

**Office of Attorneys for Children
Appellate Division, Fourth Department**

**Case Digest
2022 Decision Lists Plus Select
Court of Appeals, Federal, and Other Cases of Interest**

SUPREME COURT OF THE UNITED STATES

Under the Hague Convention, After Finding That the Return of a Child Would Put the Child at Grave Risk of Physical or Psychological Harm, a Court May Exercise Its Discretion and Decline to Consider Ameliorative Measures

Applying its own precedent, the Second Circuit affirmed the findings of the District Court which ordered the subject child's return to Italy after first remanding for consideration of all possible ameliorative measures. The Supreme Court of the United States vacated and remanded for further proceedings. The mother of the subject child, an American citizen, married the father, an Italian citizen, in Italy where they had a son in 2016. The parties and child lived in Italy until 2018, when the mother flew with the child to the United States to attend a wedding and, instead of returning to Italy, moved into a domestic violence shelter. The father filed a petition with the US District Court seeking the return of the child to Italy pursuant to the Hague Convention.

The District Court granted the father's petition after trial. As a threshold matter, the District Court determined that Italy was the child's habitual residence and that the mother had wrongfully retained the child in the United States in violation of the father's custody rights. The District Court, however, concluded that to return the child to Italy would expose him to a grave risk of harm. The District Court observed that there was no dispute that the father was violent—physically, psychologically, emotionally, and verbally—to the mother and that the child was present for much of the abuse. Undisputed expert testimony established that domestic violence disrupts a child's cognitive and social-emotional development and affects the structure and organization of the child's brain. The District Court nonetheless ordered the child's return to Italy based on Second Circuit precedent obligating examination of the full range of options that might make possible the safe return of the child to the home country.

On the mother's first appeal, the Second Circuit vacated the order finding the District Court's measures were insufficient to mitigate the risk of harm to the child absent sufficient guarantees of performance. However, because the record did not support the conclusion that there existed no protective measure sufficient to ameliorate the grave risk of harm to the child if repatriated, the Second Circuit remanded for the District Court to consider whether there were alternative ameliorative measures that were either enforceable by the District Court or supported by other sufficient guarantees of performance. To comply with the Second Circuit's directive, over the course of nine months, the District Court conducted an extensive examination of the measures available to ensure the child's safe return to Italy and eventually concluded that sufficient measures had been taken or were available to return the child. The Second Circuit affirmed. The Supreme Court of the United States granted certiorari to decide whether the Second Circuit properly required the District Court, after making a grave risk finding, to examine the full range of possible ameliorative measures before reaching a decision as to whether to deny return.

The Supreme Court found that the Second Circuit's categorical requirement that district courts examine the range of options that might make possible the safe return of a child before denying return due to grave risk was inconsistent with the text and other express requirements of the Hague Convention. The Supreme Court noted that nothing in the Hague Convention's text either forbade or required the consideration of ameliorative measures when exercising a court's discretion to grant or deny return after making a finding of grave risk. The question of the presence of grave risk should be separate from the question of the presence of ameliorative measures that could mitigate that risk.

Nevertheless, discretion should not be a whim. As a threshold matter, a court exercising its discretion is still responsible for addressing and responding to nonfrivolous arguments timely raised by the parties before it, such as proposed ameliorative measures. In addition, a court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention, which is designed to protect the interests of children and their parents. Therefore, consideration of ameliorative measures must prioritize the child's physical and psychological safety, abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute, and must accord with the Convention's requirement that courts act expeditiously in proceedings for the return of children.

In summary, although nothing in the Hague Convention prohibits a District Court from considering ameliorative measures, and such consideration may often be appropriate, a court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. A court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate.

The Supreme Court remanded to the District Court for it to make a discretionary determination as to whether to order or deny return under the correct legal standard.

Golan v Saada, 596 US ___, 142 S Ct 1850 (2022)

COURT OF APPEALS

Termination of Parental Rights Affirmed; Respondent Father Did Not Dispute the Appellate Division's Determination That His Failure to Appear Constituted a Default

Family Court terminated respondent father's parental rights on the ground that he defaulted. The Appellate Division, Fourth Department, affirmed. The Court of Appeals affirmed. A Court of Appeals majority concluded that the father failed to raise any basis for reversal and that he did not dispute the Appellate Division's determination that his failure to appear constituted a default. The dissent asserted that the father's failure to appear did not constitute a default because the father appeared through counsel during both the fact-finding and dispositional hearings. Family Court had proceeded to a fact-finding hearing on the disputed termination petition, rather than by inquest, and the petitioning agency did not move for entry of a default judgment, as would have been required to proceed by inquest. The fact that the father's counsel stayed silent during the proceedings - a tactical choice - did not support a finding that the father defaulted. At the hearing, counsel did not seek to be relieved as attorney for the father, nor did counsel state that he was unable to diligently or competently represent the father.

Matter of Irelynn S., 38 NY3d 933 (2022) See *Matter of Akol v Afet* at page 21.

The ICPC Does Not Apply to Out-Of-State, Noncustodial Parents Seeking Custody of Children Who Are in the Custody of New York Social Services Agencies

Family Court dismissed the out-of-state father's custody petitions without a hearing, holding that the requirements of the ICPC applied. The Appellate Division, Second Department affirmed. The Court of Appeals reversed. In 2012, the Suffolk County Department of Social Services (DSS) removed the child from the custody of the mother and placed the child in foster care. In 2013, application was made under the ICPC to approve the father's North Carolina's home as a suitable placement. The relevant North Carolina authority denied the ICPC request and the child remained in foster care in New York. In 2017, the father commenced custody proceedings. DSS argued that the child could not be placed with the father given North Carolina's refusal to consent. Family Court dismissed the father's petitions without conducting a hearing, holding that the requirements of the ICPC applied. The Court of Appeals unanimously held that: 1) nothing in the language of the statute or its legislative history indicated that the ICPC was intended to address any individual other than an out-of-state foster or adoptive parent; 2) regulation 3(2)(a) was inconsistent with its enabling legislation and, therefore, could not be given effect; and 3) the Family Court Act contained other effective means to ensure the safety of a child before awarding custody to an out-of-state parent, such as hearings, courtesy investigations and reports from local social service agencies or departments of probation, and orders of disposition which require the parent to submit to Family Court's continuing jurisdiction and comply with the terms and conditions of an order - which might include

making the child available for visits with social service officials. Accordingly, the Court of Appeals reversed the order of the Appellate Division and reinstated the petitions.

Matter of D.L. v S.B., 39 NY3d 81 (2022)

CASES OF INTEREST FROM THE SECOND DEPARTMENT

Supreme Court Granted the AFC's Motion for a Trial Retainer Ahead of a Contentious Custody Trial

Supreme Court, upon a motion made by the AFC, directed the parties to pay the appointed private-pay AFC a trial retainer in the amount of \$10,000.00. Supreme Court found that the AFC was tasked with the weighty responsibilities of zealously advocating for her client, taking an active role in the proceedings, and consulting and counseling the client, all in accordance with the same ethical requirements applicable to all lawyers. Accordingly, if the AFC was subject to the same rules as privately retained counsel, she should have the same expectation of compensation. The parties' conduct during the pendency of the litigation led Supreme Court to the inescapable conclusion that trial was inevitable. In consideration of the relative financial circumstances of the parties, the relative merit of their positions, and the tactics of a party in unnecessarily prolonging the litigation, Supreme Court determined that a trial retainer of \$10,000.00 was appropriate and the court was authorized to direct that a parent, who has sufficient financial means to do so, pay some or all of the AFC's fees.

J.M. v R.M., 73 Misc 3d 506 (Sup Ct, Nassau County 2022)

Supreme Court Increased the Hourly Rate of a Private-Pay AFC

Supreme Court, upon a motion made by the AFC, increased the hourly rate of the appointed private-pay AFC from \$200.00 per hour to \$400.00 per hour and awarded her an additional trial retainer of \$10,000.00. The child's attorney has a right to be paid in an amount aligned with that of the attorneys for husband and wife especially where the parties have sufficient resources to pay their privately retained counsel hundreds of thousands of dollars. The last time attorneys appointed pursuant to statute in family and matrimonial cases received an increase in the statutory amount was 2004. The current statutory amount is woefully inadequate and has been inadequate for quite some time. If the court system is going to attract attorneys to be members of their panels or to remain on the panels with the depth and breadth of experience of the instant AFC, to pay the statutory rate is detrimental to the role of the AFC. This rate is not sufficient or reasonable.

Goldman v Abramova-Goldman, 73 Misc 3d 975 (Sup Ct, Kings County 2021)

THIRD DEPARTMENT CASES OF INTEREST

Termination of Visitation Pursuant to a Post-Adoption Contact Agreement Was Appropriate When the Same Was Not in the Best Interests of the Children

Family Court terminated visitation between the biological mother and the children. The Appellate Division affirmed. The biological mother and the adoptive mother entered into post-adoption contact agreements allowing the biological mother to have two supervised visits per year and to receive photographs of the children twice per year. The agreements were incorporated into the orders of adoption. Following a hearing, Family Court terminated biological mother's visitation finding it not to be in the best interests of the children. The son's counselor testified that the son had autistic spectrum disorder, attention deficit hyperactivity disorder, and anxiety disorder. Following visitation with the biological mother, the son exhibited significant behavioral outbursts which lasted for close to a month or several months. The daughter experienced nightmares and/or began banging her head after several visits.

Two judges dissented with regards to the daughter and asserted that any correlation between the brief, supervised visits and the daughter's harmful behavior was tenuous at best. The dissent argued that courts should adopt a careful and restrained approach in reviewing post-adoption contact agreements, as the resulting deprivation from a lack of enforcement is significant and substantial.

Matter of Jennifer J.J. v Jessica J.J., 203 AD3d 1444 (3d Dept 2022)

Automatic Disqualification of the AFC Was Not Required Where the AFC Was Previously a Judge Who Decided a Custody Case Involving the Mother

Family Court awarded the parties joint legal custody with the father having primary physical custody. The Appellate Division affirmed. The father had more stable housing than the mother, there was room for the children in his residence, and the father had a plan to provide care for the children. Automatic disqualification of the AFC was not required where the AFC was previously a judge who, in 2014, decided a custody case involving the mother. The instant proceedings had not been before the AFC when he was a judge. The prior custody case was an entirely separate proceeding involving different children and a different father. While the mother's fitness as the custodial parent presumably was an issue in her prior custody case, equating a discrete issue with a "matter" as that term is used in Judiciary Law §17 would impermissibly stretch the meaning of the word.

Matter of Corey O. v Angela P., 203 AD3d 1450 (3d Dept 2022)

Family Court Erred in Dismissing Juvenile Delinquency Petition

Family Court, sua sponte, dismissed the juvenile delinquency petition filed against Respondent. The Appellate Division reversed on the merits and remitted to Family Court for further proceedings. Petitioner filed a juvenile delinquency petition alleging that respondent, who was 17 years old, had committed acts that would have constituted assault in the third degree if committed by an adult. An initial appearance was scheduled however, before it was held, Family Court dismissed the petition citing furtherance of justice. Family Court did not lack the authority to dismiss the petition prior to the initial appearance. Nevertheless, Family Court's dismissal of the petition was an improvident exercise of its discretion. Among other things, Family Court should have considered the seriousness of respondent's alleged conduct, which included physical and verbal abuse of the mother of his child, and the victim's need for protection.

Matter of James J.J., 206 AD3d 1091 (3d Dept 2022)

Where a Parent Makes a Voluntary Custodial Arrangement for a Child, A Non-Parent May Not Interfere Absent Extraordinary Circumstances

Family Court dismissed petitioners' applications for custody of the subject children. The Appellate Division affirmed. Following the custodial mother's death, custody petitions were filed by, inter alia, the children's maternal grandmother and the children's former stepfather and his wife. Family Court awarded temporary custody of the children to the grandmother upon the consent of children's fathers. Family Court subsequently conducted a fact-finding hearing on the issue of extraordinary circumstances with regards to the stepfather and his wife's petitions and dismissed said petitions on the basis that stepfather and his wife failed to meet their burdens. The boy's father testified that he was unable to assume custody because of his physical disabilities and living arrangement. Therefore, following the mother's death, the boy's father formulated a plan for the boy to live with the grandmother along with his sister, with whom the boy had a close bond. The Appellate Division, Third Department held that where a parent makes a voluntary custodial arrangement for his or her child, Family Court may not permit a non-parent to interfere with that arrangement in the absence of extraordinary circumstances.

Matter of Leslie L.L. v Robert N.N., 208 AD3d 1479 (3d Dept 2022)

FOURTH DEPARTMENT CASES

ABUSE AND NEGLECT

Department of Human Services Failed to Properly Preserve Objection to Family Court Order

Family Court denied, in part, petitioner's motion for respondent mother to submit to a parenting assessment and mental health evaluation. The Appellate Division affirmed. Family Court did not exceed its authority by ordering petitioner to obtain and pay for a risk assessment to be performed by a licensed mental health counselor. At oral argument, Family Court charted its course for resolving petitioner's motions, explaining the type of evaluation that it believed to be appropriate and naming who it intended to appoint to perform the evaluation. Petitioner failed to raise an argument at that time or at any time in the months between said oral argument and Family Court's issuance of its email decision. Petitioner's contention was not properly before the Appellate Division as said contention was raised for the first time on appeal.

Matter of Matthew M., 201 AD3d 1366 (4th Dept 2022)

Insufficient Evidence of Actual or Imminent Harm Clearly Attributable to the Mother's Conduct to Support a Neglect Finding

Family Court found that respondent mother neglected the subject child. The Appellate Division reversed and dismissed the petition. The mother had acknowledged her mental health issues, been compliant with treatment following her discovery that she was pregnant, never acted inappropriately around the child, and engaged in a supportive housing program that would allow her to care for the child. Therefore, there was insufficient evidence that any actual or imminent harm to the child was clearly attributable to any action or failure to act on the mother's part.

Matter of Isabella S., 203 AD3d 1651 (4th Dept 2022)

Father's Repeated, Unfounded Allegations of Sexual and Physical Abuse Constituted Neglect

Family Court found that respondent father had neglected the subject child and placed the father under the supervision of petitioner for a period of one year. The Appellate Division dismissed in part and affirmed in part. The appeal, insofar as it concerned the disposition was moot as that part of the order had expired. However, the father could nevertheless challenge the underlying neglect adjudication as it constituted a permanent stigma to a parent and could, in future proceedings, affect a parent's status. Nevertheless, the father's failure to exercise a minimum degree of care placed the child's physical, mental, or emotional condition at imminent danger of becoming impaired. The father made

repeated unfounded allegations of sexual and physical abuse necessitating that the child undergo medical examinations and interviews regarding intimate issues. The father also inappropriately questioned the child about the alleged abuse.

Matter of Juliette R., 203 AD3d 1678 (4th Dept 2022)

Family Court Violated Non-Party Appellant's Right to Attend the Disqualification Hearing

Family Court neither allowed non-party appellant access to the courtroom during a motion argument regarding the possible disqualification of a Deputy County Attorney nor access to the transcript of said proceeding. The Appellate Division modified, affirmed in part, and remitted for further proceedings. Family Court refused to allow appellant, an online-only local news outlet, access to the courtroom under the theory that the hearing was part of a sensitive Article 10 matter and further refused to allow appellant the opportunity to be heard. Later, appellant moved, in essence, for release of the transcript. Family Court denied the motion. The Appellate Division held that Family Court violated appellant's right to attend the disqualification hearing. Family Court failed to make findings prior to ordering appellant's exclusion and there was no indication in the record that the court relied on supporting evidence or considered any of the relevant factors in making its decision. Appellant was not causing or likely to cause a disruption, there was no indication that any party objected to appellant's presence for a compelling reason, the hearing, due to its nature, would not have required disclosure of the underlying neglect allegations, and less restrictive alternatives to exclusion were available. As Family Court abused its discretion in denying appellant access to the disqualification hearing, appellant was entitled to the transcript. Moreover, there was no statutory authority precluding the release of the transcript to appellant. The Appellate Division remitted to Family Court for release of the transcript subject to appropriate redaction of confidential information.

Matter of Rajea T., 203 AD3d 1714 (4th Dept 2022)

A Five-Year Order of Protection in Favor the Children Against a Person Related by Marriage to a Member of the Children's Household Was Impermissible

Family Court determined that respondent stepmother had neglected the oldest child and derivatively neglected the younger child and issued orders of protection which directed respondent to stay away from the children for a period of five years. The Appellate Division reversed, vacated, and remitted to Family Court. There was a sound and substantial basis to determine that respondent stepmother neglected the oldest child. The child was complying with respondent stepmother's directive to go upstairs and calm down after a verbal altercation between the two. Nonetheless, the stepmother followed the child upstairs and struck her in the face, breaking the child's glasses and causing her nose to bleed for several minutes. Furthermore, the stepmother's actions demonstrated such an impaired level of parental judgment as to allow for a finding of derivative neglect with

respect to the younger child. However, the five-year orders of protection violated FCA §1056 (1) as Family Court did not issue another dispositional order at the same time as the order of protection. Said orders further violated FCA §1056 (4) as the stepmother, although no longer living in the home, remained married to the children's mother, a member of the children's household. Finally, dispositional orders of protection should not have been issued without first holding a dispositional hearing.

Matter of Kayla K., 204 AD3d 1412 (4th Dept 2022) See also *Matter of Tara N. P.-T. v Emma P. T.*, 204 AD3d 1414 (4th Dept 2022) at page 28.

Father Neglected the Child When He Cut the Bottom of the Child's Toe With a Sword

Family Court adjudged that respondent father neglected the subject child and placed respondent under the supervision of petitioner. The Appellate Division modified on the law and, as modified, affirmed. The father neglected the child when he cut the bottom of the child's toe with a sword and exposed the child to domestic violence. However, petitioner failed to establish that the father neglected the subject child by failing to obtain medical care and treatment. The mother testified that, two days after the incident, the doctor treated the injury the same way the parents had, by cleaning it, placing ointment on it, and bandaging it. There was no testimony that the failure to seek immediate medical care impaired or threatened to impair the child's health.

Matter of McKinley H.-W., 206 AD3d 1726 (4th Dept 2022)

Supreme Court Appropriately Denied Petitioner's Application to Amend an Indicated Report of Maltreatment to an Unfounded Report

Pursuant to CPLR Article 78, Supreme Court reviewed a determination made by respondent and denied petitioner's application to amend the indicated report of maltreatment to an unfounded report. The Appellate Division confirmed and dismissed the petition. Testimony from the caseworker established that petitioner coached the child to fabricate allegations of abuse against the child's father and his girlfriend, thereby causing the child to be subjected to unnecessary professional examinations and interviews and harming the child's physical, mental, or emotional well-being. Moreover, petitioner failed to acknowledge that her behavior was harmful to the child and failed to appreciate the seriousness of her conduct, therefore her maltreatment was likely to recur and was reasonable related to her employment working with children with disabilities.

Matter of Vega v New York State Office of Children and Fam. Servs., 207 AD3d 1179 (4th Dept 2022)

Petitioner Failed to Establish that the Mother Neglected the Subject Children

Family Court determined that respondent mother had neglected the subject children. The Appellate Division reversed on the law and dismissed the petition. As a threshold matter, the paper appealed from met the essential requirements of an order and therefore the Appellate Division treated it as such, despite arguments that no appeal lay from a decision. With respect to the merits, there was nothing intrinsically dangerous about leaving two of the children to eat and watch television while the mother was in the bathroom with the door open. The mother knew that one of her children was sometimes aggressive towards his younger siblings, however there was no evidence that she was aware that he may open a locked window, remove the screen, and drop his sibling from a height of two stories. The window involved in the incident was not deemed dangerous by a caseworker during a home visit less than a month before the incident. Furthermore, petitioner's evidence that the hygiene of the children met minimal standards was not sufficient to establish neglect as there was no evidence presented concerning the financial status of the mother.

Matter of Silas W., 207 AD3d 1234 (4th Dept 2022)

Respondent's Rights Were Unaffected Whether Family Court Temporarily Placed the Child Pursuant to Family Court Act §1017 (2) (a) (ii) or (iii)

Family Court authorized the continued removal of the subject child from the custody of respondent. The Appellate Division dismissed. The child had temporarily been placed with the paternal uncle and his girlfriend pursuant to Family Court Act §1017 (2) (a) (ii). Family Court modified the placement after the uncle and girlfriend became certified as foster parents. The mother was not an aggrieved party inasmuch as her rights were unaffected by whether Family Court temporarily placed the child pursuant to Family Court Act §1017 (2) (a) (ii) or Family Court Act §1017 (2) (a) (iii). The child would have remained in the care of the uncle and his girlfriend regardless. In either event, the mother retained the right to seek the return of the child to her custody pursuant to Family Court Act §1028.

Matter of Ty'Shawn B., 209 AD3d 1280 (4th Dept 2022)

Given the Age of the Child, the Provocation, and the Dynamics of the Incident, the Father's Isolated Act Against the Child Did Not Constitute Neglect

Family Court determined that respondent father neglected the subject child. The Appellate Division reversed on the law and dismissed the petition. As a preliminary matter, inasmuch as the father was served with the order by Family Court via email and there was no indication that he was served by any of the methods authorized by statute, the time to take an appeal did not begin to run. On the merits, during the course of a multi-person melee that included the 15-year-old sister beating up the 18-year-old daughter of the father's girlfriend, the 14-year-old child threw a rock at a vehicle causing the window

to break, to which provocation the father instantly reacted by striking the child once, either in the face or the back of the head. There was no evidence that the child sustained any injury or required medical attention, or that there was a pattern of excessive force by the father. The police who investigated the incident did not press charges. Instead, the proof established that this was a single, isolated incident and the Appellate Division opined that while losing one's temper does not excuse striking and potentially injuring one's child, one such event does not necessarily establish neglect.

Matter of Grayson S., 209 AD3d 1309 (4th Dept 2022)

Inasmuch as a Temporary Order of Removal Was Not a Finding of Wrongdoing, the Exception to the Mootness Doctrine Did Not Apply

Family Court placed the subject children in the custody of petitioner. The Appellate Division dismissed. The appeal was moot because, while the appeal was pending, Family Court entered an order of fact-finding and disposition determining that respondents neglected the subject children and placing the children in petitioner's custody. Contrary to the mother's contentions, inasmuch as a temporary order of removal was not a finding of wrongdoing, the exception to the mootness doctrine did not apply.

Matter of Destiny F., 210 AD3d 1399 (4th Dept 2022)

Respondents Did Not Credibly Rebut the Presumption of Parental Culpability

Family Court found that respondents abused and neglected the subject child and subsequently continued the child's placement with petitioner. The Appellate Division affirmed. Respondents did not dispute that they were exclusively responsible for the child's care at the time of the child's injuries, which included 28 rib fractures and an injured lung. However, respondents contended that they had rebutted the presumption of parental culpability by providing a reasonable explanation for how the child's injuries could have occurred without any act or omission on their part. Respondents originally claimed that the injuries were accidental, yet none of the medical evidence supported this claim. Family Court properly rejected respondents' subsequent claim at trial that the injuries were due to an underlying medical condition - the testimony of respondents' expert witnesses was incredible and the experts' conclusions were not consistent with other evidence.

Matter of Mea V., 210 AD3d 1408 (4th Dept 2022)

The Marihuana Regulation and Taxation Act Amended Family Court Act §1046(a) Former (iii) by Specifically Foreclosing a Prima Facie Neglect Finding Based Solely on the Use of Marihuana

Family Court determined that respondent had neglected the subject children. The Appellate Division modified on the law, as modified affirmed, and remitted to Family Court. The mother neglected the youngest child by wrapping the infant to sleep, on more than one occasion, in loose blankets, despite repeated warnings that doing so created a substantial risk to the child. However, Family Court erred determining that the subject children were neglected based solely on the mother's use of marihuana. The Marihuana Regulation and Taxation Act amended Family Court Act §1046(a) former (iii) by specifically foreclosing a prima facie neglect finding based solely on the use of marihuana, while still allowing for consideration of the use of marihuana to establish neglect, provided that there was a separate finding that the child's physical, mental or emotional condition was impaired or was in imminent danger of becoming impaired. As the amendment went into effect two days before Family Court rendered its decision, the Appellate Division remitted the matter to reopen the fact-finding hearing.

Matter of Gina R., 211 AD3d 1483 (4th Dept 2022)

ADOPTION

Consent of Father Who Demonstrated Willingness to Take Parental Responsibility Required for the Adoption of His Biological Child

Family Court determined that the consent of respondent father was required for the adoption of his biological son. The Appellate Division affirmed. The father demonstrated a willingness to take parental responsibility and did everything possible to manifest and establish his parental responsibility under the circumstances. The father publicly acknowledged his paternity from the outset of the pregnancy, and, although he did not pay any expenses in connection with the pregnancy or the birth, he testified that all of those expenses were paid by the military. Prior to the child's birth, he pursued paternity testing, requested and received from the mother a commitment that he could have custody of the child, and actively began purchasing "items" in anticipation of obtaining custody of the child upon birth. The father enlisted the help of his military commanding officers in attempting to obtain custody of his child and made plans for relatives or family friends to help care for the child until his enlistment in the military ended. The father reasonably and sincerely believed that the mother would not surrender the child for adoption, and she frustrated his efforts to become involved with the child. She lied to the father by telling him that she would give him custody of the child, misled petitioners into believing that the father did not want the child, even though she knew that he was aggressively pursuing custody and misled the courts by filing a false affidavit stating that no one was holding himself out as the father. Furthermore, a parent who lacks housing for a child is not legally precluded from obtaining custody. Many parents enlist the aid of family members to help them provide housing, including single parents who serve in the military. That temporary inability to provide housing should not preclude them from asserting their custodial rights to their children where they have established their intent to embrace their parental responsibility. The Appellate Division majority disagreed with the dissent which argued that the father failed to demonstrate his ability to assume custody of the child.

Matter of the Adoption of William, 206 AD3d 1696 (4th Dept 2022)

CHILD SUPPORT

The Support Magistrate Applied a Version of the Improper Proportional Offset Method

Family Court denied petitioner's objections to an order of the Support Magistrate that, among other things, granted in part the petition for an upward modification of respondent mother's child support obligations. The Appellate Division modified on the law, vacated the amount of respondent's child support obligation, and remitted to Family Court. The Support Magistrate had determined that because the children spent approximately 50% of their parenting time with the mother and because the mother incurred expenses for the children's food, clothing, shelter, utilities, cell phones, transportation, and extracurricular activities, she should be granted a variance from the presumptive support obligation. That was error. The costs of providing suitable housing, clothing, and food for a child during custodial periods did not qualify as extraordinary expenses so as to justify a deviation. Nor did the cost of entertainment, including sports.

Matter of Livingston County Support Collection Unit v Sansocie, 203 AD3d 1675 (4th Dept 2022)

Supreme Court Relied Upon Proper Factors When Applying the CSSA to a Combined Parental Income Level in Excess of the Statutory Cap

Supreme Court, inter alia, directed defendant to pay child support on income in excess of the statutory cap. The Appellate Division affirmed. Supreme Court properly relied on the factors set forth in Domestic Relations Law §240 (1-b) (f) when it determined that application of the CSSA's statutory income cap would be inequitable because it would not afford to the child the same standard of living that the child would have enjoyed had the marriage not been dissolved. Moreover, Supreme Court's application of the CSSA formula to an income level for defendant that was above the statutory cap but below the income imputed to him for the purpose of calculating the amount of maintenance was supported by the record.

Anastasi v Anastasi, 207 AD3d 1131 (4th Dept 2022)

No Basis Existed to Depart From Strong Public Policy Against Restitution or Recoupment of Support Overpayments

Family Court denied petitioner's objections to the order of the Support Magistrate which dismissed her petition for modification of her child support obligation. The Appellate Division dismissed. During the pendency of the appeal, the subject child turned 21-years-old and the mother's obligation to pay child support ceased. Even if the mother succeeded on the appeal, she would have no avenue to regain any sums she might have overpaid in child support. There is a strong public policy against restitution or recoupment of support overpayments and there was no basis to depart from that policy.

Matter of Grimes v Medero, 210 AD3d 1427 (4th Dept 2022)

CUSTODY AND ACCESS

Family Court Inappropriately Granted Motion to Dismiss Father's Modification Petition

Family Court granted respondent mother's motion to dismiss the father's petition seeking, inter alia, to modify a prior order of custody and visitation. The Appellate Division reversed, denied the mother's motion, reinstated the father's petition, and remitted to Family Court. Family Court granted the mother's motion to dismiss on the ground that the father failed to meet his burden of establishing a requisite change in circumstances. The father had testified that at the time the underlying order was entered, the parents were able to communicate effectively and agree to additional visitation times. That arrangement subsequently changed after the father relocated to a new home 30 miles away. Taking the father's testimony as true and considering the circumstances of his move and the development of extreme acrimony between the parties, the father met his burden of demonstrating a change in circumstances warranting an inquiry into the best interests of the child.

Matter of Cooley v Roloson, 201 AD3d 1299 (4th Dept 2022)

Family Court's Initial Custody Determination, Which Allowed for the Relocation of the Subject Child, was Supported by a Sound and Substantial Basis in the Record

Family Court granted the parties joint legal custody of the subject child and granted respondent mother primary physical residency with permission to relocate to North Carolina. The Appellate Division affirmed. Inasmuch as the case involved an initial custody determination, it could not be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) need have strictly been applied. Family Court considered the effect of the mother's proposed relocation as a part of its best interests analysis, although relocation was but one factor among many in its custody determination. The relevant issue was whether it was in the best interests of the child to reside primarily with the mother or the father.

Matter of Hochreiter v Williams, 201 AD3d 1303 (4th Dept 2022)

Family Court Did Not Err in Separating the Subject Children From Their Half Siblings

Family Court awarded petitioner father sole custody and primary physical residency of the subject children. The Appellate Division affirmed. The totality of the circumstances supported Family Court's best interests determination. The presence of half siblings in the home of respondent mother was a factor to be considered but was not dispositive. The subject children were previously separated from their half siblings when the mother assaulted two of those siblings and all of the mother's children were removed from her care.

Matter of Burnett v Smith, 201 AD3d 1368 (4th Dept 2022)

Visitation Schedule Set by Family Court Was Not Too Restrictive

Family Court modified an order of custody and visitation by setting a specific schedule for the mother's parenting time. The Appellate Division affirmed. Although the mother contended that the parenting time schedule set by the court was too restrictive, the record established that Family Court's determination resulted from a careful weighing of the appropriate factors and its order explicitly provided that the mother's consistent exercise of the established schedule would constitute a change in circumstances allowing her to seek modification in the near future.

Matter of Paratore v Paratore, 202 AD3d 1500 (4th Dept 2022)

Family Court Did Not Abuse Its Discretion by Not Appointing an AFC or Allowing Father's Girlfriend to Have Contact with the Subject Child

Family Court modified a prior order of custody and visitation by granting petitioner mother sole custody of the subject child, setting a visitation schedule for respondent father, and prohibiting the father's girlfriend from being present at exchanges. The Appellate Division affirmed. Family Court did not err in failing to prohibit the father's girlfriend from having any contact with the child. There were verbal and physical altercations between the mother and the girlfriend during exchanges of the child, however, there was no evidence that the girlfriend had harmed or threatened the child. Family Court, further, did not abuse its discretion in not appointing an AFC. The subject child was less than one year old at the time and would have been unable to express his wishes to an AFC.

Matter of Santana v Barnes, 203 AD3d 1561 (4th Dept 2022)

Non-Parent Relatives Did Not Have a Greater Right to Custody than Foster Parents

Family Court denied petitioner grandparents' petition insofar as it sought custody of the subject child and granted the petition insofar as it sought visitation. The Appellate Division affirmed. Petitioners were maternal grandparents of the subject child. The child was placed in foster care after the father shot and killed the child's mother. Shortly after the commencement of a severe abuse proceeding against the father, petitioners sought custody of or visitation with the subject child. The DSS caseworker and the child's therapist testified that the child was appropriately cared for by the foster parents and that removing the child from his foster parents could cause the child to regress in his development. The grandparents did not have a greater right to custody than the child's foster parents. The progressive visitation schedule set for the grandparents had a sound and substantial basis in the record.

Matter of Robert L. v Jefferson County Dept. of Social Servs., 203 AD3d 1674 (4th Dept 2022)

Prohibition of Contact Between the Parties' Children and a Third Party Was Appropriate

Family Court modified a prior order of custody and visitation by, inter alia, prohibiting any contact between the parties' children and the mother's male friend. The Appellate Division affirmed. The mother's male friend engaged in acts of violence in the presence of the children, repeatedly used drugs with the mother, and, along with the mother, frequently and flagrantly violated Family Court's temporary order that the children not be in his presence. Consequently, Family Court properly determined that allowing the mother's friend to have contact with the children created an unnecessary risk to their health and well-being and was not in their best interests.

Matter of Hall v Velez, 204 AD3d 1422 (4th Dept 2022)

Primary Placement with Non-Parent Petitioner Was Proper

Family Court modified a prior order of custody and granted petitioner primary physical placement of the subject child. The Appellate Division affirmed. The prior custody order, entered on consent, awarded petitioner and respondent mother joint custody of the subject child with physical placement with the mother. The mother had seven children and petitioner, though not a parent of the subject child, was the father and custodial parent of the youngest two of those children. The Appellate Division made the following findings: First, petitioner met his burden of establishing extraordinary circumstances. The determination, in a dispositional order entered in a Family Court Article 10 proceeding, that the mother had neglected the subject child supplied the threshold showing that extraordinary circumstances existed. Second, petitioner established the requisite change in circumstances. Petitioner demonstrated that since the time of the prior order, the child was subjected to physical aggression in the mother's home by some of the mother's other children; the child had many unexplained absences from school, and the mother failed to assist the child with completing his homework resulting in his need to repeat second grade; and, the mother failed to comply with the requirements of the prior order to ensure the child was properly bathed and groomed and to maintain a safe and sanitary home. Additionally, the child expressed a strong preference to live with petitioner. Third, Family Court properly determined that it was in the child's best interests for petitioner to have primary physical placement. In addition to the evidence described above, petitioner had a close bond with the child and had primary physical custody of two of the child's half-siblings.

Matter of Kennell v Trusty, 206 AD3d 1578 (4th Dept 2022)

Family Court Erred in Entering Order Upon Respondent's Default When Respondent Was Represented by Counsel

Family Court awarded petitioner mother sole legal and physical custody of the subject child. The Appellate Division modified on the law by vacating those parts of the order which stated that the order should not have been entered on default and, as modified,

affirmed. The record established that, while the father failed to appear, he was represented by counsel. Therefore, the order should not have been entered upon default and appeal was not precluded. Nevertheless, Family Court did not abuse its discretion in conducting the hearing in the father's absence inasmuch as he appeared by counsel and had notice of the hearing.

Matter of Akol v Afet, 206 AD3d 1647 (4th Dept 2022) See *Matter of Irelynn S.* at page 4.

Father Violated Order Prohibiting Disparagement and Discussion of Litigation with the Child

Family Court found that respondent father violated an order of custody and parenting time which, inter alia, prohibited the parties from disparaging each other in the presence of the child in a manner that might alienate the child's affection toward the other party and from discussing litigation involving the child in her presence. The Appellate Division affirmed. While the father had knowledge of the terms of the order, he nonetheless spoke to the child about upcoming proceedings that might alter the child's custody arrangement and also told the child that the mother engaged in certain inappropriate behavior while in the child's presence. The father's actions caused the mother's relationship with the child to deteriorate. A finding of willfulness by Family Court was not necessary.

Matter of Fowler v Fowler, 206 AD3d 1718 (4th Dept 2022)

Family Court Correctly Considered the Cumulative Effect of All Issues Present When Making Its Extraordinary Circumstances Determination

Family Court awarded respondent aunt sole custody and physical placement of the subject children and awarded petitioner mother visitation in the form of weekly video or electronic communication. The Appellate Division affirmed. The mother's filing of more than 85 petitions, only a few of which raised issues that fell within the jurisdiction of Family Court, over the approximately five (5) years that the children were living with the aunt was abusive and vexatious litigation rather than serious attempts to regain custody or resume a parental role in the children's lives. In any event, even if the prolonged separation was entitled to little significance, Family Court properly considered the cumulative effect of, among other things, the mother's voluntary relinquishment of physical custody of the children, the psychological bonding of the children to the aunt and potential harm to the children if removed from the aunt's custody, the mother's failure to adequately address her ongoing mental health issues, and, importantly, the series of incidents in which the mother engaged in erratic, unstable, threatening, and psychologically abusive behavior and communication directed at the children that justifiably rendered the children fearful of the mother. With respect to Family Court's custody and visitation determination, the best interests of the children were served with weekly supervised video or electronic communication, which would continue even after the mother's release from jail, given the credible evidence that the mother's prior in-person supervised visitation was already discontinued coupled with the mother's erratic and threatening behaviors, including

repeatedly appearing uninvited at the aunt's house while approaching or communicating with the children in a manner that caused them genuine fear.

Matter of Byler v Byler, 207 AD3d 1072 (4th Dept 2022)

Supreme Court Appropriately Denied Mother's Application for Sole Custody

Supreme Court denied the application of plaintiff mother for sole custody of the subject children. The Appellate Division affirmed. Supreme Court properly limited the proof to incidents that occurred after the parties entered into their prior agreement. Moreover, Supreme Court properly precluded 1) the children's out-of-court statements when the mother failed to offer any evidence to corroborate, and 2) testimony of a child protective services caseworker and the admission into evidence of the related investigatory file when the mother failed to establish the applicability of a statutory provision allowing her to introduce unfounded child protective services reports or testimony concerning those reports.

S.P. v M.P., 207 AD3d 1213 (4th Dept 2022)

Family Court's Denial of an Adjournment Request Was Inappropriate

Family Court awarded petitioner father primary residential custody of the subject child after requiring respondent mother to proceed pro se during the hearing. The Appellate Division reversed and remitted. Approximately one week prior to the hearing, the mother's attorney informed Family Court that there had been a breakdown in her attorney-client relationship with the mother, as a result of which she was no longer representing the mother, and she requested an adjournment of the hearing. On the morning of the hearing, Family Court failed to make any inquiry of the mother concerning the fact that her attorney was not present, nor did the court make any mention of said attorney's adjournment request. The mother, herself, then sought an adjournment explaining that she had spoken to, and scheduled a meeting with, a new attorney and that the new attorney could not be present due to a pre-existing obligation. Family Court denied her adjournment request and required the mother to proceed pro se. Family Court abused its discretion in denying the mother's request to adjourn the hearing. The record established that the mother's request was not a delay tactic and did not result from her lack of diligence in retaining new counsel. Moreover, the request was the mother's first request for an adjournment in the matter.

Matter of Dupont v Armstrong, 207 AD3d 1242 (4th Dept 2022)

Plaintiff Mother Engaged in Meritless, Frivolous, or Vexation Litigation and Therefore Forfeited Her Right to Free Access to the Courts

Supreme Court precluded plaintiff mother from filing any new applications without leave of court or approval of an attorney. The Appellate Division affirmed. The mother made multiple motions for various relief, many of which were repetitive and each of which was

accompanied by voluminous and mostly irrelevant exhibits. When her requests for relief were denied, the mother ignored the court's rulings and continued making the same meritless arguments. Moreover, the mother was sending copies of her papers, which contained sensitive issues, to people who had no involvement at all in the case. Supreme Court appropriately determined that the mother had abused the judicial process by engaging in meritless, frivolous, or vexation litigation and therefore forfeited her right to free access to the courts.

S.P. v M.P., 207 AD3d 1247 (4th Dept 2022)

Family Court's Award of Four-Way Joint Custody Was Appropriate Despite Father's Criminal Conviction for Statutory Rape of the Mother

Family Court granted joint legal custody of the subject child to the mother, the maternal grandparents, and the father. The Appellate Division affirmed. Family Court granted all parties joint legal custody of the child, assigned the grandparents and the father various zones of influence, and awarded the grandparents and the father shared physical residence. As a preliminary matter, the mother and the AFC had standing to appeal as the mother and the child had a direct interest in the matter that was affected by the result and the adjudication had a binding force against their rights, person, or property. In addition, although the father had a troubled past and his relationship with the mother began under illegal circumstances, he and the mother had a long-standing, on-and-off again romantic relationship that had spanned over a decade. The father admitted his previous mistakes without excuses or hesitancy. The father had paid for his crimes and turned his life around, obtaining gainful employment, and purchasing his own home. He had demonstrated a consistent desire to parent his child, who had never been harmed in his presence and desired to spend time with him. Considering the factors relevant to the determination of a child's best interests, as well as the concerted efforts by the grandparents to interfere with the father's contact with the child, there was a sound and substantial basis for Family Court's order. Family Court's failure to conduct a scheduled Lincoln hearing, which did not occur due to a snowstorm and a global pandemic, did not require remittal. Family Court was able to discern the child's wishes as a result of the position expressed by the AFC. Moreover, there were indications that the child might have been tainted by the obvious disdain the grandparents regularly expressed for the father.

Matter of Brady J.S. v Darla A.B., 208 AD3d 1023 (4th Dept 2022)

While a Factor in a Best Interests Determination, the Wishes of the Child Alone Are Not Determinative

Family Court awarded the father sole legal and physical custody of the child. The Appellate Division affirmed. Contrary to the mother's contention, Family Court acknowledged that the wishes of the child favored the mother. However, as that factor alone is not determinative in a best interest determination, there was no error. The mother consented to the subject child's adult sister's testimony *in camera* and therefore waived her contention that Family Court erred in conducting said hearing.

Matter of Inman v Coleman, 208 AD3d 1637 (4th Dept 2022)

The Mother's Concerted Effort to Interfere With the Father's Contact with the Child by Disparaging Him to Providers Warranted a Change in Custody to Father

Family Court dismissed the father's violation and modification petitions. The Appellate Division reversed on the law, reinstated the father's modification petition, granted the modification petition, and remitted to Family Court for further proceedings. The parties' acrimonious relationship and inability to communicate effectively with respect to the needs and activities of their child made the previous joint custody arrangement not feasible and established a change in circumstances. Considering the relevant factors, the Appellate Division determined it was in the child's best interests to award the father sole custody. The father was able to provide the more stable environment for the child and was better able to nurture the child. Furthermore, the mother made a concerted effort to interfere with the father's contact with the child by, inter alia, disparaging him to educational and medical professionals, which raised a strong probability that the mother was unfit to act as a custodial parent. The Appellate Division granted the father's amended petition by awarding the father sole custody and remitted to Family Court to fashion an appropriate visitation schedule for the mother.

Matter of Johnson v Johnson, 209 AD3d 1314 (4th Dept 2022)

Supreme Court Erred in 1) Altering the Terms of the Parties' Custody and Visitation Arrangement and Imposing Its House Rules Without a Hearing, 2) Refusing the AFC's repeated requests for a Lincoln Hearing, and 3) Limiting the AFC's Interactions With Her Clients

Supreme Court, inter alia, expanded the father's visitation with the subject children. The Appellate Division dismissed, modified on the law, vacated parts of the underlying orders, and remitted to Supreme Court for further proceedings. Supreme Court should have conducted a hearing to determine the children's best interests prior to issuing temporary orders that increased the father's visitation time, directed the mother to enforce that visitation, and imposed house rules on the children and the mother until the children complied with visitation. With respect to the imposition of Supreme Court's house rules, even assuming, arguendo, that Supreme Court had the authority to impose such rules, the record failed to demonstrate that the imposition of said rules was in the children's best interests. Said house rules barred the children from many activities, including leaving the mother's home except for school and church, using cell phones and other electronic devices, engaging in any extracurricular activities, and conversing with, socializing with, or visiting family and friends. Furthermore, Supreme Court erred in refusing the AFC's repeated requests for a Lincoln hearing and in otherwise declining to consider the children's views in its determinations. Supreme Court also erred by limiting the AFC's interaction with her clients by prohibiting the AFC from disclosing pleadings and other court documents to the children or discussing the documents' contents with them. The

Appellate Division further modified Supreme Court's contempt findings against the mother and the related penalties.

Burns v Grandjean, 210 AD3d 1467 (4th Dept 2022)

AFC Had Standing to Appeal; Subject Child Received Ineffective Assistance of Counsel

Family Court dismissed the father's custody modification petition. The Appellate Division reversed on the law and remitted to Family Court. Family Court determined that the father failed to establish a change in circumstances and granted respondent mother's motion to dismiss the father's petition. Under the circumstances of this case, the appellate AFC had standing to appeal the order. Additionally, the trial AFC did not zealously advocate the child's position and thus the child was denied effective assistance of counsel. The trial AFC did make his client's wish, that there be a change in custody, known to Family Court. However, he did not cross-examine the mother, the police officers, or the school social worker called by the father. Moreover, the trial AFC's cross-examination of the father was designed to elicit testimony that undermined the child's position. Further the AFC submitted an email to Family Court, in response to the mother's motion to dismiss, in which he stated his opinion that there had been no change in circumstances.

Matter of Sloma v Saya, 210 AD3d 1494 (4th Dept 2022)

Continuation of Visitation with the Grandmother Was Not in the Child's Best Interests

Family Court dismissed respondent grandmother's petition to modify an order of visitation and granted the parents' petitions to terminate the grandmother's visitation. The Appellate Division affirmed. The circumstances of the child's family - including the worsening relations between the litigants and the strenuous objection of both parents to grandparent visitation - rendered the continuation of visitation with the grandmother not in the child's best interests.

Matter of Bukowski v Florentino, 210 AD3d 1520 (4th Dept 2022) See *Matter of Nowlan v Cunningham*, 211 AD3d 1524 (4th Dept 2022) at page 26.

The Continuity and Stability of the Children's Living Situation Weighed in Favor of the Father

Family Court awarded the father primary physical residency of the subject children with visitation to the mother. The Appellate Division affirmed. The totality of the circumstances supported Family Court's best interests determination. The father had been the primary residential custodial parent since the time he filed the petition in 2020, and the continuity and stability of the living situation weighed in favor of the father. In addition, the mother was still undergoing treatment for her drug addiction at the time of the hearing, and had

missed a number of visitations, including one scheduled visit that she missed because she had been arrested.

Matter of Manioci v Schreiber, 210 AD3d 1523 (4th Dept 2022)

Petitioner Father Willfully Violated a Court Order

Family Court found the father in willful violation of a court order. The Appellate Division affirmed. The order of custody provided the father with visitation every other weekend and such other and further visitation as the parties might have agreed on. The parents agreed to extend one of the father's weekend visitations with one of the children until Monday morning. The father conceded that the child was not returned to the mother at the agreed time. The mother was required to obtain an order to show cause and police assistance to regain custody of the child several days later.

Matter of McRae v Brown, 211 AD3d 1523 (4th Dept 2022)

Family Court Appropriately Increased the Grandparents' Visitation

Family Court modified a prior order of visitation by increasing the visitation allowed to the paternal grandparents of the subject child. The Appellate Division affirmed. The continued deterioration of the parties' relationship was a significant change in circumstances and the record supported the determination that the grandparents had had a loving and close relationship with the child since her birth.

Matter of Nowlan v Cunningham, 211 AD3d 1524 (4th Dept 2022) See *Matter of Bukowski v Florentino*, 210 AD3d 1520 (4th Dept 2022) at page 25.

Reducing the Father's Parenting Time Was Not in the Child's Best Interests

Family Court modified a prior custody and visitation agreement by awarding the mother sole legal and primary physical custody of the child and reducing the father's parenting time with the child. The Appellate Division modified on the law. The evidence did not support Family Court's determination that limiting the father's parenting time was in the child's best interests. During the course of the proceeding, Family Court issued a temporary order granting the father specific parenting time with the child. The father, the child's former therapist, and the child's principal all testified that the child was thriving under that parenting schedule. The child's therapist testified that the child was deeply affected when his time with the father was reduced and opined that the child would be negatively impacted if the father's parenting time was limited, as did the AFC. The Appellate Division extended the father's weekend parenting time until Monday mornings and granted him four weeks of parenting time during the summer.

Matter of Conrad v Conrad, 211 AD3d 1528 (4th Dept 2022)

Family Court, Having Not Previously Made an Extraordinary Circumstances Determination, Erred in Requiring Father to Prove a Change in Circumstances

Family Court dismissed the father's modification and violation petitions. The Appellate Division modified on the law, reinstated the father's modification petition, and remitted to Family Court for further proceedings. Family Court properly determined that the father failed to establish that the grandmother violated the terms of the prior order. However, there was no indication in the record that, in the history of the parties' litigation, Family Court had made a determination of extraordinary circumstance divesting the father of his superior right to custody. Accordingly, Family Court erred in dismissing the father's modification petition on the ground that there had been no substantial change in circumstances. The Appellate Division reinstated the modification petition and remitted the matter to Family Court to determine whether extraordinary circumstances existed.

Matter of Wells v Freeland, 211 AD3d 1598 (4th Dept 2022)

FAMILY OFFENSE

Family Court Sufficiently Stated the Facts It Deemed Essential to Its Decision

Family Court issued an order of protection which directed respondent to stay away from petitioner and petitioner's children. The Appellate Division affirmed. Family Court sufficiently stated the facts it deemed essential to its findings that respondent had committed the family offenses of disorderly conduct, harassment, and aggravated harassment. Although Family Court did not specify the subsections of the criminal statutes upon which it based its findings, the Appellate Division exercised its independent review power and concluded that the record was sufficient to establish, by a preponderance of the evidence, that respondent had committed the stated family offenses.

Matter of Tara N. P.-T. v Emma P. T., 204 AD3d 1414 (4th Dept 2022) See also *Matter of Kayla K.*, 204 AD3d 1412 (4th Dept 2022) at page 11.

PATERNITY

Respondent's Claim of Estoppel was Based on the Nature of the Relationship Between Petitioner's Boyfriend and the Child

Family Court adjudicated respondent to be the father of the subject child. The Appellate Division affirmed. At the time of the child's birth, the mother was in a relationship with another man who was identified as the child's father on the birth certificate and who signed an acknowledgment of paternity. Shortly thereafter, the mother informed respondent that he might be the father of the child and filed a paternity petition against him. Said petition was dismissed based on the acknowledgment of paternity. However, after the acknowledgment of paternity was vacated, the mother commenced another paternity proceeding against respondent. At the outset of the second proceeding, the Support Magistrate ordered genetic marker testing which established that respondent was the child's biological father. The Support Magistrate thereafter transferred the matter to Family Court for a hearing on respondent's defense of equitable estoppel. Following the hearing, Family Court adjudicated respondent to be the child's father. While a court should consider paternity by estoppel before it decides whether to test for biological paternity, the fact that the testing was conducted before the equitable estoppel hearing did not mandate reversal. Respondent had a full and fair opportunity to litigate his equitable estoppel defense and Family Court made clear that, notwithstanding the results of the genetic marker test, the paternity petition would have been denied had respondent met his burden of proof on equitable estoppel. In addition, although respondent had a right to counsel in the paternity proceeding, respondent cited no authority for the proposition that a Support Magistrate cannot lawfully order a party to submit to genetic testing before that party is represented by counsel. Finally, Family Court did not err in denying respondent's motion to vacate the order of paternity. Even if the mother had admitted at the hearing that she and her current boyfriend discussed marriage or had a more committed relationship than appeared from their testimony, that evidence would not establish a basis for applying the doctrine of equitable estoppel. Respondent's claim of estoppel was not based on the nature and extent of the relationship between petitioner and her boyfriend; rather it was based on the nature of the relationship between the boyfriend and the child, and there was insufficient evidence that the boyfriend ever held himself out to be the child's father.

Matter of Danielle E.P. v Christopher N., 208 AD3d 978 (4th Dept 2022)

TERMINATION OF PARENTAL RIGHTS

After Finding Severe Abuse, Family Court Appropriately Terminated Respondents' Parental Rights

Family Court adjudged that respondents had severely abused, abused, and neglected one of the subject children, derivatively severely abused, abused, and neglected the other subject child, and subsequently terminated respondents' parental rights. The Appellate Division dismissed. Petitioner established that the father committed the felony sex crime of sexual abuse in the first degree against the older child and that the mother knowingly allowed said felony to be committed, thereby establishing that the eldest child was severely abused by both respondents. Considering the same, the finding that the younger child was derivatively severely abused by both respondents was proper. Thereafter, respondents failed to meet their burden of establishing that reasonable efforts to reunify respondents with the subject children would be in the best interest of the children, would not be contrary to the children's health and safety, and would likely result in the reunification of respondents and the children in the foreseeable future. It was in the best interests of the children to terminate respondents' parental rights and not to issue a suspended judgment.

Matter of Ariana F.F., 202 AD3d 1440 (4th Dept 2022)

Father's Failure to Take Responsibility for Events Leading to Removal Constituted Permanent Neglect

Family Court terminated respondent father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner was not required, as part of its diligent efforts obligation, to forgo requiring the father to participate in a sex offender program or to formulate an alternative plan to accommodate the father's refusal to admit his role in the events that led to the removal of the child. Likewise, the father's failure to take responsibility for the events that led to the child's removal and to complete the recommended sex offender counseling aimed at addressing those events constituted permanent neglect.

Matter of Ayden D., 202 AD3d 1455 (4th Dept 2022)

Testimony from Conflicting Experts Raised a Question of Credibility for Family Court to Determine

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. To the extent that the opinion of the mother's psychological expert conflicted with the opinion of petitioner's psychological expert, the opinion of the mother's expert merely raised a question of credibility for Family Court to determine. Further, even assuming, arguendo, that Family Court improperly admitted into evidence portions of petitioner's expert's report that contained hearsay, the error was harmless. Family Court did not rely solely on the report, but also on the testimony from

petitioner's expert, the mother, and the mother's expert, as well as the mother's treatment records. Additionally, the mother lacked standing to pursue appeals from orders of disposition entered subsequent to the termination of her parental rights.

Matter of Meyah F., 203 AD3d 1558 (4th Dept 2022)

Family Court Appropriately Terminated Respondent Mother's Parental Rights on the Ground of Mental Illness

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. Testimony from petitioner's expert psychologist overwhelmingly established that the mother suffered from mental illness and that the child would be in danger of being neglected if he were returned to the mother's care at the present time or in the foreseeable future.

Matter of Jion T., 203 AD3d 1567 (4th Dept 2022)

Mother was Not Denied Effective Assistance of Counsel by Attorney's Failure to Call Her as a Witness

Family Court terminated respondents' parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner made affirmative, repeated, and meaningful efforts to assist respondents, however, its efforts were fruitless as respondents were utterly uncooperative. Furthermore, respondents failed to plan for the child's future or address the problems that caused the removal of the child shortly after her birth. Respondent mother was not deprived of effective assistance of counsel by her attorney's failure to present her as a witness. The mother failed to demonstrate the absence of strategic or other legitimate explanations for her counsel's alleged shortcoming.

Matter of Faith K., 203 AD3d 1568 (4th Dept 2022)

Respondents' Rights Were Not Prejudiced by Family Court's Denial of Their Adjournment Requests Made Due to Voluminous Discovery

Family Court terminated respondents' parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner fulfilled its duty to exercise diligent efforts to encourage and strengthen respondents' relationships with the children by providing appropriate services to respondents including parenting education, mental health counseling, budgeting and communication training, and scheduling regular visitation with the children. Respondents failed to successfully complete the programs and services made available to them and did not progress to a point where unsupervised visits could occur. A suspended judgment was not appropriate as the children had been removed from respondents' care for over two years. Neither respondent demonstrated any prejudice that they sustained as a result of the denial of their requests for an adjournment on the ground that they needed more time to review voluminous discovery materials. Family Court told respondents that, after further review of the provided discovery, it would

permit them to recall any witness for additional cross-examination. In addition, the record demonstrated that respondents' counsel used the discovery during extensive and thorough cross-examinations of petitioner's witnesses. Finally, nothing in the record established that any bias on the court's part unjustly affected the result to the detriment of respondents or that Family Court had a predetermined outcome of the case in mind during the hearing such that it abused its discretion in denying respondents' recusal motion.

Matter of Nathan N., 203 AD3d 1667 (4th Dept 2022)

Family Court Should Have Granted Mother's Attorney's Request for an Adjournment

Family Court terminated respondents' parental rights on the ground of permanent neglect. The Appellate Division vacated those parts of the order finding that respondent mother permanently neglected the subject child and terminating her parental rights and, as modified, affirmed. Family Court entered an order on each party's respective default after each failed to appear at the fact-finding hearing. Both parties' attorneys were present at the hearing, neither attorney participated aside from requesting adjournments on behalf of their individual clients. The Appellate Division rejected the father's contention that the court abused its discretion in denying his attorney's request for an adjournment. However, Family Court's denial of the mother attorney's request for the same was an abuse of its discretion. The mother had not previously requested an adjournment, there was no indication in the record that an adjournment would have adversely affected the child, and the mother was experiencing COVID-like symptoms, therefore, under the court's own rules, she was prohibited from entering the courthouse.

Matter of Jiryan S., 207 AD3d 1247 (4th Dept 2022)

Counsel for the Father Failed to Demonstrate That the Need for the Adjournment was Not Based on a Lack of Due Diligence on the Part of the Father or His Attorney

Family Court terminated the father's parental rights on the ground of permanent neglect. The Appellate Division affirmed. Family Court did not abuse its discretion in denying the request of the father's attorney for an adjournment so that the father could testify. The father's attorney offered no explanation as to why the father failed to appear. The father had been informed of the date of the hearing and the consequences of his non-appearance, and the hearing had been scheduled prior to an earlier hearing date at which the father had been present. Counsel thus failed to demonstrate that the need for an adjournment was not based on a lack of due diligence on the part of the father or his attorney.

Matter of Logan P.G., 208 AD3d 1643 (4th Dept 2022)

Family Court Appropriately Balanced the Respective Rights and Interests of the Parents and the Children in Determining Whether to Proceed

Family Court terminated respondents' parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner fulfilled its duty to exercise diligent efforts to encourage and strengthen respondents' relationships with the children by providing appropriate referrals to respondents for mental health counseling, domestic violence and parenting classes, and housing and public assistance. Petitioner scheduled regular visitation between respondents and the children, along with the services of a parent aid to educate respondents on appropriate parenting techniques. Respondents failed to successfully complete the programs and services made available to them and continued to violate orders of protection directing that they have no contact with each other. A trial discharge of the children to the mother lasted only approximately six weeks and knowing that a permanent neglect petition had been filed against her, the father continued to suggest that the children be released to the mother's custody. Contrary to the mother's contention, the psychological report prepared as a result of a court-ordered examination was relevant and material to the best interests determination and thus was properly admitted. Additionally, Family Court did not abuse its discretion in denying the father's attorney's request for an adjournment when the father was not transported from the facility where he was incarcerated to the courthouse on the first day of the hearing. Although the father was not present on the first day, he was able to assist his attorney in cross-examining the mother and the caseworker. Family Court balanced the need for a prompt adjudication with the father's interests in its evidentiary rulings by, inter alia, denying petitioner's application to play an exhibit on the first day of the hearing; and the father's attorney represented his interests at the hearing. Thus, the father failed to demonstrate that he suffered any prejudice.

Matter of Briana S.S., 210 AD3d 1390 (4th Dept 2022)