

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

**Case Digest
2021 Decision Lists Plus Select
Court of Appeals, Federal and Other Cases of Interest**

THIRD DEPARTMENT CASE OF INTEREST

Court Properly Awarded The Mother Sole Legal and Physical Custody of The Children

Family Court granted petitioner mother's application which sought modification of a prior order of custody and awarded the mother sole legal and physical custody of the two subject children. The Appellate Division affirmed. The parties were the parents of two children (born in 2001 and 2005). Pursuant to an August 2014 order of custody, entered on consent, the mother was awarded sole legal custody of the children and the parties shared physical custody on alternate weeks. In September 2017, the mother commenced the first proceeding which sought to modify the prior order by awarding her primary physical custody and continuation of her sole legal custody of the children. The father answered and filed two petitions, a modification petition which sought an award of sole legal and primary physical custody of the children, and a violation petition. Following a fact-finding hearing on the petitions, Family Court granted the mother's petition and awarded her sole legal and physical custody of the children. The court dismissed the father's petitions and reduced his parenting time to alternate weekends and other specified times as set forth in the order. Father's claim that family court was biased against him was unpreserved for appellate review inasmuch as he had not moved for recusal. The father also argued that Family Court should have conducted a *Lincoln* hearing. However, the Appellate Division agreed with the AFC that such a hearing would have caused more unnecessary stress for the children. Although a *Lincoln* hearing was the preferred manner to have ascertained the children's wishes, such a hearing was not mandatory. The record reflected that the hearing itself may have done more harm than good, particularly where, as here, the relevant and available facts were already before the court. When the father's counsel agreed to a *Lincoln* hearing solely for the younger child, the court denied the request on the additional basis that the younger child's opinion was heard through the testimony of the parties. The AFC advocated for the wishes of the children insofar as the court was advised that the children wanted to spend more time with the father. Furthermore, the parties' were not able to communicate or cooperate, which rendered shared physical custody unworkable and provided the requisite change in circumstances to have triggered a best interests analysis. The record was replete with instances in which, despite the mother having had sole legal custody of the children pursuant to the prior order, the father frequently usurped the mother's decision-making authority when he made unilateral decisions with regard to the children. There was a sound and substantial basis in the record which supported the court's conclusion that it was in the younger child's best interests for the mother to have had sole legal and primary physical custody.

Matter of Mary Ellen H. v Joseph H., 193 AD3d 1275 (3d Dept 2021)

Termination of Parental Rights Reversed

Family Court granted petitioner's application, in a proceeding pursuant to Social Services Law Section 384-b, to adjudicate the subject child to be abandoned, and terminated respondent's parental rights. The Appellate Division reversed. Petitioner failed to meet the burden of establishing, by clear and convincing evidence, that respondent's conduct evinced an intent to forgo her parental rights by failing to visit the child, and/or communicate with the child or agency, during the six months preceding the petition. The only evidence introduced by petitioner at the fact-finding hearing was the testimony of petitioner's caseworker. The caseworker, who was assigned to respondent's case in October 2018, testified that respondent was granted supervised visitation with the child every other week. The caseworker testified that, in the six-month period preceding the filing of the subject abandonment petition - which ran from February 27, 2019 to August 27, 2019 - respondent only exercised her supervised visitation on three occasions, once in March 2019, once in April 2019 and once in May 2019. According to the caseworker, respondent did not provide her with any letters or gifts to give the child during this time. However, she acknowledged that respondent brought snacks for the child. Respondent was otherwise precluded from making any other attempts to contact the child - i.e., telephone calls - outside of her scheduled supervised parenting time. The caseworker further acknowledged that, in June 2019, respondent was hospitalized with an injury that required emergency brain surgery, which prevented her from exercising one of her scheduled visitations that month, and that respondent subsequently executed a medical release so that petitioner could verify the same. Further, although the caseworker initially indicated that she had not had any contact with respondent since May 2019, during cross-examination she indicated that respondent had, in fact, called her one or two times during the relevant time period. Petitioner offered no documentary evidence in support of its petition memorializing any of the various attempts that either petitioner or the agency supervising respondent's visitation made to contact respondent during the subject time period. Even assuming that petitioner made a prima facie showing that respondent failed to maintain adequate contact with the child during the requisite time period, petitioner failed to controvert respondent's testimony in opposition, wherein respondent indicated that, during visitations, she provided the child with such things as shoes, clothing, toys and books, attended service plan reviews, notified petitioner of her June 2019 injury and attempted to reschedule certain missed visitation as a result thereof. Accordingly, the court should have dismissed the petition.

Matter of Khavonye F.F., 198 AD3d 1134 (3d Dept 2021)

Family Court Improperly Delegated to Child its Authority to Fashion an Appropriate Visitation Schedule

Family Court dismissed petitioner mother's application to modify a prior order of custody and visitation and awarded sole custody of the subject children to respondent father with visitation between the mother and the children as she and the children were able to agree. The Appellate Division modified by reversing the visitation provision of the underlying

order and remitted to Family Court for further proceedings. The parties had previously stipulated to an order of custody and visitation which granted the parties joint legal custody of the subject children, with primary physical residency of the younger child to the mother and primary physical residency of the older child to the father. Thereafter, the parties filed multiple family offense, modification, enforcement, and violation petitions against each other. Family Court conducted a fact-finding hearing on all six petitions and a *Lincoln* hearing at which both children were present.¹ Family Court appropriately found that the parties were no longer able to engage in the cooperative, civil communication necessary to make parenting decisions jointly, a change in circumstances that in turn warranted an inquiry into the continued best interests of the younger child.² With regards to the custody determination, Family Court considered a November 2018 altercation between the mother and the younger child which clearly had a significant impact on the younger child, 15 years old at the time, and the child's reasoned wishes, made clear by his attorneys, were entitled considerable weight. Additionally, Family Court weighed, among other things, the father's lackadaisical parenting and the considerable amount of evidence that he neglected his obligation to ensure that the younger child's educational needs were met with the mother's unwillingness to see her part in the deterioration of her relationship with both the father and the children and her failure to take responsibility whatsoever for the November 2018 incident, largely blaming the child for his reactions to her. Accordingly, Family Court's decision to award the father sole legal and physical custody of the younger child did not lack a sound and substantial basis in the record. Nevertheless, Family Court improperly delegated its authority to the younger child when it ordered the mother's visitation would be only as she and the younger child could agree. Family Court's rationale for its parenting schedule – that a teenager cannot be forced to do something that he or she does not want to do – fell short of satisfying its obligation to provide the mother with frequent and regular access to the younger child and did nothing to support a healthy, meaningful relationship between the two. The Appellate Division remitted the matter to Family Court for the fashioning of an appropriate, more definitive visitation schedule and the allocation of any other suitable resources to restore the relationship between the mother and the younger child. However, at the time of review the younger child was nearly 18 years old, had gone years without visiting his mother, and would likely reach the age of majority before Family Court had the opportunity to address its mistake. For these reasons, the Appellate Division underscored the importance of enabling some form of visitation between a parent and a child whenever possible.

Matter of Cecelia B.B. v Frank C.C., 200 AD3d 1411 (3d Dept 2021)

¹In a footnote, the Appellate Division noted that, given the younger child's close relationship with his older brother, who had clashed with the mother long before the commencement of the subject proceedings, the better practice would have been to hold separate *Lincoln* hearings for each child in order to provide a truly confidential forum.

²The older child turned 18 during the pendency of the appeal and any challenges to Family Court's order as it pertained to him became moot.

ADOPTION

Court Properly Determined Father's Consent Was Not Required For Adoption; Father Lacked Standing To Seek Visitation

Family Court granted the Attorney for the Child's motion to dismiss petitioner father's petition which sought visitation with the subject child. The Appellate Division affirmed. The child was born in August 2017. A neglect petition was filed against the biological mother, and she consented to the temporary removal of the child two days after her birth. The child was subsequently placed in foster care with the adoptive parents of several of her siblings. Petitioner was identified as a putative father, and Family Court appointed counsel to represent him in November 2017. Petitioner and the mother were never married, and petitioner had been incarcerated since before the child was born.

Petitioner was eventually adjudicated to be the child's biological father in September 2018, shortly before the mother's parental rights were terminated in December 2018. Custody of the child was then transferred to respondent Department of Social Services and a permanency hearing was scheduled. The permanency goal was placement for adoption. Respondent and the AFC advocated for placement with the child's foster parents. In January 2019, petitioner filed his petition which sought visitation with the child. The AFC moved to dismiss the petition for lack of standing and argued that petitioner was not entitled to visitation because the permanency goal was adoption. The AFC further asserted that petitioner was a mere notice father whose consent to adoption was not required under Domestic Relations Law § 111 (1) (d). Respondent joined the AFC's motion and requested a hearing on the issue of whether petitioner was a mere notice father or whether his consent was required for adoption. After the hearing, the court determined that petitioner was a notice father only and granted the motions. On appeal, petitioner contended that the court erroneously applied Domestic Relations Law § 111 when it determined that he lacked standing to seek visitation inasmuch as that statute applied to adoption proceedings only. However, petitioner did not oppose the AFC's request for a hearing to determine whether he was a mere notice father or whether his consent was required for adoption. Moreover, petitioner did not raise any objection to the court's statement that the purpose of the hearing was to resolve that question. Petitioner also did not challenge the permanency goal of adoption. Thus, petitioner's contention, raised for the first time on appeal, was not preserved for appellate review. Additionally, petitioner's contention lacked merit. Where the permanency determination in a related proceeding was pending, the court did not err when it resolved, as a threshold issue in these related proceedings, the question of whether the father's consent was required for adoption, particularly where, as here, petitioner did not oppose the hearing on that issue. Furthermore, the court's determination that petitioner's consent to adoption was not required was supported by clear and convincing evidence and there was no reason to disturb the credibility determinations of the court. Since petitioner's consent to adoption was not required, petitioner lacked standing to seek visitation with the child.

Matter of Amos v Erie County Dept. of Social Servs., 191 AD3d 1475 (4th Dept 2021)

Court Properly Determined That The Biological Mother Violated Post-Adoption Agreement And That The Child's Best Interests Were Served By Enforcement Of The Agreement

After a hearing, Family Court determined petitioner the biological mother of the subject child violated the provisions of her post-adoption agreement (agreement) with respondents, the child's adoptive parents, and that it was in the best interests of the child that the provisions of the agreement be enforced. Thus, in effect, the court dismissed petitioner's petition that was filed pursuant to Domestic Relations Law § 112-b. The Appellate Division affirmed. The agreement, which was incorporated into a judicial surrender of petitioner's parental rights to the child, provided that petitioner was to have four visits per year with the child but that visitation was to be within the sole discretion of respondents if, for a period of six months, petitioner failed to phone respondents to schedule a visit, or if petitioner missed two consecutive visits. The evidence at the hearing on the petition, which included petitioner's testimony, established that she did not visit the child during 2018 nor schedule a visit during that time. Thus, the court properly determined that petitioner violated the provisions of the agreement. Furthermore, 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 enforce the relevant provision in the agreement, i.e., that all future visitation was to be at respondents' sole discretion because, for a period of over six months, petitioner failed to phone respondents to schedule a visit and failed to attend two consecutive visits.

Matter of Belinda S. v Carl P., 193 AD3d 1355 (4th Dept 2021)

Biological Father's Consent To The Adoption Of The Subject Children Was Not Required

After an evidentiary hearing, Family Court determined that the consent of respondent biological father to the adoption of the subject children by petitioners was not required pursuant to Domestic Relations Law § 111. The Appellate Division affirmed. The record supported the court's determination that the father failed to meet his threshold burden of establishing his right to have consented to the adoption of his out-of-wedlock child. At the time of the hearing, the father had not visited the child in almost four years, nor had he attempted to call her or send cards or gifts. Although the father was diagnosed with a mental illness, his condition did not provide an adequate explanation for his failure to have maintained substantial contact with the child, particularly inasmuch as he did not make efforts to see her for more than a year after he began receiving regular treatment. Even if it was assumed that the father established his right to consent to the adoption of his out-of-wedlock child, the court properly dispensed with his consent as to both children inasmuch as petitioners established by clear and convincing evidence that he abandoned both children by his failure for a period of six months to visit and communicate with the children or person having legal custody of the children even though he was able to do so. Although the father filed two petitions for modification of visitation, he made no other

attempt to have contacted the children. Thus, the father's efforts were so insubstantial or infrequent that they did not preclude a finding of abandonment. The father's contention was rejected that the court abused its discretion when it considered evidence of abandonment outside of the six months immediately preceding the filing of the petitions for adoption. The court properly considered the father's contact with the children during the period of time, whether six months or longer, that immediately preceded the filing of the adoption petition.

Matter of Sophia, 195 AD3d 1033 (4th Dept 2021)

Family Court Improperly Failed to Nullify Extra-Judicial Surrender Instrument, Instead Held Best Interest Hearing

Family Court granted the adoption agency's petition for approval of respondent birth mother's extra-judicial surrender of the subject child and adjudged that it was in the child's best interests to be adopted by the prospective adoptive parents. The Appellate Division reversed. Shortly after the birth of the subject child, the birth mother executed a voluntary placement agreement placing the child in the agency's foster care program. Thereafter, she properly executed an extra-judicial surrender instrument. The agency filed a timely petition seeking approval of the extra-judicial surrender. However, within the relevant forty-five (45) day period, the birth mother sought to revoke the surrender. The birth mother, thereafter, moved for an order pursuant to Social Services Law §383-c(b)(a) deeming the surrender a nullity. Family Court refused to deem the surrender a nullity, denied the birth mother's motion and instead improperly determined that a best interests hearing was required. Family Court erroneously determined that the agency adoption, as governed by Social Services Law §383-c, was indistinguishable from a private placement adoption, as governed by DRL §115-b. The Appellate Division distinguished an extra-judicial surrender from an extra-judicial consent and found that the statute governing extra-judicial surrenders did not provide for a best interests hearing. The Appellate Division returned the child to the care and custody of the agency.

Matter of Tony S.H., Jr., 199 A.D.3d 1347 (4th Dept 2021)

CHILD ABUSE AND NEGLECT

Court Properly Determined Subject Child Was Derivatively Neglected; Father's Contention that AFC Should Have Been Removed Was Unpreserved; Dispositional Aspect Of The Order Was Not Appealable

Family Court adjudicated the subject child was a neglected child based upon a finding of derivative neglect. The Appellate Division dismissed respondent father's appeal from the order insofar as it concerned the disposition and otherwise affirmed. Contrary to the contentions of the father and respondent mother, Family Court's finding of derivative neglect had a sound and substantial basis in the record. The father failed to preserve for appellate review his contentions that the court should have recused itself, that the Attorney for the Child should have been removed, and that certain testimony was improperly admitted. Moreover, the father's challenge to the dispositional provisions in the order, which were entered upon the parties' consent, was not appealable because no appeal lied from that part of the order entered on consent.

Matter of Nino H., 191 AD3d 1407 (4th Dept 2021)

Court Properly Determined Father Neglected Older Child And Derivatively Neglected Younger Child

Family Court determined that respondent father neglected the older child and derivatively neglected the younger child. The Appellate Division affirmed. The court's determination was supported by the requisite preponderance of the evidence. Contrary to the father's contention, the older child's out-of-court statements were sufficiently corroborated. Contrary to the father's further contention, the court properly drew a negative inference from his failure to testify, notwithstanding the factually related criminal charges pending against him.

Matter of Andrew G., 191 AD3d 1426 (4th Dept 2021)

Court Properly Determined Subject Children Were Neglected

Family Court determined that respondents James B. and Madison P. neglected the subject children. Contrary to respondent Madison P.'s contention, the court properly determined that she acted as the functional equivalent of a parent in a familial or household setting for the children and thus was a person legally responsible for their care. Moreover, contrary to respondents' contentions, the court's determination that they neglected the subject children was supported by a preponderance of the evidence. Contrary to respondents' further contentions, the out-of-court statements of the two oldest children were sufficiently corroborated.

Matter of Xander B., 191 AD3d 1434 (4th Dept 2021)

Denial Of The Mother's Motion To Dismiss The Petition On The Ground That She Was Not Properly Served Was Error

Family Court adjudged that respondent mother neglected the subject child. The Appellate Division reversed, granted the mother's motion to dismiss the petition, and dismissed the petition. The mother was not properly served with the petition and, as a result, the court erred when it denied her motion to dismiss the petition for lack of personal jurisdiction. Petitioner was unable to locate the mother to deliver the summons and petition personally (see generally Family Ct Act § 1036 [b]). Petitioner then applied for an order that permitted substituted service (see generally § 1036 [d]). In support of that application, petitioner submitted documents that listed various addresses for the mother. After the application was initially denied, the court later issued an order which permitted service pursuant to CPLR § 308 (4) at a particular residence after petitioner submitted a diligence of effort affidavit. The residence in the order was not one of the residences listed in the documents submitted to the court by petitioner. Despite the order that permitted service pursuant to CPLR § 308 (4), petitioner thereafter attempted to serve the mother pursuant to CPLR § 308 (2) when it tried to serve a person over the age of 18 at the address listed in the order, i.e., the alleged dwelling house or usual place of abode of the mother, and thereafter mailing the documents by prepaid, first class mail. The affidavit of service did not identify the address used for the mailing. The mother's attorney moved to dismiss the petition against the mother for lack of personal jurisdiction. The mother's attorney argued, among other things, that the mother never lived at the residence where service was attempted and that the affidavit of service failed to identify the address to which the documents were mailed. The court erred when it denied the mother's motion. Regardless of whether service was made pursuant to CPLR § 308 (2) or (4), both subdivisions mandated that the initial act, i.e., the delivery or when the summons was affixed, service was required to have been made at the party's actual dwelling place or usual place of abode. Both subdivisions also required the requisite documents to have been mailed to the party's last known residence or actual place of business. Jurisdiction was not acquired under either subdivision unless there was strict compliance with both the delivery and mailing requirements. Petitioner failed to establish that the documents were mailed to the mother's last known address inasmuch as the affidavit of service says that the papers were mailed by prepaid, first class mail, without identification of the address to which they were mailed. Even if it was assumed that the affidavit of service was sufficient to have created the presumption of valid service, the mother's submissions were sufficient to rebut that presumption. The mother's attorney submitted an affidavit from his legal assistant which established that the person who accepted service mistakenly thought the papers were for his daughter, who shared the same first name as the mother. That person also informed the legal assistant that the mother had never resided at the address and that the mother's father, with whom petitioner believed the mother resided with, had moved out of the home months earlier. Thus, the mother rebutted any presumption that she was properly served at her actual place of business, dwelling place, or usual place of abode so as to satisfy the requirements of CPLR § 308 (2) or (4). In addition, petitioner's own submissions in the application for an order of substituted service raised a question as to

whether the mother ever resided at the address listed in the affidavit of service inasmuch as that address was not among the numerous identified addresses for her.

Matter of William A., 192 AD3d 1474 (4th Dept 2021)

Court Properly Determined Father Derivatively Neglected Newborn Infant

Family Court held the subject child was a neglected child based upon a finding of derivative neglect, and placed respondent father under the supervision of petitioner for a period of 12 months. The Appellate Division affirmed. The court's finding of derivative neglect was supported by the requisite preponderance of the evidence. Petitioner established that the neglect of the three older children was so proximate in time to the derivative proceeding that it was reasonable to conclude the condition still existed. Thus, there was sufficient evidence that established the father derivatively neglected the subject child because the evidence of neglect of the older children indicated a fundamental defect in the father's understanding of the duties of parenthood or demonstrated such an impaired level of parental judgment as to have created a substantial risk of harm for any child that was in his care. Although the father showed progress when he completed the court directed programs, he failed to meet his burden to have demonstrated that the circumstances that led to the prior neglect could not have been reasonably expected to exist currently or in the foreseeable future. Inasmuch as the paramount purpose of Family Court Act article 10 was the protection of the physical, mental, and emotional well-being of children, and mindful of the particular vulnerability that was attendant to newborn infants such as the child herein, the court did not err when it found derivative neglect.

Matter of Lamairik S., 192 AD3d 1483 (4th Dept 2021)

Court Properly Determined Children Were Neglected Based Upon A Single Incident

Family Court adjudged that, inter alia, respondent mother had neglected the subject children. The mother's contention was rejected that Family Court erred when it determined that petitioner established, by a preponderance of the evidence, that she neglected the children based upon a single incident. At the fact finding hearing, petitioner established that, on the occasion in question here, the mother went with the children to a counseling meeting at petitioner's office and, during the course of the meeting, the mother expressed suicidal ideation when she stated, inter alia, that she wanted to step in front of a motor vehicle, that she could not care for the children, and that she wished they had never been born. Petitioner's witnesses at the hearing included a counselor and supervisor on duty at the time of the meeting. The witnesses described the mother as loud, pressured in her speech, very upset, and in great distress. The record supported the court's determination that the mother neglected the children on the day in question as a result of her mental illness. Petitioner established by a preponderance of evidence that the children's physical, mental, or emotional conditions were in imminent danger of impairment if the children were

released to the mother's care after the meeting. Although the mother attempted to minimize the significance of her statements and actions on the day in question, there was no reason to disturb the court's credibility assessments of the witnesses.

Matter of Faith B., 192 AD3d 1673 (4th Dept 2021)

Appeal From Dispositional Order Entered On Consent Was Dismissed But Brought Up For Review The Determination Upon Fact-Finding; The Record Established The Children Were Neglected Based Upon Respondents' Drug Use; The Record Did Not Support A Finding Of Neglect Based Upon Corporal Punishment

Family Court ordered the subject children placed in the custody of the petitioner Department of Social Services until the completion of the next permanency hearing. The Appellate Division dismissed the appeals by respondents mother and father insofar as the appeals concerned the order of disposition inasmuch as the provisions of that order were entered on the consent of the parties. However, the appeals brought up for review the determination upon fact-finding hearing because respondents were aggrieved by the court's findings of neglect. The determination upon fact-finding hearing was modified to the extent that the court's findings that respondents neglected the subject children when they failed to provide them with adequate food and shelter through the use of excessive corporal punishment were vacated. The determination upon fact-finding hearing was otherwise affirmed. Petitioner established by a preponderance of the evidence that the subject children were neglected. The mother admitted repeated cocaine use, that she misused drugs so often that she had limited veins suitable for injection, that she was observed to have been under the influence of drugs at various times by friends and by a visitation supervisor, and that she tested positive for several different drugs on multiple occasions. With respect to the father, petitioner established that he admitted to cocaine use prior to a supervised visit and to having been under the influence of Suboxone on other occasions. The father further admitted that he relapsed during the pendency of these proceedings. Additionally, a Sheriff's Deputy observed the father under the influence of drugs when he was placed under arrest for an unrelated warrant during the pendency of these proceedings, and the deputy found cocaine in the father's possession at that time. Furthermore, the subject children found needles in respondents' home, and a neighbor observed a white powdery substance on a table in the home, while the children were present, under circumstances that supported the conclusion that the substance was a drug. Thus, the court's determination that petitioner established neglect by a preponderance of the evidence was supported by the requisite sound and substantial basis in the record. Although respondents presented evidence that supported a contrary conclusion, it was well settled that the court's credibility determinations were entitled to great deference. The court properly drew the strongest possible negative inferences against respondents after they failed to testify at the fact-finding hearing. However, the court's findings that respondents neglected the children on the ground that they failed to provide the children with adequate food and shelter was not supported by the requisite preponderance of the evidence. Similarly, petitioner failed to introduce sufficient evidence that corroborated a

statement by one of the subject children that one of the respondents caused certain injuries that the child sustained, and thus failed to establish by a preponderance of the evidence that, as the court further found, respondents neglected the children via corporal punishment.

Matter of Noah C., 192 AD3d 1676 (4th Dept 2021)

Abused Child's Out-Of-Court Statements Were Sufficiently Corroborated

Family Court determined that respondent abused and neglected a child, i.e., the daughter of his long-term live-in girlfriend, and derivatively neglected his four biological children. The court's determination that the child was abused as a result of respondent's sexual abuse was supported by the requisite preponderance of the evidence inasmuch as the child's out-of-court statements that described the abuse were sufficiently corroborated by other evidence. The child disclosed to a caseworker and a police investigator that respondent had repeatedly demanded to examine her genitals to determine whether she was a virgin. The child further disclosed that respondent had placed his hand on her genitals and used his hands to spread them open, and also once requested to do more with his finger. When respondent was confronted with those allegations, respondent told the caseworker and police investigator that he had inadvertently observed the child while she was naked from the waist down and that he was able to tell from 10 feet away that her hymen was intact. That partial admission by respondent, together with the testimony from the child's mother that was consistent with some details of the child's allegations, which included that respondent had access to the child at the times of the day when the child said the abuse occurred, was sufficient to corroborate the child's out-of-court statements.

Matter of Crystal S., 193 AD3d 1353 (4th Dept 2021)

Court Properly Denied Motions To Vacate Consent Orders That Determined Father Neglected The Subject Children

Family Court denied the motions of respondents mother and father which sought to vacate prior orders, entered on respondents' consent, that determined they had neglected the subject children. The Appellate Division affirmed. Respondents' contention that the court erred when it denied the motions because they were not adequately warned of the potential consequences of their consent to the neglect findings as required by Family Court Act § 1051 (f) was not properly considered on appeal inasmuch as this ground was not asserted in the motions to vacate the orders. The Appellate Division further declined to reach the issue in the interests of justice.

Matter of Deangelo B.-K. 194 AD3d 1376 (4th Dept 2021)

Court Properly Determined The Father Neglected Oldest Child By The Infliction Of Corporal Punishment And That The Father Derivatively Neglected His Three Younger Children

In an order of fact-finding and disposition, Family Court determined that respondent father neglected his oldest child and derivatively neglected his three younger children. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination that the father neglected the oldest child when he inflicted excessive corporal punishment on her. The evidence at the fact-finding hearing included the father's own admission to a caseworker that he had "whooped the oldest child's ass" and struck her repeatedly with a phone charger cord and a rubber tube and inflicted harm on her after she ran away. Further, out-of-court statements made by the three younger children to a caseworker established that the incident was part of a pattern of excessive corporal punishment because those children stated that the father regularly disciplined them when he, inter alia, hit them. Petitioner established that, as a result of the incident where the father struck the oldest child with the phone charger cord and rubber tube and previous instances of corporal punishment, the oldest child's mental, or emotional condition was impaired, inasmuch as she had marks on her body, was in great pain, and was afraid of the father. The fact that the oldest child's injuries had not required medical attention did not preclude a finding of neglect based on the infliction of excessive corporal punishment. There was also a sound and substantial basis in the record for the court's determination that the father derivatively neglected the three younger children. The father's use of excessive corporal punishment on the oldest child, visibly demonstrated by the photographs of her injuries, showed that he had a fundamental defect in his understanding of his duties as a parent and an impaired level of parental judgment sufficient to have supported the determination that the younger children had been derivatively neglected. Additionally, two of the three younger children confirmed that they had been subject to similar, albeit less severe, corporal punishment by the father. Thus, petitioner established that the three younger children were in imminent danger of being impaired by the imposition of excessive corporal punishment in the future. Although the three younger children were not present during the incident involving the oldest child, they were not required to have witnessed the incident of excessive corporal punishment in order for the finding of derivative neglect to have been sustained. Rather, for a finding of derivative neglect to have been sustained, the prior neglect finding must have been so proximate in time to the derivative proceeding, for the fact-finder to have reasonably concluded that the condition still existed. Because the finding of derivative neglect with respect to the three younger children was made at the same time as the finding of neglect with respect to the oldest child, this requirement was satisfied.

Matter of Balle S., 194 AD3d 1394 (4th Dept 2021)

Illicit Drug Use Combined With Other Admissible Evidence Was A Proper Basis For Neglect Findings Against Respondents Mother And Father

Family Court adjudged that respondents mother and father neglected the subject child. The Appellate Division affirmed. There was a sound and substantial basis in the record that supported Family Court's determination that the mother neglected the subject child. Contrary to the mother's contention, her medical records and the medical records of the subject child were properly admitted in evidence. The medical records established that the mother used cocaine sporadically throughout her pregnancy with the subject child and tested positive for cocaine the day before the child was born. The mother correctly maintained that a parent's positive toxicology report, alone, was insufficient to establish imminent danger to a child. However, the evidence at the fact-finding hearing, which included the mother's prior Family Court records (also properly admitted in evidence) established that the mother's use of cocaine during her pregnancy, considered in conjunction with her prior demonstrated inability to adequately care for her older children while misusing drugs, provided a sufficient basis for the conclusion, at the least, that the subject child was in imminent danger of impairment. Contrary to the mother's further contention, the court did not find that the subject child was neglected based only on the mother's disability. Rather, it was the mother's disability, combined with other factors, that established that the mother had neglected the child. Moreover, the father's continued use of illicit substances as well as his failure to have complied with a service plan instituted in relation to a proceeding that involved his older child established that the subject child would have been at imminent risk of harm if placed in his care. Until the father was able to successfully address and acknowledge the circumstances that led to the removal of the older child, the return of the subject child to the father's custody would have presented an imminent risk to the subject child's life or health. Respondents further appeals from two permanency orders that, inter alia, continued the subject child's placement with petitioner were dismissed on the grounds that the orders either expired by their terms or were superseded by subsequent orders.

Matter of Faith K., 194 AD3d 1402 (4th Dept 2021)

Court Properly Held That The Mother's Mental Health Condition Was The Basis For The Neglect Finding And Maintained Placement Of The Child With Petitioner; Court Did Not Err When It Proceeded In The Mother's Absence

After a fact-finding hearing, Family Court found respondent mother neglected the subject child (appeal No. 1). In an order of disposition, the court adjudged the child was neglected and, among other things, maintained placement of the child with petitioner Department of Social Services pending a future permanency hearing (appeal No. 2). The Appellate Division dismissed and affirmed. The mother's appeal from the order in appeal No. 1 was dismissed inasmuch as the appeal from the dispositional order in appeal No. 2 brought up for review the propriety of the fact-finding order in appeal No. 1. Additionally, the mother's appeal from the order in appeal No. 2 insofar as it concerned the disposition was

dismissed as moot because that part of the order had expired by its terms. However, the mother was able to challenge the underlying neglect adjudication because it constituted a permanent stigma to her as a parent and could have affected her status in subsequent proceedings. With respect to the mother's challenge of the neglect adjudication, petitioner met its burden and established neglect by a preponderance of the evidence. The mother's mental health condition resulted in both harm and imminent danger to the child during the period alleged in the neglect petition. The mother failed to preserve for appellate review her further contention that Family Court erred when it conducted portions of the fact-finding hearing in her absence. In any event, under the circumstances of this case, the court properly proceeded in the mother's absence. The mother's attorney fully represented her at the fact-finding hearing. Thus, the mother did not demonstrate that she suffered any prejudice arising from her absence.

Matter of Lil B. J.-Z., 194 AD3d 1413 (4th Dept 2021)

Court Properly Determined The Subject Child Was Neglected And Awarded Custody Of The Child To The Maternal Aunt And Uncle

Family Court adjudged that the subject child was neglected (appeal No. 1) and placed the child in the custody of the child's maternal aunt and uncle (petitioners) (appeal No. 2). Respondent mother appealed. The Appellate Division affirmed. In appeal No. 1, petitioner Department of Social Services (DSS) established by a preponderance of the evidence that the mother had neglected the child. Specifically, the mother had not properly fed the child and there was no refrigerator or stove in the mother's apartment. DSS also established that the mother's mental condition had impaired her ability to have cared for the child. Additionally, the mother had missed a medical appointment for the child and the child's immunizations were not up to date. DSS further established that, despite the availability of child care assistance from DSS, the mother's failure to comply with a work requirement resulted in a reduction to her public assistance benefits, upon which she relied for food, shelter and healthcare for herself and the child. With respect to appeal No. 2, there was a sound and substantial basis in the record that supported the court's determination that it was in the child's best interests to have been placed in the custody of petitioners. The evidence established that the child, who turned two during the custody hearing, was removed from the mother and placed in foster care when he was nine months old. At the time of the hearing, the child had been living with petitioners for approximately four months and was doing very well. The mother had no contact with the child since his removal more than one year earlier and had not availed herself of the resources or services offered to her by DSS. Petitioners ensured that the child received the appropriate medical care, and they were in a better position to have provided for the child's emotional, physical, and financial well being.

Matter of Adam M., 195 AD3d 1560 (4th Dept 2021)

Court Properly Held Respondent Mother Neglected The Youngest Child And Derivatively Neglected The Two Older Children

Family Court adjudged that respondent mother had neglected the youngest subject child and derivatively neglected the two older subject children. The Appellate Division affirmed. The youngest child was in imminent danger of impairment as a result of the mother's failure to provide for her medical needs. Although offered daycare assistance for her two older children, the mother refused that assistance to the detriment of the youngest child's care and treatment. The evidence of neglect of the youngest child indicated a fundamental defect in the mother's understanding of the duties of parenthood or demonstrated such an impaired level of parental judgment as to have created a substantial risk of harm for any child in her care.

Matter of Katalina M., 197 AD3d 948 (4th Dept 2021)

Presumption of Neglect Not Rebutted

Family Court determined that respondent father neglected the subject children. The Appellate Division affirmed. Petitioner established a presumption of neglect based on the father's chronic and repeated misuse of drugs while entrusted with the care of the subject children. The presumption of neglect was not rebutted inasmuch as the father was not voluntarily and regularly participating in a recognized rehabilitative program. In any event, the children's physical, mental or emotional conditions were impaired or were in imminent danger of becoming impaired as a result of the father's failure to exercise a minimum degree of care by misusing a drug or drugs and exposing the children to domestic violence.

Matter of Trinity B.-S., 198 AD3d 1331 (4th Dept 2021)

Preponderance of Evidence Established Neglect Where Mother Admitted to Using Cocaine During Pregnancy and Tested Positive for Cocaine

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the mother admitted to using cocaine during her pregnancy with the child, the mother's hospital records indicated that she tested positive for cocaine during her pregnancy and had a history of polysubstance abuse, the mother tested positive for cocaine less than three months after the child's birth, and the mother refused to provide a urine sample on four other occasions. The mother's contention that her participation in a drug treatment program was sufficient to bring the matter within the statutory exception for parents who were voluntarily and regularly participating in a recognized rehabilitative program, was rejected. There was no evidence that the mother's participation in the treatment program was voluntary.

Matter of Annastasia P., 198 AD3d 1356 (4th Dept 2021)

Right of Direct Appeal of Intermediate Order Terminated With Entry of Order of Disposition

Family Court denied respondent father's motion to dismiss the neglect petition filed against him. The Appellate Division dismissed. After the entry of the intermediate order denying father's motion, Family Court entered an order of fact-finding and disposition from which the respondent father has not appealed. The appeal from the intermediate order was dismissed because the right of direct appeal therefrom terminated with the entry of the order of disposition.

Matter of Anthony W., 200 AD3d 1596 (4th Dept 2021)

Family Court Properly Determined that Multiple Respondents Severely Abused the Subject Child When Petitioner Established a Prima Facie Case and Respondents Failed to Offer Any Explanation for the Child's Injuries

Family Court determined that the subject child had been severely abused due to the actions of all three respondents. The Appellate Division affirmed. Per Family Court Act §1046(a)(ii), a prima facie case of child abuse or neglect may be established by evidence (1) of an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents were the caretakers of the child at the time the injury occurred. Petitioner demonstrated that the subject child, seven months old, had suffered numerous broken ribs, a fractured skull, and numerous fractures to both of his legs. Said injuries had been inflicted over the course of several months and some of the fractures were the result of repeated violent shaking. Petitioner was not required to pinpoint the exact time when the injuries occurred. Petitioner established that respondents were the caretakers of the child at the time the injuries occurred, despite the fact that the child had multiple caretakers. Once petitioner had established a prima facie case, the burden going forward shifted to respondents to rebut the evidence of parental culpability. Respondents did not meet their burden as they failed to offer any explanation for the child's injuries and simply denied inflicting them. Family Court's finding of severe abuse was supported by clear and convincing evidence as it considered the nature and severity of the child's injuries, respondents' failure to offer any explanation for those injuries, and respondents' failure to promptly seek medical attention for the child.

Matter of Grayson R.V., 200 AD3d 1646 (4th Dept 2021)

Subject Child's Out-Of-Court Statements Were Sufficiently Corroborated in the Record; Family Court Properly Made a Finding of Derivative Neglect With Respect to Respondent's Child After Determining That Respondent Sexually Abused His Step-Child

Family Court determined that respondent abused his stepdaughter and derivatively neglected his daughter. The Appellate Division affirmed. Family Court appropriately relied

on a subject child's out-of-court statements where said statements were sufficiently corroborated by the testimony of petitioner's validation expert. Said expert was a psychologist who evaluated the child and opined that the child's statements, made to the psychologist, an investigator, and a therapist, were credible and consistent with those of a child who has been abused. Additionally, the record supported Family Court's determination that respondent's sexual abuse of his stepdaughter demonstrated fundamental flaws in his understandings of the duties of parenthood and warranted a finding of derivative neglect with respect to his daughter.

Matter of Brianna E., 200 AD3d 1735 (4th Dept 2021)

CHILD SUPPORT

Court Properly Ordered Upward Modification Of The Father's Support Obligation Retroactive To The Date The Petition Was Filed

Family Court denied petitioner's (Department of Social Services on behalf of Gloria Christman) objection to an order of the Support Magistrate that granted its petition which sought an upward modification of respondent father's support obligation. Specifically, the Support Magistrate directed the father to pay child support in the amount of \$58 per week retroactive to the date the petition was filed. The Appellate Division affirmed. Petitioner's contention was rejected that the upward modification should have been retroactive to the earlier date upon which the father was released from prison. Petitioner failed to present sufficient evidence to support an upward modification retroactive to a date earlier than ordered by the Support Magistrate. Furthermore, under the circumstances of this case, contrary to petitioner's contention, Family Court Act § 449 (2) did not permit the court to direct that the child support modification to have been retroactive to the date the father was released from prison.

Matter of Oneida County Dept. Of Social Servs. v Bleau, 191 AD3d 1391 (4th Dept 2021)

Dismissal Of Respondent's Objections To The Support Magistrate's Determination For Failure To Timely File Proof Of Service Of The Objections With Family Court Was Error

Family Court dismissed the objections of respondent to the determination of the Support Magistrate on the ground that respondent failed to timely file proof of service of his objections upon petitioner, among other things. The Appellate Division reversed, reinstated respondent's objections, and remitted the matter for further proceedings on respondent's objections. The record indicated that respondent timely filed his objections pursuant to Family Court Act § 439 (e), and served a copy of those objections upon petitioner on the same day, but respondent failed to file proof of service with Family Court until two days later. Under the particular circumstances of this case, the Appellate Division substituted its discretion for that of Family Court and concluded that dismissal of respondent's objections was unwarranted. Although respondent failed to comply with the statutory deadline for filing proof of service, strict adherence to that deadline was not required and the court had discretion to overlook a minor failure to comply with the statutory requirement. There was no dispute that petitioner was not prejudiced in any way by the late filing inasmuch as she was served with a copy of respondent's objections within the statutory time period (see Family Ct Act § 439 [e]). Indeed, the record showed that petitioner filed a rebuttal to respondent's objections.

Matter of Sigourney v Santaro, 192 AD3d 1482 (4th Dept 2021)

Court Properly Determined Respondent Willfully Violated A Prior Support Order

Family Court denied respondent's objections to the order of the Support Magistrate, which, inter alia, determined that he willfully violated a prior order of child support. The Appellate Division affirmed. Petitioner made out a prima facie case of a willful violation and established that respondent had not made certain support payments required by the prior order. Respondent did not dispute that claim. Respondent then failed to meet the shifted burden to have offered some competent, credible evidence of his inability to make the required payments. Although respondent testified that he had no source of income and no assets, he was able to provide for his own food and shelter even though he had not applied for public assistance since he lost his job in 2017. Respondent admitted that he was not physically or mentally incapable to have maintained employment, and he failed to present evidence to have established that he made reasonable efforts to obtain gainful employment or meet his support obligation. With deference accorded to the Support Magistrate's credibility determinations, there was no reason to disturb her determination that respondent failed to demonstrate his inability to comply with the child support order. In addition, respondent failed to preserve for appellate review his contentions that the Support Magistrate erred when she refused to reopen the underlying support proceedings, and that his support arrears should have been capped because his income fell below the federal poverty guidelines. Moreover, respondent's contention that the prior order of support was invalid was not properly before the Appellate Division. To the extent that respondent contended that he was denied effective assistance of counsel due to the failure of counsel to object to the prior order of support on the ground that his income was calculated in contravention of Family Court Act § 413, that contention was rejected.

Matter of Foley v Dwyer, 192 AD3d 1652 (4th Dept 2021)

Father's Appeal From Dismissal Of His Petition To Terminate Support Obligation Was Moot Because The Child Turned 21 Years Old

Family Court denied petitioner father's written objections to an order of the Support Magistrate, which dismissed the father's petition that sought termination of his child support obligation on the ground that the subject child was emancipated due to her participation in the Air Force Reserve Officer Training Corps. The Appellate Division dismissed the appeal as moot. During the pendency of this appeal, the child turned 21 years old and, therefore, the father's obligation to pay child support ceased. Moreover, even if the father was successful on this appeal, he would have had no avenue to regain any sums he might have overpaid in child support as there was a strong public policy against restitution or recoupment of support overpayments. There was no basis to depart from that policy in this case. Under the circumstances, the rights of the parties would not have been directly affected by the determination of this appeal. The father's contention was rejected that the mootness doctrine did not apply.

Matter of Milano v Anderson, 192 AD3d 1668 (4th Dept 2021)

Court Properly Imputed Income To The Husband

Supreme Court imputed an annual income of \$54,995 to defendant husband and ordered him to pay maintenance and child support to plaintiff wife in accordance with that financial determination. The Appellate Division affirmed. The husband's contention was rejected that the court abused its discretion when it determined his imputed income. The court properly considered the husband's gross income as reported in the most recent federal income tax return, and the husband's real property holdings that did not produce income which consisted of three homes on significant acreage with a total value of nearly \$300,000. Although the husband argued that his gross income as was reported in his tax return was a misrepresentation of his actual income due to significant expenses, where a party's account was not believable, the court was justified when it found a true or potential income higher than that claimed. Here, the record established that the husband's credibility was impeached. Thus, the court was entitled to discredit the accounting of financial resources that the husband provided.

Matter of Hint v Hint, 193 AD3d 1340 (4th Dept 2021)

Dismissal Of The Amended Petition Was Error; Court Should Have Ruled On The Father's Objections To The Support Magistrate's Change-In-Circumstances Determination First

Family Court partially granted respondent father's written objections to the order of the Support Magistrate and dismissed petitioner mother's amended petition. The Appellate Division reversed, reinstated the amended petition and the order of the Support Magistrate, and remanded the matter for further proceedings. The parties were divorced pursuant to a judgment in Supreme Court that, insofar as relevant, fixed a monthly child support obligation and provided that each party had a right to seek modification of the support obligation upon a showing of, inter alia, a substantial change in circumstances. The judgment further decreed that all future custody, visitation, and child support matters were referred to Family Court for adjudication. The mother thereafter petitioned Family Court for modification of the support obligation and alleged in her amended petition that a substantial change in circumstances had occurred. The amended petition had not sought to invalidate the child support provisions of the parties' separation agreement on the ground that it violated the Child Support Standards Act (CSSA). The Support Magistrate granted the amended petition and found that the mother established a substantial change in circumstances that warranted modification of the parties' support obligations. Alternatively, the Support Magistrate made a sua sponte determination that the child support provisions of the parties' separation agreement violated the CSSA such that a de novo computation of child support was required. The father filed objections to the Support Magistrate's determinations. Family Court granted one such objection and dismissed the mother's amended petition solely on the ground that Family Court, as an entity, lacked subject matter jurisdiction to invalidate the child support provisions of a separation agreement. The court did not address the father's objections to the Support Magistrate's primary determination, i.e., that a substantial change in circumstances required

modification of the child support obligation. The court erred when it dismissed the amended petition without first ruling on the father's objections to the Support Magistrate's change-in-circumstances determination. Given Supreme Court's prior referral, Family Court had subject matter jurisdiction to entertain the mother's petition to modify the child support order on the ground of a substantial change in circumstances. Thus, the court should have addressed the father's objection to the Support Magistrate's primary rationale to have granted the amended petition, i.e., a substantial change in circumstances. Therefore, the matter was remitted to Family Court for further proceedings on the father's remaining objections and for consideration of the mother's remaining contentions.

Matter of Andalora v Dix, 193 AD3d 1421 (4th Dept 2021)

Court's Custody Determination Was Not Properly Placed Before The Appellate Division; The Father Failed To Establish That A Suspension Or Termination Of Child Support Payments Was Warranted; Child Support Determination Was Affirmed

Family Court partially granted and partially denied respondent father's objection to an order of the Support Magistrate. The Appellate Division affirmed. The mother commenced a proceeding which sought an upward modification of a 2014 order of child support with respect to the parties' two children. The father raised a defense of parental alienation. The Support Magistrate referred that issue to Family Court and a hearing was held. In addition, the father filed a petition which sought to modify a prior order of custody, which Family Court also addressed at the same hearing. By an order entered in December 2018, Family Court found that there was no custodial interference, but it modified the custody order. Specifically, Family Court granted the father sole legal and physical custody of the daughter, and the mother sole legal and physical custody of the son. The Support Magistrate then granted the mother's petition and modified the order of child support. The father filed an objection, and in July 2019, Family Court granted in part and denied in part the father's objection. The father appealed from the July 2019 order. The father's contention that the court erred in its determination on his parental alienation defense was properly before the Appellate Division on appeal inasmuch as that part of the December 2018 order which resolved that issue was considered a nonfinal order. As such, this contention was addressed in the appeal from the July 2019 order. To the extent, however, that the father argued that the court erred when it granted the mother sole legal and physical custody of the son, that issue was not properly before the Appellate Division because the father did not appeal from the December 2018 order. With respect to the child support payments at issue, the father failed to establish that the mother deliberately frustrated his visitation rights to such an extent that suspension or termination of support payments was warranted. Although the record established that the parents had an acrimonious relationship, the mother testified that she never hindered access to the father or encouraged either child not to visit the father. To the contrary, the mother testified that she encouraged the son to speak with and visit the father, and she explained that, as the children got older, they began dealing directly with the father to schedule parenting time. The father's contention was rejected that the mother failed to establish a change in

circumstances to have justified reconsideration of the child support obligation. Inasmuch as three years had passed since the 2014 child support order, the mother was not obligated to have demonstrated a substantial change in circumstances. Contrary to the father's contention, the Support Magistrate did not abuse his discretion when income was not imputed to the mother and instead used her actual earnings when child support was calculated. The father's further contention was rejected that the award of child support was unjust or inappropriate.

Matter of Maldonado v Cappetta, 195 AD3d 1562 (4th Dept 2021)

Downward Deviation Of The Father's Presumptive Support Obligation Under The Child Support Standards Act Was Error

Family Court denied the objections of petitioner, Department of Social Services on behalf of the mother, to the order of the Support Magistrate. The Appellate Division reversed, granted the objections and the petition, directed respondent father to pay child support of \$74 per week retroactive to August 5, 2019, and remitted the matter to Family Court for further proceedings. Petitioner commenced this proceeding on behalf of the mother of the subject child and sought an upward modification of the father's child support obligation. The record established that the father and the mother shared legal and physical custody of the child, and the mother received public assistance to help support the child. The father was employed and earned approximately \$22,000 per year. A prior order directed the father to have paid \$50 per month in child support. The Support Magistrate determined that, pursuant to the Child Support Standards Act (CSSA), the father's support obligation based on his income was \$74 per week, and the record supported that calculation. Nevertheless, the Support Magistrate further determined that the amount was unjust, and granted a variance. Family Court erred when it denied petitioner's objections to the Support Magistrate's order. The Support Magistrate purported to reduce the father's obligation pursuant to the CSSA because the father made additional expenditures for maintenance of his house which would have permitted the child to stay there during the time that he stayed with the father. Such a reduction for extended visitation is permitted by section 413 (1) (f) (9) of the CSSA, however, and that subdivision of the statute applied only where the child was not on public assistance. Furthermore, the proportional offset method of calculating child support was explicitly rejected by the Court of Appeals. A downward deviation from the presumptive support obligation on the ground that the noncustodial parent incurred expenses while the child was in his or her care was merely an improper application of the proportional offset method.

Matter of Livingston County Department of Social Services v Hyde, 196 AD3d 1071 (4th Dept 2021)

Court Properly Denied The Husband's Application To Reduce His Child Support Obligation

Supreme Court denied that part of defendant husband's application which sought to

reduce his child support obligation. The Appellate Division affirmed. Plaintiff and defendant divorced in 2016. Pursuant to the terms of the parties' oral stipulation, defendant was, among other things, required to pay plaintiff child support for the benefit of the parties' six children. In 2017, defendant moved by order to show cause for, inter alia, recalculation and reduction of his child support obligation due to his health issues and inability to continue with his work as a surgeon. After a hearing, Supreme Court recalculated the parties' child support obligations and denied that part of defendant's application which sought to reduce his child support obligation. The record supported the court's discretionary determination to have imputed income to defendant based on, inter alia, his employment history and earning capacity. With respect to defendant's child support obligation, that defendant's change in circumstance, i.e., his medical disability, was not of his own making. However, defendant failed to demonstrate that he had made a good-faith or diligent effort to have obtained employment commensurate with his ability, qualifications, and experience such that a downward modification was warranted. Defendant testified that he did not conduct a job search or attempt to replace his lost income because he hoped to return to his medical practice after his surgery. Furthermore, although defendant obtained employment as an administrative consultant at a hospital after his surgery, he was fired from that position and thereafter made only one inquiry about potentially obtaining a teaching position. In any event, in addition to his non-taxable disability income, defendant had substantial assets, and the proper amount of support payable should be determined not by a parent's current economic situation, but by a parent's assets and earning powers.

Ryan v Ryan, 197 AD3d 869 (4th Dept 2021)

Family Court Properly Confirmed Support Magistrate's Finding of Willful Violation

Family Court effectively confirmed the determination of the Support Magistrate that the respondent father willfully violated a prior order of child support. The Appellate Division affirmed. Respondent failed to submit written objections which would have properly preserved his challenges. In any event, the Appellate Division refused to 1) overturn the Support Magistrate's imputation of income, 2) find that the Support Magistrate demonstrated bias or interfered with the father's presentation of his case, 3) find that petitioner did not establish proper evidence of willfulness, or 4) entertain respondent's ineffective assistance of counsel argument.

Matter of Wyoming County Dept. Of Social Servs. v Kates, 199 AD3d 1369 (4th Dept 2021)

Appellate Division Dismissed Appeal as Moot, Family Court's Amended Order was Entered at a Time When Jurisdiction was Undisputed

Family Court confirmed the Support Magistrate's finding of willful violation and committed respondent to jail for a period of 60 days, as recommended. The Appellate Division dismissed. Respondent moved to vacate Family Court's order on the ground that it was

entered at a time when the court's jurisdiction was suspended due to the pendency of respondent's application to remove to federal court. Thereafter, respondent's removal application was denied. Family Court subsequently entered an amended order denying the motion to vacate and reconfirming the Support Magistrate's determination. The amended order was entered after the denial of respondent's removal application at a time when it was undisputed that the court had jurisdiction. Any corrective measures which the Appellate Division might have taken with respect to the first order would have no practical effect.

Matter of Mercedes v Sanchez, 199 AD3d 1400 (4th Dept 2021)

CUSTODY AND VISITATION

Court Properly Limited Incarcerated Father's Access To One Letter Per Month; Father's Violation Petitions Were Properly Dismissed

Family Court dismissed the father's modification petition and violation petitions. The Appellate Division affirmed. Pursuant to a 2006 order on consent that was modified by a 2010 order on consent, the mother had sole custody of the subject child. The father had such visitation as agreed by the parties and the father was permitted to write letters to the child. The father appealed from an order that denied his petition seeking in-person visitation with the child at the correctional facility where he was incarcerated, denied his violation petitions, and partially granted the mother's petition to the extent that the father's access to the child was limited to one letter by the father to the child per month. The mother established by a preponderance of the evidence that, under all the circumstances, visitation would have been harmful to the child's welfare. There was a sound and substantial basis in the record to support the court's determination to limit the father's access to the child to writing one letter per month. The record included evidence that the father had virtually no relationship with the child prior to his most recent incarceration, and the letters he wrote to her in the past contained numerous derogatory remarks about the mother, which was resented by the child. As the court also noted in its written decision, the child strongly preferred to have no contact with the father, and while the court is not required to abide by the wishes of a child to the exclusion of the other factors in the best interests analysis, the wishes of the 14-year-old child are entitled to great weight where, as here, the age and maturity of the child would have made her input particularly meaningful. The child was aware through her own internet searches of the crimes towards women for which the defendant was incarcerated, and the child was afraid of the father because of the disturbing nature of those crimes. Furthermore, the father's violation petitions were properly dismissed. The father failed to establish by clear and convincing evidence that the mother willfully violated the terms of the custody orders with respect to his visitation.

Matter of Santoro v Guggi, 191 AD3d 1249 (4th Dept 2021)

Court Properly Granted Mother Sole Custody And Allowed The Mother To Relocate To North Carolina With The Subject Child, But Failed To Sufficiently Set Forth The Details Of Supervised Visitation With The Father

Family Court granted petitioner mother sole custody of the subject child and leave to the mother to relocate with the child to North Carolina. The Appellate Division partially modified. The determination that petitioner should return to the community at least 3 times per year for a week each time, was vacated, the order was otherwise affirmed, and the matter was remitted to Family Court for further proceedings. The father waived his challenge to the authority of the Court Attorney Referee to have heard and determined the petitions. Neither the father nor his attorney voiced any objections to the Referee having heard and determined the petitions, and each signed the written stipulation indicating their agreement to the Referee's determination of the matter. Thus, the father's challenge was

waived. The father's further contention was rejected that his consent to the Referee's determination was invalid on the ground that he signed the stipulation prior to having been advised of his right to counsel. Additionally, the father's contention was rejected that the provisions concerning his supervised visitation were inadequately set forth in the order because the terms were expressly articulated in the decision. Therefore, the decision controlled and the visitation provisions in the decision were deemed to have been part of the order. However, the supervised visitation provisions were inadequate because the mother was only required to return to the community 3 times per year which would have resulted in contact with the father once every 4 months. The Referee also failed to address the details of whether such visitation with the father was for the entire week or, if not, the number and duration of visits during each week; who would constitute an appropriate supervisor for the visitation; whether the father could have had overnight visitation with the child in the presence of a supervisor; and how much notice the mother would have been required to give the father before she returned to the community. Therefore, the provision of the order requiring mother to return to the community at least 3 times per year for a week each time was vacated. The matter was remitted so that the court could fashion an appropriate schedule for supervised visitation in accordance with the best interests of the child.

Matter of Sturnick v Hobbs, 191 AD3d 1375 (4th Dept 2021)

Court Properly Denied Petition To Terminate The Grandmother's Visitation And Properly Held Respondents Mother And Father In Contempt

Family Court found respondents mother and father in contempt of court for their violation of a prior order of custody and visitation that awarded petitioner grandmother visitation with the subject children (appeal No. 1). The court also dismissed the father's petition to modify the prior order by termination of the grandmother's visitation with the children (appeal No. 2). In both appeals by respondents, the Appellate Division dismissed the mother's appeal and otherwise affirmed. The mother's appeals were dismissed because she did not appear at the hearing and no appeal lied from an order entered on default. The father's contention in both appeals was rejected that the court abused its discretion when it precluded the mother from testifying by telephone. Remote testimony was not statutorily authorized in this proceeding. Although a court has the inherent authority to allow remote testimony, the court did not abuse its discretion when it denied such permission in this case inasmuch as no excuse was offered for the mother's absence in court. The court also specifically noted that it would be difficult to assess the mother's credibility if she testified by telephone. Moreover, the grandmother established by clear and convincing evidence that a lawful court order that clearly expressed an unequivocal mandate was in effect, that the father had actual knowledge of its terms, and that the violation defeated, impaired, impeded, or prejudiced the rights of the grandmother. The father's testimony alone established that he repeatedly withheld visitation from the grandmother without good cause. In light of that evidence, the father's challenge in appeal No. 1 as to the severity of his sentence was rejected.

Matter of Ferguson v Leclair, 191 AD3d 1380 (4th Dept 2021)

Court Properly Awarded The Mother Sole Custody, Suspended The Incarcerated Father's Visitation With The Children, And Suspended The Father's Communication With The Children And Their Service Providers

Family Court granted petitioner mother's modification petition and awarded the mother sole custody of the two subject children. The Appellate Division affirmed. It was undisputed that the father's incarceration upon his criminal conviction for sexually abusing an older sibling of the subject children constituted a sufficient change in circumstances to have warranted an inquiry into whether modification of the stipulated custody and visitation order would have been in the children's best interests. Moreover, the court's determination that, under the circumstances, it was in the children's best interests for the mother to have had sole custody was not challenged by the father. The father's contention was rejected that the court erred when it suspended all visitation and communication between himself and the children. As a threshold issue, despite a missing transcript that Family Court took judicial notice of, there was sufficient testimony elsewhere in the record to have permitted meaningful appellate review of the father's challenge to the court's suspension of all visitation and communication with the children. To the extent the father maintained that it was error for the court to have not provided him in-person visitation with the children at the correctional facility, this contention was not preserved for appellate review because the father never requested such visitation. The father only requested telephonic communication and written correspondence. Even though the court did not expressly determine whether the presumption in favor of visitation with the father was rebutted, the record on appeal adequately reflected that the mother established by a preponderance of the evidence, under all the circumstances, visitation would have been harmful to the children's welfare. The testimony of the mother, a school aide, and the statements adduced at the *Lincoln* hearing with one of the subject children, established that the father was criminally convicted for sexual abuse of the older sibling, that one of the children also disclosed sexual abuse by the father and exhibited behaviors indicative of such abuse, that prior telephone contact with the father deeply disturbed that child, and that the other subject child had not had contact with the father for years and feared him. Thus, a sound and substantial basis existed in the record for the court's determination that the visitation requested by the father would not be in the children's best interests. The father's further contention that the court's suspension of communication with the children's service providers was not preserved for appellate review as it was based solely upon inadmissible hearsay. In any event, there was a sound and substantial basis in the record to support the court's determination in this regard. The father also contended that reversal was required because the court failed to advise him of his rights pursuant to Family Court Act § 262 (a). The record reflected that the father already had assigned counsel by the time of the hearing. Additionally, the court, upon counsel's request, allowed the father, who appeared via telephone from the correctional facility, to confer privately with his counsel via telephone prior to proceeding with the hearing at which his counsel appeared in person. The father's related contention that the court should have granted an adjournment to provide him additional time to have conferred with his counsel was not preserved for appellate review because the father never requested such an adjournment. The father's contention that he was denied effective assistance of counsel lacked merit.

Court Properly Awarded Sole Custody To Subject Child's Grandparents

Following a hearing, Family Court awarded sole custody of the subject 11-year-old child to petitioners, the child's maternal grandparents (grandparents). The Appellate Division affirmed. Respondent father correctly conceded his imprisonment in a federal facility for the eight years before the petition against him was filed constituted the requisite extraordinary circumstances that warranted an inquiry into whether it was in the best interests of the child for the grandparents to have been awarded custody. The grandparents therefore met their burden of proof on that issue. Contrary to the father's contention, there was a sound and substantial basis in the record for Family Court's determination that the best interests of the child were served by the award of custody to the grandparents. The record established that the grandparents, without any financial contribution from the father, had provided the child with a loving and stable home environment since the birth of the child, and had provided for the child's physical, emotional, educational, and medical needs, as well as for the special therapeutic needs from the child's medical diagnoses of autism and attention deficit hyperactivity disorder. *Matter of Tomlinson v Horton*, 191 AD3d 1420 (4th Dept 2021)

Court Properly Granted The Mother Primary Physical Residence And Reduced Father's Parenting Time

Family Court granted petitioner mother's modification petition and awarded her primary physical residence of the subject children. Respondent father's parenting time was also reduced. The Appellate Division affirmed. As an initial matter, the father waived his contention that the mother failed to establish a change in circumstances to have warranted an inquiry into the best interests of the children. The father alleged in his own cross petition that there had been such a change in circumstances. Contrary to the father's further contention, the court properly weighed the appropriate factors and there was a sound and substantial basis in the record for the court's modification of the prior order of custody and parenting time. The record of the hearing established that the prior custody and parenting time order was no longer practical because one of the children attained school age. Thus, it was in the children's best interests to have enrolled them in the school district in which the mother lived and to have provided the father with reduced parenting time during the school year with increased parenting time when school was not in session.

Matter of Verne v Hamilton, 191 AD3d 1433 (4th Dept 2021)

Court Properly Awarded Custody Of The Two Children To Different Parents; Both Children Were Entitled To The Appointment Of Separate AFC Because Their Views Differed

Family Court granted petitioner father's modification petition and awarded him primary physical residence of the older subject child. The Appellate Division affirmed. The custody and visitation provisions of the judgment of divorce provided the mother primary physical residence of both children. The mother's and both appellate Attorneys for the Children's contentions were rejected that the father failed to meet his initial burden to have demonstrated the requisite change in circumstances that warranted an inquiry into the best

interests of the children. The father established that there had been a significant deterioration between the mother and the older child, which culminated in a physical altercation between them that was the subject of a police report and an investigation by child protective services. Contrary to the related contention by the mother and both appellate AFC, the court's determination that the best interests of the children warranted their residence with different parents was supported by a sound and substantial basis in the record. The further contention by the appellate AFC that the court erred when it initially awarded the father temporary physical residence was moot because the temporary orders issued before trial were superseded by the order appealed. The appellate AFC for the older child's contention was rejected that it was error for the court to have allowed the attorney who had jointly represented the subject children in the parties' divorce proceeding in 2015 to represent the older child, but not the younger child, at the trial in this case in 2019. The children were entitled to separate counsel in the trial here because their views differed and a different trial AFC was appointed to represent the younger child. Moreover, there was no reasonable probability that the younger child had revealed confidences to the older child's trial AFC that were relevant to the subject matter of the litigation. The older child's AFC advocated for a position that was consistent with the preferences that the older child expressed to the court in the *Lincoln* hearing.

Matter of Labella v Robertaccio, 191 AD3d 1457 (4th Dept 2021)

Court Properly Ordered Supervised Visitation Was To Occur In New York

After a hearing, Family Court granted the father's petition to modify a prior order of custody and visitation to the extent that the mother's visitation with the subject children was required to occur in New York and was to have been supervised. The Appellate Division affirmed. The mother's contention was rejected that the court erred when it denied her request for an adjournment of the hearing until she could travel from out of state to appear in person. The mother failed to demonstrate that she suffered any prejudice as a result of the fact that she did not attend the hearing in person inasmuch as she appeared by telephone, declined the opportunity to testify, and her attorney fully represented her interests at the hearing. Thus, the court did not abuse its discretion when it denied the mother's request for an adjournment. The mother's related contention was rejected that the court's refusal to grant the adjournment deprived her of effective assistance of counsel. The record established that the mother's attorney was fully familiar with the case and was both competent and zealous as evidenced by the fact that the attorney vigorously cross examined the father, made appropriate objections, and put forth a reasoned, albeit unsuccessful motion to dismiss the petition. The mother's further contention that the court erred when it determined that there was reliable corroboration of the children's out-of-court statements that described certain mistreatment by the mother, lacked merit. Each child's out-of-court statements were sufficiently corroborated and cross-corroborated by the testimony at their *Lincoln* hearings that, during an out-of-court state summer visitation period, the mother subjected them to excessive and inappropriate corporal punishment when she repeatedly struck them with a belt that left bruises, deprived them of indoor bathroom facilities and necessities, and engaged in other mistreatment and inappropriate conduct while the children were in her care. In addition, the children's reports of mistreatment and inappropriate conduct by the mother, and its detrimental effect on them, were partially

corroborated by testimony of the father. Although the mother challenged the court's determination with respect to the father's credibility and the reliability of the corroborative evidence, in view of its unique opportunity to observe the witnesses in the course of the fact-finding and *Lincoln* hearings, the court's credibility determinations were entitled to great deference. Furthermore, the father met his burden and established a change in circumstances sufficient to warrant an inquiry into whether a modification of the visitation arrangement was in the best interests of the children. The mother's mistreatment of the children during the summer visitation period constituted the requisite change in circumstances. The mother's additional assertion was rejected that the court erred to the extent that it required supervised visitation on the ground that the father failed to establish that such visitation was in the children's best interests. There was a sound and substantial basis in the record to support such visitation. Similarly, there was no basis to disturb the court's determination that the supervised visitation was to occur in New York. In the event visitation was withheld because the parties were unable to agree on a mutually acceptable supervisor that facilitated the mother's supervised visitation with the children in New York, as was contended by the mother, the mother's remedy was to file a petition which sought enforcement or modification of the order.

Matter of Dixon v Crow, 192 AD3d 1467 (4th Dept 2021)

Court Erred When It Dismissed The Father's Modification Petition As Moot Without A Determination On The Merits; Dispositions Vacated

Family Court dismissed as moot petitioner father's petition which sought modification of custody and visitation with the three subject children (appeal No. 1). In three additional orders, Family Court issued modified orders of fact-finding and disposition that found neglect or derivative neglect against respondent mother as to each of the three children and placed the children with their maternal aunt (appeal Nos. 2-4). In appeal No. 1, the Appellate Division reversed, reinstated the father's petition, and remitted the matter to family court for further proceedings. In appeal Nos. 2-4, the Appellate Division partially modified to the extent that the disposition of each order was vacated, and otherwise affirmed. The father initially filed the modification petition and sought primary residential custody of the three children. Petitioner Department of Social Services then commenced a neglect proceeding against the mother, and the mother consented to the entry of orders that determined the subject children were neglected children. Family Court held a joint hearing regarding the neglect petition and the father's custody petition. After the hearing, the court placed the children with their maternal aunt with the mother's consent but over the father's objection, and dismissed the father's custody petition as moot. Dismissal of the father's petition for modification of custody and visitation as moot without a determination on the merits of his petition was error. Moreover, based upon the facts of this case, the maternal aunt did not have the burden to have shown extraordinary circumstances inasmuch as she did not file a petition in this matter and was not awarded custody of the children. Rather, the children were placed with her for the pendency of the article 10 proceeding pursuant to Family Court Act § 1017. The order in appeal No. 1 was therefore reversed, the orders in appeal Nos. 2-4 were modified to the extent that the dispositions were vacated, and the matter was remitted to Family Court for a determination of the father's petition under Family Court Act article 6, and reconsideration of the disposition in

the article 10 proceeding in light of its determination of the father's petition.

Matter of Michael J.M., v Lisa M.H. 192 AD3d 1470 (4th Dept 2021)

Court Properly Awarded The Parties Joint Custody Of The Subject Child And Denied The Mother's Request To Relocate To North Carolina With The Child; Primary Physical Residence Should Have Been Awarded To The Father

Family Court, inter alia, awarded the parties joint custody of the subject child with primary physical residence to respondent-petitioner mother, and denied the mother's request to relocate with the child from New York to North Carolina. Both parties appealed. The Appellate Division modified to the extent that primary physical residence of the child was awarded to petitioner-respondent father. The mother's contention was rejected that the court erred when it denied her request to relocate with the child to North Carolina. The mother was correct that this case was not properly characterized as a relocation case because it involved an initial custody determination. However, when all the appropriate factors were considered, the court properly determined that the child's relationship with the father would have been adversely affected by the proposed relocation because of the distance between New York and North Carolina. The record established that, although the mother had stronger family ties to North Carolina than to New York, her plans for housing, employment, and schooling in North Carolina were not well developed. Additionally, the child demonstrated a marked improvement in behavior after the father's parenting time was increased under the temporary custody orders issued prior to the trial. With respect to the father's cross appeal, he had standing to appeal from the order even without the amended petitions in the record because he was aggrieved by the court's determination on the mother's petition. That determination was an initial custody determination, and the father's counsel made clear during oral summation at the conclusion of the trial that the father was seeking joint custody of the child with primary physical residence to him. Thus, the father had a direct interest in the matter at issue that was affected by the result, and the adjudication had binding force against his rights, person or property. Furthermore, there was not a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to have awarded the mother primary physical residence. The record established that both parents were fit and had appropriate residences and financial resources to have supported the child, but the mother had repeatedly attempted to undermine the father's relationship with the child, while the father did not engage in such behavior. Therefore, although the court properly awarded joint custody to the parties, with equal parenting time, the order was modified to award primary physical custody to the father. The court also properly determined motions to settle the record and to reconstruct trial testimony.

Matter of Johnson v Johnson, 192 AD3d 1670 (4th Dept 2021)

Dismissal Of The Father's Modification Petition Was Error; Excessive Absences From School Sufficiently Demonstrated A Change In Circumstances

Family Court dismissed the father's petition to modify a prior stipulated order of custody of the subject child on the ground that he failed to establish a change in circumstances. The

Appellate Division reversed, reinstated the petition, and remanded the matter to Family Court for a hearing on the best interests of the child. Family Court's determination lacked a sound and substantial basis in the record. The father and respondent mother entered into the stipulated order shortly after the child's fifth birthday, before she entered kindergarten. At the hearing on the petition, the court received the child's third-grade school attendance records in evidence. Although the precise number of absences was not discernable in the appellate record, the court expressed that it was concerned with the number of absences up to that point of the school year, of which there were approximately 30. Thus, the father established a change of circumstances sufficient to have warranted an inquiry into to whether a change in custody was in the best interests of the child because the child's school records demonstrated that she had excessive school absences in the third grade.

Matter of Myers v Myers, 192 AD3d 1681 (4th Dept 2021)

Court Properly Awarded Sole Legal And Primary Physical Custody To The Father

Family Court granted respondent father sole legal and primary physical custody of the parties' three children. The Appellate Division affirmed. Contrary to petitioner mother's contentions, the record reflected that both parties were loving parents who cared deeply for their children. There was a sound and substantial basis in the record to support the court's determination that the children's best interests were served in the sole legal custody and primary physical custody of the father. The court's determination after a hearing that the best interests of the children were served by such an award was entitled to great deference, particularly in view of the hearing court's superior ability to have evaluated the character and credibility of the witnesses. Such a determination was not disturbed where the record established that it was the product of the court's careful weighing of the appropriate factors.

Matter of Schram v Nine, 193 AD3d 1361 (4th Dept 2021)

Court Properly Dismissed The Father's Modification And Violation Petitions Without A Hearing

Without a hearing, Family Court granted the motions of respondent-petitioner mother to dismiss petitioner-respondent father's petitions which sought modification of a prior consent order of custody and visitation, and his other petitions that alleged the mother had violated that prior consent order. The Appellate Division affirmed. The court did not err when it granted the mother's motions without a hearing. The father failed to make a sufficient evidentiary showing of a change in circumstances that would have required a hearing on the modification petitions. Moreover, with respect to the father's violation petitions, a hearing was not required because the father failed to set forth sufficient allegations that, if established at an evidentiary hearing, could have supported an award of the relief sought.

Matter of Rodriguez v Rodriguez, 194 AD3d 1416 (4th Dept 2021)

Court Properly Declined To Sanction The Mother; Court Properly Permitted The Mother And Child To Maintain Their Residence In Herkimer County

Family Court modified a prior order to the extent that respondent mother was allowed to reside in Herkimer County with the subject child. The Appellate Division affirmed. Pursuant to the prior order entered on their consent, the parties had joint legal custody of the subject child, the mother had primary residential custody of the child, the father had such visitation as could be agreed upon by the parties, and neither party could relocate the child outside of Oneida County without a court order or the written consent of the other party. The father filed a violation petition and a modification petition. Family Court determined that the mother violated the prior order when she moved to Herkimer County without a court order or the father's written consent but that such violation was not willful, and modified the prior order to the extent that the mother and child were permitted to live in Herkimer County. The court did not abuse its discretion when it did not impose sanctions for the mother's violation of the prior order. The mother offered residential custody of the child to the father in Oneida County instead of relocating the child with her to Herkimer County, but the father refused her offer. The mother thereafter obtained the father's verbal consent to move to Herkimer County. Six months after the mother rented an apartment in Herkimer County, the father complained for the first time to the mother of her move and then filed his petition which alleged that the mother's move constituted a violation of the prior order. Moreover, the father was not aggrieved by the court's determination that he met his burden of establishing the requisite change of circumstances necessary for the modification of the prior order. Regarding the best interests of the child, the court carefully weighed the appropriate factors, and there was no basis to have disturbed its determination that permitted the mother and child to maintain their residence in Herkimer County.

Matter of Menard v Roberts, 194 AD3d 1427 (4th Dept 2021)

Court Did Not Improperly Delegate Authority To Schedule Visitation

Family Court modified a prior order of custody and access by, inter alia, granting petitioner father therapeutically supervised in-person visitation with the subject child. Visitation was to occur a minimum of once per month for a period of two hours and was to take place at an agency in Buffalo with monthly supervised video access as agreed upon and arranged by respondent mother and the visitation supervisor. The Appellate Division affirmed for the reasons stated in the decision at Family Court, but wrote only to address the father's contention that the court improperly delegated its authority to schedule visitation. The court did not improperly delegate its authority to schedule visitation, and thus the father's contention was rejected that the matter should be remitted to the court to fashion a more specific visitation schedule.

Matter of Schultz v Lanphear, 195 AD3d 1439 (4th Dept 2021)

Court Properly Modified Visitation To Supervised Visitation Once Per Week For Up To One Hour

Family Court effectively granted the mother's modification petition and adjudged that the father was to have supervised visitation with the subject child once per week for no more than one hour, among other things. The Appellate Division affirmed.

The father's contention was rejected that the court erred when it reduced the amount of his visitation with the child and when it imposed the requirement that such visitation was to be supervised. There was a sound and substantial basis in the record that supported the requirement of supervised visitation once per week for up to one hour. Additionally, the father's further contention was rejected that the court should have appointed a guardian ad litem for him. The record as a whole demonstrated that the father was capable of understanding the proceedings, assisting counsel, and defending his rights.

Matter of Detrick v Detrick, 195 AD3d 1444 (4th Dept 2021)

Court Properly Dismissed Modification Petition Without A Hearing

Family Court dismissed the father's petition which sought modification of a prior order of custody and visitation without first having conducted a hearing. The Appellate Division affirmed. Family Court did not abuse its discretion when it dismissed the petition without conducting a hearing. A hearing was not automatically required whenever a parent sought modification of a custody (or visitation) order. The father failed to make a sufficient evidentiary showing of a change in circumstances that would have required a hearing.

Matter of Ettelt v Ettelt, 195 AD3d 1453 (4th Dept 2021)

Court Properly Awarded The Mother Sole Custody Of The Subject Children

Family Court granted the mother's modification petition and awarded her sole custody of the subject children. The mother met her burden and established a change in circumstances sufficient to warrant an inquiry into whether a modification of the custody arrangement was in the best interests of the children. Here, the parties' relationship became so strained and acrimonious that communication between them was impossible. Thus, a change in circumstances was established. Additionally, there was a sound and substantial basis in the record that an award of sole custody to the mother was in the children's best interests. Even if it was assumed that the court erred when it admitted in evidence the notes of the children's school counselor, any such error was harmless. There was a sound and substantial basis in the record for the court's determination without consideration of the counselor's notes.

Matter of Kopciowski v Kopciowski, 195 AD3d 1455 (4th Dept 2021)

AFC Properly Substituted Judgment And Advocated Position Contrary To The Child's Expressed Wishes; Court Properly Awarded Sole Custody And Primary Physical Residency To The Father

Family Court awarded sole custody and primary physical residency of the subject child to respondent father, with visitation to petitioner mother. The Appellate Division affirmed. The parties were the parents of a child born in 2009. In 2017, Family Court issued an order on the mother's default that granted the father custody of the child. The mother thereafter sought to vacate the default order and, when that application was denied, she moved for leave to renew that application. On appeal, the order which denied the mother's application to vacate the default order was reversed and the matter was remitted to Family Court. The mother was entitled to a traverse hearing to determine whether she was properly served with the father's petition for custody. During the pendency of that appeal, the parties filed multiple violation petitions against each other. On remittal, the parties agreed to withdraw all prior petitions and proceeded to an initial custody determination. The mother's contention was rejected that the AFC improperly substituted her judgment for that of the child when the AFC advocated a position that was contrary to the child's expressed wishes. The record supported the determination that the mother's persistent and pervasive pattern of alienation of the child from the father was likely to have resulted in a substantial risk of imminent, serious harm to the child. Thus, the AFC acted in accordance with her ethical duties when she informed the court of the child's wishes and then advocated for a result different from the child's position. Additionally, there was a sound and substantial basis in the record which supported the court's determination that it was in the child's best interests to have awarded the father sole custody and primary physical residence. The record established that the court carefully weighed the appropriate factors. The determination of the court, which was in the best position to have evaluated the character and credibility of the witnesses was accorded great weight.

Matter of Vega v Delgado, 195 AD3d 1555 (4th Dept 2021)

The Record Lacked An Adequate Basis For An Award Of Primary Physical Placement Of The Subject Child To The Mother; The Father Was The More Fit Parent

Family Court awarded primary physical placement of the subject child to respondent mother, among other things. The Appellate Division modified and remitted the matter to Family Court for further proceedings. Petitioner father sought to modify a prior order of custody and visitation that was entered on the consent of the parties. The record lacked a sound and substantial basis for the court's determination that an award of primary physical placement to the mother was in the child's best interests. Although the existing custody arrangement established by agreement of the parties was a weighty factor, the father was the more stable parent. Particularly troubling was the mother's continued abuse of illegal narcotics. In three separate incidents during the six-month period before the hearing, the mother overdosed and was revived with Narcan, was found passed out in a parking lot, and went missing over a weekend, having left the child in the care of the maternal grandfather. The mother testified during the hearing that her addiction affected her ability to

parent and acknowledged in particular that the child's poor attendance in school was in part due to her continued abuse of narcotics. In contrast, although the father admitted to the abuse of narcotics in the past, his testimony established that he had not used illegal drugs in the 5½ years before the hearing. The father demonstrated that he was relatively more fit with respect to the quality of his home environment and his ability to have provided for the child's emotional and intellectual development, particularly her educational needs. Regarding the relative financial status of the parties, the father worked full time, whereas the mother had not worked in the two years that preceded the hearing. Therefore, the order was vacated and the matter was remitted to Family Court to fashion an appropriate visitation schedule.

Matter of Dobson v Messervey, 195 AD3d 1565 (4th Dept 2021)

Court Erred in Making Custody Determination Before Parties Completed Court-Ordered Psychological Evaluations

Family Court granted respondent father sole custody of the subject child. The Appellate Division reversed, reinstated the mother's petition seeking to suspend the father's visitation, and remitted the matter to Family Court for a new hearing. The court erred in making its custody determination before the parties had completed the psychological evaluations ordered by the court. The mother's mental and emotional health was the central issue contested and, therefore, the dispositive inquiry was whether there was sufficient testimony from the parties and other witnesses to enable the court to resolve the custody dispute without those evaluations. Although a psychological expert testified at the fact-finding hearing on behalf of the father, that expert interviewed the parties and the subject child to assess whether the child had been sexually abused, and accordingly did not provide much information on the mother's emotional functioning, the impact her mental health issues had on her ability to parent the child, or the fitness of either parent. Thus there was not sufficient evidence for the court to resolve the custody dispute without considering the court-ordered psychological examinations of the parents. Additionally, Family Court did not abuse its discretion in failing to hold a *Lincoln* hearing given the young age of the child and the fact that the child could have been inadvertently coached by the mother to repeat unfounded allegations. Pending Family Court's determination on remittal, the Appellate Division did not disturb the custody and visitation provisions in the order appealed.

Matter of Pontillo v Johnson-Kosiorek, 196 AD3d 1163 (4th Dept 2021)

Dismissal Of Modification Petition Without A Hearing Affirmed

Family Court dismissed the mother's petition which sought modification of a prior order of custody and visitation. The Appellate Division affirmed. The mother's contention was rejected that Family Court abused its discretion when it dismissed the petition without a hearing. The mother failed to make a sufficient evidentiary showing of a change in circumstances which would have required a hearing.

Matter of Thomas v Thomas, 196 AD3d 1181 (4th Dept 2021)

The Mother's Cross Petition For Retroactive Permission To Relocate With The Subject Child To Arizona Was Properly Granted Due To The Father's Continuous And Relentless Acts Of Domestic Violence Despite Lack Of Court Approval Or Consent From The Father

Family Court granted respondent mother's cross petition for retroactive permission to relocate with the subject child to Arizona. The Appellate Division affirmed by opinion and order. A prior order of custody and visitation awarded the mother sole custody of the five-year-old child with visitation to the father. That order included a provision which prohibited either parent from the permanent removal of the child from the County without the written consent of the other parent or a court order. Approximately one year later, the father discovered the mother's whereabouts and commenced this proceeding by way of petition which sought custody of the child. The mother filed a cross petition and sought permission to relocate, nunc pro tunc. The mother asserted that she relocated due to a continuous and relentless cycle of domestic violence perpetrated by the father which caused the mother to have feared for her safety. At a hearing on the petition and cross petition, the mother testified about multiple instances of domestic violence and harassment perpetrated by the father. For example, during the brief period that they lived together, the mother tried to leave their home with the child and the father prevented her from doing so. The father physically restrained her and blocked the doorway when the mother tried to leave. The father later persuaded her to return when he threatened to "blow his head off." There were several other instances of domestic violence and harassment that led to the mother's unilateral relocation with the child. Shortly after they found an anonymous note that was threatening in nature, the mother and her fiancé decided to move cross-country in order to have ensured her safety and that of the child. She chose a location in Arizona based on the quality of the schools, affordability, and relative closeness to family in California. The mother did not inform the father or request permission of the court before she left New York with the child out of fear of retaliation from the father. The father denied the allegations of domestic violence, testified that he had never been criminally charged with domestic violence, he never perpetrated acts of domestic violence against the mother in front of the child, he never threatened the mother, and there were no incidents that involved the police or Child Protective Services in the year before the mother's relocation. Additionally, the father denied ownership of any weapons, except for a collection of samurai swords. The father did not have a job or a driver's license. Instead, he lived with his brother in exchange for having provided child care. The father never paid child support. If he was awarded custody of the child, the father would have relied on his brother to pay for and transport the child to private school. In its trial findings, Family Court found the father's testimony was not credible. The mother, in contrast, gave honest and truthful testimony, particularly with respect to the many instances of domestic violence perpetrated by the father in the child's presence and threats made towards the mother. Moreover, the child's maternal grandmother, who corroborated portions of the mother's testimony at the hearing, gave exceptionally credible testimony. The court found that the mother's fear of the father was not feigned or pre-textual, and that her unilateral relocation was not intended to have deprived the father of visitation, but rather to have protected her own safety. Although the court stated that her conduct in doing so cannot be condoned, it denied the father's petition for custody due to his own fundamental unfitness, granted the mother's cross petition for retroactive permission to have relocated with the child, and awarded visitation to the father

in his county of residence in New York. The court appropriately considered the fact that the mother unilaterally removed the child from the jurisdiction, determined that the mother did not relocate to separate the father from the child, but instead acted in good faith to escape the threat of domestic violence. Although the court did not countenance the mother's decision to relocate without permission, it was the father's violent conduct that prompted her relocation to Arizona in the first instance and triggered the disruption that resulted in the relationship with his daughter. Furthermore, although the court did not expressly engage in the analysis required under *Tropea v Tropea*, 87 NY2d 727, 740 (1996), with deference to the court's factual findings and credibility assessments, there was a sound and substantial basis in the record which supported the court's determination that relocation would have enhanced the child's life economically, emotionally, and educationally, and that the child's relationship with the father could have been preserved through a liberal parental access schedule which included, but was not limited to, frequent communication as well as extended summer and holiday visits. The father's further contention was rejected that the court erroneously conditioned visitation on his attendance at mental health counseling. The court did not order counseling as a prerequisite to visitation. Rather, in its trial findings, the court conditioned the mother's payment for the child's travel for visitation upon the father's attendance at counseling. If the father refused to attend counseling, he could have exercised visitation by traveling to Arizona or by having paid for the child's travel to his residence in New York.

Matter of Robert C.E. v Felicia N.F., 197 AD3d 100 (4th Dept 2021)

Extraordinary Circumstances Supported Award of Residency to Grandmother

Family Court modified a prior stipulated order of custody by awarding primary physical residence of the subject child to the petitioner grandmother. The Appellate Division affirmed. The finding of extraordinary circumstances was supported by evidence in the record that, inter alia, the mother continued to reside and maintain a relationship with her boyfriend, who perpetrated instances of domestic violence against her in the presence of the child.

Matter of Maung v Farrell, 198 AD3d 1361 (4th Dept 2021)

Award of Custody to Father in Children's Best Interests Where Mother Made Repeated and Unfounded Allegations of Physical and Sexual Abuse

Family Court granted respondent father's cross petition to modify the parties' judgment of divorce by awarding him sole legal and physical custody of the subject children. The Appellate Division affirmed. The mother's appeal, which challenged only the court's custody determination, was not made moot by a subsequent order modifying her visitation with the children. The mother waived her contention that the father failed to establish a change of circumstances warranting an inquiry into the best interests of the children inasmuch as she alleged in her own petition that there had been such a change in circumstances. In any event, the father established the requisite change in circumstances based on the deterioration of the parties' relationship, as well as the mother's repeated unsubstantiated allegations that the father abused the children. The court did not err in

determining that awarding the father sole legal and physical custody of the children was in the children's best interests. The record supported the court's conclusion that the mother interfered with the father's relationship with the children by making repeated and unfounded allegations that the father had physically and sexually abused the children. The mother failed to prove her allegations of domestic violence by a preponderance of the evidence.

Matter of Fowler v Rothman, 198 AD3d 1374 (4th Dept 2021)

Family Court Improperly Considered Untimely Motion

Family Court dismissed the father's petitions to modify and enforce the custody and visitation provisions of the parties' judgment of divorce. The Appellate Division modified by, among other things, reinstating the father's petitions. Family Court erred in its decision to grant respondent mother's motion seeking to preclude materials and strike allegations in the petitions related thereto. Per CPLR 2214[b], a notice of motion and supporting affidavits must be served at least eight days before the time at which the motion is noticed to be heard. However, per CPLR 2103[b][2], although service was complete upon mailing, five days must have been added to any relevant time period measured from the date of service when service is effectuated by mail. The mother's motion was filed and mailed eight (8) days before the hearing/return date. Accordingly, her motion was untimely.

Matter of Streiff v Streiff, 199 AD3d 1370 (4th Dept 2021)

Family Court's Award of Sole Custody to the Mother was Supported by a Sound and Substantial Basis in the Record

Family Court modified a prior order of custody and parenting time by awarding petitioner mother sole legal and physical custody of the subject children. The Appellate Division affirmed. Family Court's determination was supported by, inter alia, evidence concerning the respective home environments of the parents and each parent's respective financial stability and employment status. As such, Family Court's custody determination was supported by a sound and substantial basis in the record. In addition, the father did not meet his burden with regard to his ineffective assistance of counsel contention. The father's counsel elicited what the father contended was unduly prejudicial testimony, however, said testimony was relevant to the best interests analysis and the father did not demonstrate an absence of strategic or other legitimate explanations for counsel's alleged shortcomings.

Matter of Clark v Clark, 199 AD3d 1455 (4th Dept 2021)

Family Court Did Not Abuse Its Discretion in Failing to Recuse Itself or by Awarding Father Sole Custody of the Subject Children

Family Court modified a prior order of custody and visitation and awarded petitioner father sole custody of the subject children and respondent mother supervised visitation. The

Appellate Division affirmed. The part of the mother's appeal challenging the supervised visitation provision was moot by the time of the appeal, as Family Court issued a subsequent order modifying said visitation provision. Nevertheless, as the subsequent order did not modify the order on appeal with regards to custody, the mother's appeal challenging Family Court's determination granting the father sole custody remained. The Appellate Division rejected the mother's contention that Family Court abused its discretion by refusing to recuse itself. Family Court's knowledge of the prior acts of domestic violence by mother's husband against his former wife stemmed not from an extrajudicial source, but from a prior judicial proceeding over which the court presided. Furthermore, the mother waived her contention that the father failed to establish a sufficient change in circumstances inasmuch as she alleged a substantial change in her own petition. In any event, although Family Court failed to make an express finding that there was a change in circumstances, the Appellate Division had the authority to review the record and ascertain for itself whether such circumstances existed. The father established the requisite change in circumstances based on the deterioration of the parties' relationship and ability to work together to co-parent the children, the mother's violation of the prior order, and the exposure of the children to domestic violence at the mother's home.

Matter of Allison v Seeley-Sick, 199 AD3d 1490 (4th Dept 2021)

Family Court Inappropriately Dismissed Father's Petition Seeking Communication with the Children During His Incarceration

Family Court dismissed the father's petition seeking to modify a prior order of custody and visitation by allowing him to communicate with the subject children while he was incarcerated. The Appellate Division reversed, reinstated the father's petition and remitted to Family Court. The prior order, appropriately, did not impose prerequisites to the father filing a modification petition. Rather, the order stated that father's completion of a parenting program and his consistent engagement in mental health and substance abuse treatment would constitute a change in circumstances sufficient to support a future petition for modification of the order. Father demonstrated that he had completed a parenting program, consistently engaged in mental health treatment, and made appropriate efforts to continue engagement in substance abuse treatment. Furthermore, Family Court erred to the extent that it determined, without a full evidentiary hearing, that visitation with the father in the form of communication by writing and by phone would be detrimental to the children. As the record was not sufficient to determine whether the requested visitation would be harmful, the presumption that visitation with a non-custodial parent, even when that parent is incarcerated, was not rebutted.

Matter of Rigdon v Close, 200 AD3d 1562 (4th Dept 2021)

Family Court Appropriately Granted Father Extensive Summer Visitation

Family Court modified a prior order of custody and visitation by granting petitioner father visitation during school and summer breaks. The Appellate Division affirmed. Family Court did not abuse its discretion in awarding the father extended visitation during the child's summer school break. The father had relocated out of state, which significantly reduced his

visitation during the school year. Furthermore, Family Court had directed the return of the child to the mother sufficiently before the school year began in order to permit the child and the mother to adjust their schedules.

Matter of Yount v Yount, 200 AD3d 1720 (4th Dept 2021)

Family Court Appropriately Granted Mother Primary Physical Residence Where The Evidence Established that the Mother Was Better Able to Provide for the Child's Educational and Medical Needs

Family Court modified a prior order of custody and visitation by granting petitioner mother primary physical residence of the subject child. The Appellate Division affirmed. Family Court's determination was based on a careful weighing of appropriate factors. While many of the factors did not favor one parent over the other, the evidence presented at the hearing established that the mother was better able to provide for the child's educational and medical needs.

Matter of Narolis v Lewis, 200 AD3d 1727 (4th Dept 2021)

FAMILY OFFENSE

The Father's Family Offense Petition And Petition Seeking Enforcement Of A Prior Custody And Visitation Order Were Erroneously Dismissed

Family Court granted respondent mother's motion to dismiss the family offense petition that alleged the mother contacted petitioner father by text and telephone a minimum of 110 times over two days, even after he told her to stop (appeal No. 1). The court also granted the mother's oral motion to dismiss the father's petition seeking enforcement of an existing custody and visitation order against her (appeal No. 2). The Appellate Division reversed both orders and remitted the matter to Family Court for further proceedings. With respect to appeal No. 1, Family Court erred when it dismissed the family offense petition because the father stated a cause of action for at least harassment in the second degree under Penal Law § 240.26 (3). The mother's assertion was rejected that there was a requirement for the family offense petition to have been verified. Additionally, the court acquired personal jurisdiction over the mother with respect to the family offense petition despite the fact that she resided in Texas inasmuch as the father fulfilled all the necessary requirements (see CPLR § 302 [b]; Family Ct Act §154 [c]), and the mother admitted service of the family offense petition by mail (see CPLR 312-a). The Appellate Division therefore denied the mother's motion, reinstated the family offense petition, and remitted the matter for further proceedings on the petition. With respect to appeal No. 2, Family Court erred when it granted the mother's oral motion to dismiss the father's enforcement petition on the ground that Texas was the appropriate forum. The court failed to permit the father to submit information concerning the statutory factors on the issue of which forum was proper (see Domestic Relations Law § 76-f [2]). The court was required to consider the statutory factors and should have allowed the parties to submit information regarding these factors. The record did not indicate whether the court considered the statutory factors. Furthermore, the mother submitted no evidence in support of the motion and failed to specify any statutory or other legal basis for the requested relief. The mother had several months to make a proper motion on notice to dismiss the enforcement petition, but she did not do so. The order was therefore reversed and the enforcement petition reinstated. Since the limited information in the record reflected that the father had no visitation or contact with the child named in the enforcement petition since the summer of 2017, the court was directed to hold proceedings on the petition forthwith.

Matter of Henshaw v Hildebrand, 191 AD3d 1237 (4th Dept 2021)

JUVENILE DELINQUENCY

Court Properly Determined Respondent Was A Juvenile Delinquent; Respondent Received Meaningful Representation.

Family Court adjudicated respondent to be a juvenile delinquent based upon the finding that he committed an act that, if committed by an adult, would have constituted the crimes of assault in the third degree (Penal Law § 120.00 [2]) and reckless endangerment in the second degree (Penal Law § 120.20). The Appellate Division affirmed. Petitioner's contention was rejected that the appeal was mooted by the expiration of respondent's one-year conditional discharge because the delinquency determination implicated possible collateral legal consequences. Respondent's contention that the court abused its discretion when it allowed certain rebuttal evidence was not preserved for appellate review because respondent failed to object to the allegedly improper evidence. The Appellate Division declined to exercise its power to review that contention in the interests of justice. Respondent's further contention was rejected that he received ineffective assistance of counsel. Defense counsel made a successful motion for a trial order of dismissal that resulted in the dismissal of the only felony count of which respondent was charged, and secured a conditional discharge on the misdemeanor charges which respondent was ultimately found to have committed. Based upon the evidence, law, and circumstances of the case in totality and as of the time of the representation, respondent received meaningful representation.

Matter of Jerome G., 192 AD3d 1476 (4th Dept 2021)

PATERNITY

Father Had Standing To Commence Paternity Proceeding; Court Properly Ordered Genetic Testing; Denial Of The Father's Motion To Vacate The Acknowledgment Of Paternity Executed By The Mother And Her Boyfriend Was Error

Family Court adjudged that petitioner is the father of the subject child who was born out of wedlock. The Appellate Division partially modified the order to the extent that the father's motion which sought genetic testing and vacatur of the acknowledgment of paternity (AOP) was granted in its entirety. The order was otherwise affirmed. Respondent Shelby S. (the mother) and respondent Ryan S. (mother's boyfriend; collectively respondents) executed an AOP with respect to the subject child shortly after her birth. The mother countersigned the AOP and certified that her boyfriend was the only possible father of the subject child. The mother later conceded, under oath, that the certification was false because she had engaged in unprotected sexual intercourse with both the father and her boyfriend during the conception window. Within weeks of the child's birth, the father commenced this proceeding pursuant to Family Court Act § 522 which sought a declaration of paternity that named him as the child's father. The father then moved for genetic testing and for vacatur of the AOP. The genetic testing revealed that, to a 99.9% degree of certainty, petitioner was the subject child's biological father. No objections were filed as to the authenticity or accuracy of the test results. The court therefore granted the petition and declared petitioner was the father of the subject child. The court denied petitioner's motion insofar as it sought vacatur of the AOP on the ground that it lacked the power to grant such relief. The respondents' contentions were rejected that the father lacked standing to commence the proceeding because the AOP conclusively established the boyfriend as the child's father. The standing limitations applicable to a proceeding under FCA § 516-a had no bearing on a person's standing to commence a proceeding under FCA § 522. Respondents further contention was rejected that the court erred when it granted genetic testing without first affirmatively finding that such testing would have best served the child's interests. The law did not require such an affirmative finding as a precondition to court ordered genetic testing. Contrary to respondents' assertions, the Legislature made genetic testing in paternity cases mandatory subject to a single limited exception that applied only when one of three threshold barriers (i.e., res judicata, equitable estoppel, or the presumption of legitimacy) are present and where genetic testing would not serve the best interests of the child. Thus, a court had no power to deny an otherwise proper demand for genetic testing on the ground that testing would not serve the child's best interest due to factors other than res judicata, equitable estoppel, or the presumption of legitimacy. Indeed, in the absence of these three factors, the Legislature has plainly indicated its belief that the best interests of the child would have been advanced by the establishment of the alleged father's paternity, irrespective of the mother's wishes. Respondents did not contend that either res judicata or the presumption of legitimacy applied in this case, and the mother did not contend that equitable estoppel applied. The boyfriend's current assertion of equitable estoppel was improperly raised for the first time on appeal. Moreover, given the father's commencement of the proceeding within weeks of the child's birth, equitable estoppel was clearly inapplicable. Thus, because none of the three threshold barriers existed in this case, the court was required to grant the father's

motion to the extent it sought genetic testing. The court was not required to make factual findings about the child's overall best interests because any such finding would not have altered the court's statutory duty to order testing. With respect to the AOP, the Appellate Division acknowledged respondents' concern that the order of filiation may have effectively created an impermissible three-parent arrangement for the subject child and held that Family Court had the power to vacate the AOP. Thus, the AOP was vacated on appeal. This eliminated any question that petitioner was the only legal father of the subject child.

Matter of Ryan M.E. v Shelby S., 191 AD3d 1315 (4th Dept 2021)

Court Properly Determined The Father Was The Biological Father Of The Subject Child; The Father's Paternity Claim Was Not Equitably Estopped And The Paternity Hearing Was Fair

Family Court determined that petitioner was the father of the subject child. Respondent mother and the Attorney For the Child (appellants) appealed. The Appellate Division affirmed. In response to the father's petition which sought a determination that he was the father of the subject child, the mother filed an answer and asserted as an affirmative defense that the father could not assert paternity on the ground of equitable estoppel. A hearing was held on whether the father's assertion of paternity was in the best interests of the child. The father, the paternal grandmother, the child's therapist, the mother's friend, and the mother testified at the hearing. Appellants failed to preserve for appellate review their contention that the court deprived them of a fair hearing because the hearing was concluded during cross-examination of the mother. Appellants failed to object at the time the court indicated that it was prepared to rule on the paternity petition without the need for further evidence. Instead, appellants waited until after an adverse determination was issued before they claimed the need to present further evidence. In any event, this contention was without merit. Appellants did not make an offer of proof as to what the testimony of the remaining potential witness, i.e. the child's teacher, or any other allegedly unrepresented testimony would have established with respect to the limited issue of equitable estoppel that was before the court. The mother's further contention was rejected that the court was required to have made its findings on that issue in writing (see CPLR 4213 [b]; Family Ct Act 165 [a]), and the bench decision was sufficient to have allowed for effective appellate review. The court stated that the evidence established that the father was in fact the child's biological father; there was regular contact between the child, the father, and the father's family for nine years; and the interruption in that contact appeared to be precipitated by the introduction of the father's girlfriend, at which point the mother ceased to encourage or facilitate the father-child relationship. Those facts were sufficient to support the court's determination that it was not in the best interests of the child to equitably estop the father's paternity claim.

Matter of Alex H. v Aspy L., 191 AD3d 1393 (4th Dept 2021)

Petition To Vacate Acknowledgment Of Paternity Was Properly Dismissed

Family Court dismissed petitioner mother's amended petition which sought vacatur of the acknowledgment of paternity (AOP) more than 60 days after it was signed pursuant to

CPLR 3211 (a) (7). Petitioner was required to allege fraud, duress, or a material mistake of fact that would have required DNA or genetic marker testing (see Family Ct Act § 516-a [b] [iv]). Even if the truth of the allegations in the amended petition were assumed to have been true and if the petitioner was accorded the benefit of every favorable inference, the facts as alleged in the amended petition did not fit into any of the specified grounds for vacatur of an AOP more than 60 days after it was executed.

Matter of Kristen B. v Steven Z. 191 AD3d 1425 (4th Dept 2021)

Court Erred When It Ordered Genetic Marker Testing Without A Hearing To Determine If Such Testing Was In the Child's Best Interests

Without conducting a hearing, Family Court determined that genetic marker testing was in the best interests of the subject child, and ordered such testing. The Appellate Division granted the mother permission to appeal, reversed, and remitted the matter for further proceedings. The court erred when it did not hold a hearing to determine whether genetic marker testing was in the best interests of the child before it ordered such testing. It was undisputed that, at the time of the child's birth, respondent parents were married to one another. The parents alleged that they had access to each other during the relevant time frame such that the presumption of legitimacy applied. There was insufficient evidence before the court to determine the child's best interests. Thus, based upon the presumption of legitimacy, before the genetic marker test was ordered, the court should have conducted a hearing to determine whether it was in the best interests of the child to do so.

Matter of Kirk M.B. v Rachel S., 192 AD3d 1492 (4th Dept 2021)

TERMINATION OF PARENTAL RIGHTS

Court Properly Revoked Suspended Judgment And Terminated The Mother's Parental Rights; The Mother Could Not Challenge The Suspended Judgment Through An Appeal From The Revocation Order

Family Court revoked a suspended judgment entered upon respondent mother's admission to permanent neglect of the subject child and terminated the mother's parental rights with respect to the child. The Appellate Division affirmed. The mother's contention was rejected that the court abused its discretion when it refused to extend the suspended judgment. Additionally, the mother's appeal from the order that revoked the suspended judgment did not bring up for review the prior orders and proceedings in the matter, including the suspended judgment itself. Thus, the mother's claim of ineffective assistance of counsel in connection with the suspended judgment itself was not reviewable on this appeal. Similarly, the mother's remaining challenges to the suspended judgment, i.e., that it was procedurally deficient, substantively unreasonable, and involuntarily entered, were not reviewable on appeal from the order which revoked the suspended judgment. The mother's remedy with respect to each contention (directed at the suspended judgment) was a motion to vacate in family court.

Matter of Harmony W., 191 AD3d 1251 (4th Dept 2021)

Incarcerated Father's Parental Rights Were Properly Terminated; Father's Contention That He Should Have Been Granted A Suspended Judgment Was Not Preserved; Father Received Meaningful Representation

Family Court terminated respondent father's parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. From the time the father admitted neglect to the time of the fact-finding hearing on the petition that alleged permanent neglect (a period of two years), the father was released from incarceration and then returned to incarceration four times. Each time the father was returned to incarceration during the two year period it was within two months of his release because he violated parole. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the father's relationship with the children, both during the times of incarceration and when he was released. While the father was incarcerated, petitioner's caseworkers sent him monthly letters and met with him on several occasions, they arranged for visitation with the children, provided him with a prepaid phone card so that he could call the children twice a week, and they advised him of the services he needed when he was released from incarceration. When the father was not incarcerated, petitioner provided him with temporary housing, and the caseworkers attempted to locate him when he failed to make contact with them. Petitioner further established that despite its diligent efforts, the father permanently neglected the children inasmuch as he failed substantially and continuously or repeatedly to plan for the future of the children although he was able to do so. While he was incarcerated, the father called the children only a few times a month when they were placed with a relative and not at all when they were subsequently placed in foster care, which is where they were for over a year at the time of the fact-finding hearing. During the times of release, the father made no effort to contact petitioner or comply with his court-ordered services, and he visited the

children only once. In fact, while the children were in foster care for over a year, the father never called the children, never sent them letters or gifts, and never arranged for visits with them when he was released from incarceration. The father's contention that Family Court should have granted a suspended judgment was not preserved for appellate review because the father never requested such relief. In any event, the court did not abuse its discretion when it terminated the father's parental rights rather than issuing a suspended judgment. The father made no progress in addressing the issues that led to the removal of the children, and thus a suspended judgment was not warranted. The father's further contention was rejected that he was denied effective assistance of counsel. The father failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings. While counsel's performance was not perfect, the record, viewed in totality, revealed that the father received meaningful representation. Furthermore, the father's contention was rejected that the court erred when it denied his requests for the assignment of a new attorney or, in the alternative, for an adjournment for him to retain a new attorney. The father failed to show good cause for a substitution. The father's statements with respect to his attorney were conclusory and reflected only a delaying tactic. With respect to the alternative request for an adjournment to retain his own attorney, the father made this request on the day of the rescheduled fact-finding hearing, after having been granted two prior adjournments. Under these circumstances, the court did not abuse its discretion when it denied the request for another adjournment.

Matter of Carter H., 191 AD3d 1359 (4th Dept 2021)

AFC Failed To Zealously Advocate For One Of The Three Subject Children; New Dispositional Hearing Was Required

Family Court terminated the parental rights of respondent father with respect to the three subject children on the ground of permanent neglect and freed those children for adoption. On the father's and the subject child's (Ebony J.) appeals, the Appellate Division partially modified. The disposition with respect to Ebony J. was vacated, the matter was remitted for further proceedings, and the order was otherwise affirmed. The father waived his contention that the petition was improperly filed before the children were in the care of an authorized agency for one year. The father's related claim of ineffective assistance of counsel was not properly before the Court on appeal because the issue was raised for the first time in his reply brief. In addition, contrary to the contentions of the father and Ebony J., Family Court's finding of permanent neglect was supported by clear and convincing evidence. Despite diligent efforts by petitioner to encourage and strengthen the parental relationship, and although he was physically and financially able to do so, the father failed to substantially and continuously or repeatedly plan for the future of the children for a period of more than one year following their placement with petitioner. The father's contention was rejected that the best interests of the subject children Beulah J. and Ivory J. were not best served by the termination of his parental rights with respect to those two children. The father's further contention was rejected that Family Court abused its discretion when his request for a suspended judgment was denied. However, the Court agreed with the father and Ebony J. that a new dispositional hearing was required for Ebony J. because termination of the father's parental rights as to Ebony J. rendered her a legal orphan. Furthermore, the AFC who jointly represented the children at trial failed to zealously

advocate for Ebony J.'s position with respect to adoption and focused instead on her sister's position, which was conflicted on that issue. The appointment of a new AFC and a new dispositional hearing for Ebony J. were therefore required.

Matter of Beulah J., 191 AD3d 1395 (4th Dept 2021)

Appeals From Orders That Terminated The Mother's Parental Rights Were Dismissed Because The Orders Were Entered On The Mother's Default

In four separate orders all entered on the same date in October 2018, Family Court terminated respondent mother's parental rights with respect to the subject child, and freed the child for adoption. The Appellate Division dismissed the appeals from all four orders because the mother refused to appear at the dispositional hearing and her attorney, although present, elected not to participate in the mother's absence. The mother's refusal to appear constituted a default, and the appeals were therefore dismissed.

Matter of Paul S., 191 AD3d 1421 (4th Dept 2021)

Court Properly Terminated The Father's Parental Rights; Orders Were Not Entered On Default Because The Father's Counsel Participated In The Proceedings

In two separate orders, Family Court terminated the parental rights of respondent father with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed in both appeals. Contrary to the contentions of petitioner and the Attorney for the Child, the orders were not entered on the father's default because the father's attorney cross examined a witness, repeatedly indicated his lack of objection to various exhibits offered by petitioner, and informed the court that he had no witnesses after petitioner rested. Thus, the father's attorney participated in the proceedings and, as a result, the order was not entered on default. Regarding the merits, petitioner met its burden in both appeals and established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the father's relationship with the children. Contrary to the father's contentions in both appeals, the evidence at the hearing established that, despite those diligent efforts, the father failed to plan for the future of the children, although physically and financially able to do so. Specifically, the father failed to correct the conditions that led to the children's removal because he failed find suitable and stable housing, among other things.

Matter of Bianca F., 191 AD3d 1491 (4th Dept 2021)

Court Properly Terminated The Mother's Parental Rights; The Mother's Uncooperative Behavior Prevented Safe Supervised Visitation

Family Court terminated the mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The mother's contentions were rejected that petitioner failed to establish that it had exercised diligent efforts to encourage and strengthen her parental relationship with the child. The record established

by clear and convincing evidence that petitioner made affirmative, repeated, and meaningful efforts to assist the mother. Specifically, petitioner made referrals for evaluation and therapy, provided transportation services, and coordinated supervised visitation. Nonetheless, petitioner's efforts were fruitless because the mother was utterly uncooperative in that she, among other things, refused to provide her residential address for the purpose of a home inspection or sign a release so that petitioner could talk to the mother's purported psychologist, despite Family Court's confirmation that the mother understood that her failure to do either prevented the return of the child to the mother's care from petitioner. Further, the mother's disruptive behaviors during supervised visitation inhibited petitioner's ability to find willing visitation supervisors despite petitioner's continued attempts. Thus, it was not a lack of diligent efforts by petitioner that prevented safe visitation with the child. Under the circumstances, petitioner provided what services it could. The mother's further contention was rejected that the court erred when it determined she permanently neglected the child inasmuch as the mother failed to plan for the child's future, i.e., she failed to take such necessary steps to have provided an adequate, stable home and parental care for the child. There was a substantial basis in the record for the court's determination to terminate the mother's parental rights.

Matter of Dagan B., 192 AD3d 1458 (4th Dept 2021)

Court Properly Denied The Mother's Motion To Vacate A Default Order That Terminated Her Parental Rights

Family Court denied respondent mother's motion to vacate a default order that terminated the her parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. The mother contended that her motion should have been granted because she was deprived of her right to due process for a number of reasons, which included the assertion that Family Court conducted a trial in her absence and that the record was unclear whether she received notice of the trial. The mother's contentions that related to due process were raised for the first time on appeal, and were thus unpreserved for appellate review. The mother's contentions were rejected that her motion should have been granted because she had multiple reasonable excuses for her failure to appear, and a meritorious defense to the petition. The court properly determined that the mother's purported reasonable excuses were unsubstantiated and based only on conclusory allegations that, inter alia, she was too ill to attend the trial and lacked transportation. Furthermore, the mother did not establish a meritorious defense to the petition based upon her decision to enroll in an inpatient drug treatment program because she did not submit any factual support for her claim that she was making progress in that treatment program.

Matter of Alexander GR., 192 AD3d 1501 (4th Dept 2021)

Court's Excusal Of Guardian Ad Litem From A Portion Of The Termination Proceedings Was Not Reversible Error

Family Court, inter alia, terminated respondent mother's parental rights with respect to the subject child on the ground of mental illness. The Appellate Division affirmed. The

mother's contention that a new trial was required because Family Court excused the mother's guardian ad litem from a portion of the termination proceeding was unpreserved. The mother's counsel did not move for an adjournment of the proceeding or object on the ground that the guardian ad litem was absent. Although the better practice would have been for the guardian ad litem to have been present, under the circumstances of this case, any error was harmless.

Matter of Malachi S., 192 AD3d 1674 (4th Dept 2021)

Court Properly Terminated Respondent's Parental Rights; Petitioner Made Requisite Diligent Efforts And The Father Failed To Plan For Child's Future

Family Court terminated respondent's parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen respondent's relationship with the child during his period of incarceration. Among other things, while respondent was incarcerated, petitioner attempted to facilitate communication between respondent and the child when it provided respondent with avenues of communication with the child that did not violate the order of protection that was in effect. Petitioner also sent respondent monthly letters that provided him with updates on the child, encouraged him to plan for the child's future by engaging in recommended treatment and services, notified him of service plan review meetings, and investigated the potential placement resources that respondent suggested for the child. The fact that the potential placement resources suggested by respondent failed to respond to communications from petitioner did not mean that petitioner failed to make the requisite diligent efforts. In addition, Family Court properly determined that respondent failed to plan for the future of the child. Although respondent completed a substance abuse program after the time period at issue in the petition and claimed to have completed anger management training, respondent failed to engage in the other recommended services, including additional sex offender treatment, mental health treatment and conflict resolution. There was no evidence that respondent had a realistic plan to provide an adequate and stable home for the child. Respondent further failed to preserve for appellate review his contention that the court should have issued a suspended judgment because he did not request one.

Matter of Natalee F., 194 AD3d 1397 (4th Dept 2021)

The Father's Unexplained Failure To Appear Constituted A Default And The Court Properly Revoked The Suspended Judgment; Motion To Vacate The Default Was Properly Denied

Family Court issued a default order that, inter alia, revoked a suspended judgment and terminated respondent father's parental rights with respect to the subject child (appeal No. 2). The court thereafter denied the father's motion to vacate the default order (appeal No. 1). The Appellate Division affirmed in appeal No. 1 and dismissed appeal No. 2. In appeal No. 2, the father failed to appear at the hearing on petitioner's application by order to show which sought revocation of the suspended judgment and, although his attorney

was present at the hearing, the attorney did not participate.

The court properly determined that the father's unexplained failure to appear constituted a default. In appeal No. 1, the court properly exercised its discretion when it denied the father's motion to vacate the default. The father was notified of the scheduled hearing date and he willingly failed to appear. Thus, the father waived his appearance and forfeited any right he had to be present regardless of whether he was warned that the hearing would have proceeded in his absence. In addition, the father failed to demonstrate a meritorious defense in support of his motion to vacate the default. Even though the court misstated a few facts in its findings, there was ample evidence at the hearing that the father violated multiple terms of the suspended judgment and that it was in the child's best interests for the father's parental rights to have been terminated. The father's motion did not establish otherwise.

Matter of Malachi S., 195 AD3d 1445 (4th Dept 2021)

Court Erred When It Relieved Respondent Mother's Counsel And Proceeded With Hearing In Her Absence

Family Court terminated the parental rights of respondent mother. The Appellate Division reversed and remitted the matter for further proceedings. Family Court erred when it allowed the mother's attorney to withdraw as counsel and when it proceeded with the hearing in the mother's absence. Inasmuch as there was no indication in the record that the mother's attorney informed her that he sought to withdraw as counsel, the court should not have relieved him as counsel. Even though generally no appeal lies from an order entered on default, in this case, the absence of evidence that the mother was put on notice of her attorney's motion to withdraw rendered the finding of default improper, and thus the mother's appeal was not precluded. The order was therefore reversed and remitted to Family Court for the assignment of new counsel and a new hearing.

Matter of Calvin L.W., III, 196 AD3D 1181 (4th Dept 2021)

Mother Permanently Neglected Child, Suspended Judgment Unwarranted

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Family Court denied the requests of the mother's attorney for adjournments of the fact-finding and dispositional hearings when the mother failed to appear. The mother was fully aware of the court dates and no excuse was offered for her absences. Petitioner demonstrated by clear and convincing evidence that it made the requisite diligent efforts - i.e., reasonable attempts - to assist, develop and encourage a meaningful relationship between the parent and child. Petitioner coordinated regular visitation with the child, provided the mother with transportation assistance to those visits, encouraged the mother to obtain the required substance abuse and mental health treatment, and encouraged her to maintain employment and housing, among other things. Furthermore, the court did not abuse its discretion in refusing to issue a suspended judgment. The child had been removed from the mother's care when he was approximately eight months old and, while he had been in foster care for almost two-and-a-half years, the mother had made no progress in

addressing the issues that led to the removal of the child and still had only supervised visitation with the child.

Matter of Brandon I.J., 198 AD3d 1310 (4th Dept 2021)

Court Properly Revoked Suspended Judgment

Family Court granted petitioner's motion to revoke a suspended judgment that had been entered upon the father's admission to permanently neglect and freed the child for adoption. The Appellate Division affirmed. Petitioner established, by the requisite preponderance of the evidence, that the father failed to comply with the visitation requirements of the suspended judgment. In particular, petitioner established that the father failed to meet the condition in the suspended judgment requiring that he graduate to unsupervised overnight access. The agency did not need to establish diligent efforts. Any lapses on the part of petitioner did not excuse the father's failure to comply with the terms and conditions of the suspended judgment. Ultimately, there was a sound and substantial basis in the record to support the determination that revocation of the suspended judgment and termination of the father's parental rights was in the subject child's best interests.

Matter of Christina S., 198 AD3d 1367 (4th Dept 2021)

Separate Dispositional Hearing Not Required Where Petition Alleged Terms of a Suspended Judgment Were Violated as Hearing Addressed Both Alleged Violations and Children's Best Interests

Family Court revoked a suspended judgment pursuant to Family Court Act §633 and terminated respondent mother's parental rights. The Appellate Division affirmed. The hearing, on a petition alleging that the terms of a suspended judgment were violated, was part of the dispositional phase of the permanent neglect proceeding. There was no need for a separate dispositional hearing inasmuch as the court conducted a lengthy hearing that addressed both the alleged violations of the suspended judgment and the children's best interests. Furthermore, the denial of an adjournment, based on respondent's failure to appear for day three (3) of the hearing, was within the sound discretion of the trial court.

Matter of James D., 199 AD3d 1375 (4th Dept 2021)

Family Court Did Not Err in Denying Request for Adjournment; Where Order is Made Upon Default, Review is Limited to Matters Contested Below

Family Court terminated respondent mother's parental rights. The Appellate Division dismissed, except insofar as respondent challenged the denial of her attorney's request for an adjournment, and affirmed. Respondent failed to appear at the fact-finding and dispositional hearings. Respondent's attorney was present and elected not to participate after making a request for an adjournment. The Appellate Division limited its review to matters which were the subject of contest below - namely, the request for an adjournment. Denial of said request was not an abuse of discretion inasmuch as respondent's attorney offered nothing beyond a vague and unsubstantiated claim that respondent could not

appear.

Matter of Tyrone O., 199 AD3d 1386 (4th Dept 2021)

Family Court Appropriately Denied Requests for Adjournment Where Counsel Offered No Good Cause for Respondents' Default; Where Order is Made Upon Default, Review is Limited to Matters Contested Below

Family Court terminated respondents' parental rights with regards to the subject children, among other things. The Appellate Division dismissed, except insofar as respondent father challenged the denial of his attorney's request for an adjournment, and affirmed. Respondents filed a total of six (6) appeals both from orders of fact-finding and disposition on the underlying neglect petitions and from orders terminating their parental rights. Inasmuch as the orders terminating respondents' parental rights are final, said dispositions render moot the appeals from the orders entered in the underlying neglect proceedings. Inasmuch as respondents appeal from orders made upon respondents' default, review is limited to matters which were the subject of contest below - specifically, respondents' attorneys request for an adjournment. Respondents' attorneys offered no good cause for respondents' default, instead counsel offered only speculation as to why respondents might be absent. Moreover, this was neither respondents' first request for an adjournment, nor was it their first failure to appear for a scheduled hearing without explanation. Inasmuch as respondent mother contends that the court abused its discretion in not imposing a suspended judgment, she did not request the same at the dispositional hearing and thus failed to preserve the issue for review. In any event, a suspended judgment would not have been warranted as the mother's progress was not sufficient to warrant further prolongation of the subject children's unsettled familial status.

Matter of John D., Jr., 199 AD3d 1412 (4th Dept 2021)

NEW YORK COURT OF APPEALS CASE OF INTEREST

Court Properly Precluded Expert Testimony Without A *Frye* Hearing

The 14-year old defendant was convicted of murder in the second degree and attempted murder in the second degree after a jury trial in Supreme Court. The Appellate Division affirmed the judgment of conviction. The Court of Appeals affirmed. The defendant was seated at the back of a bus when rival gang members boarded the bus and moved toward the back. As the rival gang members reached the middle of the bus, the defendant took out a gun and shot at them, but killed an innocent passenger. The defendant then ran off the bus in pursuit of the rival gang members and continued to shoot at them. At the trial, the defense was justification (see Penal Law § 35.15). The defense sought to introduce testimony by an expert witness that concerned the science of adolescent brain development and behavior. The defense expert purportedly would have assisted the jury when it determined whether the People met their burden to disprove justification. Supreme Court denied the defendant's request without a *Frye* hearing (see *Frye v United States*, 293 F 1013 [DC Cir 1923]). The Appellate Division held that Supreme Court providently exercised its discretion when it precluded the proffered expert testimony with regard to the topic of adolescent brain development, since the impulsiveness of adolescents was not a matter beyond the ken of the typical juror. The Court of Appeals held that the admissibility and limits of expert testimony lied primarily within the sound discretion of the trial court. The criterion was whether the proffered testimony would have aided a lay jury to have reached a verdict. Under the particular facts of this case, the Court of Appeals held that the trial court had not abused its discretion when it precluded the proffered expert testimony.

People v Anderson, 36 NY3d 1109 (2021)

UNITED STATES SUPREME COURT CASE OF INTEREST

Student's Suspension From The Cheerleading Team Violated The First Amendment

The District Court concluded that B.L., a public high school student, received a punishment from the School District that violated the First Amendment. The Third Circuit Court of Appeals and the United States Supreme Court affirmed. B.L. transmitted to her Snapchat friends vulgar language and gestures that criticized both the school and the school's cheerleading team. B. L.'s speech took place outside of school hours and away from the school's campus. In response, the school suspended B. L. for a year from the cheerleading team. Unlike the Third Circuit, The Supreme Court held that the special characteristics which gave schools additional license to have regulated student speech, disappeared when a school regulated speech that takes place off campus. The school's regulatory interests remained significant in some off-campus circumstances, including serious or severe bullying or harassment that targeted particular individuals; threats aimed at teachers or other students; the failure to follow rules that concerned lessons; the writing of papers; the use of computers, or participation in other online school activities; and breaches of school security devices, which included material maintained within school computers. The Supreme Court did not set forth a general First Amendment rule which defined off campus speech, and whether or how ordinary First Amendment standards gave way off campus to a school's special need to have, e.g., prevented substantial disruption of learning-related activities or to have protected those who made up a school community. The Court did, however, mention three features of off-campus speech that often, even if not always, distinguished schools' efforts to have regulated that speech from efforts to have regulated on-campus speech. First, a school, in relation to off-campus speech, rarely stood *in loco parentis*. Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, included all the speech a student utters during the full 24-hour day and may have meant the student could not have engaged in that kind of speech at all. When it came to political or religious speech that occurred outside school or a school program or activity, the school had a heavy burden to justify intervention. Third, the school itself had an interest to have protected a student's unpopular expression, especially when the expression took place off campus. Our representative democracy only worked if we protected the marketplace of ideas. B. L.'s posts, while crude, did not amount to fighting words. She did not identify the school nor had she targeted any member of the school community with vulgar or abusive language. She transmitted her speech through a personal cell phone, to an audience that consisted of her private circle of Snapchat friends. The school's interest to have taught good manners was not sufficient to overcome B. L.'s interest in free expression. It was not shown that the school's action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanied an unpopular viewpoint. There was no substantial interference in, or disruption of, the school's efforts to maintain team cohesion.

Mahanoy Area School District v B.L., 141 S.Ct. 2038, ___ US ___, 2021 WL 2557069 (2021)

FEDERAL COURT CASES OF INTEREST

School District Improperly Reduced Child's Speech Therapy

Plaintiffs brought this action on behalf of themselves and their minor child against the school district and board of education. Plaintiffs alleged discrimination on the basis of disability in violation of §504 of the Rehabilitation Act claiming, inter alia, denial of autism-related services for their son. The District Court denied the parties' cross-summary judgment motions except for plaintiffs' claim pertaining to the reduction of the child's speech therapy services. New York regulations require that instructional speech and language services be provided to meet the individual language needs of a student with autism for a minimum of 30 minutes daily in groups not to exceed two, or 60 minutes daily in groups not to exceed six. Defendants knew that the child required speech services in order to have meaningful access to education and yet the child's IEP did not provide for the required minimum of 30 minutes of speech and language services daily. In fact, defendants reduced speech service to the child after he failed to make progress. Considering that the child's hours were reduced after not meeting his goals in speech, the school district's actions rose to the deliberate indifference standard. The court denied summary judgment on plaintiffs' additional claims, however, it opined that a rational juror could conclude that defendants chose to ignore the scientific and medical evidence which supported the provision of intensive Applied Behavioral Therapy to have enabled the child to make social and academic progress, and that this decision rose to the level of gross negligence or reckless indifference; that defendants knew that the child needed 1:1 teaching assistant support, yet failed to provide it; and that while defendants have provided evidence of the difficulty in finding a long-term substitute teacher with a special education license, there was nothing in the record beyond defendants' apparent good faith effort to have found a teacher.

Robert F. v North Syracuse Central Sch. Dist., ___ F. Supp. 3d. ____, 2021 WL 3569108 (NDNY 2021)