Office of Attorneys for Children
Appellate Division, Fourth Department

Case Digest 2018

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Plus Select Court of Appeals, Federal and Other Cases of Interest

THIRD DEPARTMENT CASE OF INTEREST

Trial AFC Did Not Provide Effective Assistance Where AFC Should Have Taken a More Active Role

Family Court dismissed the mother's petition to modify a prior order of custody. The Appellate Division reversed and remitted for further proceedings, including a new fact-finding hearing. The mother's petition sought to eliminate the father's scheduled parenting time in favor of an arrangement that would allow the child to visit his father as the child wished. The father appeared at the initial appearance, but did not appear at the scheduled fact-finding hearing. The mother was the only witness to testify at the fact-finding hearing. After conducting a *Lincoln* hearing, the court concluded that the "thin record" failed to support the mother's request for modification. The trial AFC appealed. The appellate AFC argued that the record was not sufficiently developed to allow the court to find that continued parenting time with the father was in the child's best interests, and the trial AFC did not provide effective representation. To effectively represent and protect a child's interests, the AFC's role was twofold: (1) help the child express his or her wishes to the court, and (2) take an active role on the proceedings. By meeting with the child and informing the court that the child did not want to continue visitation as ordered, and by requesting and participating on the *Lincoln* hearing, the trial AFC met the first objective. Given the mother's limited testimony, however, the court understandably characterized the record as "thin." The AFC should have taken a more active role in the proceedings by presenting witnesses that could speak to the child's concerns and/ or conducting a more thorough cross-examination of the mother. During his brief cross-examination of the mother, for example, the trial AFC did not attempt to elicit any further information about his client's behavior and demeanor relative to his visits with the father. Accordingly, the trial AFC did not provide effective assistance.

Matter of Payne v Montano, 166 AD3d 1342 (3d Dept 2018)

FOURTH DEPARTMENT CASES

ATTORNEY FOR CHILDREN

Attorney for Children Fulfilled Responsibilities Pursuant to 22 NYCRR 7.2

Family Court dismissed the article 6 petition. The Appellate Division affirmed and noted that the children's positions with respect to custody were clarified during oral argument of the appeal and that the AFC had fulfilled her responsibilities pursuant to 22 NYCRR 7.2.

Matter of Heidrick v Sherman, 165 AD3d 1630 (4th Dept 2018)

Father's Contention That AFC Was Ineffective Not Properly Before Court

Family Court determined that respondent father neglected one child and derivatively neglected the other three children, and placed them in the custody of petitioner. The Appellate Division dismissed the appeal insofar as it concerned the finding of neglect, and affirmed. The father's contention that the AFC was ineffective was not preserved for review because the father failed to make a motion seeking the AFC's removal. Moreover, the father's contention that the AFC was ineffective because she substituted her judgment for that of the children was based on matters outside the record and was not properly before the Court. There was minimal evidence in the record regarding the AFC's interactions with the subject children, and no evidence with respect to whether the AFC ignored their wishes. The father's further contentions were not reviewable that the court erred in its finding of derivative neglect.

Matter of Daniel K., 166 AD3d 1560 (4th Dept 2018)

ADOPTION

Pursuant to Agreement, Mother's Right to Receive Photographs Was Absolute

Family Court granted the motion of the AFC to dismiss the mother's petitions for visitation and photographs of the children. The Appellate Division modified and remitted. Petitioner mother conditionally surrendered her two children for adoption on October 26, 2010. Pursuant to the post-adoption contact agreement between the mother, the adoptive parents, and the Department of Social Services, the mother could have two supervised visits with the children per year. The mother agreed that she would forfeit her right to such visits should she fail to schedule or attend any two visits for any reason. Independent of the visits, the adoptive parents agreed to send the mother a photograph of each child every spring. The mother also agreed to notify the adoptive parents of any address changes. On February 22, 2016, the mother filed petitions seeking photographs of, and visitation with, the children. The court did not err in granting the AFC's motion with respect to those parts of the petitions seeking visitation with the children inasmuch as the petitions failed to set forth any reason for the mother's failure to schedule and attend visits with the children for several years. The petitions similarly failed to set forth the manner in which the visitation sought was in the children's best interests. However, the court erred in granting the motion with respect to those parts of the petitions seeking photographs of the children. Pursuant to the agreement, the mother's right to receive photographs was absolute.

Matter of the Adoption of Noah W., 158 AD3d 1258 (4th Dept 2018)

Adoptive Parents Properly Permitted to Complete Adoption

Surrogate's Court granted the petition for approval of the adoption of baby Boy O. The Appellate Division affirmed. The determination of the court to permit petitioners, the adoptive parents, to complete the adoption was supported by the record inasmuch as the adoptive parents demonstrated the ability to establish and maintain continuous stable relationships and employment, and the record demonstrated that they were better suited to meet the day-to-day and life-long physical, emotional, and material needs of the child. Respondent biological mother's contention was rejected that the court erred in crediting the expert testimony regarding bonding and attachment disorder. That testimony was not unduly speculative, and the fact that the studies cited by the expert were based on children removed from their biological parents, as opposed to their adoptive parents, was an issue relevant to the weight to be given to the testimony, not its admissibility. Respondent's further contention was rejected concerning the validity of her surrender. The record established that her unambiguous, open-court stipulation that the surrender was voluntary was reduced to an order that provided, among other things, that respondent recognized that her surrender was properly, voluntarily, and knowingly given, without undue pressure and not under duress; and she withdrew any objections which she had made to the manner in which

her surrender was given.

Matter of Baby Boy O., 162 AD3d 1586 (4th Dept 2018)

ASSIGNED COUNSEL ELIGIBILITY

Court Cannot Impute Income to Party in Determining Eligibility For Assigned Counsel

Following the parties' divorce, plaintiff mother was awarded sole legal custody and primary physical residence of the parties' two children. After extensive further proceedings, in 2016, plaintiff moved in Supreme Court for an order that would, among other things, adjudicate defendant father in contempt for his continued disobedience of the court's prior orders, sentence defendant to an appropriate period of incarceration, and modify defendant's supervised visitation to eliminate all rights of visitation and communication with the children. In an appearance before the court, defendant requested that counsel be appointed for him given his status as an unemployed graduate student and his lack of a full-time job. Defendant admitted that his living expenses were next to nothing, except for his car payment and insurance inasmuch as he lived with his parents. The court reserved decision and scheduled a hearing. Thereafter, defendant moved, pursuant to County Law §722, for an order assigning him counsel, supported by, among other things, an affirmation from the public defender affirming that his office evaluated defendant's financial circumstances in determining that he was eligible for assigned counsel. In an order, the court concluded that it had authority to impute income to defendant in determining his eligibility for assigned counsel and that a hearing was required to determine the amount of imputed income. After further proceedings, the court issued an order determining that $50,000 should be imputed to defendant and that he was thus not eligible for assigned counsel. The Appellate Division reversed, defendant's motion for assigned counsel was granted, and the case was remitted for further proceedings before a different justice. The same statutory phrase that is used throughout New York law to designate when a person is entitled to court-appointed counsel -"financially unable to obtain" counsel - evinces that the requisite inquiry must relate to the person's present financial ability to pay for counsel, not an inquiry into the person's potential employment capacity of hypothetical income. Unlike imputation in the context of child support or spousal maintenance, there is no statutory authority for imputing income in determining eligibility for assigned counsel. The omission regarding imputation suggests that the Legislature intended that courts consider an applicant's present financial status only, and not the potential earnings an applicant could or should be receiving in employment commensurate with his or her education and skills. Imputation of income is justified in determining child support and spousal maintenance because the obligation imposed upon the parent or former spouse is ongoing over a period of time and may be paid over that period. The evaluation of eligibility for assigned counsel, however, requires a determination whether a party has presently available financial resources to pay an attorney to fulfill the immediate need for representation.

Carney v Carney, 160 AD3d 218 (4th Dept 2018)

CHILD ABUSE AND NEGLECT

Finding of Neglect Reversed Where Mother's Conduct, Troubling at Times, Did Not Render Child Impaired or in Imminent Danger of Impairment

Family Court adjudged that respondent mother had neglected the subject child. The Appellate Division reversed. Petitioner, the Attorney for the Child, had the statutory authority to file a neglect petition on behalf of the child at the direction of the court. Even assuming, arguendo, that the mother's contention was preserved that the court erred in permitting the AFC to substitute her judgment for that of the child, the AFC's position that the child lacked the capacity for knowing, voluntary and considered judgment was supported by the record. However, the court erred in determining that the mother neglected the child inasmuch as the AFC failed to meet her burden of establishing by a preponderance of the evidence that the child's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired as a consequence of the mother's failure to exercise a minimum degree of care. The statutory test is minimum degree of care - not maximum, not best, not ideal. The court concluded that, "on one hand, the mother may simply be a mother determined to protect her child. On the other hand, she may be a woman determined to cause emotional harm to the father of their child. In either case, the consequence of this course of action *may* be emotional harm to the child" (emphasis added). While the record established that the mother's conduct had been troubling at times, there was no indication in the record that the child was impaired or in imminent danger of impairment of her physical, mental, or emotional condition as a result of any acts committed by the mother.

Matter of Ellie Jo L.H., 158 AD3d 1232 (4th Dept 2018)

Appeal From Temporary Order Removing Children Moot

Family Court granted petitioner's request for the temporary removal of the subject children from the custody of respondent mother. The Appellate Division dismissed. A final order of disposition was entered during the pendency of the appeal, finding that the children were neglected but releasing the children to the mother's custody. The appeal was thus rendered moot. Inasmuch as a temporary order was not a finding of wrongdoing, the exception to the mootness doctrine did not apply.

Matter of Faith B., 158 AD3d 1282 (4th Dept 2018)

Direct Neglect by Excessive Corporal Punishment and Alternative Finding of Derivative Neglect Supported by Preponderance of Evidence

Family Court determined that respondent mother directly neglected her sons, and also found, in the alternative, that the sons were derivatively neglected based on its

conclusion that the mother neglected the sons' half-sister. The Appellate Division modified. The court's finding of direct neglect by excessive corporal punishment with respect to the older son, as well as the half-sister, which was relevant to the alternative finding of derivative neglect, was supported by a preponderance of the evidence adduced at the fact-finding hearing. The half-sister's out-of-court statements that the mother caused her injuries by striking her with a jump rope were sufficiently corroborated by the observations of the school nurse and caseworkers, photographic evidence of the injuries, and the testimony of petitioner's medical expert who reviewed the photographs. In addition, the half-sister's out-of-court statements indicating that the mother inflicted excessive corporal punishment or allowed such harm to be inflicted upon the older son were sufficiently corroborated by the caseworkers' testimony and the photographs of his injuries. The court properly drew the strongest possible negative inference against the mother after she failed to testify at the fact-finding hearing. The court's alternative finding of derivative neglect with respect to both sons was supported by a sound and substantial basis in the record. However, the court erred in finding that the mother neglected the sons by using illegal drugs and engaging in domestic violence in their presence, and by failing to supply them with adequate food, medical care, and education. Those findings were not supported by a preponderance of the evidence.

Matter of Rashawn J., 159 AD3d 1436 (4th Dept 2018)

Court Erred in Determining Petitioner Failed to Make Reasonable Efforts to Prevent Removal of Children, and Further Erred by Ordering Petitioner to Find Foster Home for Respondents' Cat

Respondents consented to the temporary removal of the children and, after a hearing pursuant to Family Court Act Section 1027, Family Court determined, among other things, that the temporary removal of the children while the neglect petition was pending was in the children's best interests based upon respondents' failure to provide adequate nutrition for the children and the uninhabitable condition of respondents' home. The court also determined that petitioner failed to make reasonable efforts to prevent the removal of the children from respondents' custody, and ordered petitioner to find a foster home for respondents' cat. The Appellate Division modified. The court erred in determining that petitioner failed to make reasonable efforts to prevent or eliminate the need for removal of the children from respondents' custody, and the order was modified accordingly. Inasmuch as the record established that respondents were receiving considerable support and assistance during the months prior to the filing of the neglect petition, the court's determination lacked a sound and substantial basis in the record. Respondents were receiving public assistance for their rent, medical care and treatment of the father's mental health issues, as well as assistance buying groceries through the food stamp and WIC programs. In addition, among other things, petitioner provided respondents with a preventive caseworker who met with respondents up to four times per month. The court lacked the authority to order petitioner to find a foster home for respondents' cat, and the order was further modified accordingly.

Matter of Ruth H., 159 AD3d 1487 (4th Dept 2018)

Mother Knew or Should Have Known That Child Either Was Being Beaten by Her Boyfriend or Was in Imminent Danger of Such Harm

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. The evidence adduced by petitioner, including medical records, established that the mother and her boyfriend brought the child to the hospital with significant bruising on the left side of his face, a dark bruise on his right cheek, a missing upper left tooth, and lacerations and bruising on his lips. Among other things, the medical records also established that the evaluating physicians determined that the child's injuries, which included bruising at different stages of healing, were the result of non-accidental trauma and were not consistent with the mother's explanation that such injuries resulted from the child's sleep disturbances. The mother's unsubstantiated speculation that her attorney would have been able to obtain some unidentified medical witness to rebut petitioner's evidence was insufficient to constitute good cause for an adjournment. Petitioner established by a preponderance of the evidence that the mother knew or should have known that the child either was being beaten by her boyfriend or was in imminent danger of such harm. The mother's failure to protect the child from that harm supported the court's finding of neglect against her. Contrary to the mother's contention, the record established that she received meaningful representation.

Matter of Michael S., 159 AD3d 1502 (4th Dept 2018)

Affirmance of Determination That Mother Abused Two Children by Inflicting Injuries with Electrical Cord and Derivatively Abused Third Child

Family Court determined that the mother abused and derivatively abused the subject children. The Appellate Division affirmed. Petitioner met its burden of establishing by a preponderance of the evidence that the mother abused the youngest child by presenting the testimony of its caseworker and an expert nurse practitioner, which established that the youngest child sustained injuries as a result of the mother hitting him with an electrical cord. The nurse practitioner also testified that, based on her experience, the wounds were not accidental and, contrary to the mother's contention, the wounds could not have been caused by another child. The mother's contention was rejected that the court abused its discretion in permitting the nurse practitioner to testify with respect to the cause of the youngest child's injuries. Similarly, the mother's contention was rejected that the court abused its discretion in permitting the caseworker, who had undergone training in identifying injuries and their causes, to give expert testimony that a mark on one of the children raised concerns that the injury was inflicted with a cord or a belt. Petitioner also established by a preponderance of the evidence that the middle child was an abused child by submitting evidence that there were "old-looking" scars on his body, and evidence concerning the mother's conduct

toward the other two children, which supported the inference that the mother caused the scars on the middle child's body. Petitioner established by a preponderance of the evidence that the oldest child was derivatively abused based on the evidence that the mother abused the other two children.

Matter of Deseante L.R., 159 AD3d 1534 (4th Dept 2018)

Court Did Not Err in Admitting Hearsay

Family Court adjudged that respondent mother abused the subject children and placed the mother under petitioner's supervision. The Appellate Division affirmed. The mother's contention was rejected that the court improperly relied on inadmissible hearsay in reaching its determination. The court acknowledged that the out-of-court statements attributed by witnesses to the mother's adult daughter constituted hearsay, but expressly stated in its decision that it had not considered those statements for the truth of the matter asserted therein. The out-of-court statements attributed to the child who allegedly was sexually abused by the mother's boyfriend were sufficiently corroborated under Family Court Act Section 1046 (a) (vi) and therefore were properly considered by the court. The court did not abuse its discretion in qualifying a witness for petitioner as an expert in his capacity as a mental health counselor as well as based on his expertise in the skill of forensic mental health as it pertained to sexual abuse. The court properly considered the witness's history of long observation and actual experience in addition to his academic credentials.

Matter of Aliyah M., 159 AD3d 1564 (4th Dept 2018)

Father Abused Younger Child and Derivatively Abused Older Child

Family Court determined that respondents mother and father abused their three-month-old child and derivatively abused their two-year-old chid. The Appellate Division affirmed. The evidence was legally sufficient to support the court's findings with respect to the younger child. The physician's testimony that the younger child had a fractured humerus and rib, and that the explanation offered by respondents for those injuries was inconsistent with the nature and severity of the injuries, established a prima facie case of child abuse and the father failed to rebut the presumption of parental responsibility. Moreover, petitioner was not required to establish whether it was the mother or the father who inflicted the injuries.

Matter of Tyree B., 160 AD3d 1389 (4th Dept 2018)

Challenge to Neglect Finding Not Reviewable

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division dismissed the appeal. The mother's challenge to the finding of

neglect was not reviewable on appeal because it was premised upon the mother's admission and thus was made in an order entered upon consent. Moreover, the mother moved to vacate the finding of neglect or withdraw her consent and thus her contention that her consent was not knowing, intelligent, and voluntary was not properly before the Appellate Division.

Matter of Jenessa L. M., 160 AD3d 1434 (4th Dept 2018)

Father Neglected Children by Firing Firearm in Apartment With Children Present

Family Court granted petitioner's motion for summary judgment, determining that respondent father neglected the subject children. The Appellate Division affirmed. The contentions in the father's brief were raised for the first time on appeal and, therefore, were not properly before the Court. In any event, they lacked merit. Petitioner moved for summary judgement following the father's conviction of criminal possession of a weapon in the second degree and five counts of endangering the welfare of a child, stemming from a physical altercation between the father and mother during which a loaded firearm was fired inside the apartment with the children present. Petitioner presented sufficient evidence that the children were in actual or imminent danger of physical, emotional, or mental impairment as a result of the father's failure to exercise a minimum degree of care. The father did not submit any opposition to petitioner's prima facie showing and therefore failed to raise a triable issue of fact.

Matter of Takoda G, 161 AD3d 1574 (4th Dept 2018)

No Error in Continuing Child's Placement in Foster Care

Family Court adjudicated that respondent father neglected the subject child. The Appellate Division dismissed the appeal insofar as it concerned the finding of neglect, and affirmed. Petitioner commenced the neglect proceeding alleging, among other things, that the father neglected the subject child by failing to protect the child after the child disclosed that he had been sexually abused by the paternal grandfather. Despite having been directed by police detectives and DCFS staff to ensure that the child had no contact with the grandfather while the investigation was pending, the father allowed the child to stay at the grandfather's house for two days, and the child was found sleeping in the grandfather's bed. The father's challenge to the underlying finding of neglect was not reviewable because it was premised on his admission of neglect and thereby made in an order entered on the consent of the father. The father never moved to vacate the finding of neglect or to withdraw his consent to the order, and thus his challenge to the factual sufficiency of his admission was not properly before the Court. Therefore, the appeal was dismissed to that extent. The father's further contention was rejected that the court erred in continuing the child's placement in foster care when the child could have been returned home safely with an order of protection. Although the evidence at the hearing established that the father received sexual abuse education and counseling, and that he completed domestic violence classes, it further established

that he had made little progress in overcoming the specific problems which led to the removal of the child. Therefore, the court's determination was supported by the record and there was no need to disturb it.

Matter of Caiden G., 162 AD3d 1497 (4th Dept 2018)

Family Court Properly Determined that Respondent Derivatively Neglected His Newborn Son

Family Court determined that respondent father derivatively neglected his newborn son. The Appellate Division affirmed. The court's determination was based on, among other things, the father's sexual abuse of a child, which resulted in an abuse adjudication. There was no reason to believe that the father's proclivity for sexual abuse had changed, nor was there any indication the father had addressed the issues that led to the prior adjudication of his sexual abuse of a child. Therefore, there was no reason to disturb the court's finding of neglect. Inasmuch as petitioner made out a prima facie case of derivative neglect, the father's further contention was rejected that the court erred in denying his motion to dismiss at the close of petitioner's case.

Matter of Sean P., 162 AD3d 1520 (4th Dept 2018)

Affirmance of Findings of Sexual Abuse and Derivative Neglect

Family Court determined that respondent sexually abused a seven-year-old girl (victim) for whom he acted as a parent substitute, and derivatively neglected the victim's two siblings who resided in the same household. The court also determined that respondent derivatively neglected his biological daughter, who was born after the filing of the petition pertaining to the victim and her siblings. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that respondent sexually abused the victim. A child's out-of-court statements could form the basis for a finding of abuse as long as they were sufficiently corroborated by any other evidence tending to support their reliability. The victim told two of her teachers about the abuse, as well as her sister and a police investigator. Although there may have been minor inconsistencies in her various statements, the victim did not waver in her description of how respondent sexually abused her, where it happened and when it happened. The victim's allegation that respondent put his penis in her anus was corroborated by the medical evidence, which established that the victim had anal bruising and redness. That allegation was also corroborated in part by respondent's statement to police. Although respondent denied having any sexual contact with the victim, he acknowledged that he was alone in a bedroom with the victim on the date in question, and he said that his hair might had inadvertently come into contact with the victim's vagina. Moreover, because respondent did not testify at the fact-finding hearing, the court was entitled to draw the strongest possible inference against him. Respondent's sexual abuse of the victim established that there were fundamental flaws in his

understanding of the duties of parenthood justifying the finding that he derivatively neglected the subject children.

Matter of David C., 162 AD3d 1648 (4th Dept 2018)

Order Modified Where Subject Child "Presumably Present" When Father Engaged in Pattern of Domestic Violence

In two related child protective proceedings, Family Court determined that respondent father neglected the older subject child, and derivatively neglected the younger subject child. The Appellate Division modified. Petitioner failed to establish by a preponderance of the evidence that the father neglected the older child on the ground that he engaged in misconduct constituting a pattern of domestic violence when the child was "presumably present." That order was modified accordingly. However, petitioner established by a preponderance of the evidence that the father neglected the older child based on the father's long-standing history of mental illness and erratic and aggressive behavior. Petitioner met its initial burden of establishing derivative neglect with respect to the younger child. The court properly determined that petitioner's submissions established an impairment of the father's parental judgment to the point that it created a substantial risk of harm for any child left in the father's care, and that the determination that the father neglected the older child was sufficiently proximate in time to support a reasonable conclusion that the problematic conditions continued to exist. Therefore, the court properly granted petitioner's motion for summary judgment on the petition alleging that the father derivatively neglected his younger child.

Matter of Raven F., 162 AD3d 1699 (4th Dept 2018)

Finding of Neglect Affirmed Where Children Left Alone in Home and Respondents Did Not Return for More Than 24 Hours

Family Court determined that respondent father neglected the subject children. The Appellate Division affirmed. The court's determination was supported by a preponderance of the evidence. The testimony presented at the fact-finding hearing established that the father suffered from untreated posttraumatic stress and substance abuse disorders. On one occasion, the father returned home after drinking liquor and beer and displayed increasingly erratic behavior in the presence of the children. The father engaged in a verbal altercation with respondent mother, which became physical, and he threw his phone into a fire that he had started in the backyard. The father then left the home with the mother, leaving the children alone in the home, and they did not return for more than 24 hours. The children became afraid when respondents did not return home or contact them after so many hours had passed. The children had no way to contact respondents, and respondents never checked in on the children or had another adult do so. The children eventually contacted their older sister through Facebook, and then waited two hours for her to travel from Utica to their home in

Wayne County. The children's older sibling called 911 and reported respondents as missing persons and the police responded to the residence, where the children had been alone for approximately 20 hours. Meanwhile, respondents drove past the house while police cars were parked outside and chose not to return home for another four hours. The children's proximity to the domestic violence between respondents, combined with the father's failure to address his mental health and substance abuse issues and respondents' failure to provide adequate supervision, placed the children in imminent danger of physical, emotional or mental impairment. The out-of-court statements of the children were sufficiently corroborated by the father's testimony as well as the testimony of the police officers who responded to the 911 call, and there was sufficient cross-corroboration of each child's statement with the statements of the other children.

Matter of Ricky A., 162 AD3d 1747 (4th Dept 2018)

Court Lacked Authority to Compel Participation of Child Who Waived His Right to Participate in Permanency Hearing After Consultation With His Attorney

Family Court directed the subject child to be present for any permanency hearing. The Appellate Division reversed and vacated those paragraphs ordering the child to be present at the hearing. The child was freed for adoption in 2014. A permanency hearing was scheduled for March 30, 2017, and the notice of the hearing was provided to the child, who was then 14 years old. One week before the scheduled hearing date, the Attorney for the Child filed a form indicating that the child, after consultation with the AFC, waived his right to participate in the hearing. The AFC appeared at the hearing on the child's behalf and reiterated that the child had waived his right to participate in the hearing. The court stated, however, that it was "required by law to have some communication" with the child, and that the child would therefore be required to appear at the next scheduled hearing date. The AFC objected; the court overruled the objection and directed the child to "be present, either in person or electronically." After two adjournments, the permanency hearing resumed on May 11, 2017, and the child appeared by telephone. The hearing concluded on that date. While the appeal was moot inasmuch as the permanency hearing had concluded, an exception to the mootness doctrine applied because the issue was likely to recur, typically evaded review and raised a significant question not previously determined. The AFC was correct in the assertion that the court lacked the authority to compel the child to be present at the permanency hearing. The statutory language was clear and unambiguous. Although the permanency hearing must include an age appropriate consultation with the child (Family Ct Act Section 1090-a [a] [1]), that requirement may not be construed to compel a child who did not wish to participate in his or her permanency hearing to do so. Section 1090-a [g]. The choice belonged to the child. Indeed, a child age fourteen and older shall be permitted to participate in person in all or any portion of his or her permanency hearing in which he or she chooses to participate. Section 1090-a [b] [1]. Moreover, a child who has chosen to participate in his or her permanency hearing shall choose the manner in which he or she shall

participate, which may include participation in person, by telephone or available electronic means, or the issuance of a written statement to the court. Section 1090-a [c]. Although the court may limit the participation of a child under the age of 14 based on the best interests of the child (*see* Section 1090-a [a] [3]; [b] [2]), the court lacked the authority to compel the participation of a child who has waived his or her right to participate in a permanency hearing after consultation with his or her attorney. *See* Section 1090-a [a] [2]; [g].

Matter of Shawn S., 163 AD3d 31 (4th Dept 2018)

Evidence Sufficient to Establish Causal Connection Between Mother's Failure to Treat Her Mental Illness and Actual or Potential Harm to Child

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division affirmed. The mother's contention was rejected that the court erred in granting petitioner access to her mental health records. A party's mental health records were subject to discovery where that party had placed his or her mental health at issue. The mother had refused to authorize disclosure of the mental health records, which made it impossible to assess whether she was compliant with her prescribed mental health treatment. Indeed, the paramount issue in the case was the mother's mental health and its alleged impact upon the subject child which required an assessment of the mother's mental health. Thus, the court properly disclosed the records. However, certain records were improperly admitted in evidence inasmuch as the records were certified by someone other than the head of the hospital or agency and were not accompanied by a photocopy of a delegation of authority signed by both the head of the hospital or agency and by such other employee. Nonetheless, such error was harmless. A respondent's mental condition could form the basis of a finding of neglect if it was shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child. Multiple witnesses testified that the mother had not been taking her medications as prescribed, and the mother testified that she had experienced at least two nervous breakdowns and had contracted "brain fever" from the spread of a sexually transmitted disease, which resulted in epilepsy-type symptoms. The court also heard testimony about the mother's troubling behaviors, including her tendency to disassociate and become non-communicative for days at a time and her habit of staring off into space for significant periods of time. The incident that gave rise to the investigation, which involved the mother pounding on the floors of her apartment with a hammer because she thought that the child could hear the downstairs neighbors saying inappropriate things, scared the child to such a degree that he hid inside a cat crate with a blanket over it so that he could not be seen. Accordingly, the evidence was sufficient to establish a causal connection between the mother's failure to treat her mental illness and actual or potential harm to the child.

Matter of Lyndon S., 163 AD3d 1432 (4th Dept 2018)

Summary Judgment Properly Granted on Petition Alleging Severe Abuse and Neglect

Family Court granted petitioner's motion for summary judgment and determined that the mother's paramour abused, severely abused, and neglected the subject children. The Appellate Division affirmed. Respondent was convicted of, among other things, rape in the first degree and sexual abuse in the first degree in connection with sexual contact with one of the subject children and the subject children's 16-year-old sister. On its motion for summary judgment, petitioner met its burden to show that respondent was a person legally responsible for the children by submitting the hearsay statements of the children and their sister, along with respondent's admissions. Respondent received effective assistance of counsel.

Matter of Celeste S., 164 AD3d 1605 (4th Dept 2018)

Affirmance of Determination of Mother's Derivative Neglect

Family Court adjudged that respondent parents derivatively neglected the subject child. The Appellate Division affirmed. Petitioner established that the neglect of the child's older siblings was so proximate in time to the derivative neglect proceeding that it could reasonably be concluded that the condition still existed and the mother failed to address the problems that led to the prior neglect findings. Those findings were based in part on domestic violence in the home and unstable and unsuitable housing arrangements. The evidence at the hearing established that those conditions were unresolved on the date the instant petition was filed. In addition to several instances of domestic violence during the relevant period, a caseworker testified that during a visit to the father's home there was an overwhelming smell of a dead animal. The mother was not denied effective assistance of counsel.

Matter of Carmela H., 164 AD3d 1607 (4th Dept 2018)

Neglect Adjudication Not Supported by Preponderance of Evidence

Family Court adjudged that the subject children were neglected by respondent mother and placed her under the supervision of petitioner for 12 months. The Appellate Division reversed and dismissed the petition. The court's finding of neglect was not supported by a preponderance of the evidence. Petitioner alleged that the children were in imminent danger of impairment as the result of the mother's mental illness. The court determined that the mother neglected the children by failing to feed them, but the only evidence of that danger was the uncorroborated out-of-court statement of one of the children. Although the mother failed to preserve her contention that the court erred in relying on the child's uncorroborated statement, the Appellate Division reviewed it in the interests of justice. Because the statement was uncorroborated, the court erred in relying upon it to conclude neglect occurred. The court's further determination that the

mother stopped taking her medications and without them she could rapidly deteriorate and endanger the children was belied by the only witness to testify on the issue. The mother's counselor testified that the mother had been properly weaned off the medications because they were impeding her functionality, and that the mother's ability to parent increased after the mother successfully stopped taking the medications.

Matter of Chance C., 165 AD3d 1593 (4th Dept 2018)

Father Testing Positive For Drugs on One Occasion Insufficient to Establish Neglect

Family Court found that respondent father neglected the subject child by misuse of drugs. The Appellate Division reversed and dismissed the amended petition. The court's finding of neglect was not supported by a preponderance of the evidence. Petitioner submitted evidence that the father tested positive for THC, Oxycodone, and opiates on one occasion, which was insufficient to establish that the father repeatedly misused drugs. The father's admission to using marijuana was also insufficient to meet petitioner's burden without evidence about the duration, frequency, or repetitiveness of his drug use, or whether he was ever under the influence of drugs while in the presence of the subject child.

Matter of Bentley C., 165 AD3d 1629 (4th Dept 2018)

Neglect Adjudication Not Supported by Preponderance of Evidence

Family Court adjudged that respondent parents neglected the subject children. The Appellate Division reversed and dismissed the amended petitions. The court's finding of neglect was not supported by a preponderance of the evidence that the children's physical, mental or emotional conditions had been impaired. Although the evidence established that respondents used illicit drugs, the mere use of illicit drugs was insufficient to support the finding of neglect. There was no evidence in the record as to the duration or frequency of respondents' drug use. Petitioner failed to produce any evidence that respondents used drugs in the presence of the children and, although the younger child suffered two accidents, each of which resulted in a fractured wrist, petitioner offered no evidence that respondents were using drugs at the time of the accidents, and respondents' innocent explanations for the accidents were uncontroverted.

Matter of Delainie S., 165 AD3d 1639 (4th Dept 2018)

No Error in Allowing AFC to Present Evidence After In-Camera Hearing

Family Court adjudged that respondent father neglected the subject children. The Appellate Division affirmed. The court did not err in allowing the AFC to present

additional evidence after the in camera hearing inasmuch as the AFC had not rested. In any event, even if the AFC had rested, the court did not abuse its discretion in allowing the AFC to reopen her case. Because the father raised no objection to the in camera procedures, the Appellate Division did not review his contention that he was denied due process when the court conducted an in camera interview of one of the children outside the presence of the father and his counsel.

Matter of Christian W., 166 AD3d 1530 (4th Dept 2018)

Appeals Dismissed From Orders Denying Motions to Preclude Testimony, Quash Subpoenas

Family Court denied respondent mother's motions to preclude testimony from certain witnesses and to quash the subpoenas issued by petitioner for those witnesses to testify at a hearing in a proceeding pursuant to Family Court Act Article 10. The Appellate Division dismissed the appeals. Any right of direct appeal from the orders terminated with the entry of the order of disposition, from which no appeal was taken.

Matter of Janette G., 166 AD3d 1544 (4th Dept 2018)

Petitioner's Inability to Pinpoint Time and Date of Each Injury and Link It to Particular Parent Not Fatal to Establishment of Prima Facie Case of Abuse

Family Court determined that respondent father had neglected and abused the subject child. The Appellate Division affirmed. Petitioner established a prima facie case of abuse by submitting proof of injuries sustained by the child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent, i.e., multiple fractured ribs in various stages of healing. Petitioner's inability to pinpoint the time and date of each injury and link it to a particular parent was not fatal to the establishment of a prima facie case of abuse. The presumption of culpability created by Family Court Act Section 1046 (a) (ii) extended to all of a child's caregivers, especially when they were few and well defined. The father failed to rebut the presumption that he, as one of the child's parents, was responsible for her injuries. The father was not aggrieved by, and thus cannot challenge, the court's dismissal of the petition against the mother.

Matter of Avianna M.-G., ___ AD3d ___ (4th Dept 2018) 2018 WL 6714192

Appeal From Denial of Application for Return of Child Became Moot at Point Decision Made in Charges of Neglect

Family Court denied respondent mother's Family Court Act Section 1028 application seeking the return of the subject children. The Appellate Division dismissed the appeal as moot. A final order of disposition was entered during the pendency of the appeal,

finding that the children were neglected and placing them in petitioner's custody. An appeal from a denial of an application for return of a child removed as a result of the initiation of a proceeding pursuant to Family Court Act article 10 became moot at the point a decision was made in the charges of neglect or abuse. Inasmuch as a temporary order of removal was not a finding of wrongdoing, the exception to the mootness doctrine did not apply.

Matter of Nickolas B., ___ AD3d ___ (4th Dept 2018) 2018 WL 6714351

Appeal From Order Awarding Temporary Custody Rendered Moot by Subsequent Finding of Neglect

Family Court awarded temporary custody of respondent mother's son to the son's biological father while she was incarcerated. The Appellate Division dismissed respondent's appeal. A finding of neglect and final dispositional order was entered during the pendency of the appeal. An appeal from a temporary order was rendered moot by Family Court's subsequent finding of neglect and issuance of a final dispositional order. Inasmuch as a temporary order was not a finding of wrongdoing, the exception to the mootness doctrine did not apply.

Matter of Keon D.W., ___ AD3d ___ (4th Dept 2018) 2018 WL 6715043

CHILD SUPPORT

Appeal From Order Revoking Suspended Sentence and Committing Respondent to Jail Moot

Family Court revoked a suspended sentence imposed for respondent's admitted willful violation of a child support order and committed him to jail for 90 days. The Appellate Division dismissed. Inasmuch as respondent conceded that he had served his sentence, the appeal was moot. Respondent's contention was rejected that the appeal was not moot because a finding of contempt and willful violation could have significant collateral consequences for him, inasmuch as he did not appeal from the order finding him in willful violation of the order requiring him to pay child support.

Matter of McGrath v Healey, 158 AD3d 1069 (4th Dept 2018)

Determination That Respondent Willfully Violated Prior Order Affirmed

Family Court confirmed the Support Magistrate's determination that respondent father willfully violated a prior order to pay child support for the parties' children and conditionally sentenced him to six months in jail if the adjudged child support arrearage was not satisfied within a stated period of time. The Appellate Division affirmed. Petitioner mother established that the father willfully violated the prior order by presenting evidence that the father had not made any of the required child support payments, and the father failed to offer any medical evidence to substantiate his claim that his disability prevented him from making any of the required payments. The fact that the father was receiving Social Security benefits did not preclude a finding that he was capable of working where, as here, his claimed inability to work was not supported by the requisite medical evidence.

Matter of Hwang v Tam, 158 AD3d 1216 (4th Dept 2018)

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

Family Court confirmed the Support Magistrate's determination that respondent father had willfully violated a prior child support order and directed that the father be incarcerated for a period of six months. The Appellate Division reversed and remitted. At the confirmation hearing, the mother testified that she was agreeable to a resolution whereby the father, who owed approximately $26,000 in arrears, would make a $3,000 child support payment to the mother that morning; he would make the required future monthly child support payments from the construction job he had recently acquired; and he would receive a suspended sentence of incarceration. The court erred in refusing to allow the parties to enter into the settlement agreement. Stipulations of settlement were favored by the courts and not lightly cast aside.

Matter of Soldato v Feketa, 158 AD3d 1303 (4th Dept 2018)

Petitioner Established Respondent Willfully Violated Order of Support

Family Court denied the objections of respondent mother to the order of the Support Magistrate. The Appellate Division affirmed. The mother's contention was rejected that petitioner failed to establish that she willfully violated the order of support. Petitioner presented evidence that the mother failed to pay child support as ordered, which constituted prima facie evidence of a willful violation. The burden then shifted to the mother to present some competent, credible evidence of her inability to make the required payments. The mother failed to meet that burden because she failed to present evidence that she made reasonable efforts to obtain gainful employment. The mother testified that her only sources of income were food stamps and Medicaid benefits, and that she could not work as a result of a medical disability. The Support Magistrate, however, found that the mother's explanation was totally lacking in credibility. The Support Magistrate was in the best position to evaluate the mother's credibility, and her determination was entitled to great deference. Furthermore, the record established that the mother failed to submit competent medical evidence to substantiate her claim that she was unable to work because of a disability.

Matter of Wayne County Dept. of Social Servs. v Loren, 159 AD3d 1504 (4th Dept 2018)

Error to Dismiss Father's Petition to Modify New Jersey Child Support Order

Family Court denied petitioner father's objections to the order of the Support Magistrate dismissing his petition to modify a New Jersey child support order. The Appellate Division reversed. Although the New Jersey child support order was registered in New York, the father was the petitioner and he was a resident of New York. Therefore, under the Uniform Interstate Family Support Act ([UIFSA] Family Court Act article 5-B), the father could not properly bring the petition for modification of the New Jersey child support order in New York. The father could, however, properly bring the petition for modification in New York under the Full Faith and Credit for Child Support Orders Act ([FFCCSOA] 28 USC Section 1738B. Neither the parties nor the child continued to reside in New Jersey, and New Jersey therefore ceased to have continuing, exclusive jurisdiction. Although the UIFSA and the FFCCSOA had complementary policy goals and should be read in tandem, the UIFSA and the FFCCSOA conflicted when applied to these facts, and the FFCCSOA preempted the UIFSA.

Matter of Reynolds v Evans, 159 AD3d 1562 (4th Dept 2018)

Father Properly Relieved of Support Obligation

Family Court granted the father's petition seeking modification of his child support

obligation. The Appellate Division affirmed. The AFC appealed from an order granting the petition of the father to be relieved of his child support obligation with respect to his daughter. While the evidence failed to establish that the mother deliberately interfered with visitation or otherwise contributed to the breakdown in the father-daughter relationship, the court nevertheless properly relieved the father of his obligation to support the daughter on the ground that the daughter, by her conduct, forfeited her right to support. The daughter, who was 17 when the proceeding was commenced and 18 when it concluded, was of employable age and the record did not support the conclusion that the daughter was justified in refusing all contact with the father based upon his conduct. The father made consistent efforts to establish a relationship with the daughter, but those efforts were rebuffed.

Matter of Jones v Jones, 160 AD3d 1428 (4th Dept 2018)

Lack of Findings Necessitated Remittal

Family Court reversed and vacated the order of the Support Magistrate. The Appellate Division reversed and remitted the matter to the court. The father commenced this proceeding seeking to terminate his child support obligation. After a hearing, the Support Magistrate granted the petition in part by eliminating the basic child support obligation because it was unjust and/or inappropriate; ordered the father to continue providing health care insurance for the children; and ordered the father to pay his pro rata share of unreimbursed medical expenses. Upon the mother's objections, the court reversed and vacated the order of the Support Magistrate, without making the required findings of fact to support the determination. The case was therefore remitted to the court to review the mother's objections to the Support Magistrate's determination in accordance with the Family Court Act.

Matter of Humbert v Humbert, 160 AD3d 1481 (4th Dept 2018)

Court Erred in Calculating and Setting the Retroactive Date of Defendant's Net Child Support Obligation

Supreme Court ordered defendant father to pay plaintiff mother child support and maintenance. The Appellate Division modified. One of the children resided with defendant, and the other resided with plaintiff. Pursuant to the amendment to Domestic Relations Law Section 240, which was effective prior to entry of the judgment, including in plaintiff's income the amount of spousal maintenance to be paid to her for purposes of calculating child support resulted in a net child support obligation payable from defendant to plaintiff of $57 per week. Upon termination of defendant's spousal maintenance obligation, his child support obligation must be adjusted to $151 per week. Therefore, the judgment was modified accordingly. The court erred in ordering child support retroactive to the date that plaintiff filed her summons with notice requesting such relief inasmuch as the parties' daughter did not live with plaintiff at that time.

Instead, plaintiff was entitled to child support retroactive to November 2013, when the daughter began living with her. Accordingly, the judgment was further modified.

Murray v Murray, 162 AD3d 1494 (4th Dept 2018)

Court Properly Denied Father's Petition for Downward Modification of Child Support

Family Court denied the objection of petitioner father to an order of the Support Magistrate that dismissed the father's petition with prejudice. The Appellate Division affirmed. The father sought a downward modification of his child support obligation. 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, where, among other things, there had been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted. Although the father's income decreased by more than 15% after he was laid off from his job as a nuclear power plant contractor in May 2016, he failed to establish his entitlement to relief under the statute because the change did not occur since the time that the parties' judgment of divorce was entered in August 2016. In any event, the father also failed to establish that his reduced income was involuntary. The record demonstrated that the father had no intention of returning to his occupation and made minimal efforts to secure employment commensurate with his education, ability and experience, as required under Section 451 (3) (b) (ii). Instead, the father intended to work on the family farm, despite the fact that it was not profitable for him to do so. Similarly, the father also failed to establish his entitlement to a downward modification of child support under the nonstatutory change in circumstances standard.

Matter of Gratton v Gratton, 162 AD3d 1502 (4th Dept 2018)

Court Erred in Sustaining Father's Objection to Determination That He Violated Separation Agreement by Failing to Contribute to Daughter's College Costs

Family Court denied petitioner mother's objections to an order of the Support Magistrate, granted, in part, the objections of respondent father, vacated an order of disposition entered in 2016 (2016 order), and dismissed the mother's violation petition. The Appellate Division modified and remitted. The court erred in sustaining the father's objection to the determination in the 2016 order that he violated the separation agreement by failing to contribute to his daughter's educational costs. The father's specific commitment to pay for tuition expenses during the four years following graduation from high school controlled over the more general list of termination events, which included the parties' agreement to consult with each other and the children with respect to the daughter's choice of college. The evidence in the record did not support the court's conclusion that the father's agreement to contribute to his daughter's college expenses was conditioned on him being consulted regarding her choice of college. To

the contrary, the parties' separation agreement did not require that they agree upon a choice of college, nor did it condition either party's duty to contribute to college expenses upon such consultation. In addition, the Support Magistrate noted during argument concerning the 2016 order that the court had previously determined that the father was obligated to pay a percentage of college expenses, and the father's attorney conceded that issue. Therefore, the order was modified by denying the salient part of the father's objection, reinstating the mother's violation petition, and reinstating the 2016 order insofar as it determined that the father violated his obligation to contribute to the daughter's college expenses.

Matter of Wheeler v Wheeler, 162 AD3d 1517 (4th Dept 2018)

Court Erred in Denying Mother's Objections to That Part of Order of Support Magistrate That Deviated From Presumptive Child Support Obligation

Family Court denied petitioner mother's objections to that part of an order of the Support Magistrate deviating from the presumptive child support obligation. The Appellate Division reversed, granted the mother's objection in part, granted the petition to the extent that the father was directed to pay child support in the amount of $172 per week retroactive to January 22, 2015, and remitted for the court to calculate the amount of arrears owed to the mother. In a shared custody arrangement with the mother as the primary custodial parent, the Support Magistrate erred in determining that the child was spending a sufficient amount of time with the father to warrant a downward deviation from the presumptive support obligation inasmuch as that determination was merely another way of improperly applying the proportional offset method explicitly rejected by the Court of Appeals. Further, to the extent that the Support Magistrate relied upon the factors in Family Court Act Section 413 (1) (f) in deviating from the presumptive support obligation, the determination lacked support in the record. The costs of providing suitable housing, clothing and food for a child during custodial periods did not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount. Thus, the father's testimony that he incurred household expenses for the benefit of the child in the form of housing, food, clothing, and certain activities did not establish that he incurred any extraordinary expenses that would warrant a deviation from the presumptive support obligation. To the extent that the Support Magistrate determined that the mother's expenses were substantially reduced as a result of the father's expenses incurred during extended visitation, there was no support in the record for that determination. The Support Magistrate's determination that a deviation was justified given the non-monetary contributions that the parents will make toward the care and well-being of the child also was unsupported by the record.

Matter of Jerrett v Jerrett, 162 AD3d 1715 (4th Dept 2018)

Speedy Trial Best Remedy for Any Claimed Inequity in Awards of Temporary Child Support

Supreme Court entered a temporary order that directed defendant father to pay a basic monthly amount of child support and to contribute to the statutory add-on expenses. The Appellate Division affirmed. The best remedy for any claimed inequity in awards of temporary alimony, child support or maintenance was a speedy trial. Absent compelling circumstances, parties to a matrimonial action should not seek review of an order for temporary support. Plaintiff mother failed to allege the existence of compelling circumstances warranting a review of the award of pendente lite child support.

Baxter v Baxter, 162 AD3d 1743 (4th Dept 2018)

Downward Modification Properly Granted

Family Court denied the mother's objections to an order of the Support Magistrate directing a downward modification of the child support obligation of petitioner father. The Appellate Division affirmed. The father established a substantial change in circumstances by establishing that he was terminated from his job through no fault of his own and that he diligently sought re-employment. He testified that he was terminated from employment because management disagreed with his decision to purchase a digital printing press and that he applied for more than 300 jobs in several states over a 19-month period. He ultimately accepted a position that paid less than one-fourth of his prior salary. The Support Magistrate properly applied the CSSA and set forth the relevant statutory factors and reasons why it was unjust and inappropriate to require the father to pay his presumptive obligation.

Matter of Fanizzi v Delforte-Fanizzi, 164 AD3d 1653 (4th Dept 2018)

Subjective Complaints of Disability Insufficient to Show Support Order Not Willfully Violated

Family Court confirmed the determination of the Support Magistrate that respondent mother willfully violated a prior support order and awarded petitioner father a judgment for support arrears. The Appellate Division affirmed. It was undisputed that the mother failed to pay her child support obligation and she failed to meet her burden to submit evidence of her inability to make the required payments. Although the mother presented some evidence of medical conditions that allegedly disabled her from work, her medical records indicated that the diagnoses were based solely upon the mother's subjective complaints, rather than objective testing. Moreover, the mother did not seek treatment for her alleged conditions until shortly after the father filed a violation petition, and she had testified previously that she did not intend to work because her paramour would support her. The court did not err in refusing to cap her unpaid child support arrears at $500. Although the mother received public assistance, circumstantial evidence suggested that she had access to, and received, financial assistance from her paramour.

Matter of Mandile v Deshotel, 166 AD3d 1511 (4th Dept 2018)

Reversal of Order Awarding Upward Modification

Supreme Court granted plaintiff mother's motion seeking an upward modification of defendant father's child support obligation. The Appellate Division reversed, vacated the award of child support, and remitted for a new hearing. Plaintiff alleged that she was no longer able to work due to injuries she sustained in an automobile accident and sought, among other things, child support from defendant. At the hearing on plaintiff's motion, the court, over defendant's objection, admitted in evidence two documents prepared by plaintiff's physician to show that plaintiff was temporarily totally disabled. That was error. Plaintiff failed to lay a proper foundation for the admission of those documents. Without those documents, plaintiff failed to meet her burden of establishing a substantial change in circumstances sufficient to warrant an upward modification of child support inasmuch as she did not provide competent medical evidence of her disability or establish that her alleged disability rendered her unable to work.

Jennings v Domagala, ___ AD3d ___ (4th Dept 2018) 2018 WL 6715079

CUSTODY AND VISITATION

Grandmother's Visitation Properly Terminated

Family Court dismissed the maternal grandmother's petition for modification of a prior order of visitation, and granted respondent father's petition terminating the grandmother's visitation. The Appellate Division affirmed. The court properly determined that it was not in the children's best interests to continue visitation with the grandmother. The record supported the court's determination that a change of circumstances had occurred and that it was in the best interests of the children to terminate the grandmother's visitation in view of, among other things, the lack of contact between the grandmother and the children for at least 10 years.

Matter of Tinucci v Voltra, 158 AD3d 1075 (4th Dept 2018)

Daughter's Out-of-Court Statements Describing Her Alleged Sexual Abuse by Mother's Boyfriend Sufficiently Corroborated

Family Court modified a prior custody order by awarding petitioner father primary physical custody of the parties' daughter, with supervised visitation to the mother. The Appellate Division affirmed. The court did not abuse its discretion in determining that the daughter's out-of-court statements describing her alleged sexual abuse by the mother's boyfriend were sufficiently corroborated. Corroboration was provided by the daughter's age-inappropriate knowledge of sexual conduct, which demonstrated specific knowledge of sexual activity. Moreover, the daughter's statements described unique sexual conduct that the boyfriend engaged in with the daughter, and the father submitting evidence that the mother and her boyfriend had admitted that the boyfriend engaged in such conduct with the mother during their sexual relations. The court's determination to award primary physical custody to the father with supervised visitation to the mother was supported by a sound and substantial basis in the record.

Matter of William J.B. v Dayna L.S., 158 AD3d 1223 (4th Dept 2018)

Court Did Not Abuse Its Discretion in Dismissing Petitions Sua Sponte

Family Court dismissed the father's petitions seeking to modify the parties' existing order of custody and visitation. The Appellate Division affirmed. The court did not abuse its discretion in sua sponte dismissing the respective petitions without conducting a hearing. A hearing was not automatically required whenever a parent sought modification of a custody or visitation order, and the father failed to make a sufficient evidentiary showing with respect to either petition. The court did not err in modifying the existing order as a matter of law, without a hearing on the second petition, to eliminate a provision that improperly delegated decision-making authority with respect to visitation to one of the children's counselors.

Matter of Gworek v Gworek, 158 AD3d 1304 (4th Dept 2018)

Deterioration of Parties' Relationship and Inability to Coparent Constituted Significant Change in Circumstances

Family Court modified a prior joint custody order by awarding petitioner father sole legal and physical custody of the subject child, with visitation to respondent mother. The Appellate Division affirmed. The mother did not dispute that the continued deterioration of the parties' relationship and their inability to coparent constituted a significant change in circumstances warranting an inquiry into whether a change in custody was in the child's best interests. The court properly considered the appropriate factors in making its custody determination, and the record supported the court's conclusion that awarding sole custody to the father was in the child's best interests.

Matter of Drajem v Carr, 159 AD3d 1392 (4th Dept 2018)

Court Properly Modified Custody by Granting Sole Custody to Mother

Family Court modified the parties' existing custodial arrangement by granting respondent mother sole custody of the parties' child, with visitation to petitioner father. The Appellate Division affirmed. The father contended that the court abused its discretion in granting the Attorney for the Child's motion to change venue from Madison County to Chautauqua County. However, the father's contention could not be reviewed because the father, as appellant, failed to include the motion papers and any transcript of the proceeding in the record. The court properly determined that the father failed to establish by clear and convincing evidence that the mother willfully violated the terms of the custody order with respect to his visitation. The record established that the purported violations were the result of the child's refusal to comply with the order, or were based on misunderstandings between the parties. The record established the requisite change in circumstances warranting an inquiry into whether a change in custody was in the best interests of the child based on, among other things, the inability of the parties to communicate in a manner conducive to sharing custody. There was a sound and substantial basis in the record for the court's award of sole custody to the mother. The child had principally resided with the mother, the mother provided a more stable environment for the child, and the mother was better able to nurture the child.

Matter of Unczur v Welch, 159 AD3d 1405 (4th Dept 2018)

Joint Custody Not Feasible Where Parties Unable to Communicate Effectively

Family Court granted the mother's petition to modify a prior order by awarding her sole legal and primary physical custody of the parties' child, and dismissed respondent father's cross petition seeking primary physical custody while maintaining joint legal custody. The Appellate Division affirmed. The father's contention was rejected that the orders lacked the essential jurisdictional predicate of the father's consent to have the

matters heard and decided by the Referee. The record established that the father and his attorney previously signed a stipulation permitting a referee or a judicial hearing officer to hear and determined the issues involved in these proceedings, as well as all future proceedings concerning this matter, i.e., custody of and visitation with the child. The court properly concluded that there had been a sufficient change in circumstances inasmuch as the evidence at the hearing established that the parties had an acrimonious relationship and were not able to communicate effectively with respect to the needs and activities of their child, and joint custody was not feasible under those circumstances.

Matter of Mattice v Palmisano, 159 AD3d 1407 (4th Dept 2018)

Affirmance of Denial of Relocation Request

Family Court denied the father's petition for permission to relocate with the subject child to the State of Alabama. The father and the Attorney for the Child appealed. The Appellate Division affirmed. Family Court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727 [1996]) in determining that the father failed to meet his burden of establishing by a preponderance of the evidence that the proposed relocation was in the child's best interests. The father's primary motivation for wanting to relocate to Alabama was based on the fact that his parents and siblings have moved there. The father, however, failed to establish that the child's life would be enhanced economically, emotionally and educationally by the proposed relocation. Although the father asserted that there were better job opportunities in Alabama, he failed to establish that the jobs he had researched in that area would pay any more than his employment in New York. The proposed relocation would have a negative impact on the child's relationship with respondent mother, as well as the mother's relatives, who have visited often from Pennsylvania. Accordingly, the court's determination to deny the father's relocation request had a sound and substantial basis in the record. The AFC contended in his appeal that the court erred in preventing the AFC at trial from examining the child during the *Lincoln* hearing. Despite the court's statement that it would not allow the AFC to question the child, the AFC was in fact able to question the child and elicit certain information, and she raised no further objection. Therefore, the AFC's contention was not preserved for review.

Matter of Shepherd v Stocker, 159 AD3d 1441 (4th Dept 2018)

Court Erred in Awarding Shared Physical Custody Without Designation of Primary Physical Residential Parent

Family Court awarded petitioner mother and respondent father joint legal custody and shared physical custody of their child, and required the mother to relocate and maintain a residence withing 35 minutes' travel of the father's current residence at Brockport College. The Appellate Division modified and remitted. The court's determination that joint legal custody was in the best interests of the child was supported by the requisite

sound and substantial basis in the record. However, the court's determination that shared physical custody without designation of a primary physical residential parent was in the best interests of the child lacked a sound and substantial basis in the record. Although the father, a college professor, had made accommodations for the child at his apartment in a dormitory on the college campus where he worked and resided, the father had considerable travel obligations associated with his professorship. By the father's own testimony, he was periodically absent from the Brockport area for as long as five to six weeks at a time. The mother's home was about 90 miles away from the residence hall where the father resided. She had a job with no travel obligations, an apartment where the child had his own room, and a support system close to where she lived and worked. The mother had been the child's primary caregiver since birth. Thus, although both parents appeared to be fit and loving parents, the mother was better able to provide for the child's care and was better suited to serve as the primary residential parent. Therefore, the order was modified accordingly. Inasmuch as it was in the best interests of the child to reside with the mother in her current residence, the court erred in ordering the mother to relocate to be closer to the father's residence. Therefore, the order was further modified accordingly and the matter remitted to fashion an appropriate visitation schedule.

Matter of Sorrentino v Keating, 159 AD3d 1505 (4th Dept 2018)

No Abuse of Discretion in Failure to Conduct *Lincoln* Hearing

Family Court granted petitioner mother sole legal custody and physical custody of the subject children and directed that respondent father have significant visitation. The Appellate Division affirmed. The father did not dispute that there was a sufficient change in circumstances since the prior order. The deterioration of the parties' relationship and their inability to coparent rendered the existing joint custody arrangement unworkable. The father's contention was rejected that the court erred in granting the mother sole custody. The court's custody determination was based in large part upon the court's firsthand assessment of the character and credibility of the parties, and was entitled to great deference. There was no basis to disturb the court's determination inasmuch as it was supported by a sound and substantial basis in the record. The father's contention was unpreserved that the court erred in failing to conduct a *Lincoln* hearing. In any event, based on the children's young ages, there was no abuse of discretion in the court's failure to conduct a *Lincoln* hearing.

Matter of Kakwaya v Twinamatsiko, 159 AD3d 1590 (4th Dept 2018)

Where Prior Order Provided for Visitation as Parties Mutually Agreed, Party Unable to Obtain Visitation Could File Petition Seeking to Enforce or Modify Order

Family Court *sua sponte* dismissed the father's petition seeking modification of a prior custody and visitation order. The Appellate Division reversed, reinstated the petition, and remitted for a hearing. The prior order provided that the father was entitled to

supervised visitation with the subject child under such circumstances and conditions as the parties could mutually agree. In support of his petition, the father alleged that, since the entry of the prior order, there had been a change of circumstances inasmuch as respondent mother had not allowed the father to have any contact with the child, it had been three years since the last such contact, the mother had alienated the child from the father, and the father had been incarcerated. The father thus requested correspondence with the child and supervised visitation to reconnect with the child. The court determined that it could not grant supervised visitation to which the father was already entitled, and took the view that modification of the prior order was not available under the circumstances. That was error. Where a prior order provided for visitation as the parties could mutually agree, a party who was unable to obtain visitation pursuant to that order could file a petition seeking to enforce or modify the order. The father made a sufficient evidentially showing of a change in circumstances to require a hearing. Although the father was incarcerated, there was a rebuttable presumption that visitation was in the child's best interests.

Matter of Kelley v Fifield, 159 AD3d 1612 (4th Dept 2018)

Court Erred in Dismissing Father's Petition For Custody

Family Court dismissed the father's amended petition insofar as it sought a change in custody and granted the alternative request for increased visitation with the child only to the extent of allowing petitioner additional holiday visitation with the child. The Appellate Division reversed and remitted the matter to the court. In 2013, the mother, grandparents and father entered into a consent order whereby the mother and grandparents had joint legal custody of the child, the grandparents had primary physical residence, and the father would have increasing periods of visitation. In 2015, after no increase in his visitation, the father petitioned for custody, and in an amended petition, the alternative relief of increased visitation, including overnights and holidays. The mother and grandparents opposed the petition. Before trial, the court dismissed the amended petition insofar as it sought custody of the child. That was error. Because the father consented to the prior custody order and there was no prior finding of extraordinary circumstances, he was not required to demonstrate a change in circumstances. The court erred in dismissing the amended petition without first finding that extraordinary circumstances existed. On the record, the Appellate Division found extraordinary circumstances inasmuch as there had been a prolonged separation from the child where the father voluntarily relinquished her care and control to the grandparents. The amended petition was reinstated, however, for a determination whether an award of primary physical custody to the father would be in the child's best interests. The court's denial of the father's alternative request for increased visitation was not based upon a sound and substantial basis in the record inasmuch as the court's decision was riddled with misstatements and incorrect assertions of fact.

Matter of Schultz v Berke, 160 AD3d 1398 (4th Dept 2018)

Sole Custody of Child to Father in Child's Best Interests

Family Court awarded petitioner father sole custody and primary physical residence of the parties' child and reduced the mother's parenting time with the child to six hours per week. The Appellate Division affirmed. The court did not err in refusing to consider the mother's motion to dismiss the father's modification petition. Where, as here, the mother had several months to make a proper motion on notice, the court did not abuse its discretion in refusing to consider the oral motion of the mother immediately before trial. The father established a change in circumstances by showing the mother's unwillingness to communicate with the father and the paternal grandmother about the child, as well as the mother's virtual absence from the child's life for almost five months. The court's determination in awarding sole custody of the child to the father had a sound and substantial basis in the record.

Matter of Clark v Kittles, 160 AD3d 1420 (4th Dept 2018)

Change in Custody to Father in Child's Best Interests

Family Court awarded petitioner father primary physical custody of the parties' child. The Appellate Division affirmed. There was a change of circumstances based upon the undisputed evidence of domestic violence in the mother's household, the mother's frequent changes of residence, and the child's repeated changes of schools. There was a sound and substantial basis in the record for the court's determination that awarding the father primary physical placement was in the child's best interests.

Matter of Greene v Kranock, 160 AD3d 1476 (4th Dept 2018)

Court Improperly Dismissed Petition Without Considering UCCJEA Factors

Family Court dismissed the father's petition for custody of the parties' daughters on the ground that Pennsylvania was the home state of the children and matters concerning custody were pending in that state. The Appellate Division reversed, reinstated the petition, and remitted the matter to the court. The children were born in 2015 and lived with the parties in New York for approximately seven months, when the parties moved to Pennsylvania. In April 2016, the children and the mother moved to another city in Pennsylvania, without the father, and the father returned to New York. He commenced this proceeding in June 2016 and the mother commenced a custody proceeding in Pennsylvania in August 2016. The court erred in declining to exercise jurisdiction without following the procedures required by the UCCJEA. The court properly communicated with the Pennsylvania court, but erred in failing to give the parties the opportunity to present facts and legal arguments before making a jurisdictional decision. The court also violated UCCJEA requirements by failing to create a record of its communication with the Pennsylvania court. There were insufficient facts in the record to make a determination, based upon the factors set forth in the statute, regarding which state was the most convenient forum to resolve the issue of custody.

Matter of Beyer v Hofmann, 161 AD3d 1536 (4th Dept 2018)

Mother Properly Granted Sole Custody

Family Court awarded sole custody of the subject child to the mother. The Appellate Division affirmed. The record supported the determination that joint custody was no longer appropriate in light of the parties' acrimonious relationship. There was a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award sole custody of the child to the mother. The record also supported the determination that the father failed to establish a change in circumstances reflecting a real need for change in the primary residence of the child to ensure that his best interests were served.

Matter of Loveland v Barnes, 161 AD3d 1573 (4th Dept 2018)

Error to Deny Father's Violation Petition Where Mother Violated Terms of Consent Order

Family Court denied the father's petition seeking to modify a prior custody order entered on consent by awarding him sole physical custody of the parties' child, and dismissed his violation petition. The Appellate Division modified. The court properly determined that primary physical custody with the mother was in the child's best interests. The record established that the conditions of the father's parole, which had not been modified to allow for custody under these circumstances, required that the father's contact with the child be supervised. Thus, while the best interests factors favored the father in several significant respects, there was a sound and substantial basis in the record supporting the court's determination inasmuch as there was a legal impediment to the relief sought by the father. However, the court erred in denying the father's violation petition. The terms of the consent order were unequivocal and the mother repeatedly violated the terms, particularly with respect to communication and visitation. The father struggled to maintain telephone contact with the child, because the mother's phone number frequently changed and she failed to notify the father of those changes. Indeed, at times the mother prevented the father from speaking with the child for weeks. Moreover, the consent order mandated that the father was to have Skype contact with the child one time per week, and the mother failed to comply with that directive. Thus, the father established by clear and convincing evidence that the mother violated the consent order, and the mother was therefore advised to abide by both her visitation and communication obligations.

Matter of Mauro v Costello, 162 AD3d 1475 (4th Dept 2018)

Error to Dismiss Petition for Modification of Custody Order

Family Court granted respondent father's motion to dismiss the mother's petition for modification of a custody order. The Appellate Division reversed, denied the motion,

reinstated the mother's petition, and remitted for further proceedings. The court erred in granting the motion and summarily dismissing the mother's petition. In order to survive a motion to dismiss and warrant a hearing, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child. When faced with such a motion, the court must give the pleadings a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory. The mother adequately alleged a change in circumstances warranting a modification of the prior order, i.e., that the father had repeatedly and consistently neglected to exercise his right to full visitation and had endangered the children by exposing them to individuals who engaged in drug use.

Matter of Kriegar v McCarthy, 162 AD3d 1560 (4th Dept 2018)

Father Failed to Preserve for Appellate Review His Contentions

Family Court awarded respondent mother sole legal and physical custody of the parties' two children. The Appellate Division affirmed. The court's determination that it was in the children's best interests to award sole custody to the mother had a sound and substantial basis in the record. The father failed to preserve for appellate review his contention that the court was biased against him because he failed to make a motion asking the court to recuse itself. The father also failed to preserve his contention that the Attorney for the Children was biased against him because he failed to make a motion seeking the AFC's removal. The father's contention was reject that he was denied effective assistance of counsel at the hearing on the ground that counsel failed to renew his request for an adjournment. 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 Buckley v Kleinahans, 162 AD3d 1561 (4th Dept 2018)

Court Erred by Failing to Fashion Specific and Definitive Visitation Schedule

Family Court granted the father's petition to modify a prior custody order by awarding him primary physical custody of the parties' daughter. The Appellate Division modified. The court erred in failing to set a specific and definitive visitation schedule. Therefore, the amended order was modified by striking from the first ordering paragraph the words "and subject to periods of visitation with the Mother and the Father shall encourage [the child] to visit with her Mother," and the matter remitted for the court to fashion a specific and definitive schedule for visitation between the mother and daughter.

Matter of Montes v Johnson, 162 AD3d 1561 (4th Dept 2018)

Petition to Modify Custody Properly Denied

Family Court denied the mother's petition to modify the prior order of custody and directed that the parties continue to share joint legal custody of their children. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination that the mother failed to establish a change in circumstances. Although the record established that the parties had difficulty communicating with each other, the mother failed to demonstrate that those communication problems had changed since the prior custody order was entered. There was no basis in the record to give less weight to the court's determination on the ground that the trial judge recused himself after issuing the order on appeal.

Matter of McCarthy v Kriegar, 162 AD3d 1563 (4th Dept 2018)

Court Properly Modified Custody by Awarding Each Party Equal Amount of Time with Children

Family Court continued joint custody of the parties' children and granted the father's amended petition to modify the existing custody and visitation schedule so that each party would have custody of the children for an equal amount of time. The Appellate Division affirmed. The mother waived her contention that the father failed to establish a change in circumstances warranting an inquiry into the best interests of the children inasmuch as the mother alleged in her own cross petition that there had been such a change in circumstances. Nonetheless, the father established the requisite change of circumstances based on the increasing animus between the parties, the deterioration of the father's relationship with the children and the psychological issues that had arisen with one of the children. The Attorney for the Children's contention was rejected that the court erred in failing to consider the preferences of the children. There was evidence in the record that the mother's animus toward the father had negatively affected the children's relationship with him, and the court-appointed psychologist opined that the children's interests would be best served by an equal split in time between the parties.

Matter of Biernbaum v Burdick, 162 AD3d 1664 (4th Dept 2018)

Modification of Visitation Schedule Affirmed

Family Court modified the visitation schedule for petitioner mother and respondent father with respect to the subject child. The Appellate Division affirmed. As modified, the visitation schedule reduced the number of exchanges of the child between the parties, which was a constant source of discord. The mother failed to establish that reducing the father's visitation time would be in the child's best interests. Thus, there was no basis for disturbing the court's determination.

Matter of Jones v Jamieson, 162 AD3d 1720 (4th Dept 2018)

Affirmance of Order Holding Defendant in Civil Contempt for Failing to Comply with Order That Set Forth Terms of His Visitation with Parties' Child

Supreme Court held defendant father in civil contempt for failing to comply with an order that set forth the terms of his visitation with the parties' child, directed defendant to pay a fine, and modified his visitation with the child. The Appellate Division affirmed. A motion to punish a party for civil contempt was addressed to the sound discretion of the hearing court, and the court did not abuse its discretion. Plaintiff mother met her burden of establishing, by clear and convincing evidence, that defendant violated the custody and visitation order then in effect, which required him to have visitation at the home of his mother, not to remove the child from Erie County under any circumstances, and to return the child to plaintiff at a designated time and location. The evidence further established that defendant's violation of the order unjustifiably impaired plaintiff's custodial rights. The court thus properly determined that defendant violated a lawful and unequivocal mandate of the court and thereby prejudiced plaintiff's rights. The court properly determined that the best interests of the child would be served by modifying defendant's visitation schedule and by providing that visitation be supervised at an agency.

Rech v Rech, 162 AD3d 1731 (4th Dept 2018)

Court Erred in Entering Order Upon Mother's Default Based on Her Failure to Appear in Court Where Mother Was Represented by Counsel

Family Court granted sole custody of the subject children to petitioner father with supervised visitation to respondent mother. The Appellate Division modified. Family Court erred in entering the order upon the mother's default based on her failure to appear in court. The record established that the mother was represented by counsel, and where a party failed to appear but was represented by counsel, the order was not one entered upon the default of the aggrieved party and appeal was not precluded. Therefore, the order was modified by vacating the phrase "on default" in the caption and the phrase "and Respondent having failed to appear" preceding the ordering paragraphs. The court's determination with regard to custody and supervised visitation was supported by a sound and substantial basis in the record.

Matter of Abdo v Ahmen, 162 AD3d 1742 (4th Dept 2018)

Physical Residency With Father in Child's Best Interests Where Mother's Paramour Engaged in Domestic Violence in Child's Presence

Family Court awarded petitioner father primary physical custody of the parties' child. The Appellate Division affirmed. Although the court failed to expressly determine whether there had been a sufficient change in circumstances to warrant an inquiry into the best interests of the child, the record revealed extensive findings of fact, placed on the record by the court, which demonstrated unequivocally that a significant change in

circumstances occurred since the entry of the consent order. The father met his burden by establishing, among other things, that the mother relocated her residence with the child several times within a relatively short time frame, and that the mother's mental health condition was not adequately treated. Where the parties stipulated to certain issues related to custody and visitation, the court was not bound by that stipulation and instead must consider the child's best interests, regardless of the parties' stipulation. The mother previously alleged that her paramour, who had ongoing substance abuse issues, had engaged in domestic violence toward her in the presence of the child, and she refused to stipulate that he would not be left in charge of, or alone with, the subject child. Based on, among other things, those facts, the court's determination to award primary physical custody to the father and grant the mother visitation was in the child's best interests.

Smith v Lopez, 163 AD3d 1406 (4th Dept 2018)

Order Dismissing Petition Reversed Where Referee Made Credibility Determinations and Weighed the Probative Value of Evidence on Motion to Dismiss

Family Court granted respondent's motion pursuant to CPLR 4401 and dismissed the petition at the conclusion of petitioner's case. The Appellate Division reversed, denied the motion, reinstated the petition and remitted for further proceedings. Petitioner commenced the proceeding seeking joint custody of, and visitation with, the five subject children, all of whom were born to respondent and conceived by the implantation of fertilized eggs. With respect to her standing to commence the proceeding, petitioner alleged that she and respondent had previously been involved in a romantic relationship, and that they entered into an agreement to raise and co-parent the child that was alive when the parties met. Petitioner further alleged that, prior to the conception of the younger four children, the parties also agreed that respondent would conceived additional children and the parties would jointly raise them as a family. The Referee granted a hearing on the issue of petitioner's standing to seek custody of the children, at which petitioner's testimony was consistent with the petition. Petitioner also introduced additional evidence on the issue, including that she was listed as a parent on the birth certificate of one of the children, who had petitioner's last name as his middle name, and that the middle names of several of the other children were the same as petitioner's first or middle names, and that respondent told one of her child care providers that respondent "wanted to raise a family with" petitioner. During cross examination of petitioner and her witnesses, respondent introduced evidence to the contrary. A motion to dismiss pursuant to CPLR 4401 should not be granted where the facts were in dispute or where different inferences might reasonably be drawn from undisputed facts, or where the issue depended upon the credibility of witnesses. The court could not properly undertake to weigh the evidence, but must take that view of it most favorable to the nonmoving party. The Referee made credibility determinations and weighed the probative value of the evidence in making a determination on the motion to dismiss. Petitioner's further contention was rejected that the Referee erred in

bifurcating the hearing and limiting the preliminary inquiry to the issue of petitioner's standing. However, the Referee erred in failing to appoint an attorney for the children. Thus, upon remittal, counsel should be appointed for the children. Insofar as petitioner's brief could be read to challenge the Referee's denial of her request for interim visitation, the challenge was not considered. At the conclusion of the hearing, the Referee issued a stay-away order of protection with respect to a different petition, to which petitioner stipulated, thus rendering moot petitioner's challenge to the earlier ruling.

Matter of Demarc v Goodyear, 163 AD3d 1430 (4th Dept 2018)

Court Erred in Prematurely Ending Hearing

Family Court awarded primary physical custody of the subject children to respondent maternal grandmother. The Appellate Division reversed and remitted the case to the court. The grandmother filed a petition to modify a prior custody order, pursuant to which petitioner mother would have had primary physical custody of the subject children. The grandmother alleged that the mother suffered from mental health issues and was abusing drugs and alcohol. At the hearing, the mother was the only witness to testify and the court granted the petition before the grandmother rested and awarded her primary physical custody of the children. The court erred in granting the petition without completing the hearing. The mother's testimony was not complete, the grandmother had not rested, and the mother had not been afforded the opportunity to call witnesses or present other evidence on her own behalf. There were controverted issues inasmuch as there was no evidence of the mother's mental health other than her erratic behavior in-court, which she attributed to the trauma of being separated from her children, and there was no evidence that the mother abused drugs or alcohol.

Matter of Driscoll v Mack, 165 AD3d 1590 (4th Dept 2018)

Mother Failed to Establish Relocation Was in Child's Best Interests

Family Court denied the mother's relocation petition and directed that she not relocate with the child outside Monroe County without court approval or the express written consent of the father. The Appellate Division modified by vacating the provision that transferred primary physical custody of the child to the father if the mother relocated outside Monroe County. The mother, who had moved to North Carolina, asserted that her primary motivation for the move was a new job that provided better salary and benefits, more reasonable working hours, and tuition assistance that would have allowed her to finish her education as a nurse. However, at the time of the trial the mother had resigned from that position. She testified that she would be allowed to reapply for the position and that her application would be given priority, but she provided no additional evidence for that claim or provided evidence that a comparable position was not available in Monroe County. Moreover, the evidence supported the court's determination that the proposed relocation would have a detrimental impact on

the child's relationship with the father. The court did not improperly act as the father's legal advisor. The court erred, however, in including the provision that transferred custody of the child to the father in the event the mother relocated outside Monroe County.

Matter of Eason v Bowick, 165 AD3d 1592 (4th Dept 2018)

Sufficient Change in Circumstances to Modify Custody of Children

Family Court granted petitioner father primary physical custody of the subject children. The Appellate Division affirmed. The court properly determined that the deterioration of the parties' relationship was a significant change in circumstances justifying a change in custody. 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 award primary physical custody of the children to the father and to reduce the mother's visitation. The AFC did not appeal from the order and, therefore, to the extent her brief raised contentions not raised by the mother, the Appellate Division did not consider those contentions.

Matter of Noble v Gigon, 165 AD3d 1640 (4th Dept 2018)

In Child's Best Interests to Remain in Father's Custody

Family Court denied the mother's petition seeking modification of a judgment for divorce providing for joint legal custody of the subject child with primary physical custody to the father and visitation to the mother. The Appellate Division affirmed. The court erred in determining that the mother failed to establish a sufficient change in circumstances. However, the court's further determination that it was in the child's best interests to remain in the primary physical custody of the father was supported by a sound and substantial basis in the record. The mother failed to establish the elements necessary to support a finding that the father was in civil contempt of court for disobeying prior court orders. The court did not abuse its discretion in conducting an in-camera interview with the child before commencement of the fact-finding hearing.

Matter of White v Stone,165 AD3d 1641 (4th Dept 2018)

Nurse Qualified to Render Medical Opinion

Family Court awarded respondent mother sole custody of the subject child and directed that respondent father have supervised visitation with the child. The Appellate Division held the case, reserved decision, and remitted to the court for further proceedings. The court did not abuse its discretion in determining that a nurse was qualified to testify with respect to the cause of the child's injuries. The nurse testified that she was licensed as a registered nurse and was certified as a sexual assault nurse examiner. She also testified that she had performed between 30-40 sexual assault examinations on children since receiving her certification and had been training other nurses to be

sexual assault nurse examiners. Because the court failed to set forth those facts upon which the rights and responsibilities of the parties depended, specifically an analysis of those factors that traditionally affect the best interests of a child, the case was remitted to the court to set forth its factual findings.

Matter of Valentin v Mendez, 165 AD3d 1643 (4th Dept 2018)

Father's Use of Excessive Corporal Punishment and Failure to Foster Relationship With Mother Weighed in Favor of Custody of Children to Mother

Supreme Court awarded petitioner mother primary legal and physical custody of the subject children with visitation to respondent father. The Appellate Division affirmed. Although the court failed to set forth the facts essential to its determination, the record was sufficient for the Appellate Division to make its own factual findings. The court's determination was supported by a sound and substantial basis in the record. While the parties lived together, the mother was the primary caretaker and means of emotional and financial support for the children. Both parents had worked to overcome challenges in providing stable environments for the children. However, the mother was better suited to provide for the children's emotional development. Two critical factors, the father use of excessive corporal punishment and his failure to foster the children's relationship with the mother, weighed in favor of the mother. The mother offered a home that was loving and stable, while the father's home was an environment of fear. The contention of the AFC representing the oldest child that the court erred in ordering unsupervised visitation with the father, was not properly before the Appellate Division because the AFC did not appeal from the court's order.

Matter of Wojciulewicz v McCauley, 166 AD3d 1489 (4th Dept 2018)

Parties' Alteration of Custody and Visitation Arrangement Was Sufficient Change in Circumstances

Supreme Court awarded the parties joint legal custody of the subject child with primary physical custody to petitioner father. The Appellate Division affirmed. There was a sufficient change in circumstances inasmuch as the parties had altered the custody and visitation arrangement set forth in the stipulated order. A sound and substantial basis in the record supported the court's determination that awarding the father primary physical custody was in the child's best interests.

Matter of McKenzie v Polk, 166 AD3d 1529 (4th Dept 2018)

Award of Custody Reversed Where Court Failed to Set Forth Facts Essential to Its Decision

Family Court dismissed the mother's custody modification petition and granted the father's custody modification petition. The Appellate Division reversed, reinstated the

mother's petition, and remitted. The court failed to make factual findings to support the award of sole custody to the father. The court was obligated to set forth those facts essential to its decision, and the court utterly failed to follow that well-established rule inasmuch as it made no findings to support its determination.

Matter of Brown v Orr, 166 AD3d 1583 (4th Dept 2018)

Court Erred in Conditioning Father's Visitation Upon His Participation in Therapeutic Counseling

Family Court modified a prior custody and visitation order by awarding petitioner mother sole legal and residential custody of the subject child and limiting the father's visitation with the child to family therapy sessions. The Appellate Division modified and remitted. Venue was proper in Ontario County, and the father failed to demonstrate good cause for transferring the proceeding to Seneca County. The mother established the requisite change in circumstances inasmuch as the father's relationship with the subject child had deteriorated since the prior order. The court did not err in modifying the prior order inasmuch as there was a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award sole custody to the mother and reduce the father's visitation. However, the court erred in conditioning the father's visitation upon his participation in therapeutic counseling. Although a court could include a directive to obtain counseling as a component of a custody or visitation order, the court did not have the authority to order such counseling as a prerequisite to custody or visitation. The court erred in making participation in counseling the triggering event in determining visitation. Moreover, the court improperly gave the therapists the authority to determine if and when visitation would occur.

Matter of Rice v Wightman, ___ AD3d ___ (4th Dept 2018) 2018 WL 6714243

Court Properly Granted Father's Application to Relocate With Parties' Children to North Carolina

Family Court granted the father's amended cross petition seeking to modify a prior order of custody and visitation by allowing the parties' teenage children to relocate with him to North Carolina. The Appellate Division affirmed. The father met his burden of demonstrating by a preponderance of the evidence that the proposed relocation was in the children's best interests. The father established that the proposed relocation would enhance the children's lives economically, emotionally, and educationally, inasmuch as, among other things, the father and the children would unite under a single household with the father's new wife and her daughter, with whom the children were close, thereby allowing for the combination of two incomes and consolidation of household expenses. The father, who was the children's primary caretaker, also had another child in North Carolina with whom the children had a close relationship. In addition, the children expressed their desires to relocate with the father to North Carolina and, while the express wishes of children were not controlling, they were entitled to great weight,

particularly where, as here, their age and maturity made their input particularly meaningful. Although the relocation would affect the frequency of the mother's visitation, the father demonstrated his willingness to foster communication and to facilitate extended visitation during school recesses and summer vacation.

Matter of Townsend v Mims, ___ AD3d ___ (4th Dept 2018) 2018 WL 6715073

Error to Decrease Mother's Visitation

Family Court denied the mother's petition seeking to modify a prior visitation order. The Appellate Division modified. Family Court properly denied the petition because the mother failed to establish a change in circumstances which reflected a real need for change to ensure the best interests of the child. However, in its order denying the mother's petition, the court erred in also ordering that the visitation would occur every other week, which was a modification of the prior visitation order's provision granting the mother weekly visitation. The issue of decreasing the mother's visitation was not before the court in the mother's petition, respondent father did not petition to reduce the mother's visitation time, and that issue was not the subject of the hearing. Although the mother had informally agreed with the visitation supervisor to have visits every other week with the apparent intent that it would improve her relationship with the child, and, over time, result in additional visitation, the mother did not consent to an order reducing her visitation.

Bontzolakes v Green, ___ AD3d ___ (4th Dept 2018) 2018 WL 6714937

Court Erred in Dismissing Petition Based on Lack of Jurisdiction Without Holding Hearing

Family Court dismissed for lack of jurisdiction the mother's petition for custody of the subject child. The Appellate Division reversed, reinstated the petition, and remitted. The court erred in dismissing the petition based on lack of jurisdiction without holding a hearing. There were disputed issues of fact whether the child's four- or five-month stay in North Carolina constituted a temporary absence from New York State in light of allegations that respondent father withheld the child from the mother for purposes of establishing a home state in North Carolina, and whether the mother's absence from New York State interrupted the child's six-month pre-petition residency period required by Domestic Relations Law Section 76 (1) (a).

Matter of Dean v Sherron, ___ AD3d ___ (4th Dept 2018) 2018 WL 6714141

Visitation With Grandmother Not in Children's Best Interests

Family Court determined, among other things, that visitation with the paternal grandmother was in the children's best interests. The Appellate Division reversed and dismissed the grandmother's petitions. Even assuming, arguendo, that the

grandmother established standing by demonstrating circumstances in which equity would see fit to intervene, the court's best interests determination lacked a sound and substantial basis in the record. Because the parents were fit, their decision to prevent the children from visiting the grandmother was entitled to special weight. Based on examination of the record, the parents' decision was founded upon legitimate concerns. On Sunday, June 25, 2017, the grandmother hosted brunch at her home. Almost every weekend prior to that date, the older of the two subject children (child) had at least one overnight visit at the grandmother's home. Following brunch, respondent father and the uncle, who were brothers, engaged in a heated argument. That same day, a report of child abuse or maltreatment was made to the Office of Children and Family Services (OCFS). The reporter's identity was confidential, per the normal protocol. However, the grandmother was an attorney, a longtime practitioner in Family Court, and an administrative law judge in OCFS. The report was investigated by Child Protective Services (CPS) and determined to be unfounded. The grandmother subsequently filed a petition seeking visitation with the child. The younger of the two subject children (baby) was born after the commencement of the litigation, and a second petition was filed by the grandmother seeking visitation with the baby. The father testified that he expected the argument to be forgiven by the next weekend and for the family relationship to return to normal. In light of the CPS investigation and the litigation, however, the father no longer felt comfortable leaving the child with the grandmother. Respondent mother testified to her observation that the child's behavior had improved since she stopped visiting the grandmother, whom the mother believed to be a bad influence. The court wholly ignored that testimony by the parents, erroneously refusing to give it the weight to which it was entitled. Although the grandmother and the child had an extensive preexisting relationship, the grandmother exhibited a willingness to use her position in the legal system to undermine the parental relationship by initiating court proceedings almost immediately, rather than making a good faith attempt to fix her family relationships without resorting to litigation. That evidence made it difficult to draw any conclusion other than that the grandmother was responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact her behavior would have on the family relationships and making no effort to mitigate that impact. Moreover, there was palpable animosity between the parties. Approximately three months after the litigation commenced, the parents legally changed their hyphenated surname to remove the grandmother's surname. The father testified at the hearing that he was no longer part of that family. There was evidence demonstrating that the grandmother and uncle were an emotional trigger for the father. That evidence was corroborated by the testimony of the parents' counselor, who testified that the father was mild-mannered, but that he became upset with the grandmother because she was very controlling. The grandmother, in her testimony, eventually acknowledged the extent of the animosity that had developed in her family. Although animosity alone was not a sufficient reason to deny visitation, the animosity threatened to disrupt the harmonious functioning of the family unit. Thus, visitation with the grandmother was not in the children's best interests.

Matter of Jones v Laubacker, ___ AD3d ___ (4th Dept 2018) 2018 WL 6714408

HABEAS CORPUS

No Extraordinary Circumstances to Warrant Departure from Traditional Orderly Procedures

Petitioner grandfather of the subject children and his paramour initiated a proceeding pursuant to article 70 in the Appellate Division to produce the children. The Appellate Division dismissed the petition. Petitioners sought production of the children on the ground that they were suitable persons with whom the children should be placed following the children's removal from the parental home. The preferred procedure was for the grandfather to make a motion to intervene in the underlying neglect proceeding and there was no indication that he did so. Petitioner also could have commenced a proceeding for custody of the children pursuant to article 6. Petitioner previously did so, but he failed to appear at the ensuing hearing. Thus, petitioners failed to demonstrate any extraordinary circumstances warranting a departure from traditional orderly procedure.

Matter of Michael S. v Christa P., 164 AD3d 1628 (4th Dept 2018)

ORDER OF PROTECTION

Affirmance of Two-Year Order of Protection

Family Court entered a two-year order of protection upon a finding that respondent husband committed the family offense of harassment in the second degree against petitioner wife. The Appellate Division affirmed. Respondent failed to preserve for review his contention that the court improperly assumed the role of advocate for petitioner, who appeared pro se, in asking questions to guide her direct testimony, and, in any event, the record did not support respondent's contention. Respondent's contention was rejected that the court erred in failing to conduct a dispositional hearing, inasmuch as the record established that respondent waived such a hearing. The duration and conditions of the order of protection were reasonably designed to advance the purpose of attempting to stop the violence, end the family disruption and obtain protection.

Matter of Robinson v Robinson, 158 AD3d 1077 (4th Dept 2018)

Appeal Dismissed Where No Ameliorative Action Could Be Taken by Court

Family Court committed respondent to jail for two consecutive six-month jail terms for violations of a temporary order or protection. The Appellate Division dismissed. Respondent's sole contention was that the court exceeded its authority in imposing two consecutive six-month jail terms based on the violations. The appeal was academic because respondent had served the period of incarceration and there was no ameliorative action to be taken by the Court.

Matter of Tubilewicz v Styles, 162 AD3d 1569 (4th Dept 2018)

Court Erred in Issuing Order of Protection Without Adhering to Procedural Requirements, and Further Erred in Denying Alternative Relief Sought in Motion to Modify Duration of Order of Protection

Supreme Court directed respondent to stay away from petitioner, among others, until November 29, 2029. The Appellate Division modified. The court erred in issuing an order of protection without adhering to the procedural requirements of Family Court Act Section 154-c (3), inasmuch as the court did not make a finding of fact that petitioner was entitled to an order of protection based upon a judicial finding of fact, judicial acceptance of an admission by respondent or judicial finding that respondent had given knowing, intelligent and voluntary consent to its issuance. Indeed, the court failed to specify which family offense respondent committed. Remittal was not necessary because the record was sufficient for the Court to conduct an independent review of the evidence, and a fair preponderance of the evidence established that respondent committed the family offense of harassment in the second degree. The court further erred in denying the alternative relief sought in the motion to modify the duration of the

order of protection. Accepting the court's finding of aggravating circumstances based on respondent's repeated violations of prior orders of protection, the maximum duration of the order of protection was five years. Therefore, the order of protection was modified by deleting the expiration date and substituting therefore an expiration date of November 29, 2021.

Matter of White v Byrd-McGuire, 163 AD3d 1413 (4th Dept 2018)

TERMINATION OF PARENTAL RIGHTS

Written Psychological Report Properly Admitted For Limited Purpose

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The father's contention was rejected that the court improperly admitted hearsay evidence at the fact-finding hearing when it received a written psychological report recommending that mental health treatment be part of the father's service plan. The report was not offered for the truth of the matters asserted therein. Rather, it was offered, and properly admitted, for the limited purpose of establishing the good-faith basis for petitioner's service plan for the father. Petitioner met its burden by establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child, and that the father failed substantially and continuously to plan for the future of the child although physically and financially able to do so.

Matter of Jayveon S., 158 AD3d 1283 (4th Dept 2018)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child. Petitioner, among other things, provided mental care health referrals, parenting classes, and transportation or bus tickets and/ or mileage reimbursement to counseling and the child's medical appointments, and scheduled and coordinated visitation. Family Court required the mother to complete various programs and to attend regularly appointments for mental health treatment, but she failed to do either. To the extent that the mother participated in any of the recommended or ordered programs or services, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return, asserting that she did not need to be taught how to be a parent.

Matter of Soraya S., 158 AD3d 1305 (4th Dept 2018)

Petitioner Made Diligent Efforts

Family Court determined respondent father permanently neglected the subject children. With the consent of the parties, the court suspended judgment for six months. The court subsequently revoked the suspended judgment and terminated the father's parental rights. The Appellate Division affirmed. The court properly determined that petitioner demonstrated by the requisite clear and convincing evidence that it made

diligent efforts to encourage and strengthen the relationship between the father and the children. Petitioner had the father psychologically evaluated, provided him with a copy of the report, connected him with mental health providers, coordinated regular visitation with the children, provided him with parenting classes, encouraged him to schedule medical appointments for the children, provided transportation assistance, offered him budget counseling, and encouraged him to maintain safe, suitable and stable housing. There was a sound and substantial basis in the record to support the court's determination that the father failed to comply with the terms of the suspended judgment and that it was in the child's best interests to terminate his parental rights.

Matter of Michael S., 159 AD3d 1378 (4th Dept 2018)

Affirmance of Termination of Parental Rights on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child. Among other things, petitioner arranged for the father's psychological examination, facilitated supervised visitation between the father and the child, attempted unsupervised visits, and provided referrals for various services. Although the father participated in some of the services offered by petitioner, he failed to address successfully the problems that led to the removal of the child and continued to prevent his safe return. While the father completed parenting classes and a domestic violence class, he did not successfully complete mental health treatment or addiction and substance abuse treatment. Evidence that he was inconsistently applying the knowledge and benefits he obtained from the services provided and arguing with various service providers and professionals sufficiently supported a finding that he failed to articulate a realistic plan for the child's return to his care.

Matter of Joshua W., 159 AD3d 1589 (4th Dept 2018)

Court Properly Terminated Mother's Parental Rights on the Ground of Mental Illness

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of mental illness. The Appellate Division affirmed. Because the mother failed to object to the testimony of the psychologist who examined her, on the basis that his opinion was based, in part, on inadmissible hearsay, her contention regarding it was unpreserved. Petitioner established, by clear and convincing evidence, that the mother, by reason of mental illness, was presently and for the foreseeable future unable to provide proper and adequate care for her children. The examining psychologist testified that the mother suffered from a personality disorder that rendered her unable to parent the children effectively, and that the children would be in danger of being neglected if they were returned to her care.

Matter of Jason B., 160 AD3d 1433 (4th Dept 2018)

Court Properly Granted Petitioner's Motion For Summary Judgment Terminating Parental Rights of Respondent on Ground of Mental Illness

Family Court granted petitioner's motion for summary judgment terminating the parental rights of respondent father on the ground of mental illness. The Appellate Division affirmed. The court properly granted petitioner's motion based on collateral estoppel. The relevant issue was whether the father was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for a child, and the court resolved that exact issue against him in a prior termination proceeding concerning his other children. The father did not dispute that he was afforded a full and fair opportunity to litigate that issue in the prior proceeding. Thus, all the requirements were satisfied for applying collateral estoppel to sustain the instant termination petition.

Matter of Yeshua G., 162 AD3d 1470 (4th Dept 2018)

Diligent Efforts Made Both Before and During Father's Incarceration

Family Court terminated the parental rights of respondent father on the ground of permanent neglect. The Appellate Division affirmed. The father's contention was rejected that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen the parent-child relationship during his incarceration, as required by Social Services Law Section 384-b (7) (a). Social Services Law Section 384-b (7) (f) (3) provided that an agency did not need to provide services and other assistance to incarcerated parents. Diligent efforts in such circumstances may be established by the agency apprising the incarcerated parent of the child's well-being, developing an appropriate service plan, investigating possible placement of the child with relatives suggested by the parent, responding to the parent's inquiries and facilitating telephone contact between the parent and child. Petitioner established by clear and convincing evidence that it fulfilled its duty in that regard. During the nearly four-month period after petitioner removed the children from the father's home to the time the father was incarcerated, petitioner offered the father drug treatment and parent counseling services, transportation assistance, and information about available apartments when the father stated that he was going to be evicted from his apartment. The father refused drug treatment and parent counseling and tested positive for cocaine, and he was arrested for armed robbery and criminal possession of a controlled substance in the third degree, leading to his incarceration. While the father was incarcerated, petitioner arranged visits between the father and the children, kept the father apprised of the children's well-being, and investigated the children's possible placement with relatives. The father's alternative suggestion, that the children remain in foster care until he was released from prison, was not in the children's best interests and was antithetical to their need for permanency. The father contended that the oldest child was denied effective assistance of counsel inasmuch as one attorney represented all three children and there was an alleged conflict of interest between the eldest child

and the two younger children. That contention was not preserved for appellate review inasmuch as the father failed to request the removal of the Attorney for the Child. The father's further contentions were also unpreserved that the AFC was biased against him, and that the AFC improperly substituted judgment for the younger siblings. There was a sound and substantial basis in the record for the order terminating the father's parental rights and freeing the children for adoption.

Matter of Caidence M., 162 AD3d 1539 (4th Dept 2018)

Affirmance of Finding of Permanent Neglect and Subsequent Revocation of Suspended Judgment

Family Court adjudged that the mother permanently neglected the subject children, and with consent of the parties, entered a suspended judgment. The court subsequently revoked the suspended judgment and terminated the mother's parental rights with respect to the subject children. The Appellate Division affirmed in each appeal. Although the mother participated in some of the services offered by petitioner, she 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. If the petitioner established by a preponderance of the evidence that there had been noncompliance with any of the terms of the suspended judgment, the court could revoke the suspended judgment and terminate parental rights. The court properly determined that the mother failed to comply with the terms of the suspended judgment and that it was in the children's best interests to terminate her parental rights.

Matter of Michael S., 162 AD3d 1651 (4th Dept 2018)

Court Properly Revoked Suspended Judgment

Family Court revoked a suspended judgment and terminated the mother's parental rights to the child. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the mother failed to comply with the terms of the suspended judgment. The record established that the mother violated numerous terms of the suspended judgment, including requirements that she demonstrate safe and developmentally appropriate parenting practices, maintain adequate housing, and not have anyone else present during visits with the child. During her hearing testimony, the mother acknowledged that she had been evicted from her apartment because her friends were causing problems, including causing damage to the apartment. In one incident, the mother's friend, who was addicted to drugs, suffered a seizure and got blood "everywhere," resulting in the involvement of the police. Although the mother had obtained a new apartment, her new roommate, who was occasionally present during the mother's visits with the child, had a history of drug abuse and involvement with Child Protective Services. Furthermore, the terms of the mother's housing arrangement did not allow her to have children living in her new apartment, and she made no additional efforts to obtain child-friendly housing. The failure to obtain appropriate

housing as required by a suspended judgment could, alone, constitute ground for the revocation of a suspended judgment.

Matter of Zander L., 162 AD3d 1671 (4th Dept 2018)

Order Affirmed Where Uncle Not Prejudiced by Any Failure to Notify Him of Proceeding

Family Court terminated the parental rights of respondent mother on the ground of permanent neglect. The Appellate Division affirmed. The mother's contention was rejected that reversal was required because petitioner failed to properly notify the child's maternal uncle of the instant proceeding. Even assuming, arguendo, that petitioner failed to fulfill its statutory duty to notify the uncle of the pendency of the proceeding and of the opportunity for becoming a foster parent or for seeking custody of the child, the record established that the uncle was aware of the fact that the child was in foster care. Indeed, the uncle filed a custody petition with respect to the child, but that proceeding was dismissed as a result of the uncle's failure to appear and the uncle did not appeal from the order dismissing his petition. Thus, it could not be said that the uncle was prejudiced by any failure to notify him of the proceeding. The record supported the court's determination that termination of the mother's parental rights was in the best interests of the child, and that the mother's progress in addressing the issues that led to the child's removal from her custody was not sufficient to warrant any further prolongation of the child's unsettled familial status.

Matter of Mirabella H., 162 AD3d 1733 (4th Dept 2018)

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment and terminated respondent parents' parental rights with respect to the subject child. The Appellate Division affirmed. The suspended judgment was entered on consent of the parties after the mother admitted that she had not addressed her substance abuse issues and the father admitted that he had not demonstrated an understanding of how the mother's substance abuse problems impacted her ability to parent. The terms of the suspended judgment required the mother to refrain from using illegal drugs or engaging in criminal activity and required the parents to demonstrate that the circumstances that resulted in the child's placement had been ameliorated. The mother admitted that she relapsed and used cocaine during the period of the suspended judgment, which resulted in a 12-month period of incarceration. Moreover, the father testified at the hearing on the suspended judgment that the mother was "a very good mother," and that her addiction did not affect her parenting. The child had bonded with his foster mother and desired to keep living with her. Thus, there was a sound and substantial basis to support the court's determination that respondents violated the terms of the suspended judgment and that it was in the child's best interest to terminate parental rights.

Matter of Aiden T.,164 AD3d 1665 (4th Dept 2018)

Suspended Judgment Properly Revoked

Family Court revoked a suspended judgment and terminated respondent mother's parental rights with respect to the subject child. The Appellate Division affirmed. The mother's contention that the suspended judgment was revoked prematurely because a copy of the suspended judgment was not given to her before petitioner filed its motion was unpreserved for review. In any event, the mother's testimony established that she understood and agreed to the terms of the suspended judgment on the date it was granted. A preponderance of the evidence established that the mother violated several terms of the suspended judgment and the record did not support the mother's characterization of those violations as inconsequential. The court conducted a lengthy hearing that addressed the alleged violations and the child's best interests and thus there was no need for an additional dispositional hearing. It was in the child's best interests to terminate the mother's parental rights. Any progress the mother made was not sufficient to warrant the prolongation of the child's familial status.

Matter of Jenna D., 165 AD3d 1617 (4th Dept 2018)

Court Properly Terminated Mother's Parental Rights on Ground of Mental Illness

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide adequate and proper care for the children. Petitioner presented evidence establishing that the mother suffered from antisocial personality disorder, which is characterized by a lack of empathy, the failure to adhere to social norms, aggression, impulsiveness, and a failure to plan. The court's failure to conduct a dispositional hearing was not an abuse of discretion inasmuch as the evidence at trial established that termination of the mother's parental rights and freeing the children for adoption was in their best interests.

Matter of Michael S., 165 AD3d 1633 (4th Dept 2018)

TPR Based Upon Father's Mental Illness Affirmed; Petition Based Upon Permanent Neglect Dismissed

Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of mental illness and permanent neglect. The Appellate Division modified by dismissing the petition insofar as it alleged that respondent permanently neglected the children. Petitioner met its burden of demonstrating by clear and convincing evidence that the father was presently and for the foreseeable future unable, by reason of mental illness, to provide adequate and proper care for the children. Petitioner presented the testimony of two psychologists who examined the

father and testified that he suffered from multiple mental illnesses, including antisocial personality disorder and narcissistic personality disorder. One psychologist testified that, as a result of the father's mental illness, the children would be placed in immediate imminent jeopardy of neglect or harm if they were returned to the father's care. Even assuming, arguendo, that the court improperly admitted into evidence portions of the reports of DSS containing hearsay, the error was harmless because the result reached would have been the same even if the records had been excluded. Because the court found that the father was incapable of caring for the children by reason of mental illness, the court erred in terminating his parental rights on the additional ground of permanent neglect.

Matter of Norah T., 165 AD3d 1644 (4th Dept 2018)

Court Erred in Failing to Hold Hearing on Whether Guardian ad Litem Should Have Been Appointed for Mother

Family Court terminated respondent mother's parental rights with respect to her son on the ground of permanent neglect. The Appellate Division reversed and remitted. A meritorious question of the mother's competence was raised. It was of no moment that the mother's attorney did not move for the appointment of a guardian ad litem inasmuch as the court could make such an appointment on its own initiative. Although the mother's attorney did not specifically request the appointment of a guardian ad litem, she informed the court that the mother was unable to assist in her own defense when she moved to strike the mother's incoherent testimony. The court granted that motion, which was not opposed by petitioner or the AFC. That was sufficient to alert the court to the issue of the mother's competence. Furthermore, the issue was meritorious inasmuch as the record demonstrated significant questions concerning the mother's ability to understand the nature of the proceedings, defend her rights and assist in her own defense. There was no dispute that the mother, who had been diagnosed with, among other things, schizophrenia, had been in and out of psychiatric hospitals throughout her life. For example, during the course of the hearing, the mother was involuntarily committed to a psychiatric unit, and the matter had to be adjourned until her release. Given the magnitude of the rights at stake in a termination proceeding, as well as the allegations of mental illness, the court erred in failing to hold a hearing on whether a guardian ad litem should have been appointed for the mother.

Matter of Jesten J.F., ___ AD3d ___ (4th Dept 2018) 2018 WL 6714230

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. A child was deemed abandoned where, for a period of six months immediately prior to the filing of the petition, 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. *See* Social Services Law Section 384-b [4[] [b]. Despite being afforded the opportunity to visit with the child twice each week, the mother merely delivered items for the child on one occasion at the beginning of the six-month period when the child was not present, visited the child on just two occasions in close succession several months later but failed to visit the child thereafter, and contacted petitioner once by telephone to cancel a visit. 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 Armani W., ___ AD3d ___ (4th Dept 2018) 2018 WL 6714836

COURT OF APPEALS CASES

Petition Dismissed to Terminate Respondent's Parental Rights Where Petitioner Did Not Meet Its Burden

The Court of Appeals dismissed a petition to terminate respondent's parental rights on the ground of abandonment. The petitioner agency bore the burden of proving abandonment by clear and convincing evidence. Petitioner's caseworker testified that respondent, who was incarcerated, did not visit with the child or communicate with the caseworker or other agency personnel in the six months preceding the filing of the abandonment petition. However, the record was bereft of evidence establishing that respondent failed to communicate with the child, directly or through the child's foster parent, during the relevant time period. Thus, petitioner did not meet its burden of demonstrating, by clear and convincing evidence, that respondent abandoned the child.

Matter of Mason H., 31 NY3d 1109 (2018)

Using Child as Pawn in Shoplifting Scheme Created Imminent Risk of Physical, Mental and Emotional Harm to Child

The Court of Appeals determined that it was rational for the Administrative Law Judge to have concluded that the child was placed in imminent risk of impairment, constituting maltreatment, and that petitioner mother's actions were reasonably related to employment in the child care field. The act in question, using the child as a pawn in a shoplifting scheme, was sufficiently egregious so as to create an imminent risk of physical, mental and emotional harm to the child. There was imminent potential for physical confrontation during a theft from a department store monitored by security. Moreover, utilizing a child to commit a crime and teaching a child that such behavior was acceptable must have had an immediate impact on the child's emotional and mental well-being, particularly where the child was young and just learning to differentiate between right and wrong. The ALJ rationally concluded that these actions were reasonably related to employment in the childcare field as a matter of common sense. The dissent noted that the ruling was fundamentally at odds with *Nicholson v. Scoppetta*, 3 NY3d 357 [2004].

Matter of Natasha W. v. New York State Office of Children and Family Servs., 32 NY3d 982 (2018)

Reasonable Efforts Made Where Agency Failed to Offer or Deliver Accommodations Requested Under ADA at Time Six-month Permanency Reporting Period Ended

Family Court determined that the agency made reasonable efforts to achieve the permanency goal of returning the child to respondent mother during the nine-month period following the child's removal. The Appellate Division affirmed. The Court of

Appeals affirmed. It was undisputed that the mother was intellectually disabled. Before the subject child's birth, a finding of neglect was entered against the mother as to a different child of hers. When the subject child was born, ACS removed her from the mother's care and filed a petition under Article 10 of the Family Court Act (FCA) alleging that the subject child was neglected because, among other things, the mother had not completed the mental health and drug treatment required in the case involving her prior child. The agency's compliance with the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12101 et seq., was required when making reasonable efforts to reunify children with parents who were disabled. However, ACS's failure to offer or provide certain services at the time a six-month permanency reporting period ended did not necessarily mean that it had failed to make "reasonable efforts." Family Court was not required to determine compliance with the ADA in the course of a permanency proceeding. The ADA's "reasonable accommodations" test was often a time- and fact-intensive process with multiple layers of inquiry. Permanency proceedings had distinct purposes and procedures and thus were not the appropriate forum to adjudicate affirmative claims brought under the ADA. The court should not blind itself to ADA requirements placed on ACS and like agencies, and a court may look at the accommodations ordered by other courts in ADA cases for guidance as to what was feasible or appropriate with respect to a given disability. FCA § 1089's "reasonable efforts" standard and the ADA's "reasonable accommodation" requirement were in harmony in requiring that services were tailored to the specific needs of people with disabilities. But even as to accommodations that could be required under the ADA, the failure of ACS to offer or deliver such accommodations by the end of a given measuring period did not necessarily mean that ACS had violated the ADA or failed to make reasonable efforts under New York law. Each of the ADA accommodations requested was eventually provided to the mother. Some were not provided immediately upon request, sometimes because of miscommunications, sometimes because of lack of follow-through by the mother or ACS personnel, and sometimes because processing eligibility through outside governmental agencies did not happen overnight. Other accommodations were provided with substantial effort by the court and the mother's attorneys. But each requested item was provided, and the permanency goal remained "Return to Parent." The court took seriously the mother's need for services, was frustrated with ACS's slow pace in providing some of those services, and, aided by the mother's attorneys, did not let the mother's needs go unmet. The dissent would reverse. The majority ignored the fact that the federal and state statutory obligations fell squarely on ACS. Shifting the burden to a disabled parent undermined the purpose of the federal law, which was to place persons with disabilities in an equal position with persons who did not have physical or intellectual challenges to access government services that affected fundamental rights.

Matter of Lacee L., __ NY3d __, 2018 WL 5046100 (2018)

Affirmance of Lower Courts' Determination that Respondent's Statements Were Voluntary Where Respondent Interrogated Without Adult Present

This case involved police interrogation of respondent, a person alleged to be a juvenile delinquent, without an adult being present. The Appellate Division determined that respondent's statements were voluntary. In a 4-2 decision, the Court of Appeals affirmed. Respondent's challenge to the admission of his statements, insofar as preserved, presented a mixed question of law and fact. Inasmuch as there was record support for the lower courts' determination that respondent's statements were voluntary, that issue was beyond further review. Further, any hearsay error in the admission of certain medical records relating to the complainant was harmless. The dissenting judges asserted that although respondent's mother was present during the Miranda warnings, she was not his legal guardian because he was previously removed from her care due to her failure to protect him from sexual abuse; that respondent's legal guardian, his grandmother, was never consulted, and was not in the room when respondent waived his rights and was questioned, despite being present at the precinct throughout the interrogation; and that in light of United States Supreme Court jurisprudence and scientific studies regarding the capacity of juveniles, this Court should revisit *Matter of Jimmy D.,* 15 N.Y.3d 417 (2010), where the Court held that the parent of a child had the right to attend the child's interrogation by a police officer but that a confession obtained in the absence of a parent was not necessarily involuntary. The dissenting judges also would find that respondent's challenge to the admission of his written confession was preserved, and that a question of law was presented with respect to whether a thirteen-year-old's written confession was voluntary when a detective asked him if he would like to write an "apology note" without an adult or guardian present in the room.

Matter of Luis P., __ NY3d ___, 2018 WL 6492691 (2018)

FEDERAL CASES

Petitioner's Temporary Physical Separation From His Father While in Detention Did Not Terminate Father's "Physical Custody;" Petitioner Acquired Citizenship When Father Became Citizen

The FBI arrested petitioner, then a minor child and a legal permanent resident (LPR), for allegedly conspiring to provide material support for terrorism. The District Court placed petitioner in pretrial juvenile detention. Shortly thereafter, petitioner's father became a citizen while petitioner was still under the age of eighteen. A month later, petitioner turned eighteen in federal pretrial juvenile detention. During petitioner's subsequent removal proceedings, the Board of Immigration Appeals concluded that the detention had terminated the father's "physical custody" over petitioner, and therefore petitioner was not eligible to acquire derivative citizenship under the Immigration and Nationality Act, 8 U.S.C.A. § 1431[a]. The Second Circuit reversed. Petitioner was a U.S. citizen and the Department of Homeland Security must terminate removal proceedings. Under § 1431[a], a child under the age of eighteen who was a LPR of the United States acquired citizenship when that child's parent became a citizen if the child was residing in the United States in the "legal and physical custody" of that parent. Petitioner's temporary physical separation from his father while in detention did not terminate the father's "physical custody." A parent's physical custody did not cease due to a child's brief, temporary separation from a parent. The "physical custody" requirement ensured that the LPR child had a strong connection to the naturalizing parent and to the United States at the time the child became eligible for derivative citizenship. There was no dispute that petitioner had such a connection to his United States citizen father at the time that his father naturalized. Petitioner had lived at home with his parents since entering the United States. The distinctive nature of federal pretrial juvenile detention, which encouraged continued family involvement with the child, also supported the conclusion that the father retained "physical custody."

Khalid v. Sessions, 904 F.3d 129 (2d Cir. 2018)

County Jail Enjoined from Holding Juveniles in 23-Hour Disciplinary Isolation

Plaintiffs sought declaratory and injunctive relief on behalf of themselves and a proposed class of fellow 16– and 17–year–olds who had been or will be held in some form of solitary confinement at the Broome County Correctional Facility. The court, among other things, granted plaintiffs' motion for class certification, issued a preliminary injunction barring imposition of 23–hour disciplinary isolation, directed that juveniles could be locked in their cells for disciplinary purposes only if the juvenile posed an immediate threat to the safety or security of the facility and only after less restrictive measures had been employed and found inadequate to address the particular threat at issue, directed that under no circumstances shall a juvenile be locked in a cell for greater than four hours for disciplinary purposes, directed that if a juvenile remained an immediate threat to the safety and security of the facility after four hours, a psychiatrist

shall be consulted and a plan put in place to ensure the juvenile's safe return to the general juvenile population, directed that juveniles be given access to at least three hours of educational instruction each day as well as any IDEA-mandated special education and related services, and directed that if a juvenile with a mental health or intellectual disability would potentially lose access to the benefits, services, and programs offered at the facility as a result of the disciplinary process, defendants shall ensure that mental health staff will perform an individualized assessment of the juvenile as soon as possible. There was a broad and growing consensus in the scientific and professional community that juveniles were psychologically more vulnerable than adults. Plaintiffs asserted a constitutionally protected property interest in receiving a certain amount of minimum education under New York's Education Law, and, with respect to their IDEA claim, asserted that defendants routinely failed to adhere to the procedural requirements mandated by federal law, such as a "manifestation hearing," before changing a qualifying juvenile's "current placement." Plaintiffs also contended that defendants violated the ADA and § 504 of the Rehabilitation Act of 1973 by routinely placing juveniles with disabilities in solitary confinement without ever conducting the type of "individualized assessment" of their disability that these laws required.

A.T. v. Harder, 298 F.3d 391(NDNY 2018)

Where Plaintiffs' Exhaustion of Administrative Remedies Would Have Been Futile, Court Could Properly Exercise Subject Matter Jurisdiction Over Plaintiffs' Claims

Plaintiffs were the parents of three students who were born with serious medical conditions that severely limited their cognitive and physical abilities. These disabilities presented significant disadvantages for the students and their families, and constrained virtually every facet of their lives, including their ability to obtain an adequate education. Plaintiffs commenced this action to compel the Department of Education (DOE) to take prompt action. With a preliminary injunction in place, plaintiffs amended their complaint, asserting claims based on violations of the Individuals with Disabilities Education Act (IDEA), the New York State Education Law, the Rehabilitation Act, the Americans with Disabilities Act, and federal civil rights under 42 U.S.C. § 1983. Defendants DOE and the Chancellor of the New York City School District, in his official capacity, moved to dismiss the amended complaint for lack of subject matter jurisdiction because plaintiffs failed to exhaust their administrative remedies before commencing the action under IDEA, and for failure to state a claim. The District Court dismissed the claims pertaining to certain school years, and the claims against the individual defendant under the ADA and the Rehabilitation Act, but denied the motion in all other respects. The exhaustion of administrative remedies requirement was excused where it would be futile because the administrative procedures did not provide an adequate remedy. The DOE's policies fostered organized dysfunction and sanctioned a Kaftaesque approval process that often precluded receipt of IEP-related services. The DOE also lacked a mechanism to assure plaintiffs that their children would received

IEP-mandated services. Plaintiff's claims arose from DOE's failure to implement IEP-sanctioned services. That failure stemmed not from a dispute regarding the scope of an IEP, but primarily from DOE's policies. In some cases, the implementation of these policies prevented plaintiffs' children from attending school for several years, essentially rendering the IEP useless. Thus, the focus of the case was on defendants' alleged policy, not whether a particular IEP was appropriate for a particular student. Because systemic violations were often the result of implemented policies and procedures, administrative hearing officers did not have the ability to alter already existing policies. Accordingly, because plaintiffs' exhaustion of administrative remedies would have been futile, the Court could properly exercise subject matter jurisdiction over plaintiffs' claims. The fact that DOE adopted a new policy did not moot the case, because it was unclear whether the revised manual would fix the issues raised by plaintiffs. While the bulk of plaintiffs' allegations adequately supported their claims under the IDEA, H.B.'s claims, as they related to the 2014-15 and 2015-16 school years, were insufficiently pled. The complaint contained a threadbare allegation that M.C. spent those school years, in their entirety, at home without instruction. Accordingly, H.B.'s IDEA claims were dismissed insofar as they sought relief for defendants' conduct predating the December 2016 IEP. Plaintiffs adequately alleged defendants' gross misjudgment, as required to state claims under the Rehabilitation Act and ADA in conjunction with IDEA violation allegations. Plaintiffs also adequately alleged a § 1983 claim premised on municipal liability.

J.L. v. New York City Dep't of Educ., 324 F. Supp.3d 455 (SDNY 2018)