

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

**Case Digest
February - July 2019 Decision Lists
Plus Select Court of Appeals and Federal Cases**

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 DV 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 a 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 altercation, 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 in 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)

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)

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., ___ AD3d ___, 2019 WL 2707931 (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, ___ AD3d ___, 2019 WL 2896748 (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 May Supervise His Visits With the Subject Children

Family Court adjudged that petitioner father's wife may 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

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 set 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 a Sound and Substantial Basis in the 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 addiction, 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, laches, 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, ___ AD3d ___, 2019 WL 2400674 (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 1753 (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, ___ AD3d ___, 2019 WL 2707935 (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 1773 (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 the 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)

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)

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)

The 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, he 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 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 AD

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 plan 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 in 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)

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., ___ NY3d ____, 2019 WL 2583020 (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, ___ F.3d ___, 2019 WL 2505366 (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)