the burden rested on the parent to maintain contact and that subjective good faith would not prevent a finding of abandonment.

Matter of Kaylee D.,154 AD3d 1343 (4th Dept 2017)

Court Properly Determined That Child Would Be Harmed if Mother Were Allowed to Control His Feeding Schedule or to Hold Child Unsupervised

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The evidence supporting the court's determination included the testimony and notes of petitioner's caseworker, as well as neonatal hospital records, which outlined the mother's difficulties in caring for the child during the first four days of his life. While evidence of mental illness, alone, did not support a finding of neglect, such evidence could be part of a neglect determination when the proof further demonstrated that a respondent's condition created an imminent risk of physical, mental or emotional harm to a child. Petitioner presented testimony and documentary evidence establishing that the mother's mental illness and intellectual disabilities rendered her unable to feed the child properly or to support the child's head, even while under hospital supervision. Thus, there was a sound and substantial basis supporting the court's determination that the child would be harmed if the mother were allowed to control his feeding schedule or to hold the child unsupervised.

Matter of Sean P., 156 AD3d 1339 (4th Dept 2017)

Affirmance of Adjudication that Child Severely Abused on Ground That Father Committed Felony Sex Offenses Against Her

Family Court adjudicated the subject child severely abused on the ground that respondent father committed felony sex offenses against her. The Appellate Division affirmed. Petitioner proved by clear and convincing evidence that the father committed felony sex offenses against the child in violation of Penal Law Sections 130.50 (3) and 130.65 (3). The child's disclosures of sexual abuse were sufficiently corroborated by, among other things, the testimony of validation experts, a school psychologist, investigators, and the child's counselor, as well as the child's age-inappropriate knowledge of sexual matters. Furthermore, the child gave multiple, consistent descriptions of the abuse and, although repetition of an accusation by a child did not corroborate the child's prior account of abuse, the consistency of the child's out-of-court statements describing the sexual conduct enhanced the reliability of those out-of-court statements. Family Court Act Section 1051 (e) was amended prior to the filing of the petition such that a diligent efforts finding was no longer a required element of a finding of severe abuse in the context of a Family Court Act article 10 proceeding.

Matter of Brooke T., 156 AD3d 1410 (4th Dept 2017)

Petitioner Failed to Establish That Father Intentionally Harmed Child or That Father's Conduct Was Part of Pattern of Excessive Corporal Punishment

Family Court determined that respondent father neglected the subject child. The Appellate Division reversed. Petitioner alleged that the father inflicted excessive corporal punishment on the child. Petitioner's caseworker testified that the child initially stated that he sustained a bruise while roughhousing with his siblings and, although he

later gave inconsistent accounts of the incident, the child maintained that his father had not caused the injury. When asked about other marks on his body, the child stated that he had been in trouble at school, so the father struck him. The father testified that he was called into the school by the child's teachers because the child was misbehaving. The father chased the child around the classroom and, in attempting to grab him, accidentally caught him in the face with his hand, causing the marks. The father further testified, consistent with the child's statement to the caseworker, that the child sustained a bruise while roughhousing with his siblings. Petitioner failed to establish that the father intentionally harmed the child or that his conduct was part of a pattern of excessive corporal punishment, and petitioner thus failed to meet its burden of establishing by a preponderance of the evidence that the child was in imminent danger.

Matter of Damone H., 156 AD3d 1437 (4th Dept 2017)

Court Did Not Abuse Its Discretion in Denying Mother's Request to Appear by Telephone

Family Court adjudged that respondent mother neglected the subject children. The Appellate Division affirmed. The mother failed to preserved for review her contention that the court erred in refusing to adjourn the trial and proceeding in her absence. Inasmuch as the mother relocated to Michigan less than one month before the trial date without notifying petitioner, the court did not abuse its discretion in denying the mother's request to appear by telephone. Any error was harmless in the court's admission of an entire case file that contained some inadmissible hearsay because the result reached would have been the same even had such records, or portions thereof, been excluded.

Matter of Jaydalee P., 156 AD3d 1477 (4th Dept 2017)

CHILD SUPPORT

Court Erred in Denying Father's Objections to Support Magistrate's Order

Family Court denied respondent father's objections to the order of the Support Magistrate denying his petition for a downward modification of his child support obligation. The Appellate Division reversed and remitted. The court erred in concluding, following a hearing, that the father failed to establish a sufficient change in circumstances to warrant such a modification. The reduction of the father's income by approximately 18% constituted a sufficient change in circumstances to warrant a recalculation of his child support obligation.

Matter of Brink v Brink, 147 AD3d 1443 (4th Dept 2017)

Mother's Child Support Petition Reinstated Where Petition Denied Upon Application of Incorrect Standard

Family Court denied petitioner mother's objection to an order that dismissed her petition with prejudice. The Appellate Division reversed, granted the objection, reinstated the petition and remitted. The mother sought modification of her child support obligation as set forth in a 2013 oral stipulation which was incorporated but not merged in the judgment of divorce, on the ground that respondent father's income had increased by more than 15%. The Support Magistrate dismissed the petition on the ground that the mother failed to establish a substantial change in circumstances since the entry of the stipulation. The court denied the mother's objection, stating that, although a petition for modification of child support could be brought based on an increase in a party's income of 15% or more, there had to be a showing of a substantial change of circumstances in order to be successful. Section 451 of the Family Court Act allowed a court to modify an order of child support without requiring a party to allege or demonstrate a substantial change in circumstances. Because the court and the Support Magistrate failed to address Family Court Act Section 451 (3) (b) (ii), the petition was denied upon application of the incorrect standard.

Matter of Harrison v Harrison, 148 AD3d 1630 (4th Dept 2017)

Family Court Properly Denied Respondent DSS's Written Objections to Order of Support Magistrate

Family Court denied respondent Department of Social Services's written objections to the order of the Support Magistrate. The Appellate Division affirmed. Petitioner father sought to terminate an order of support with respect to his daughter, who had been released to his custody on a trial basis but remained in the legal custody of respondent. Respondent opposed the petition, contending that it was entitled to reimbursement for foster care maintenance payments that it had expended on the daughter's behalf during the one-month trial discharge period. The Support Magistrate determined, among other things, that, given the father's financial resources and the expenses he had incurred as

a result of the child residing with him during the trial discharge period, he was entitled to a deviation from the level of child support calculated under the Child Support Standards Act (CSSA) (*see* Section 413 [1][f]), and that it would be unjust and inappropriate to require the father to pay support during that period. When a child was placed in foster care, the child's parent had a continuing obligation to provide financial support (*see* Social Services Law Section 398 [6] [d]; Family Court Act Sections 415, 422). Family Court properly denied respondent's objections inasmuch as the Support Magistrate properly applied the CSSA guidelines, analyzed the relevant factors and made specific findings on the record concerning why it would be unjust or inappropriate to require the father to pay the amount of child support calculated under the CSSA formula.

Matter of Smith v Jefferson County Dept. of Soc. Servs., 149 AD3d 1539 (4th Dept 2017)

Affirmance of Adjudication That Respondent Father Willfully Violated Order of Support

Family Court adjudged that respondent father willfully violated the order of support, ordered the father to pay child support in the amount of $50 per month, and denied his cross petition seeking a downward modification of the child support order. The Appellate Division affirmed. The father failed to meet his burden of establishing a change in circumstances sufficient to warrant a downward modification of the prior order inasmuch as he did not provide competent medical evidence of his disability or establish that his alleged disability rendered him unable to work. Although the court misstated the amount of arrears, that misstatement did not require reversal or modification because the court did not order the father to pay any arrears and thus the father was not aggrieved thereby. The father's contention that the arrears should be limited to $500 pursuant to Family Court Act Section 413 (1) (g) was not properly before the Court because it was raised for the first time on appeal. In any event, the father failed to establish that his income was below the federal poverty income guidelines when the arrears accrued.

Matter of Kelley v Holmes, 151 AD3d 1704 (4th Dept 2017)

Court Erred in Increasing Father's Child Support Obligation; Sum Awarded to Mother for Attorney's Fees Excessive

Supreme Court increased the child support obligation of defendant father, modified the father's visitation, and awarded plaintiff mother attorney's fees. The Appellate Division modified and remitted. The court erred in increasing the father's child support. The mother failed to demonstrate a substantial change in circumstances warranting an upward modification of child support. In her affidavit supporting her request for increased child support and during her hearing testimony, the mother stated only that the father failed to pay his share of the expenses for the children's extracurricular activities. She admitted during her hearing testimony, however, that the children's basic needs were being met. Inasmuch as the mother's remedy for the father's failure to pay

his share of the expense was to seek enforcement of the parties' agreement, the court erred in increasing the father's child support obligation as a substitute for that relief. The court's determination that a modification of the visitation schedule was in the children's best interests was supported by a sound and substantial basis in the record. The father's constantly changing work schedule resulted in his inability to see the children for visitation on certain days and had created animosity between the parties. Thus, the court's new schedule providing for visitation with the father on alternating weekends, instead of Mondays and Fridays, was in the children's best interests. However, the court's order was ambiguous regarding the timing of his visitation. Therefore, the order was modified to clarify that the father will pick up the children at 7:30 p.m. on Fridays, and drop them off at 7:30 p.m. on Sundays, on alternating weekends, year-round. The court abused its discretion in awarding the mother $11,336.94 in attorney's fees, costs and disbursements, and the order was further modified accordingly. The father was not provided a meaningful opportunity to object to, or request a hearing on, the mother's attorney's affirmation requesting fees. Although the parties' agreement regarding child support contained an attorney's fees provision, the majority of the hearing was spent on the mother's request for sole custody, which was denied. Accordingly, the sum awarded was excessive. Therefore, the matter was remitted for a determination of reasonable attorney's fees, costs, and disbursements, in accordance with the parties' agreement, after the father has been afforded an opportunity to oppose the application.

Provenzano v Provenzano, 151 AD3d 1800 (4th Dept 2017)

Support Magistrate Erred in Dismissing Mother's Cross Petition for Downward Modification of Child Support

Family Court denied the mother's objection to orders issued by the Support Magistrate. The Appellate Division modified by granting the objection in part, reinstating the mother's cross petition for a downward modification of child support, and remitting. The court did not err in imputing income to the mother in denying her objections to the denial of her cross petition for a downward modification of child support. The record supported the determination that the mother had access to, and received, financial support from her paramour, with whom she resided. Furthermore, the court did not err in failing to impute income to the father when addressing the mother's initial burden on her cross petitions for a downward modification of child support. A party seeking a downward modification of his or her child support obligation must establish a substantial change in circumstances. The mother alleged that the change in circumstances was a reduction in her income level. Thus, the father's income or imputed income would have become relevant only if the mother met her initial burden of establishing a reduction in her income. The Support Magistrate was not bound by the account provided by the mother of her own finances, and was therefore entitled to impute income to the mother from support provided by her paramour in determining whether the mother had established a substantial change in circumstances. The mother's contention was rejected that the Support Magistrate was biased and had prejudged her cross petition. Absent a legal disqualification under Judiciary Law Section 14, which was not at issue

here, the Support Magistrate was the sole arbiter of recusal, and his or her decision, which lied within the personal conscience of the Support Magistrate, would not be disturbed absent an abuse of discretion. Here, there was no such abuse of discretion. However, the Support Magistrate erred in dismissing the mother's cross petition for a downward modification of child support. The sole justification for that dismissal was the mother's failure to provide financial disclosure from her paramour, a nonparty, who had filed an affidavit stating that he refused to provide financial disclosure to the court. While certain penalties or sanctions could be appropriate for the individual conduct of the mother, it was apparent that the actions of a nonparty weighed heavily in the decision to invoke the ultimate penalty.

Matter of Deshotel v Mandile, 151 AD3d 1811 (4th Dept 2017)

Support Magistrate Did Not Abuse Discretion in Permitting Dentist's Telephonic Testimony

Family Court denied respondent's objection to the order of the Support Magistrate. The Appellate Division affirmed. Petitioner mother alleged that respondent father violated his child support obligations by refusing to pay certain dental expenses for the parties' child. The Support Magistrate permitted a dentist to testify telephonically regarding the child's need for dental treatment. The Support Magistrate did not abuse her broad discretion in permitting the dentist's telephonic testimony. Moreover, the father was not prejudiced by a ministerial error on the dentist's application for leave to testify by telephone.

Matter of Phalen v Robinson,155 AD3d 1587 (4th Dept 2017)

Court Erred in Granting Father Downward Modification That He Did Not Seek

Family Court concluded that it was not in the children's best interests to change their primary placement and, among other things, modified the parties' visitation schedule and also modified the father's weekly child support obligation despite the fact that the parties had agreed to a different amount in a separate proceeding. The Appellate Division modified. The court erred in granting the father a downward modification of child support inasmuch as the father did not raise any issue regarding his child support obligation in his petitions. Therefore, the order was modified by vacating the ninth ordering paragraph.

Matter of Buchanan v Kocke,155 AD3d 1602 (4th Dept 2017)

Wife Was Noncustodial Parent for Purpose of Calculating Child Support Obligation

Among other things, Supreme Court ordered plaintiff wife to pay defendant husband child support. The Appellate Division affirmed. Supreme Court properly determined that the wife was the noncustodial parent for purpose of calculating the child support

obligation. The court did not abuse its discretion in imputing $32,000 of income to the husband for 2013 and $33,500 of income to the husband for 2014. The income imputed to the husband was based upon his employment history and earning capacity as a truck driver. The wife's contention was rejected that the court should have imputed additional income to the husband inasmuch as such imputation was not supported by the record and would be speculative. The wife's income was established at trial and was higher than that imputed to the husband. Where, as here, neither parent had the children for a majority of the time, the parent with the higher income, who bore the greater share of the child support obligation, should be deemed the noncustodial parent for purpose of child support.

Betts v Betts, 156 AD3d 1355 (4th Dept 2017)

Court Properly Denied Motion Based on Doctrine of Unclean Hands

Supreme Court denied the motion of defendant to, among other things, vacate a judgment of divorce with respect to his obligation to pay child support and maintenance. The Appellate Division affirmed. Shortly after the entry of a judgment of divorce in 2008, defendant relocated to Taiwan and failed to comply with the judgment or with subsequent judgments ordering him to pay money to plaintiff. Defendant learned in early 2016 that, during the marriage, plaintiff acquired property in Taiwan that she failed to disclose in her statement of net worth. As a result, in August 2016, defendant moved, among other things, to vacate the judgment of divorce regarding his obligation to pay maintenance and child support. The court did not abuse its discretion in denying the motion based on the doctrine of unclean hands. Defendant's contention was rejected that the doctrine of unclean hands was not applicable or that there was an exception where there was a fraud perpetrated on the court.

Hsieh v Teng, 156 AD3d 1421 (4th Dept 2017)

CUSTODY AND VISITATION

Court Erred in Denying Father's Motion to Compel Mother to Engage in Collaborative Counseling

Supreme Court denied defendant father's motion to compel plaintiff mother to engage in collaborative counseling. The Appellate Division modified by granting the father's motion to the extent of compelling the mother to cooperate with collaborative counseling, and remitted. The parties stipulated in 2011 that the mother would have sole custody of their two daughters, and the father would have two hours a week of supervised visitation, with the eventual goal of unsupervised visitation. The parties stipulated that the parties and the children would all engage in individual counseling, and at some point they would engage in family therapy with one professional. The parties further stipulated that the mother's positive support for the father's parental role, and the mother's participation in the therapy, were essential for any meaningful progress to occur. The father began supervised visits but they ended when, according to him, the children decided they no longer wanted to go on the visits. The father sought to have the parties engage in family counseling, which the mother resisted. An in camera interview was conducted with the children. Although the children expressed their wish not to have visitation with the father, there was no showing on the record that collaborative counseling or even supervised visitation was harmful to the children or contrary to their best interests. The record established that the mother made little or no effort to encourage the relationship between the father and the children, and the father submitted evidence supporting an inference that the mother was alienating the children from the father. The court improperly allowed the children essentially to dictate whether visits would ever occur with the father. In the event that the mother or children continued to refuse to participate in the collaborative counseling or attend visitation, the court should consider whether an order of contempt or an order relieving the father of his child support obligation with respect to the older child would be appropriate.

Guy v Guy, 147 AD3d 1305 (4th Dept 2017)

Court Properly Modified Prior Order By Awarding Petitioner Father Custody in View of Evidence of Domestic Violence at Mother's Home

Family Court modified a prior order by awarding petitioner father custody of the parties' child. The Appellate Division affirmed. The father established a change in circumstances sufficient to warrant an inquiry into whether a change in custody was in the best interests of the child. The mother admitted at the hearing that she was arrested for assault in the second degree and spent about two weeks in jail following an incident with her former boyfriend that occurred with the child asleep in the home. The mother's contention was rejected that the arrest had no current bearing on the proceeding, inasmuch as the underlying incident was plainly relevant to her fitness as a parent. The award of custody to the father was in the child's best interests in view of the evidence of domestic violence at the mother's home. Notably, the court found that the mother's testimony was not entirely credible that she no longer had any relationship

with her former boyfriend, and there was no basis for disturbing that credibility determination.

Matter of Belcher v Morgado, 147 AD3d 1335 (4th Dept 2017)

New York Court Had Jurisdiction to Modify Order of Florida Court, Notwithstanding Florida Court's Reservation of Jurisdiction

Family Court granted respondent father's motion to dismiss for lack of jurisdiction the mother's petition seeking to modify a custody order entered by a court in the state of Florida, which granted the father permission to relocate with the child to New York. The Appellate Division reversed, denied the motion to dismiss, reinstated the petition and remitted. The mother's petition was dismissed on the ground that the Florida court's order expressly provided that it retained jurisdiction over the matter. The New York court had jurisdiction to modify the order of the Florida court, notwithstanding the Florida court's reservation of jurisdiction. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) had been adopted by both New York and Florida. It was undisputed that New York was the child's home state as of the commencement of the proceeding, and that the child and both parents had lived in New York since 2011. The appeal was not rendered moot by the commencement of subsequent proceedings in Florida inasmuch as no orders had been entered in those proceedings. However, the New York court was required by Domestic Relations Law Section 76-e to confer with the Florida court upon learning that the father commenced a subsequent proceeding in Florida, and the court failed to do so. The matter was remitted for the court to make the requisite contact with the Florida court, so that the courts of the two states could confer with each other and determine which state was the more appropriate forum for this proceeding at this juncture.

Matter of Rusiecki v Marshall, 147 AD3d 1394 (4th Dept 2017)

Court Erred By Refusing to Allow Parties to Enter Into Settlement Agreement

Supreme Court granted primary physical custody of the parties' children to plaintiff father. The Appellate Division modified by vacating all but three decretal paragraphs of the judgment of divorce, and granted a new trial on the issues of custody, visitation, child support and equitable distribution. The court erred by refusing to allow the parties to enter into a settlement agreement. Where the parties evinced their agreement in open court to the material terms of a settlement agreement, there were no indicia of fraud or manifest injustice, and the court prevented the parties from ratifying their agreement but instead made a ruling directly contrary to the terms of that agreement, the court erred in granting primary physical custody to plaintiff. That error was compounded when the court entered a visitation schedule that erroneously denied meaningful visitation to defendant. The judgment of divorce also failed to conform with the mandatory provisions of the Domestic Relations Law pertaining to child support and equitable distribution. The court erred in failing to award plaintiff child support arrears. The court should have awarded child support retroactive to the date of the application

therefor. Moreover, the final judgment contained no provision at all for child support. That was also error.

Keegan v Keegan, 147 AD3d 1417 (4th Dept 2017)

Court Erred in Determining That Respondent Grandparents Failed to Establish Extraordinary Circumstances

Family Court granted full custody of respondents' grandson to petitioner, the child's biological mother. The Appellate Division reversed and remitted. Pursuant to a prior consent order, respondents had primary physical custody of the child, with visitation to petitioner, since shortly after his birth. Nearly six years later, petitioner filed the modification petition at issue, seeking primary physical custody of the child. In *Matter of Suarez v Williams*, 26 NY3d 440, the Court of Appeals clarified what constituted extraordinary circumstances when the nonparent seeking custody was a grandparent of the child. In that context, extraordinary circumstances could be demonstrated by an extended disruption of custody, specifically: (1) a 24-month separation of the parent and child, which was identified as prolonged, (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household. The grandparents met their burden of establishing extraordinary circumstances, thereby giving them standing to seek custody of the child. Petitioner voluntarily relinquished custody to respondents and had been separated from the child for a prolonged period of well over 24 months, during which time the child had resided in respondents' home.

Matter of Orlowski v Zwack, 147 AD3d 1445 (4th Dept 2017)

Court Erred in Dismissing Petition

Family Court dismissed with prejudice a petition seeking modification of the custody provisions in the parties' judgment of divorce. The Appellate Division modified. The court determined that the petition was facially insufficient to allege a change of circumstances warranting a change in custody. Thus, because petitioner did not have a full and fair opportunity to litigate her allegations that the custody provisions in the judgment of divorce should have been modified, the court erred in dismissing the petition with prejudice.

Matter of Coughlin v Coughlin, 147 AD3d 1485 (4th Dept 2017)

Affirmance of Award of Primary Physical Residence to Father

Supreme Court awarded plaintiff father and defendant mother joint custody of the subject child, with primary physical residence to the father and visitation to the mother. The Appellate Division affirmed. The fact that the mother was the child's primary caretaker prior to the parties' separation was not determinative. The record supported the court's determination that both parents love and care for the child, but the mother

was less willing to truly co-parent the child, and the father was the more stable parent with a higher quality home and was better situated to serve as a primary placement parent. The AFC's contention was rejected that the court gave undue weight to the paternal grandparents' involvement in the child's life inasmuch as a more fit parent could not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations. Although the court was required to consider the effects of domestic violence in determining the best interests of the child, the mother failed to prove her allegations of domestic violence by a preponderance of the evidence.

Hendrickson v Henderickson, 147 AD3d 1522 (4th Dept 2017)

Court Abused Its Discretion in Eliminating Periods of Visitation; Record Supported Award of Sole Custody

Family Court determined that respondent father wilfully violated an amended order entered on consent, that petitioner mother established a change in circumstances warranting a determination of the best interests of the child, and that the child's best interests were served by an award of sole custody to the mother. The court also reduced the father's visitation. The Appellate Division modified. The court erred in conditioning the father's right to file any future modification petitions on his completion of anger management and parenting classes. Accordingly, that ordering paragraph was vacated. Furthermore, the record did not support the court's determination that it was in the best interests of the child to eliminate the Thursday evening and Friday night visitation periods. There was no testimony that there were any problems regarding the Thursday visits. The mother admitted that she and the father disputed which weekend visits were to commence on Friday and which were to commence on Saturday, but it appears from the record that the parties had resolved that issue prior to the hearing. Thus, the court abused its discretion in eliminating those periods of visitation. Therefore, the order was further modified by reinstating the schedule set forth in the amended order. The father's contentions were rejected that the court erred in determining that the mother established a change of circumstances warranting a review of the amended order with respect to custody, and it further erred in determining that it was in the best interests of the child to award the mother sole custody. The court credited the mother's testimony that the father yelled and swore at her on the telephone and that she therefore communicated with him only through text messages, and the text messages admitted in evidence supported the court's determination that, in light of the acrimonious relationship between the parties, the existing joint custody arrangement was inappropriate. The court's determination was entitled to great deference, and it was supported by a sound and substantial basis in the record.

Matter of Gorton v Inman, 147 AD3d 1537 (4th Dept 2017)

Court Erred in Sua Sponte Ordering That Father Had Right to Relocate Residence of Child

Family Court modified a prior order entered on stipulation of the parties by awarding petitioner father primary physical residence of the parties' child. The Appellate Division modified. Family Court properly determined that the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a change of custody was in the best interests of the child. There was a sound and substantial basis in the record for the court's determination that it was in the child's best interests to award the father primary physical residence of the child and to award the mother visitation. However, the court erred in sua sponte ordering that the father had the right to relocate the residence of the child anywhere in the continental United States with 30 days' notice to the mother inasmuch as that relief was not requested by the parties or the Attorney for the Child. Therefore, the order was modified accordingly.

Matter of Kieffer v Defrain, 147 AD3d 1539 (4th Dept 2017)

Court Properly Exercised Its Discretion in Declining to Conduct Lincoln Hearing

Family Court modified a prior order by granting petitioner mother primary physical custody of the parties' child. The Appellate Division affirmed. The father's decision to enroll the child in a different school, together with the mother's testimony concerning the father's interference with her custodial rights, was sufficient to establish a change in circumstances. The court's determination awarding the mother primary physical custody was in the child's best interests. Most of the factors did not favor one party over the other. However, the evidence established that the father failed to nurture or facilitate a relationship between the mother and child. In addition, the father made decisions regarding the child that were beneficial to his new family, such as changing her school, pediatrician, and dentist, but the decisions were not always beneficial to the child. Granting the mother primary physical custody was in the child's best interests inasmuch as the mother was better able to provide for the child's emotional and intellectual development. Moreover, the court properly exercised its discretion in declining to conduct a *Lincoln* hearing. The conduct of the father's wife prevented the scheduled *Lincoln* hearing from occurring, and the court declined to schedule another one. Considering the child's young age as well as the testimony that she was being coached on what to say to the court, an in camera hearing with the child would not be helpful in determining the child's preferences.

Matter of Sloma v Sloma, 148 AD3d 1680 (4th Dept 2017)

Modification of Grandmother's Visitation With Teenaged Children Affirmed

Family Court modified a prior consent order by changing respondent grandmother's one-hour biweekly supervised therapeutic visitation with the two teenaged children to one supervised two-hour visit per month in a public place, and denied petitioner father's request to terminate visitation. The Appellate Division affirmed. The grandmother's contention was rejected that the father failed to establish that there was a sufficient change in circumstances to warrant consideration of the best interests of the children. The 15-year-old testified that she did not wish to visit with the grandmother and,

although not dispositive, the express wishes of older and more mature children could support the finding of a change in circumstances. Furthermore, the Court Attorney Referee was entitled to credit the testimony of the father and the child that the children had difficulty completing homework on the days that both extracurricular activities and the therapeutic visits were scheduled. The determination of the court that it was in the best interests of the children to modify the visitation schedule had a sound and substantial basis in the record. In any event, the modified schedule had no meaningful adverse impact on the grandmother's interests.

Matter of Rohr v Young, 148 AD3d 1681 (4th Dept 2017)

Court Properly Weighed Against Mother Her Proposed Relocation to Texas in Initial Custody Determination

Family Court awarded the parties joint custody of their child and ordered that the child's residence remain in New York. The Appellate Division affirmed. This case involved an initial custody determination and was not properly characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea*, 87 NY2d 727 [1996] strictly applied. The court, in evaluating respondent mother's proposed relocation to Texas as part of the best interests analysis, properly weighed that factor against the mother upon determining that the child's relationship with petitioner father would be adversely affected by the proposed relocation because of the distance between western New York and Texas. The court's determination that the child's best interests were served by awarding joint custody to the parties with continued residence in New York was supported by a sound and substantial basis in the record and could not be disturbed.

Matter of Fisher v Fisher, 148 AD3d 1784 (4th Dept 2017)

Family Court Properly Transferred Primary Physical Custody of Child to Father

Family Court continued joint custody of the parties' son but transferred primary physical custody of the child to petitioner father, with visitation to respondent mother. The Appellate Division affirmed. The father established the requisite change in circumstances since the entry of the consent order, namely, the child's repeated changes of schools, his recent attendance at a school in the district where the father resided, and the parents' inability to agree on where their child should attend school. There was a sound and substantial basis in the record for the determination that it was in the child's best interests to change his primary physical residence from the mother's house to the father's house in connection with the child's school enrollment.

Matter of Stanton v Kelso, 148 AD3d 1809 (4th Dept 2017)

Court Erred By Ordering That Future Modification of Father's Visitation Was Conditioned on Completion of Parenting Class

Family Court modified a prior custody and visitation order by directing that petitioner father have supervised visitation with the parties' three children and ordering him to attend a parenting class as a prerequisite for modification of visitation. The Appellate Division modified. The mother established the requisite change in circumstances inasmuch as her undisputed testimony established that, the last time she met the father to exchange the children, he physically assaulted her in the children's presence such that persons in a nearby parking lot had to intervene. The record established that the father committed acts of domestic violence against the mother in the children's presence and that he demonstrated poor impulse control during trial. Thus, although there was no evidence in the record that the father physically harmed the children, the record provided no basis to disturb the court's conclusion that limiting the father to supervised visitation was in the children's best interests. However, the court erred to the extent that it ordered that future modification of the father's visitation was conditioned on completion of a parenting class. The court lacked the authority to condition any future application for modification of a parent's visitation on her or his participation in counseling. Nevertheless, the court may order that a parent's completion of counseling and compliance therewith would constitute a substantial change of circumstances for any future petition for modification of the order, provided that nothing in the order prevented the parent from supporting a modification petition with a showing of a different change of circumstances. Therefore, the order was modified by striking the provision requiring the father to complete a parenting class as a prerequisite for modification of visitation and substituting therefor a provision directing that the father comply with that condition as a component of supervised visitation.

Matter of Allen v Boswell, 149 AD3 1528 (4th Dept 2017)

Affirmance of Order Denying Modification Petition

Family Court denied the father's petition seeking modification of a prior order of custody by awarding him sole custody of the subject child. The Appellate Division affirmed. The order was entitled to great deference and would not be disturbed inasmuch as it was supported by a sound and substantial basis in the record. There was no reason to remit the matter for an expedited hearing, as requested by the Attorney for the Child, based upon allegations of a change of circumstances subsequent to the entry of the order on appeal. The contentions raised in that regard were more appropriately considered by the court in a petition to modify its order.

Matter of Gschwend v Davila, 149 AD3 1608 (4th Dept 2017)

Award of Custody to Grandmother Affirmed

Family Court granted custody of the subject children to respondent maternal grandmother. The Appellate Division affirmed. Petitioner father's contention was rejected that the grandmother failed to establish the requisite extraordinary circumstances. The evidence at the hearing established that, since the father and respondent mother separated in 2007, the father never had primary physical placement

of the children and did not file a petition for custody for another seven years. Twice since then, when the mother was unable to have primary physical placement of the children, the father consented to award the grandmother custody of the children. During that time, he played a minimal role in the children's lives and made no contact with them for as long as 1 ½ years at a time. The grandmother, by contrast, had provided the children with a stable home, where they resided with their mother, half brother and uncle. Although the court made no determination with respect to the best interests of the children, the record was sufficient for the Appellate Division to determine that it was in the children's best interests to award the grandmother primary physical custody. The grandmother had continuously provided the children with a stable home whenever needed. The grandmother's country home was recently renovated and the children had their own bedrooms, whereas the father over the years had resided with a series of paramours and he acknowledged that he did not have a plan if his current living situation changed. While living with the grandmother, the children had developed a close relationship with their half brother, who also lived there. The grandmother had facilitated the children's schooling and extracurricular activities, whereas the father did not know the names of their teachers or pediatrician. Moreover, the grandmother was financially stable, owned her own home, and was employed full time as a registered nurse.

Matter of Greeley v Tucker, 150 AD3 1646 (4th Dept 2017)

Mother's Contentions Rejected Pertaining to Lack of *Lincoln* Hearing

Family Court dismissed the mother's petition seeking modification of a judgment of divorce that awarded joint custody of the subject children to the parties and primary residential placement to respondent father. The Appellate Division affirmed. The mother's contention was unpreserved for appellate review that the court erred in failing to conduct a *Lincoln* hearing. In any event, the mother's contention was without merit inasmuch as an in camera interview was not warranted where, as here, a court had before it sufficient information to determine the wishes of the children. The mother's contention was rejected that she was deprived of her right to effective assistance of counsel based on her attorney's failure to request a *Lincoln* hearing. There was no indication that he would have succeeded in obtaining a *Lincoln* hearing even if he had requested one. Furthermore, the mother's attorney could have believed that a *Lincoln* hearing would produce harmful evidence against the mother. Therefore, the mother failed to demonstrate the absence of strategic or other legitimate explanations for her attorney's alleged shortcoming in failing to request a *Lincoln* hearing. Contrary to the mother's further contention, the failure to call particular witnesses did not necessarily constitute ineffective assistance of counsel, particularly where the record failed to reflect that the desired testimony would have been favorable. The mother's contention was impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on her behalf.

Matter of Pfalzer v Pfalzer, 150 AD3 1705 (4th Dept 2017)

Matter Remitted to Provide More Definitive Schedule of Visitation for Holidays and School Breaks

Family Court modified the custodial provisions in the parties' judgment of divorce by awarding petitioner mother residential custody of the parties' son, and awarding respondent father visitation on alternate weekends, among other things. The Appellate Division modified by vacating the fourth ordering paragraph, and remitted the matter to Family Court to provide a more definitive schedule of visitation for holidays and school breaks. As an initial matter, the father's contention that reversal of the order was warranted on the ground that the court was biased against him was unpreserved for appellate review because he failed to make a motion asking the court to recuse itself. Having failed to make a motion seeking the Attorney for the Child's removal, the father likewise failed to preserve his contention that the AFC had a conflict of interest that impacted her representation of the children because of the children's alleged divergent interests. There was a sound and substantial basis in the record to support the court's determination that it was in the best interests of the parties' son that the mother have residential custody. However, given the acrimonious nature of the parties' relationship, including the parties' repeated arguments over visitation, the court's order with regard to visitation for holidays and school breaks was unrealistic to the extent that it required the parties to cooperate in reaching an agreement.

Matter of Shonyo v Shonyo, 151 AD3d 1595 (4th Dept 2017)

No Error in How Court Addressed Wishes of 15-year-old Child

Family Court denied the father's petition seeking modification of a prior custody order by awarding him sole legal and physical custody of the parties' child. The Appellate Division affirmed. Although the court did not expressly determine that there was a sufficient change in circumstances to warrant an inquiry into whether the best interests of the child would be served by a change in custody, a review of the record demonstrated unequivocally that a significant change in circumstances occurred since the entry of the consent custody order. The court properly considered the appropriate factors and determined that it was in the best interests of the child to maintain the existing custody arrangement, while affording the father greater visitation in order to reflect a more shared and equal custody access arrangement. Although the parties were hostile to each other, they both believed that the child should maintain a good relationship with each parent, and they have endeavored to achieve that goal for the child's benefit. Indeed, the record established that their relationship was not so acrimonious that they were incapable of putting aside their differences and working together in a cooperative fashion for the good of their child. Furthermore, the wishes of the 15-year-old child were entitled to great weight where the age and maturity of the child would make her input particularly meaningful. The court acknowledged that factor, and noted that it was the only factor that weighed most in favor of the father. However, the court further stated that, while the child was mature and articulate, she was somewhat apprehensive and she carried a heavy burden of being in the middle of her parents' persistent conflict. Because the wishes of the child were not determinative, there was no error in how the court addressed that factor.

Matter of Aronica v Aronica, 151 AD3d 1605 (4th Dept 2017)

Record Supported Court's Determination That it Was in Child's Best Interests to Require That Mother's Visitation Occur in Onondaga County

Family Court modified a prior order of custody and visitation by awarding petitioner father primary physical custody of the subject child upon stipulation of the parties, and awarding the mother visitation with the child as the parties mutually agree, with the visitation to occur in Onondaga County. The Appellate Division affirmed. There was a sound and substantial basis in the record supporting the court's determination that it was in the child's best interests to require that the mother's visitation occur in Onondaga County rather than to require that the child visit the mother in Florida, where the mother resided. Although a child's wishes were not determinative, to the extent that the court relied upon the in camera interview of the then-13-year-old child, it was entitled to place great weight on the child's wishes, inasmuch as she was mature enough to express them. The court did not improperly delegate to the parties its authority to schedule visitation. Thus, the mother's contention was rejected that the matter should be remitted to the court to fashion a more specific visitation schedule. If the mother was unable to obtain visitation with the child as the parties mutually agree, she could file a petition seeking to enforce or modify the order.

Matter of Pierce v Pierce, 151 AD3d 1610 (4th Dept 2017)

Petitioner Failed to Make Requisite Evidentiary Showing of Change in Circumstances to Warrant Inquiry Into Best Interests of the Children

Family Court denied the father's petition seeking modification of a prior custody order issued by an out-of-state court that granted respondent mother sole legal and primary physical custody of the parties' son and daughter. The Appellate Division affirmed. The father contended that modification was warranted because the mother failed to provide the children with proper nutrition, failed to ensure that they received proper medical attention and failed to inform the father of the medical care required by the children. However, the evidence at the hearing established that the mother appropriately addressed the children's medical, education and dietary needs. Therefore, the court properly determined that the father failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the children would be served by a modification of the prior order.

Matter of Perez v Johnson, 151 AD3d 1654 (4th Dept 2017)

Failure of AFC to Request *Lincoln* Hearing and/or to Submit Written Closing Argument Did Not Constitute Ineffective Assistance of Counsel

Family Court awarded petitioner mother sole legal and primary physical custody of the subject child, with visitation to respondent father. The Appellate Division modified. There was a sound and substantial basis in the record for the court's determination that awarding the mother sole legal and physical custody was in the child's best interests.

The contention of the father and the appellate AFC was rejected that the court could not make a proper custody determination without being advised of the child's wishes either through a *Lincoln* hearing or a closing statement from the AFC who represented the child at trial. The contention with respect to the *Lincoln* hearing was not preserved for appellate review. In any event, it was without merit. Although a child's wishes were entitled to great weight, the child was only four years old at the time of the trial. Furthermore, the failure of the AFC who represented the child at trial to request a *Lincoln* hearing and/or to submit a written closing argument did not constitute ineffective assistance of counsel. The court did not abuse its discretion when it limited evidence of the mother's substance abuse to events occurring only after the child's birth. In determining the best interests of the child, the court was vested with broad discretion with respect to the scope of proof to be adduced. However, the court abused its discretion in fashioning a visitation schedule. Therefore, the order was modified by vacating the 5th, 6th and 10th ordering paragraphs and inserting in place thereof and in addition thereto a visitation schedule that reflected a reasonable balance between the court's award of sole legal and primary physical custody to the mother in Florida and the father's residency in Oswego County, New York.

Matter of Terramiggi v Tarolli, 151 AD3d 1670 (4th Dept 2017)

Initial AFC Violated His Ethical Duty to Determine Subject Child's Position and Advocate Zealously in Support of Child's Wishes

Family Court granted sole custody of the parties' child to petitioner mother, dismissed the father's petition, and denied the father visitation until certain conditions were met, including that the father obtain a report from a counselor or therapist regarding the impact that his visitation would have on the subject child. The Appellate Division modified by vacating the third and fourth ordering paragraphs, reinstated that part of the father's petition seeking visitation, and remitted. Based upon the evidence of the parties' acrimonious relationship, the court did not err in granting the mother sole custody. However, the court erred in eliminating the father's visitation with the subject child and in setting unattainable conditions upon any attempt by him to reinstitute visitation. There was not substantial evidence that the father's visitation was detrimental to the child's welfare. The court's inference that the improvement in the child's anxiety was the result of the cessation of visitation was not supported by the record. Although the counselor recommended that both parents undergo counseling, neither party followed that recommendation. Furthermore, the mother's self-serving testimony was the only evidence of most of the troublesome behavior allegedly exhibited by the child. Also, the mother testified that she wished to eliminate the father from the child's life. Thus, the record established that the mother had made little or no effort to encourage the relationship between the father and the child, the father submitted evidence supporting an inference that the mother was alienating the child from the father, and the court improperly allowed the mother essentially to dictate whether visits would ever occur with the father. In addition, despite numerous allegations that the father had mental health issues, there was no evidence in the record to support a determination that he suffered from a mental health condition that would prohibit him from obtaining visitation with his child. Therefore, the order was

modified by vacating the third and fourth ordering paragraphs, and the matter was remitted for further proceedings on the issue of visitation, including a new hearing after mental health evaluations of both parties and the subject child. Also, the initial Attorney for the Child (AFC) violated his ethical duty to determine the subject child's position and advocate zealously in support of the child's wishes, because that AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. There were only two circumstances in which an AFC was authorized to substitute his or her own judgment for that of the child: when the AFC was convinced either that the child lacked the capacity for knowing, voluntary and considered judgment, or that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child, neither of which was present. In addition, although an AFC should not have a particular position or decision in mind at the outset of the case before the gathering of evidence, the initial AFC indicated during his first court appearance, before he had spoken with the child or gathered evidence regarding the petitions, that he would be substituting his judgment for that of the child. Thus, the child's interests were not represented with respect to visitation. A new AFC had already been substituted for the original AFC, however, and the matter was being remitted for a new hearing regarding visitation for the reasons set forth above. The AFC's erroneous actions implicated only the parts of the order that pertained to the father's request for visitation. Consequently, there was no need to modify the order further, or direct the appointment of a replacement for the new AFC, who had advocated in accordance with the child's wishes.

Matter of Kleinbach v Cullerton, 151 AD3d 1686 (4th Dept 2017)

Affirmance of Order Permitting Mother's Relocation with Parties' Child From Monroe County to Adjacent County

Family Court granted the mother's petition to relocate with the parties' child from Brockport in Monroe County to Albion in Orleans County, a distance of 13 to 14 miles. The Appellate Division affirmed. The mother established by the requisite preponderance of the evidence that the proposed relocation was in the child's best interests. The court properly weighed the *Tropea* factors in permitting the move. Among the reasons cited in support of the move were the mother's need for mental health treatment, which the prior order in fact directed her to continue, and the much easier access that she would have to such treatment in Albion as opposed to Brockport. The mother further demonstrated that she would have better access to vocational rehabilitation programs, including a job training workshop in Albion, opportunities denied to her in Monroe County because of her lack of transportation and mental health history. The mother also testified to certain other financial benefits of the move. In contrast, the father's reasons for opposing the move were unfounded and arbitrary and, indeed, were appropriately deemed by the court to be outweighed by other factors. The court determined that the permitted relocation would not negatively impact the father's visitation time or otherwise interfere with his important role in the child's life.

Matter of Fleisher v Fleisher, 151 AD3d 1768 (4th Dept 2017)

No Appeal As of Right From Order That Did Not Decide Motion Made on Notice

Family Court sua sponte dismissed the mother's petition seeking custody of her son, with respect to whom her parental rights had previously been terminated. The Appellate Division dismissed. No appeal lied as of right from an order that did not decide a motion made on notice. The mother had not sought leave to appeal.

Matter of Kelly v Senior, 151 AD3d 1775 (4th Dept 2017)

Reversal of Award of Custody Where Court Did Not Make Express Finding Whether There Had Been Requisite Change in Circumstances

Family Court denied the mother's two separate petitions to modify a prior custody order and granted in part respondent father's cross petition to modify the prior order by awarding the father primary placement of the parties' child. The Appellate Division reversed and remitted. Although the court determined that the mother had failed to show the existence of a change in circumstances that required or justified a change in custody, the court did not make an express finding whether the father, in support of his cross petition, established that there had been the requisite change in circumstances in the 10 months since entry of the prior order. The Appellate Division declined to exercise its power to independently review the record to ascertain whether the requisite change in circumstances existed, inasmuch as it appeared from the court's decision that it improperly dispensed with the change in circumstances requirement when it stated that "to dismiss the petitions herein without a determination of the best interests of the child would be to elevate form over substance." Thus, it was not clear on the record what the court would have found had it actually addressed the issue.

Matter of Austin v Wright, 151 AD3d 1861 (4th Dept 2017)

Court Erred in Invoking Doctrine of Equitable Estoppel in Context of Violation Petition

Family Court dismissed the father's violation petition alleging that respondent mother had not allowed him visitation with their child despite a prior court order that allowed the father visitation at times and places as the parties could agree. The Appellate Division affirmed, but its reasoning differed from that of the court. The court erred in invoking the doctrine of equitable estoppel in the context of a violation petition, and in granting the AFC's motion to dismiss on the ground that the father was equitably estopped from asserting his visitation rights due to his failure to establish a relationship with the child. The law imposed the doctrine as a matter of fairness. Its purpose was to prevent someone from enforcing rights that would work injustice on the person against whom enforcement was sought and who, while justifiably relying on the opposing party's actions, had been misled into a detrimental change of position. Here, there was a prior order establishing the father's visitation rights, and he was alleging that the mother violated that order. He was not seeking visitation rights in the first instance. Nevertheless, because the court proceeded with a full hearing on the merits, there was an adequate record and the merits of the father's violation petition could be determined.

The father failed to establish by clear and convincing evidence that the mother willfully violated the order regarding visitation.

Matter of Young v Rios, 151 AD3d 1862 (4th Dept 2017)

Error to Order That Father Complete Anger Management Classes as Condition of His Access to Child

Family Court awarded respondent mother sole custody of the subject child, granted petitioner father access to the parties' child, and ordered that, as a condition of such access, the father "shall complete a program of anger management classes." The Appellate Division modified. The father's contention was rejected that the court erred in directing that he complete an anger management program. A court could direct a parent to obtain counseling or therapy as one of the aspects of a custody or visitation order, if such intervention would serve the child's best interests. Here, there was an ample evidentiary basis for the court's issuance of such a directive. However, the court erred in ordering that the father complete a program of anger management classes as a condition of his access to the child, instead of as a component of such access.

Matter of Sanchez v Alvarez, 151 AD3d 1869 (4th Dept 2017)

Child, While Dissatisfied With Order, Could Not Force Mother to Litigate Petition That She Had Since Abandoned

Family Court dismissed the mother's petition seeking modification of a custody order. The Appellate Division dismissed the appeal. The Attorney for the Child representing the parties' oldest child appealed from the order. Inasmuch as the mother had not taken an appeal from that order, the child, while dissatisfied with the order, could not force the mother to litigate a petition that she had since abandoned. A child in a custody matter did not have full-party status, and the Court declined to permit the child's desires to chart the course of litigation.

Matter of Lawrence v Lawrence, 151 AD3d 1879 (4th Dept 2017)

Affirmance of Dismissal of Post-divorce Application to Modify Stipulated Order

Supreme Court dismissed plaintiff father's post-divorce application to modify a stipulated order by changing his visitation from supervised to unsupervised. The Appellate Division affirmed. The father and the Attorney for the Children's contention was rejected that the court erred in granting the mother's motion to dismiss the application without a hearing. A hearing was not automatically required whenever a parent sought modification of a custody or visitation order. Upon haven given the pleading a liberal construction, accepted the facts alleged therein as true, and accorded the nonmoving party the benefit of every favorable inference, the father's allegations regarding the unavailability of supervisors and the mother's conduct did not set forth a change in circumstances which would warrant the relief sought, i.e., unsupervised visitation. The father otherwise failed to make a sufficient evidentiary showing of a

change in circumstances to require a hearing.

Carney v Carney, 151 AD3d 1912 (4th Dept 2017)

Award of Primary Physical Custody to Mother Lacked Sound and Substantial Basis in Record

Family Court granted primary physical custody of the parties' child to respondent mother. The Appellate Division modified and remitted. Although the custody determination of the court ordinarily was entitled to great deference, such deference was unwarranted where that determination lacked a sound and substantial basis in the record. Upon a review of the relevant factors, awarding the father primary physical custody was in the child's best interests. Although the mother had been the child's primary caretaker since birth, her living conditions were unstable. The mother and the child had lived in seven different residences over the three years preceding the hearing, which resulted in the child changing schools every year. As the court recognized in its decision, the father was the more stable parent. Concerning the quality of the home environment, the father and his wife owned a home where the child had his own room, his own bed, and age-appropriate toys. In contrast, the mother's chaotic living arrangements had put the child in regular contact with a half-sister who abused drugs and had resulted in the child living in a home that was infested with fleas. Concerning the child's emotional and intellectual development, the father ensured that the child attended school regularly and completed his homework. Since the father began playing a larger role in the child's life, the child's attendance and performance in school had improved dramatically. Also, the father facilitated the child's participation in activities, encouraged him to read, and adjusted his diet to address his medical needs. In contrast, the mother had shown a lack of concern for the child's attendance and performance in school, shielded him from experiences and foods that he found unpleasant, and preferred that he played video games and ate fast food. Concerning the parents' relative financial status, the father's household income was significantly higher and his job was stable. In contrast, although the mother had difficulty affording her expenses and was evicted from prior residences, she continued to bounce from one part-time job to another and testified that she saw no need to work more than 28 hours a week. Concerning the child's wishes, the child told the Attorney for the Child that he wished to remain with the mother. However, the child's wishes were entitled to little weight, particularly given his young age and the mother's overly permissive parenting philosophy. Concerning the child's need to live with siblings, the hearing testimony established that the child often played with two other half-sisters who lived with or near the mother, and that the child had a close relationship with them. Nevertheless, awarding the father primary physical custody was in the child's best interests. Therefore, the order was modified accordingly and the matter remitted to the court to fashion an appropriate visitation schedule with the mother.

Matter of Braga v Bell, 151 AD3d 1924 (4th Dept 2017)

Court Erred in Dismissing Amended Modification Petition Without Hearing

Family Court granted the motion of respondent mother to dismiss the father's amended petition seeking to modify the custody and visitation provisions of the parenting agreement, and directed the return of the child to the mother. The Appellate Division modified by denying the motion and reinstating the amended petition, and remitting for further proceedings. The court erred in dismissing the amended petition without a hearing. The mother refuted the father's allegation that there was a change in circumstances because she was being investigated for possible drug use and neglect by the Division of Children and Family Services in Georgia (DCFS). In support of her motion to dismiss the amended petition, the mother submitted a letter from DCFS establishing that the investigation had been closed and there were no indications of maltreatment or child abuse and neglect. However, the father made a sufficient evidentiary showing of a change in circumstances to require a hearing with respect to certain remaining allegations in the amended petition. Considering the mother's history of drug and alcohol addiction, as acknowledged by the parties in the parenting agreement, the allegation that the mother was arrested and was being prosecuted for criminal possession of a controlled substance in Georgia was sufficient to warrant a hearing. Such conduct, including the mother's possible unlawful use of a controlled substance, was plainly relevant to her fitness as a parent. To the extent that the mother disputed the father's allegations regarding her hospitalization and the treatment of her mental health condition, it was well established that determinations affecting custody should be made following a full evidentiary hearing, not on the basis of conflicting allegations. The father also alleged that the mother's boyfriend used a belt to discipline the child, and that the child had made disclosures of such corporal punishment to the father and the paternal grandmother. The allegations of excessive corporal punishment or inappropriate discipline in this case constituted a sufficient evidentiary showing of a change of circumstances to warrant a hearing.

Matter of Farner v Farner, 152 AD3d 1212 (4th Dept 2017)

Court Properly Denied Motion to Remove AFC

Family Court, among other things, awarded sole custody of the subject child to respondent mother and directed that a third-party supervise the father's overnight visitation with the child. Thereafter, the court issued orders allowing the father to exercise unsupervised visitation. Therefore, the appeal insofar as it concerned visitation was moot and the exception to the mootness doctrine did not apply. The Appellate Division otherwise affirmed. The court properly denied the father's recusal motion. The record did not support the father's allegations that the court treated the attorneys differently because of their racial backgrounds or that the Judge was biased against the father because of her alleged familiarity with his social worker. The court properly denied the father's motion to remove the AFC inasmuch as it was based upon unsubstantiated allegations of bias. The fact that the AFC took a position contrary to the father did not indicate bias.

Matter of Brooks v Greene, 153 AD3d 1621 (4th Dept 2017)

Record Insufficient to Determine Child's Best Interests

Family Court, among other things, modified a prior order of custody by awarding petitioner father sole custody of the parties' child, with supervised visitation with the mother. The Appellate Division reversed and remitted for a determination of the child's best interests. Here, DSS's allegations of the neglect of the child by the mother and her paramour constituted the requisite change in circumstances to warrant an inquiry into the best interests of the child. However, the court failed to set forth the essential facts of its best interests determination and the record was insufficient to enable the Appellate Division to make an independent determination with respect to that issue. The record was silent on the issue of the well-being of the child and, specifically, the impact that the alleged actions of the mother and her paramour had on the child.

Matter of Brockel v Martin, 153 AD3d 1654 (4th Dept 2017)

Paternal Grandmother Established Extraordinary Circumstances

Family Court awarded sole custody of the subject child to petitioner paternal grandmother. The Appellate Division affirmed. The finding of neglect based upon excessive corporal punishment against the mother supplied the threshold extraordinary circumstances needed by the grandmother. The finding of extraordinary circumstances was further supported by evidence that the mother had virtually no insight into her mental health problems or the inappropriateness of her disciplinary methods, and that she refused to comply with the court's prior order directing her to obtain a mental health evaluation and enroll in parenting classes. The record supported the court's determination that the award of custody was in the child's best interests. The court was not biased against the mother. Both the mother and grandmother proceeded pro se and the record established that the court treated them evenhandedly and did not undertake the function of an advocate.

Matter of Jackson v Euston, 153 AD3d 1655 (4th Dept 2017)

Grandmother's Appeal Seeking Custody of Child Moot

In an amended order, Family Court granted custody of the subject child to petitioner mother. Respondent paternal grandmother appealed from that part of the amended order that confirmed the Referee's report recommending granting the petition, based upon the Referee's findings that the grandmother failed to establish extraordinary circumstances warranting an examination whether custody of the child could be awarded to a nonparent. The Appellate Division dismissed the appeal. The amended order also confirmed that part of the Referee's report that found that, even assuming, arguendo, that the grandmother established extraordinary circumstances, the mother established that the best interests of the child would be served by awarding custody of the child to the mother and the grandmother did not challenge that confirmed finding on appeal. Because the only relief the grandmother sought on appeal was a remittal for a best interests hearing and she had already received the benefit of such hearing, her appeal was moot.

Matter of Smith v Visker, 153 AD3d 1656 (4th Dept 2017)

Court Properly Denied Motion to Vacate Order Entered on Default

In an order, Family Court granted petitioner father sole custody of the subject children upon the mother's default and thereafter denied the mother's motion to vacate the custody order. The Appellate Division dismissed the appeals. No appeal lies from an order entered upon default. With respect to the order denying the motion to vacate the default, the mother did not have a reasonable excuse for the default and, even assuming she did, she failed to show the requisite meritorious defense. Because the mother received default notice and was put on actual notice of a new date for the adjourned proceeding, there was no procedural bar to awarding the father relief on the default when neither the mother nor her attorney appeared on the date of the adjourned proceeding.

Matter of Roache v Hughes-Roache, 153 AD3d 1658 (4th Dept 2017)

Family Court Erred in Dismissing Amended Petition Without Hearing

Family Court dismissed the father's amended petition for a modification of a prior custody order. The Appellate Division reversed, reinstated the petition and remitted the matter for further proceedings. The court erred in dismissing the amended petition without a hearing inasmuch as the father made a sufficient evidentiary showing of a change in circumstances to require a hearing, based upon, among other things, the undisputed fact that, after entry of the prior custody order, one of the children was left unattended at the mother's house and accidently set a fire that resulted in $125,000 in property damage.

Matter of Whitney v Whitney, 154 AD3d 1295 (4th Dept 2017)

Court Violated CPLR 4403 By Confirming Referee's Report Prior to Expiration of 15-day Period

Family Court adjudged that the parties shall have joint custody of the subject child and designated respondent mother the primary residential custodian. The Appellate Division reversed and remitted. The court referred to a Court Attorney Referee to hear and report the father's petition to obtain custody and/or visitation with the parties' minor son. The Referee conducted an evidentiary hearing and issued an oral report. Three days later, the Referee issued supplemental written findings. The court, acting on its own initiative, confirmed the Referee's report that same day. The court violated CPLR 4403 by confirming the Referee's report prior to the expiration of the 15-day period during which the parties were permitted to move to confirm or reject the report in whole or in part. Therefore, the order was reversed and the matter remitted to afford the parties and the Attorney for the Child an opportunity to file any appropriate motions under CPLR 4403.

Matter of McDuffie v Reddick, 154 AD3d 1308 (4th Dept 2017)

Mother's Willful Violations of Court's Orders Constituted Civil Contempt

Family Court adjudged that respondent mother's willful violations of the court's orders constituted civil contempt. The Appellate Division affirmed. A motion to punish a party for civil contempt was addressed to the sound discretion of the hearing court. The court did not abuse its discretion in determining that the father met his burden of establishing, by clear and convincing evidence, that the mother willfully violated orders that required her, among other things, to permit the father to have visitation and telephone contact with the children; to share medical information; to be absent during visitation exchanges; to complete the intake process at the Parent Resource Center Visitation Program as soon as possible after a May court appearance so that the father could have visitation with the children at the Center in June; and to re-enroll the children in counseling services. The record supported the court's finding that the mother's violations of the orders unjustifiably impaired the father's rights to communicate with the children, to visit with the children, and to participate in decision-making with respect to the children's healthcare. Thus, the court properly determined that the mother violated a lawful and unequivocal mandate of the court that was in effect at the time of the filing of the petition, that her actions caused prejudice to a right of the father, who was a party, and that the mother's violations were willful.

Matter of Moreno v Elliott, 155 AD3d 1561 (4th Dept 2017)

Family Court Properly Awarded Petitioner Father Sole Legal and Physical Custody

Family Court granted petitioner father sole legal and physical custody of the parties' child. The Appellate Division affirmed. A year after the child was born, the parties stipulated that the mother would have sole legal and physical custody of the child. The father shortly thereafter moved first to Delaware and then to New Jersey. Neglect proceedings were brought against the mother in 2015 based on her drug use, and the father sought custody in May 2016. Inasmuch as the father was not the custodial parent when he relocated to New Jersey and when he filed his petition seeking custody, the contention of the mother and the AFC was rejected that the court should have applied the factors set forth in *Matter of Tropea v Tropea*. However, the relocation of the child to New Jersey was an issue for the court to consider in determining whether custody to the father was in the child's best interests. The court's custody determination, which was afforded great deference, was supported by a sound and substantial basis in the record. The father showed through his testimony that he wanted to remedy his absence and inexcusable lack of contact with the child, who lived with him for several weeks before the hearing began. The court properly determined that the fitness of the father, the quality of his home environment, and the parental guidance he would be able to provide for the child were superior to that of the mother. The 11-year-old child's wishes were not entitled to great weight where it appeared that they were due at least in part to the lack of discipline in the home of the mother and grandmother.

Matter of Gartner v Reed, 155 AD3d 1562 (4th Dept 2017)

Venue in Erie County Was Proper

Family Court granted petitioner grandparents sole custody of respondent mother's children. The Appellate Division affirmed. The mother's contention was rejected that Family Court should have sua sponte transferred venue from Erie County to Monroe County. The grandparents and the children all resided in Erie County at the commencement of the proceedings and, therefore, venue in Erie County was proper. The mother did not move for a change in venue to Monroe County, where she lived, and thus she did not set forth any good cause for such change. Moreover, the court did not abuse its discretion in denying the mother's request for an adjournment of the hearing. The mother's further contention was rejected that she received ineffective assistance of counsel. With respect to counsel's failure to move for a change in venue, there was no denial of effective assistance of counsel arising from a failure to make a motion or argument that had little or no chance of success.

Matter of Devita v Devita, 155 AD3d 1587 (4th Dept 2017)

Court Properly Permitted Mother to Testify Regarding Child's Out-of-Court Statements Where Such Statements Were Corroborated and Based in Part Upon Allegations of Neglect

Family Court modified a prior order of custody and visitation to grant the mother sole legal custody and to provide that the father's visitation take place through a particular agency. The Appellate Division affirmed. The court did not abuse its discretion in failing to conduct a Lincoln hearing with the 13-year-old child, inasmuch as the Attorney for the Child provided the court with sufficient information concerning the child's wishes, i.e., that the child was in favor of the mother's petition. The court did not err in permitting the mother to testify to out-of-court statements made by the child. Such statements, if corroborated, were admissible in custody and visitation proceedings that were based in part upon allegations of abuse or neglect. The father's alleged conduct in allowing a 13-year-old child with no prior experience to operate a boat and race another boat at 70 miles per hour would support a finding of neglect. The child's statements about the incident were corroborated by a screenshot properly admitted into evidence of the father's Facebook post regarding the incident. The court stated that it intended that the father receive visitation comparable in frequency and duration to his visitation under the prior order. Therefore, the court satisfied its obligation to set a visitation schedule even though it did not specify the days of the week or times of day that visitation would occur.

Matter of Montalbano v Babcock, 155 AD3d 1636 (4th Dept 2017)

Court Erred in Enforcing Residency Provision of Parties' Agreement and Denying Motion to Modify Custody and Visitation Provisions Without a Hearing

Supreme Court enforced the residency provision of the parties' separation/ opting out agreement (the agreement) and denied that part of the father's cross motion seeking to

modify the custody and visitation provisions of the agreement. The Appellate Division reversed and remitted to Supreme Court for a hearing to determine whether to enforce or modify the agreement. The court erred in giving the father a three-month deadline to relocate within the 15-mile radius of the mother's residence provided in the agreement without conducting a hearing. The court further erred in denying that part of the father's cross motion seeking modification of the custody and visitation provisions of the agreement, also without conducting a hearing. While a hearing was not automatically required whenever a parent sought modification of a custody order, the combined effect of the parties' relocations was a change in circumstances warranting a reexamination of the existing custody arrangement at an evidentiary hearing.

Shaw v Shaw, 155 AD3d 1673 (4th Dept 2017)

Award of Residential Custody With Father and Visitation With Mother Affirmed

Supreme Court modified the custody and visitation provisions of the parties' judgment of divorce by, among other things, awarding the parties joint legal custody of the subject children, with residential custody with defendant father and visitation with plaintiff mother. The Appellate Division affirmed. The prior custody arrangement, which was set forth in a stipulation that was incorporated but not merged into the parties' judgment of divorce, provided that the father had residential custody of the children in Syracuse, New York, and that the mother's appointment to a semi-permanent station with her job in the United States Air Force would constitute a change in circumstances warranting an inquiry into whether a change in custody would be in the best interests of the children. After the mother received a three-year assignment in California, she moved to modify the prior custody arrangement, seeking residential custody of the children. The mother's contention was rejected that the court erred in awarding residential custody to the father inasmuch as the children would live with their half brother if the mother were awarded residential custody. The children had never resided with their half brother, outside of the times when they visited with the mother. Thus, this was not a situation in which the children would be removed from a home with half siblings to live in a home without those siblings. The court properly determined that it was in the children's best interests to remain in the residential custody of the father. The record established that the children shared a close bond the maternal and paternal grandmothers, as well as the mother's brother and his children, all of whom live near the father, and that the mother would be able to maintain her relationship with the children through nightly telephone contact, as well as visitation during school breaks and summer.

Prall v Prall, 156 AD3d 1351 (4th Dept 2017)

Finding of Contempt Supported by Record; Order Modified by Adding Ordering Paragraph Containing Requisite Language

Family Court found respondent mother in contempt of court and denied her petition to modify a prior stipulated order of custody and visitation. The Appellate Division modified. The father established by clear and convincing evidence that a lawful court order clearly expressing an unequivocal mandate was in effect, that the mother had

actual knowledge of its terms, and that the violation defeated, impaired, impeded or prejudiced the rights of the father. The father testified that the mother failed to bring one or more of the children for visitation on four scheduled dates in 2015. The mother admitted to those failures. Indeed, it was undisputed that the father did not see the children between June 6, 2015 and March 8, 2016, the date of the hearing. The court found the mother in contempt of court based on her refusal to allow visitation. However, the court did not expressly find that the contemptuous acts were calculated to, or actually did, defeat, impair, impede or prejudice the father's rights or remedies. Inasmuch as the finding of contempt was supported by the record, the order was modified by adding an ordering paragraph containing the requisite language. The mother's contention was moot that the court inappropriately imposed a suspended jail sentence inasmuch as that portion of the order had expired according to its own terms. The court properly dismissed the mother's petition seeking to modify the prior stipulated order. The mother alleged that there was a change in circumstances because the parties' son sustained a bruise while in the father's care. The court properly determined that the facts of the incident did not demonstrate the requisite change in circumstances.

Matter of Peay v Peay, 156 AD3d 1361 (4th Dept 2017)

Court Abused Its Discretion in Denying Mother's Motion for Adjournment

Family Court awarded petitioner father sole custody of the parties' children. The Appellate Division reversed. The court entered the amended order after holding a joint trial on the mother's Family Court Act article 6 petition for modification of custody and visitation, and the father's amended article 8 petition alleging family offenses against the mother. Before the trial commenced, the mother's attorney made a motion for an adjournment based on the mother's absence, and the court denied the motion. On the mother's prior appeal from the order of protection entered on the father's amended article 8 petition, the court was found to have abused its discretion in denying the mother's motion for an adjournment inasmuch as she had shown good cause for her absence. Because the instant appeal arose out of the same joint trial and motion for an adjournment, the order was reversed for the reasons stated in the Court's prior decision (*see Drake*, 149 AD3d at 1469).

Matter of Drake v Riley, 156 AD3d 1478 (4th Dept 2017)

Court Lacked Authority to Condition Any Future Application by Father on Proof of His Completion of Substance Abuse Evaluation and Completion of Any Recommended Treatment

Family Court modified a prior order of custody and visitation by, among other things, reducing respondent father's visitation time with the parties' son. The Appellate Division modified. Pursuant to the prior order, the father was entitled to visitation with the parties' son for five hours every Sunday. After a hearing, the court modified the order by, among other things, reducing the father's visitation time to five hours every other Saturday. The court was entitled to credit petitioner mother's testimony that the father was visibly intoxicated on an occasion when she came to drop the child off for

visitation. In view of the father's history of alcohol abuse, that testimony establish both a change of circumstances warranting review of the prior order and that modification of the father's visitation was in the best interests of the child. However, the court lacked the authority to condition any future application by the father to modify the custody and visitation order on proof of his completion of a substance abuse evaluation and completion of any recommended treatment from this evaluation. Therefore, the order was modified accordingly.

Matter of Smith v Loyster, 156 AD3d 1490 (4th Dept 2017)

ORDER OF PROTECTION

Order Reversed Where Court Abused Its Discretion in Denying Request For Adjournment

Family Court entered a stay away order of protection directing respondent mother to refrain from having contact with petitioner father and the parties' two children. The Appellate Division reversed and remitted for a new trial. The court entered the order of protection upon a finding that the mother committed two family offenses, i.e. disorderly conduct (Penal Law Section 240.20) and harassment in the second degree (Penal Law Section 240.26), against petitioner father. In his amended petition, the father alleged that the mother yelled at him and called him names. The matter proceeded to trial, after which the court issued a stay away order of protection. The court abused its discretion in denying the mother's attorney's motion to adjourn the hearing because the mother was unable to attend. Although the court would not abuse its discretion in denying a request for an adjournment where the party making the request gave no reason for his or her absence, here, the mother explained her absence. Moreover, the proceedings were not protracted and the mother made no prior requests for an adjournment.

Matter of Drake v Riley, 149 AD3d 1468 (4th Dept 2017)

Court Did Not Abuse Its Discretion In Denying Respondent's Request for Adjournment

Family Court entered an order of protection requiring respondent to remain at least 500 feet from petitioner at all times and to refrain from any communication with petitioner. The Appellate Division affirmed. Respondent's contention was rejected that the court abused its discretion in denying her request for an adjournment of the hearing. The record reflected that respondent was avoiding service of the summons to appear in the proceeding, thereby rendering it necessary for the court to ask the police to serve respondent therewith. Moreover, on the morning of the scheduled hearing, respondent conveyed misleading information to the court and gave inconsistent excuses why she could not be present. Under those circumstances, the court did not abuse its discretion in refusing to adjourn. Petitioner established by a preponderance of the evidence that respondent committed the family offense of aggravated harassment in the second degree. The record evidence, consisting of the testimony of petitioner and petitioner's mother, established that respondent communicated threats of physical harm to petitioner.

Matter of Clausell v Salame, 156 AD3d 1401 (4th Dept 2017)

TERMINATION OF PARENTAL RIGHTS

Court Did Not Abuse Discretion in Limiting Evidence Concerning Whether Subject Child's Foster Parents Were Qualified to Adopt Him

Family Court terminated respondent mother's parental rights with respect to the subject child on the basis of the mother's admission to permanent neglect. The Appellate Division affirmed. Family Court did not abuse its discretion in limiting the evidence concerning whether the subject child's foster parents were qualified to adopt him. It was emphasized that termination of parental rights did not hinge upon a comparison of the relative benefits offered a child by his biological family to those offered by the foster family. The ultimate purpose of the dispositional inquiry was not to determine whether the child was in the best possible foster placement - a determination statutorily entrusted to petitioner - but to decide whether his best interests required termination of the mother's parental rights. Given the evidence that the child's progress in the foster home was satisfactory, and the lack of any evidence that the mother was capable of offering him a safe home, the court's determination to commit the child's guardianship and custody to petitioner was in his best interests. Moreover, the court did not abuse its discretion in declining to grant a suspended judgment, inasmuch as the mother made only minimal progress in addressing the issues that resulted in the child's removal from her custody.

Matter of James P., 148 AD3d 1526 (4th Dept 2017)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to the subject children on the ground of permanent neglect, and transferred guardianship and custody of the children to petitioner. The Appellate Division affirmed. Petitioner demonstrated by the requisite clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship by developing an appropriate service plan tailored to the situation, regularly updating the father on the children's progress and continually reminding him to comply with the requirements of the service plan. The father's contention was rejected that he planned for the children's return by planning to participate in sex offender treatment, but could not do so because such a program was not offered at the facility where he was incarcerated. Petitioner was not required to provide services and other assistance so that problems preventing the discharge of the children from care could be resolved or ameliorated. The father failed to plan for the children's future by neither acknowledging nor meaningfully addressing the conditions that led to the children's removal in the first place, namely, the underlying sexual abuse of another older daughter, and by failing to provide any realistic and feasible alternative to having the children remain in foster care until his release from prison.

Matter of Skye N., 148 AD3d 1542 (4th Dept 2017)

Court Did Not Err in Admitting Forensic Psychologist's Report in Evidence at Fact-finding Hearing on Permanent Neglect Petition

Family Court adjudicated the subject child to be permanently neglected and terminated respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. In a prior appeal, the Appellate Division determined that Family Court erred in admitting in evidence at a fact-finding hearing on a neglect petition a 2012 evaluation of the mother by a forensic psychologist who did not testify at the hearing. On this appeal, the mother contended that the court erred in admitting the same report in evidence at a fact-finding hearing on a permanent neglect petition. Although the admission of such reports in neglect proceedings was governed by the rules of evidence set forth in Family Court Act Section 1046 (a) (iv), the admission of such reports in termination proceedings under Social Services Law Section 384-b was governed by CPLR 4518. Even if petitioner did not meet the foundational requirements for admission of the report, any error was harmless because the result reached would have been the same even if it had been excluded. Unlike the prior appeal, the court in this matter did not base its determination on findings contained within the report. Thus, even without reference to the report, the evidence at the fact-finding hearing established that petitioner made the requisite diligent efforts, and that the mother did not comply with her service plan.

Matter of Chloe W., 148 AD3d 1672 (4th Dept 2017)

Court Properly Terminated Mother's Parental Rights on Ground of Permanent Neglect

Family Court adjudicated the subject children to be permanently neglected and terminated respondent mother's parental rights. The Appellate Division affirmed. Petitioner established, by the requisite clear and convincing evidence, that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the mother's relationships with her children. Petitioner established that it arranged visitation between the mother, who was incarcerated, and the subject children, transported the children to those visits, explored the planning resources suggested by the mother, and kept her apprised of the children's progress. Thus, given the circumstances, petitioner provided what services it could. The court properly concluded that the mother permanently neglected the subject children. There was no evidence that the mother had a realistic plan to provide an adequate and stable home for the children. The mother's contention was rejected that the court erred in denying her request for a suspended judgment. There was little chance that the mother could continue to control her addictions or gain insight into how her choices were impacting the children, and the court's assessment that the mother was not likely to change her behavior was entitled to great deference.

Matter of Christian C.-B., 148 AD3d 1775 (4th Dept 2017)

Affirmance of Termination of Parental Rights on Ground of Abandonment

Family Court terminated respondent mother's parental rights on the ground of abandonment. The Appellate Division affirmed. The mother's contention was rejected that her period of hospitalization and her repeated drug use constituted valid defenses

to the claim of abandonment. Hospitalization did not automatically excuse a parent from maintaining the contacts required under the Social Services Law, and the mother failed to submit any supporting documentary evidence to substantiate the length, severity, or extent of her purported illness and hospitalization. The mother failed to show that her hospitalization so permeated her life that contact was not feasible. Moreover, the mother's vague and conclusory testimony failed to establish that her alleged health problems and other hardships permeated her life to such and extent that contact was not feasible. Furthermore, the mother's period of incarceration did not excuse her failure to contact the child or petitioner. Insofar as there appeared to be a week prior to the filing of the petition when the mother was not incarcerated, there was no evidence in the record of any attempt by the mother to contact or communicate with petitioner, the child, or the child's foster parents during this time.

Matter of Madelynn T., 148 AD3d 1784 (4th Dept 2017)

Reversal of Termination of Parental Rights on Ground of Abandonment

Family Court terminated respondent father's parental rights on the ground of abandonment. The Appellate Division reversed. Petitioner failed to establish by clear and convincing evidence that the father abandoned the subject children. A child was deemed abandoned where, for the period of six months immediately prior to the filing of the petition for abandonment, a parent evinced an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. The evidence established that the father, who was incarcerated for most of the six-month period immediately prior to the filing of the petition, contacted the children or petitioner every month during that period. The father wrote letters to the children and called, met with, and wrote letters to the children's caseworker. The father's contacts were not minimal, sporadic or insubstantial. Moreover, during that period, the father filed a petition seeking custody or visitation with the children, which indicated that he did not intend to forego his parental rights. Although the court's finding that the father failed to offer a meaningful plan for the children's future was relevant to a termination proceeding based on permanent neglect, it was not relevant to a termination proceeding based on abandonment.

Matter of John F., 149 AD3d 1581 (4th Dept 2017)

Revocation of Suspended Judgment Affirmed

Family Court revoked a suspended judgment entered upon respondent father's admission that he had permanently neglected the subject child, and terminated the father's parental rights. Although the record from the hearing on petitioner's motion to revoke the suspended judgment established that the father made minimal progress on some of the conditions of the suspended judgment, literal compliance with the terms of the suspended judgment would not suffice to prevent a finding of a violation. A parent must also have shown that progress had been made to overcome the specific problems which led to the removal of the child. The record established that the father failed to

demonstrate such progress, and that he continued to deny the existence of the problems that led to the removal of the subject child. The court's finding after a hearing that the father violated the conditions of the suspended judgment was supported by a preponderance of the evidence. The father's contention was rejected that the was denied the right to due process when the court curtailed his cross-examination of a witness at the hearing. The cross-examination that the father's attorney was attempting to pursue was properly excluded as too remote and speculative. The father's further contentions were rejected that the court erred in admitting certain records because they were not certified pursuant to Section 1046 (a) (iv) of the Family Court Act, and also erred in granting petitioner access to his mental health records. By denying that he needed to comply with that part of the suspended judgment directing him to undergo mental health treatment, the father placed his mental health at issue.

Matter of Joseph M., 150 AD3d 1647 (4th Dept 2017)

Termination of Father's Parental Rights on Ground of Permanent Neglect Affirmed

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The petition sufficiently specified the requisite diligent efforts to encourage and strengthen the parental relationship, which included arranging visitation with the children, consulting with the father about developing a service plan, and reviewing his progress. The father's admission that he failed to plan adequately for the children's long-term care was sufficient to establish permanent neglect, inasmuch as the failure of an incarcerated parent to provide any realistic and feasible alternative to having the children remain in foster care until the parent's release from prison supported a finding of permanent neglect. Furthermore, in view of the father's admissions of permanent neglect, the court was not required to determine whether petitioner exercised diligent efforts to strengthen and encourage the parental relationship. The father's contention was rejected that the court should have entered a suspended judgment rather than terminated his parental rights. In light of the positive living situation of the children while residing with their foster parents, the absence of a more significant relationship between the children and the father, and the uncertainty surrounding both when the father would be released from prison and where he would reside, the court properly determined that further delay was not in the best interests of the children and that termination of the father's parental rights was warranted.

Matter of Nataylia C.B., 150 AD3d 1657 (4th Dept 2017)

Affirmance of Termination of Parental Rights on Based Upon Mother's Inability, By Reason of Intellectual Disability, to Provide Adequate and Proper Care for Children

Family Court terminated respondent mother's parental rights with respect to four of her children. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the mother was intellectually disabled and that by reason of

such disability, she was unable to provide proper and adequate care for the subject children presently and for the foreseeable future. Petitioner presented the testimony of two psychologists who examined the mother and concluded that she had below average intelligence and that, if the children were placed in her care, the children would be at significant risk of neglect for the foreseeable future. Further, petitioner presented evidence that the mother had been unable to improve her parenting skills and would not benefit from any additional support services. The mother's contention was rejected that the determination to terminate her parental rights was not supported by the record and that a suspended judgment would be in the best interests of the children. While a separate dispositional hearing was not statutorily required where, as here, parental rights were terminated based on intellectual disability, the court held such a hearing. Under the circumstances, including the fact that the foster parents planned to adopt three of the children, termination of the mother's parental rights was in the children's best interests. Moreover, there was no statutory authority for a suspended judgment when parental rights were terminated by reason of intellectual disability. A report from a psychologist who examined the mother on behalf of petitioner was improperly admitted in evidence at the fact-finding hearing. The report did not qualify for the business records exception to the hearsay rule because it was prepared for the purpose of litigation rather than in the ordinary course of business. However, the error was harmless.

Matter of Akayla M., 151 AD3d 1684 (4th Dept 2017)

Court Properly Determined That Suspended Judgment Unwarranted

Family Court terminated respondent mother's parental rights on the ground of permanent neglect. The Appellate Division affirmed. The court did not abuse its discretion in declining to enter a suspended judgment. A suspended judgment was a brief grace period designed to prepare the parent to be reunited with the child, and may be warranted where the parent had made sufficient progress in addressing the issues that led to the child's removal from custody. Here, the credible evidence at the hearing, including the testimony of petitioner's caseworker that the mother's apartment lacked a stove, and a bed or clothes for the child, established that the mother had not made sufficient progress in providing the child with suitable living conditions. Moreover, the court's findings concerning lack of meaningful visitation, lack of transportation, financial concerns, and unsuitable living conditions demonstrated that the court was properly concerned with the child's best interests, and thus the court properly determined that a suspended judgment was unwarranted.

Matter of Danaryee B., 151 AD3d 1765 (4th Dept 2017)

Order Vacated Where Court Abused Discretion in Denying Mother's Request for Continuance

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground that mother was intellectually disabled and that by reason of such disability, she was unable to provide proper and adequate care for the subject

children presently and for the foreseeable future. The Appellate Division vacated and remitted. The court abused its discretion in denying the mother's request for a continuance when, due to emotional distress, the mother was unable to appear in the afternoon on the final day of her hearing. The determination whether to grant a request for an adjournment for any purpose was a matter resting within the sound discretion of the trial court. Under the circumstances presented, including that the issue was the termination of parental rights, it was an abuse of discretion to deny the mother's request for a continuance. Therefore, the order was vacated and the matter remitted to allow the mother to present evidence at a reopened fact-finding hearing.

Matter of Destiny G., 151 AD3d 1799 (4th Dept 2017)

Petitioner Made Diligent Efforts

Family Court terminated respondent mother's parental rights with respect to the subject children. The Appellate Division affirmed. Petitioner demonstrated by the requisite clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship, including arranging for a psychological assessment of the mother, developing an appropriate service plan tailored to her situation, notifying the mother of the children's medical appointments, conducting service plan reviews, and encouraging the mother to engage in regular visitation. The mother, however, frustrated petitioner's efforts by, among other things, insisting that visitation occur in her home, but refusing to allow a home inspection. The mother was not denied effective assistance of counsel.

Matter of Kemari W., 153 AD3d 1667 (4th Dept 2017)

Petitioner Established by Clear and Convincing Evidence That it Made Diligent Efforts

Family Court terminated the parental rights of respondent father with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The father's contention was rejected that reversal was required because petitioner did not comply with the statutory requirement of contacting the child's paternal grandmother and advising her of the pendency of the proceeding and her right to seek to become a foster parent or to seek custody of the child. Even assuming, arguendo, that petitioner failed to fulfill its statutory duty with respect to the child's grandmother, a reversal was not required. The grandmother filed a petition for custody of the child, and the court denied that petition after determining that it was not in the child's best interests for custody to be granted to the grandmother; that determination was not reviewable on the present appeal. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and child. The evidence adduced at the fact-finding hearing established that petitioner, among other things, scheduled regular visitation between the two and referred the father to tailored services designed to address his needs regarding his mental health and parenting skills. Although the father took advantage of some of the services offered by petitioner, petitioner demonstrated that he failed to fully comply with his

service plan inasmuch as he did not regularly attend visitation and refused to engage in mental health treatment. Although the court misstated that the father failed to engage in recommended sex offender treatment, as opposed to the recommended mental health treatment, the misstatement did not warrant reversal.

Matter of Valentina M.S., 154 AD3d 1309 (4th Dept 2017)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. The children were removed from the father's home and placed in foster care after a domestic violence incident when the father was beating his wife and throwing objects, and a diaper bag thrown by the father struck one of the children. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children. Among other things, petitioner conducted service plan reviews and provided supervised visitation with the children until the visits were suspended because of the father's belligerent and threatening behavior during visits. Petitioner also referred the father to parenting and domestic violence programs and to anger management and mental health counseling. Despite those diligent efforts, the father failed to plan for the future of the children. To the extent that the father completed any of the recommended programs or services, he 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 record supported the court's determination that termination of the father's parental rights was in the best interests of the children.

Matter of Brady J.C., 154 AD3d 1325 (4th Dept 2017)

Termination of Parental Rights on Ground of Permanent Neglect Affirmed

Family Court terminated the parental rights of respondent father with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Contrary to the father's contention, the court did not excuse petitioner from its obligation to demonstrate diligent efforts based on the father's incarceration but, rather, excused petitioner on the ground that the court, in a prior order under a separate docket number, had previously determined in accordance with Social Services Law § 358-a (3) (b) that reasonable efforts to make it possible for the child to return safely to his or her home were not required. Although the court's determination was based on a previous determination under a separate docket number, the father's contention was properly before the Court; however, it lacked merit. Petitioner established that the father permanently neglected the child inasmuch as he failed to address successfully the problems that led to the removal of the child and continued to prevent the child's safe return. The father failed to preserve for appellate review his contention that the court erred in failing to grant a suspended judgment. In any event, where, as here, the parent had not made any progress in addressing the issues that led to the child's removal, a suspended judgment was unwarranted.

Matter of Justin T., 154 AD3d 1338 (4th Dept 2017)

Suspended Judgment Properly Revoked

Family Court revoked the suspended judgment issued on behalf of respondent mother and terminated her parental rights with respect to the subject children. The Appellate Division affirmed. If the court determined by a preponderance of the evidence that there had been noncompliance with any of the terms of a suspended judgment, the court could revoke the suspended judgment and terminate parental rights. The mother acknowledged that such failure included repeated positive tests for cocaine. Accordingly, there was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to terminate the mother's parental rights.

Matter of Ireisha P., 154 AD3d 1340 (4th Dept 2017)

Mother's Contacts with Child Merely Sporadic and Insubstantial

Family Court terminated the parental rights of respondent mother with respect to the subject child on the ground of abandonment. The Appellate Division affirmed. A child was deemed to be abandoned where, for the period of six months immediately prior to the filing of the petition for abandonment, a parent evinced an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or petitioner, although able to do so and not prevented or discouraged from doing so by petitioner. The mother admitted in her testimony at the hearing that she had moved to Florida voluntarily after the child was placed in foster care based upon a finding of neglect, that she thereafter had only a single visit with the child, which occurred after the petition was filed, and that her only contacts with the child, the caseworker, or the child's foster parent during the six-month period prior to the filing of the petition were several telephone calls and one birthday gift. Those were merely sporadic and insubstantial contacts. An abandonment petition was not defeated by a showing of sporadic and insubstantial contacts where clear and convincing evidence otherwise supported granting the petition.

Matter of Kaylee Z., 154 AD3d 1341 (4th Dept 2017)

Respondent Father's Parental Rights Properly Terminated on Ground of Mental Illness

Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of mental illness, and declined to rule on whether the father had permanently neglected the children. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the father, by reason of mental illness, was presently and for the foreseeable future unable to provide proper and adequate care for his children. The psychologist who examined the father on petitioner's behalf testified that the father suffered from delusional disorder, paranoid type and persecutory type. The psychologist further testified that, as a result of the

disorder, the father was unable to parent the children effectively, and that the children would be in danger of being harmed or neglected if they were returned to his care at the present time or in the foreseeable future. The father's contention was rejected that the testimony was equivocal with respect to his inability to parent the children. Inasmuch as the psychologist had performed a recent and extensive examination of the father, the fact that some of the records upon which the psychologist relied to form his opinion were older than other records did not render the evidence insufficient to meet petitioner's burden. A separate dispositional hearing was not required following the determination that a parent was unable to care for a child because of mental illness. Because the court properly terminated the father's parental rights based on mental illness, his contention was not addressed that petitioner failed to establish permanent neglect.

Matter of Jason B., 155 AD3d 1575 (4th Dept 2017)

Termination of Father's Parental Interests With Respect to 14-year-old Child Was in Child's Best Interests, Notwithstanding Child's Hesitancy Toward Adoption

Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner properly laid a foundation for those parts of the case file that the court admitted in evidence at the fact-finding hearing through the testimony of its caseworkers and typist, which established that they contemporaneously made those entries in the case file within the scope of their statutory duty to maintain a comprehensive case record for the children containing reports of any transactions or occurrences relevant to their welfare. The court erred in failing to consider the father's hearsay objections to the entries in the case file that contained statements by persons under no business duty to report to petitioner. Nonetheless, even assuming, arguendo, that the court improperly admitted in evidence the entries in the case file that contained hearsay, the error was harmless. The father failed to preserve for review his contention that the court improperly admitted and relied upon evidence that the father was regularly using marihuana after the date of the petition inasmuch as the father failed to object on that ground to the admission of the evidence. Nonetheless, any errors were harmless. Even without reference to such evidence, the record of the fact-finding hearing contained sufficient admissible facts to support the court's permanent neglect finding. Although one of the subject children was over 14 years old and was not prepared to consent to adoption, the desires of a child who was over 14 years old was but one factor to be considered in determining whether termination of parental rights was in the child's best interests. Termination of the father's parental interests with respect to the 14-year-old child was in the child's best interests, notwithstanding his hesitancy toward adoption.

Matter of Cyle F., 155 AD3d 1626 (4th Dept 2017)

Court Properly Revoked Suspended Judgment

Family Court vacated a previously issued suspended judgment and terminated

respondent mother's parental rights to the subject child. The Appellate Division affirmed. The mother's contention that petitioner did not make significant efforts to reunite her with the child was not properly before the Court inasmuch as it was conclusively determined in the prior proceedings to terminate the mother's parental rights. To the extent that the mother contended that her consent to the finding of permanent neglect and the entry of the suspended judgment was not given knowingly, voluntarily, and intelligently, the mother did not move to vacate her admission to having permanently neglected the subject child, and thus, her contention which was raised for the first time on appeal, was not properly before the Court. The court's determination that the mother failed to comply with the terms of the suspended judgment, and that it was in the child's best interests to terminate the mother's parental rights, was supported by the requisite preponderance of the evidence. Although there was some evidence in the record that the mother attempted to comply with the literal terms and conditions of the suspended judgment, the record established that she was unable to overcome the specific problems that led to the removal of the child from her care.

Matter of Kh'niayah D., 155 AD3d 1649 (4th Dept 2017)

Parental Rights of Mother Diagnosed With Antisocial Personality Disorder Properly Terminated

Family Court terminated the parental rights of respondent mother with respect to the subject children on the ground of mental illness. The Appellate Division affirmed. Petitioner demonstrated by clear and convincing evidence that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her children. Petitioner's expert psychologist diagnosed both the mother and the father with antisocial personality disorder (ASPD). According to the expert. ASPD was effectively resistant to treatment, had a very remote chance of being cured, and was characterized by criminal and/or antisocial behavior that suggested a lack of internalization of societal norms and appropriate moral development. The expert opined, to a reasonable degree of clinical certainty and without contradiction, that any child in the care of either the mother or the father would be at imminent risk of harm both in the present and for the foreseeable future. The reliability of the expert's diagnosis and prognosis was underscored by various tragedies that befell other children of these parents. In light of the overwhelming evidence of the mother's mental illness and her resulting inability to parent the subject children adequately, any improperly admitted hearsay was harmless.

Matter of Neveah G., 156 AD3d 1340 (4th Dept 2017)

Respondent Father's Parental Rights Properly Terminated on Grounds of Mental Illness and Intellectual Disability

Family Court terminated the parental rights of respondent father with respect to the subject children on the grounds of mental illness and intellectual disability. The Appellate Division affirmed. The petitioner met its burden of establishing by clear and convincing evidence that the father was presently and for the foreseeable future unable,

by reason of mental illness or intellectual disability, to provide proper and adequate care for the children. The testimony and report of petitioner's expert psychologist established that the father's capacity to care for the children was substantially impaired as the result of both his limited intellectual functioning, and his antisocial personality disorder. The father did not object to the testimony or report of the expert psychologist on the ground that his methods should have been subjected to a *Frye* hearing, and thus the father failed to preserve that contention for appellate review.

Matter of Ayden W., 156 AD3d 1389 (4th Dept 2017)

Suspended Judgment Properly Revoked

Family Court revoked the suspended judgment entered upon respondent mother's admission of permanent neglect and terminated the mother's parental rights with respect to the subject child. The Appellate Division affirmed. The prior order finding permanent neglect and suspending judgment was entered on consent of the parties, and thus it was beyond appellate review. The court properly revoked the suspended judgment and terminated the mother's parental rights. If the court determined by a preponderance of the evidence that there had been noncompliance with any of the terms of a suspended judgment, the court could revoke the suspended judgment and terminate parental rights. The testimony of the case planner assigned to the mother established that he mother was repeatedly discharged from substance abuse treatment and repeatedly failed drug tests. Inasmuch as there was proof that a parent had repeatedly violated significant terms of a suspended judgment, petitioner was not obligated to wait until the end of the period of suspended judgment to seek to revoke the suspended judgment.

Matter of Dah' Marii G., 156 AD3d 1479 (4th Dept 2017)