

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

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

## **SUPREME COURT OF THE UNITED STATES**

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

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

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

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

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

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

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

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

*Golan v. Saada*, 142 S.Ct.1880, 2022 WL 2135489 (2022)

## **COURT OF APPEALS**

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

Family Court terminated respondent father's parental rights on the ground that he defaulted. The Appellate Division, Fourth Department, affirmed. The Court of Appeals affirmed. A Court of Appeals majority concluded that the father failed to raise any basis for reversal and that he did not dispute the Appellate Division's determination that his failure to appear constituted a default. The dissent asserted that the father's failure to appear did not constitute a default because the father appeared through counsel during both the fact-finding and dispositional hearings. Family Court had proceeded to a fact-finding hearing

on the disputed termination petition, rather than by inquest, and the petitioning agency did not move for entry of a default judgment, as would have been required to proceed by inquest. The fact that the father's counsel stayed silent during the proceedings - a tactical choice - did not support a finding that the father defaulted. At the hearing, counsel did not seek to be relieved as attorney for the father, nor did counsel state that he was unable to diligently or competently represent the father.

*Matter of Irelynn S.*, 38 N.Y.3d 933 (Ct. App. 2022) See *Matter of Akol v. Afet* at page13.

## **CASE OF INTEREST FROM THE SECOND DEPARTMENT**

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

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

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

## **THIRD DEPARTMENT CASES OF INTEREST**

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

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

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

*Matter of Jennifer JJ. v. Jessica J.J.*, 203 A.D.3d 1444 (3d Dept 2022)

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

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

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

### **Family Court Erred in Dismissing Juvenile Delinquency Petition**

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

*Matter of James J.J.*, 206 A.D.3d 1091 (3d Dept 2022)

## **FOURTH DEPARTMENT CASES**

### **ABUSE AND NEGLECT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Matter of Kayla K.*, 204 AD3d 1412 (4th Dept 2022) See also *Matter of Tara N. P.-T. v. Emma P. T.*, 204 AD3d 1414 (4th Dept 2022) at page 17.

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

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

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

### **Petitioner Failed to Establish that the Mother Neglected the Subject Children**

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

*Matter of Silas W.*, \_\_\_\_ AD3d \_\_\_\_ (4th Dept 2022)



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

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

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

## **ADOPTION**

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

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

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

## **CHILD SUPPORT**

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

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

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

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

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

*Anastasi v. Anastasi*, \_\_\_ AD3d \_\_\_ (4th Dept 2022)

## **CUSTODY AND ACCESS**

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

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

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

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

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

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

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

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

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

### **Visitation Schedule Set By Family Court Is Not Too Restrictive**

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

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

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

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

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

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

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

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

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

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

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

### **Primary Placement With Non-Parent Petitioner Was Proper**

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

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

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

Family Court awarded petitioner mother sole legal and physical custody of the subject child. The Appellate Division modified on the law by vacating those parts of the order which stated that the order should not have been entered on default and, as modified, affirmed. The record established that, while the father failed to appear, he was represented by counsel. Therefore, the order should not have been entered upon default and appeal was not precluded. Nevertheless, Family Court did not abuse its discretion in conducting the hearing in the father's absence inasmuch as he appeared by counsel and had notice of the

hearing.

*Matter of Akol v. Afet*, 206 AD3d 1647 (4th Dept 2022) See *Matter of Irelynn S.* at page 2-3.

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

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

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

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

Supreme Court precluded plaintiff mother from filing any new applications without leave of court or approval of an attorney. The Appellate Division affirmed. The mother made multiple motions for various relief, many of which were repetitive and each of which was accompanied by voluminous and mostly irrelevant exhibits. When her requests for relief were denied, the mother ignored the court's rulings and continued making the same meritless arguments. Moreover, the mother was sending copies of her papers, which contained sensitive issues, to people who had no involvement at all in the case. Supreme Court appropriately determined that the mother had abused the judicial process by engaging in meritless, frivolous, or vexation litigation and therefore forfeited her right to free access to the courts.

*S.P. v. M.P.*, 169 N.Y.S. 3d 865, \_\_\_\_ AD3d \_\_\_\_ (4th Dept 2022)

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

Family Court awarded respondent aunt sole custody and physical placement of the subject children and awarded petitioner mother visitation in the form of weekly video or electronic communication. The Appellate Division affirmed. The mother's filing of more than 85 petitions, only a few of which raised issues that fell within the jurisdiction of Family Court, over the approximately five (5) years that the children were living with the aunt was abusive and vexatious litigation rather than serious attempts to regain custody or resume a parental role in the children's lives. In any event, even if the prolonged separation was entitled to little significance, Family Court properly considered the cumulative effect of, among other things, the mother's voluntary relinquishment of physical custody of the children, the

psychological bonding of the children to the aunt and potential harm to the children if removed from the aunt's custody, the mother's failure to adequately address her ongoing mental health issues, and, importantly, the series of incidents in which the mother engaged in erratic, unstable, threatening, and psychologically abusive behavior and communication directed at the children that justifiably rendered the children fearful of the mother. With respect to Family Court's custody and visitation determination, the best interests of the children were served with weekly supervised video or electronic communication, which would continue even after the mother's release from jail, given the credible evidence that the mother's prior in-person supervised visitation was already discontinued coupled with the mother's erratic and threatening behaviors, including repeatedly appearing uninvited at the aunt's house while approaching or communicating with the children in a manner that caused them genuine fear.

*Matter of Byler v. Byler*, 170 N.Y.S.3d 459, \_\_\_ AD3d \_\_\_ (4th Dept 2022)

### **Supreme Court Appropriately Denied Mother's Application for Sole Custody**

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

*S.P. v. M.P.*, \_\_\_ AD3d \_\_\_ (4th Dept 2022)

### **Family Court's Denial of An Adjournment Request Was Inappropriate**

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

*Matter of Dupont v. Armstrong*, \_\_\_ AD3d \_\_\_ (4th Dept 2022)



## **FAMILY OFFENSE**

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

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

*Matter of Tara N. P.-T. v. Emma P. T.*, 204 AD3d 1414 (4th Dept 2022) See also *Matter of Kayla K.*, 204 AD3d 1412 (4th Dept 2022) at pages 6-7.

## **TERMINATION OF PARENTAL RIGHTS**

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

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

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

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

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

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

### **Testimony from Conflicting Experts Raised A Question of Credibility for Family Court to Determine**

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. To the extent that the opinion of the mother's psychological expert conflicted with the opinion of petitioner's psychological expert, the opinion of the mother's expert merely raised a question of credibility for Family Court to determine. Further, even assuming, arguendo, that Family Court improperly admitted into evidence portions of petitioner's expert's report that contained hearsay, the error was harmless. Family Court did not rely solely on the report, but also on the testimony from petitioner's expert, the mother, and the mother's expert, as well as the mother's treatment records. Additionally, the mother lacked standing to pursue appeals from orders of disposition entered subsequent to the termination of her parental rights.

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

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

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

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

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

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

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

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

Family Court terminated respondents' parental rights on the ground of permanent neglect. The Appellate Division affirmed. Petitioner fulfilled its duty to exercise diligent efforts to encourage and strengthen respondents' relationships with the children by providing appropriate services to respondents including parenting education, mental health counseling, budgeting and communication training, and scheduling regular visitation with the children. Respondents failed to successfully complete the programs and services made available to them and did not progress to a point where unsupervised visits could occur. A suspended judgment was not appropriate as the children had been removed from respondents' care for over two years. Neither respondent demonstrated any prejudice that they sustained as a result of the denial of their requests for an adjournment on the ground that they needed more time to review voluminous discovery materials. Family Court told respondents that, after further review of the provided discovery, it would permit them to recall any witness for additional cross-examination. In addition, the record demonstrated that respondents' counsel used the discovery during extensive and thorough cross-examinations of petitioner's witnesses. Finally, nothing in the record established that any bias on the court's part unjustly affected the result to the detriment of respondents or that Family Court had a predetermined outcome of the case in mind during the hearing such that it abused its discretion in denying respondents' recusal motion.

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

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

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

*Matter of Jiryan S.*, \_\_\_ AD3d \_\_\_ (4th Dept 2022)