

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

**2020 Case Digest
Plus
Select Court of Appeals, Federal, and
Other Cases of Interest**

FIRST DEPARTMENT CASE OF INTEREST

Child's Expressed Wishes Did Not Dictate Result Of Best Interests Analysis

Following a hearing, Family Court granted petitioner father three therapeutic supervised visits with the subject child. The Appellate Division affirmed. The presumption that the father and the child should visit with each other was not rebutted inasmuch there was no evidence in the record that such visitation would place the child in physical danger or that it would harm her by producing serious emotional strain or disturbance. There were no exceptional circumstances to support a finding that the father forfeited his right to visitation. Additionally, the Court rejected the AFC's argument that Family Court did not properly consider the child's wishes after conducting an *in camera* interview. While the child's wishes were some indication of what was in her best interests and were entitled to great weight, those expressed wishes were only one factor to consider. The child's wishes did not dictate a certain result when the best interest of the child were determined.

Matter of Byron M. v Sasha A., 182 AD3d 455 (1st Dept 2020)

SECOND DEPARTMENT CASE OF INTEREST

AFC Improperly Took A Position Contrary To The Children's Wishes And Substituted Her Own Judgment; AFC Failed To Provide Meaningful Assistance Of Counsel

Supreme Court granted that branch of plaintiff father's motion which sought to modify the parties' so-ordered stipulation of settlement (stipulation) and awarded the father residential custody of the parties' two children, who were 11 and 13 years old at the time of the hearing. The Appellate Division reversed and remitted the matter for the appointment of a new Attorney for the Children, for a *de novo* hearing, and a new determination of the father's motion. Pending the new determination of the father's motion, custody and parental access was ordered to be in accordance with the stipulation. In the stipulation, the parties agreed to joint legal custody of the children with residential custody to defendant mother and parental access to the father, which included therapeutic parental access in addition to his scheduled parental access. After the stipulation was entered into but prior to the entry of a judgment of divorce, the father moved to modify the stipulation to award him residential custody of the children. While the father's motion was pending, the mother filed a family offense petition in Family Court. The mother alleged that the father had strangled the youngest child. Family Court issued a temporary order of protection against the father which directed him to stay away from the children, among other things. The family offense proceeding was transferred to Supreme Court. After an *in camera* interview with the children, Supreme Court dismissed the family offense petition, vacated the temporary order of protection, and directed overnight parental access with the father to commence after several therapeutic sessions with a psychologist. Subsequently, the court held a five-day hearing and granted the father's motion insofar as it sought to modify the stipulation.

During the hearing, the AFC improperly substituted judgment and took a position that was contrary to the wishes of the children, to such a degree that a new hearing and the appointment of a new AFC was required. At the beginning of the hearing, the AFC advised the court that the children wanted to spend daytime with the father but they wanted to spend overnights with the mother. The AFC further advised the court that the children wanted residential custody to remain with the mother. The AFC represented that the children did not lack the capacity for knowing, voluntary, and considered judgment, or that following the children's wishes was likely to result in a substantial risk of imminent serious harm to the children (see 22 NYCRR 7.2 [d][3]). The AFC further acknowledged that as a result of the foregoing, it would not have been proper to substitute her own judgment for what the children wanted. However, the AFC's representation of the children during the hearing that followed was in direct contravention of her clients' stated parameters. Throughout the course of the proceedings, the AFC failed to advocate on behalf of her clients who were both on the high honor roll and involved in extracurricular activities. The AFC actively pursued a course of litigation aimed at opposing the children's stated positions. The AFC joined the father and opposed the introduction of evidence and witnesses in support of the mother's case. When the mother sought to introduce evidence in the defense of the father's allegations that the mother provided the children with unnecessary medical care, the AFC joined the father and opposed the introduction of the mother's evidence. The AFC also opposed the introduction of evidence that may have supported one child's claim that the father attempted to strangle her. The AFC objected to the testimony of school personnel offered for the purpose of explaining the children's seemingly excessive school absences while they were in the mother's custody. The AFC's questions of the father during cross-examination were designed to elicit testimony in support of the father's case and in opposition to her clients' wishes. The AFC's questioning of the psychologist chosen by the parties to provide therapeutic parental access included whether one child's alleged parentification interfered with the other child's relationship with the father. The AFC's questions supported the father in his quest for residential custody. Moreover, the AFC objected to the introduction of witnesses and evidence favorable to the mother's case but did not make similar objections to the father's evidence. When the court precluded the mother's proffered evidence, the AFC proceeded to use the mother's lack of evidence to support the father's positions. The AFC also failed to object to the court's decision to limit the amount of time for the mother to present her case. Not only did the AFC support the father's case, she also failed to take an active role in the proceedings by presenting evidence and witnesses on behalf of the children. The AFC's failure to support her clients' position was particularly troubling due to the allegations of domestic violence made by both the mother and the children. The mother advised the psychologist that the father had physically abused her and that the children had witnessed an incident wherein the father choked the mother and grabbed her arm. The mother was concerned that the children did not want to go with the father because they were afraid of him. Had the AFC engaged in a more robust representation of her clients, the issues of domestic violence as it related to alienating behavior demonstrated by the mother could have been more fully presented. The AFC could have called as a witness a forensic evaluator who prepared a report prior to the stipulation, wherein custody to the

mother was recommended. Instead, the AFC called no witnesses and presented no evidence. When the AFC appeared before the Appellate Division for oral argument, the AFC stated that her clients were not doing well, but she hoped they would improve. Nevertheless, the AFC continued to argue in support of residential custody to the father, in opposition to the wishes of her clients, who were 15 and almost 13 at the time. The record established that neither of the exceptions to the rule regarding the AFC's duty was present. There was no finding that the children lacked the capacity for knowing, voluntary, and considered judgment. There was no evidence of imminent serious harm to the children if their wishes were followed. Hence, the AFC failed to provide meaningful assistance of counsel. The father was concerned about the children's absence from school while in the mother's custody. Although not in the long term best interests of the children, the school absences did not pose a substantial risk of imminent harm. Thus, it was improper for the AFC to substitute judgment and to have taken a position that was contrary to the wishes of the children. In addition, the court failed to take in to account the stated preferences of the children as some indication of their best interests. While not raised by either party, the Appellate Division stated that in a case such as this, the better practice would have been to order an updated forensic evaluation of the parties and the children, particularly where issues of parental alienation, parentification, and Munchausen syndrome by proxy were raised.

Silverman v Silverman, 186 AD3d 123 (2d Dept 2020)

THIRD DEPARTMENT CASES OF INTEREST

Suspended Visitation Based Upon Flawed Forensic Evaluator's Report Was Error

Family Court dismissed petitioner mother's application (filed in 2016) to modify a 2008 order which awarded respondent father sole custody and suspended mother's visitation until an application for reconsideration was made. The Appellate Division reversed and remitted the matter to Family Court for additional fact finding proceedings and a determination on visitation with the assistance of a different forensic evaluator. The mother established a change in circumstances. At the hearing, the mother testified that she had not seen the child in nine years because of her drug addiction. Since that time, the mother obtained stable housing, made efforts to contact the child, regained custody of some of her other children, was employed, and had stopped using drugs for at least three years. However, the court erred when it concluded that the requested visitation was not in the child's best interests. The court gave undue weight to the forensic evaluator's report, which acknowledged the progress that the mother had made in her life, yet cited those improvements as a basis for the conclusion that the mother's life was chaotic and that she was not equipped to add anything positive to the child's life. Sanctioning this rationale would essentially give no incentive to any parent to achieve stability in his or her life. Additionally, the forensic evaluator cited the father's position that he would not comply with any visitation as ordered by the court. The forensic evaluator improperly acquiesced to the father's preferences that the child have no contact with the mother and gave the father's preferences higher priority over any court directive. Any unwillingness of the father to facilitate visitation did not demonstrate that

the child's welfare would be placed in harm if visitation with the mother occurred and in no way rebutted the presumption that visitation was in the best interests of the child. In light of the flaws in the forensic evaluator's report, the court should have given it minimal consideration. Moreover, the mother's display of emotions at the hearing were of minimal relevance. Thus, Family Court's determination that visitation with the mother was not in the child's best interests lacked a sound and substantial basis in the record. Upon remittal, the court was directed to consider whether ordering the parties, including the child, to undergo counseling under the court's guidance with the goal of advancing to some form of visitation between the mother and the child or whether ordering therapeutic visitation would be in the best interests of the child.

Matter of Jessica D. v Michael E., 182 AD3d 643 (3d Dept 2020)

Preclusion Of Hearsay Statements Regarding Diagnosis And Treatment Of The Subject Child And Denial Of AFC's Request For Adjournment To Allow For The Presentation Of Expert Testimony Were Errors

Family Court dismissed petitioner mother's application to modify a prior order of visitation after a fact-finding hearing and a Lincoln hearing. The court also granted respondent father's competing modification petition to the extent that the father was provided parenting time on the fourth Sunday of each month for five hours and such other parenting time as the parties could agree, and directed the father to have daily telephone or other electronic contact with the child. In addition, the court required the father to engage in and actively participate in the child's counseling with the child's counselor or such other counselor as the parties may agree. The court further ordered that the father could petition the court for an expansion of parenting time after twelve (12) months of consistent visitation and engagement with the child in counseling without the demonstration of a change in circumstances. The mother and the father appealed. The Appellate Division modified by reversing the provisions of the order that provided for parenting time. The matter was remitted for a new hearing before a different Family Court judge to determine whether parenting time with the father was in the child's best interests and, if so, the type (e.g., therapeutic visitation, supervised visitation, unsupervised visitation, etc.) and the amount (e.g., a graduated schedule) that would serve the child's best interests. The father first met the child (born in 2007) in 2016, a few weeks prior to the child's ninth birthday. Thereafter, pursuant to an October 2016 order entered on consent, the parties shared joint legal custody of the child. The mother had primary physical custody and the father was provided parenting time as the parties could agree. The 2016 order further provided that if the parties were unable to agree on the father's parenting time, either party could petition for a modification of the order without the need to demonstrate a change in circumstances. The child was initially excited to meet the father, however, her mental health progressively declined in the months after the introduction. In April 2017, the child expressed a desire to stop the visitation with the father and exhibited signs of physical and emotional distress related to the father's parenting time. Both parties filed modification petitions. Family Court erroneously precluded the child's mental health counselor from testifying as to any statements made by the child that formed the basis for the counselor's diagnosis and

treatment of the child. Such hearsay statements should have been permitted under the exception for statements germane to diagnosis and treatment. This ruling prevented the introduction of evidence that may have been relevant to the determination of the cause for the child's distress and the formulation of parenting time provisions that were addressed to the child's best interests. Specifically, there was ambiguity as to whether the child's mental health issues were related to the father's failure to attend weekly ice cream visits with the child. The court also erroneously declined to adjourn the fact-finding hearing to allow the Attorney for the Child to present testimony from a mental health professional who had evaluated the child when, during the pendency of the fact-finding hearing, the child presented at the Comprehensive Psychiatric Emergency Program in crisis. The court incorrectly ruled that the testimony proffered by the AFC constituted inadmissible post-petition proof because the testimony was highly relevant to the determination of the best interests of the child and should have been permitted for that purpose. The erroneous evidentiary rulings precluded the court's ability to obtain a complete picture as to the child's mental health conditions and to receive evidence of the cause of such conditions. Such proof was necessary to determine whether parenting time with the father was detrimental to the child's welfare and, if not, to fashion a parenting time schedule that took into consideration the child's mental health needs, while also promoting the development of a meaningful relationship with the father. Thus, a sound and substantial basis did not exist in the record to support the parenting time provisions in the order. The Appellate Division did not exercise its independent power to decide the parenting time issues due to the passage of time and because the record was incomplete. Family Court also ignored testimony from the child's counselor that it would be a conflict of interest for her to counsel the father and the child together and that they should have been counseled by an independent counselor. Upon remittal, in the event the court determined therapeutic visitation was in the child's best interests, the court should require someone other than the child's counselor to conduct the therapy.

Matter of Jill Q. v James R., 185 AD3d 1106 (3d Dept 2020)

Failure To Conduct Age-Appropriate Consultation With The Child At A Permanency Hearing Was Error; AFC Did Not Articulate Child's Wishes

After a permanency hearing in February 2019 at which the child (born in 2009) was not present, Family Court entered an order that terminated the child's placement pursuant to prior neglect proceedings, but continued the child's placement pursuant to a voluntary placement agreement executed by respondent mother. The agreement placed the child in foster care indefinitely because the mother, who was developmentally disabled, and was unable to care for the child. The court also dismissed neglect petitions and entered an order of disposition that approved the voluntary placement agreement. On appeal by the grandfather, the Appellate Division affirmed but directed that in future permanency hearings, the court was required to conduct an age-appropriate consultation with the child. Shortly after the child's birth, the mother voluntarily placed the child in the custody of petitioner. The grandfather and grandmother were designated as the child's custodians. The grandfather subsequently

left the grandmother and moved into his girlfriend's residence with the child. In June 2018, a child protective report alleged the grandfather and the girlfriend provided inadequate guardianship and lack of medical care. This report was subsequently indicated. In July 2018, petitioner filed neglect petitions that alleged the grandfather and the girlfriend placed the child in inappropriate physical restraints, among other things. The child was temporarily placed with an aunt, but then placed in petitioner's care and custody. Soon thereafter, petitioner offered the mother a voluntary placement agreement which indefinitely placed the child in foster care. The mother executed the voluntary placement agreement and petitioner filed for approval of the placement instrument. The grandfather's arguments directed at Family Court's approval of the voluntary placement instrument were not before the Appellate Division on appeal because the grandfather did not file a notice of appeal from the order of disposition approving the agreement (see Family Ct Act § 1115). The grandfather's contentions were rejected that the court improperly delegated its authority to determine visitation to the child's therapist because the record did not reflect that the court did so. However, the court erred when it failed to conduct an age-appropriate consultation with the child at the permanency hearing (see Family Ct Act § 1089 [d]). Although the statute did not require a young child to be personally produced in court, the court was required to find some age-appropriate manner of consultation with the child. Here, although the permanency hearing order stated that the court consulted with the child in an age-appropriate manner, the record did not reflect this. The Attorney for the Child informed the court of the multitude of reasons why it was inappropriate for the child to be present at the hearing and then offered his opinion that it was best for the child to have remained in foster care. The AFC did not articulate the child's wishes to the court. Even though reversal was appropriate where the court failed to ascertain the child's wishes, under these circumstances reversal was unnecessary.

Matter of Sandra D.D., 185 AD3d 1259 (3d Dept 2020)

AFC Wholly Failed To Fulfill His Obligation To Zealously Advocate The Children's Position On Appeal And Thus Provided Ineffective Assistance Of Appellate Counsel

Family Court partially granted petitioner mother's application seeking to modify a prior order of custody and visitation entered as part of a divorce settlement agreement. The Appellate Division reserved decision, relieved the AFC of his assignment, and directed new counsel to be assigned to represent the interests of the children on the appeal. Family Court determined that the mother established a change in circumstances and that the children's best interests warranted modification of the prior agreement. The AFC on the appeal was the same counsel who represented the children in Family Court and initially submitted a letter to the Appellate Division stating that he did not intend to file a brief because the children, then approximately 10 and six years old were too young to formulate an independent opinion and provide a foundation for their respective opinions. The AFC also expressed his own views on the children's best interests. The Court rejected AFC's letter and directed him to submit a brief. In response, the AFC filed a brief in which he reiterated his position that the children lacked an ability to form

an opinion and that he, as their legal advocate, should articulate to the Court what he believed was in their best interests. Without stating the children's preferences, the brief discussed the factors pertinent to a best interests analysis and concluded that Family Court's order was in the children's best interests and should be affirmed. The AFC wholly failed to fulfill his obligation imposed by Rule 7.2 of the Rules of the Chief Judge to zealously advocate the children's position on the appeal. The only stated basis for the AFC's determination to advocate for the children's best interests rather than for their wishes was their ages. However, the AFC had an obligation to consult with and advise the children to the extent of and in a manner consistent with their capacities. At 10 years old, the older child was certainly old enough to express her wishes, and whether the younger child, at six, had the capacity to do so was not solely dependent on her calendar age, but also upon such individual considerations as to her level of maturity and verbal ability. The AFC did not claim that either child met either of the two exceptions to 22 NYCRR 7.2 [d] [3]. The AFC's brief was devoid of any indication of the children's wishes, did not reference 22 NYCRR 7.2 or the analysis that this rule required an AFC to undertake before he or she advocated for a position that did not express the children's wishes. Moreover, although the record revealed that the AFC met with the children during the Family Court proceedings, it did not appear as though he met or spoke with them again during the appeal. The children were entitled to be consulted with and be counseled by their assigned attorney, to have the appellate process explained, to have their questions answered, to have an opportunity to articulate a position which could change with the passage of time, and to explore whether to bring their own appeal of Family Court's order. The children were also entitled to be apprised of the progress of the proceedings throughout. The AFC did not provide any of these services to the children. Thus, the AFC failed to fulfill his essential obligations and the children did not receive effective assistance of appellate counsel.

Matter of Jennifer V.V. v Lawrence W.W., 241 AD3d 622 (3d Dept 2020)

ADOPTION

Court Properly Terminated Biological Mother's Visitation

Family Court terminated the biological mother's (petitioner) visitation with the subject children. The Appellate Division affirmed. Pursuant to a post-adoption agreement (agreement), petitioner had visitation with the children who were in the custody of their adoptive parents (respondents). Petitioner was afforded a full and fair evidentiary hearing and the court's determination that continued visitation was not in the children's best interests had a sound and substantial basis in the record. The court was entitled to credit the testimony of respondents over that of petitioner. On appeal, great deference was afforded to the court's determination of the children's best interests, particularly following a hearing.

Matter of J.B., 188 AD3d 1683 (4th Dept 2020)

AFC FEES/OTHER

Court Erred By Awarding Fees To AFC's Estate Without First Determining Reasonableness Of Hours Claimed; Fee Award Reduced

Supreme Court awarded the estate of the Attorney for the Child a money judgment in the amount of \$70,890.00 for the AFC's fees. The Appellate Division modified by reducing the amount of fees awarded to \$47,500.00. The Court determined that Supreme Court erred in concluding a prior appellate decision precluded defendant husband from challenging the number of hours for which the AFC sought compensation. On the prior appeal, the Appellate Division (1) ruled defendant must pay the AFC's fees, and (2) remitted the matter to Supreme Court to "determine the amount" of AFC fees to be paid. Upon remittal, Supreme Court concluded that the Appellate Division's order limited the remittal to a determination of the hourly rate to be used to calculate the amount of the AFC's fees and that "the number of hours performed by the AFC [could not] be questioned at this stage." The court then concluded that the rate to be used was \$100.00 per hour, applied that rate to 708.90 hours that the AFC previously claimed, and entered judgment accordingly. The Appellate Division held that its prior order unequivocally directed the court to calculate the amount of the AFC's fees. Thus, based upon the AFC's prior concession that the amount sought was excessive, the Court concluded it was an abuse of discretion to fix the amount of fees without first determining the reasonableness of the number of hours included in the fee request. The Court further rejected the estate's position that Supreme Court's statement that "[n]o one ha[d] questioned the number of hours the [AFC] ha[d] claimed" became law of the case. Based upon the circumstances of this case, the Court exercised its discretion to award the estate fees for 475.0 hours of work at the unchallenged rate of \$100.00 per hour.

Stefaniak v Zulkharnain, 180 AD3d 1366 (4th Dept 2020)

CHILD ABUSE AND NEGLECT

Court Properly Awarded Custody To Grandmother; Uncontested Neglect Finding Supplied Threshold Showing Of Extraordinary Circumstances

Family Court placed the subject child in the custody of her grandmother following two proceedings commenced against her mother. The Appellate Division affirmed. The first petition was filed by the Department of Social Services (DSS) and the second by the grandmother. The mother did not contest a finding of neglect in the proceeding initiated by DSS. As a result, in the proceeding filed by the grandmother, the Court held that the uncontested neglect finding supplied the threshold showing that extraordinary circumstances existed and was sufficient to warrant an inquiry into whether an award of custody to the grandmother was in the child's best interests. The evidence at the combined dispositional/custody hearing established that the mother had an unstable living situation, mental health problems, and failed to address the child's special needs. Family Court did not err by failing to establish a regular and frequent visitation schedule between the mother and the child in favor of supervised visitation as agreed and arranged between the mother and the grandmother. The record did not show the visitation arrangement was untenable under the circumstances. In addition, Family Court properly dismissed the mother's motion to change venue from Ontario County to Monroe County. After the mother gave birth and while the child was still in the hospital, a report of child abuse or maltreatment was made against the mother by a hospital worker. At that time, the mother listed her address as a post office box in Ontario County and refused to tell the hospital where she lived. During the abuse investigation, the mother also refused to provide DSS an address where she resided. Thus, the court did not abuse its discretion in dismissing the mother's motion to change venue inasmuch as she failed to show good cause to transfer venue.

Matter of Emma D., 180 AD3d 1331 (4th Dept 2020)

Court Properly Determined That Mother Abused One Child And Derivatively Neglected Two Children

In three separate orders, Family Court determined that respondent mother derivatively abused one child (appeal No. 1), abused another child (appeal No. 2), and derivatively neglected a third child (appeal No. 3). In appeal No. 1, the Appellate Division modified and determined that the subject child was derivatively neglected. In appeal Nos. 2 and 3, the Court affirmed. In appeal No. 1, the Court vacated the determination that the child was derivatively abused because there was a conflict between the decision and the order. The order had to be conformed to the decision which reflected the child was derivatively neglected. In appeal No. 2, the Department of Social Services (petitioner) established by a preponderance of evidence that the mother abused the subject child. The evidence included testimony from the child's father that the child was injury free prior to being left with the mother for visitation and, when the father picked the child up several days later, the child was bruised and scarred. A pediatric nurse testified that the child disclosed that the mother used a belt to inflict his injuries and coached him to

blame the father's wife. Additionally, in appeal No. 2, Family Court properly determined that the "persisting" scarring of the wounds inflicted on the subject child constituted protracted disfigurement within the meaning of Family Court Act §1012. In appeal Nos. 1 and 3, Family Court properly determined that the mother derivatively neglected the children who were the subject of both orders. Derivative neglect was established through the testimony of a pediatric nurse who stated that days after the injuries were inflicted on the child who was the subject of the order in appeal No. 2, the nurse counted marks on that child's body which demonstrated the child was struck as many as 26 times. Thus, the mother's prolonged beating of the child in appeal No. 2, evidenced fundamental flaws in the mother's understanding of the duties of parenthood which warranted a finding of derivative neglect with respect to the children in appeal Nos. 1 and 3. The mother's contention was rejected in all three appeals that Family Court's destruction of certain trial exhibits precluded adequate appellate review because the information in the missing exhibits could be gleaned from the record and there was no dispute as to the accuracy of that information.

Matter of Aaren F., 181 AD3d 1167 (4th Dept 2020)

Court Properly Determined Subject Child Was Derivatively Neglected

Family Court continued the subject child's placement with petitioner (appeal No. 1) and determined that the subject child was derivatively neglected (appeal No. 2). The Appellate Division dismissed the mother and the father's (respondents) appeals in appeal No. 1 on the ground that their appeals from the dispositional order in appeal No. 2 brought up for review the propriety of the fact-finding order in appeal No. 1. In appeal No. 2, the Court dismissed the mother's appeal moot insofar as it concerned the disposition because that part of the order had expired by its terms. Family Court properly determined that the child was derivatively neglected because petitioner presented evidence that respondents' other children were determined to have been neglected, respondents failed to make consistent changes regarding their self-prioritization, respondents continued to fail to manage daily living without assistance from third parties, and respondents had ongoing mental health issues. Petitioner established that the neglect of the subject child's older siblings was so proximate in time to the derivative proceeding that it could reasonably be concluded that the condition still existed. The neglect of the older children indicated a fundamental defect in respondents' understanding of the duties of parenthood or demonstrated such an impaired level of parental judgment which created a substantial risk of harm for any child in their care. Thus, there was sufficient evidence to establish the child was derivatively neglected.

Matter of Dante S., 181 AD3d 1311 (4th Dept 2020)

Court Properly Credited Child's Out-Of-Court Statements Regarding Sexual Abuse

Family Court adjudged that the subject child was as an abused child. The Appellate

Division affirmed. Family Court's finding that respondents father and stepmother sexually abused the child was supported by the requisite preponderance of evidence. The child gave multiple consistent descriptions of the abuse which enhanced the reliability of the child's statements regarding the abuse. The child's out-of-court statements were sufficiently corroborated by evidence that the father had sexually abused his other child, the child's age-inappropriate knowledge of sexual matters, the testimony of the child's play therapist that the child's behavior following the alleged abuse was consistent with that of a child who was sexually abused, and the opinions of the child's play and trauma therapists that the child's out-of-court statements were credible and consistent in describing the sexual conduct. The fact that the child recanted at times did not render the child's initial statements as incredible as a matter of law particularly because there was evidence that the child recanted as a result of being prompted by the father. The court, principally upon the testimony of the child's therapists, credited the child's out of court statements disclosing the abuse and there was no basis in the record to disturb the court's resolution of the credibility issues.

Matter of James L.H., 182 AD3d 990 (4th Dept 2020)

Court Properly Held Father Willfully Violated Order Of Disposition

Family Court determined that respondent father willfully and without just cause violated an order of disposition in a neglect proceeding. The court sentenced the father to 30 days in jail. The Appellate Division affirmed. The father violated the order of disposition when he failed to complete required counseling services. The father's contention was rejected that his violation of the disposition order was not willful because during the relevant time period he was intermittently incarcerated, or on a waiting list for the required counseling services. Although the father's incarceration might have contributed to initial delays in the completion of counseling, the father was incarcerated as a result of various violations of the order of disposition, which included alleged acts of domestic violence against the mother. In addition, the father's own testimony demonstrated his lack of effort to re-engage in counseling services during the period of time between his brief incarceration in April 2018 and the filing of the motion by petitioner at the end of August 2018. Thus, the record supported the determination that petitioner established by a preponderance of evidence that the father willfully violated the order of disposition.

Matter of Jalyce S., 182 AD3d 1054 (4th Dept 2020)

Court's Dismissal Of Neglect Petition Was Error

Family Court dismissed the amended petition that alleged respondent mother neglected the subject children. On appeal by the AFC, the Appellate Division reversed, granted the amended petition, held that the mother neglected the children, and remitted the matter to Family Court for a dispositional hearing. Petitioner established a prima facie case of medical neglect by presenting evidence that the mother failed to follow mental health treatment recommendations upon the daughter's discharges from psychiatric

hospitalizations for suicidal and homicidal ideation. The mother failed to rebut petitioner's prima facie case. The evidence of neglect demonstrated such an impaired level of judgment as to create a substantial risk of harm for any child in the mother's care, which warranted a finding of derivative neglect with respect to the younger children.

Matter of Olivia W., 184 AD3d 1080 (4th Dept 2020)

AFC's Appeals Were Moot

Family Court adjudged the subject child to have been neglected and returned the child to the care of respondent mother under the supervision of petitioner. The court subsequently denied a motion by the Attorney for the Child to vacate the order of fact-finding and disposition. The Appellate Division dismissed the AFC's appeals from the order denying her motion and the order of fact-finding and disposition as moot. The appeals only involved a challenge to the dispositional part of the order of fact-finding and disposition which had expired by its terms.

Matter of Novaleigh B., 184 AD3d 1122 (4th Dept 2020)

Incarcerated Father Derivatively Abused Child Born After Acts Of Severe Abuse Against Another Child; Denial Of Visitation To Father Was Proper

Family Court granted that part of petitioner's motion for summary judgment which sought a determination that respondent father derivatively abused the subject child, who was born after the father's underlying acts of severe abuse against another child. The Appellate Division affirmed. The evidence of the father's conduct established that he had an impaired level of parental judgment which created a substantial risk of harm to any child that resided in his care. The father failed to rebut the presumption that the impaired level of parental judgment which led to the underlying abuse continued to exist at the time petitioner initiated this proceeding, especially because only approximately two months had elapsed between the father's underlying severe abuse of the other child and the commencement of this proceeding. The father failed to preserve for appellate review his contention that the court should have granted him an additional adjournment of petitioner's summary judgment motion because he failed to request such an adjournment at the appearance at which the court heard the motion. The record belied the father's further contention that the court prevented him from presenting additional evidence in opposition to the petitioner's motion. To the contrary, before the motion was decided, the court asked the father's attorney whether there was anything else counsel wanted to add. The father's attorney replied in the negative. The father's further contention was rejected that the court erred when it denied his request for visitation while he was incarcerated. The presumption in favor of visitation with a noncustodial incarcerated parent was rebutted by evidence that the child had no relationship with the father, that it would have been difficult for the child to travel to see the father, and that, in light of the child's especially young age, visitation at the correctional facility would not have served the child's best interests.

Matter of Madalynn W., 185 AD3d 1458 (4th Dept 2020)

Court Properly Determined Father Neglected And Abused Older Daughter And Derivatively Abused And Neglected His Three Other Children

Family Court determined respondent father had neglected and abused his older daughter, and that he derivatively abused and neglected his three other children. In an order of disposition, the court placed all four children with their mother and ordered that the father was to have no contact with them. The Appellate Division affirmed. There was a sound and substantial basis in the record which supported the court's determination that the older daughter was neglected and abused as a result of the father's sexual abuse. The older daughter's disclosures of sexual abuse were sufficiently corroborated by the testimony of her speech therapist, a school psychologist, and a caseworker trained in forensic interviewing techniques, as well as the child's age-inappropriate knowledge of sexual matters. In addition, the child gave multiple and consistent descriptions of the abuse. The court's failure to comply with Family Court Act § 1051[e] when it failed to specify the particular sex offense perpetrated upon the child as defined by Penal Law article 130 was technical in nature and harmless. Inasmuch as the older daughter was seven years old at the time of the contact, the specific offense could only have been sexual abuse in the first degree (see Penal Law § 130.65 [3]). Contrary to the father's further contention, where, as here, the underlying crime was sexual abuse, the court was permitted to infer the sexual gratification element from the conduct itself if that conduct involved deviate touching of the child's genitalia. The finding of derivative abuse and neglect with respect to the other three children was supported by a preponderance of the evidence.

Matter of Skyler D., 185 AD3d 1515 (4th Dept 2020)

Court Properly Determined Respondents Severely Abused Older Child And Derivatively Neglected Younger Child

Family Court adjudged that respondents severely abused the older child and derivatively neglected the younger child. The Appellate Division affirmed with a dissent. Respondents were the biological parents of the younger child. Respondent father was also the biological father of the older child, and respondent mother was her stepmother. The finding of severe abuse was based upon two incidents in which the father found the older child at the bottom of the basement stairs in the morning. After the first incident, the older child sustained back and leg injuries, torso abrasions and facial bruising that was so severe that she could not open her eyes all the way. After the second incident, the child had two lacerations across the front of her neck that required significant medical attention. The father failed to preserve for appellate review his contention that the court improperly granted petitioner's request to conform the pleadings to the proof. Additionally, this contention lacked merit. A sound and substantial basis in the record existed for the court's finding that the older child was abused by the father. Petitioner presented evidence that, during both incidents, the older child was found at the bottom of the basement stairs and sustained injuries. Those incidents occurred while the older

child was being supervised by respondents. When the father discovered the injuries, he did not immediately seek medical treatment for the older child. Moreover, petitioner presented the testimony of a physician who stated that the injuries sustained by the older child in the second incident were intentionally inflicted. Accordingly, petitioner established a prima facie case of child abuse. The father failed to rebut the presumption of culpability inasmuch as he failed to offer a reasonable and adequate explanation for how the older child sustained her injuries. Furthermore, the court properly concluded that the father severely abused the older child. Although the court erred when it failed to set forth the clear and convincing evidence that formed the basis for that determination (see Family Ct Act § 1051 [e]), the Appellate Division exercised its authority to independently review the record and determined that the child was severely abused by the father. The act of cutting the older child's throat twice demonstrated that the actor simply did not care whether grievous harm would have resulted to the older child. Even if it was assumed that the evidence did not establish that the father was the one who inflicted those injuries, the evidence demonstrated that the father was in the home when the older child sustained serious physical injuries. The father offered no compelling explanation for what caused the older child's injuries or why he failed to seek immediate medical help for her after he discovered those injuries. The father took no additional precautions with respect to the older child's care after the first incident despite the fact that he was aware of her serious injuries. The father's failure to seek immediate medical care after he observed two severe lacerations on the older child's neck at the time of the second incident supported the finding of severe abuse. Petitioner was not required to present evidence that the father's delay in seeking medical treatment exacerbated the older child's injuries or complicated the medical treatment. The mother's contention was rejected that the court's finding that she abused the child was against the weight of the evidence. Petitioner presented evidence that the older child suffered from lacerations to the throat which was an injury that would not ordinarily occur absent an act or omission, and that the mother was a caretaker of the older child at the time the injury occurred. The court determined that the mother's testimony that she was not present in the home when the older child's injuries occurred and that the child may have been sleepwalking at the time or inflicted self-injury was not credible. Furthermore, a victim witness coordinator testified that the older child informed her that the mother cut the older child's throat with a knife. Therefore, the weight of the evidence supported the court's finding that the older child was abused by the mother. The mother's contention that the *Lincoln* hearings violated her due process rights was unpreserved because she did not object when the court conducted those hearings and did not object when her attorney was excluded from those hearings. The mother also failed to demonstrate that she was afforded less than meaningful representation by her attorney. The dissent disagreed with the majority's conclusion that the father severely abused the older child and voted to vacate that portion of the order, but otherwise would have affirmed. The dissent argued that the record demonstrated by clear and convincing evidence that the mother inflicted the neck lacerations to the older child's neck. Moreover, there was no testimony, medical or otherwise, to establish a causal link between the father's 30 minute delay in seeking medical help to the older child's serious physical injuries.

Matter of Mya N., 185 AD3d 1522 (4th Dept 2020)

Court Properly Determined Mother Neglected Children

Family Court adjudged that respondent mother had neglected the subject children. The Appellate Division affirmed. The mother's contention was rejected that the children's out-of-court statements were not sufficiently corroborated. The statements of each child to petitioner's caseworker provided sufficient cross-corroboration inasmuch as they tended to support the statements of the others, and viewed together, provided sufficient indicia of reliability to each child's out-of-court-statements. Moreover, the finding of neglect was supported by a preponderance of the evidence. The testimony of petitioner's caseworkers established that the mother, who was diagnosed with bipolar disorder and psychosis, behaved erratically while shopping with her 10-year-old daughter. On the way home from shopping, the mother drove in a dangerous manner which caused the daughter to exit the vehicle and walk the rest of the way home. When the mother arrived outside the home, she told her 13-year-old son that she had to wash herself, whereupon she removed her clothes in the yard and sprayed herself with a hose. When the daughter arrived home on foot, she discovered the mother washing herself with the hose. The next day, the children informed the caseworkers that the mother had not taken her psychiatric medication in over 20 days. That same day, according to the testimony of the maternal grandmother, the mother struck the son with a closed fist. Although proof of mental illness alone could not have supported a finding of neglect herein, the evidence was sufficient to establish a causal connection between the mother's failure to treat her mental illness and actual or potential harm to the children.

Matter of Cameron M., 187 AD3d 1582 (4th Dept 2020)

Court Properly Held That Respondent Severely Abused One Of The Subject Children

Family Court adjudged, inter alia, that respondent severely abused one of the subject children (appeal No. 1). The court further held that no further disposition was necessary because the court had issued a permanent order of protection that directed respondent to have no contact with the subject children (appeal No. 2). The Appellate Division affirmed in appeal No. 1 and dismissed in appeal No. 2 on the ground that the order was entered upon the consent of the parties. In appeal No. 1, respondent failed to preserve for appellate review the contention that Family Court failed to conduct an inquiry into his legal and financial circumstances before his request to appear by telephone was denied. Respondent's further contention was rejected that he received ineffective assistance of counsel because his attorney failed to request such an inquiry by the court. Respondent failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings. Respondent's further contentions were rejected that the court erred when it took judicial notice of testimony from a custody hearing that involved the children's biological parents from which his counsel was absent and did not object. Respondent's contention was also rejected that

his counsel was ineffective in this regard. The record reflected that respondent's counsel did object and that the court, in effect, sustained the objection and declined to take judicial notice of the testimony in question. Any error by the court with respect to judicial notice was harmless.

Matter of Ethan F., 187 AD3d 1609 (4th Dept 2020)

Court Properly Determined Child Was Severely Abused But Erred By Terminating Father's Parental Rights

Family Court held that respondent father committed a felony sex offense against the subject child (appeal No. 1); that the child was an abused child and a severely abused child and released the child to the custody of the non-respondent mother (appeal No. 2); and terminated the father's parental rights (appeal No. 3). The Appellate Division dismissed appeal No. 1, affirmed in appeal No. 2, and reversed in appeal No. 3. Appeal No. 1 was dismissed because the order of fact-finding and disposition in appeal No. 2 brought up for review the propriety of the order in appeal No. 1. In appeal No. 2, DSS established by clear and convincing evidence that the father committed the crime of criminal sexual act in the first degree against his daughter (Penal Law § 130.50 [3]) and thereby established that the child was severely abused. The child's out-of-court statements were sufficiently corroborated by, inter alia, the consistency of the child's account that the father touched and made oral contact with her genitals, as well as witness testimony that the child engaged in identical behaviors that she had attributed to the father, and that the child engaged in age-inappropriate sexual behavior with other children. In addition, a caseworker for child protective services (CPS) testified that she found the child's account credible because the child could give specific details of the abuse and where it occurred. The child's sexual and aggressive behaviors were also consistent with behaviors seen in children proven to have been sexually abused. Moreover, there was also testimony from the mother that the child reacted vocally and negatively when a physician sought to touch her genitals when the child was examined for a urinary tract infection. The statements were reliably corroborated and the above evidence constituted sufficient corroboration. Thus, Family Court's finding in appeal No. 2 was supported by the record and there was no reason to disturb it. However, in appeal No. 3, DSS had no standing to bring a petition to terminate the father's parental rights pursuant to Social Services Law § 384-b and the court had no jurisdiction to entertain it. That statute applied to destitute or dependent children in situations where termination of parental rights would have freed them for adoption (§ 384-b [1] [b]; 3 [a]; [10]). The child herein was neither a destitute nor a dependent child within the meaning of the Social Services Law (see § 371 [3], [7]) and there was no indication in the record that an adoption was planned for the child. At the first court appearance in this matter, the court granted temporary full custody to the mother with the consent of DSS and did not thereafter make any other custody order. A directive in the order in appeal No. 2, by which the court released the child into the custody of the mother pursuant to Family Court Act § 1054, did not render the termination proceeding authorized by Social Services Law § 384-b applicable to the child and the father. Therefore, the order was reversed and the petition seeking termination of the father's parental rights was

dismissed. The father's contentions that he was deprived of due process and meaningful representation because he appeared only by telephone during the termination proceeding were rendered moot by the reversal of the order in appeal No. 3 and the dismissal of the petition granted in that order.

Matter of Bryleigh E.N., 187 AD3d 1684 (4th Dept 2020)

Court Properly Determined Mother Neglected Child Due To Mental Illness

Family Court determined that respondent mother neglected the subject child, among other things. The Appellate Division dismissed the appeal insofar as it concerned the disposition because that part of the order was entered on the mother's consent. The order was otherwise affirmed. Petitioner established by a preponderance of the evidence that the child was neglected as a result of the mother's mental illness. The evidence at the hearing included the testimony of three caseworkers, a substance abuse counselor, and a psychiatric nurse practitioner. The testimony established that the mother engaged in bizarre and paranoid behavior that placed the child's physical, mental, or emotional condition in imminent danger of impairment.

Matter of Kendall N., 188 AD3d 1688 (4th Dept 2020)

Court Properly Held Mother Neglected The Subject Children

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The out-of-court statements of the children were sufficiently corroborated by the mother's testimony and by the cross-corroboration of each child's statements with the statements of the other children (see Family Court Act § 1046 [a] [vi]). It was harmless error when the court conducted an in camera interview with two of the children outside the presence of the mother's attorney. There was no indication that the court considered, credited, or relied upon the in camera interview when it reached its determination.

Matter of Janae R., 188 AD3d 1753 (4th Dept 2020)

CHILD SUPPORT

Court Erred By Denying Husband's Motion Seeking Downward Modification Of Child Support Obligation Without Hearing

Supreme Court summarily denied plaintiff husband's motion seeking a downward modification of his child support obligation with respect to health insurance premiums. With a single Justice dissent, the Appellate Division modified the order and remitted the matter for a hearing on husband's request to reduce his child support his obligation, among other things. The Court concluded husband did not implicitly waive his right to seek a downward modification by failing to act when defendant wife notified him of the insurance premium increase. Husband was entitled to a hearing on the downward modification request because he submitted evidence that his 50% share of the insurance premium had increased from \$50.15 to \$113.00, which amounted to nearly 18% of his gross income. The dissent wrote to dismiss the appeal on the ground that the paper appealed from was a decision, not an order. The dissent disagreed with the majority's conclusion that the decision was an appealable paper because it was denominated only as a decision and had no ordering paragraphs.

Nicol v Nicol, 179 AD3d 1472 (4th Dept 2020)

Court Properly Calculated Father's Support Obligation; Father's Payment Of Sports Related Activities Were Not Considered Extraordinary Expenses Under Family Court Act § 413

Family Court ordered respondent father to pay semi-monthly support of \$1,206.56. The Appellate Division Affirmed. The father's contention was rejected that the Support Magistrate lacked subject matter jurisdiction on the ground that he raised "visitation as a defense." The father merely identified his equal visitation time with the children as a factor for the Support Magistrate to consider in determining whether a deviation from his obligation under the Child Support Standards Act (CSSA) was appropriate. The father's further contention was rejected that his basic child support obligation ([CSSA] Family Ct Act § 413) was unjust or unfair and that a downward deviation was warranted. Expenses incurred by the father in connection with the children's sporting activities were not "extraordinary expenses" for the purpose of calculating child support under the Family Court Act. Additionally, the father failed to establish that the mother's expenses were substantially reduced by the father's payment of the sports related expenses. The father also failed to establish that his past service as a volunteer coach for the children's sports teams and his decision to travel less for work were non-monetary contributions to the care and well being of the children.

Matter of Firenze v Firenze, 181 AD3d 1198 (4th Dept 2020)

Appeal From Order Revoking Father's Suspended Sentence Was Moot

Family Court revoked respondent father's suspended sentence of incarceration

imposed for willful violation of a child support order and directed the father to surrender himself to serve the five month period of incarceration previously imposed. The Appellate Division dismissed the appeal as moot because the father already served his sentence. The father's argument was rejected that the appeal was not moot because the willful violation finding might cause significant collateral consequences for the father inasmuch as the father did not appeal from the order finding him in willful violation of the order that required him to pay child support.

Matter of Ladd v Frank, 181 AD3d 1208 (4th Dept 2020)

Court Properly Ordered Mother To Contribute Towards College Expenses

Family Court denied the objections of respondent mother to an order of the Support Magistrate, which modified a prior order of support and continued the provisions of the parties separation agreement which required the mother and petitioner father to contribute to their children's college expenses. The Appellate Division affirmed. The mother alleged that the Support Magistrate failed to consider that she incurred significant liabilities such as debt to the state and federal governments. The mother also alleged that it was a financial impossibility for her to contribute towards college expenses and that the father was in a much better position to have incurred the cost. The mother's contention was rejected that the court erred when it imputed income to her for the purpose of the calculation of her child support obligation. The mother only worked part time as a dental hygienist and had received substantial sums of money from others, including \$14,871 from the father pursuant to the parties' separation agreement, \$5,000 from her second husband upon their divorce, and \$20,000 in proceeds from the sale of her house in 2012. The record demonstrated that although the mother was able to work full time and had done so in the past, she worked a maximum of 32 hours per week. Historically, when the mother was not able to obtain full-time hours from a single employer in her field, she supplemented her income and worked nights and weekends as a waitress, retail clerk, or at multiple dental offices. Thus, imputed income for eight hours per week at \$30 per hour, representing the difference between the mother's part-time salary and the full-time salary she is capable of earning, was a fair representation of the mother's demonstrated earning capacity. The mother's contention was rejected that she experienced difficulty maintaining employment as a dental hygienist due to typical turnover in the industry. The record established that the mother was repeatedly terminated by employers for cause. To the extent that the mother's financial circumstances were self-created, they provided no basis for disturbing the court's determination. The record did not support the mother's further contention that her ability to work full time was impacted by her deteriorating health. The mother's testimony was not corroborated by any medical evidence and the court was not obliged to accept the mother's unsupported testimony that a medical condition prevented her from working full time. The mother's contention that she proved the parties' oldest child was constructively emancipated was not preserved for appellate review. Nevertheless, that contention lacked merit because the mother failed to demonstrate that the child actively abandoned her by refusing all contact and visitation. Where, as here, it was the parent who caused the breakdown in communication with

the child, or had made no serious effort to contact the child and exercise visitation rights, the child was not deemed to have abandoned the parent. The mother failed to contend in her written objections to the order of the Support Magistrate that the enforcement provision of the parties separation agreement that required contribution to college expenses was premature, excessive, and in violation of the Child Support Standards Act. Moreover, the mother did not challenge the determination of arrears on the ground that she did not willfully violate the agreement. As a result, those contentions were not properly preserved (see Family Ct Act § 439 [e]).

Matter of Drake v Drake, 185 AD3d 1382 (4th Dept 2020)

Father Failed To Establish Physical Disability Prevented Him From Paying Child Support

Family Court denied the objections of respondent father to the order of the Support Magistrate which found the father willfully violated a prior order of child support. The Appellate Division affirmed. Petitioner established and the father did not dispute that he had not made certain payments required by the prior order. The father failed to meet his burden of demonstrating an inability to make the required payments inasmuch as he failed to present evidence that he made reasonable efforts to obtain gainful employment. The father asserted that he was physically unable to perform certain work he had previously performed and that he had been unable to obtain suitable employment in light of alleged physical limitations. However, the father failed to offer any medical evidence to substantiate his claim that his disability prevented him from making the required payments. Additionally, the father's claim for Social Security benefits was denied.

Matter of Monroe County Child Support Enforcement Unit v Hemminger, 186 AD3d 1093 (4th Dept 2020)

Court Properly Calculated Husband's Child Support Obligation

Supreme Court ordered defendant husband to pay child support to plaintiff wife, and distributed the marital assets. The husband's contention was rejected that the court erred in its calculation of the husband's child support obligation. The court properly imputed income to the husband based upon a vehicle and repair storage business. The husband did not disclose income from the business. The evidence in the record to support the court's imputed income determination included the husband's payment of business expenses and sales tax. The husband's further contention with respect to the calculation of child support was not preserved for appellate review.

Scoppo v Scoppo, 188 AD3d 1632 (4th Dept 2020)

Court Improperly Relied On Unsworn Letters From Children's Psychologist; Father's Petition To Terminate Support Obligation Reinstated

Family Court denied petitioner father's motion for summary judgment on the petition which sought to terminate his child support obligation and granted respondent mother's motion to dismiss the petition. The Appellate Division modified, denied the mother's motion, reinstated the petition, and remitted the matter for further proceedings on the petition. As modified, the order was affirmed. The parties were married in 1991 and had four children together, two of whom were the subject children. The mother also had three other children from a prior relationship. Before the two subject children were born, the father had an inappropriate sexual relationship with one of his stepdaughters. The parties remained married until 2009, when they were divorced. After the divorce, the mother and the stepdaughter reported the sexual abuse committed by the father to child protective services (CPS), which resulted in an abuse petition filed Family Court. In 2010, the father was granted an adjournment in contemplation of dismissal with respect to the abuse petition on the condition that he, inter alia, participated in supervised visitation with the subject children. Over the next year, although the subject children continued to visit with the father, they started to withdraw from him, and ultimately ceased visitation with him altogether. In 2016, the father filed a petition which sought an order that required the mother to facilitate visitation with the subject children. The court, inter alia, granted the father visitation with the subject children "as he and [the mother] agree" but, despite that order, no such visitation occurred during the next three years. In February 2019, the father commenced the proceeding at issue herein pursuant to Family Court Act article 4, which sought to terminate his child support obligation with respect to the subject children on the ground that they constructively emancipated themselves. Under the doctrine of constructive emancipation, a child of employable age who actively abandoned the noncustodial parent by refusing all contact and visitation may forfeit any entitlement to support. Even if it was assumed that the subject children were both of employable age, the father did not meet his initial burden on his motion and failed to establish that the subject children's refusal to visit with him was unjustified. The father's own submissions suggested that the subject children did not want to visit him due to their purported knowledge of the sex abuse allegations. Thus, the father's submissions failed to eliminate all material issues of fact because he did not establish that his behavior was not a primary cause of the deterioration in his relationship with the subject children. Consequently, the court properly denied the father's motion for summary judgment. However, the court should not have granted that part of the mother's motion which sought summary judgment dismissing the petition. The court erred in its reliance on unsworn letters from the children's psychologist because they were not in admissible form. Without the letters from the children's psychologist, the mother failed to meet her initial burden on her motion of establishing that the children were justified in their abandonment of the father when they refused to attend visitation. Like the father, the mother did not submit any admissible evidence that established the reasons for the children's decision not to visit the father.

Timothy M.M., 188 AD3d 1711 (4th Dept 2020)

Court Was Not Required To Calculate The Father's Temporary Child Support Obligation Pursuant to the CSSA And Speedy Trial Was The Proper Remedy For

Any Claimed Calculation Error; Award Of Interim Counsel Fees To The Mother Was Proper

Supreme Court directed defendant father to pay temporary monthly child support of \$4,970 and awarded plaintiff wife interim counsel fees of \$5,500. Defendant father's contention was rejected that Supreme Court was required calculate the defendant's temporary child support obligation pursuant to the Child Support Standards Act (CSSA). With respect to defendant's contention that the court erred in its calculations, imputation of income, and application of the statutory factors, it was well settled that a speedy trial was the remedy for any claimed inequity in an award of temporary child support. The award of interim counsel fees to the plaintiff mother was not an abuse of discretion.

Rifkin v Ilecki, 188 AD3d 1773 (4th Dept 2020)

CUSTODY AND VISITATION

Court Properly Awarded Sole Custody To Maternal Grandmother

Family Court awarded petitioner maternal grandmother sole custody of the subject child. The court also dismissed respondent father's custody petition against respondent Erie County Children's Services (ECCS). The Appellate Division affirmed the court's custody determination and dismissed father's appeal from the dismissal of the petition filed against ECCS. The record supported the finding of extraordinary circumstances based upon father's abandonment of his parental rights and responsibilities to the subject child, as well as multiple incidents of domestic violence. Specifically, evidence at the hearing established that father was voluntarily absent from the 16-month-old child's life starting when she was eight months old and that he made minimal efforts thereafter to maintain a relationship with the child. At most, father spoke to the child by telephone twice during the five months that elapsed between his departure from the home he shared with respondent mother and the child, and the subsequent removal of the child from the home. Upon learning of the removal of the child from the home, father refused mother's request that he take custody of the child, and the child was temporarily placed with another relative. After the child was placed with petitioner, father took no steps to engage in the child's life and avoided efforts of his own family to facilitate visitation. Father's own testimony at the hearing established that, at the time he sought custody, he was not a care giver for the child, had not been visiting the child, and had not been a part of the child's life for half of her 16 months. Moreover, the finding of extraordinary circumstances was supported by evidence of father's history of domestic violence, including violence towards children and mother while she was pregnant with the subject child. Additionally, father admitted that he failed to comply with the terms of an order of protection in favor of one of his other children. The record supported the determination that the award of custody to petitioner was in the child's best interests. Furthermore, father's contention was rejected that the Referee lacked authority to render the custody determination. The father failed to raise any contentions with respect to the dismissal of his petition filed against ECCS.

Matter of Miner v Torres, 179 AD3d 1490 (4th Dept 2020)

Court Properly Awarded Sole Legal And Primary Physical Custody To Father And Declined To Hold Lincoln Hearing; Mother's Contention That AFC Was Ineffective Lacked Merit

Family Court granted petitioner father sole legal and primary physical custody of the subject children. With a single Justice dissent, the Appellate Division affirmed. The mother waived her contention that father failed to establish the requisite change in circumstances warranting an inquiry into the best interests of the children because she alleged in her cross petition that there had been such a change in circumstances. In any event, the mother's contention was rejected as to the change of circumstances because mother engaged in conduct designed to alienate the children from father. Additionally, based upon the court's credibility assessments of the witnesses, there was

a sound and substantial basis in the record to support its custody determination. Furthermore, the mother's contention that the AFC was ineffective for advocating a position that was contrary to the children's wishes was unpreserved because the mother failed to make a motion seeking the AFC's removal. Nevertheless, the AFC fulfilled his obligation to inform the court that the subject children had expressed their wishes to live with the mother despite the AFC's position that they should be placed in the father's custody. The record supported a finding that the children lacked the capacity for a knowing, voluntary, and considered judgment and that following the children's wishes would have placed them at a substantial risk of imminent and serious harm. The court did not err in declining to conduct a Lincoln hearing. The mother's contention was rejected that the court erred in directing that her visitation be supervised. A Lincoln hearing was unnecessary based upon the AFC's expression of the children's wishes to the court, the youthful age of the children (7 and 10), as well as indications in the record that the children were being coached on what to say. The dissent wrote to reverse and remit the matter for a Lincoln hearing because the AFC substituted his judgment for that of the children, the children had been in the mother's custody since birth, and because the father admitted to having committed an act of domestic violence against mother.

Matter of Muriel v Muriel, 179 AD3d 1529 (4th Dept 2020)

Court Erred In Granting Mother Custody Of Subject Child In Absence Of Adequate Notice To Father Of Hearing To Determine Best Interests Of The Child

Family Court awarded respondent mother sole legal and physical custody of the subject child with supervised visitation with petitioner father as mutually agreed to by the parties. The Appellate Division reversed and remitted for a new hearing on custody and visitation. During an appearance at which the court specifically stated that it was not "making any findings" and that it would make findings only after a future hearing, petitioner grew frustrated with the proceedings and walked out of court. As petitioner was leaving, the court warned him that it would issue a permanent order in his absence. Thereafter, the court proceeded to hold a hearing, take testimony from respondent and issued its determination on custody and visitation. While not condoning petitioner's behavior, the Court agreed with petitioner that Family Court erred in granting respondent custody in the absence of adequate notice to petitioner of a hearing to determine the best interests of the child.

Matter of Williams v Davis, 179 AD3d 1532 (4th Dept 2020)

Mother's Motion To Dismiss Father's Modification Petition Properly Granted

Family Court granted respondent mother's motion to dismiss the father's petition, which was made during a hearing following the close of the petitioner's proof. The Appellate Division affirmed. The court erred by interpreting the underlying order and stipulation to permit petitioner to seek modification of the visitation arrangement without first satisfying the threshold burden of establishing a change in circumstances.

Nevertheless, upon an independent review of the record, petitioner failed to establish the requisite change in circumstances. Thus, petition was properly dismissed.

Matter of Berg v Stoufer–Quinn, 179 AD3d 1544 (4th Dept 2020)

Record Supported Modification Of Custody To Award Father Sole Custody

Family Court modified a prior custody order by granting petitioner father sole custody of the subject child. The Appellate Division affirmed. The record supported the court's determination that petitioner established a change in circumstances. Specifically, testimony established that there were incidents of domestic violence in respondent mother's household and that respondent changed her residence several times. The court's determination that it was in the child's best interests for petitioner to have sole custody was supported by a sound and substantial basis in the record. Additionally, the court properly relied upon a prior litigation between the parties to conclude that respondent was unwilling or unable to foster a relationship between the child and petitioner. The court took judicial notice of the previous orders and proceedings upon petitioner's counsel's request without objection from respondent's counsel.

Matter of Hermann v Williams, 179 AD3d 1545 (4th Dept 2020)

Court Properly Modified Custody By Awarding Father Sole Custody

Supreme Court modified a prior custody and visitation order by awarding plaintiff father sole custody of the parties' children. The Appellate Division affirmed. Plaintiff established a change in circumstances based upon the parties' heightened inability to communicate in a manner conducive to sharing joint custody and defendant's violation a prior court order. Thus, there was a sound and substantial basis in the record to support the determination that an award of sole custody to plaintiff was in the best interests of the children.

Murray v Murray, 179 AD3d 1546 (4th Dept 2020)

Court Properly Dismissed Petition To Modify Custody By Incarcerated Father; Best Interests Inquiry Was Not Warranted

Family Court granted the mother's motion to dismiss the incarcerated father's petition seeking to modify an existing custody order entered on the consent of the parties. The Appellate Division affirmed. The existing custody order granted sole custody to mother and permitted father to send correspondence to the child. Mother was to provide correspondence sent by father as she deemed appropriate. Approximately one month after the existing order was entered, father filed a petition and alleged there was a change in circumstances because mother failed to send him letters or photographs of the child. The mother was not obligated to send such items under the existing custody order. The father's contentions in this regard did not constitute a change in circumstances. An inquiry into the best interests of the child was therefore

unwarranted.

Matter of Avent v Avent, 180 AD3d 1329 (4th Dept 2020)

Court Properly Awarded Mother Primary Physical Custody

Family Court granted father and mother joint custody of their two children with primary physical residence to the mother. The Appellate Division affirmed. Father's contention was rejected that Family Court's determination was not in the children's best interests and that he should be awarded sole custody or primary physical custody. The court's determination was based on a careful weighing of appropriate factors. The father's further contention was rejected that Family Court improperly relied on allegations that were not substantiated during the custody hearing. The court's determination was supported by a sound and substantial basis in the hearing record.

Matter of Lesinski v Ciamaga, 180 AD3d 1341 (4th Dept 2020)

Court Properly Awarded Father Physical Custody

Family Court modified a prior custody order by awarding the parties joint physical custody of the subject child with physical custody to petitioner father. The Appellate Division affirmed. The father made the requisite showing of a change in circumstances to warrant an inquiry into whether the child's best interests would be served by modifying the existing custody arrangement. Specifically, since the entry of the prior custody order, which awarded mother physical custody, the child experienced a significant decline in her school performance including failing grades in three classes. Additionally, the child had multiple instances of tardiness and unexcused absences from school while residing with mother. Moreover, since entry of the prior custody order, the child's anxiety and depression significantly increased, in part as a result of living in mother's home. There was a sound and substantial basis in the record to support Family Court's determination that it was in the child's best interests to award physical custody to the father including the child's poor school performance as well as her increased anxiety and depression while in mother's custody. Moreover, the mother worked six nights a week and the child was home alone during those times. In contrast, since residing with the father pursuant to a temporary custody order, the child was provided a more stable home. The father provided the child with an academic tutor and her grades significantly improved. The father also transported the child to summer school as well as a part-time job. When father was at work, his wife stayed with the child.

Matter of McGee v McGee, 180 AD3d 1342 (4th Dept 2020)

Court Properly Permitted Mother To Relocate To North Carolina With Subject Child Despite Unilateral Removal Of Child From Court's Jurisdiction Without Notice To Father

Family Court denied the father's petition seeking modification of custody to award him sole custody and return of the subject child to Syracuse from North Carolina where the mother relocated with the child without any notice to the father. The Appellate Division modified and granted the father liberal parenting access that comported with the child's school schedule in North Carolina. It was in the child's best interests to remain in North Carolina in the mother's custody. Despite the mother's unilateral removal of the subject child from the jurisdiction, there was a sound and substantial basis in the record to support the determination that relocation to North Carolina would enhance the child's life economically, emotionally, and educationally. Moreover, the child's relationship with the father could be preserved through extended parenting access over the child's vacations from school in North Carolina. Thus, the order was modified to grant the father visitation during the child's vacations from school in North Carolina, which included six weeks over the summer.

Matter of McMiller v Frank, 181 AD3d 1154 (4th Dept 2020)

Court Properly Continued Pre-existing Custody Arrangement; Neither AFC Nor Mother Appealed, Thus AFC's Contention that Mother Should be Awarded Sole Custody Was Not Properly Before Court

Family Court ordered that the parties continued to have joint legal and shared physical custody of the subject children, and established a definitive parenting schedule. The Appellate Division dismissed as moot the appeals as to the parties' oldest child who attained the age of 18 and otherwise affirmed. The father's contention was rejected that Family Court erred in its refusal to award him sole custody. The Court concluded that there was a sound and substantial basis in the record to support the conclusion that the preexisting custodial arrangement was in the children's best interests. The Attorney for the Children's contention that Family Court should have awarded sole custody to the mother was not properly raised on appeal because neither the mother nor the AFC filed a notice of appeal.

Matter of Latray v Hewitt, 181 AD3d 1175 (4th Dept 2020)

Court Properly Awarded Father Sole Custody; Mother's Contention That AFC Failed To Provide Meaningful Representation Was Unpreserved And Without Merit

Family Court granted the father's petition to modify a prior stipulated order of custody and visitation and awarded the father sole custody of the parties children. The Appellate Division affirmed. Because both parties sought modification, neither party disputed that there was a sufficient change in circumstances that demonstrated a real need for a change in order to insure the children's best interests. There was a sound and substantial basis in the record to support the determination that it was in the children's best interests to award the father sole custody. Moreover, the mother's contention that the Attorney for the Child did not provide meaningful representation to the subject children was unpreserved and, in any event, without merit.

Matter of Crill v Crill, 181 AD3d 1199 (4th Dept 2020)

Court Properly Awarded Father Sole Legal And Residential Custody

Family Court awarded the father sole legal and residential custody of the subject child. The Appellate Division affirmed. The court properly concluded there was a sound and substantial basis in the record to award the father sole custody. In this initial custody determination, the court properly weighed factors such as each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, the willingness of each parent to foster a relationship with the other parent, and the stability of the home environment with each parent. 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, the record supported the court's determination that it was in the child's best interests to award sole custody to the father. In addition, the mother's contention was rejected that the father was not an active and capable parent because the father assigned day-care responsibilities to a relative due to his work obligations.

Matter of Gilbert v Nunez-Merced, 181 AD3d 1210 (4th Dept 2020)

Court Failed To Set Forth Analysis Of Whether Extraordinary Circumstances Warranted An Award Of Joint Custody With Maternal Grandmother

Family Court awarded petitioner father and the subject child's maternal grandmother joint custody. Additionally, the court awarded parenting access for the mother as the parties agree or stipulate and if there is no such agreement, then Family Court would make a determination of same after a hearing. The Appellate Division, with a single justice dissent, reserved decision, held the case, and remitted the matter for further proceedings. Family Court failed to set forth its analysis of whether extraordinary circumstances existed to warrant an inquiry into whether an award of joint custody to the maternal grandmother was in the best interests of the child. Thus, the absence of the required findings precluded proper appellate review, and the case was remitted to Family Court to set forth its findings regarding extraordinary circumstances. Assuming *arguendo* that the order on appeal was not final, the majority deemed the mother's notice of appeal as an application for leave to appeal from the "non-final" order and exercised its discretion to grant her leave to appeal. The dissent disagreed and voted to dismiss the appeal on the ground that, *inter alia*, the order was not appealable as of right under the Family Court Act because it was not "final," the mother did not move for leave to appeal, and she did not present any excuse or explanation for her failure to so move.

Matter of Steeno v Szydlowski, 181 AD3d 1224 (4th Dept 2020)

Court Properly Awarded Mother Sole Legal And Physical Custody But Improperly Entered Order On Default

Family Court continued sole legal and physical custody of the subject child with

respondent mother on default by petitioner father. The Appellate Division modified by striking the words "upon default of the petitioner and" from the order, and otherwise affirmed. Inasmuch as the record established father was represented by counsel, the order was not properly entered on default and the appeal was not precluded. Family Court did not abuse its discretion when it conducted the hearing in the father's absence because he appeared by counsel and had notice of the hearing. The father failed to establish the requisite change of circumstances and an inquiry into the best interests of the child was not warranted.

Matter of Williams v Richardson, 181 AD3d 1292 (4th Dept 2020)

Court Properly Dismissed Incarcerated Mother's Modification Petition Without Hearing But Improperly Altered Mother's Entitlement To Child's Report Cards And Photographs

Family Court granted the petition filed by the subject child's paternal aunt which sought joint custody of the subject child (appeal No. 1); granted the AFC's petition which sought to modify a prior custody and visitation order (prior order) and reduced the visitation of the child's maternal grandmother to one supervised visit per month (appeal No. 2); and summarily dismissed the mother's petition which sought modification of the prior order by, inter alia, allowing the mother to communicate with the child (appeal No. 3). The Appellate Division dismissed appeals Nos. 1 and 2 on the ground that the mother was not an aggrieved party. The mother was incarcerated in connection with the murder of the child's father and her access to the child consisted only of receiving the child's report card and photographs. Thus, the orders did not alter the mother's circumstances or affect her legal rights or direct interests. In appeal No. 3, the Appellate Division held that the court properly dismissed the mother's modification petition without a hearing on the ground that the mother failed to make a sufficient evidentiary showing of a change in circumstances to warrant a hearing. Moreover, the mother failed to set forth allegations rebutting the presumption in Domestic Relations Law § 240 (1-c) that visitation was not in the child's best interests. However, the Court modified the order with respect to the mother's entitlement to receive certain communications about the child because of a conflict in Family Court's oral decision and the order itself. As a result, the mother was entitled to continue to receive photographs and report cards of the child pursuant to the details of a prior order entered in May 2015.

Matter of Chase v Chase, 181 AD3d 1322 (4th Dept 2020)

Visitation Order Entered On Consent Mooted Appeal

Family Court awarded petitioner father sole legal and physical custody of the subject child upon respondent mother's default. The Appellate Division dismissed the mother's appeal. Even if the order appealed from was not properly entered on the mother's default, a subsequent order entered on the consent of the mother and the father superseded the order on appeal and rendered the appeal moot. The subsequent order

continued custody with the father and provided the mother specific periods of visitation, which included multiple nights of overnight visitation each week.

Matter of Wallace v Eure, 181 AD3d 1329 (4th Dept 2020)

Mother's Ex-Girlfriend Lacked Standing To Seek Custody

Family Court dismissed the amended petition for custody filed by the ex-girlfriend of respondent mother (petitioner) on the ground that petitioner lacked standing under Domestic Relations Law § 70. The Appellate Division affirmed. The original petition sought visitation with the biological child of the mother and respondent father. Petitioner then filed an amended petition which sought, inter alia, custody of the subject child. Petitioner and the mother began their romantic relationship after the mother was pregnant with the child. That relationship continued for almost three years until May 2017, when the mother moved out of their residence. The father was incarcerated prior to the birth of the child and remained incarcerated until October 2017. The father's paternity was established during that time, and he and the mother agreed in February 2017 that the mother would have sole custody of the subject child. Upon his release from incarceration, the father began visiting with the child. After commencement of the proceeding in June 2017, the mother's motion to dismiss the amended petition for lack of standing was denied because petitioner could have had standing under an equitable estoppel theory. Subsequently, a trial was held, after which the Referee found that petitioner established standing under equitable estoppel inasmuch as the mother created, fostered, furthered, and nurtured a parent-like relationship between petitioner and the child. The father also fostered that relationship through his inaction because he had no contact with the child until after petitioner filed the amended petition which sought custody. Moreover, the father did not provide financial support for the child. Thus, the Referee concluded that equitable estoppel could be used to create a three-parent arrangement. Family Court rejected the Referee's report and concluded petitioner lacked standing. On appeal, petitioner's contention was rejected that Family Court was bound to apply equitable estoppel as the law of the case because the mother's motion to dismiss was previously denied. The motion to dismiss was in a different procedural posture from a post-trial determination and did not preclude Family Court from reaching a different conclusion after trial. Domestic Relations Law § 70 limited standing to only two parents at any given time. The statute simply did not contemplate a court-ordered tri-custodial arrangement and the child already had two legally recognized parents. Thus, petitioner could not establish standing under the statute.

Matter of Wlock v King, 181 AD3d 1341 (4th Dept 2020)

Court Properly Modified Custody And Awarded Mother Sole Legal And Physical Custody; Trial Court AFC Did Not Provide Ineffective Assistance of Counsel

Family Court modified a prior custody and visitation order entered on consent and awarded petitioner mother sole legal and physical custody of the subject child. The

Appellate Division affirmed. Contrary to the positions taken by the father and the appellate AFC, there were extensive findings of fact in the record which unequivocally demonstrated a significant change in circumstances since the entry of the prior order. The mother established that her relationship with the father deteriorated to the point where the existing joint custody arrangement was no longer feasible. The father violated the prior custody and visitation order and engaged in ongoing efforts to alienate the child from the mother. A concerted effort by one parent to interfere with the other parent's relationship with the child was so inimical to the best interest of the child as to per se raise a strong probability that the interfering parent was unfit to act as a custodial parent. Thus, there was a sound and substantial basis in the record to support Family Court's award of sole custody to the mother. Family Court did not err when it denied the father's motion to remove the trial court AFC. Had the trial court AFC advocated the 10-year old child's stated wishes to have no contact with the mother, this would have been tantamount to severing the child's relationship with the mother and that result would have been contrary to the child's best interests. The father's persistent and pervasive pattern of alienating the child from the mother was likely to result in a substantial risk of imminent, serious harm to the child. The trial court AFC acted in accordance with her ethical duties and the child was not denied effective assistance of counsel. The trial court AFC did not deprive the child of effective assistance of counsel when she advocated a position contrary to the child's stated wishes. The father's contention was rejected that Family Court erred by finding he willfully violated a court order because there was no such order in the record.

Matter of Grabowski v Smith, 182 AD3d 1002 (4th Dept 2020)

Court Properly Awarded Father Sole Custody And Imposed Supervised Visitation With Mother

Family Court modified a prior custody and visitation order and awarded the father sole custody of the subject child. The Appellate Division affirmed for reasons stated in the court's decision and order but clarified two issues. First, the mother's and the AFC's contention that Family Court violated the mother's constitutional rights was unpreserved for appellate review and would not be addressed in the interests of justice. Second, Family Court's determination to impose supervised visitation with the mother was supported by the requisite sound and substantial basis in the record. To the extent the mother preserved the contention, joined by the AFC, that Family Court improperly considered her toxicology test results when it made the supervised visitation determination, the contention lacked merit.

Matter of Reska v Browne, 182 AD3d 1052 (4th Dept 2020)

Post-Conception Agreement To Raise Child Between Mother And Her Same-Sex Partner Insufficient To Confer Standing To Non-Parent Under DRL § 70

Family Court dismissed for lack of standing the petition and amended petition of the former same-sex partner of the mother. The Appellate Division affirmed with a

concurrence and a dissent. Petitioner and respondent mother were in a relationship and became engaged in 2009, but they never married because, at that time, same-sex marriage was not recognized under New York law. Their romantic relationship ended in early 2010, and petitioner moved out of their residence. That summer, the mother engaged in sexual relations with respondent father, which resulted in her becoming pregnant with the subject child. The most recent order of custody gave the mother and the father shared equal access with the child. Petitioner did not have standing under Domestic Relations Law § 70 (a) to seek joint custody of, and visitation with, the child, which would result in a tri-custodial arrangement among respondents and petitioner. In *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, the Court of Appeals held that where a partner had shown by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner had standing to seek visitation and custody under Domestic Relations Law § 70. Petitioner and the Attorney for the Child's contention was rejected that the facts were a natural extension of the reasoning in *Brooke S.B.*, and that although there was no pre-conception agreement, there was a post-conception agreement for petitioner to raise the child as a parent. DRL § 70 (a) simply did not contemplate a court-ordered tri-custodial arrangement. DRL § 70 (a) stated that "either" parent may seek custody or visitation. The term "either" limited a child to two parents, and no more than two, at any given time. The clear wording of DRL § 70 (a), which was expressly recognized by the Court of Appeals in *Brooke S.B.*, precluded any relief to petitioner because there were already two parents: the mother and the father. Although the AFC contended that petitioner could have taken legal countersteps such as seeking standing by showing extraordinary circumstances under *Bennett v. Jeffreys*, 40 N.Y.2d 543, 549, the petition and amended petition did not make any allegations to show standing under that theory. There were thus no legal countersteps that petitioner could have taken to defeat the father's motion to dismiss this amended petition for lack of standing. While an equitable estoppel argument was a logical extension of *Brooke S.B.*, the doctrine was to be considered within the confines of DRL § 70, which did not allow a tri-custodial arrangement. Petitioner's situation was neither novel or unique. For example, stepparents often form close parental bonds with their stepchildren. Yet if a stepparent and a biological parent separated, the unfortunate result sometimes was the severing of that relationship between the stepparent and stepchild if the biological parents were unwilling for that relationship to continue. There was no indication that had been the case inasmuch as the mother continued to allow petitioner to see the child during the mother's parenting time. When the Court of Appeals expanded the definition of "parent" in *Brooke S.B.*, it was careful to both recognize and protect perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court, i.e., the interest of parents in the care, custody and control of their children. The concurring opinion respectfully disagreed with the dissent's supposition that either the United States Supreme Court or the New York Court of Appeals had held that a child had a 'fundamental liberty interest . . . in preserving [his or] her family-like bonds.' The concurring opinion further disagreed that any such liberty interest possessed by the child could be lawfully elevated to such a height that it could outweigh a parent's rights. A single Justice dissented and voted to remit the matter for a hearing on custody and visitation. The dissent reasoned that petitioner had standing because, inter alia, the

legislature could not have anticipated the many changes that would occur with respect to what constituted an American family when DRL § 70 was originally enacted in 1909 or as amended in 1964; tri-custodial arrangements were a necessary evolution of Brooks S.B.; and the child had a fundamental liberty interest as well as principles of equity under these circumstances to preserve established intimate family-like bonds.

Matter of Tomeka N.H. v Jesus R., 183 AD3d 106 (4th Dept 2020)

Court Properly Awarded Maternal Grandmother Physical Custody

Family Court modified a prior custody order entered on stipulation of the parties and awarded physical custody to of the subject children to the maternal grandmother. The Appellate Division affirmed. Respondent mother's contention was rejected that the record did not support a finding of extraordinary circumstances necessary to justify an award of custody to a nonparent. It was undisputed that the children lived in the grandmother's home for at least seven years. Moreover, the mother failed to resume her parental role in the children's lives despite having scheduled visitation. The mother's further contention was rejected that the grandmother failed to make the requisite showing of a change in circumstances sufficient to warrant an inquiry into whether modification of the prior custody order was in the best interests of the children. To the extent the Court's prior cases suggested a change in circumstances analysis was not required here, those cases should no longer be followed. In this case, the parties' stipulation required the mother to assume additional and greater responsibilities during a five-month period, at the conclusion of which the mother was to obtain primary physical custody. The record established that the mother increasingly failed to attend scheduled visitation during that time period and, instead, often chose to spend time with her boyfriend. The mother also exhibited poor judgment through her acknowledgment of domestic violence in her home with the children present. Additionally, the court observed firsthand the mother's deteriorated mental condition. Thus, it was in the children's best interests for the grandmother to have physical custody because the grandmother provided a stable living situation for the children and the children wanted to remain in her home.

Matter of Driscoll v Mack, 183 AD3d 1229 (4th Dept 2020)

Court Properly Awarded Maternal Grandfather Visitation

Family Court awarded petitioner maternal grandfather visitation with the subject child. The Appellate Division affirmed. Respondent mother's contention was rejected that the grandfather lacked standing to seek visitation under Domestic Relations Law § 72 (1). The grandfather established that conditions existed in which equity would see fit to intervene. Specifically, it was undisputed that the grandfather had a long-standing and loving relationship with the child. The record supported the court's determination that the mother's proffered objections to visitation lacked a sound basis and were primarily pretextual. Additionally, the record supported the court's conclusion that visitation was in the best interests of the child.

Matter of Panebianco v Panebianco, 183 AD3d 1239 (4th Dept 2020)

Award Of Primary Residential Custody To Mother Was Error

Family Court denied the father's amended petition which sought to modify a prior order of custody and visitation, and awarded primary residential custody of the subject child to respondent mother. The Appellate Division reversed, awarded the father primary residential custody of the child, awarded visitation to the mother, and remitted the matter for an appropriate visitation schedule to be fashioned. The father established a sufficient change of circumstances to warrant a review of the custody provisions that were in existence. The court's custody determination lacked the requisite sound and substantial basis in the record. The court failed to adequately address the factors that could impact the best interests of the child. Upon a review of the relevant factors, the Court determined that it was in the child's best interests to award the father primary physical custody. The only relevant factor that weighed in favor of the mother was the existing custody arrangement which had been in place for a lengthy period of time. Separation of the subject child from her brother that lived at the mother's house was not a factor that favored the mother because both parties had other children. Thus, an award of primary residential custody to either parent would have resulted in the separation of the subject child from some of her siblings. The remaining factors favored an award of primary residential custody to the father, as follows: during the time the mother had primary residential custody, the child performed poorly at school and experienced increased depression; due to the mother's work schedule, the child was required to arise before 5:00 a.m. and was thereafter taken to a relative's house where the child stayed for two hours before school; and the mother conceded she was unable to assist with the child's school work or to schedule or attend the child's medical and mental health counseling appointments. In contrast, the father was able to provide a more stable home for the child and was helping the child with these measures. Furthermore, the 14-year-old child expressed a desire to reside with the father and the Attorney for the Child supported that position. The child's age and maturity made her input particularly meaningful and her wishes were thus entitled to great weight. Although the position of the AFC was not determinative, it was a factor to be considered as well.

Matter of Alwardt v Connolly, 183 AD3d 1252 (4th Dept 2020)

Court Properly Modified Visitation Schedule

Family Court continued joint custody of the subject child with primary residence and placement with the father. Additionally, the court granted in part, the father's modification petition which sought to change the visitation provisions of a prior custody and visitation order. The Appellate Division affirmed. The mother waived her contention that the father failed to establish the requisite change in circumstances to warrant an inquiry into the best interests of the child because the mother alleged such a change in circumstances in her amended cross petition. Despite the mother's waiver, the father established the requisite change in circumstances. The mother's further

contention was rejected that modification of the visitation schedule was not in the best interests of the child. The record established that the court's best interest determination resulted from a careful weighing of the appropriate factors and had a sound and substantial basis in the record. Due to the past acrimony between the parties, it was appropriate to divide the decision-making authority with respect to the child. The father's contention that the mother was awarded excessive visitation and that said visitation should have been reduced was not properly before the Court in the absence of a cross appeal.

Matter of Andross v Aiello, 183 AD3d 1266 (4th Dept 2020)

Court Properly Determined Custody; The Record Failed To Demonstrate Mother Was Unfit

Family Court denied respondent father's petition to modify a prior custody agreement by granting him primary physical residence of the parties' three children and otherwise continued joint custody and primary physical residence with petitioner mother. The Appellate Division dismissed the appeal insofar as it concerned the parties' oldest child and otherwise affirmed. While the appeal was pending, Family Court entered an order upon consent of the parties that modified the custody and visitation arrangement by granting the father primary physical residence of the parties' oldest child. That order rendered the appeal moot insofar as it concerned the oldest child. The father's contention was rejected that the court erred when it denied his petition with respect to the parties' two other children on the ground that the mother was unfit to act as a custodial parent. Even if it was assumed that the father demonstrated a change in circumstances, the record did not establish that the mother engaged in a concerted effort to interfere with the father's contact with the children. The father's further contention was rejected that the court did not consider the appropriate factors in making its custody determination. There was a sound and substantial basis in the record to support the court's determination with respect to the best interests of the children.

Matter of Common v Pirro, 184 AD3d 1087 (4th Dept 2020)

Court Properly Denied Mother's Family Offense Petition; Award Of Temporary Sole Custody To Father Was Error; Certain Restrictions On Daughter Were Error

Supreme Court denied the mother's family offense petition seeking an order of protection against the father, awarded sole custody of the subject children to the father for a period of 60 days with limited visitation to the mother, and vacated a temporary order of protection granted ex parte in Family Court, among several other things. After partially staying the order pursuant to the mother's show cause application, the Appellate Division modified and remitted the matter to Supreme Court for further proceedings. The mother's contention was rejected that the court erred by vacating the temporary order of protection and by effectively denying the family offense petition. In the petition originally filed in Family Court and subsequently removed to Supreme Court, the mother alleged that the father committed the family offenses of harassment

and stalking. At that time, the parties had joint legal custody of the children and the mother had primary residential custody. There was no reason to disturb Supreme Court's credibility determinations or its conclusion that the father did not commit any of the family offenses alleged in the petition. The mother's related contention was rejected that the record insofar as it concerned the merits of the family offense petition was not sufficient for appellate review because the recordings of the father's cell phone conversations with the older child, on which the court based some of its findings, were not included in the record on appeal. It was the mother's responsibility as the appellant to furnish an adequate record on appeal. The contents of the cell phone recordings were not in dispute and were gleaned from the record. However, it was error to award the father sole custody for 60 days with limited visitation to the mother. The father did not allege, let alone establish, a change in circumstances which reflected a real need for change to ensure the best interests of the children. Even if a change of circumstances was assumed, the court in its custody and visitation determination failed to adequately address the factors that could impact the best interests of the children. This determination lacked the requisite sound and substantial basis in the record. The father's motion seeking modification of the parties custody and visitation arrangement was therefore denied. Additionally, inasmuch as no party requested such relief, there was no legal basis for the court's *sua sponte* directives that the parties' older child be deprived of a cell phone and other electronic devices and barred from attending all extracurricular and activities outside the home for 60 days. This aspect of the order was vacated. Furthermore, the mother's contention was rejected that the court erred by restricting her from filing new petitions seeking an order of protection against the father without permission of the court. The record established that the mother abused the judicial process by having engaged in meritless, frivolous or vexatious litigation. The mother was not without recourse should she be the victim of spousal abuse because the order did not restrict the mother from obtaining police assistance or from filing for an order of protection with permission of the court. Since the father did not cross appeal, the merits of the court's similar restriction on the father's ability to file future petitions or to seek an order of protection was not addressed.

Ritchie v Ritchie, 184 AD3d 1113 (4th Dept 2020)

Court Properly Held That New York Was An Inconvenient Forum Under Domestic Relations Law § 76-f; Dismissal Of Petitions Was Error

Family Court granted respondent mother's motion to dismiss the father's modification petitions on the ground that New York was an inconvenient forum under the Uniform Child Custody Jurisdiction and Enforcement Act, N.Y. Dom. Rel. Law § 75 et. seq. The Appellate Division modified, reinstated the petitions, and remitted the matter to Family Court for further proceedings pursuant to DRL § 76-f (3), including the entry of an order staying the proceedings upon the condition that a child custody proceeding was promptly commenced in California. The father filed the modification petitions after the mother moved to California with the parties' five-year-old child without informing the father, who was incarcerated at the time. The father's contention was rejected that Family Court erred in declining to exercise its jurisdiction in this matter. Although the

record did not reflect that Family Court considered the factors required to determine whether a forum was inconvenient under DRL § 76-f (2), the record was sufficient for consideration of those factors on appeal. Under the circumstances of this case, California was an appropriate forum and New York was an inconvenient forum. The father abused the mother in front of the child, an order of protection had previously been entered against the father in New York for domestic violence, and the mother moved to California to avoid any further abuse, which weighed heavily in favor of California being the more appropriate forum to protect the safety of the mother and the child (see DRL § 76-f [2] [a]). With respect to the length of time the child resided outside of New York, although the father filed the modification petition only two weeks after the mother relocated to California, the additional time it took to dispose of this proceeding did not militate in favor of finding that New York was an inconvenient forum (id., § 76-f [2] [b]). Even though the two forums were a great distance from one another, greater financial burden would have been placed upon the mother if she was required to travel to New York with the child, which weighed in favor of finding New York to be an inconvenient forum (id., § 76-f [2] [c], [d]). The parties could have appeared by telephone, video, or other electronic means. The majority of the evidence pertaining to the best interests analysis was located in California. Specifically, evidence of the child's school performance, response to therapy, the indigenous tribe she belonged to, and her relationship with extended family were all in California (id., § 76-f [2] [f]). The child did not appear to have any connection with New York other than the father and a paternal grandmother. The Attorney for the Child in New York had trouble providing effective representation to the child because it was difficult to communicate with the child by telephone. There was no agreement between the parties that the mother would stay in New York or that New York courts would have jurisdiction (id., § 76-f [2] [e]). There was no reason that the California courts could not handle the case expeditiously and it could not be said that New York courts were more familiar than the California courts with the facts and issues in this case (id., § 76-f [2] [g], [h]). Although evidence of the father's criminal history was available in New York and the court here was familiar with the parties and the allegations of domestic violence due to the prior custody order, the circumstances changed sufficiently that it would not be of more value to have New York rather than California hear the case. Thus, after weighing all the factors, California was the more appropriate forum to resolve the underlying custody dispute and the record supported a determination that New York was an inconvenient forum. However, dismissal of the petitions was error. Instead, the proceedings should have been stayed pending the prompt commencement of a child custody proceeding in California.

Matter of Coia v Saavedra, 184 AD3d 1127 (4th Dept 2020)

Court Properly Barred Father's Access To The Children

Family Court awarded sole custody of the subject children to respondent mother and directed that petitioner father shall have no access to them. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the court's determination. The father committed acts of domestic violence against the mother in the presence of the children, and the court found that the father's testimony denying of

such behavior was not credible. Testimony of a licensed trauma therapist established that the children suffered ongoing stress as a result of supervised visitation with the father, which had a harmful effect on their emotional and mental well-being. Although the court erred when it failed to record in camera interviews with the children (see CPLR 4019 [a]), that error did not require reversal under the circumstances of this case. Furthermore, while the court's order stated that a change in circumstances shall be deemed if the father completed a 52-week domestic violence program and a mental health evaluation, the order did not require father to complete such a program and evaluation as a prerequisite to filing a future petition. Nothing in the order prevented the father from supporting a future petition with a showing of a different change in circumstances. The father's contention was rejected that the gaps in the hearing transcript caused by inaudible portions of the audio tape recording were not so significant as to preclude meaningful review of the order. The father's further contention was rejected that the court denied him of due process when it ordered both parties to use the same interpreter.

Matter of Thurarajah v Manjula, 184 AD3d 1130 (4th Dept 2020)

Court's Failure To Determine Whether Extraordinary Circumstances Existed Was Error

Family Court dismissed one petition filed individually by petitioner father and two petitions filed by the father jointly with petitioner mother each of which sought to modify a prior order that awarded custody of the subject children to respondent, the children's paternal aunt (aunt). The Appellate Division reversed in the interests of justice, reinstated all three petitions, and remitted the matter for a determination of whether extraordinary circumstances existed, and if so, for any other necessary determinations. Although the father failed to preserve for appellate review the contention that the court erred when it failed to make an initial determination with respect to the existence of extraordinary circumstances necessary to justify an award of custody to a nonparent, the Appellate Division reviewed that contention in the interest of justice. The court erred when it failed to make an initial determination with respect to the existence of extraordinary circumstances. A prior consent order did not by itself constitute a judicial finding or an admission of extraordinary circumstances and there was no indication in the record that the court previously made such a determination. The Appellate Division declined to make its own determination of extraordinary circumstances.

Matter of Byler v Byler, 185 AD3d 1403 (4th Dept 2020)

Mother's Appeal Was Untimely

Family Court granted petitioner father sole legal custody and primary physical placement of the parties' biological children, and guardianship of respondent mother's biological daughter, with supervised visitation to the mother. The Appellate Division dismissed the mother's appeal as untimely pursuant to Family Court Act § 1113, as was argued by the Attorney for the Children. Family Court served its order on the parties

and counsel in court on September 24, 2018, and the order complied with the statutory requirements of the Family Court Act. The notice of appeal was not filed until November 2, 2018, more than 30 days from the service of the order. As a result, the Court lacked jurisdiction to consider the mother's appeal pursuant to § 1113.

Matter of Fraser v Fraser, 185 AD3d 1444 (4th Dept 2020)

Court Properly Dismissed Maternal Aunt's Custody Petition

Family Court dismissed with prejudice the petition seeking custody of the subject child filed by petitioner, the child's maternal aunt. The Appellate Division affirmed. In a prior proceeding pursuant to Social Services Law § 384-b, Family Court terminated the parental rights of the mother on the ground of abandonment and placed the child in the custody and guardianship of respondent Department of Social Services (DSS). Thereafter, petitioner sought custody of the child and commenced a proceeding pursuant to Family Court Act article 6. Where a court terminated parental rights and committed a child's custody and guardianship to an authorized agency thereby freeing the child for adoption, the sole remedy and exclusive means to gain care and custody of the child was adoption. At that point, the court was without authority to entertain custody proceedings commenced by a member of the child's extended family. Petitioner's recourse was to seek adoption, not mere custody of the child. In view of the termination of the mother's parental rights and the commitment of the child's custody and guardianship to DSS, petitioner's contention was rejected that the court erred when it dismissed the petition without a hearing.

Matter of Amber W. v Erie Co. Children's Services, 185 AD3d 1445 (4th Dept 2020)

Court Properly Granted Sole Custody To Child's Adult Sister And Did Not Improperly Assume The Role Of An Advocate

Family Court granted sole custody of the subject child to petitioner, the child's adult sister. On appeal by petitioner father, the Appellate Division affirmed for reasons stated in the decision at Family Court. However, the Court addressed the father's contention that Family Court improperly assumed the role of an advocate and aided the adult sister during the hearing. The father's contention was rejected that the court improperly allowed the adult sister, who appeared pro se, to consult with the attorney for respondent, the subject child's mother. The record established that the court admonished the adult sister and the mother's attorney during the two instances when they began to consult, and the consultations ceased. The father's contentions that the court improperly aided the adult sister during her testimony and inappropriately examined witnesses during the hearing were unpreserved for appellate review and without merit. The court's questions during its examination of the witnesses properly advanced the goals of truth and clarity. Furthermore, the court made permissible reasonable efforts that facilitated the ability of unrepresented litigants to have their matters fairly heard (see 22 NYCRR 100.3 [B] [12]).

Matter of Hershberger v Brown, 185 AD3d 1462 (4th Dept 2020)

Court Properly Awarded Sole Custody Of The Subject Child To The Grandmother

Family Court granted sole custody of the subject child to petitioner, the child's paternal grandmother (grandmother). The Appellate Division affirmed. Respondent mother's contention was rejected that there was no showing of extraordinary circumstances that warranted an inquiry into whether an award of custody to a nonparent was in the child's best interests. The record established that the mother relinquished her superior right to custody through her persistent neglect of the child and that the mother voluntarily abandoned custody of the child to the grandmother. The evidence adduced at the fact-finding hearing established that the mother had failed either to maintain substantial, repeated and continuous contact with the child or to plan for the child's future. The court's determination to credit the grandmother's testimony over the mother's when it determined the existence of extraordinary circumstances was entitled to great deference and there was no reason to disturb that credibility determination. The record established that since she left the home and ceased caring for the child, the mother had only sporadically visited the child, had not communicated with the grandmother about the child or his care, did not provide financial support for the child, and had not stayed informed about the child's health and education. The grandmother provided the child with a safe and stable home environment, which the mother had not been able to replicate. The mother did not have adequate supplies for the child and did not know the child's clothing size. Thus, the court properly determined that the grandmother met her burden of establishing that extraordinary circumstances existed. The mother did not challenge the court's determination that the child's best interests were served by the award of sole custody to the grandmother.

Matter of Johnson v Wellington, 185 AD3d 1549 (4th Dept 2020)

AFC's Contention Of Ineffective Assistance Was Not Properly Before The Court On Appeal; Family Court Properly Granted Grandmother Visitation

After a hearing, Family Court granted petitioner grandmother visitation with two of her grandchildren over the objection of respondents, the children's parents (appeal No. 1). The court also dismissed, without a hearing, respondents' petition to modify the order in appeal No. 1 and for a determination that petitioner violated the order (appeal No. 2). The Appellate Division affirmed. The appellate Attorney for the Children's (AFC) contention that the subject children were denied effective assistance of counsel in each appeal on the ground that the trial AFC failed to meet with the children was based on matters outside the record. Moreover, a notice of appeal was not filed on behalf of the children. As a result, this contention was not properly before the Appellate Division. In appeal No. 1, the court properly awarded petitioner visitation, which she had standing to seek over respondents' objections pursuant to Domestic Relations Law § 72 (1). The record clearly established that, despite the animosity between the parties, petitioner had a loving and beneficial relationship with the children that respondents permitted and encouraged. In addition, the court found petitioner's testimony was credible and there

was no evidence in the record that petitioner or her husband did anything that undermined respondents' relationship with the children. Accordingly, there was a sound and substantial basis in the record to support the court's determination to grant petitioner visitation with the subject children. Furthermore, in appeal No. 2, the court properly dismissed, without a hearing, respondents' petition insofar as it sought modification of the prior order because the petition did not allege a change in circumstances. Similarly, a hearing was not required with respect to respondents' contention that petitioner violated the order in appeal No. 1 because the petition failed to set forth sufficient allegations that would have supported such a finding. Respondents merely alleged that petitioner allowed her husband to interact with the subject children during visitation. The order in appeal No. 1 did not prohibit such interaction. Thus, the allegations were insufficient to support a finding that petitioner violated the order.

Matter of Honeyford v Luke, 186 AD3d 1049 (4th Dept 2020)

Court Properly Continued Mother's Primary Physical Custody Of The Subject Child

Family Court ordered that the parties were to have joint legal custody of the subject child and that the mother was to continue to have primary physical custody of the subject child. The Appellate Division affirmed. Both parties were fit parents who loved the subject child and were determined to act in his best interests. Although an award of primary physical custody to the father would not have been unreasonable based on the evidence adduced at the hearing, there was a sound and substantial basis in the record for the court's determination that it was in the child's best interests to continue his primary physical residence with the mother.

Matter of Foster v Ouderkirk, 187 AD3d 1573 (4th Dept 2020)

Court Properly Granted Father Sole Custody But Erred In Holding Mother Committed Family Offense Of Reckless Endangerment

Family Court granted petitioner father sole legal and physical custody of the subject child with visitation to respondent mother (appeal No. 1). Additionally, the court found that the mother committed the family offense of reckless endangerment in the second degree against the child and directed the mother to refrain from committing any criminal offense against the child (appeal No. 2). The Appellate Division affirmed the order in appeal No. 1, reversed the order in appeal No. 2 and dismissed the family offense petition. In appeal No. 1, the father established a change in circumstances sufficient to warrant an inquiry into whether a modification of the custody and visitation arrangement was in the best interests of the child. The evidence at the hearing established the requisite change in circumstances based upon, among other things, the mother's inability to handle the then 3 ½ -year-old child's purported misbehavior and her resort to inappropriate physical discipline to punish the child, and the parties' heightened inability to communicate in a manner conducive to sharing joint custody. Furthermore, the court

properly determined that modification of the existing custody and visitation order was in the best interests of the child. The record established that the court's determination resulted from a careful weighing of the appropriate factors and had a sound and substantial basis in the record. In appeal No. 2, the father failed to establish by a fair preponderance of the evidence that the mother committed the family offense of reckless endangerment in the second degree. The mother's acts did not create a substantial risk of serious physical injury.

Matter of Morales v Vaillant, 187 AD3d 1591 (4th Dept 2020)

Court Properly Determined Supervision Was Not Required For Father's Live-In Girlfriend's Interaction With The Children

Family Court determined that respondent father's live-in girlfriend did not require supervised when she interacted with the subject children. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination. Despite the girlfriend's criminal history and past substance abuse issues that led to the lose of her own children, the court credited the girlfriend's testimony that she was drug free for seven years, was employed, and had been a law-abiding citizen since her most recent conviction in 2012. The court also credited testimony of the girlfriend's sister and mother, who had no concerns about the girlfriend's interaction with the children. There was no basis to disturb the court's credibility determination, which was entitled to great deference.

Matter of Kerr v Kerr, 187 AD3d 1593 (4th Dept 2020)

Court Properly Granted Aunt's Motion To Dismiss Mother's Modification Petition

Without a hearing, Family Court granted the subject children's aunt's (aunt) motion to dismiss the petition filed by petitioner mother which sought to modify prior custody orders by granting the mother sole legal and residential custody of her daughter and son. The Appellate Division affirmed. The mother failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing. The mother's contentions were rejected that the allegations in the petition regarding her employment and residence demonstrated a change in circumstances. The mother held the same job and lived in the same residence at the time she filed her petition as she did at the time of the custody trial in 2017. The mother's further contention was rejected that a change in circumstances was demonstrated because the aunt started her son on a medication without court permission. The mother failed to include in the record on appeal the court's prior custody orders or evidence of some other directive of the court that concerned the administration of medication. Therefore, the record is not adequate to review this contention by the mother. Furthermore, the mother's contention was rejected that a change in circumstances was demonstrated because the children expressed a preference for living with her as opposed to the aunt. The children were seven and five years old. Thus, the children were too young and not of sufficient maturity for their alleged desires to reside with the mother to have demonstrated a

change in circumstances. None of the mother's other allegations warranted a hearing or precluded the grant of the aunt's motion to dismiss the petition.

Matter of Williams v Reid, 187 AD3d 1593 (4th Dept 2020)

Court Properly Awarded Custody To Child's Adult Sister

Family Court granted custody of the subject child to petitioner, the child's adult sister. The Appellate Division affirmed. Petitioner established the existence of extraordinary circumstances which gave her standing to seek custody of the child. The child was immediately removed from respondent mother's custody after birth and placed in foster care where she remained for two years before she was placed with petitioner. At the time of the trial, the child was in petitioner's care for almost one year and had never lived with the mother. The foregoing evidence, along with the mother's admission in a separate neglect proceeding to neglect of the child, supplied the threshold showing of extraordinary circumstances. The record supported the court's determination that it was in the child's best interests for petitioner to have custody. The mother failed to testify at the trial or present any proof to counter petitioner's petition for custody. The mother's further contention was rejected that the court erred when it appointed a new Attorney for the Child during the trial without an adjournment of the trial. On the start of the second day of the trial, the original AFC was recused due to a conflict of interest. Thus, the court properly appointed a new AFC. The court did not abuse its discretion in denying the request for an adjournment. Although the new AFC had not met with the mother, the child, or petitioner, the mother had not responded to the prior AFC and there was no indication that she would respond to the new AFC. Moreover, in light of the child's young age, she would not have been able to express her wishes to the AFC. The new AFC actively participated in the trial, assured the court that she would look at a copy of the transcripts, submit a written summation at a later time, which she did. The mother's contention that it was highly unlikely that the new AFC ever reviewed the trial transcript was mere speculation.

Matter of Watkins v Hart, 187 AD3d 1599 (4th Dept 2020)

Appeal From Best Interests Determination Was Moot; Finding of Extraordinary Circumstances Affirmed

Family Court found extraordinary circumstances, and determined the subject child's best interests were served by awarding petitioner grandparents custody and supervised visitation to respondents, the child's parents. Respondent father appealed. During the pendency of the appeal, the court entered an order on consent of the parties that continued custody with petitioners and awarded respondents unsupervised visitation. The Appellate Division dismissed the appeal except insofar as the father challenged the finding of extraordinary circumstances, and affirmed. The later consent order rendered moot the father's challenge to the court's finding regarding the child's best interests, but not his challenge to the court's finding of extraordinary circumstances. The ordering paragraph in the consent order appealed which purported to reserve the father's right to

challenge the entirety of the consent order was ineffective and unenforceable. The litigants had no authority to stipulate to enlarge the Appellate Division's appellate jurisdiction nor could they predetermine the scope of appellate review. Thus, the appeal was dismissed except insofar as the finding of extraordinary circumstances was concerned. On the merits of that challenge, the court's finding was affirmed for reasons stated in Family Court's written decision.

Matter of Gorski v Phalen, 187 AD3d 1670 (4th Dept 2020)

Court Properly Awarded Primary Physical Custody To Grandmother

Family Court awarded respondent father and petitioner maternal grandmother (grandmother) joint legal custody of the two subject children, with primary physical custody to the grandmother. The Appellate Division dismissed the appeal as moot insofar as it concerned the oldest child who had reached the age of majority, and otherwise affirmed the order as to the younger child. The grandmother met her burden of establishing that extraordinary circumstances existed to warrant an inquiry into whether it was in the best interest of the younger child (child) to award her custody. The evidence at the hearing established that the child's biological mother was deceased. Additionally, the individual who previously had custody relinquished custody of the child and the father had gone years without seeing the child. Furthermore, the evidence at the hearing established that the child was doing well in school while living with the grandmother pursuant to a temporary order, and the grandmother appeared willing to foster a relationship between the child and the father. The father, on the other hand, had only just before the hearing reconnected with the child. Moreover, the father's request for physical custody of the child, which would have required the child to move to the father's residence in South Carolina, was against the child's wishes. Thus, the court's custody determination was in the best interests of the child.

Matter of Hilkert v O'Dell, 187 AD3d 1676 (4th Dept 2020)

Court Properly Refused To Award Mother Sole Physical Custody; Order Should Have Specified That The Family Offense Petition Was Dismissed

After a hearing on the mother's petition for custody of the child and on her family offense petition against the father, Family Court ordered the parties to share joint legal and physical custody of the subject child. The Appellate Division modified, dismissed the family offense petition, and otherwise affirmed. In the court's written decision, in addition to the custody determination, the court also dismissed the mother's family offense petition. However, the order appealed by the mother did not expressly mention that the court dismissed the family offense petition and referenced only its resolution of the mother's custody petition. The court properly refused to award the mother sole physical custody of the child. The court's determination that it was in the child's best interests to award the parties joint legal and physical custody was supported by a sound and substantial basis in the record. The record established that the court weighed the appropriate factors, and the determination of the court, which was in the best position to

evaluate the character and credibility of the witnesses was to be accorded great weight. With respect to the mother's contention challenging the dismissal of the family offense petition, where, as here, there was a conflict between the decision and the order, the decision controlled. Thus, the order required conformation to the decision, and the family offense petition was dismissed. Moreover, the court properly determined that the mother failed to prove by a fair preponderance of the evidence that the father's alleged conduct established the relevant family offense. There was no reason to disturb the court's credibility determinations or its conclusion that the father did not commit the relevant family offense of harassment in the second degree. The record did not support the conclusion that the father intended to harass, annoy or alarm the mother. Therefore, the mother did not meet her burden of establishing a family offense was committed by the father.

Matter of Mench v Majerus, 188 AD3d 1651 (4th Dept 2020)

Dismissal Of Relocation Petition Without A Hearing Was Error

Family Court granted respondent father's motion to dismiss petitioner mother's petition which sought permission to relocate with the subject child from Ontario County to Monroe County. The Appellate Division reversed, denied the motion, reinstated the petition, and remitted the matter for further proceedings. On the mother's previous appeal from an order that denied her prior relocation petition, the Appellate Division concluded that Family Court erred when it dismissed the prior petition because the mother was not required to establish a change in circumstances to warrant a modification of the existing order of custody and visitation. The order on the prior appeal was nevertheless affirmed because the mother failed to establish that the best interests of the child were served by the proposed relocation. While the mother's previous appeal was pending, she filed the new relocation petition at issue on this appeal. In the new petition, the mother alleged that the child's best interests were served if relocation was permitted because the child was accepted into an advanced ballet school in Monroe County that required significant weekly commute times from their current residence in Ontario County. The mother also alleged that she worked at a job in Monroe County that offered advancement possibilities that were negatively impacted by her commute. Family Court granted the father's motion to dismiss the new petition on the ground that the new petition suffered from the same flaw as the original petition, i.e. that there had been no change in circumstances. The Appellate Division's decision on the prior appeal was released shortly after the court issued the determination at issue on this appeal. Family Court erred in dismissing the new petition without a hearing. The mother alleged that she had specific employment advancement opportunities at her job in Monroe County. Economic necessity may present a particularly persuasive ground to permit the proposed relocation. Furthermore, the mother alleged that the relocation would enhance the child's extracurricular activities, which is a factor that may support a relocation. In addition, the Attorney for the Child indicated that the child favored the relocation, another factor that may support a relocation petition. Consequently, the petition sufficiently alleged that the relocation was in the child's best interests and the court erred in dismissing it on the ground that it

did not. To the extent that the decision indicated that the court dismissed the petition on the ground that the mother failed to allege a sufficient change in circumstances, that was error.

Matter of Betts v Moore, 188 AD3d 1747 (4th Dept 2020)

It Was In The Child's Best Interests To Remain In The Custody Of The Foster Parents Even Though The Child's Great Aunt Had Custody Of Siblings

Family Court dismissed the custody petition filed by the subject child's great aunt (aunt). The Appellate Division affirmed. The aunt's contentions were rejected that DCFS failed to contact and inform her of her right to attempt to become a foster parent or otherwise obtain custody as statutorily required, and that she should not have been "penalized" for her failure to seek such relief within 12 months of foster care placement. At all relevant times, the aunt knew that the child had been placed in foster care. However, the aunt did not express any interest in seeking foster care placement or custody of the child until two years after the child was born. Shortly after the child was born, the aunt declined to be considered a resource for the child because she was already overwhelmed with caring for the child's siblings. Thus, even if it was assumed that DCFS violated its statutory duty to inform as alleged by the aunt, reversal was not required because the aunt was not prejudiced by such an error. Furthermore, the evidence at the dispositional hearing established that it was in the child's best interests to have been freed for adoption rather than placed in the custody of the aunt. Although the record established that the aunt was loving and was able to provide the child a suitable home, the child was in the care of the foster parents since she was five weeks old, had developed relationships with the foster parents' extended family, and had known no other home. Additionally, the child had bonded with the foster parents who ensured that she was happy, healthy, and well provided for. Although the aunt had custody of the child's siblings, the rule that required keeping siblings together was not absolute and may be overcome where it was not in the best interests of the child. In this case, it was not in the subject child's best interests to reside with the aunt merely because the aunt had custody of the child's siblings, especially because the subject child never resided with her siblings. Moreover, the relationship that the subject child had with her siblings was initiated and encouraged by the foster parents. The aunt's appeal from a subsequent order that, inter alia, terminated the subject child's mother's parental rights, was dismissed on the ground that the aunt was not an aggrieved party.

Matter of Sandy L.S., 188 AD3d 1751 (4th Dept 2020)

Court Erred In Granting Relocation Petition; Father Failed To Establish Relocation Was In the Best Interests of the Child

Family Court granted petitioner father's relocation petition which allowed the father to relocate to the State of North Carolina with the subject child. The Appellate Division modified, denied the petition, vacated multiple parts of the order, otherwise affirmed and remitted the matter for further proceedings. The court's determination that the

father met his burden of establishing the proposed relocation was in the child's best interests was error and lacked a sound and substantial basis in the record. Although the court considered the relevant *Tropea* factors (see *Tropea v Tropea*, 87 NY2d 727 [1996]), the court erred in its application of those factors to the facts and circumstances of this case. The father failed to establish that the child's life would have been enhanced economically, emotionally, and educationally by the proposed relocation. While the father established that he would enjoy greater economic job opportunities in North Carolina, those nominal financial gains would have been negated by the greater cost of living in the area of North Carolina where he intended to move. The father also had unrealistic goals for housing in North Carolina. Notably, the father testified that he paid monthly rent of \$900 for a home in Olean, New York, but wanted to purchase a home in North Carolina for \$200,000 - \$250,000. The father acknowledged that he could not afford a home within that price range on his own and would need the financial assistance of family, his employer, and his fiancée. There was no evidence in the record that anyone had committed to provide father with financial assistance or had the financial ability to do so. The father also failed to establish that the child would have received a better education in North Carolina because there was no evidence in the record that compared the schools in North Carolina to schools in Olean, New York. Furthermore, the father admitted that he had "zero" family living in North Carolina whereas the father's mother, the maternal grandmother, great-grandmother, and great-grandfather all lived in Olean, New York. Additionally, the father's aunt lived in a nearby town. The father therefore failed to establish that he and the child would have received similar support if they relocated to North Carolina. The only factor that supported the father's request for relocation was a "fresh start" away from Olean where he and the mother struggled with an opiate addiction. Standing alone, that factor was insufficient to warrant relocation. Since the court's order insofar as it addressed visitation was based upon the child's relocation to North Carolina, those aspects of the order were vacated and the matter was remitted for the court to fashion an appropriate visitation schedule with the father in Olean, New York and the mother in Hamburg, New York.

Matter of Gasdik v Winiarz, 188 AD3d 1760 (4th Dept 2020)

Court Erred In Granting Motion To Dismiss Father's Modification Petition

Family Court dismissed petitioner father's petition which sought to modify a prior order of custody and visitation entered in 2012 (2012 order). The Appellate Division reversed, denied respondent's motion to dismiss, reinstated the petition, and remitted the matter to Family Court for further proceedings. Respondent's motion to dismiss the petition was based upon the contention that the father had not complied with the provision mental health treatment provision of an April 2010 order of custody and visitation (2010 order) that required him to successfully complete mental health treatment before petitioning for modification of the custody or visitation arrangements set forth in the 2010 order. The mental health treatment provision of the 2010 order was no longer in effect because the 2012 order superseded it. The 2012 order granted custody to respondent and awarded the father monthly visitation, but did not include a mental health treatment provision with respect to the father. Moreover, the court lacked

the authority to condition a future application for modification of the father's visitation on his participation in mental health counseling. Thus, the court erred when it granted respondent's motion to dismiss. Furthermore, the father made a sufficient evidentiary showing of a change in circumstances which required a hearing with respect to the allegations in the petition.

Matter of Lane v Rawleigh, 188 AD3d 1772 (4th Dept 2020)

Court Properly Increased Mother's Visitation With The Subject Children

In this post-judgment of divorce proceeding, Supreme Court granted the portion of the plaintiff mother's motion which sought to increase her visitation with the subject children. The Appellate Division affirmed. Defendant father's contention was rejected that the mother failed to demonstrate a sufficient change in circumstances since the time of the judgment which warranted an inquiry into the best interests of the children. The record established that the father was living entirely in Canandaigua when the judgment of divorce was issued, and the judgment granted the father significant time with the children during the week. However, the mother established that the father then began attending college in Ithaca and lived there during the week. When the father was in Ithaca during the week, the children were cared for entirely by the paternal grandmother. Additionally, the mother moved back to Canandaigua from Albany at approximately the same time the judgment was issued. Thus, the combined effect of the parties' relocations was a change of circumstances which warranted a reexamination of the existing custody and visitation arrangement. Furthermore, although not dispositive, the 12- and 14-year-old children stated that they wished to spend more time with the mother. The father's further contention was rejected that the court delegated to the children its responsibility to set a visitation schedule. The record established that the schedule issued by the court was the product of the court's careful consideration of the appropriate factors and it had a sound and substantial basis in the record. The mere fact that the Attorney for the Children drafted the schedule was of no moment. Absent a drafting error, which the father did not allege, the order was a fully enforceable court order.

Hendershot v Hendershot, 299 AD3d 880 (4th Dept 2020)

Court Properly Awarded Sole Legal And Physical Custody To The Father

Family Court awarded sole legal and physical custody of the subject child to petitioner-respondent father. The Appellate Division affirmed. On appeal, respondent-petitioner mother's contentions were rejected that Family Court's custody determination lacked a sound and substantial basis in the record. The evidence in the record, which included testimony obtained during the *Lincoln* hearing established that the father and the child engaged in various activities together, that the father supported the child's schooling, and that the father sought appropriate counseling for the child. Additionally, the father owned the home he lived in with his wife, whereas the mother lived with the child's maternal grandmother. Furthermore, the record established that when the child lived

with the mother, the child was allowed to be in the presence of and supervised by the mother's partner, who was a registered sex offender. The father also testified that he was worried for the child's safety when the child was in the mother's care. Specifically, the father described multiple instances in which the mother behaved inappropriately toward the child, and stated that he observed a hand mark on the child as well as a bruise on his face while the child was in the mother's care.

Matter of Papineau v Sanford, ___ AD3d ___, 2020 WL 7653744 (4th Dept 2020)

FAMILY OFFENSE

Fair Preponderance Of Evidence Supported Findings That Father Committed Family Offense Of Assault And That Father Neglected Subject Child

Family Court issued an order of protection directing father to stay away from mother upon a finding that father committed the family offense of assault in the third degree. The court further determined that father neglected the subject child and that the child should remain in the custody of the maternal grandmother. The court also placed father under the supervision of petitioner Department of Social Services. The Appellate Division affirmed. The mother's testimony that, during an argument, father attacked her and caused her to sustain a broken tooth and a broken wrist, which required mother to undergo physical therapy and might require future surgery, was sufficient to establish father committed the family offense of assault in the third degree, including the element of physical injury. The neglect finding was supported by evidence at the fact finding hearing that the child witnessed and intervened in an incident of domestic violence. Additionally, there was evidence of a pattern of ongoing domestic violence between father and mother fueled by drug and alcohol abuse. Thus, the child was placed in imminent risk of emotional harm. Father's contention that the court erred in continuing the child's placement with the maternal grandmother was mooted by a superseding custody order entered on the consent of the father and the mother.

Matter of Holli H. v Joseph R., 179 AD3d 1524 (4th Dept 2020)

Refusal To Dismiss Family Offense Petition Was Error

Family Court determined that respondent committed the family offense of disorderly conduct (an offense that was not alleged in the petition) and issued an order of protection that directed respondent to refrain from committing criminal offenses against petitioner. The Appellate Division reversed and dismissed the petition. Petitioner alleged in her petition that respondent committed the family offenses of aggravated harassment in the second degree, assault in the second or third degree, menacing in the second or third degree, and sought an order of protection. The court's refusal to dismiss the petition was error. The petition did not adequately plead that respondent committed disorderly conduct.

Matter of Kowalewski v Rushing, 185 AD3d 1449 (4th Dept 2020)

ORDER OF PROTECTION

Respondent Intended To Harass Petitioner; Order Of Protection Properly Issued

Family Court entered an order of protection directing respondent to stay away from petitioner upon the determination that respondent committed the family offense of harassment in the second degree pursuant to Penal Law § 240.26 (3). The Appellate Division affirmed. Petitioner alleged that she found respondent hiding in her bedroom closet while she got dressed in that room. Additionally, petitioner alleged that respondent secretly placed a cell phone with a camera in her bedroom aimed at her bed, then monitored petitioner from a laptop in a nearby room. The evidence at the hearing established that respondent committed the conduct alleged by petitioner and respondent's course of conduct evidenced a continuity of purpose to harass, annoy or alarm petitioner. Respondent's contentions were rejected that he played a joke when he hid in the closet or that he merely intended to startle petitioner. Thus, based upon respondent's conduct and the surrounding circumstances, the record supported the court's determination that petitioner met her burden and established by a fair preponderance of the evidence that respondent committed harassment in the second degree.

Matter of Wandersee v Pretto, 183 AD3d 1245 (4th Dept 2020)

Court Properly Issued Order Of Protection

Family Court issued an order of protection that directed respondent to stay away from petitioner. The Appellate Division affirmed. Respondent committed family offenses against petitioner during the time when petitioner sought to break off a five-year relationship with respondent and have him move out of her residence. Respondent's contention was rejected that reversal was mandated on the ground that the court based its determination, in part, on incidents that were not alleged in the petition. Inasmuch as respondent failed to make any showing of prejudice, the Appellate Division exercised its discretion pursuant to CPLR 3025© and deemed the petition amended to conform to the proof presented at the hearing. The record supported the court's determination that petitioner established by a preponderance of evidence that respondent committed the family offense of harassment in the second degree. Petitioner testified that respondent pushed her twice during an argument, and respondent admitted one of the pushes. The record further supported the court's determination that respondent committed the family offense of stalking in the fourth degree inasmuch as respondent engaged in a course of conduct he should have reasonably known would likely cause reasonable fear of material harm to the physical health, safety, or property of petitioner. Specifically, respondent twice violated a temporary order of protection issued by the court, pushed petitioner down on a bed to kiss her, threatened to burn down petitioner's house, and to beat her physically to the point that she required hospitalization. Although petitioner's testimony of verbal threats, without more, could not establish menacing in the third degree, the course of conduct which supported the determination that respondent committed stalking in the fourth degree also supported the determination that

respondent committed the family offense of menacing in the second degree. The fact that petitioner was placed in reasonable fear of physical injury by respondent's course of conduct was readily inferred from the conduct and the circumstances that surrounded the dissolution of the parties' relationship. In light of the evidence that supported the three family offenses, petitioner established that an order of protection in her favor was warranted (see Family Ct Act § 812 [1]). Respondent's contention was rejected that the court abused its discretion when it issued the order of protection for a duration of two years (*id.*, §§ 841 [d]; 842).

Matter of Cousineau v Ranieri, 185 AD3d 1421 (4th Dept 2020)

Court Properly Directed Parties To Ensure The Children Were To Have No Contact With The Mother's Male Friend

Family Court ordered the parties to ensure that the subject children have no contact with a male friend of respondent mother. The Appellate Division affirmed. The male friend was the ex-husband of petitioner father's current wife and was a parent of the subject children's stepsiblings. Family Court properly declined to entertain the mother's general motion to dismiss the father's modification petition after the father rested his case-in-chief but before the court conducted the *Lincoln* requested by the Attorney for the Children. The mother's contention was rejected that the father failed to establish that there had been the requisite change in circumstances that warranted an inquiry into the best interests of the children. There was a sound and substantial basis in the record that supported the court's determination that the mother and the father should ensure that the mother's male friend was to have no contact with the children. The father presented unrefuted evidence that established the mother and her male friend started a friendship that was perhaps intimate, despite the fact that the mother and the father had previous concerns over the male friend's contact with the subject children based upon the male friend's behavior with his own children. The father testified about an incident during which the subject children became frightened and tearful when they saw the male friend's vehicle in the mother's driveway when the children were returning home to the mother after weekend visitation with the father. The father further testified that the male friend's own children had orders of protection against him in the past. The statement of the oldest child during the *Lincoln* hearing also provided support for the court's determination. The court had wide discretion over visitation matters which included the power to restrict interactions of the children with third parties. There was no basis to disturb the court's determination in this regard. The mother's further contention that the court's bias against her deprived her of a fair and impartial verdict was not preserved for appellate review because a recusal motion was not made. In any event, the mother did not allege an extrajudicial source of the court's alleged bias required for disqualification. To the extent that the mother argued that her constitutional rights to due process and to confer with her attorney were violated, those contentions were not preserved for appellate review because the mother failed to make those specific objections during the proceedings.

Matter of Tartaglia v Tartaglia, 188 AD3d 1754 (4th Dept 2020)

Respondent Consented To Referee's Authority To Decide Case; Order Of Protection Was Properly Issued

Respondent appealed from, inter alia, an order of protection, entered on his default, requiring him, among other things, to remain at least 500 feet away from petitioner and to refrain from any communication with petitioner. The Appellate Division affirmed. Respondent's contention was rejected that the record did not establish that he consented to having the Referee hear and determine the matter. Inasmuch as the Referee's authority to hear and determine the case was a subject of contest prior to respondent's later default, that issue was subject to review. Even if it was assumed that the appeal was not moot despite the expiration of the order of protection, the order of protection did not lack the essential jurisdictional predicate of respondent's consent to have the matter heard and determined by the Referee.

Matter of McIntosh v McIntosh, ___ AD3d ___, 2020 WL 7653780 (4th Dept 2020)

PATERNITY

Dismissal Of Petition Should Have Been Without Prejudice

Family Court dismissed the paternity petition filed by the maternal grandmother (petitioner) and custodian of the subject child. The petition sought a determination that respondent was the biological father of the child. The Appellate Division modified on the law and dismissed the petition without prejudice, and as modified, the order was affirmed. Petitioner alleged, inter alia, that respondent had sexual intercourse with the mother at the time of the child's conception. Respondent, a resident of North Carolina, moved to dismiss the petition on, inter alia, the grounds that petitioner failed to state a cause of action and that the court lacked personal jurisdiction over him. The court granted the motion and dismissed the petition, with prejudice, on the ground that the court lacked personal jurisdiction pursuant to Family Court Act § 519. It was error for the court to grant respondent's motion on the ground that it lacked personal jurisdiction pursuant to Family Court Act § 519. Section 519 was enacted to provide exceptions to the common-law rule that paternity proceedings customarily abated upon the unavailability of the putative father, and did not prevent personal jurisdiction from being established over an available party. In a paternity proceeding, personal jurisdiction over a nonresident putative father could have been established pursuant to Family Court Act § 580-201 (6), (8). However, petitioner failed to allege in her petition that respondent engaged in sexual intercourse with the mother in New York State at the time of conception, or that he had any other relevant ties to New York State, and no other grounds for jurisdiction applied (see Family Ct Act § 580-201 [6], [8]). Under the circumstances of this case, the court should have granted the motion on the ground that petitioner failed to state a cause of action predicated upon respondent's sexual intercourse with the mother in New York State. Since the dismissal was not on the merits, the petition should have been dismissed without prejudice.

Matter of Joyce M.M. v Robert J.G., 187 AD3d 1610 (4th Dept 2020)

TERMINATION OF PARENTAL RIGHTS

TPR Warranted; Contentions That AFC Was Ineffective Were Based On Matters Outside Record; Record Did Not Support Allegation That AFC Had Conflict Requiring Disqualification

Family Court terminated mother and father's parental rights with respect to the subject children based upon a finding of permanent neglect and freed the children for adoption. The Appellate Division affirmed. Petitioner, Department of Children and Family Services, met its burden of demonstrating 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 and other assistance aimed at ameliorating or resolving problems preventing the children's return to the mother's care. Additionally, mother failed to substantially and continuously plan for the future of the children even though financially and physically able to do so. Although mother participated in some of the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the children and continued to prevent the children's safe return. Therefore, the record supported the court's determination that termination of mother's parental rights was in the best interests of the children. Furthermore, a suspended judgment was not warranted because any progress made by the mother prior to the dispositional determination was insufficient to require any further prolongation of the children's unsettled familial status. With respect to the father, there was no evidence to support that he had a realistic plan to provide an adequate and stable home for the children. The record also supported the court's determination that termination of father's parental rights was in the best interests of the children. The mother's allegation that the AFC was ineffective because she substituted her judgment for that of the children was based on matters outside the record. Moreover, the record did not support mother's contention that the AFC represented conflicting interests requiring disqualification. Reversal was not required by petitioner's failure to notify the children's uncle and his fiancée of the instant proceeding, nor was Family Court's prehearing ruling precluding certain evidence reversible error.

Matter of Giohna R., 179 AD3d 1508 (4th Dept 2020)

TPR Warranted On Ground Of Permanent Neglect; Father Failed To Cooperate With Services

Family Court terminated respondent father's parental rights with to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner demonstrated by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the parent-child relationships. Petitioner established that the father was uncooperative and argumentative with service providers and was unable to consistently apply the knowledge and benefits he gained from the services provided. Thus, the father's refusal to engage with services demonstrated a failure to address or gain insight into the problems that led to the removal of the children and continued to prevent the children's safe return. Furthermore, the court did not abuse its discretion

when it refused to enter a suspended judgment with respect to each child because the record established that the father did not have a realistic, feasible plan to care for the children. Any progress made by the father was insufficient to warrant prolongation of the children's unsettled familial status.

Matter of Jewels J., 180 AD3d 1346 (4th Dept 2020)

TPR Warranted; Incarcerated Father Abandoned Child

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of abandonment. The Appellate Division affirmed. The Court held that the petitioner Department of Social Services established by clear and convincing evidence that father abandoned the child. Even though father was incarcerated during the six months preceding the filing of the abandonment petition and was subject to an order of protection precluding direct contact with the child, father failed to meet his obligation to maintain contact with the person that had legal custody of the child. Petitioner had legal custody of the child and the Social Services caseworker testified that she provided father with her contact information, sent father regular updates regarding the child, and informed father that he needed to plan for the child's future. In return, the caseworker received only one letter from father during the relevant period. This contact was insubstantial and did not preclude a finding of abandonment. Similarly, the father's expressions of a subjective intent to care for the child at a future time did not preclude a finding of abandonment. The father's assertions at the hearing that he sent additional letters to the caseworker presented an issue of credibility that the court was entitled to resolve against him. In addition, the court's denial of the father's request to adjourn the hearing for a substitution of assigned counsel and to permit father's counsel to meet further with the father to prepare for the hearing were not an abuse of discretion. Contrary to the father's contention, he received meaningful representation.

Matter of Anthony J.A., 180 AD3d 1376 (4th Dept 2020)

Court Properly Terminated Father's Parental Rights; No Conflict Of Interest For AFC Or Public Defender's Office; AFC Did Not Fail To Advocate For Child's Best Interests

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of permanent neglect; denied the father's motion to disqualify both the Attorney for the Child and the public defender's office for conflicts of interest; and denied the father's request for a suspended judgment. The Appellate Division affirmed. Regarding the motion to disqualify the AFC, there was no conflict of interest on the ground that other attorneys from the same legal aid society previously represented two of the mother's other children in an unrelated proceeding and advocated placement of the subject child in foster care. The father's argument was rejected that the AFC failed to advocate for the child's best interests. Although the AFC recommended that the child remain in foster care as opposed to being placed together with his siblings, the

caselaw relied upon by the father which stated that siblings should remain together was distinguishable. The subject child lived with his foster parents for the vast majority of his life, and had not developed a relationship with the mother's other children. Furthermore, even though the father had a prior attorney-client relationship with the public defender's office, the father failed to establish that his interests and the mother's interests were materially adverse. On the contrary, the record demonstrated that both parents wanted the child placed with family members rather than foster care. Therefore, the father's motion to disqualify the public defender's office was properly denied. In addition, petitioner met its burden and established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship. The father failed to adequately plan for the child's future when the father was physically and financially able to do so. Specifically, petitioner created a service plan for the father that required him to engage in chemical dependency treatment and mental health therapy, to obtain a stable source of income, and to find stable housing. Petitioner also provided the father with transportation assistance, regular correspondence including when he was incarcerated, and arranged visits between the father and the child. Despite petitioner's efforts, the father failed to comply with the service plan and missed appointments with caseworkers. In addition, the father's visits with the child were sporadic and he missed both medical and therapeutic visits for the child. Thus, Family Court properly terminated the father's parental rights and denied his request for a suspended judgment.

Matter of Carl B., 181 AD3d 1161 (4th Dept 2020)

Court Properly Terminated Incarcerated Mother's Parental Rights On Ground Of Permanent Neglect

Family Court terminated the incarcerated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner exercised diligent efforts over the course of at least one year to encourage and strengthen the parent-child relationship while the mother was incarcerated. Specifically, the caseworker sent the mother monthly letters informing her of service plan review meetings, provided her with updates on the child's condition and progress, and explained that if the child remained in foster care, the mother's parental rights could be terminated. In light of the distance from the child's foster home to the prison, the child's age, medical needs, and inability to speak, neither visitation nor telephone contact was feasible. In addition, the mother failed to substantially and continuously or repeatedly maintain contact with or plan appropriately for the future of the child. The mother's failure to provide any realistic or feasible alternative to having the child remain in foster care until the mother's release from prison supported the finding of permanent neglect. Moreover, termination of the mother's parental rights was warranted based upon the child's positive living situation in foster care, the absence of a more significant relationship between the mother and the child, the uncertainty that surrounded the mother's ability to care for the child, and the stability of her living situation.

Matter of Nykira H., 181 AD3d 1163 (4th Dept 2020)

Court Properly Terminated Incarcerated Father's Parental Rights

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the parent-child relationship both while the father was incarcerated and when he was released. Specifically, while the father was incarcerated, petitioner sent monthly letters to the father, advised him to complete mental health and substance abuse treatment upon release, investigated the father's sister as a potential placement resource for the child, and responded to the father's inquiries. When the father was not incarcerated, petitioner provided him with opportunities for mental health and substance abuse treatment, and arranged for his visitation with the child. The father's contention was rejected that Family Court erred when it determined that the father failed to plan for the future of the child. The father made no substantive progress in addressing his mental health or substance abuse issues. Additionally, there was no evidence that the father had a realistic plan to provide an adequate and stable home for the child. Moreover, the father did not identify a placement resource for the child while he was incarcerated nor did he have an alternative proposal if he was not released from prison. The father's failure to request a suspended judgment rendered that contention unpreserved for appellate review. Nevertheless, the father's lack of progress on the above issues rendered a suspended judgment unwarranted.

Matter of Jamarion N., 181 AD3d 1200 (4th Dept 2020)

Finding Of Permanent Neglect Affirmed

In three separate orders all entered on respondent father's default, Family Court terminated the father's parental rights with respect to his three children and transferred custody and guardianship of each child to petitioner. The Appellate Division dismissed the appeals except insofar as respondent challenged the finding of permanent neglect, and otherwise affirmed each order. Although no appeal lies from an order entered on default of the appealing party, the appeals nevertheless brought up for review any issue that was contested in the proceedings below, i.e., the fact-finding determination. On the merits, the father's contention was rejected that petitioner failed in its duty to make diligent efforts to encourage and strengthen his relationships with the subject children during the relevant time period.

Matter of Braylynn S., 181 AD3d 1205 (4th Dept 2020)

Record Supported Termination Of Father's Parental Rights Rather Than A Suspended Judgment

Family Court terminated respondent father's parental rights with respect to the subject

children on the ground of permanent neglect. The Appellate Division affirmed. The record supported the determination that termination of the father's parental rights, rather than a suspended judgment was in the children's best interests. Specifically, the father failed to complete his service plan and made inadequate efforts to exercise visitation with the children when he was able to do so. In addition, the children had been in foster care nearly their entire lives and had developed a strong, loving bond with the foster parents who wanted to adopt them. Any progress made by the father during the period of his most recent incarceration was insufficient to warrant further prolongation of the children's unsettled familial status.

Matter of Jason M., 181 AD3d 1206 (4th Dept 2020)

Court Properly Terminated Mother's Parental Rights On Ground Of Permanent Neglect

Family Court terminated respondent mother's parental rights on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it had exercised diligent efforts to encourage and strengthen the mother's relationship with the child. The mother's contention was rejected that because of her possible mental health issues, petitioner was required to do more than merely provide her with referrals for services and leave her to manage them on her own. Petitioner not only provided the mother with referrals for services but also regularly checked the mother's progress, repeatedly encouraged the mother to actively participate in the services recommended despite her unwillingness to do so and her refusal to accept the need for those services. Petitioner also attempted to send the mother transportation stipends. Thus, petitioner provided what services it could under the circumstances. Despite petitioner's diligent efforts, the mother failed to plan for the child's future because there was no evidence to establish that she had a realistic plan to provide an adequate and stable home for the child. Thus, the mother's parental rights were properly terminated and a suspended judgment was not warranted because any progress made by the mother prior to the dispositional determination was insufficient to warrant a prolongation of the child's unsettled familial status.

Matter of Janette G., 181 AD3d 1308 (4th Dept 2020)

Court Properly Terminated Father's Parental Rights Upon A Finding Of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to the subject children upon a finding of permanent neglect. The Appellate Division unanimously dismissed the appeal except insofar as the father challenged the finding of permanent neglect. Even though the order appealed was entered on default of the father, and no appeal lied from an order entered upon the default of the party that appealed, the appeal nevertheless brought up for review any contested issue in the proceedings below, i.e., Family Court's fact-finding determination with respect to permanent neglect.

The father's contention was rejected that petitioner failed to establish that he permanently neglected the subject children.

Matter of Maria P., 182 AD3d 1028 (4th Dept 2020)

TPR Warranted; Petitioner Exercised Diligent Efforts To Strengthen Parent-Child Relationship

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of permanent neglect, transferred guardianship and custody of the child to petitioner, and freed the child for adoption. The father's contention was rejected that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parent-child relationship. Petitioner provided appropriate services to the father, which included parenting education, mental health counseling, sexual behavior counseling, and an alcohol evaluation. Additionally, petitioner maintained regular supervised visitation with coaching, even after the father repeatedly threatened and behaved inappropriately toward the visitation supervisor. The father failed to successfully complete the programs and services offered to him and did not progress to a point where unsupervised visits could occur despite the efforts of petitioner. Moreover, the father lacked a realistic plan to provide an adequate and stable home for the child. Thus, the court properly concluded that the father permanently neglected the subject child.

Matter of Hannah W., 182 AD3d 1032 (4th Dept 2020)

Court Properly Revoked Suspended Judgment And Terminated Mother's Parental Rights

Family Court revoked a suspended judgment entered upon respondent mother's admission that she permanently neglected the subject child and terminated her parental rights with respect to that child. The Appellate Division affirmed. There was a sound and substantial basis in the record to support the court's determination that the mother failed to comply with the terms of the suspended judgment and the child's interests were best served by the termination of the mother's parental rights. The fact that the mother may not have understood the reasoning for or agreed with the terms and conditions of the suspended judgment did not render such provisions anything less than compulsory. The mother's constitutional challenges to the terms of the suspended judgment were unpreserved for appellate review. Any error committed by the court when it excluded certain photographs was harmless because the photographs depicted a residence that the mother conceded was not an appropriate home.

Matter of Michael S., 182 AD3d 1053 (4th Dept 2020)

Court Properly Terminated Mother's Parental Rights

Family Court terminated respondent mother's parental rights with respect to her

daughter on the ground of permanent neglect. The Appellate Division affirmed. The mother failed to plan for the future of the child. Although the mother completed parenting classes and maintained contact with the child, she did not complete mental health and substance abuse treatment. The mother also continued to have positive toxicology screens for cocaine. Therefore, the mother did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return. In addition, the evidence supported the court's determination that termination of the mother's parental rights was in the best interests of the child and the refusal to issue a suspended judgment was not an abuse of discretion. The steps taken by the mother to address her mental health and substance abuse issues were not sufficient to warrant further prolongation of the child's unsettled familial status particularly in light of the mother's continued criminal conduct. Although the record established that the child had a bond with the mother, it also established the child had a bond with her foster parents. Thus, there was no basis to disturb the court's determination to terminate the mother's parental rights.

Matter of Maria M., 183 AD3d 1250 (4th Dept 2020)

Court Properly Terminated Father's Parental Rights

Family Court determined respondent father abandoned the subject child (appeal No. 1) and, in a final order of disposition, terminated the father's parental rights (appeal No. 2). The Appellate Division dismissed appeal No. 1 because the dispositional order in appeal No. 2 brought up for review the propriety of the fact-finding order in appeal No. 1. The Court affirmed the order in appeal No. 2. The father's contention was rejected that Family Court's determination that he abandoned the child was error. The father had not seen the child since 2009 after the mother failed to return the child to the father's home in Pennsylvania following a weekend visit. Although the mother restricted the father's ability to speak with the child, the father's last conversation with the child was in 2015. Around that time, the father filed a petition in Pennsylvania which sought modification of the joint custody arrangement between him and the mother. A bench warrant was issued for the mother's arrest and the father was informed that the child resided in Jefferson County, New York. The father did not initiate a proceeding in New York to modify custody and testified that he was told there was nothing he could do to obtain custody until the mother was arrested. In 2016, the child was removed from the mother's care after a neglect petition was filed against her. The father was served with the petition by publication only. The father did not learn that the child had been placed in foster care until the termination petition was filed against him in August 2018. The father did not dispute that he failed to maintain contact with the child for the six-month period prior to the termination petition (Social Services Law § 384-b [4] [b]). The father's contention was rejected that contact with the child was infeasible or discouraged by the agency. The father's further contentions were rejected that the court failed to consider the mother's limitation of his contact with the child and petitioner's failure to personally serve him with the neglect petition against the mother. The father failed to meet his burden to establish that circumstances existed to prevent his contact with the child or agency or that the agency discouraged such contact.

Although the mother removed the child from the father's care and took the child to an undisclosed location in violation of the custody arrangement, the father did not report that violation, make any attempt thereafter to locate the child, or attempt to file a modification petition after his unsuccessful filing in Pennsylvania approximately six years after the mother left with the child. The father's assertion that he paid for the child's Medicare was unsupported by the record. Petitioner's alleged failure to give the father sufficient notice that the child was placed in foster care was insufficient to demonstrate that contact with the child was infeasible. The father's lack of awareness with respect to the neglect petition was not the reason the father failed to communicate with the child. After the father was served with the termination petition he failed to contact the child even though petitioner told him that he could write letters to the child. Father's contact with the foster parents and conversation with petitioner about the petition did not preclude a finding of abandonment.

Matter of Najuan W., 184 AD3d 1111 (4th Dept 2020)

Court Properly Terminated Mother's Parental Rights Due To Intellectual Disability

Family Court terminated the mother's parental rights with respect to the subject child. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that the mother was presently and for the foreseeable future unable, by reason of intellectual disability, to provide proper and adequate care for the child. Specifically, petitioner presented evidence that the mother's IQ score was 57, which had remained substantially constant and rendered her meaningfully unable to understand the child's significant medical needs and to effectively parent him. Additionally, petitioner presented the opinion of a psychologist that the mother was unable to safely care for the child both at the time of the psychologist's testimony and for the foreseeable future. The mother's contention was rejected that Family Court erred in giving weight to the psychologist's testimony. The psychologist interviewed and examined the mother, reviewed his prior psychological evaluation of the mother, reviewed documents from the child's foster parent and the mother's parent educators, and reviewed a prior psychological evaluation report of the mother compiled by another professional. The fact that the psychologist did not review certain of the mother's mental health records was not reason to discredit his testimony. The mother's further contention was rejected that the court erred by permitting lay witnesses to testify about the child's medical condition. Any such error was harmless because the result reached would have been the same without such testimony. It was undisputed that the child suffered from certain medical conditions, and testimony about the nature of those conditions was properly elicited through the child's pediatrician. The mother did not challenge the admission of the pediatrician's testimony on appeal. The mother failed to preserve for appellate review her contentions that the court erred in terminating her parental rights absent a finding that petitioner had made reasonable accommodations for her pursuant to the Americans with Disabilities Act, or that the court erred because it failed to adjourn the termination proceedings.

Matter of Bryson M., 184 AD3d 1138 (4th Dept 2020)

Court Properly Terminated Father's Parental Rights; Properly Denied Father's Request For A Suspended Judgment; Granted An Appropriate Adjournment Of The Dispositional Hearing

Family Court terminated respondent father's parental rights based upon the father's admission that he permanently neglected the subject child. The Appellate Division affirmed. The father's contention was rejected that the court abused its discretion when it granted a 10 week adjournment of the dispositional hearing rather than the four month adjournment he requested. The father's further contention was rejected that the court improperly denied his request for a suspended judgment. Although the father participated in several programs in prison, he had not made progress sufficient to warrant any further prolongation of the child's unsettled familial status. Even if the father was released from incarceration in the near future, he would have still needed to address the issues that led to the child's removal. The father's further contention was rejected that he was denied effective assistance of counsel inasmuch as the absence of strategic or other legitimate explanations for counsel's alleged shortcomings were not demonstrated.

Matter of Jazmine M., 185 AD3d 1457 (4th Dept 2020)

Court Properly Admitted Caseworkers' Notes Into Evidence

Family Court terminated the parental rights of respondents, the biological parents of the subject children. The Appellate Division affirmed. Respondents' contention was rejected that the court abused its discretion when it received in evidence notes prepared by two of petitioner's caseworkers. Contrary to the assertions of petitioner and the Attorney for the Children, respondents preserved for appellate review their challenges to the admission of the notes into evidence. Respondents objected to the notes of the first caseworker on the grounds that they raised on appeal, thus respondents' contentions with respect to that set of notes was preserved. The court overruled respondents' objections and rejected their challenges to the admission of the first caseworker's notes. Respondents were not required to repeat the same arguments in order to preserve their contentions with respect to the second caseworker's notes. A proper foundation for the admission of the notes was laid by the caseworkers' respective supervisors who were familiar with petitioner's record-keeping practices (see CPLR 4518 [a]). Even if petitioner did not meet the foundational requirements for admission of the notes, any error in their admission was harmless because the result reached would have been the same even had they been excluded.

Matter of Carmela H., 185 AD3d 1460 (4th Dept 2020)

Court Properly Terminated The Father's Parental Rights; Petitioner Made Diligent Efforts

Family Court adjudged the children to have been permanently neglected, terminated respondent father's parental rights, freed the children for adoption, and transferred the

guardianship and custody of the children to petitioner. The Appellate Division affirmed. The record amply demonstrated that petitioner established by clear and convincing evidence that it made the requisite diligent efforts to reunite the father with the children. The father's contention was rejected that petitioner failed to meet its burden because it presented evidence of diligent efforts only with respect to the one-year time period that coincided with the father's alleged permanent neglect of the subject children. The father argued that petitioner was required to demonstrate it exercised diligent efforts the entire time the children were in its custody. The statutory period for evaluating diligent efforts was either at least one year or 15 out of the most recent 22 months following the date such children went into the care of an authorized agency (see Social Services Law § 384-b [7][a]). Even if petitioner was required to present evidence of its diligent efforts outside the identified period of the father's alleged permanent neglect, the court considered evidence of petitioner's diligent efforts beyond the one-year period alleged in the petition. Specifically, there was clear and convincing evidence of petitioner's counseling, visitation, substance abuse treatment, and anger management treatment. Petitioner also provided respondent with information regarding the children. Furthermore, petitioner provided substantial evidence that the father refused to cooperate with its efforts as he revoked petitioner's access to his treatment records and unilaterally terminated his participation in counseling. Thus, the record established by clear and convincing evidence that although petitioner made affirmative, repeated, and meaningful efforts to assist the father, its efforts were fruitless because the father was utterly uncooperative. The father's further contention was rejected that petitioner failed to establish by clear and convincing evidence that he neglected the children. The father missed a substantial portion of scheduled visits with the children, reduced his participation in counseling services, and then stopped participating altogether. On the whole, the father's steadfast refusal to cooperate with petitioner and its service plan demonstrated his unwillingness to plan for the future of his children. Father also failed to obtain adequate and safe housing during the relevant time period. For the first 20 months after the children were placed in petitioner's care, the father continued living with his mother, whom he described as acting like a lunatic and who verbally assailed a caseworker. Thereafter, the father moved in with his significant other to a home that lacked enough beds for the children. Petitioner was unable to conduct a home study to evaluate the adequacy of the new residence because of threats made by the father. Additionally, a background check on the father's significant other returned unfavorable results. The father's further contention was rejected that the court abused its discretion when it refused to issue a suspended judgment. At the time of the dispositional hearing, the children had been in foster care for two and a half years, had bonded with the foster mother, and were doing well. The foster mother indicated her willingness to adopt the children. Although he was permitted to visit the children during that time, the father cancelled all such visits and did not maintain contact with the children. Moreover, the father refused to address the problems that led to the children's placement with petitioner in the first place. Thus, the court properly terminated the father's parental rights and freed the children for adoption.

Matter of Cheyenne C., 185 AD3d 1517 (4th Dept 2020)

Mother's Contentions Were Not Preserved Or Appealable

Family Court revoked a suspended judgment and terminated the mother's parental rights with respect to the subject child. The Appellate Division dismissed the mother's appeal. The mother's contentions were not raised before Family Court and were therefore unpreserved for appellate review. Additionally, the mother's contentions were directed at the prior order entered on consent that found permanent neglect and suspended judgment. Thus, the mother's contentions were beyond appellate review.

Matter of Raymond H., 186 AD3d 1125 (4th Dept 2020)

Court Properly Denied Motions To Vacate Default Orders That Terminated Mother's Parental Rights

In two separate orders, Family Court denied respondent mother's motions to vacate default orders that terminated her parental rights as to each of the subject children on the ground of abandonment after the mother failed to answer the abandonment petitions and failed to appear in court on the return date. The Appellate Division affirmed. Even if it was assumed that the mother established a reasonable excuse for the default when she asserted the petitions were never served upon her, the mother failed to demonstrate a meritorious defense to the abandonment petitions (see CPLR 5015 [a] [1]). The petitions alleged that the mother had no meaningful contact with the subject children during the six-month period immediately preceding the filing of the petitions (see Social Services Law § 384 [4] [b]). In support of the mothers motions, she did not dispute that she failed to visit or contact the children during the relevant time period. Thus, the motions were properly denied.

Matter of Marianys I., 187 AD3d 1570 (4th Dept 2020)

Court Properly Terminated Parental Rights On The Ground Of Mental Illness

Family Court terminated the parental rights of respondents mother and father on the ground of mental illness. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondents, by reason of mental illness, were presently and for the foreseeable future unable to provide proper and adequate care for the child. Testimony from petitioner's expert psychologists established that the child was in danger of being neglected if she returned to respondents' care at the present time or in the foreseeable future. Respondents' contention was rejected that they were denied effective assistance of counsel on the ground that separate counsel should have been appointed for each of them. Respondents made a motion that requested the same counsel represent both of them, which was properly granted by the court. Thus, respondents waived any challenge to the joint representation. Respondents also failed to establish that there were not strategic or other legitimate explanations for counsel's choices during the underlying proceedings. The father's further contention was rejected that the court should have recused itself was unpreserved because he failed to request that relief at the hearing, and the Appellate Division declined to address that issue in

the interests of justice. The father's further contention was rejected that the court erred when it permitted the admission of certain permanency reports into evidence because those reports were properly admitted under the business record exception to the hearsay rule (see CPLR 4518 [a]). The father's further contention was unpreserved that the court should have granted him a suspended judgment. There was no statutory provision that provided for a suspended judgment when parental rights were terminated based on mental illness.

Matter of Matilda B., 187 AD3d 1677 (4th Dept 2020)

No Appeal Lied From Termination Order Where Father Failed To Appear At The Dispositional Hearing

Family Court terminated respondent father's parental rights and freed the subject child for adoption. The Appellate Division dismissed the father's appeal. The father failed to appear at the dispositional hearing. The Father's attorney, although present at the hearing, elected not to participate in the father's absence. The father's refusal to appear constituted a default and the appeal was dismissed.

Matter of Irelynn S., 188 AD3d 1744 (4th Dept 2020)

Court Properly Terminated Father's Parental Rights

Family Court terminated the parental rights of respondents mother and father with respect to the subject children. The Appellate Division affirmed on an appeal by the father. The father's contention was rejected that denial of his request for new assigned counsel was error. The father failed to establish that good cause existed to necessitate dismissal of his assigned attorney. Moreover, any error in the admission of hearsay evidence at the fact-finding hearing was harmless because the court placed minimal, if any, reliance on the statements in question. Even without reference to the hearsay statements, there was clear and convincing proof presented at the fact-finding hearing that established the father permanently neglected the children.

Matter of Danyel J., 188 AD3d 1757 (4th Dept 2020)

Court Improperly Denied Respondent Mother's Attorney's Request For An Adjournment

Family Court terminated the parental rights of respondent mother with respect to the subject child on the ground that the child had been abandoned. The order was entered upon respondent's's default. The Appellate Division dismissed the appeal except insofar as respondent challenged the denial of her attorney's request for an adjournment, reversed that aspect of the order, and remitted the matter for further proceedings. Respondent failed to appear at the fact-finding hearing on the petition to terminate her parental rights and, although her attorney was present at the hearing, respondent did not participate. Thus, respondent's unexplained failure to appear at the

hearing constituted a default. Although no appeal lied from an order entered upon respondent's default, the appeal nevertheless brought up for review any issue that was subject to contest in the proceedings below, i.e., Family Court's failure to grant the request of the respondent's attorney for an adjournment. It was an abuse of discretion for the court to deny respondent's attorney's request for an adjournment. Under the unique circumstances of this case, i.e., that the court was aware of respondent's history of mental illness, that this was the first request for an adjournment on respondent's behalf, and that the child's situation would remain unaltered if the adjournment was granted, the court improperly denied the request for an adjournment. In addition, the court abused its discretion when it denied the request for an adjournment because of the serious concerns about respondent's competency to assist in her own defense, which raised the issue of whether it was necessary for the court to continue the appointment of a guardian ad litem. Accordingly, the matter was remitted for further proceedings on the petition.

Matter of Hayden A., 188 AD3d 1758 (4th Dept 2020)

Court Properly Terminated Parental Rights On The Ground Of Permanent Neglect

Family Court terminated the parental rights of respondents mother and father with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Petitioner met its burden and established by clear and convincing evidence that it made the requisite diligent efforts to reunite respondents with their children. The record amply established that petitioner presented respondents with services and resources to strengthen their relationship with the children, including parenting classes, therapeutic counseling, individual coaching, and mentoring. Additionally, petitioner coordinated supervised visits between respondents and the subject children. Despite petitioner's diligent efforts, respondents failed to adequately plan for the return of the children. Although respondents participated in the services petitioner provided, they did not improve their ability to accept responsibility and modify their behavior accordingly. Moreover, respondents did not gain insight into the problems that led to the removal of the children and continued to prevent their safe return.

Matter of Steven D., 188 AD3d 1770 (4th Dept 2020)

Court Properly Terminated Parental Rights; Petitioner Established Diligent Efforts Were Made

Family Court terminated the parental rights of respondents mother and father with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between respondents and the subject child. The evidence established that petitioner developed a service plan; helped respondents obtain public assistance recertification and mental health treatment, including

attachment therapy; provided referrals for domestic violence services, parenting classes, housing, and employment; provided transportation and parenting instruction; and facilitated supervised and unsupervised visitation. Respondents contentions were rejected that petitioner did not prove that they permanently neglected the child. Petitioner established that despite its efforts, respondents failed to plan appropriately for the child's future. Furthermore, the mother failed to preserve for appellate review her contention that Family Court should have imposed a suspended judgment. In any event, a suspended judgment was not warranted under the circumstances because any progress made by the mother prior to the dispositional hearing was insufficient to warrant further prolongation of the child's unsettled familial status.

Matter of Dante S., ___ AD3d ___, 2020 WL 7653748 (4th Dept 2020)

COURT OF APPEALS

Mother's Claim That The Trial Court Failed To Consider Effects Of Domestic Violence In The Best Interests Analysis Was Unpreserved

Supreme Court awarded the parties joint legal custody and awarded primary physical custody of the subject children to plaintiff father. The Second Department affirmed. The Court of Appeals affirmed with a dissent. Defendant mother's claim under Domestic Relations Law § 240[1][a] that the trial court failed to consider the effects of domestic violence on the best interests of the children when it awarded custody to the father was unpreserved. The parties never litigated, and the court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constituted a sworn petition for purposes of the statute or whether the mother proved allegations of domestic violence by a preponderance of the evidence – issues that were essential to the arguments the mother sought to raise on appeal (DRL § 240 [1][a]). The dissent asserted that the mother preserved her claim and that the order should be reversed. The mother made a sworn allegation in a family offense petition that the father committed acts of violence against her, and the petition was admitted into evidence at the father's divorce proceeding in which he sought custody of the children. The mother also testified to the alleged abuse, and provided additional evidence that corroborated her allegations. The father acknowledged that the mother withdrew the petition but did not controvert the mother's claims of abuse in any way. Thus, the court was required to consider the mother's allegations to determine whether she established them by a preponderance of the evidence. There was no credible argument that the court was unaware that domestic violence was a statutorily prescribed factor in its best interest analysis.

Cole v Cole, 35 NY3d 1012 (2020)

FEDERAL CASES

Unlawful Retention Of Children Overseas Was Sufficient To Support Conviction Under IPKCA; Abduction Was Not Required; The Statute Was Not Vague As Applied; Defendant Was Properly Sentenced

The defendant pled guilty to two counts of international parental kidnaping under the International Parental Kidnaping Crime Act (IPKCA), and one count of passport fraud. On appeal, the defendant argued that the IPKCA was vague as it applied to him, among other things. The Second Circuit affirmed the convictions. The defendant was married in Yemen and promptly came to the United States with his wife, where they had two daughters. A few years later they returned to Yemen as a family. After a Yemeni divorce (and remarriage by the wife), they separately returned to the United States, and left the children with the defendant's family in Yemen. The ex-wife sought custody, and in September 2016, obtained visitation rights from Kings County Family Court, which ordered the defendant to bring their daughters back from Yemen for an extended visit with their mother in the United States. The defendant defied that order, fled the United States, rejoined his family in Yemen, and prevented his ex-wife from seeing her daughters for the next three years. About six months after he absconded, the defendant fraudulently tried to replace his U.S. passport, which he had surrendered to the Family Court. The passport application triggered an INTERPOL red notice. A year later, the defendant was arrested in Cairo and returned to the United States. After the district court denied the defendant's motion to dismiss the IPKCA charges on vagueness grounds, he pled guilty to all three counts in the indictment. The defendant was sentenced concurrently to 36 months on the IPKCA charges and 42 months on the passport fraud charges. The defendant's vagueness challenge failed because the IPKCA provided sufficient notice that the defendant's conduct was proscribed. The plain language of the IPKCA made it a crime to retain a child outside the United States when that retention was done with the intent to obstruct lawful parental rights, if the retained child had been in the United States. It was undisputed that the defendant retained both of his daughters in Yemen for many months with the requisite mental state. It was also undisputed that both of his daughters had been in the United States for extended periods of time: one resided here for the first two years and seven months of her life, and the other for the first five months. The statutory text drew no distinction between a child who was in the United States immediately preceding the unlawful retention, and a child who was not. Thus, both children were covered by the statute. A person of ordinary intelligence who read the IPKCA's broad but unambiguous language would have had sufficient notice that the statute applied here since both children had been in the United States for significant periods of time. The defendant's claim that he did not abduct his children from the United States did not render the IPKCA vague because the statute proscribed retention as well as abduction. The defendant's contention was rejected that he lacked notice because the IPKCA caselaw primarily addressed abduction as opposed to retention alone. Since the vagueness inquiry depends on the text of the statute, caselaw scenarios were of limited relevance. Even if the defendant consulted caselaw, not all IPKCA cases involved an abduction. As a result, this contention fell far short. The defendant further asserted that the statute was

vague because of the phrase “has been in the United States” (see 18 USC § 1204 [a]). The defendant argued that this would apply to every child who set foot in the United States, even if it was just for minutes on a flight layover. However, a vagueness challenge was not evaluated on whether the statute’s reach was clear in every application, just whether it was clear as applied to the defendant’s conduct. Unlike a child in the defendant’s posited layover hypothetical, both of the children in this case were in the United States for significant periods of time. The defendant’s further contention was rejected that the IPKCA was vague because it provided law enforcement with inadequate guidance. The defendant’s conduct fell within the core of the IPKCA’s prohibition on international parental kidnaping. The defendant retained his two young daughters abroad for years with the intent to obstruct his ex-wife’s parental rights. Both daughters were born in the United States and spent a significant portion of their young lives here. Since the defendant’s conduct fell within the core of the statute’s prohibition, it was unnecessary to address, as general matter, whether the IPKCA provided clear enforcement standards with respect to when or how long a child must have been in the United States in order to have been covered by the statute. The court also properly applied a sentencing enhancement for substantial interference with the administration of justice based upon the defendant’s defiance of Family Court’s visitation order when he retained his daughters in Yemen. The defendant’s contention was rejected that the application of this sentencing enhancement punished him twice for the same conduct alleged in the underlying IPKCA charges. The enhancement was imposed for the additional reason of the defendant’s flight from Brooklyn to Yemen after the visitation order was issued, in defiance of Family Court’s directive for the defendant to have remained within the court’s jurisdiction. Since the substantial interference enhancement served to punish the defendant for the additional conduct of flight, it was not redundant of the IPKCA charges. Furthermore, the interference was substantial because the defendant’s flight impaired Family Court’s ability to administer justice through its contempt power to compel the defendant’s compliance with the visitation order. The court properly held that the defendant’s flight hindered Family Court’s ability to have administered justice and there was no error in the application of the substantial interference sentencing enhancement.

United States of America v Houtar, 960 F.3d 268 (2d Cir. 2020)

Escrow Agent Should Not Have Been Granted Unilateral Power To Decrease Reimbursable Educational Services And Plaintiffs Should Not Have Been Required To Pay For Any Escrow Account Costs

Plaintiff John Doe was diagnosed with autism shortly before turning three years old. Consequently, John required special education services. In this third appeal pursued by John's mother, Jane Doe (collectively, plaintiffs), the Second Circuit held that once a party had filed an administrative due process complaint, the Individuals with Disabilities Education Act's (IDEA) stay-put provision required that during the pendency of related proceedings, the child was to remain in the then-current educational placement (see 20 USC § 1415 [jj]). This provision sought to maintain the educational status quo while the parties' dispute was resolved. Thus, the school district was required to continue funding

whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings were completed. Where an educational agency violated the stay-put provision, compensatory education may, and generally should, be awarded to make up for any appreciable difference between the full value of stay-put services owed and reimbursable services the parent actually obtained. Plaintiffs sued the East Lyme Board of Education (Board) under the IDEA. Plaintiffs alleged that the Board denied John a free appropriate public education (FAPE) and violated the "stay-put" provision of the IDEA when it refused to pay for services mandated by John's individualized education plan (IEP). The District Court granted summary judgment to plaintiffs on the stay-put claim and ordered reimbursement of certain mandated services for which plaintiffs had paid out-of-pocket. The court granted summary judgment to the Board on the other claims. The Second Circuit affirmed the District Court's substantive rulings, vacated the reimbursement award, and remanded so the compensatory education award could be calculated and structured. On remand, the court awarded plaintiffs reimbursement for past expenses that were related to services covered by John's IEP. The court denied any reimbursement for tuition or for services that were not mandated by the IEP. The court further ordered the compensatory funds were to be placed in an escrow account with certain restrictions, and approved a calculation formula for interest. The Second Circuit vacated the compensatory education award to the extent that it permitted the escrow agent to unilaterally decrease reimbursable services, and required plaintiff Jane Doe to pay for half the maintenance costs. It was a violation of the IDEA to give final decision-making authority to the escrow agent. Adjustments to an award were required to be justified to a hearing officer (see *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 527 [DC Cir. 2005]; see also 20 USC § 1515 [1] [A], [B]). Inasmuch as the IDEA sought to ensure a "free" education, plaintiff Jane Doe should not be required to pay for a portion of the costs associated with management of a fund for educational services the Board should have provided. The District Court's decision was otherwise affirmed.

Doe v East Lyme Board of Education, 962 F.3d 649 (2d Cir. 2020)

Court Properly Sentenced Fifteen Year Old Juvenile To 55 Years Imprisonment Without The Possibility Of Parole

The district court imposed a sentence of fifty-five years, without the possibility of parole, on a juvenile who was fifteen years and eleven months of age when he planned and participated in four murders. The Second Circuit held that the sentence was lawfully imposed and affirmed the judgment. Pursuant to a guilty plea and waiver of the indictment, the defendant was convicted of participating in a pattern of racketeering activity under 18 USC § 1962 [c]. In April of 2017, the defendant was a member of the MS-13 gang when he planned and participated in the execution-style murders of four rival gang members. The defendant sought and obtained a gang leader's approval to commit the murders which took place in a public park after the victims were lured there under the guise of smoking marijuana with two females. The defendant wielded a machete during the attack and other gang members present used an ax, knives, and tree limbs. A fifth person escaped the attack. The Probation Department's

presentence report calculated a Sentencing Guideline range of life imprisonment and recommended that sentence. The Government recommended a sentence of sixty years. The sentence, although severe, is not life imprisonment and was not required to have been imposed. The defendant argued that the court was required to consider the factors discussed in *Miller v Alabama*, 567 US 460 (2012) when it imposed a sentence on a juvenile as severe as fifty-five years, without parole. Even if it was assumed that the court was required to consider the *Miller* factors, the court gave thoughtful consideration to all of those factors and noted that it had reread the *Miller* opinion at the sentencing hearing. Specifically, the court considered, among other factors, the defendant's chronological age and characteristics, including any immaturity, impetuosity, failure to appreciate the risks and consequences of his actions, the defendant's family and home environment that surrounded him, as well as the possibility of rehabilitation. The court also properly considered the circumstances of the offense which included the extent of the defendant's participation, conduct, and the way familial and peer pressures may have affected him. Thus, the defendant's contention was rejected that the court did not consider the *Miller* factors. It was clear that the court recognized the relevance of these factors, and departed downward from the Sentencing Guidelines in part because of the defendant's age, but reasonably concluded, after the *Miller* factors were considered, that further departure was not warranted. Although severe and fairly deemed especially harsh for a defendant fifteen years of age, based upon the heinous, brutal, and premeditated nature of this crime, the sentence was not unreasonable in any legally cognizable sense. Furthermore, although the unavailability of parole was an unfortunate consequence of the legislature's elimination of parole when it enacted the Sentencing Reform Act, this was a sentence lawfully imposed by a conscientious judge who determined it was appropriate.

United States of America v Portillo, 981 F.3d 181 (2d Cir. 2020)