Office of Attorneys for Children
Appellate Division, Fourth Department

2019 Case Digest
Plus
Select Court of Appeals, Federal, and
Other Cases of Interest

SECOND DEPARTMENT CASE OF INTEREST

Record Insufficient Where AFC Failed to Advise Court of, Much Less Advocate for, Position of 10-year-old Child

Family Court denied the mother's petition to modify a stipulation of custody which was incorporated but not merged into the parties' judgment of divorce, so as to allow her to temporarily relocate with the parties' child, and awarded physical custody of the child to respondent father and parental access to the mother. The Appellate Division reversed, and among other things, reinstated the mother's petition, before a different Court Attorney Referee. The record was insufficient to allow the Appellate Division to make a fully informed decision as to whether relocation was in the child's best interests. Throughout the course of the proceedings on the petition, the Attorney for the Child failed to advise the court of, much less advocate for, the position of the then 10-year-old child. The Rules of the Chief Judge required that, except in certain proceedings not relevant here, the AFC must zealously advocate the child's position. Indeed, the Family Court Act identified as one of the primary obligations of the AFC helping the child articulate his or her position to the court. Moreover, despite the fact that it was not made aware of the child's position through the AFC, the court did not meet in camera with the child to aid it in determining her best interests. In light of the intemperate remarks made during the hearing by the Court Attorney Referee, it was appropriate to remit the matter for further proceedings before a different Court Attorney Referee.

Matter of David v LoPresti, 176 AD3d 701 (2d Dept 2019)

THIRD DEPARTMENT CASES OF INTEREST

Court Erred in Failing to Appoint AFC in Contested Custody Matter

Family Court granted petitioner mother's application to modify a prior order of custody and visitation. The Appellate Division reversed and remitted the matter for a new fact-finding hearing, with the appointment and participation of an Attorney for the Child. Despite the court's order being supported by the current record, the court erred in failing to appoint an AFC. The appointment of an AFC in a contested custody matter remained the strongly preferred practice, although such appointment was discretionary, not mandatory; *see* Family Court Act Section 249 (a). In the instant case, the lack of an AFC prejudiced the child's interests. The mother called the child's therapist as a witness and no objection was raised when the therapist testified regarding information that the child had disclosed in therapy. Had an AFC been appointed, that attorney presumably would have sought to protect the private and confidential nature of the child's discussions in therapy, rather that let the parents use the child's statements and therapist as weapons to support their own goals. The father also testified regarding statements made by the child; an AFC could have objected to those hearsay comments. Further, a AFC could have called additional witnesses, asked questions of the witnesses called by the parties or presented other evidence to elicit information that would support the child's position.

Matter of Marina C. v Dario D., 177 AD3d 1228 (3d Dept 2019)

AFC Breached Confidentiality of Lincoln Hearing by Referencing *Lincoln* Hearing in Brief Submitted on Children's Behalf

Family Court granted petitioner mother's application to modify a prior order of custody and visitation. The Appellate Division modified. The court's determinations that the parties were unable to communicate effectively regarding the children - as conceded by respondent father - and that the father's living arrangements were unsuitable for the children were supported by the record and established the existence of a change in circumstances. Turning to the best interests analysis, the record supported the court's findings that the father's living arrangements were unsuitable for the children. The record also established that the mother provided an appropriate and stable home for the children. These factors, together with the parents' admitted inability to effectively communicate regarding the children, provided a substantial basis for the court's determinations that joint legal custody was no longer workable and that the award of sole custody to the mother and the geographic restrictions on the father's visitation were in the best interests of the children. However, the court improperly delegated its authority to the mother by providing that the father shall not have overnight visitation with the children unless the mother consents. Accordingly, the order was modified by prohibiting all overnight visitation, noting that the father could petition for overnight visitation upon a showing of a change in circumstances. The Appellate Division noted its displeasure that the Attorney for the Children made repeated references to the *Lincoln* hearing in the appellate brief that he submitted on the children's behalf. Family Court's promise of confidentiality should not be lightly breached, and these transcripts were sealed. The right to confidentiality during a *Lincoln* hearing belonged to the child and was superior to the rights or preferences of the parents. Children whose parents were engaged in custody and visitation disputes must be protected from having to openly choose between parents or openly divulging intimate details of their respective parent/ child relationships. The breach of the confidentiality of the *Lincoln* hearing - and the trust of the children - was exacerbated by the fact that the Attorney for the Children made certain representations about the children's testimony that were inconsistent with their statements during the hearing.

Matter of Ellen T.T. v Parvaz U.U., 178 AD3d 1294 (3d Dept 2019)

ADOPTION

Biological Mother's Consent to Adoption Not Required

Family Court determined that respondent mother abandoned the child, and that her consent to the adoption of the child by petitioner was not required pursuant to Domestic Relations Law Section 111. The Appellate Division affirmed. Petitioner adequately alleged that the biological mother's consent to adoption was not required due to her abandonment of the child. The testimony credited by the court established that, during the six-month period immediately preceding the filing of the petition, the biological mother did not call petitioner, nor did she visit, write to, or provide any gifts for the child, and the biological mother's only contact with the child was a brief interaction initiated by petitioner at another individual's home during which the biological mother did not want to hold the child. Such insubstantial and infrequent contact was insufficient to preclude a finding of abandonment. The record did not support the biological mother's contention that petitioner interfered with her efforts to contact the child.

Matter of Brianna B., 175 AD3d 1791 (4th Dept 2019)

CHILD ABUSE AND NEGLECT

Petitioner Met Burden of Establishing that Children's Physical, Mental or Emotional Conditions Were in Imminent Danger of Becoming Impaired Due to Mother's Mental Illness

Family Court adjudged that respondent mother had neglected her four children. The Appellate Division affirmed. Although the dispositional part of the order was entered upon consent and had expired, the mother could nonetheless challenge the neglect adjudication because it constituted a permanent stigma to a parent and could, in future proceedings, affect a parent's status. Contrary to the contentions of the Attorneys for the Children, the mother did not default with respect to the fact-finding part of the order. Petitioner established by a preponderance of the evidence that the mother neglected the children. Evidence of mental illness alone did not support a finding of neglect, but such evidence could be part of a neglect determination when the proof further demonstrated that a respondent's condition created an imminent risk of physical, mental or emotional harm to a child. The testimony established that the mother was mentally ill and that, although she voluntarily sought treatment, she missed many follow-up appointments after doing so. Because of her admitted delusions and paranoia, she often stayed in her home with the shades drawn and refused to let her children go outside. The mother reported that her second oldest child did most of the cooking for the family because she was too depressed to do so, and that she yelled at the children and called them names to keep from hitting them. The mother also admitted being irritable and having a violent past and, based on the testimony, she continued to exhibit such behavior when she screamed at and threatened a caseworker for petitioner in front of the children and struck the youngest child during a psychiatric assessment. Therefore, petitioner met its burden of establishing that the children's physical, mental or emotional conditions were in imminent danger of becoming impaired due to the mother's mental illness.

Matter of Amiracle R., 169 AD3d 1453 (4th Dept 2019)

Contention Rejected that Court Committed Reversible Error by Failing to Preserve Exhibit

Family Court determined that respondent father abused the oldest subject child. The Appellate Division affirmed. The father allegedly committed an act of sexual abuse against the child while she was staying in the psychiatric unit of Erie County Medical Center (ECMC). Prior to the hearing, the father sought disclosure of the child's psychiatric records. The court permitted disclosure of the psychiatric records pertaining to the dates of the alleged incident of abuse, but denied disclosure of any other records. ECMC provided the court with records in response to a subpoena. The court reviewed those records in camera and the provided the father's attorney with the psychiatric records pertaining to the dates in question. The father's attorney requested that the court mark the remaining psychiatric records provided by ECMC as an exhibit for appellate review. Although the court agreed to do so, that exhibit had since been

lost. The father's contention was rejected that the court committed reversible error by failing to preserve the exhibit. The father did not assert an appealable issue. It was not enough to merely allege that documentary evidence had been lost. The father made no contention that the court abused its discretion in refusing to disclose the exhibit.

Matter of Faith B., 169 AD3d 1509 (4th Dept 2019)

Father's Actions in Engaging in Domestic Violence in Children's Presence and Choking Child Constituted Neglect

Family Court adjudged that respondent father neglected two of the subject children and derivatively neglected the third subject child. The Appellate Division affirmed. The evidence at the hearing established that the father engaged in abusive behavior against respondent mother while the children were present and that he choked the oldest son twice in two months. Both of the older children, when interviewed by an investigator, expressed fear and apprehension of the father. Thus, petitioner established, by a preponderance of the evidence, that the two older children's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired by the father's actions. There was sufficient evidence to establish that the father derivatively neglected the younger child because the evidence of neglect of the older children indicated such a fundamental defect in the father's understanding of the duties of parenthood or demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care. The father failed to preserve for review his contentions that the AFC failed to advocate for the children's positions regarding custody and visitation or that the AFC had a conflict of interest.

Matter of Jacob W., 170 AD3d 1513 (4th Dept 2019)

Father Neglected Child by Using Excessive Corporal Punishment

Petitioner and the AFC appealed from Family Court's order dismissing the petition alleging that respondent neglected the child by inflicting excessive corporal punishment. The Appellate Division reversed and granted the petition insofar as it sought a determination that the child was neglected. Petitioner established by a preponderance of the evidence that the father neglected the child. At the hearing, petitioner presented, among other things, witness testimony that the child sustained a bruised left temple, a bruised eye, and a bloody and swollen nose after the father struck him.

Matter of Justin M.F., 170 AD3d 1514 (4th Dept 2019)

Child Neglected as Result of Mother's Mental illness

Family Court placed respondent mother under petitioner's supervision based upon a finding that, as a result of her mental illness, she neglected the subject child. The Appellate Division affirmed. The court did not err in admitting into evidence certain hearsay statements in the mother's hospital records that were generated after a mental

hygiene arrest during the relevant time period. The records contained information concerning how and why the mother was taken to the hospital and, because of her refusal or inability to inform hospital personnel about what had occurred, the information was required for an understanding of her condition. Thus, the statements were properly admitted both because they related to diagnosis and treatment and were admissible as an exception to the hearsay rule and because they had the requisite indicia of reliability. Petitioner met its burden of establishing that the children's physical, mental or emotional conditions were in imminent danger of becoming impaired due to the mother's mental illness. The evidence at the hearing established that the mother engaged in bizarre and paranoid behavior.

Matter of Zackery S., 170 AD3d 1594 (4th Dept 2019)

Court Erred in Drawing Negative Inference Against Respondent for Failure to Call His Girlfriend to Testify

Family Court adjudged that respondent father neglected and abused the subject child. The Appellate Division affirmed. Petitioner met its initial burden to show a prima facie case of abuse and neglect by establishing that the father committed an act against the child constituting sexual abuse in the first degree. The child's disclosures of the sexual abuse were sufficiently corroborated by the testimony of a forensic expert, a caseworker, and the child's caretaker, who was not involved in the custody dispute between the mother and father, and by the child's age-inappropriate knowledge of sexual matters. The court erred in, sua sponte, drawing a negative inference against him based upon his failure to call his girlfriend as a witness and in failing to advise the father that the court intended to do so. However, the error did not affect the result.

Matter of Liam M.J., 170 AD3d 1623 (4th Dept 2019)

Drug Paraphernalia in Home Placed Children in Imminent Risk of Harm

Family Court adjudged that respondent mother neglected the subject children. The Appellate Division modified by conforming the order to the decision. Petitioner met its burden to show the children were in imminent risk of harm by establishing, by a preponderance of the evidence, that drug paraphernalia used in the manufacture of methamphetamine, including acetone, was in the home where mother and children resided, in areas accessible to the children.

Matter of Jillian E., 170 AD3d 1627 (4th Dept 2019)

Respondent Mother Failed to Properly Supervise Children and Protect Them From Father's Harmful Behavior

Family Court adjudged that respondent mother neglected the subject children. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the mother neglected the child. The testimony at the hearing established that the

mother and the children, one of whom was the mother's natural child, lived with respondent B.A., who was respondent's boyfriend and the father of the children and who suffered from untreated posttraumatic stress and substance abuse disorders. On one occasion, the father returned home after drinking alcohol and displayed increasingly erratic behavior in the presence of the children. He and respondent engaged in a verbal alteration, which became physical, and the father threw his phone into a fire in the backyard. Then respondent left the home with the father, leaving the children with no supervision and no phone. Respondent did not return home or communicate with the children for more than 24 hours. The children became afraid and eventually contacted their older sister through Facebook and waited two hours for her to travel from Utica to their home in Wayne county. The sister called 911 and reported respondent and the father as missing persons. When the police responded to the home, respondent and the father had been missing for 20 hours. When the respondent and father drove past the home and saw police cars, they stayed away for four more hours.

Matter of Ricky A., 170 AD3d 1667 (4th Dept 2019)

Reasonable Efforts Not Required to Reunite Mother With Child

Family Court granted the motion of petitioner in an order determining that reasonable efforts were not required to reunite respondent mother with the subject child. The Appellate Division affirmed. Because petitioner met its burden to show reasonable efforts were not required, by establishing that the mother's parental rights to her older children had been terminated, the burden shifted to the mother to establish that reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result tin parent-child reunification. Respondent failed to do so. The mother's caseworker testified that the mother continued to live with the child's father, which was a barrier to reunification because of domestic violence issues. One of the mother's witnesses testified that the mother still required parenting intervention, the mother acknowledged in her own testimony that she did not learn anything in parenting classes, and the caseworker testified that she believed that the mother could not make any further progress in her parenting.

Matter of Carmela H., 171 AD3d 1488 (4th Dept 2019)

Respondent's Challenge to Fact-finding Determination Foreclosed by Law of The Case

Family Court continued the placement of respondent mother's child in the care and custody of petitioner DSS. The Appellate Division affirmed. The mother's challenge to the disposition was moot and the exception to the mootness doctrine did not apply. The appeal brought up for review the order of fact-finding determining that the mother neglected the child, however, inasmuch as the AD determined on a prior appeal that the child was neglected, that determination was the law of the case, which foreclosed the mother's challenge. There was no new evidence at the dispositional hearing and no

subsequent change in the law.

Matter of Dagan B., 172 AD3d 1905 (4th Dept 2019)

Respondent Was a Person Legally Responsible For Children

Family Court determined that respondent neglected the subject children. The Appellate Division affirmed. The court properly determined that respondent acted as the functional equivalent of a parent in a familial or household setting for the children. With respect to educational neglect, the caseworker testified that during the 2016-17 school year, the children were absent from school more often than not and that as of the date of the petition, respondent resided with the children and their mother and provided care for the children. School records listed respondent as the children's emergency contact and indicated that, on at least one occasion during the relevant time period, he called the school to report the absence of one of the children.

Matter of Heavenly A., 173 AD3d 1621 (4th Dept 2019)

Mother Failed to Preserve Contentions on Appeal

Family Court determined that respondent mother neglected one of the subject children and derivatively neglected the other subject children. The Appellate Division affirmed. The mother's contention that the court erred in its finding of derivative neglect was not reviewable because it was premised on her admission of neglect. To the extent that the mother contended that she did not consent to the finding of derivative neglect, it was not properly before the Appellate Division because it was raised for the first time on appeal. The court did not err in determining that it was in the best interests of the two youngest derivatively neglected children to continue their placement in petitioner's custody inasmuch as that determination reflected a resolution consistent with the best interests of the children after careful consideration of all the relevant facts and circumstances and was supported by a sound and substantial basis in the record. The mother's contention that she was denied a fair hearing because the AFC made prejudicial remarks on summation was not preserved for review.

Matter of Daniel K., 173 AD3d 1732 (4th Dept 2019)

Finding of Abuse Legally Sufficient

Family Court determined that respondent mother abused the subject child. The Appellate Division affirmed. The injuries sustained by the child were of sufficient magnitude to sustain a finding of abuse pursuant to Family Court Act § 1012 (e). The 21-month-old child sustained approximately 25 distinct bruises, including a black eye, and bruises on her forehead, her right ear, and under her eye. She also had an adult-sized bite mark on her arm, was missing clumps of hair, and the hearing testimony established that the pattern of hair loss and the child's reaction to the examination were consistent with the child's hair having been forcibly pulled from the child's head. The

mother's explanations for the injuries were not credible. Thus, the evidence was legally sufficient to support the finding of abuse inasmuch as a preponderance of the evidence established that the mother endangered the child by creating a substantial risk of serious injury.

Matter of Addison M., 173 AD3d 1735 (4th Dept 2019)

Presumption of Neglect Established by Evidence of Father's Misuse of Illegal Drugs

Family Court determined that respondent father neglected the subject children. The Appellate Division affirmed. The fact that the father was not aggrieved by the dispositional portion of the order, because he waived his right to a dispositional hearing and consented to the disposition, did not bar his appeal from that part of the order with respect to the finding of neglect, which followed a fact-finding hearing. A preponderance of the evidence established that the father neglected the children. Family Court Act § 1046 (a) (iii) created a presumption of neglect if the parent chronically and persistently misused alcohol and drugs which, in turn, substantially impaired his or her judgment while the children were entrusted to his or her care. That presumption operated to eliminate a requirement of specific parental conduct vis-a-vis the children and neither actual impairment nor specific risk of impairment needed to be established. That presumption was not rebutted by a showing that the children were never in danger and were always well kept, clean, well fed and not at risk. Petitioner established at the fact-finding hearing a presumption of neglect pursuant to § 1046 (a) (iii) by presenting evidence of the father's misuse of illegal drugs. There was evidence that the father had used cocaine nearly non-stop for the week preceding the removal of the children, that he admitted being addicted to drugs, that respondent mother called the police, who arrived while the father was in the midst of injecting cocaine, and that dozens of hypodermic needles were found in respondents' house. In addition, the court properly drew the strongest possible negative inference against the father after he failed to testify at the fact finding hearing. The presumption of neglect was not rebutted inasmuch as the evidence did not establish that the father was voluntarily and regularly participating in a recognized rehabilitative program. Indeed, the record contained significant evidence establishing that the father continued using drugs.

Matter of Jack S., 173 AD3d 1842 (4th Dept 2019)

Any Error in Admitting School Records Was Harmless

Family Court determined that respondent mother neglected her five children. The Appellate Division affirmed. The mother's contention was rejected that the petitions were invalid inasmuch as they were not properly verified. Petitions in neglect proceedings did not need to be verified. The mother failed to preserve her contention that Family Court improperly admitted into evidence, without a proper foundation, the children's school records. Moreover, the mother's attorney conceded that the records were properly admitted. Nonetheless, any error in admitting the records was harmless.

Most of the information contained therein, including that regarding attendance and behavioral issues, was cumulative of testimony given by school social workers, and the court expressly noted that its finding of neglect was not based on educational neglect. Thus, the result would have been the same even if the school records had been excluded.

Matter of Alana G., 173 AD3d 1848 (4th Dept 2019)

Appeals Dismissed as Moot Where Respondent Challenged Disposition Only

Family Court temporarily removed the subject children from respondents' care and placed them in the care and custody of petitioner pending the completion of a hearing on the amended petition, and then granted the amended petition and continued placement of the subject children with petitioner until the completion of the next permanency hearing in June 2018. The Appellate Division dismissed the appeals as moot. In each appeal, respondents challenged only the disposition. Those challenges were moot inasmuch as it was undisputed that superceding permanency orders had since been entered, in which respondents stipulated that it was in the best interests of the children to continue their placement with petitioner.

Matter of Nyjeem D., 174 AD3d 1424 (4th Dept 2019)

Mother Neglected Child by Leaving Child With Inadequate Caregiver

Family Court determined that respondent mother neglected her child. The Appellate Division affirmed. Petitioner met its burden of establishing that the child's physical, mental or emotional condition was in imminent danger of becoming impaired and that the actual or threatened harm to the child was a consequence of the mother's failure to exercise a minimum degree of care in providing the child with proper supervision. The child, who was nonverbal and had autism, was left alone for multiple hours with the mother's teenage daughter, who also had autism. The daughter acknowledged that she could not care for the child, and the father and petitioner's caseworker confirmed that the daughter was not capable of caring for the child. The daughter's individual service plan specified that she was not to be left at home alone without supervision, much less left alone to supervise the child. When DSS staff arrived at the home, the child and daughter were observed alone, without supervision, a second-floor window was open, and the child was attempting to turn on the stove. The mother knew that she needed help caring for the child and she had years to complete and submit the necessary paperwork to secure appropriate services for the child.

Matter of Edward T., 175 AD3d 1115 (4th Dept 2019)

Court Erred in Failing to Set Forth Factual Findings in Awarding Custody to Grandmother

Family Court granted, without a hearing, the grandmother's petition for custody of

respondents' three children. The Appellate Division dismissed as moot the appeal insofar as it concerned respondents' oldest child because she had attained the age of majority, and the case was held, the decision was reserved and the matter was remitted. With respect to the court's award of custody of the other two children to the grandmother, the court failed to set forth those facts upon which the rights and liabilities of the parties depended. It appeared that this custody order was intended to resolve a pending child protective proceeding against one or both respondents. Nonetheless, the court failed to reference in its bench decision or its order either Family Court Act Sections 1055-b or 1089-a, the statutes that provided the requisite procedure for terminating an article 10 proceeding by granting custody to a relative or relatives or other suitable person or persons pursuant to article six of the Family Court Act. Further, if the petition was intended to resolve a pending child protective proceeding, the court erred in failing to hold a joint hearing and failing to make the statutorily required findings supporting its award of custody to the grandmother.

Matter of Susan T. v Crystal T., 175 AD3d 1829 (4th Dept 2019)

Father Neglected Child by Sleeping in Same Bed, Lying on Top of Her, Among Other Things

Family Court adjudged that respondent father neglected his child. The Appellate Division affirmed. There was a sound and substantial basis in the record supporting the court's determination that petitioner met its burden of establishing that the child was neglected. The evidence adduced by petitioner established that the father engaged in conduct that included sleeping in the same bed as the child, lying on top of her, and moving up and down on top of her. Petitioner's witnesses also testified that the father placed his genitals against the child's buttocks. Contrary to the father's contention, in this neglect proceeding, petitioner was not required to prove that the father's actions were done for the purpose of sexual gratification. The court did not credit the father's testimony that he was merely hugging the child. The court's determinations and assessments of credibility were supported by the record and would not be disturbed. Petitioner established that the child was placed in actual or imminent danger of physical, emotional, or mental impairment by the father's conduct. The testimony of petitioner's witnesses showed that the child was clearly impacted by the father's conduct inasmuch as she told others that she did not like it, it made her uncomfortable, and she wanted it to stop.

Matter of Kayla V., 175 AD3d 1840 (4th Dept 2019)

Mother Neglected Children by Chronically and Persistently Misusing Alcohol and Drugs

Family Court determined that respondent mother neglected the subject children pursuant to Family Court Act section 1012 (f) (I) (B). The Appellate Division affirmed. The evidence at the hearing established, among other things, that the mother lost a job due to her drug use, she appeared intoxicated by drugs or alcohol on an occasion when

police officers arrived to check on respondent father, she admitted that she used cocaine during the relevant time period, and she took prescription drugs in a suicide attempt that left her hospitalized. The mother failed to rebut the presumption of neglect that arose from the evidence that she chronically and persistently misused alcohol and drugs which, in turn, substantially impaired her judgment while the children were entrusted to her care. Additionally, the court properly drew the strongest possible negative inference against the mother after she failed to testify at the fact-finding hearing. Thus, a preponderance of the evidence established that she neglected the children.

Matter of Jack S., 176 AD3d 1643 (4th Dept 2019)

Error to Deny Mother's Motion to Dismiss Petition at Close of Petitioner's Proof

Family Court's corrected order, among other things, adjudged that respondent mother Casey V. had neglected four of her five children. The Appellate Division reversed and dismissed the petition. The court erred in denying the mother's motion to dismiss the petition at the close of petitioner's proof on the ground that petitioner failed to establish a prima facie case that the children were neglected. Petitioner alleged in its petition, inter alia, that the mother neglected the subject children because there had been incidents of age-inappropriate sexual conduct between the three youngest children and an additional sibling not named in the petition, that the youngest child also engaged in an age-inappropriate sexual act with a non-family member, and that the mother knew of the latter incident and failed to take appropriate action. Petitioner conceded that it was alleging that the mother was aware of only the single incident between the youngest child and the non-family member and that the mother did not have firsthand knowledge of that incident. Petitioner failed to offer sufficient evidence to corroborate the out-of-court disclosure of the youngest child, who was five years old at the time of the interviews. Although the testimony of the two caseworkers established that the disclosure reflected age-inappropriate knowledge of sexual matters, petitioner failed to submit any other evidence tending to support the reliability of the youngest child's statements apart from the disclosure itself. For example, the disclosure was not independently substantiated by any of the other involved children, the eldest of whom was apparently not even interviewed during petitioner's investigation. Further, although expert validation testimony may also constitute sufficient evidence to corroborate a child's out-of-court statement, no such expert testimony was submitted by petitioner. The two caseworkers who testified on behalf of petitioner asserted that they utilized forensic interviewing techniques to avoid leading the youngest child during their interviews, but petitioner failed to offer any evidence establishing that either caseworker was qualified to give expert validation testimony in such matters. An admission by the mother that she had heard that the purported prior incident occurred in the manner stated by others was in no sense an admission of any fact pertinent to the issue, but a mere admission of what she had heard without adoption or indorsement. In addition to the failure to sufficiently corroborate the youngest child's disclosure, petitioner further failed to present sufficient evidence that the mother became aware of the incident between the youngest child and the non-family member at a time when she could have

acted to avoid harm or the risk of harm to the children, but failed to act accordingly.

Matter of Carmellah Z., 177 AD3d 1364 (4th Dept 2019)

Court Properly Denied Request of Mother's Attorney for Adjournment

Family Court terminated the subject child's placement with petitioner, among other things (order on appeal No. 1), and awarded sole legal and physical custody of the child to his paternal grandparents (order on appeal No. 2). The Appellate Division dismissed except insofar as respondent mother challenged the denial of her attorney's request for an adjournment, and affirmed. Both orders were entered following a dispositional hearing at which the mother failed to appear and in which her attorney, although present, elected not to participate. Where the orders appealed from were made upon the mother's default, review was limited to matters which were the subject of contest below. Thus, in both appeals, review was limited to the denial of the request of the mother's attorney for an adjournment. The mother's contention was rejected that the court abused its discretion in denying that request inasmuch as the mother's attorney offered nothing beyond a vague and unsubstantiated claim that the mother could not appear.

Matter of Ramere D., 177 AD3d 1386 (4th Dept 2019)

Court's Determination that it Was in Children's Best Interests to Change Permanency Goals to Placement for Adoption Supported by Sound and Substantial Basis in Record Where Mother Had Long History of Problems With Alcohol

Family Court entered a fact-finding order that determined that respondent mother neglected the subject children, and in permanency orders, changed the permanency goals with respect to the children from reunification to adoption, and in a final order of disposition, directed that the mother remain under petitioner's supervision and placed the children in petitioner's custody, to reside in foster care with their maternal grandmother and step-grandfather. The Appellate Division dismissed the appeal from the fact-finding order inasmuch as the appeal from the dispositional order brought up for review the propriety of a fact-finding order, and affirmed the remaining orders. The court properly determined that the children were neglected. The children had been removed from the mother's custody in 2013 and placed with her mother and stepfather due to her substance abuse issues, and the mother had relapsed twice before. The children had only recently been returned to the mother's custody when the first of the two incidents occurred in which the mother consumed alcohol to the point that she was unable to care for them. The oldest child, who was 14 years old at the time of the respective incidents, testified at the fact-finding hearing that he and his siblings were afraid of the mother when she consumed alcohol, and his testimony was corroborated by the testimony of the caseworker who interviewed the younger siblings. This was not a situation where the mother used alcohol or other substances after the children were asleep and thus ignorant of any such use. The mother, who had a long history of

problems with alcohol, was drinking and passing out when her children were awake and in need of her care. The court's determination that it was in the children's best interests to change the permanency goals to placement for adoption was supported by a sound and substantial basis in the record.

Matter of Nevaeh L., 177 AD3d 1400 (4th Dept 2019)

CHILD SUPPORT

Court Lacked Jurisdiction to Distribute Parties' Tax Refund

Family Court denied respondent mother's objections to an order of the Support Magistrate, entered after a hearing, that reduced the amount of petitioner father's child support obligation. The Appellate Division modified and remitted. The court properly denied the mother's first objection to that part of the Support Magistrate's order finding that the mother lived rent-free. The Support Magistrate did not credit the mother's testimony that she paid rent when she was able to do so, and the court properly deferred to the Support Magistrate's findings of fact and credibility determinations with respect to that issue. The court properly denied the mother's fourth objection to that part of the Support Magistrate's order imputing income to her as part of the determination whether to reduce the father's support obligation. The Support Magistrate determined that the mother's testimony was not credible on the issue of being forced to leave her employment. There was no reason on the record to disturb the findings of the Support Magistrate. However, the court erred in denying the mother's second objection to that part of the Support Magistrate's order that, in effect, distributed half of the parties' tax refund to the father by reducing his child support obligation by that amount. The father's entitlement to claim the children as dependents for income tax purposes was not an element of support set forth in Family Court Act article 4, and thus the court lacked jurisdiction to distribute the parties' tax refund. Therefore, the order was modified by granting the second objection and vacating the first ordering paragraph of the order of the Support Magistrate, and the matter was remitted to recalculate the father's child support obligation without regard to the parties' income tax refund.

Matter of Bashir v Brunner, 169 AD3d 1382 (4th Dept 2019)

Court Did Not Err in Permitting AFC to Participate in Financial Trial; No Error in Calculating Retroactive and Prospective Child Support

Supreme Court entered a judgment of divorce that, among other things, calculated retroactive and prospective child support. The Appellate Division modified by vacating the award of $14,000 in attorneys' fees to defendant husband. Plaintiff mother contended that the court erred in permitting the Attorney for the Child (AFC) to participate in the financial trial. That contention was rejected inasmuch as issues of child support were to be determined at that trial. Further, there was no merit to plaintiff's contention that the court erred in denying her motion to remove the AFC. Plaintiff's unsubstantiated allegations of bias were insufficient to support her application to remove the AFC. Plaintiff's further contention was rejected that she was entitled to a credit for excess child support payments. There was a strong public policy against restitution or recoupment of support overpayments and nothing in the record showed that it was error to deny that relief. The court did not abuse or improvidently exercise its discretion in using the parties' tax returns for the actual years under review as opposed to the tax returns from the year before each year under review inasmuch as the court

was being asked to review retroactively the pendente lite award of child support. The court properly used the parties' most recent tax returns to calculate the amount of future child support, and the presumptively correct amount of child support did not result in an award that was unjust or inappropriate. The award of attorneys' fees to defendant was vacated inasmuch as neither party was a "less monied spouse", and plaintiff had significantly more student loan debt than defendant.

Haggerty v Haggerty, 169 AD3d 1388 (4th Dept 2019)

Court Properly Ordered Defendant to Pay Eldest Daughter's Outstanding Undergraduate Debt

Supreme Court determined that the parties' divorce settlement agreement obligated defendant husband to pay all of the eldest daughter's undergraduate and graduate expenses, except for certain loans that plaintiff mother took out in her own name. Consequently, the court ordered defendant to pay the eldest daughter's outstanding undergraduate debt, which amounted to $57,418.96. The Appellate Division affirmed. The plain language of the agreement reflected defendant's undertaking to pay for all - i.e., "100%" - of his children's educational expenses through and including - i.e., "until" - the completion of the program in which they were "currently" enrolled. Such expenses necessarily included the undergraduate debt incurred by the eldest daughter. Inasmuch as defendant had a voice in the selection of the contractual language, there was no basis to construe any ambiguity in that language against plaintiff.

Kozminski v Kozminski, 169 AD3d 1418 (4th Dept 2019)

Respondent Not Entitled to Cancellation of Child Support Arrears

Family Court granted that part of respondent's motion to vacate a default order of filiation, but denied that part of respondent's motion seeking a cancellation of child support arrears. The Appellate Division affirmed. Respondent was adjudicated the father of the subject child in 1999, in a filiation order entered upon his default. He moved in 2016 to vacate the default and cancel his child support arrears, after another man was adjudicated the father of the subject child in a Mississippi court, based upon DNA test results. The Family Court Act unequivocally provides that the court shall not reduce or annual child support arrears accrued before making application under the Act. Therefore, given the statute and the Court of Appeals pronouncement that under the current scheme for enforcing court-ordered child support obligations, courts may not reduce or cancel any arrears that have accrued, the court properly determined that it had no authority to vacate the child support arrears that arose before the filing of this motion to vacate.

Matter of Onondaga County Dept. of Social Servs. v Marcus N.D., 170 AD3d 1561 (4th Dept 2019)

Support Magistrate Erred in Applying New Jersey Law

Family Court denied the mother's first and second objections to the order of the Support Magistrate. The Appellate Division reversed, granted the objections, and remitted to the court for further proceedings. In 2011, a New Jersey court issued a judgment of divorce that incorporated, but did not merge, the parties separation agreement. The agreement stated that,"notwithstanding the future residence or domicile of either party, this Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance with the laws [of New Jersey]." In 2016, when the parties and children were living in New York State, the mother filed a petition in the court seeking modification of a support order. During the proceeding, the mother registered the support order in that court. The Support Magistrate agreed with the mother that a modification was proper under the terms of the agreement and calculated the father's support obligation pursuant to New Jersey law. The mother filed an objection asserting that the calculation should be governed by New York law and another objection that the matter should be remitted for a hearing to recalculate the father's support obligation. The court denied the objections. The court had jurisdiction under the Uniform Interstate Family Support Act (UIFSA). New York law must be applied to determine the father's child support obligation inasmuch as the UIFSA (Family Court Act § 580 - 613 [b]) provides that the state exercising jurisdiction shall apply the procedural and substantive law of that state. The Support Magistrate erred in determining that the choice of law provision in the contract controlled over the statute. Courts will not enforce choice of law clauses where they, among other things, violate public policy. Under New York law, child support obligations are required to be calculated pursuant to the CSSA and the duty to support the child shall not be diminished or eliminated by the terms of a separation agreement. Further, New Jersey law provides that generally the child support obligation ends when a child reaches the age of 19, whereas in New York that obligation ends when the child reaches the age of 21. Enforcement of the parties' choice of law provision would violate these strong public policies.

Matter of Brooks v Brooks, 171 AD3d 1462 (4th Dept 2019)

Father's Income Properly Supplemented by Income Imputed From New Wife

Family Court granted petitioner mother's objections to the order of the Support Magistrate. The Appellate Division affirmed. Petitioner commenced this proceeding seeking an upward modification of respondent's child support obligation, which had not been modified for several years, despite respondent father's increase in income. The Support Magistrate granted the petition insofar as it sought an upward modification, but denied her request to impute income to the father. The father had voluntarily accepted a position in North Carolina that paid about $13,800 less per year than his previous position in New York State. The motivating reason for the change was the fact that the father's new wife accepted a position in North carolina that paid $30,000 more per year than her position in New York. The court granted the mother's objections and imputed income to the father. The court erred when stating that it was not permitted to reduce the father's child support obligation even if his decision to take a lower paying job was reasonable. However, reversal was not required because the Appellate Division was able to make its own findings. The record established that the father had the potential

to earn $64,819 and that under the circumstances of this case, it was proper to consider a portion of the salary of the new wife as income of the father.

Matter of Montgomery v List, 173 AD3d 1657 (4th Dept 2019)

Court Erred in Awarding Father Child Support Because Parties Shared Near Equal Access Time and Father Had Higher Income

Family Court denied respondent's objections to an order of the Support Magistrate. The Appellate Division modified and remitted. The court erred in awarding the father $125 per week in child support effective April 2, 2015 until January 1, 2016 because the parties shared near equal access time with the child during that period and the father had higher income. Shared custody arrangements did not alter the scope and methodology of the Child Support Standards Act (CSSA). A court must calculate the basic child support obligation under the CSSA, and then must order the noncustodial parent to pay his or her pro rata share of the basic child support obligation, unless it found that amount to be unjust or inappropriate. In instances where the parents' custodial arrangement split the child's physical custody so that neither could be said to have had physical custody of the child for a majority of the time, the parent who had the greater pro rata share of the child support obligation should be identified as the noncustodial parent for purpose of child support, regardless of the labels employed by the parties. Inasmuch as the parties shared near equal access time in 2015 and the father's income was higher than that of the mother, the Support Magistrate should have deemed the father the noncustodial parent for purposes of child support and denied his petition to the extent that it sought child support from the mother during that period. The mother was entitled to a credit against any arrears from the order for the amount of child support erroneously awarded to the father from April 2, 2015 to January 1, 2016, and the matter was remitted to determine the amount of arrears and the credit to be applied thereto. Although there was a strong public policy against recoupment of child support overpayments, the requested credit was appropriate under the limited circumstances of the case. The record established that the mother had significantly less income and received certain public benefits, while the father received substantial disability and pension benefits, and had significant assets. Moreover, granting the mother's request would not detract from the father fulfilling the needs of the child while he was in the father's care. The mother's contention was rejected that the court erred in denying her objection to the amount of child support awarded effective January 1, 2016 because the Support Magistrate abused his discretion in imputing income to her. The Support Magistrate correctly found that, beginning in 2016, the mother did not diligently exercise her access time and the father spent far more time with the child. Thus, the record established that the mother was the noncustodial parent and the father was the custodial parent for purposes of child support, inasmuch as the father then had physical custody of the child for a majority of time. The imputation of income was not disturbed because there was record support for it.

Matter of Rapp v Horbett, 174 AD3d 1315 (4th Dept 2019)

Court Erred by Reducing Amount of Father's Contribution to College Expenses

On remittal, Family Court granted in part respondent father's objections to the Support Magistrate's order by reducing the amount of his contributions to the daughter's college expenses. The Appellate Division modified. The parties' separation agreement did not provide that the agreed-upon "SUNY cap" should be calculated by reducing the amount of such cap by the daughter's financial aid, grants, loans, and scholarships. If the parties had intended the cap to be calculated in such a manner, language to that effect could have been included in the agreement, but it was not. In addition, the father's interpretation would render the parental contribution illusory inasmuch as the amount of financial aid that the daughter received at the private university exceeded the cost of SUNY Geneseo established at the hearing before the Support Magistrate. The court erred in granting in part the father's objections by reducing the amount of his contribution inasmuch as the Support Magistrate properly concluded that the daughter's net college expenses were less than the cost of SUNY Geneseo and properly calculated the amount of the father's contribution obligation. Therefore, the order was modified accordingly. The father was not entitled to a credit for the daughter's room and board expenses inasmuch as the record established that the mother must maintain a household for the daughter during school breaks.

Matter of Wheeler v Wheeler, 174 AD3d 1507 (4th Dept 2019)

Father Willfully Violated Child Support Order

Family Court determined that respondent father willfully violated a child support order and committed him to jail for a term of six months. The Appellate Division affirmed. The father's contention that he failed to make payments because he was financially unable to do so was raised for the first time on appeal and therefore was not preserved for review. In any event, that contention was belied by the father's representation to the court that he had just made a payment and that he was employed and could pay $150 "today."

Matter of Jordan v Reed, 175 AD3d 1006 (4th Dept 2019)

Error to Allow Father's Attorney to Withdraw as Counsel, and to Proceed With Hearing in Father's Absence

Family Court, in effect, confirmed the determination of the Support Magistrate, upon the father's purported default, that he willfully violated a prior child support order and directed that he be incarcerated. The Appellate Division reversed and remitted. Although the father had presumably completed serving his term of incarceration, his appeal was not moot because of the enduring consequences that potentially flow from an order adjudicating a party in civil contempt. The Support Magistrate erred in allowing the father's attorney to withdraw as counsel and in proceeding with the hearing in the father's absence. The father's attorney did not make a written motion to withdraw; rather, counsel merely agreed when the Support Magistrate, after noting the

father's failure to appear for the hearing, offered to relieve her of the assignment. The absence of evidence that the father was provided notice of his counsel's decision to withdraw in accordance with CPLR 321 (b) (2) rendered the Support Magistrate's finding of default improper. Thus, the court thus erred in confirming those findings.

Matter of Gonzalez v Bebee, 177 AD3d 1274 (4th Dept 2019)

Reversal of Order that Determined Father Willfully Violated Prior Order

Family Court determined that respondent father willfully violated a prior order and committed the father to jail for a term of six months. The Appellate Division reversed. The court erred when it determined that the father's alleged violation of the child support order was willful because it did not afford the father with the opportunity to be heard and present witnesses. Although no specific form of a hearing was required, at a minimum the hearing must consist of an adducement of proof coupled with an opportunity to rebut it. Moreover, neither a colloquy between a respondent and the court nor between a respondent's counsel and the court was sufficient to constitute the required hearing. At most, there was a mere colloquy between the father and Support Magistrate, which was insufficient to constitute the required hearing.

Matter of Green v Lafler, 177 AD3d 1380 (4th Dept 2019)

Court Properly Denied Petitioner's Objection to Order of Support Magistrate Dismissing Its Modification Petition Seeking Costs Incurred at Birth of Subject Child Approximately 26 Years After Entry of Order of Filiation and Support

Family Court denied petitioner's objection to the order of the Support Magistrate dismissing its modification petition seeking from respondent father certain confinement costs incurred at the birth of the subject child. The Appellate Division affirmed. In 1992, an order of filiation and support was entered on consent of the parties, which required the father to inter alia, pay child support. It also established the value of the confinement costs. There was no language in the 1992 order compelling either party to pay those costs. Approximately 26 years later, petitioner filed a modification petition seeking an order requiring the father to pay those costs, arguing that he now could afford to pay them. Even assuming, arguendo, that the court improperly deferred to the Support Magistrate's findings, both the Support Magistrate and the court properly held that the plain language of the 1992 order did not require the father to pay the confinement costs incurred at the child's birth. Moreover, there was no language in the 1992 order holding the payment of those costs in abeyance until such time as the father was capable of providing payment, and such language would not be read into the order.

Matter of Erie Co. Dept. Soc. Srvs. v Bower, 177 AD3d 1387 (4th Dept 2019)

Father Willfully Violated Order of Child Support

Family Court confirmed the determination of the Support Magistrate that respondent

father willfully violated an order of child support and committed him to jail for a period of four months. The Appellate Division dismissed the appeal insofar as it concerned commitment to jail, and affirmed. Respondent's undisputed failure to comply with the order of child support constituted prima facie evidence of a willful violation of that order, and the burden therefore shifted to him to rebut that prima facie showing of willfulness. Respondent failed to meet that burden. The ability to pay child support included the ability to find employment, and respondent failed to show that he made a reasonable effort to find gainful employment. Respondent's contention that a jail term was improperly imposed was moot because that part of the order with regard to the commitment had expired by its own terms. Therefore, respondent's appeal from that part of the order was dismissed.

Matter of Steuben Co. Support Collection Unit v Cregan, 177 AD3d 1398 (4th Dept 2019)

Proper Procedure to Challenge Order Entered Upon Default Was by Way of Motion to Vacate Default

Family Court denied respondent father's objections to the order of the Support Magistrate. The Appellate Division dismissed. The Support Magistrate granted the mother's petition upon the father's default. The proper procedure to challenge an order entered upon a default was by way of a motion to vacate the default pursuant to CPLR 5015 (a) rather than by way of the filing of objections pursuant to Family Court Act Section 439 (e).

Matter of Jagger v Jagger, 177 AD3d 1403 (4th Dept 2019)

Court Erred in Determining Modification Retroactive to Date Petition Was Filed

Family Court denied the objection of the petitioner to an order of the Support Magistrate. The Appellate Division reversed, granted the objection, granted the petition, and remitted for a determination of the correct amount of arrears. The court erroneously concluded that the modification of child support could only be retroactive to the date petitioner filed the petition, July 30, 2018. Because it was undisputed that the father did not notify the Support Collection Unit of his change in employment status as required by the prior support order, the court had the authority to modify the child support payments retroactive to the date of his employment on May 30, 2018.

Matter of Oneida Co. Dept. Soc. Srvs. v Abu-Zamaq, 177 AD3d 1412 (4th Dept 2019)

Petitioner Not Entitled to Hearing Based on Allegation that Two of Parties' Children Were Constructively Emancipated

Supreme Court granted in part the mother's petition seeking a downward modification of her child support obligation on the grounds that the parties' oldest child was emancipated and that she had lost her job, dismissed her supplemental petition seeking

a downward modification of her child support obligation on the ground that two of the parties' other children were constructively emancipated, and granting in part the application of respondent seeking, inter alia, child support arrears and counsel fees as provided for by the parties' judgment of divorce. The Appellate Division modified. Petitioner's contention was rejected that the court was required to apply a credit against her arrears for certain college expenses. A credit against child support for college expenses was not mandatory but depended on the facts and circumstances in the particular case. Petitioner's further contention was rejected that, because she disputed the alleged arrears, she was necessarily entitled to a hearing prior to the court's determination with respect thereto. Petitioner failed to raise a material issue of fact that would warrant a hearing inasmuch as she did not contest respondent's calculation of the arrears and instead contended only that he provided certain untimely and insufficient documentation of those arrears. Petitioner's contention was rejected that she was entitled to a hearing because two of the parties' children were constructively emancipated. Under the doctrine of constructive emancipation, a child of employable age who actively abandoned the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support. Petitioner's contention was incorrect as a matter of law with respect to one of the children, who was only 16 years old and was therefore not of employable age. With respect to the other child, petitioner failed to establish, or even allege, that the child had abandoned a relationship with petitioner by refusing all contact and visitation with her. However, it was an abuse of discretion to award the amount of counsel fees requested, without affording petitioner the opportunity to elicit further information on the reasonable value of those services. Therefore, the order and judgment was modified by vacating the award of attorney's fees, and remitted for a determination regarding attorney's fees based upon proper proof.

Brinson v Brinson, 178 AD3d 1367 (4th Dept 2019)

Affirmance of Order Terminating Father's Child Support Obligation and Requiring Mother to Pay Father Child Support

Family Court confirmed the amended order of the Support Magistrate which granted petitioner father's petition seeking to terminate his child support obligation and require the mother to pay him child support. The Appellate Division affirmed. The mother's contention was rejected that the doctrine of the law of the case required that she should be designated the custodial parent for child support purposes. The Appellate Division's prior decision established that the father's reduced income constituted a sufficient change in circumstances to warrant a recalculation of his child support obligation. Based on that determination together with the allegations in the 2016 petition regarding the father's decreased income and the mother's increased income in 2015 and 2016, the Support Magistrate was entitled to modify the father's support obligation, including by terminating his obligation altogether and requiring the mother to pay child support. The Support Magistrate did not err in considering the equal placement of the children. Where the parents shared physical custody with approximately an even distribution of parenting time, the parent with the higher income was deemed the noncustodial parent

for purposes of the Child Support Standards Act. The Support Magistrate did not err in considering the children's equal placement with the parties because the change in circumstances justifying her recalculation of the parties' child support obligation was the change in each party's income, not the father's equal access. The Appellate Division previously rejected the father's contention that a sufficient change in circumstances existed to warrant a recalculation of his child support obligation based on the parties' equal access time with the children because the change in the visitation schedule occurred years before the 2013 support order and thus could not serve as the basis for any recalculation of his support obligation.

Matter of Brink v Brink, 178 AD3d 1369 (4th Dept 2019)

Court Properly Determined that Father Willfully Violated Order of Child Support

Family Court denied respondent's objections to the order of the Support Magistrate determining that he willfully violated a prior order of child support, fixing the amount of his child support arrears, and recommending that he be placed on probation. The Appellate Division affirmed. There was a presumption that a respondent had sufficient means to support his or her minor children and evidence that a respondent failed to pay support as ordered constituted prima facie evidence of a willful violation. Petitioner established that respondent failed to pay the amount directed by the prior order, and the burden thus shifted to respondent to submit some competent, credible evidence of his inability to make the required payments. Respondent failed to meet that burden inasmuch as he failed to present evidence establishing that he made reasonable efforts to obtain gainful employment to meet his support obligation. He also failed to offer competent medical evidence in support of his contention that his alleged medical condition prevented him from maintaining employment.

Matter of Movsovich v Wood, 178 AD3d 1441 (4th Dept 2019)

CUSTODY AND VISITATION

Petitioners Met Burden of Establishing Extraordinary Circumstances; Court Improperly Delegated Its Authority to Set Supervised Visitation Schedule

After terminating the placement of the four subject children with DCFS, Family Court granted sole legal and physical custody of respondent's youngest two children to their aunt, and granted sole legal and physical custody of respondent's oldest two children to their great aunt. The Appellate Division modified. In light of the mother's history of leaving while the proceedings were in progress, the court did not abuse its discretion in denying her attorney's request for an adjournment. In determining that extraordinary circumstances existed, the court relied on the circumstances underlying the initial finding of neglect, including that the mother suffered from acute depression and reported suicidal thoughts, but refused treatment and that, after the children's subsequent removal by DCFS, she admitted that her untreated mental health conditions made her incapable of caring for the children. The court found that, in the nearly two years since the children's removal, the mother had wholly failed to participate and progress in needed mental health services. Accordingly, the court properly determined that petitioners met their burden of establishing extraordinary circumstances. However, the court erred in granting the mother only so much supervised contact as was deemed appropriate by petitioners. The court improperly delegated to petitioners its authority to set a supervised visitation schedule. Therefore, the orders were modified and the matter remitted to Family Court to determine the supervised visitation schedule. The court also erred in ordering that any petition filed by the mother to modify or enforce the custody orders must have a judge's permission to be scheduled. It was undisputed that the mother had not commenced any frivolous proceedings. In the absence of such a finding, it was error to restrict the mother's access to the court. Thus, the orders were modified by vacating the sixth ordering paragraph of each order.

Matter of Lakeya P. v Ajja M., 169 AD3d 1409 (4th Dept 2019)

Court Erred in Adjudging that Father's Wife Could Supervise His Visits With the Subject Children

Family Court adjudged that petitioner father's wife could supervise his visits with the subject children, and permitted the father to designate the location of visitation, including his own home. The Appellate Division reversed. The prior order, which was entered upon stipulation of the parties after the father was convicted of sexually abusing their then-four-year-old daughter, granted sole legal and physical custody of the children to the mother; required the father's visitation to be supervised by either his therapist, or the maternal grandmother; and specified that visitation was to occur at a location mutually agreed upon by the father and the grandmother. The father failed to establish the requisite change in circumstances. The father's employment, his lack of a criminal history other than the sexual abuse of his child, his completion of sex offender treatment, his lack of a history with Child Protective Services, and his lack of a mental health diagnosis did not constitute a change in circumstances because those

circumstances existed at the time of the parties' stipulation. The children's alleged desire to spend additional time with the father also did not constitute the requisite change in circumstances. The established custodial arrangement should not be changed solely to accommodate the desires of the children, particularly where the children were unaware that visitation with the father had been supervised by their grandmother for the last five years because the father was convicted of sexually abusing the daughter and was a registered sex offender. Even assuming, arguendo, that the father met his threshold burden of demonstrating a change in circumstances sufficient to justify a best interests analysis, there was no sound and substantial basis in the record to support the court's determination that the children's best interests warranted replacing the visitation supervisor, their grandmother, with the father's new wife, and permitting the father to select any location for his visits with the children. The record established that the maternal grandmother had a long history of successfully facilitating positive interaction between the children and the father while providing meaningful protection to the children. The visits lasted between four and eight hours; the grandmother provided crafts and projects for the father to enjoy with the children during visits; and the father and the children participated in a variety of activities together, such as swimming in the grandmother's pool, watching movies, playing board games, reading and playing imaginary games. There were no issues with the grandmother's supervision of the father's visits until the father brought his new wife to the grandmother's home, unannounced, for his routine visit with the children, and the grandmother refused to allow the father's wife into her home. That same day, however, the grandmother brought the children to a restaurant so they could eat with the father and his new wife and visit with them both. In addition, the grandmother testified that she would be willing to allow the father's new wife into her home as long as she had notice; the grandmother also stated that she would be willing to supervise visits at the father's home. In addition, the record established that the father's wife would supervise her husband's visits with his children through a very different lens than would the grandmother, whose allegiance was to the children.

Matter of William F.G. v Lisa M.B., 169 AD3d 1428 (4th Dept 2019)

No Abuse of Discretion in Denial of Father's Motion to Reopen Proof

Family Court modified a prior order of custody and visitation by reducing petitioner father's visitation with his son. The Appellate Division affirmed. A change in circumstances existed because the parents' relationship had become so strained and acrimonious that communication between them was impossible. The court did not abuse its discretion by reducing the father's visitation inasmuch as there was a sound and substantial basis in the record to support the court's determination. Furthermore, the court did not abuse its discretion in denying the father's motion to reopen the proof after he left court early during the first day of the hearing and did not return for the completion of the hearing on the next adjourned date. This was not an instance in which a party sought to reopen and supply defects in evidence which had inadvertently occurred.

Matter of Gibbardo v Ramos, 169 AD3d 1482 (4th Dept 2019)

Record Supported Determination that Joint Legal Custody Was Inappropriate

Supreme Court entered a judgment of divorce that, among other things, awarded plaintiff mother sole legal and physical custody of the parties' child, and directed defendant father to pay child support to the mother. The Appellate Division modified the father's child support obligation. The record established that, although the parties could sometimes effectively communicate with each other, most of their interactions were acrimonious, and that the father physically and emotionally abused the mother. Thus, the court's determination that joint legal custody was inappropriate had a sound and substantial basis in the record. The record also supported the court's determination that it was in the child's best interests to award sole legal and physical custody to the mother and to deny the father any extended weekend and holiday visitation. Evidence of the father's temper and acts of domestic violence against the mother and his other children demonstrated that he possessed a character that was ill-suited to the difficult task of providing his young child with moral and intellectual guidance. However, the court erred in applying the Child Support Standards Act (CSSA) to the combined parental income in excess of the statutory cap. In awarding child support on income above the statutory cap, the court considered only the father's financial situation. The court made no factual findings that the child had financial needs that would not be met unless child support was ordered to be paid out of parental income in excess of the statutory cap, and even if the court had made such a finding, there was no evidence in the record to support it. The father's child support obligation was modified accordingly.

Benedict v Benedict, 169 AD3d 1522 (4th Dept 2019)

Mother's Motion to Remove AFC Based on Unsubstantiated Allegations of Bias Properly Denied

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division affirmed. The court properly weighed the relevant factors in determining the best interests of the child. Those factors weighed in the father's favor, particularly in light of the mother's efforts to interfere with the father's contact with the child. Thus, there was a sound and substantial basis in the record for the court's determination. The court properly denied the mother's motion to remove the AFC, inasmuch as it was based upon unsubstantiated allegations of bias and nothing in the record established that the AFC failed to diligently represent the child's best interests.

Matter of Athoe v Goodman, 170 AD3d 1532 (4th Dept 2019)

Primary Residential Placement With Petitioner in Children's Best Interests

Family Court adjudged that the parties share joint custody of the parties' children with primary placement with petitioner father. The Appellate Division affirmed. A change in circumstances existed because the mother, in violation of an existing order, failed to enroll two of the children in counseling, failed to provide the father with the children's

educational, medical, dental and mental health appointment information, and interfered with his visitation and/or telephone access. There was a sound and substantial basis in the record for the court's determination. Further, inasmuch as the propriety of an order of protection was determined on the merits in a prior proceeding between the parties, the doctrine of res judicata precluded the mother from challenging it on this appeal. The court did not err in dismissing the mother's modification petitions without a hearing. The mother failed to establish a change in circumstances during the less than two-month period that had elapsed since the court transferred primary placement to the father.

Matter of Moreno v Elliot, 170 AD3d 1610 (4th Dept 2019)

Father Who Murdered Mother Not Entitled to Visitation

Family Court dismissed respondent father's petition seeking visitation with his children. The Appellate Division affirmed. At the time the petition was filed, the father was incarcerated based upon his conviction of murder in the second degree for killing the mother of the subject children. Pursuant to the Family Court Act and the Domestic Relations Law where one parent intentionally murders another parent and seeks custody or visitation of the children, there is a presumption that custody or visitation with the murdering parent is not in the children's best interests. The father failed to st forth allegations rebutting the presumption and therefore the court properly dismissed the petition without a hearing. There was no merit to the contention of the father that the court erred in failing to appoint an AFC for the children to assess whether the children would agree to visitation.

Matter of Pajek v Feketi, 170 AD3d 1625 (4th Dept 2019)

Custody Determination Had Sound and Substantial Basis in Record

Family Court denied the father's amended petition seeking modification of a prior joint custody order by awarding him primary residential custody and increased visitation with the parties' child and granted the cross motion of the mother insofar as she sought modification of the order directing that her address be used as the child's residential address for school purposes. The Appellate Division affirmed. The court properly considered and weighed the appropriate factors in denying the father's amended petition and in designating the mother as the primary residential parent for all purposes, including the use of her address for school purposes. Thus, there was a sound and substantial basis in the record for the court's determination.

Matter of Nordee v Nordee, 170 AD3d 1636 (4th Dept 2019)

Insufficient Facts Precluded Appellate Review

Family Court issued an order of protection upon a finding that respondent father committed a family offense against petitioner mother and, in another order, granted the mother's petition for sole custody of the parties' daughter and denied the father any visitation. The Appellate Division held the case, reserved decision and remitted to the

court for further proceedings. The court failed to specify the family offense upon which the order of protection was predicated. It also failed to set forth its analysis of the factors that traditionally affect the best interests of a child. As a result, the Appellate Division was unable to review the court's ultimate factual finding regarding the orders on appeal.

Matter of Benson v Smith, 170 AD3d 1640 (4th Dept 2019)

Reversal of Court's Denial of Mother's Motion to Vacate Order Entered on Default

Family Court denied respondent mother's application to vacate an order entered upon her default. The Appellate Division reversed and remitted to the court for further proceedings. The mother, who had physical custody of the child since birth until the father took custody pursuant to the default order, established a meritorious defense to the father's petition and raised an issue of fact whether she was served with the petition, this warranting a traverse hearing.

Matter of Delgado v Vega, 171 AD3d 1457 (4th Dept 2019)

Award of Physical Custody of Child to Father Affirmed

Family Court granted petitioner father physical custody of the parties' child. The Appellate Division affirmed. The father established a change in circumstances by establishing that the mother demonstrated a lack of concern for the young child's pressing dental needs and failed to seek treatment for those needs. The court's determination that it was in the best interests of the child to modify the parties' custody arrangement by awarding the father primary physical custody of the child had a sound and substantial basis in the record.

Matter of Kinne v Byrd, 171 AD3d 1495 (4th Dept 2019)

Mother Waived Contention that There Was No Change in Circumstances

Family Court granted petitioner father sole custody of the parties' child. The Appellate Division affirmed. The mother waived her contention that the father failed to establish a change in circumstances inasmuch as she consented at trial to custody of the child being transferred to the maternal grandparents. In any event, a change in circumstances was established inasmuch as it was established that the mother had an alcohol addition, and that the child had been residing primarily with the maternal grandparents for approximately two years at the time of trial.

Matter of Johnson v Jimerson, 171 AD3d 1498 (4th Dept 2019)

Court Improperly Conditioned Respondent's Right to File Future Petitions on Completing Anger Management Treatment

Family Court dismissed the father's petition for modification of a prior custody and

visitation order. The Appellate Division modified. The court improperly conditioned respondent's right to file future petitions on completing anger management treatment and modified the order accordingly. However, because of the father's history of frivolous and vexatious filing, the court did not abuse its discretion by prohibiting him from filing future modification petitions without prior judicial approval.

Matter of Sanchez v Mercedes, 172 AD3d 1898 (4th Dept 2019)

Court Lacked Subject Matter Jurisdiction in Custody Case

Family Court denied petitioner father's application to vacate a prior order that, among other things, granted the mother sole legal custody of the parties' child. The Appellate Division reversed, vacated the order, and dismissed the petition. The parties are the parents of a child born in New Jersey on February 18, 2015. The child lived with his parents in New Jersey until the mother relocated with the child to New York state and commenced this proceeding against the father on January 8, 2016. In her petition, which sought sole custody of the child, the mother averred that the child was moved on July 15, 2015. The parties appeared before the court six times in 2016 and the father expressed his frustration about the pace of the proceeding and the court's reluctance to set a visitation schedule. When the case was called for the seventh time, the father did not appear. The court then granted the mother's petition after taking no testimony. The father moved to vacate the default order, principally on the ground that the court lacked subject matter jurisdiction because at the time of the commencement of the proceeding, New York was not the child's home state for purposes of the Domestic Relations Law. The court denied the father's motion to vacate. The father did not waive his objection to the court's subject matter jurisdiction inasmuch as a defect in subject matter jurisdiction may be raised at any time by any party or by the court, and it cannot be created through waiver, estoppel, latches, or consent. Reading Domestic Relations Law § 76 (1) (a) in conjunction with § 75-a (7), home state jurisdiction attached when the subject child resided with a parent in New York either since birth or for the six consecutive months immediately preceding the commencement of a custody proceeding. Because the subject child had not lived in New York state either since birth or for six months as of the commencement of this proceeding, the court did not have home state jurisdiction over the proceeding. Further, the court did not have jurisdiction pursuant to the safety net provisions of Domestic Relations Law § 76 (1) (d), because New Jersey could have exercised jurisdiction on the date of the instant proceeding's commencement. The mother's contention that the New York court had subject matter jurisdiction because New York was the state where the child was present at the commencement of the proceeding was without merit inasmuch as Domestic Relations Law § 76 (3) provides that the subject child's physical presence is not necessary or sufficient to make a child custody determination.

Matter of Nemes v Tutino, 173 AD3d 16 (4th Dept 2019)

Sound and Substantial Basis for Sole Custody to Father

Family Court awarded sole custody of the subject child to petitioner father. The

Appellate Division affirmed. The contention of the mother and the AFC that sole custody to the father with visitation to the mother was not in the child's best interests was rejected. There was a sound and substantial basis in the record for the court's determination. The testimony established that after the tragic drinking-and-driving death of the mother's fiancé, the mother allowed the child to believe that the fiancé was her actual father, allowed the child to refer to the deceased fiancé as "dad" and to call the father by his first name, allowed the child to wear clothes memorializing the fiancé during visits with the father, and encouraged discussion in her household about the father's presumed participation in an alleged conspiracy to "ruin" the family. The mother admitted that she disregarded provisions of the prior custody order and that she filed a petition seeking to deprive the father of overnight, weekend, and holiday visitation. The father, unlike the mother, held a stable, full-time job for more than a decade, made attempts to get the child needed mental health counseling that were undermined by the mother, and he testified that he would continue to promote the child's relationship with the mother.

Matter of Russell v Russell, 173 AD3d 1607 (4th Dept 2019)

Mother Properly Granted Sole Custody of Parties' Children

Family Court granted sole custody of the subject children to petitioner mother. The Appellate Division affirmed. At the time the mother filed the petition, the father was incarcerated pending trial on charges of rape in the second degree and predatory sexual assault against a child, which stemmed from the impregnation of the mother's teenage daughter from a previous marriage. The court was not required to conduct a hearing because the court possessed sufficient information to make a comprehensive assessments of the best interests of the child. The father's twenty year incarceration rendered him incapable of fulfilling the obligations of a custodial parent.

Matter of Santos v Muhammed, 173 AD3d 1650 (4th Dept 2019)

Court Should Have Held Hearing on "Extraordinary Circumstances"

Family Court awarded petitioner parents of the child's putative father shared legal custody with the child's mother and physical custody of the child to petitioners. The Appellate Division reversed. The court erred in entering a final order upon the mother's "default." Where, as here, a party fails to appear but is represented by counsel, the order is not entered upon default. The court also erred in granting the petition without holding a hearing to determine whether petitioners established the existence of extraordinary circumstances and, if so, evaluate the child's best interests. Thus, the case was remitted for a hearing on the custody petition.

Matter of Hilton v Hilton, 173 AD3d 1674 (4th Dept 2019)

No Error in Limiting Father's Visitation With Child to One Hour Every Other Week

Family Court, among other things, limited petitioner father's visitation with his child to

one hour every other week. The Appellate Division affirmed. The court did not err in issuing an order of protection with a five-year duration based upon its finding of aggravating circumstances arising from the father's repeated violations of a prior order of protection. 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 limit the father's visitation.

Matter of April L.S. v Joshua F., 173 AD3d 1675 (4th Dept 2019)

Court Properly Prohibited Father's Girlfriend From Contact With Children

Family Court dismissed the father's violation petition and granted respondent mother's petition for modification of the existing custody order. The Appellate Division affirmed. The record did not establish that the court was biased or prejudiced against the father. The mother met her burden to establish a change in circumstances sufficient to warrant an inquiry into whether a modification of the custody and visitation order was in the best interest of the child. The evidence at the fact-finding hearing, as well as the child's statements at the *Lincoln* hearing, established the requisite change in circumstances inasmuch as the father and girlfriend exposed the child to inappropriate behavior, fighting, and verbal altercations at the father's home. The girlfriend, who had a history of substance abuse, admitted to a caseworker a few weeks before the filing of the mother's modification petition, that she had again been using drugs. The court did not err in determining that it was in the child's best interests to prohibit the girlfriend from having contact with the child. In addition to the inappropriate conduct that the child was exposed to at the father's home and the girlfriend's drug use, the record established that the girlfriend had a history of neglect and restricted visitation with her own daughter.

Matter of Chromczak v Salek, 173 AD3d 1750 (4th Dept 2019)

Court Abused Its Discretion in Denying Mother's Request to Adjourn Hearing

Family Court granted sole legal and physical custody of respondent mother's child to petitioners, the child's grandparents. The Appellate Division reversed. The court abused its discretion in denying the mother's request to adjourn the hearing. The record demonstrated that the mother presented a valid and specific reason for her inability to attend the hearing well before the hearing date and supported her request for an adjournment, which was her first, with a letter from her inpatient provider. Although the mother's counsel appeared on her behalf at the hearing, the record supported the mother's contention that she was prejudiced by her inability to provide testimony at the hearing. The court denied the adjournment based on its general desire to effect a quick and efficient resolution of this matter. There was, however, no evidence that the child would have been harmed by an adjournment.

Matter of Sullivan v Sullivan, 173 AD3d 1844 (4th Dept 2019)

Elimination of Overnight Visitation Affirmed

Family Court eliminated overnight visitation between respondent father and the children. The Appellate Division affirmed. The father's contention was rejected that the court's determination was not in the children's best interests inasmuch as petitioners, the children's mothers, attempted to alienate the children from him. The court found that petitioners acted with genuine concern for the emotional well-being of the children, and that finding had a sound and substantial basis in the record. The record established that the children were anxious and fearful of spending nights with the father because of his inattention to them, lack of suitable accommodations for them, and frequent arguments with his girlfriend.

Matter of Gilroy v Backus, 174 AD3d 1458 (4th Dept 2019)

Court Properly Denied Father's Request for In-person Visitation at Correctional Facility

Family Court denied petitioner father's request for in-person visitation with the subject child at the correctional facility in which he was currently incarcerated. The Appellate Division affirmed. Respondent mother established by a preponderance of the evidence that, under all the circumstances, visitation would be harmful to the child's welfare. The mother established that the child, who was approximately 2 ½ years old at the time of the hearing, did not have a significant relationship with the father, who last saw the child when he was 15 months old. The mother also established that the child had no relationship with the paternal relatives with whom he would have to travel more than two hours each way to visit the father in prison. The age of the child was a significant factor to consider, and the court properly considered the effects that visitation in prison might have on the child in light of his young age.

Matter of Kelly v Brown, 174 AD3d 1523 (4th Dept 2019)

Mother Failed to Show Relocation in Child's Best Interests

Family Court dismissed the mother's petition and amended petition for modification of a prior custody order, which sought relocation from Ontario County to Monroe County and for sole custody of the parties' child. The Appellate Division affirmed. The court erred in denying the mother's request for permission to relocate on the ground that she failed to establish a change in circumstances. She was not required to do so; rather, the court was required to determine whether the proposed relocation was in the child's best interests by analyzing the *Tropea* factors. After applying a *Tropea* analysis, the Appellate Division concluded that the mother failed to establish that the relocation would be in the child's best interests. Although the mother cited improved job prospects and a better school system as reasons for relocating, she did not indicate the school district into which she planned to move and she indicated that she had the possibility of finding a better job in Monroe County. The mother failed to make the requisite showing of a change in circumstances that would have warranted an inquiry into whether the best interests of the child would be served by modifying the existing custody

arrangement.

Matter of Betts v Moore, 175 AD3d 874 (4th Dept 2019)

Visitation With Incarcerated Father Not in Child's Best Interests

Family Court dismissed the father's petition seeking in-person visitation with the subject child at the correctional facility where the father was incarcerated. The Appellate Division affirmed. The father was serving a sentence imposed on a conviction stemming from an incident where he entered the mother's home and choked her, in the presence of the then infant child. He was sentenced to 10 years in prison and orders of protection were issued prohibiting the father from having contact with the mother or child until 2031. On a prior appeal, the order of protection was modified by deleting provisions that prohibited the father from communicating with or contacting the child by mail, telephone, voicemail or other electronic means. There was a sound and substantial basis in the record for the court's determination that the visitation requested by the father was not in the child's best interests. The court noted that the father did not express remorse or acknowledge that his behavior underlying his conviction was detrimental to the child. Moreover, the record established that the father was a stranger to the child and had never been involved in the child's life in any meaningful way. Also, although the father had a plan to accomplish visitation, it entailed having his father, who was a stranger to the child, transport the child to Attica prison, two weekend mornings per month, for visitations of five to six hours, in a room shared with several other inmates and their visitors

Matter of Bloom v Mancuso, 175 AD3d 924 (4th Dept 2019)

Sole Custody to Mother Affirmed

Family Court determined that it was in the best interests of the child to award sole legal custody of the child to the mother. The Appellate Division affirmed. There was a sound and substantial basis to support the court's determination. Based upon review of the relevant factors, including the finding that joint custody was no longer feasible because the mother and father had an acrimonious relationship and an inability to communicate in a civil manner, there was no basis to set aside the court's award of sole custody to the mother.

Matter of Valentin v Mendez, 175 AD3d 1021 (4th Dept 2019)

Court Erred in Dismissing Mother's Amended Petition

Family Court granted the motion of respondent father to dismiss the mother's amended petition seeking to modify the custody agreement. The Appellate Division reversed, the motion insofar as it sought to dismiss the amended petition was denied, the amended petition was reinstated, and the matter was remitted to the court for further proceedings. The parties' judgment of divorce provided that the parties would have joint legal and

equal shared physical custody of the children in accordance with the parties' settlement agreement. Shortly thereafter, the mother filed a family offense petition. About one year later, the mother filed an amended petition to, among other things, modify the custody agreement. The mother adequately alleged a change in circumstances warranting an inquiry whether the children's best interests would be served by modifying the custody agreement, inasmuch as she alleged the children's performance at school had deteriorated and that increased animosity between the parties made the shared custody arrangement unworkable.

Matter of Little v Little, 175 AD3d 1070 (4th Dept 2019)

Court Reviewed Mother's Challenge to the Validity of Her Waiver of the Right to Counsel Even Though Mother Defaulted

Family Court awarded petitioner father sole custody of the subject child. The Appellate Division dismissed the appeal except insofar as it challenged the validity of respondent mother's waiver of her right to counsel and affirmed. During the proceeding, the mother was represented by a number of attorneys. During the hearing on the petitions, the mother discharged her final attorney and proceeded pro se. Later in the hearing, the mother failed to return to the courtroom after a recess and did not appear for the reminder of the hearing. Orders were entered upon her default. The majority determined that the mother's contention that the court erred in failing to ensure, in response to her request to proceed pro se, that her waiver of the right to counsel was knowing, voluntary, and intelligent was reviewable, despite the mother's default. Notwithstanding the prohibition in CPLR 5511 against an appeal from an order or judgment entered upon default, the appeal from such order brought up for review those matters which were the subject of contest before the trial court. Here, the validity of the mother's waiver of her right to counsel was a subject of contest before the court. However, the mother's contention lacked merit. The mother was repeatedly advised by the court of the right to counsel, including assigned counsel, and was represented by several attorneys during the proceedings. Yet she discharged or consented to the withdrawal of her attorneys for her own reasons and opted to represent herself, even after she was advised that proceeding without counsel might be difficult or detrimental and that she would be required to follow the rules of evidence. Moreover, she demonstrated the ability and preparedness to proceed pro se by issuing subpoenas and filing exhibits. The first dissent would have dismissed the appeals because they were entered upon the mother's default and she was not aggrieved inasmuch as she received precisely the relief she sought. The second dissent also would have dismissed the appeals because they were entered upon the mother's default and faulted the majority for too broad a reading of the relevant cases.

Matter of DiNunzio v Zylinski, 175 AD3d 1079 (4th Dept 2019)

Record Supported Court's Determination to Reduce Father's Visitation

Family Court denied the father's petition seeking unsupervised visitation with the subject child and granted the mother's cross petition seeking to reduce the father's

supervised visitation. The Appellate Division affirmed. A sound and substantial basis in the record supported the court's determination to reduce the father's visitation. Specifically, the Sunday visits interfered with the child's other activities and the father failed to avail himself of his Sunday visitation on numerous occasions.

Matter of Shaffer v Woodworth, 175 AD3d 1803 (4th Dept 2019)

Referee, Attorney for Child, and Mother's Own Counsel Admonished for Unseemly Conduct and Unprofessional Comments Throughout Hearing

Family Court granted petitioner father sole legal and physical custody of the subject child. The Appellate Division affirmed. 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. The court's determination with respect to the child's best interests was entitled to great deference and would not be disturbed where, as here, it was supported by a sound and substantial basis in the record. The Referee, the Attorney for the Child, and the mother's own counsel were admonished for their unseemly conduct and unprofessional comments throughout the hearing. While Family Court matters could be emotional and taxing on the parties, that was not an excuse for a lapse in courtroom decorum from the attorneys and professionals in attendance.

Matter of Keller v Keller, 176 AD3d 1573 (4th Dept 2019)

Affirmance of Denial of Visitation to Grandmother; Child Not Deprived of Effective Assistance of Counsel on Appeal

Family Court granted petitioner mother sole legal custody and physical placement of the subject child, and denied visitation to respondent grandmother. The Appellate Division affirmed. While the appeal was pending, the court granted the grandmother's subsequent petition seeking visitation. The mother's renewed motion to dismiss the appeal was denied insofar as it concerned the issue of visitation inasmuch as the exception to the mootness doctrine applied under the circumstances presented. Nevertheless, the grandmother's contention was rejected that the court erred in denying her petition. The grandmother failed to establish her claim that the mother suffered from unaddressed, serious mental health issues that would warrant a finding of extraordinary circumstances. As of the time that the order was entered, the record supported the court's determination that it was in the best interests of the subject child to deny the grandmother visitation in view of the grandmother's failure to abide by court orders, the grandmother's animosity toward the mother, with whom the child resided, and the fact that the grandmother frequently engaged in acts that undermined the subject child's relationship with the mother. The grandmother's contention was rejected that the child was deprived of effective assistance of counsel on appeal. The record, the briefs, and the statements of the attorneys at oral argument did not support the grandmother's allegation that the Attorney for the Child failed to make a recommendation in accordance with the child's wishes, or that she failed to consult with the child. The dissent agreed with the majority that the grandmother failed to establish

extraordinary circumstances, and the child was not deprived of effective assistance of counsel on appeal, but concluded that the exception to the mootness doctrine did not apply. Therefore, the dissent would have granted the mother's renewed motion to dismiss the appeal.

Matter of Smith v Ballam, 176 AD3d 1591 (4th Dept 2019)

Court Properly Admitted Hearsay Statements to Establish that Child Had Been Sexually Abused

Family Court modified the prior order of custody and visitation by, among other things, granting petitioner father sole legal custody of the subject child. The Appellate Division affirmed. Family Court properly admitted in evidence hearsay statements during the fact-finding hearing to establish that the child had been sexually abused while under the mother's supervision by his half brother. The child's out-of-court statements were sufficiently corroborated by, among other things, an expert who did more than merely vouch for the child's credibility and, instead, objectively validated the child's account of the alleged abuse. Even assuming, arguendo, that the court erred in admitting the child's hearsay statements, any error was harmless because there was otherwise a sound and substantial basis in the record to support the court's determination to award the father sole legal custody. The father established a sufficient change in circumstances to warrant an inquiry into the best interests of the child. Moreover, the evidence amply established that the award of sole legal custody to the father was in the child's best interest given the mother's incarceration, her failure to exercise visitation or telephonic rights with the child, and the child's own stated wishes.

Matter of Poromon v Evans, 176 AD3d 1642 (4th Dept 2019)

Court Properly Denied Mother's Motion to Dismiss

Family Court modified the parties' prior order of custody and visitation by, among other things, granting petitioner father custody of the subject child. The Appellate Division affirmed. The court properly denied the mother's motion to dismiss at the close of the father's proof. The father presented evidence that the mother failed to follow the visitation provisions of the court's order and that she had frustrated his telephonic access to the child. This evidence, viewed in the light most favorable to the father, demonstrated a change in circumstances that, if established, would warrant an inquiry into whether modification of the order would be in the child's best interests. Although the court did not expressly determine that there was a sufficient change in circumstances, review of the record revealed extensive findings of fact, placed on the record, which demonstrated unequivocally that a significant change in circumstances occurred since the entry of the consent order. Specifically, the child was performing poorly in school, his attendance there was flagging, and the mother was alienating the child from the father. There was no basis to disturb the court's credibility assessment and factual findings.

Matter of Devore v O'Harra-Gardner, 177 AD3d 1264 (4th Dept 2019)

No Reversible Error in Admission of Hearsay Evidence

Family Court granted the father's petition seeking to modify a prior stipulated order of joint custody by designating him as the primary residential parent of the subject child. The Appellate Division affirmed. The mother failed to preserve her contention that the court improperly admitted and relied on inadmissible hearsay evidence inasmuch as she did not object to the admission of such testimony. In any event, the hearsay statement of the child that the mother struck her with a hairbrush was corroborated by observations of the child by the principal of the child's school, who testified at the hearing and was deemed by the court to be credible. Thus, that statement was admissible pursuant to Family Court Act Section 1046 (a) (vi). The testimony of the principal that the child was falling behind in school and failing to complete her homework assignments was corroborated by school records, and therefore, any error in admitting such testimony was harmless because the result reached by the court would have been the same even had such testimony been excluded. With respect to the alleged hearsay testimony concerning the child's poor hygiene, there was no indication that the court considered, credited, or relied upon that testimony in reaching its determination.

Matter of Adorno v Vaillant, 177 AD3d 1275 (4th Dept 2019)

No Remittal Where Order Lacked Definitive Schedule for Supervised Visitation

Family Court granted petitioner, the father's ex-girlfriend, sole legal and physical custody of respondent parents' child, and awarded the mother supervised visitation. The Appellate Division affirmed. Petitioner established extraordinary circumstances, and the court properly determined that the child's best interests were served by awarding petitioner custody. Although the better practice would have been to set a specific and definitive schedule for the supervised visitation between the mother and child, the matter was not remitted to fashion such a schedule given the unique circumstances of the case, which included the mother's abandonment of a subsequent petition and her failure to avail herself of the visitation afforded her.

Matter of Shelley v Testa, 177 AD3d 1314 (4th Dept 2019)

Court Erred in Granting Respondent Great Aunt's Motion to Dismiss

Family Court dismissed the mother's petitions seeking to modify a prior stipulated order granting respondent great aunt custody of the mother's three children. The Appellate Division reversed, reinstated the petitions, and remitted. The court erred in granting respondent's motion to dismiss the petitions at the close of the mother's case on the ground that the mother failed to show a sufficient change in circumstances since entry of the stipulated order. At the time the prior order of custody and visitation was entered, the mother did not have a vehicle or employment, and she lived with a man who was prohibited by court order from having any contact with the subject children. The mother established that, at the time of the hearing, she owned a car, worked full-time, and no longer lived with or had a relationship with the aforementioned man. Indeed, in its oral

decision dismissing the petitions, the court noted that the mother had "improved" herself and that it was "impressed" with her progress. Accordingly, the mother met her burden of demonstrating a sufficient change in circumstances to require consideration of the welfare of the children. Inasmuch as the court dismissed the petitions before respondent testified or offered any evidence, the record was not adequate for a best interests determination to be made by the Court. Accordingly, the matter was remitted for a new hearing.

Matter of Heinsler v Sero, 177 AD3d 1316 (4th Dept 2019)

Wishes of 15-year-old Child Not Entitled to Great Weight Where Child Profoundly Influenced by Mother

Family Court granted petitioner father sole legal and physical custody of the subject child. The Appellate Division modified. Contrary to the contention of the mother and the AFC, the father established a sufficient change in circumstances to warrant an inquiry into the best interests of the child, based on both the expert testimony that the child was demonstrating elements of parental alienation and the continued deterioration of the parties' relationship. The determination to award sole custody to the father was supported by the requisite sound and substantial basis in the record. The court properly weighed the appropriate factors and found that all weighed in favor of placement with the father except the child's wishes. Although the subject child was 15 years old at the time of the hearing, the court properly determined that his wishes were not entitled to great weight inasmuch as the child was so profoundly influenced by his mother that he could not perceive a difference between the father's abandonment of the marriage and the father's abandonment of him, and that it was in the child's best interests to reside with the father despite his wishes to the contrary. Contrary to the further contention of the mother and the AFC, the court did not improperly rely on the presence of "parental alienation syndrome" (PAS) in making its custody determination. Indeed, the father's expert did not conclude that the type of conduct in which the mother engaged resulted in the subject child becoming alienated from the father. Although PAS was not routinely accepted as a scientific theory by New York courts, the Fourth Department had repeatedly recognized the effects of alienating behaviors by a parent on children in custody and visitation determinations. The court did not err in including a directive that the mother obtain counseling as a component of the order on appeal inasmuch as the court did not order such counseling as a prerequisite to custody or visitation. However, the court exceeded its jurisdiction in suspending maintenance payments to the mother inasmuch as the parties' separation agreement setting forth that obligation was an independent contract. Family Court was a court of limited jurisdiction and could not exercise powers beyond those granted to it by statute. It generally had no subject matter jurisdiction to reform, set aside or modify the terms of a valid separation agreement. Therefore, the order was modified by vacating the provision relating to the suspension of maintenance payments, and remitted for a determination of the amount of any maintenance arrears.

Matter of Krier v Krier, 178 AD3d 1372 (4th Dept 2019)

Court Properly Awarded Visitation as Parties Agreed Where Such an Arrangement Was Not Untenable Under the Circumstances

Family Court awarded respondent father sole legal and primary physical custody of the parties' children and directed that petitioner mother's parenting time be supervised at such times and locations as the mother and father agreed. The Appellate Division affirmed. The record established that the mother made multiple unfounded allegations of sexual abuse against the father, among other people, and that she subjected the parties' oldest child to repeated unnecessary physical examinations by numerous individuals. Thus, the court's determinations, including the requirement that the mother's visitation be supervised until she completed a counseling program, had a sound and substantial basis in the record and should not be disturbed. The mother's contention was rejected that the court improperly delegated its authority to determine visitation when it failed to set forth a visitation schedule in the order. Although a court could not delegate its authority to determine visitation to either a parent or a child, it could order visitation as the parties agreed so long as such an arrangement was not untenable under the circumstances. Although the parties had an acrimonious relationship, the evidence at the hearing established the father's commitment to ensuring contact between the children and their maternal relatives, including the mother. Inasmuch as the mother's visitation would be supervised, any concerns about future false allegations had been alleviated. Thus, the arrangement was not untenable under the circumstances. If the mother found that she was unable to obtain visitation pursuant to the order, she could file a petition seeking to enforce or modify the order.

Matter of Ballard v Piston, 178 AD3d 1397 (4th Dept 2019)

Subsequent Order Rendered Appeals Moot

Family Court granted respondent grandmother's motion to dismiss the mother's custody petition seeking to modify a prior consent order awarding custody of the subject child to the grandmother, and, in a separate order, granted respondent father's motion to dismiss the mother's petition against him seeking custody of the child. The Appellate Division dismissed. While these appeals were pending, the court entered a subsequent order that, on consent of the parties, awarded sole custody to the father. The mother did not dispute this fact, and the subsequent order was a matter of public record of which the Appellate Division could take judicial notice. The subsequent custody order rendered these appeals moot, and the exception to the mootness doctrine did not apply.

Matter of Salgado v Santiago, 178 AD3d 1399 (4th Dept 2019)

Extraordinary Circumstances Not a Prerequisite to Obtaining Modification of Father's Visitation

Family Court granted the mother's petitions insofar as they sought to modify the visitation provisions of the judgment of divorce by eliminating respondent father's morning visits with the child. The Appellate Division affirmed. The father's contention

was rejected that the court erred in failing to apply the extraordinary circumstances standard when evaluating the mother's modification petitions. Once a visitation order was entered, it could be modified only upon a showing that there had been a subsequent change of circumstances and modification was required. Extraordinary circumstances were not a prerequisite to obtaining modification; rather, the standard ultimately to be applied remained the best interests of the child when all of the applicable factors were considered. The continued deterioration of the parties' relationship was a significant change in circumstances warranting an inquiry into whether a modification of visitation was in the child's best interests, and such a further deterioration occurred after the entry of the judgment of divorce.

Matter of Vaccaro v Vaccaro, 178 AD3d 1410 (4th Dept 2019)

Visitation at Correctional Facility Not in Children's Best Interests

Family Court confirmed the written report of the Referee that determined that it was not in the subject children's best interests to visit petitioner father at the correctional facility in which he was incarcerated, but allowed the father to exchange letters with the children. The Appellate Division affirmed. The father's challenges were rejected to the order of reference. The father's further contention was rejected that the order on appeal must be reversed because the court confirmed the Referee's report before the expiration of the 15-day period set forth in CPLR 4403. A sound and substantial basis existed in the record for the court's determination that the visitation requested by the father would not be in the children's best interests. The record established that the father committed acts of domestic violence against respondent mother in the presence of the children, and the Referee noted that the father expressed no remorse or understanding that his actions were harmful to the children. Although the father had communication with the children over the telephone and thus was not a stranger to them, the record established that the father's telephone communication occurred in violation of an order of protection prohibiting him from engaging in any form of communication with the children. Furthermore, although the father had a plan to accomplish the requested visitation, the plan entailed having the children's paternal grandmother transport them to the prison. The Referee found that the paternal grandmother was ill-suited for that responsibility inasmuch as she permitted the children to speak on the telephone with the father in violation of the order of protection, and because she never testified, the Referee had no assurance that she would abide by the order. Thus, there was no basis to disturb the court's determination.

Matter of Grayson v Lopez, 178 AD3d 1427 (4th Dept 2019)

Court Erred in Denying Father Any Visitation or Contact With Child and Placing Conditions on Father's Right to File Further Modification Petition

Family Court granted the mother's petition for sole custody of the subject child and denied respondent father any visitation or contact. The appeal was held by the Appellate Division, decision was reserved and the matter remitted to Family Court to set forth the factual findings supporting its determination. The proceedings were held and

completed. The Appellate Division modified. The award of sole custody of the child to the mother was supported by a sound and substantial basis in the record. The parties' acrimonious relationship demonstrated that joint custody was not appropriate. However, the court erred in denying the father any visitation or contact with the child. The court did not make the requisite threshold finding that visitation would be harmful to the child, and the record did not support such a finding in any event. Therefore, the order was modified accordingly, and the matter remitted to Family Court to set an appropriate visitation schedule granting the father not less than two hours of supervised visitation per week. The court erred in conditioning the father's right to file a further modification petition on his release from custody, his "successfully engag[ing]" in mental health treatment, and his prospective waiver of his right to confidentiality with respect to his mental health records. A court lacked authority to condition any future application for modification of a parent's visitation on his or her participation in mental health treatment, much less his or her release from custody and waiver of statutory confidentiality rights. The order was therefore further modified by vacating the conditions imposed on any future application by the father to modify his visitation.

Matter of Benson v Smith, 178 AD3d 1430 (4th Dept 2019)

Court Did Not Abuse its Discretion by Imposing Discovery Sanction

Family Court awarded petitioner mother sole legal and physical custody of the subject children, with supervised visitation to respondent father. The Appellate Division affirmed. The father's contention was rejected that the court abused its discretion by precluding him from introducing evidence at the hearing as a sanction for his willful failure to respond to the mother's interrogatories. According to the father, the sanction prevented him from fully exploring the issues affecting the children's best interests. The father failed to preserve his contention for appellate review inasmuch as he did not object to the court's ruling or otherwise raise that contention at the hearing. In any event, the contention was without merit. The discovery sanction imposed did not adversely affect the children's right to have issues affecting their best interests fully explored, including, as was particularly relevant, the father's history of domestic violence.

Matter of Serna v Jones, 178 AD3d 1447 (4th Dept 2019)

Court Erred in Summarily Granting Respondent's Motion to Dismiss Relocation Petition

Family Court summarily granted respondent father's motion to dismiss the mother's petition to relocate with the parties' child to the Honeoye Falls-Lima Central School District or Livingston County. The Appellate Division reversed. Generally, determinations affecting custody and visitation should be made following a full evidentiary hearing, and the allegations in the mother's petition established the need for a hearing on the issue whether her relocation was in the best interests of the child. The mother was not required to demonstrate a change of circumstances inasmuch as she sought permission to relocate with the subject child. Further, the mother adequately

alleged in her petition that relocation was in the best interests of the child inasmuch as she alleged that the cost of housing would be lower in Livingston County, that the child's maternal grandfather would be able to assist the mother with childcare upon her relocation allowing her to return to work, and that the relocation would not interfere with the father's visitation schedule. The court was therefore required to determine whether the proposed relocation was in the child's best interests by analyzing the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 739-741 [1996]).

Matter of Johnston v Dickes, 178 AD3d 1454 (4th Dept 2019)

Affirmance of Award of Sole Legal and Physical Custody to Petitioner Father

Family Court awarded petitioner father sole legal and physical custody of the subject child. The Appellate Division affirmed. The mother's contention was rejected that the court abused its discretion in refusing to permit her to testify by telephone from another state during the hearing on the father's custody petition. Under the circumstances of the case, in which the mother absconded with the child to Georgia without the father's knowledge or permission, there was no abuse of discretion. There was a sound and substantial basis in the record supporting the court's determination limiting the mother to supervised visitation in the county of the father's residence. The mother's contention was rejected that the court erred in awarding custody to the father in the absence of an order of filiation. The court properly determined that the mother was judicially estopped from denying the father's paternity. The mother's contention that the child was deprived of effective assistance of counsel because the Attorney for the Child improperly substituted her judgment for the wishes of the child was not preserved for review and, in any event, was without merit.

Matter of Nickerson v Woods, 178 AD3d 1462 (4th Dept 2019)

FAMILY OFFENSE

Court Erred in Dismissing Petition Alleging Harassment in the Second Degree

Family Court, without a hearing, granted respondent, petitioner's former boyfriend's motion to dismiss the petition. The Appellate Division modified by reinstating the petition insofar as it alleged that respondent committed harassment in the second degree pursuant to Penal Law §240.26 (1). By alleging that respondent pushed her so hard into a door that the door ripped off its hinges and on another occasion slammed her onto a table, the petition adequately pled an allegation of harassment in the second degree under Penal Law §240.26 (1). The petition did not sufficiently plead an allegation that respondent committed harassment in the second degree pursuant to Penal Law § 240.26 (3) because although the petition accused respondent of engaging in a course of conduct that annoyed and alarmed petitioner, it did not allege that respondent's course of conduct served no legitimate purpose.

Matter of Rohrbach v Monaco, 173 AD3d 1774 (4th Dept 2019)

Finding Vacated that Respondent Committed Family Offense of Aggravated Harassment in Second Degree Under Penal Law Section 240.30 (1) (a)

Family Court issued an order of protection that, after a fact-finding hearing and upon a related decision made after the hearing, found that respondent committed family offenses against petitioner. The Appellate Division affirmed, and vacated the finding that respondent committed the family offense of aggravated harassment in the second degree under Penal Law Section 240.30 (1) (a). Respondent's contention that a dispositional hearing was required was moot. The order of protection had expired by its terms, and respondent's contention on appeal concerning the terms of that order would not directly affect the rights and interests of the parties. Petitioner testified that he received an anonymous telephone call from an individual whose voice he recognized to be respondent's. The caller called him "a pathetic piece of shit" and told him that he "deserved to die" and "sit in jail forever." Petitioner received approximately five to 10 anonymous hang-up telephone calls per day for the next three days. Petitioner thereafter filed the instant family offense petition, and the calls stopped following the entry of a temporary order of protection against respondent. The evidence was legally insufficient to establish that respondent committed the family offense of aggravated harassment in the second degree under Penal Law Section 240.30 (1) (a). Petitioner did not sustain his burden of establishing by a fair preponderance of the evidence that a threat to cause physical harm to, or unlawful harm to the property of petitioner, or a member of petitioner's same family or household was communicated during the initial anonymous telephone call. However, petitioner sustained his burden of establishing by a fair preponderance of the evidence that respondent committed the family offense of aggravated harassment in the second degree as defined in subdivision (2) of Penal Law Section 240.30. The evidence was sufficient to establish respondent's identity as the anonymous hang-up caller.

Matter of Brant v Widger, 177 AD3d 1392 (4th Dept 2019)

JUVENILE DELINQUENCY

Restrictive Placement Proper

Family Court dismissed the juvenile delinquency petition against respondent. The Appellate Division reversed, reinstated the petition and remitted to the court for further proceedings. The statutory provision that a parent or other person legally responsible for a respondent in a JD matter be notified of respondent's initial appearance did not require that more than one parent or guardian be notified. Here, the petition included an address for respondent's mother, the custodial parent, who was served and appeared in court, thereby ensuring the presence of a parent or responsible adult to help respondent understand the proceedings and safeguard his legal rights.

Matter of Hayden B.S., 171 AD3d 1503 (4th Dept 2019)

ORDER OF PROTECTION

Court Properly Determined that it Had Temporary Emergency Jurisdiction Under UCCJEA

Family Court entered an order of protection directing respondent father to stay away from petitioner mother and the parties' child, which was issued upon a finding that he committed a family offense, and further granted the mother's custody and visitation petition, and awarded her sole custody of the child. The Appellate Division affirmed. The father's contention was rejected that the court erred in denying his motion to dismiss the petitions for lack of subject matter jurisdiction. The court properly determined that it had temporary emergency jurisdiction over both proceedings. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Domestic Relations Law art 5-A) specifically noted that it was enacted with the intent of, among other things, protecting victims of domestic violence (*see* Section 75 [2]). Indeed, section 76-c was rephrased from "it is necessary in an emergency to protect the child," to "it is necessary in an emergency to protect the child, a sibling or *parent of the child*" (Unified Ct Sys Mem in Support, Bill Jacket, L 2001, ch 386 [emphasis added]). Thus, the legislative history of the UCCJEA made clear that the expansion of the statute to include danger to a parent was reflective of an increased awareness and understanding of domestic violence. The allegations in the petitions were sufficient to establish the requisite emergency, i.e., the alleged acts of physical violence perpetrated by the father against the mother, resulting in her hospitalization in an intensive care unit for several days. Although the father was incarcerated in Florida at the time the mother's custody petition was filed, and thus posed no immediate threat to the mother's physical safety, the mother, who had been hospitalized for several days and suffered significant injuries, including a subdural hematoma, had no knowledge regarding when the father would be released. The mother thereafter relocated to New York to be with family, who could help her with the ten 11-month-old child, and to be safe in the event the father was released.

Matter of Alger v Jacobs, 169 AD3d 1415 (4th Dept 2019)

Mother's Right to Due Process Violated

Family Court determined that respondent mother willfully violated an order of protection and imposed a 30-day suspended jail sentence. The Appellate Division modified. In rendering its determination, the court found that the mother violated the order of protection on November 4, 2017 when she parked her vehicle outside petitioner father's residence with her engine off for approximately 30 minutes. The court further found that the mother had violated the order of protection when she left a voicemail for the father regarding a nonemergent issue. The court imposed the suspended jail sentence on the basis of both of these violations. Although unpreserved for review, the mother's contention was addressed in the interest of justice that she was denied due process because the court considered conduct that was not alleged in the violation petition. As the father correctly conceded, the court considered such conduct, i.e., the voicemail incident, in determining that the mother failed to comply with the order of protection and

thus violated the mother's right to due process. Despite the court's error in considering conduct not alleged in the petition, reversal was not required given the other evidence of the mother's violation, which was alleged in the petition and addressed at the fact-finding hearing. However, the court stated that it imposed the 30-day suspended jail sentence based upon both violations and further stated that it found the mother's conduct with respect to the voicemail incident to be more concerning. Thus, the order was modified by vacating that part finding that the mother willfully violated the order of protection by leaving the voicemail message and vacating the 30-day suspended jail sentence, and the matter was remitted to the court to impose a punishment in its discretion based only on the November 4, 2017 incident.

Matter of Ferratella v Thomas, 173 AD3d 1834 (4th Dept 2019)

Affirmance of Order of Protection and Order Determining Mother Willfully Violated Order of Custody; Court Properly Directed Supervised Visitation

In appeal No. 1, Family Court issued an order of protection pursuant to Family Court Act article 8 upon a finding that respondent mother committed the family offense of aggravated harassment in the second degree. The Appellate Division affirmed. Petitioner father testified that, after the court issued a decision granting him sole custody of the child, the mother called him and told him that if he took the child away from her, she would kill herself and the child. While the mother denied the allegation, the court found that her testimony was not credible and credited the testimony of the father. The record supported the court's credibility determination and its determination that the father met his burden on the family offense petition. In appeal No. 2, Family Court determined that the mother willfully violated an order of custody. The Appellate Division affirmed. The father established by clear and convincing evidence that the mother willfully violated the custody order by failing to notify the father of medical issues involving the child as soon as reasonably possible, as provided in the custody order. With respect to both appeals, the mother's contention was rejected that the court erred in directing that her visitation be supervised. The court's determination had the requisite support in the record inasmuch as the record established that the mother's behavior, including making threats and making disparaging remarks about the father and attempting to limit his involvement with the child, was harmful to the child's relationship with the father. Thus, supervised visitation with the mother was in the best interests of the child.

Matter of Paliani v Selapack, 178 AD3d 1425 (4th Dept 2019)

Reversal of Order of Protection Issued Upon Finding that Respondent Committed Harassment in Second Degree

Family Court issued an order of protection upon a finding that respondent committed an unspecified family offense against petitioner. The Appellate Division held the case, reserved decision and remitted. Upon remittal, the court clarified that its order of protection was based on respondent's commission of harassment in the second degree under Penal Law Section 240.26 (1), which provided that a person was guilty of

harassment in the second degree when, with intent to harass, annoy or alarm another person...her or she struck, shoved, kicked or otherwise subjected such other person to physical contact, or attempted or threatened to do the same. The Appellate Division reversed. At the fact finding hearing, petitioner conceded that respondent did not strike, shove, kick or otherwise subject her to physical contact during the particular incident, and there was no evidence that respondent attempted or threatened to subject petitioner to any such contact during that incident. Thus, the evidence failed to establish by a fair preponderance of the evidence that respondent committed the family offense of harassment in the second degree under Penal Law Section 240.26 (1). The court's reliance on respondent's conduct during other incidents as the basis for finding that he committed that particular family offense was improper because the petition did not accuse respondent of committing a family offense against petitioner in connection with any other incident.

Matter of Benson v Smith, 178 AD3d 1429 (4th Dept 2019)

PATERNITY

No Need For Hearing on Paternity Petition

Family Court, among other things, declared respondent Gerald F.M. to be the father of the subject child and dismissed the paternity petition, without a hearing, on the ground of equitable estoppel. The Appellate Division affirmed. Inasmuch as the court was fully familiar with relevant background facts regarding the parties and the child from several past proceedings, there was no need for a hearing on the petition.

Matter of Richard K.H. v Emilie P., 173 AD3d 1707 (4th Dept 2019)

Court Properly Denied Father's Application Seeking to Vacate Order of Filiation Entered Upon His Default

Family Court denied the father's application seeking to vacate an order of filiation entered upon his default. The Appellate Division affirmed. Pursuant to CPLR 5015 (a) (1), a court may vacate a judgment or order entered upon default if it determined that there was a reasonable excuse for the default and a meritorious defense. With respect to whether there was a reasonable excuse for the default, the father's assertions that he was never served with the underlying summons and petition for paternity and that he was unaware that he needed to appear at the hearing on the petition were belied by the record. The process server's affidavit of personal service established that she personally served the father. The father's conclusory and unsubstantiated denial of service of the underlying summons and petition lacked the factual specificity necessary to rebut the prima facie proof of proper service established by the process server's affidavit of service. Moreover, in order to support his claim of a meritorious defense, the father was required to set forth sufficient facts or legal arguments to demonstrate, on a prima facie basis, that a defense existed. The father's speculative assertion that he may not be the child's father because the mother worked in a strip club around the time of conception was insufficient.

Matter of Oneida County DSS v Russell R., 175 AD3d 1793 (4th Dept 2019)

Respondent Mother's Appeal Properly Dismissed Inasmuch as She Was Not an Aggrieved Party

Family Court determined that it was not in the best interests of the child to order genetic marker testing to determine the child's paternity, and dismissed the petitions. The Appellate Division dismissed. Respondent mother's appeal was dismissed inasmuch as she was not an aggrieved party *(see* CPLR 5511). The mother did not seek any relief herself, and the Attorney for the Child's motion to dismiss the petitions did not seek any relief against her. The mother did not join in the petitions that were dismissed, nor did she file a petition of her own seeking to vacate the acknowledgment of paternity signed by Tariq S. or to establish the paternity of Nabil A.A. Moreover, neither petitioner appealed from the order, which left the mother's rights unchanged. The fact that the mother might be disappointed by the order did not equate to

aggrievement under CPLR 5511.

Matter of Tariq S. v Ashlee B., 177 AD3d 1385 (4th Dept 2019)

TERMINATION OF PARENTAL RIGHTS

Petitioner Not Obligated to Wait Until Suspended Judgment Expired Before Filing Motion Seeking Revocation Thereof

Family Court revoked a suspended judgment entered upon respondent father's admission that he had permanently neglected the three subject children, and terminated his parental rights. The Appellate Division affirmed. 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 children's best interests to terminate his parental rights. Petitioner was not obligated to wait until the suspended judgment expired before filing its motion seeking revocation thereof.

Matter of Ashante H., 169 AD3d 1454 (4th Dept 2019)

Court Did Not Abuse Its Discretion in Denying Father's Request for Suspended Judgment

Family Court terminated respondent father's parental rights with respect to the subject children based on a finding of permanent neglect. The Appellate Division affirmed. The court did not abuse its discretion in denying the father's request for a suspended judgment. The determination of whether to grant a suspended judgment was to be based solely on the best interests of the child. There was no evidence that the father had a realistic, feasible plan to care for the children, and the court's determination was entitled to great deference that, even if given more time, the father was not likely to change sufficiently to enable him to parent the children. The minimal progress made by the father in the weeks preceding the dispositional hearing was not sufficient to warrant any further prolongation of the children's unsettled familial status.

Matter of Matthew S., 169 AD3d 1456 (4th Dept 2019)

Court Properly Revoked Respondent's Suspended Judgment

Family Court terminated respondent father's and mother's parental rights with respect to the subject children. The Appellate Division affirmed. The father's contention that the court violated his right to due process by holding the dispositional hearing in his absence was waived inasmuch as the father chose not to attend and consented to the continuation of the hearing in his absence. Moreover, because the father's attorney represented the father's interests at the hearing, hi failed to show any prejudice as a result of his absence. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and children by providing numerous services tailored to the mother's needs. Petitioner also facilitated visitation with the youngest child, including providing an alternate location for visitation when it was determined that the mother's home was an inappropriate venue. Petitioner was not required to make diligent efforts with respect to the mother's visitation with the older children because after their

removal, the court determined in the article 10 proceeding against the father that he sexually abused respondents' oldest child. The Appellate Division affirmed that determination. The record established that the mother failed to acknowledge the abuse in a video she posted online and that this incident and the mother's continued failure to acknowledge the abuse caused the older children significant emotional and behavioral harm. Thus, petitioner was thereafter allowed to facilitate the mother's relationship with the older children by arranging for telephone contact, providing her with information from their school, and attempting to impress on her the importance of supporting her children. The mother failed to adequately plan for the children's future. Although she complied with certain aspects of the service plan, she failed to benefit from many of the services offered. She failed to keep a clean and sanitary home to which the children could return and she failed to provide the children with support in light of her continued failure to acknowledge the father's sexual abuse.

Matter of Eden S., 170 AD3d 1580 (4th Dept 2019)

Father Failed to Gain Insight Into Reasons for Children's Removal

Family Court terminated respondent father's parental rights with respect to the subject children based on a finding of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the children. He also failed to substantially and continuously plan for the future of the children, although physically and financially able to do so. With respect to the younger child, although the father participated in some of the services offered by petitioner, he did not successfully address or gain insight into the problems that led to the child's removal. With respect to the older siblings, the father failed to provide a realistic and feasible alternative to having the children remain in foster care until his release from prison.

Matter of Deon M., 170 AD3d 1586 (4th Dept 2019)

Incarcerated Mother Failed to Plan for Child's Future

Family Court terminated respondent mother's parental rights with respect to the subject child based on a finding of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and children by providing services and other assistance aimed at ameliorating or resolving the problems preventing the child's return to the mother. The mother did not challenge petitioner's efforts before she was incarcerated. After she was incarcerated, petitioner also properly engaged in diligent efforts, with the exception of telephone contact, which was infeasible because the child was too young to communicate by telephone. Despite petitioner's diligent efforts, the mother failed to plan appropriately for the child's future. She failed to provide any realistic and feasible alternative to having the children remain in foster care until the her release from prison and, although she participated in services offered by petitioner, she did not address or gain insight into the problems that led to

the child's removal.

Matter of Callie H., 170 AD3d 1612 (4th Dept 2019)

Incarcerated Father Failed to Plan for Child's Future

Family Court terminated respondent father's parental rights with respect to the subject child based on a finding of permanent neglect and freed the child for adoption. The Appellate Division affirmed. The father's appeal from the order insofar as it concerned the disposition was rendered moot by the subsequent adoption of the child. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child. Petitioner asked the father for names of relatives who might be a custodial resource for the child, ascertained the father's location when he failed to maintain contact with the caseworker, informed him of his right to visitation with the child while incarcerated, provided him with updates and photographs of the child, and provided him with reports prepared in conjunction with permanency hearings. Despite those diligent efforts, the father failed to plan for the child's future. His plan for the child to remain in foster care until he was released from prison at some indeterminate time was inadequate, particularly in light of his failure to engage in drug treatment and parenting classes while incarcerated.

Matter of Jaxon S., 170 AD3d 1687 (4th Dept 2019)

Respondent's Challenge to Finding of Permanent Neglect Not Properly Before Appellate Division

Family Court terminated respondent father's parental rights with respect to the subject children based on a finding of permanent neglect. The Appellate Division affirmed. The portion of the order finding permanent neglect was entered upon the admission of the father and he did not move to vacate the order or withdraw his consent. Therefore, the father's contention that his admission was not knowing or voluntary was raised for the first time on appeal and was not properly before the AD. His contention about audio recording of the proceedings also was raised for the first time on appeal and was not properly before the AD. In any event, that contention lacked merit inasmuch as the few gaps in the transcripts attributable to inaudible portions of the recordings were not significant and did not preclude meaningful appellate review.

Matter of Abigail H., 172 AD3d 1922 (4th Dept 2019)

TPR, Rather than Suspended Judgment, Warranted

Family Court terminated respondent mother's parental rights with respect to the subject children based on a finding of permanent neglect. The Appellate Division affirmed. Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the children by providing services tailored to the mother's needs. Before the mother was

incarcerated, petitioner made referrals for the mother to mental health and substance abuse treatment and parenting assistance. Petitioner facilitated visitation and conducted service plane reviews with the mother. Petitioner attempted to assist the mother with finding suitable housing, but the mother was uncooperative. The mother failed to participate meaningfully in the recommended services. After the mother was incarcerated, petitioner continues to make diligent efforts, but the mother failed substantially and continuously or repeatedly to plan for the future of the children. The court did not abuse its discretion in denying the mother's request for a suspended judgment. The mother had custody of the older of the two children for only a few weeks after his birth and never had custody of the other child, the children had been in foster care for several years at the time of the hearing, and even if the mother was released from incarceration I the near future, she would still need to address the issues that led to the children's removal. Thus, termination of the mother's parental rights was in the children's best interests.

Matter of Lennox M., 173 AD3d 1668 (4th Dept 2019)

Father's Contentions About Qualifications of Interpreter Not Preserved

Family Court terminated respondent father's parental rights with respect to the subject children based on a finding of permanent neglect and freed the children for adoption. The father's contention regarding the qualifications of the interpreters who were present with him while he appeared via video conference because of his out-of-state incarceration was not preserved for review. The father also failed to preserve for review his contention that his ability to understand the proceedings was limited by the inadequate services of the interpreters and, in any event, the father confirmed that he was comfortable with the services of the interpreters and that he understood the proceedings. The record established that petitioner sufficiently investigated the suitability of placing the children with out-of-state relatives, but the relatives failed to respond to the entity that would approve such placement. The Appellate Division affirmed.

Matter of Olivia G., 173 AD3d 1688 (4th Dept 2019)

Case Remitted for Dispositional Hearing

Family Court terminated respondent father's parental rights with respect to the subject children based on findings of permanent neglect and abandonment. The Appellate Division modified by dismissing the petition insofar as it alleged abandonment and vacated that disposition. Petitioner failed to establish by clear and convincing evidence that he abandoned the child. The record established that the father, following up on a previous attempt to establish paternity that he initially failed to adequately pursue, definitively established his paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition. Thereafter, throughout the relevant period, the father initiated contact with the child's caseworker, sent the caseworker at least four letters inquiring about the child, included a card and drawing in one of the letters, and participated in a service plan review. However, petitioner established by

clear and convincing evidence that the father permanently neglected the child. Although the father was present at the hospital when the child was born and he believed that he was the father, he delayed several months before filing the initial paternity petition, refused to pay for DNA testing, missed the court appearance for the tests results, resulting in a dismissal of the petition, and did not file a second paternity petition until he was incarcerated. After the father was adjudicated the father of the child, petitioner made diligent efforts to encourage and strengthen the relationship between the father and the child, but there was no evidence that the father had a realistic plan to provide an adequate and stable home for the child. Inasmuch as the permanent neglect finding was the only ground in the petition that was established by clear and convincing evidence, the court was required to hold a dispositional hearing and the case was remitted for that purpose.

Matter of Jarrett P., 173 AD3d 1692 (4th Dept 2019)

Court Properly Denied Father's Motion to Vacate Default Judgment

Family Court denied respondent father's motion to vacate a default order that, among other things, found that he permanently neglected the subject child. The Appellate Division affirmed. Even assuming, arguendo, that the father established a reasonable excuse for his failure to appear, he failed to establish a meritorious defense. The father's contention that the court erred in granting his attorney's motion to withdraw as counsel, which the attorney made and the court granted before scheduling the hearing that led to default order, was not properly before the Appellate Division, inasmuch as it was not raised in the father's motion to vacate the default order. In any event, the court granted the attorney's motion only after the father received notice of the motion and after the attorney demonstrated sufficient cause to be allowed to withdraw.

Matter of Patience T., 173 AD3d 1761 (4th Dept 2019)

Father Failed to Plan for Children's Future

Family Court terminated respondent father's parental rights with respect to the subject children based on a finding of permanent neglect and transferred guardianship and custody of the child to petitioner. The Appellate Division affirmed. Petitioner met its burden of establishing 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 developed a service plan for the father that included drug and alcohol evaluations, a psychological evaluation, domestic violence classes, parenting classes, and visitation with the child, but the father refused to engage in services, other than visitation. Thus, the father failed to plan for the child's future. The court found limited credibility in the father's testimony that he did not engage in services because his attorney advised him not to do so, and there was no reason to disturb that credibility determination. The court did not err in refusing to grant a suspended judgment because any progress made by the father was not sufficient to warrant further prolongation of the child's unsettled familial status.

Matter of D'Angel M.-B., 173 AD3d 1764 (4th Dept 2019)

Father Violated Terms of Suspended Judgment

Family Court terminated respondent father's parental rights with respect to the subject child. The Appellate Division affirmed. The court did not violate the father's due process rights by admitting in evidence two documents purportedly authored by a non-testifying psychiatrist. Family Court matters are civil in nature and the Confrontation Clause applies only in criminal matters. Also, while litigants have a right, guaranteed by the Due Process Clauses of the Federal and State Constitutions to confront witnesses, that right is not absolute in civil matters. The Family Court Act allows the admission of hearsay at dispositional hearings if the material is material and relevant. Here, because the father did not object to either the relevancy or materiality of the challenged exhibits, they were properly admitted into evidence. Moreover, any purported error in admitting the exhibits was harmless inasmuch as it did not appear from the court's decision that it relied on the exhibits in determining that it would be in the child's best interests to terminate the father's parental rights.

Matter of Ramon F., 173 AD3d 1775 (4th Dept 2019)

***Floyd Y.* Analysis Not Applicable to Family Court Proceedings**

Family Court terminated respondent mother's parental rights pursuant to Social Services Law Section 384-b (4) (c). The Appellate Division affirmed. The admission in evidence of certain testimony of petitioner's expert did not violate the mother's right to due process under the two-part test stated in *Matter of State of New York v Floyd Y.*, 22 NY3d 95 [2013]. *Floyd Y.* applied in a narrow context: the admission of hearsay evidence serving as the basis of an expert's opinion at civil commitment hearings held pursuant to article 10 of the Mental Hygiene Law. In such cases as respondent's, however, courts applied the professional reliability exception to the foundational requirements for expert testimony without addressing *Floyd Y*. To the extent that *Floyd Y.* required additional due process scrutiny in the civil commitment context, its analysis should not be applied to the instant Family Court proceedings. Even assuming, arguendo, that the court erred in allowing petitioner's expert to provide certain testimony, the error was harmless in light of the expert's non-hearsay testimony regarding his own testing and personal observations.

Matter of Fredericka S., 176 AD3d 1624 (4th Dept 2019)

Court Did Not Err in Sua Sponte Conforming Petitions to Proof

Family Court terminated respondent mother's parental rights with respect to the three subject children on the grounds of mental illness and intellectual disability. The Appellate Division affirmed. Although the petitions did not allege mental illness as a ground for termination of the mother's parental rights, the mother did not object to the evidence relating to that ground. Thus, the court did not err in sua sponte conforming the petitions to the proof.

Matter of Destiny S., 177 AD3d 1314 (4th Dept 2019)

Petitioner Not Required to Wait 12 Months Until Suspended Judgment Expired Before Filing Motion to Revoke it

Family Court revoked suspended judgments and terminated respondent mother's parental rights with respect to the four subject children. The Appellate Division affirmed in each appeal. Less than three months after entry of the suspended judgment, which Family Court had granted for a period of 12 months, petitioner moved to revoke it based on the mother's alleged failure to comply with numerous conditions of the suspended judgment. Inasmuch as petitioner was not required to wait 12 months until the suspended judgment expired before filing its motion, the mother's contention was rejected that the court should have granted her additional time to demonstrate compliance with the suspended judgment. There was a sound and substantial basis in the record to support the court's determination.

Matter of Skyler B., 177 AD3d 1341 (4th Dept 2019)

Appeals Dismissed Based on Father's Failure to Provide Adequate Record

Family Court determinated respondent father's parental rights with respect to the two subject children, and freed the two children for adoption. The Appellate Division dismissed. It was incumbent upon an appellant to assemble a proper record, including the relevant documents that were before the lower court, and appeals would be dismissed when the record was incomplete. Inasmuch as the father failed to include in the record on appeal the transcripts of the combined fact-finding and dispositional hearing, the appeals must be dismissed based on his failure to provide an adequate record.

Matter of Charlie C., 178 AD3d 1450 (4th Dept 2019)

Any Error in Admission of Psychiatrist's Report and SPC Notes Was Harmless

Family Court adjudged that respondent mother permanently neglected her child and terminated her parental rights with respect to that child. The Appellate Division affirmed. The mother's contention was rejected that a new fact-finding hearing was required because the court erred in admitting in evidence a report by an independent psychiatrist who examined the mother, and visitation notes prepared by the Society for the Protection of Children (SPC) that memorialized the mother's visitation appointments with the child. Even assuming, arguendo, that the court erred in admitting the documents in evidence, any error in the admission of those documents was harmless because the result reached would have been the same even had such documents been excluded.

Matter of Carl B., 178 AD3d 1456 (4th Dept 2019)

COURT OF APPEALS

Appeal Dismissed Where Order Appealed From Not Final Order Within Meaning of Constitution

In July 2016, shortly before the filing of a neglect petition against respondent mother, Family Court issued temporary orders of supervision and protection upon her consent. By November 2016, petitioner believed that the terms of those orders had been repeatedly violated. Petitioner soon filed a violation petition but, before doing so, asked that the court temporarily remove the subject child from respondent's care. The court did so and embarked on a fact finding hearing, during which it rejected respondent's offer to consent to the continued removal without also admitting that the removal was necessary to avoid imminent risk to the child's life or health. The court made such a finding at the conclusion of the hearing and issued an order continuing the temporary removal. Respondent appealed. Respondent subsequently agreed to a resolution in which the violation petition was withdrawn, the neglect petition was adjourned in contemplation of dismissal, and the child was returned to her care. The Third Department dismissed respondent's appeal because these developments rendered it moot, and the exception to the mootness doctrine did not apply. The Court of Appeals dismissed respondent's appeal upon the ground that the order appealed from did not finally determine the proceeding within the meaning of the Constitution.

Matter of Tyrell FF., 33 NY3d 1063 (2019)

FEDERAL CASES

Act Granted Foster Parents Right to Payments Enforceable Through 42 U.S.C. § 1983

Congress enacted the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272 ("the Act"), to strengthen the program of foster care assistance for needy and dependent children. One of the ways the Act did so was by creating a foster care maintenance payment program. Under this program, participating states received federal aid in exchange for making payments to foster parents on behalf of each child who had been removed from the home of a relative. These payments were calculated to help foster parents provide their foster children with basic necessities like food, clothing, and shelter. The New York State Citizens' Coalition for Children (the Coalition), filed a Section 1983 action in district court on behalf of the Coalition's foster parent members, alleging that the New York State Office of Children and Family Services (the State) had failed to make adequate foster care maintenance payments as required by the Act. The district court dismissed the Coalition's suit, holding that the Act created no federally enforceable right to receive foster care maintenance payments. The Coalition appealed. On appeal, the State asserted, for the first time, that the Coalition lacked standing to bring the suit on behalf of its members. The Second Circuit remanded the case for additional fact finding on that issue. On remand, the district court found that the Coalition had standing inasmuch as the Coalition expended resources to advise and assist foster parents because of the State's allegedly inadequate reimbursement rates. The Coalition then returned to the Second Circuit for review of the district court's original holding that it could not enforce the Act through Section 1983. The Second Circuit, with a dissent, reinstated the suit. The Court agreed that the Coalition had standing, and rejected the State's argument that the Coalition was barred by the third-party standing rule. The Court, agreeing with the Sixth and Ninth Circuits and disagreeing with the Eighth Circuit, then held that the Act granted foster parents a right to payments, enforceable through 42 U.S.C. § 1983. The Act used mandatory language, binding participating states. It evinced a Congressional focus on meeting the needs of individual foster children and translated that focus into a specific monetary entitlement granted to an identified class of beneficiaries: foster parents. The Act, moreover, provided sufficient guidance to courts to make the right appropriate for judicial enforcement. Because the Act did not provide any other federal avenues for foster parents to vindicate that right, the right was enforceable through Section 1983.

New York State Citizens' Coalition for Children v Poole, 922 F.3d 69 (2d Cir. 2019)

Permanent Resident Removable for Crimes of Child Abuse, Neglect or Abandonment Based on Convictions Under NY Penal Law

Petitioner, a citizen of Ireland, had been a lawful permanent resident of the United States since 1989. Petitioner, who was physically and sexually abused as a child, had a long history of alcoholism and had repeatedly exposed himself in public while intoxicated. Between 1990 and 2011, these public exposure incidents resulted in at

least nine convictions for public lewdness and two convictions for endangering the welfare of a child under New York Penal Law § 260.10 (1). In 2011, the Department of Homeland Security placed petitioner in removal proceedings, alleging that petitioner was removable on the ground that his New York convictions for endangering the welfare of a child were crimes of child abuse, child neglect or child abandonment under the Immigration and Nationality Act (INA) § 237(a)(2)(E)(I), 8 U.S.C § 1227 (a)(2)(E)(I). An Immigration Judge (IJ) initially granted petitioner discretionary relief from removal, but the Board of Immigration Appeals (BIA) overturned that ruling in 2013. Petitioner appealed, and the Second Circuit remanded the case to the agency to explain fully its denial of relief. On remand, the government added an additional charge that petitioner was removable for having been convicted of two crimes involving moral turpitude, based on the public lewdness convictions in 1990 and 1994. In April 2016, the IJ denied all relief and ordered petitioner removed. The IJ found that petitioner's public lewdness convictions were not crimes involving moral turpitude, but concluded that petitioner was removable for crimes of child abuse, neglect or abandonment based on his convictions under New York Penal Law. In August 2016, the BIA affirmed the IJ's order for petitioner's removal. Petitioner appealed once again to the Second Circuit. The Court upheld the BIA's determination, and held that it would continue to defer to the BIA's definition of the crime of child abuse, neglect or abandonment. Moreover, New York's child endangerment law was a categorical match to the INA removal provision, which provided that any alien convicted of a crime of child abuse, child neglect or child abandonment was deportable. The Court rejected petitioner's challenge to the BIA's interpretation of the crime of child abuse, which encompassed state child endangerment offenses that involved a sufficiently high risk of physical, mental, or moral harm to a child. The Court also rejected petitioner's contention that the New York child endangerment law stretched even further than the BIA's broad definition because the statute and New York courts' interpretation of it allowed for convictions based on conduct that posed only a minimal risk of non-serious harm to a child. Furthermore, petitioner had not shown a realistic probability of conviction for conduct that did not pose a likelihood of harm.

Matthews v Barr, 927 F.3d 606 (2d Cir. 2019)

Court Properly Determined Child's Habitual Residence Was Italy Pursuant to Hague Convention. However, Court Erred by Granting Father's Petition to Return Child to Italy by Imposing Unenforceable and Insufficient Conditions of Return

In this proceeding under the Hague Convention on the Civil Aspects of International Child Abduction, the District Court granted father's petition to return the parties only child (born in July 2016) to Italy subject to certain conditions notwithstanding the court's determination that repatriating the child would expose him to "a grave risk of harm." The conditions of repatriation included: (1) the father was to give mother $30,000 before the child was returned to Italy to pay for housing, legal fees, and other finances; (2) the father was to stay away from the mother; and (3) the father could visit the child only with the mother's consent. The Second Circuit affirmed the District Court's conclusion that Italy was the child's "habitual residence" for purposes of the Hague Convention; vacated the court's order insofar as it granted father's petition subject to conditions; and

remanded the matter to the District Court to determine whether alternative ameliorative measures existed that were enforceable by the court or, were supported by other sufficient guarantees of performance by the father. Factually, the parties were in a violent and abusive relationship wherein the father committed multiple acts of physical violence and other abuse against the mother in the child's presence. In July 2018, the mother traveled with the child to the United States to attend her brother's wedding. After the wedding, the mother elected not to return to Italy and moved into a confidential domestic violence shelter in New York. Regarding the District Court's residence determination, the Court agreed that Italy was where the child "usually or customarily" lived because the child spent the first two years of his life there. The mother's repeated and undisputed declarations that she intended to return to the United States with the child supported her position that the United States was the child's residence. However, District Court properly concluded under the totality of circumstances and specific facts of this case, that Italy was the child's habitual residence. In this regard, the Court observed that the child had an Italian passport, medical coverage in Italy, Italian identification cards and a certificate of residence, and prior to being relocated to the United States by mother, the child was enrolled in a daycare program in Italy. Furthermore, in light of the court's determination that repatriating the child would expose him to a grave risk of harm due to father's violent and other abusive behavior, the Second Circuit held that unenforceable conditions such as those imposed here, were generally disfavored particularly where there was reason to question whether the petitioning parent would comply and there were no "other guarantees of performance." In this case, it was undisputed that many of the conditions imposed were unenforceable because they did not need to be executed until the child was returned to Italy. Thus, the Court held that the conditions imposed were insufficient and remanded the matter to the District Court for further proceedings. The Second Circuit stated that on remand, the court could consider whether Italian courts would enforce key conditions such as father's promise to stay away from mother and to visit the child only with mother's consent; whether it was practicable at this stage of proceedings to require one or both parties to apply to Italian courts for any relief that would avoid grave risk of harm to the child; the court could then take into account any corresponding decision by Italian courts in determining whether there were sufficient guarantees of performance of protective measures that would mitigate the risk of harm to the child if repatriated. In addition, the court could elect to revise the conditions already imposed that would render them directly enforceable by requiring father to comply with a condition prior to repatriation of the child. The court could also solicit: (1) assistance from the United States Department of State to ascertain whether the government of Italy was willing and able to enforce conditions designed to protect the child; and (2) additional evidence from the parties concerning whether and, to what extent father had undertaken to abide by any of the unenforceable conditions imposed.

Saada v Golan, 930 F.3d 533 (2d Cir. 2019)

Motion for Class Certification Granted in Action Alleging Defendants Systemically Failed to Provide Appropriate Care to Students with Type 1 and Type 2 Diabetes

Seeking declaratory and injunctive relief, plaintiffs filed suit pursuant to § 504 of the

Rehabilitation Act of 1973, 29 U.S.C. § 794 (Rehabilitation Act); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. (ADA); and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 et seq. (NYCHRL), alleging that defendants (collectively, Department of Education or DOE) had systemically failed to provide appropriate care to students with Type 1 and Type 2 diabetes in New York City public schools in violation of the students' civil rights. The Court granted plaintiffs' motion for class certification, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class was defined as: "All students with diabetes who are now or will be entitled to receive diabetes-related care and attend New York City Department of Education schools." Defendants did not object to class certification. Plaintiffs alleged that the DOE had consistently failed to hold meetings and to finalize plans for students at the beginning of the school year or following diagnosis of students with diabetes, as required under Section 504 of the Rehabilitation Act. Without what was referred to as a "Section 504 plan," plaintiffs alleged that parents and guardians reported to school multiple times per day to provide medical care that the DOE did not provide, including testing blood glucose levels and administering insulin. As a result, plaintiffs alleged that it could take days, weeks or months before students with diabetes were able to safely attend DOE schools or school-sponsored activities without their parents or family members also attending. Plaintiffs further claimed that, even when a Section 504 plan was in place, defendants lacked backup plans to ensure a staff member was available to help with diabetes care when the primary school caregiver was absent. Additionally, plaintiffs alleged that the DOE segregated and stigmatized the putative class of plaintiffs. For example, plaintiffs alleged that students with diabetes missed educational time by being forced to leave the classroom multiple times per day to receive care in nurses' offices and by being unable to participate in field trips, before and after school activities, and school bus transportation.

M.F. v. New York City Dept. of Education, ___ F.3d ____, 2019 WL 2511874 (EDNY 2019)

Court Granted Preliminary Injunction Prohibiting Correctional Facility From Keeping 17-Year-Old Juvenile With Mental Illness in Solitary Confinement Despite Lengthy Disciplinary History

In this action commenced pursuant to 42 USC Section 1983 by plaintiff parent on behalf of her son who was a minor in the custody of New York Department of Corrections and Community Supervision (DOCCS), the District Court granted plaintiff's motion for a preliminary injunction and enjoined DOCCS from confining the adolescent offender (AO) in the Adolescent Offender Separation Unit (AOSU), pending the resolution of the action. The AO was a 17-year-old male in the custody of DOCCS who exhibited symptoms of mental illness including violent behavior that began in early childhood. The AO also abused alcohol and illicit drugs. The AO was admitted to Hudson Correctional Facility (Hudson) in August 2018 following a conviction for firing a gun into a neighbor's house in connection with a dispute over illegal drugs. The AO had an extensive disciplinary history (39 separate incidents) at Hudson, which included "cheeking" medications, assaults of correctional staff, unhygienic acts that involved urine and fecal matter, property damage to the facility, and he flooded his cell. In

November 2018, the AO was found guilty of disciplinary violations and was placed in the AOSU where he remained for almost seven months. The AO spent a minimum of 18 hours a day in a cell the size of a parking space. On weekends, he was confined to his cell for at least 22 hours. Additionally, the AO had been placed on "deprivation," during which he could not leave his cell for 24 hours, except for a visit. The AO stated that he had been put on deprivation a minimum of eight times for at least 75 days. Moreover, the AO stated that he had been placed on water deprivation orders. In deciding the motion, the court found that plaintiff made the requisite showing of irreparable harm absent injunctive relief through expert testimony which established that the placement of juveniles with mental health problems in solitary confinement subjected them to a much higher risk of suffering permanent negative sequela in the form of short and long term psychological damage. Plaintiff sufficiently established a clear likelihood of success on the merits of the claim under the Eighth Amendment which prohibited cruel and unusual punishment. Specifically, plaintiff demonstrated through expert testimony that the conditions at Hudson presented an unreasonable risk of serious damage to the AO's health and that the officials at Hudson deliberately disregarded that risk. In addition, the court held that the balance of the hardships decidedly favored injunctive relief because the AO's interest in avoiding serious, possibly long-term damage to his mental health outweighed the safety and security concerns of Hudson. Moreover, the injunction did not preclude Hudson from imposing alternate remedies that did not infringe on the AO's constitutional rights. The public interest was served by the injunction because such relief enforced the mandates of the Constitution.

Paykina v Lewin, 387 F. Supp.3d 225 (NDNY 2019)

Law Enforcement Officials Enjoined from Being Present in Room When Teenagers Charged in Criminal Matters Were Discussing Their Cases with Their Attorneys

Plaintiffs were sixteen-year-olds charged in criminal cases being handled in the Youth Part of the City of Syracuse criminal courthouse (the Courthouse). Before each court appearance, they attempted to consult with their attorneys in private, but an Onondaga County Sheriff's deputy or Syracuse police officer remained in the room and refused to leave. The court granted plaintiffs' motions for class certification and a preliminary injunction and directed, inter alia, that "Onondaga County and County Executive Ryan McMahon shall make a room available for class members to meet privately with their attorneys in the Syracuse Criminal Courthouse before appearances in the Youth Part," and that "law enforcement officials … [were] enjoined from being present in the room when class members [were] discussing their cases with their attorneys before or after court appearances[.]" Evidence revealed that Onondaga County routinely sent other teenagers into criminal hearings, including arraignments and bail hearings, without the chance to have a candid conversation with their lawyers and, therefore, without meaningful assistance of counsel. A criminal defendant's Sixth Amendment right to a lawyer included the right to confer with the lawyer in private. Violation of this right was most troubling at the time of arraignment, a critical stage of the proceeding at which facts were to be developed for purposes of the arraignment and hearings that will soon

follow. Understandably, young people were unwilling to reveal sensitive information about family situations, mental health, potential police misconduct, and crimes they might have committed in front of law enforcement officers. Indeed, their attorneys needed to instruct them not to disclose certain material information because the officer could use it against them in court. Moreover, the Sheriff did not establish that the policy that required that law enforcement officers were in the room during class members' attorney-client interviews was necessary to ensure security.

J.B. et al. v. Onondaga County, 401 F. Supp.3d 320 (NDNY 2019)