

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

Case Digest 2013

ADOPTION

Biological Father Not Consent Father

Family Court determined that respondent biological father abandoned his children and dispensed with his right to consent to the adoption of the children. The Appellate Division affirmed. Although it was unclear whether the court made a finding pursuant to Domestic Relations Law §111 (1) (d), reversal was not required because the record supported the finding that respondent's consent was not required under the statute. Despite being awarded supervised visitation with the children in 2009, respondent did not exercise such visitation. At the time of the hearing, respondent had not visited the children in over three years and had not sent gifts since 2009. Further, respondent had not made child support payments since 2010, when his tax returns were garnished. Although there was conflicting testimony regarding alleged interference of petitioner mother and petitioner stepfather with respondent's relationship with the children, the court resolved the issue in favor of petitioners and that determination was entitled to great deference. Even assuming respondent demonstrated his right to consent, the record established abandonment because respondent had no contact with the children in the six months preceding the filing of the adoption petition. Because the majority of the testimony at the hearing concerned events that occurred outside the six-month time period preceding the filing of the adoption petition, the court did not prevent respondent from fully establishing the nature of his relationship with the children and the alleged efforts of petitioners to exclude him from the children's lives.

Matter of Angelina K. 105 AD3d 1310 (4th Dept 2013), *lv denied* 21 NY3d 860

CENTRAL REGISTER

Court Erred in Granting Petitioner's Motion For Summary Judgment

After an administrative expungement hearing, respondent OCFS denied the request of petitioner, that a report maintained in the NYS Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment, be amended to unfounded. The Appellate Division affirmed. The report was based upon petitioner's, an employee of OCFS, physical altercation with a 16-year-old resident at a secure residential facility. Based upon the record, the determination was supported by substantial evidence. Petitioner was not denied effective assistance of counsel at the fair hearing.

Matter of Milton v Joyce, 109 AD3d 1138 (4th Dept 2013)

CHILD ABUSE AND NEGLECT

Children's Statements Sufficiently Corroborated; Strongest Possible Negative Inference Drawn Against Father for Failure to Testify

Family Court adjudged that respondent father neglected two of his children and derivatively neglected three others. The Appellate Division affirmed. The out-of-court statements of respondent's two children were sufficiently corroborated by their "cross statements," the photographic evidence of their injuries, and the caseworker's testimony. Moreover, the court properly drew the strongest possible negative inference against the father for his failure to testify at the fact-finding hearing. The court's finding of neglect was justified on the record, as was its finding of derivative neglect. The admission of evidence relating to an order of protection that father contended was not in effect was not material to the court's ultimate finding of neglect. Thus, any error in its admission was harmless.

Matter of Brittany W., 103 AD3d 1217 (4th Dept 2013)

Mother's Appeal from Order Temporarily Removing Children Dismissed as Moot

Family Court denied the application of respondent mother pursuant to Family Court Act § 1028 for the return of the subject children who were temporarily removed from her custody. The Appellate Division dismissed the mother's appeal as moot. A final order of disposition was entered while the appeal was pending, which found the children were neglected and placed them in petitioner's custody. The appeal was mooted for the further reason that the order of disposition expired during the pendency of the appeal, and the children were returned to the mother's custody. Contrary to mother's contention, the case did not fall within the exception to the mootness doctrine. Although there may be additional Family Court Act § 1028 hearings with respect to this family, the circumstances addressed in each application were fact-specific; the issue raised did not typically evade review; and the issue raised was not substantial or novel.

Matter of Angel C., 103 AD3d 1246 (4th Dept 2013)

Mother Failed to Rebut Prima Facie Evidence of Educational Neglect

Family Court adjudicated respondent mother's children to be neglected based on her failure to supply them with an adequate education. The Appellate Division affirmed. Petitioner met its burden of establishing educational neglect by a preponderance of the evidence. Proof that a minor child did not attend a public or parochial school in the district where the parent resided made out a prima facie case of educational neglect pursuant to § 3212 (2) (d) of the Education Law. Unrebutted evidence of excessive school absences was sufficient to establish educational neglect. Petitioner submitted the children's school records and the testimony of the caseworker, which established that each child had a significant, unexcused absentee rate that had a detrimental effect on each child's education. The mother failed to present evidence that the children

attended school and received the required instruction in another place, or to establish a reasonable justification for the children's absences. Thus, the mother failed to rebut the prima facie evidence of educational neglect.

Matter of Gabriella G., 104 AD3d 1136 (4th Dept 2013)

Sufficient Evidence of Sexual Abuse of Two Children and Derivative Neglect of Another Child

Family Court determined that respondent father sexually abused two of his children and derivatively neglected another child. The Appellate Division affirmed. The findings of sexual abuse were supported by a preponderance of the evidence. Although the court erred in admitting in evidence the written report of a social worker who performed sexual abuse assessments because it contained prior consistent statements that bolstered her trial testimony, the error was harmless because it did not appear from the record that the court relied on the report in its decision.

Matter of Arianna M., 105 AD3d 1401 (4th Dept 2013)

Neglect Adjudication Against Father Reversed

Family Court adjudged that respondent father neglected his child. The Appellate Division reversed. The only evidence of domestic violence presented by petitioner consisted almost entirely of out-of-court statements made by the mother to a police officer and caseworkers. Those statements were not admissible against the father absent a showing that they came within an exception to the hearsay rule. Petitioner's theories for admissibility of the hearsay statements were not reviewed because they were not advanced at the fact-finding hearing. The nonhearsay evidence was insufficient to establish that the child's physical, mental or emotional condition was impaired or in danger of becoming impaired as a consequence of the father's conduct. Respondent was not denied effective assistance of counsel.

Matter of Nicholas C., 105 AD3d 1402 (4th Dept 2013)

Finding of Neglect Supported by Preponderance of Credible Evidence

Family Court adjudged that respondent mother neglected her children. The Appellate Division affirmed. Although the court erred in admitting police records into evidence because the certification attached to the records did not comply with Family Court Act § 1046 (a) (iv), the finding of neglect was supported by a preponderance of the credible evidence. The evidence presented at trial established that police officers had been called to the mother's residence on numerous occasions for disturbances and repeated acts of domestic violence and that the eight and nine-year-old children were present for many of the instances. On the most recent occasion, the police observed a "huge puddle" of blood and mother's boyfriend with a cloth covering his bloody arm. The mother was not injured, the police recovered a hunting knife with fresh blood on it, the

mother and boyfriend appeared intoxicated, and the children were in a bedroom watching television. Although the children told a social worker that they slept through the incident, they were traumatized by the blood and being forced to clean up the blood the next day. The evidence established that the children were neglected, and the mother, who was the instigator of the physical altercation with the boyfriend, was responsible for the neglect.

Matter of Kady J., 109 AD3d 1158 (4th Dept 2013)

Respondent Properly Excluded From Courtroom During Stepdaughters' Testimony

Family Court determined that respondent sexually abused his stepchildren. The Appellate Division affirmed. The findings of abuse were supported by a preponderance of the evidence. The court did not abuse its discretion in excluding respondent from the courtroom during his stepdaughters' testimony. The court properly balanced the respective interests of the parties and, based upon the hearing testimony, reasonably concluded that the stepdaughters would suffer emotional trauma if they were compelled to testify in open court. Further, the court properly based its decision to exclude respondent from the courtroom on the social worker's affidavit that respondent's abuse of the children compromised their ability to give clear and accurate testimony in respondent's presence.

Matter of Alesha P., 110 AD3d 1461 (4th Dept 2013)

Respondent Not Prejudiced by Absence From Court

Family Court determined that respondent father abused and derivatively abused the subject children. The Appellate Division affirmed. Although not preserved for review, respondent's contention was without merit that the court violated his right to due process by conducting proceedings in his absence. While due process of law applied in article 10 proceedings and included the right of a parent to be present at every stage of the proceeding, that right was not absolute. At the time of the article 10 proceeding, respondent was incarcerated on criminal charges stemming from his conviction of sexually abusing one of his daughters, which was the same conduct that formed the basis of the article 10 proceeding. Respondent was not prejudiced by his absence from the court appearance during which the court granted petitioner's motion for summary judgment. It was well settled that evidence that a parent had been convicted of having raped or sexually abused a child was sufficient to support a finding of abuse of that child within the meaning of the Family Court Act. Here, there was nothing respondent could have stated at the appearance that would have warranted the denial of the motion for summary judgment.

Matter of Skyla H., 111 AD3d 1285 (4th Dept 2013)

Determination of Neglect Supported by Sound and Substantial Basis

Family Court determined that respondent mother neglected the subject children. The Appellate Division affirmed. The court's decision had a sound and substantial basis in the record. The undisputed evidence at the hearing established that the mother's husband repeatedly misused alcohol to the point of intoxication, and that the harm to the children was causally related to the mother's failure to acknowledge, confront and adequately address her husband's alcohol abuse and associated aggressive behavior. The mother's contention that the court erred in requesting an oral report from the Attorney for the Children was not preserved for review and, in any event, any alleged error was harmless.

Matter of James DD., 111 AD3d 1337 (4th Dept 2013)

Court Erred in Granting Motion to Dismiss with Respect to Mother

Family Court dismissed the neglect petition against respondents. The Appellate Division modified by denying that part of the motion with respect to respondent mother and reinstating that part of the petition and remitted the matter for further proceedings. With respect to the allegation of neglect against the mother, her 16-year-old son testified that she drank beer nearly every day and that she often drank beer all day and evening. A caseworker testified that the mother's younger son told the caseworker that the mother started drinking before the younger son went to school and was still drinking when he went to bed. Thus, petitioner established a prima facie case that the children were neglected by the mother pursuant to Family Court Act Section 1046 (a) (iii).

Matter of Tyler J., 111 AD3d 1361 (4th Dept 2013)

Petition Dismissed: Neglect Finding Based On Child's Possible Reaction to Future Harm

Family Court determined that the subject child was neglected by respondent, the child's paternal grandmother, and granted the custody modification petition of petitioner, the child's maternal grandmother. The Appellate Division modified by dismissing the neglect petition. The court's finding of neglect hinged on the testimony of DSS's expert psychologist that respondent's dismissive response to the child's allegations that she was sexually abused by her eight-year-old cousin put the child at risk of harm because such response would cause the child to be reluctant to report future allegations of abusive contact. The evidence did not establish that the child was in fact sexually abused. Thus, the court erred in finding that respondent was chargeable with neglect for failing to protect the child from actual harm. Moreover, the finding of neglect could not be based upon the child's possible reaction to future harm. With respect to the court's directives concerning custody and visitation, although the award of sole custody to petitioner had a sound and substantial basis in the record, the court's determination that respondent's visitation should be supervised did not. Accordingly, the order was further modified by vacating the supervised visitation provision and the matter was remitted to fashion an appropriate schedule of unsupervised visitation for respondent.

Matter of Lebraun H., 111 AD3d 1439 (4th Dept 2013)

Finding of Neglect Supported by Preponderance of Evidence

Family Court determined that respondent father neglected the subject children. The Appellate Division affirmed. The court's finding of neglect was supported by a preponderance of the evidence. Testimony presented at the fact-finding hearing established that one child witnessed, and the other was in proximity to, a physical altercation between the parties, where the father kicked the mother in the face and placed his hands around her neck to prevent her from breathing. The child who witnessed the altercation told a caseworker for petitioner later that day that she was "very sad and scared" upon seeing the mother's bloodied face after the altercation. Both children indicated to the caseworker that they were afraid of the father. The children's proximity to the altercation, together with the evidence of a pattern of ongoing domestic violence in the home, placed the children in imminent risk of emotional harm.

Matter of Amodea D., 112 AD3d 1367 (4th Dept 2013)

Finding that Child in Imminent Danger Supported by Sound and Substantial Basis

Family Court determined that respondent mother neglected the subject child. The Appellate Division affirmed. The mother surrendered her parental rights to the child during a subsequent Family Court appearance, but the appeal was not mooted because the finding of neglect constituted a permanent and significant stigma that might indirectly affect the mother's status in future proceedings. Based upon the evidence presented by petitioner, combined with the adverse inference that the court properly drew based upon the mother's failure to testify, there was a sound and substantial basis to support the court's finding that the child was in imminent danger of impairment as a result of the mother's failure to exercise a minimum degree of care.

Matter of Gada B., 112 AD3d 1368 (4th Dept 2013)

CHILD SUPPORT

Father Who Failed to Appear at Hearing Not Denied Right to Rebut Mother's Prima Facie Showing of Willful Violation

Family Court entered an amended order that, among other things, confirmed the Support Magistrate's determination that respondent father had willfully violated an order of child support. The Appellate Division modified the amended order on the law by vacating Special Conditions 17, 18 and 19. The Support Magistrate's amended order determining that there was a willful violation was issued after the father failed to appear for the hearing on the violation petition. The father's contention that he was denied his right to a hearing was not properly before the Appellate Division. The proper procedure for challenging the Support Magistrate's amended order entered upon the father's default was by way of a motion to vacate the amended order pursuant to CPLR 5015 (a). Nonetheless, on the merits, the father was statutorily presumed to have sufficient means to support his child, and evidence of the failure to pay support as ordered constituted prima facie evidence of a willful violation. Once the mother made a prima facie showing of a willful violation, the burden shifted to the father to rebut that showing. Having failed to appear, the father could not now argue that he was denied his right to rebut the mother's prima facie showing. The father's contention that he was denied due process of law was rejected. Inasmuch as Special Conditions 17, 18 and 19 were not reasonably related to the underlying issue of child support arrears, those conditions were vacated.

Matter of Ball v Marshall, 103 AD3d 1270 (4th Dept. 2013)

CPLR 5019 (a) Cannot be Applied to Amend Judgment of Divorce to Change Maintenance and Child Support Arrears

Supreme Court granted plaintiff husband's motion to amend the parties' judgment of divorce to correct an error in the calculation of the child support and maintenance arrears due to defendant wife, and applied CPLR 5019 (a) to amend the judgment by changing the amount of the husband's arrears. The Appellate Division determined that the court erred in granting husband's motion and applying CPLR 5019 (a) to amend the judgment. The court's power to amend orders or judgments under that statute was limited to correcting orders or judgments that contained a mistake, defect, or irregularity not affecting a substantial right of a party, or [that were] inconsistent with the decision upon which [they were] based. The mistakes contemplated for correction pursuant to CPLR 5019 (a) were merely ministerial, not those that involved new exercises of discretion or a further turn of the fact-finding wheel. A court had no power to reduce or increase the amount of a judgment when there was no clerical error. Unlike cases relied upon by the husband, this case did not involve an inconsistency between the judgment and an underlying decision or stipulation of the parties. Rather, the husband sought to correct a mistake of fact, i.e., the court's allegedly erroneous calculation of a credit for maintenance and child support payments made by the husband pursuant to a temporary order, and the court's failure to credit the husband for the wife's equitable

share of medical insurance premiums.

Meenan v Meenan, 103 AD3d 1277 (4th Dept. 2013)

Father Directed to Obtain Life Insurance Policy to Secure Obligation for Child Support and Pro Rata Share of Children's Private School Tuition

Supreme Court entered a judgment of divorce that, among other things, directed defendant father to pay to plaintiff mother the amount of \$30,160 per year in child support and to pay his pro rata share of 80% of the children's private school tuition. The Appellate Division modified and directed defendant to obtain a life insurance policy with plaintiff as the beneficiary in the amount of \$500,000 and to maintain the policy until the youngest child reached the age of majority. Supreme Court did not abuse its discretion when it refused to award child support on the parties' combined income in excess of \$130,000. The court properly considered the factors set forth in Domestic Relations Law § 240 (1-b) (f), including that the divorce did not result in a change in the children's standard of living. Plaintiff's contention that the court erred in its calculation of the parties' pro rata shares was raised for the first time in her reply brief and thus was not properly before the Appellate Division. However, the court erred in failing to direct defendant to obtain a life insurance policy to secure his obligation for child support and his pro rata share of the children's private school tuition.

Scully v Scully, 104 AD3d 1137 (4th Dept. 2013)

Family Court Erred in Revoking Respondent's Suspended Jail Sentence for Willful Violation of Child Support Order

Family Court confirmed an order of the Support Magistrate that found the father to be in willful violation of an earlier order that required the father to pay child support in the amount of \$155 per week. The court sentenced the father to four months in jail. The Appellate Division reversed and remitted the matter. The Support Magistrate issued an order "on consent" setting forth that the father admitted that he willfully violated a child support order and found him in willful violation of the order. The Support Magistrate imposed a sentence of four months in jail, but suspended the sentence on the condition that the father did not miss two consecutive support payments. Based upon the father's alleged failure to pay support as ordered, at a subsequent court appearance, the court dispensed with a hearing and took an oral admission of nonpayment from the father's attorney. Although the court had the discretion to revoke the suspension of the jail sentence, the court erred in doing so when it did not first afford the father an opportunity to be heard and to present witnesses on the issue whether good cause existed to revoke the suspension of the sentence. No specific form of a hearing was required, but at a minimum the hearing must have consisted of an adducement of proof coupled with an opportunity to rebut it.

Matter of Davis v Bond, 104 AD3d 1227 (4th Dept. 2013)

Court's Errors Required Remittal For Recalculations

Supreme Court's judgment in this divorce action dissolved the marriage, awarded the mother maintenance and child support and distributed the marital property. The Appellate Division modified and remitted for a number of recalculations. The court did not err in imputing annual income of \$20,000 to the mother for the purpose of calculating child support and maintenance given her education, qualifications, employment history, past income, and earning potential. The court erred, however, in failing to distribute certain assets to the mother. An investment account, the father's 403-b account, and the father's in-service death benefit were marital property or at least partly marital property, subject to equitable distribution. The court also erred in failing to award the mother any portion of the father's enhanced earnings from his master's degree because the mother made at least a modest contribution towards the degree. It was not possible to ascertain from the record the merit of the mother's contentions regarding the amount of \$250 per week in child support and whether the court deducted maintenance from the father's income before calculating his child support obligation. Finally, the case was remitted for resolution of the mother's contention that the father owed her money pursuant to an order requiring him to pay for groceries during the pendency of this action and the father's contention that he satisfied that obligation.

Lauzonis v Lauzonis, 105 AD3d 1351 (4th Dept. 2013)

Father Not Denied Effective Assistance of Counsel

Family Court confirmed the determination of the Support Magistrate that respondent father willfully failed to pay child support. The Appellate Division affirmed. Respondent failed to submit some competent, credible evidence of his inability to make the required support payments. Also, respondent was not denied effective assistance of counsel and did not suffer any actual prejudice as a result of the claimed deficiency. Although respondent's attorney had difficulty before the Support Magistrate in introducing admissible evidence regarding respondent's alleged disability, the record established that the court considered those documents and admitted them into evidence during its consideration of the penalty to be imposed.

Matter of Davis v Driggs, 106 AD3d 1525 (4th Dept 2013), *lv denied* 21 NY3d 864

Willful Violation of Prior Order of Child Support Affirmed

Family Court confirmed the determination of the Support Magistrate that respondent father willfully violated a prior order of child support. The Appellate Division affirmed. The appeal was not mooted by the fact that respondent completed serving his sentence of incarceration because of the enduring consequences that potentially flowed from an order adjudicating a party in civil contempt. Respondent failed to preserve for review his contention that the petition was not legally sufficient because it did not allege that he willfully failed to comply with a prior order of child support. Nonetheless, the contention was without merit. The petition included, in capital letter and large bold type on the

front page, the “warning” that a hearing was being requested, the purpose of which was to punish respondent for contempt of court. The “warning” further advised respondent that the sanction of imprisonment could be imposed.

Matter of Jasco v Alvira, 107 AD3d 1460 (4th Dept 2013)

Court Erred in Determining Child Was Emancipated

Plaintiff appealed from a judgment of divorce entered by Supreme Court that directed plaintiff to pay maintenance and child support and equitably distributed marital assets, among other things. The Appellate Division modified and remitted the matter for further proceedings. The court erred in concluding that defendant mother met her burden of establishing that the parties’ third eldest child was emancipated during the time she resided with plaintiff father. Although the child in question worked two jobs in 2010, defendant did not submit any evidence regarding the child’s income in 2011. Further, the fact that plaintiff paid for the subject child’s rent and utility costs demonstrated that the child was not economically independent and self-supporting. Inasmuch as the record was insufficient to determine defendant’s child support obligation with respect to the subject child, the Court vacated the decretal paragraphs that related to plaintiff’s child support obligation, and remitted the matter for consideration of defendant’s child support obligation and a recomputation of the parties’ respective child support obligations.

Schmitt v Schmitt, 107 AD3d 1529 (4th Dept. 2013)

Court Erred in Confirming Support Magistrate’s Finding of Willful Violation Before Counsel Appeared on Father’s Behalf

Family Court committed respondent to the Oswego County Correctional Facility for a term of six months upon a determination that he violated probation insofar as he failed to comply with the terms and conditions of his support order. The Appellate Division dismissed as moot the appeal from the order insofar as it concerned commitment to jail, and otherwise modified by striking that part adjudging respondent to be in willful violation of a support order, and, as modified, affirmed. Shortly after an initial appearance on the petition in which the father requested counsel, and before counsel appeared for the father, the Support Magistrate found that the father willfully violated the child support order and referred the matter to Family Court. The court erred in confirming the Support Magistrate’s finding before counsel appeared on the father’s behalf. The father’s challenge to the Support Magistrate’s finding of willfulness was not rendered moot because the jail sentence had been served.

Matter of DuBois v Piazza, 107 AD3d 1587 (4th Dept. 2013)

Support Magistrate Erred in Finding Respondent in Default; Court Erred in Confirming Order

Family Court found that respondent father was in willful violation of an order of support, among other things. The Appellate Division reversed and remitted the matter to Family Court for further proceedings. The court erred in confirming the Support Magistrate's order inasmuch as the Support Magistrate erred in finding respondent in default. Although respondent did not appear before the Support Magistrate on the scheduled date for the hearing, his attorney appeared in court. Furthermore, respondent's attorney previously made a written request for an adjournment and reiterated that request on the date of the hearing. A party who was represented at a scheduled court appearance by an attorney did not fail to appear. Additionally, the colloquy with petitioner did not constitute the requisite fact-finding hearing necessary to develop a factual basis for a finding of willful violation.

Matter of Manning v Sobotka, 107 AD3d 1638 (4th Dept. 2013)

Award of Child Support to Father Reversed in Shared Physical Custody Arrangement

Supreme Court granted sole legal custody of the parties' children to plaintiff father, shared physical custody of the children to the parties, and awarded child support to plaintiff, among other things. The Appellate Division modified, vacated the award of child support to plaintiff, and as modified, affirmed and remitted the matter for further proceedings. The court erred in awarding child support to plaintiff. Instead, child support should have been awarded to defendant mother. In shared residency arrangements, where neither parent had the children for a majority of the time, the party with the higher income was deemed to be the noncustodial parent for purposes of child support. The residency schedule afforded the parties equal time with the children. Thus, neither party had the children for the majority of the time. Inasmuch as plaintiff's income (\$134,924.48 annually) exceeded that of defendant (imputed income \$25,000; actual income \$14,109.53), plaintiff was the noncustodial parent and, as such, he must pay child support to defendant. Plaintiff's decision-making authority did not increase his child-related costs. There was already a significant disparity in the parties' incomes, and an award of child support to plaintiff would only widened that gulf. The children's standard of living should not vary so drastically from one parent's house to the other.

Leonard v Leonard, 109 AD3d 126 (4th Dept. 2013)

Father Required to Pay Child Support - Child Not Emancipated

Supreme Court, among other things, ordered defendant father to pay child support to plaintiff mother. The Appellate Division modified by reducing defendant's net child support obligation. Where, as here, there was no provision for an adjustment of child support upon the termination of maintenance, it was not error to fail to deduct the amount defendant paid in maintenance from his gross income before calculating the parties' child support obligations. However, although not raised on appeal, the court made a mathematical error. Consequently, the amount defendant was required to pay in child support per month was reduced from \$540.85 to \$504.85.

Zufall v Zufall, 109 AD3d 1135 (4th Dept 2013)

Defendant Willfully Failed to Pay Child Support And Plaintiff Properly Awarded Attorney's Fees

Supreme Court, among other things, found defendant father in contempt of court on the ground that he willfully failed to pay child support and awarded attorney's fees to plaintiff mother. The Appellate Division modified other parts of the order, but affirmed the finding of contempt and award of attorney's fees. Defendant's admission that he failed to pay child support pursuant to the judgment of divorce constituted prima facie evidence of a willful violation and thus the burden shifted to him to show some competent, credible evidence to justify his failure to make the required payments. Respondent did not meet his burden. His failure to make payments was not excused by an Idaho statute requiring that payments be made to an Idaho agency because the judgment of divorce was issued in New York and, under the Uniform Interstate Family Support Act, the law of the issuing state governs. Because the court properly determined that defendant willfully failed to pay his child support, it properly awarded plaintiff attorneys' fees she incurred in enforcing those obligations.

Johnson v Johnson, 109 AD3d 1164 (4th Dept 2013)

Mother Established Change in Circumstances - Order Reversed

Family Court denied mother's amended petition seeking an upward modification of child support. The Appellate Division reversed and remitted for further proceedings. The parties' separation agreement provided that the parties were opting out of the requirements of the CSSA based upon several factors, including that the children would spend a significant portion of their time with respondent father pursuant to the visitation schedule in the separation agreement. The evidence at trial supported the mother's allegations in her petition that there was a breakdown in the father's relationship with the children such that there was only sporadic visitation with the father and there was a concomitant increase in the mother's child-rearing expenses. Thus, there was an unanticipated change in circumstances that created a need for modification of the child support obligation.

Matter of Gallagher v Gallagher, 109 AD3d 1176 (4th Dept 2013)

No Evidence that Father Made Reasonable Efforts to Obtain Employment

Family Court denied respondent father's objections to the order of the Support Magistrate, which denied respondent's motion to vacate the underlying support order entered upon his default and to cap his unpaid child support arrears. The court also confirmed the Magistrate's determination that respondent willfully failed to obey the support order and committed him to a term of incarceration of three months. The Appellate Division affirmed. Although default orders involving child support are disfavored, here the father's excuse for the default, that he and the child's mother

agreed that neither of them would pay child support and he therefore thought the court proceedings were scheduled in error, was not reasonable. Respondent also failed to establish a meritorious defense. Family Court Act § 413 (1) (h) did not apply because the underlying support order was entered upon default, not pursuant to a stipulation or agreement of the parties. The order was not invalid because it imputed income to respondent without providing calculations. Where a party defaults, the court shall order child support based upon the needs of the child or standard of living of the child, whichever is greater. Respondent's contention that the court erred in confirming the Magistrate's finding that he willfully violated the support order lacked merit. Respondent failed to submit some competent, credible evidence to establish that he made reasonable efforts to obtain gainful employment.

Matter of Roshia v Thiel, 110 AD3d 1490 (4th Dept 2013), *lv denied* __ NY3d__

Support Magistrate Properly Conformed Petition to Proof

Family Court granted the mother's petition seeking an upward modification of child support. The Appellate Division affirmed. Pursuant to an agreement of the parties that was incorporated, but not merged, in their judgment of divorce, in the event that either party's income increased or decreased by 25% through no fault of their own, either could petition the court for a de novo review of their respective child support obligations and school cost contributions. In her petition, the mother alleged that her income had decreased by 25%. After a hearing, the Support Magistrate determined that the father had more than a 25% increase in income, and thereafter calculated the father's child support obligation in accordance with the Child Support Standards Act. The father did not dispute that his income increased more than 25%. Rather, the father contended that the Support Magistrate should have dismissed the petition after finding that the mother failed to demonstrate that she had a 25% decrease in income. The Support Magistrate properly conformed the petition to the proof and rejected the father's contention that he was prejudiced. Additionally, the father's contention was unavailing that it made no sense for the Support Magistrate to keep the father's private school tuition obligation intact while quadrupling his basic support obligation. The Support Magistrate ordered the mother to pay her pro rata share of the private school tuition and, while the father dismissed the mother's contribution as negligible, that was a function of the vast disparity in income between the parties.

Matter of Barton v Barton, 111 AD3d 1348 (4th Dept 2013)

Court Erred in Dismissing Petition For Lack of Personal Jurisdiction

Family Court denied the objections of petitioner to the order of the Support Magistrate. The Appellate Division reversed, reinstated the petition and remitted for further proceedings. Family Court erred in determining that it lacked personal jurisdiction over respondent because the affidavit of service did not include the last name of the person of suitable age and discretion who was served with process. Moreover, the court's sua sponte dismissal of the petition for lack of personal jurisdiction was error.

Matter of Monroe County Dept. of Human Servs.-CSEU v Derrell M., 111 AD3d 1394 (4th Dept 2013)

Appeal From Nonfinal Intermediate Order in CPLR Article 78 Proceeding Dismissed

In a CPLR article 78 proceeding, Supreme Court remitted the proceeding to Family Court for a hearing before the Support Magistrate on the merits of petitioner's objection to his ex-wife's request for a cost of living adjustment to the amount of his child support obligation. The Appellate Division dismissed petitioner's appeal. An appeal from a nonfinal intermediate order in a CPLR article 78 proceeding did not lie as of right. The appeal was dismissed on the further ground that petitioner was not aggrieved by the order inasmuch as Supreme Court merely remitted the matter to Family Court for a hearing. Finally, the issue whether the court properly remitted the matter to Family Court was not encompassed by the notice of appeal.

Matter of Green v Monroe County Child Support Enforcement Unit, 111 AD3d 1446 (4th Dept 2013)

CUSTODY AND VISITATION

Court Erred in Failing to Advise Party of Her Right to Assigned Counsel

Family Court granted mother's petition to modify an order on consent that had awarded grandmother, mother, and father joint legal custody of the subject child and primary physical custody to grandmother. The mother's petition sought visitation with the child in the mother's home. The Appellate Division reversed. The court committed reversible error when it failed to advise the grandmother of her right to assigned counsel. Contrary to the contention of the AFC, the Appellate Division, Fourth Department had not squarely addressed the issue whether respondents in visitation proceedings are entitled to assigned counsel under the Family Court Act. In doing so in this case, the Court concluded that respondent was entitled to assigned counsel. Although the word "visitation" did not appear in Family Court Act § 262, a proceeding to modify a prior order of visitation was a proceeding under the Family Court Act article 6, part 3 and therefore, was within the purview of the assigned counsel statute.

Matter of Wright v Walker, 103 AD3d 1087 (4th Dept 2013)

Award of Sole Custody to Mother Had Sound and Substantial Basis

Supreme Court awarded sole custody and primary physical residence of the parties' child to plaintiff mother. The Appellate Division affirmed. The Referee's findings that the father's application for equal time with or sole custody of the child was economically motivated and that the mother was more fit because the father was preoccupied with child support, placed his needs above the child's needs, and was not as stable as the mother were supported by a sound and substantial basis in the record. The Referee did not abuse his discretion in ordering the father to pay 40 % of the child's private school tuition.

Belec v Belec, 103 AD3d 1089 (4th Dept 2013)

Mother Established Changed Circumstances

Family Court modified a prior joint custody order entered upon the parties' consent by awarding primary physical custody of the parties' children to petitioner mother and granting her all decision-making authority with respect to the children's health, education and welfare. The Appellate Division affirmed. Even assuming, for purposes of argument, that a showing of changed circumstances had to made notwithstanding language in the prior order that such showing need not be made, the mother established changed circumstances. The record established that the father interfered with the children's telephone conversations with the mother. Also, the parties' relationship had become so strained and acrimonious that communication between them was impossible.

Matter of Murphy v Wells, 103 AD3d 1092 (4th Dept 2013), *lv denied* 21 NY3d 854

Father Who Did Not Seek Modification Not Aggrieved by Order

Family Court directed the parties to participate in and cooperate in therapeutic supervised visitation for petitioner mother. The Appellate Division dismissed respondent father's appeal. In her petition, mother had sought enforcement of a 2009 visitation order, and the court determined that father was not in willful violation of the order and continued supervised visitation. On appeal, father and AFC contended that the court erred in continuing supervised visitation. Because the father never requested a modification of the 2009 order he was not aggrieved by the court's disposition.

Matter of Mosher v Mosher, 103 AD3d 1095 (4th Dept 2013)

Order Reversed: Relocation in Child's Best Interests

Family Court denied mother's petition to relocate with the parties' child to the New York City area. The Appellate Division reversed. The court's determination lacked a sound and substantial basis. The mother established that the relocation would benefit the child economically and emotionally because the relocation would increase the mother's earning potential and would enable her to spend more time with the child. The mother agreed to maintain a visitation schedule that would foster the child's relationship with the father, to transport the child to and from Syracuse, and to pay transportation costs. The AFC was not ineffective. The AFC actively participated in the hearing and there is no requirement that she submit a position in her written closing argument. Also, there was no indication that the AFC would have succeeded in obtaining a *Lincoln* hearing even if she had requested one because the child was five at the time of the hearing.

Matter of Venus v Brennan, 103 AD3d 1115 (4th Dept 2013)

When Substitution of Judgment Warranted, AFC Not Obligated to State the Basis of Position

Family Court awarded respondent father sole custody of the parties' child. The Appellate Division affirmed. The mother contended that the AFC improperly advocated a position that was contrary to the child's express wishes because the AFC failed to state the basis for advocating that contrary position. Because she did not move to remove the AFC, the issue was not preserved for appeal. In any event, the mother's contention lacked merit. There were only two circumstances in which an AFC would be authorized to substitute his or her own judgment for that of the child: where the AFC was convinced either that the child lacked the capacity for knowing, voluntary and considered judgment, or that following the child's wishes was likely to result in a substantial risk of imminent, serious harm to the child. Where the AFC was convinced that one of those two circumstances was implicated, the obligation of the AFC was to inform the court of the child's wishes, if the child requested that the AFC do so. The AFC did so in this case. Moreover, the record supported a finding that the child lacked the capacity for knowing, voluntary and considered judgment.

Matter of Mason v Mason, 103 AD3d 1207 (4th Dept 2013)

Primary Physical Placement Transferred to Father After Mother Violated Court Orders

Family Court transferred primary physical placement of the parties' child to petitioner father. The Appellate Division affirmed. Pursuant to a consent order entered in August 2011, the mother was awarded primary physical placement of the child. The father was awarded liberal visitation that included, in odd-numbered years, "Christmas/Winter Break***or*** at least two weeks at Christmas time." The mother, who had relocated to Virginia, was responsible for all transportation to and from visitation with the father in New York. It was undisputed that the mother did not transport the child for Christmas 2011 visitation. The father established by clear and convincing evidence that a lawful court order clearly expressing an unequivocal mandate was in effect, that the mother had actual knowledge of its terms, and that the violation***defeated, impaired, impeded, or prejudiced the rights of the father. The fact that the court did not specifically address any other factors related to the child's best interests before transferring primary physical placement of the child did not warrant reversal. The record was sufficient for the Appellate Division to make a best interests determination. The mother's repeated violations of court orders and her interference with the father's visitation rendered her unfit to act as a custodial parent.

Matter of Howell v Lovell, 103 AD3d 1229 (4th Dept 2013)

Order Appealable; Refusal to Grant Downward Modification of Child Support and Award of Attorney's Fees Affirmed

Supreme Court modified defendant's visitation schedule, among other things. The Appellate Division modified by vacating the first ordering paragraph. The mother sought, among other things, a modification of the parties' access arrangement set forth in their settlement agreement, which was incorporated into their judgment of divorce, an upward modification of defendant father's child support obligation, and attorney's fees. The mother's contention that certain issues raised by the father with respect to the modification of the access schedule were not reviewable on appeal because they were the subject of a consent order was rejected. Although an order incorporated into the final order stated at the end that it was a "stipulation," it stated at the beginning that it was an order entered after the court heard testimony and***considered***evidence in the matter, in the best interests of the children. Additionally, another order incorporated into the final order that amended access provisions stated that the modification was proposed by the attorney for the child. No agreement or stipulation was placed on the record during the action, and the court issued a written decision, which supported the notion that the determination was made on the merits. The court erred in modifying certain access provisions where the mother failed to establish a subsequent change in circumstances. Although raised for the first time on appeal and thus not properly under review, nonetheless, the court did not err in using the father's 2010 tax return to calculate his child support obligation nor did it abuse its discretion in not granting a

downward departure from the Child Support Standards Act. The record did not indicate that the parties provided the court with more recent financial documents. The recalculation provisions of the settlement agreement were triggered by the father's failure to continue to provide health insurance for the children. Further, the court did not abuse its discretion in awarding attorney's fees to plaintiff. The court properly reviewed the financial circumstances of both parties together with all the other circumstances of the case, including the relative merits of the parties' positions. The father's failure to provide the children with health insurance for over a year in part necessitated the action and further justified the court's award.

Griffin v Griffin, 104 AD3d 1270 (4th Dept 2013)

Res Judicata Did Not Bar Consideration of Mother's Prior Changes in Residence

Family Court modified a prior custody order and awarded petitioner father primary physical custody of the parties' teenage child. The Appellate Division affirmed. Respondent mother contended that the court erred in considering her pre-2007 changes in residence in determining that there had been a change in circumstances because those changes were considered in a prior custody hearing after which the petition was dismissed. The mother's pre-2007 changes in residence were not barred by res judicata. The court properly considered the mother's pre-2007 changes in residence as background information in determining the significance of her post-2007 changes in residence.

Matter of Nelson v Morales, 104 AD3d 1299 (4th Dept 2013)

Jurisdiction Properly Retained; Mother's Violation of Divorce Judgment Among Factors Considered in Granting Sole Custody to Father

Family Court modified the parties' joint custody arrangement and granted petitioner father sole custody of the parties' youngest child. The Appellate Division affirmed. Notwithstanding the fact that respondent mother had primary physical residence of the parties' children in California for approximately five years, the court had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law § 76-a. It was undisputed that the initial custody determination was rendered in New York. Ample evidence existed of a significant connection by the child with New York. The father's extensive parenting time took place in New York, the child's extended family lived in New York, and her medical and dental providers were located there. The mother's argument that New York was an inconvenient forum was rejected. There was substantial evidence in this state from which the custody determination was made, the New York courts were more familiar with the parties and the child, and the court permitted the mother to appear electronically for all proceedings except the fact-finding hearing. The court properly determined that the father established the requisite change in circumstances to warrant inquiry into whether the best interests of the child were served by a custody modification. Moreover, the record supported the court's determination that it was in the child's best interests to award sole custody to the father.

Among the factors considered were the express wishes of the 13-year-old child to live with her father. Her wishes were entitled to substantial weight. Further, the weight of the evidence supported the court's finding that the mother willfully violated that part of the parties' divorce judgment that pertained to travel expenses for visitation. The court had discretion to consider that violation as part of its best interests analysis.

Matter of Mercado v Frye, 104 AD3d 1340 (4th Dept 2013), *lv denied* 21 NY3d 859

Sole Custody to Father Properly Denied

Family Court denied father's petition for sole custody of his son. The Appellate Division affirmed. Although the father's contention that the court erred in characterizing him as a "notice," rather than "consent" father, was not properly before the Appellate Division, it noted that, in any event, the father failed to establish that he had a substantial relationship with the child such that his consent to an adoption of the child would be required. The father's contention that respondent failed to use its best efforts to promote the father's relationship with the child pursuant to Article 10 of the Family Court Act was not properly before the Appellate Division because those sections of the Family Court Act were applicable only when a child was initially removed from a parent's custody. The court properly denied the father's custody petition.

Matter of Bowie v Erie County Children's Servs., 105 AD3d 1312 (4th Dept 2013)

Father Established Changed Circumstances

Family Court modified the parties' judgment of divorce, which incorporated the terms of their oral stipulation providing joint legal custody of the children, primary physical custody to the mother and unsupervised visitation to the father, by directing that the mother maintain primary physical custody of the parties' 15-year-old daughter and that the father have primary physical custody of the parties' 13-year old-daughter. The Appellate Division affirmed. The father met his burden of establishing a change in circumstances. The mother's testimony at the hearing established that her relationship with her 13-year-old daughter was strained due to the mother's inability to communicate with the daughter. It was in the 13-year-old daughter's best interests to reside with the father because of the stress caused by the mother's interactions with her, but it was in the older child's best interests to reside with the mother because that child had learned to cope with her mother's personality. Although the separation of siblings was unfortunate, the children attended the same school and pursuant to the visitation schedule, the children would spend time together at each party's house during the week and every weekend.

Matter of O'Connell v O'Connell, 105 AD3d 1367 (4th Dept 2013)

Order Reversed: Petition For Visitation With Father in Prison Reinstated

Family Court dismissed father's petition seeking visitation with the parties' then nine-

year-old child. The Appellate Division reversed and reinstated the petition. The petitioner was an inmate at a New York State prison serving a 15-year sentence. He never had sought custody or visitation with the child. During the pendency of this proceeding, the mother agreed to transport the child to prison to visit the father. Thereafter, the mother and AFC informed the court that after the visit the child did not wish to have further contact with the father. The AFC also stated that the child's school counselor told him that contact between the father and child was not "preferable." The record was insufficient to determine whether visitation with the father would be detrimental to the child's welfare. Further, neither the mother nor the AFC presented any evidence rebutting the presumption that it was in the child's best interest to have visitation with the noncustodial parent and the fact that the parent was incarcerated did not, by itself, render visitation inappropriate. Moreover, no sworn testimony or other evidence was presented and the court did not conduct an in camera interview with the child.

Matter of Brown v Divelbliss, 105 AD3d 1369 (4th Dept 2013)

Court Erred in Summarily Dismissing Petition Based on Incarcerated Father's Failure to Appear

Family Court dismissed the father's petition alleging that respondent violated a prior order because he failed to appear by video or telephone for proceedings held on an adjourned date. The Appellate Division reversed and reinstated the petition. Although the court was entitled to dismiss the petition with prejudice for failure to prosecute based upon exceptional circumstances or an unreasonable neglect to prosecute, here neither ground was established. The record did not establish the basis for petitioner's failure to appear by telephone or video but, rather, the court stated on the record that staff had attempted to call the correctional facility and "didn't get through."

Matter of Thomas v Smith, 105 AD3d 1398 (4th Dept 2013)

Grant of Sole Custody to Father Affirmed

Family Court granted petitioner father sole custody of the parties' child. The Appellate Division affirmed. The court's determination that sole custody to the father was in the child's best interests was supported by a sound and substantial basis in the record. There was evidence that the mother sought to interfere with the relationship between the father and child by pressuring the child into making groundless allegations of sexual abuse against the father and by repeating those groundless accusations. The court did not err in relying heavily on the investigative report and opinion testimony of a licensed clinical psychologist. The psychologist met with the parties individually, visited their homes when the child was present, administered psychological tests to the parties and the child, and consulted with caseworkers. Although the opinion of a court-ordered psychologist was only one factor to be considered in a custody proceeding, there was additional evidence in the record supporting the court's determination. The mother's contention that the court erred in failing to hold a *Lincoln* hearing was not preserved for

review. In any event, given the child's young age, there was no abuse of discretion in the court's failure to conduct a *Lincoln* hearing.

Matter of Olufsen v Plummer, 105 AD3d 1418 (4th Dept 2013)

Validity of Service of Summons With Notice by Email to Defendant in Iran Affirmed

Supreme Court granted plaintiff father a divorce and sole custody of the parties' child. The Appellate Division affirmed. On appeal, defendant mother, who lived in Iran, contended that the court erred in ordering service of the summons with notice by email. Plaintiff made a sufficient showing that service upon defendant pursuant to CPLR 3018 (1), (2), or (4) was impracticable. Plaintiff submitted evidence that defendant left the US with the parties' child and declared her intention to remain in Iran with her family. Iran and the US do not have diplomatic relations and Iran is not a signatory to the Hague Convention on Service Abroad. Once the impracticability standard was satisfied due process required that the method of service be reasonably calculated, under all the circumstances, to apprise defendant of the action. Here, the court initially ordered service by (1) personal service upon defendant's parents, (2) mail service upon defendant at her parent's address in Iran; and (3) service upon defendant by plaintiff's attorneys in accordance with Iranian law. When plaintiff was unable to effect personal service upon defendant's parents, the court relieved him of that obligation and allowed service via email at each email address that plaintiff knew defendant had. Although service of process by email is not directly authorized by the CPLR of the Hague Convention, it is not prohibited by state or federal law or the Hague Convention. Here, service by email was sufficient to satisfy due process. For several months before the application for alternative service, the parties had been communicating by email at the two email addresses used for service. Although defendant claimed she did not receive the emails, she acknowledged receipt of a subsequent email from plaintiff's attorney sent to the same email addresses.

Safadjou v Mohammadi, 105 AD3d 1423 (4th Dept 2013)

Visitation Properly Suspended But Conditions on Resumption of Visits Improper

Family Court suspended respondent mother's visitation with her three children who were in the custody of petitioner, the children's maternal grandfather. The Appellate Division modified. The court's determination to suspend visitation with the children had a sound and substantial basis in the record. In determining that visitation with the mother would be detrimental to the youngest child, the court properly considered the deleterious effects of such visitation on the two older children. The court erred, however, in directing the mother to engage in mental health counseling as a condition of visitation and in delegating its authority to the children's counselor to determine when resumption of visitation was appropriate.

Matter of Roskwitalski v Fleming, 105 AD3d 1432 (4th Dept 2013)

Award of Primary Physical Custody to Father Had Sound and Substantial Basis

Family Court awarded primary physical custody of the parties' child to petitioner father and visitation to respondent mother. The Appellate Division affirmed. Family Court properly denied respondent's motion to change venue. Respondent failed to demonstrate good cause for transferring the proceeding to Chautauqua County. She failed to identify a single witness who would be inconvenienced by proceeding in Erie County. Because this proceeding involved an initial determination with respect to custody, petitioner was not required to show changed circumstances. The court properly determined that it was in the child's best interests that the parties have joint custody with primary physical custody with petitioner. The court engaged in a careful weighing of the appropriate factors and its determination had a sound and substantial basis.

Matter of Bonnell v Rodgers, 106 AD3d 1515 (4th Dept 2013), *lv denied* 21 NY3d 864

Custodial Grandmother Properly Directed to Transport Child for Visits With Incarcerated Mother

Family Court directed petitioner paternal grandmother, who was the subject child's primary physical custodian, to transport the child for visits with respondent mother at the correctional facility where the mother was incarcerated. The Appellate Division affirmed. The grandmother failed to establish by a preponderance of evidence that visitation with the mother would be detrimental to the child. Thus, she did not overcome the presumption that visitation with the mother was in the child's best interests.

Matter of Cormier v Clarke, 107 AD3d 1410 (4th Dept 2013), *lv denied* 21 NY3d 865

Petition to Suspend Visitation Properly Denied

Family Court denied petitioner mother's application to suspend visitation. The Appellate Division affirmed. The court properly denied the petition and reinstated visitation between the father and the child. Visitation with the noncustodial parent was presumed to be in the child's best interests and denial of visitation was justified only for a compelling reason. The record supported the court's findings that the mother sought to alienate the child from her father by blaming the father for an incident of alleged sexual abuse perpetrated against the child by a third party, and that the father was not in any way responsible for the occurrence of that alleged crime.

Matter of Nwawka v Yamutuale, 107 AD3d 1456 (4th Dept 2013), *lv denied*, 21 NY3d 865__

Termination of Visitation with Incarcerated Parent Affirmed

Family Court granted mother's petition to modify a prior order of custody and visitation by terminating visitation with respondent father, who was incarcerated, and denied respondent father's petition for an order of contempt based on the alleged failure of the

mother to comply with the prior order. The Appellate Division affirmed. The prior order required the mother to bring the parties' biological child, who was 10 year old at the time of the commencement of the proceeding, to the visit the father at the Auburn Correctional Facility twice a year. The mother established the requisite change in circumstances to warrant a review of the prior order. As the child matured, she developed a strong desire not to visit the father. Additionally, the mother testified that the father used visitation time to attempt to reconcile with the mother, rather than to interact with the child. The mother established by a preponderance of the evidence that, under all the circumstances, visitation would be harmful to the child's welfare. Visitation need not always include contact visitation at the prison. While the father's incarceration did not, by itself, render visitation inappropriate, that fact, when considered with the evidence that established the father's lack of prior contact with the child, the father's failure to interact with the child during visitation and the child's express desire not to visit with the father, provided a sufficient basis for the court's determination that terminating visitation with the father was in the child's best interests.

Matter of Rulinsky v West, 107 AD3d 1507 (4th Dept 2013)

Dismissal of Petition to Modify Custody Reversed

Family Court dismissed that part of mother's petition that sought a modification of custody. The Appellate Division reversed, granted the petition in part by awarding primary physical custody of the child to the mother and visitation to respondent father, and remitted the matter to Family Court for further proceedings. The mother met her burden of establishing a change in circumstances. Each party remarried since the original custody trial and had two additional children who were younger than the subject child, and the father had two-step children who were older than the subject child. The evidence established that the child felt isolated at the father's home and indicated a strong desire to live with the mother. The evidence further established that the child's anxiety with respect to living with the father progressed to the point where he expressed to others his thoughts of harming the father and his family. It was in the child's best interests to award the mother primary physical custody. The mother was better able to provide for the child's emotional needs. Given the child's anxiety, this factor was accorded greater weight.

Matter of Cole v Nofri, 107 AD3d 1510 (4th Dept 2013)

Award of Sole Legal and Physical Custody to Father Affirmed

Supreme Court awarded petitioner father sole legal and physical custody of the parties' children. The Appellate Division affirmed. Respondent mother's contention was rejected that the court placed too much emphasis on the wishes of the children and that the award of custody to the father was not in the children's best interests. Although the wishes of the children were but one factor to be considered when determining the relative fitness of the parties and the custody arrangement that served the best interests of the children, the court properly weighed and considered all of the relevant factors,

some of which favored the father while others favored the mother. Due deference was given to the court's superior ability to evaluate the character and credibility of the witnesses, and there was no basis to disturb its award of custody to the father.

Matter of Radley v Radley, 107 AD3d 1578 (4th Dept 2013)

Dismissal of Petition to Terminate Child's Half-brother's "Access" to Child Proper

Family Court denied the objection of petitioner father and confirmed the report of the referee which recommended dismissal of the petition following a hearing. The Appellate Division affirmed. Petitioner, who had sole custody of his 12-year-old daughter, sought to terminate the weekend "access" to the child that respondent, the child's half-brother, was granted pursuant to a stipulated order. Petitioner alleged that respondent was a drug dealer and exposed the child to domestic violence. Respondent failed to answer the petition. The court's determination that it was in the best interests of the child to continue having scheduled visitation with respondent had a sound and substantial basis in the record. It was undisputed that the child and respondent had a close relationship which the child wished to continue. Although not controlling, the express wishes of the child were entitled to great weight because her age and maturity rendered her input particularly meaningful.

Matter of Perry v Render, 107 AD3d 1615 (4th Dept 2013)

Reversal of Dismissal of Violation Petition

Family Court granted respondent father's motion to dismiss the amended violation petition. The Appellate Division reversed on the law, the motion to dismiss the amended petition was denied, the petition was reinstated and the matter was remitted to Family Court for a hearing on the amended petition. The court erred in dismissing petitioner's amended petition without a hearing inasmuch as the amended petition alleged sufficient factual and legal grounds to establish a violation of a prior order. Moreover, respondent's submissions in support of his motion to dismiss did not address all of the allegations in the mother's amended petition.

Matter of Schultz v Schultz, 107 AD3d 1616 (4th Dept 2013)

Reversal of Order that Designated Mother Primary Residential Custodian

Family Court entered an order that designated respondent mother the primary residential custodian of the parties' children. The Appellate Division reversed and remitted the matter to Family Court. The expert's report relied upon by the court was of limited utility inasmuch as it highlighted challenges faced by the father and downplayed similar challenges faced by the mother. In any event, the Court was advised that facts and circumstances had changed during the pendency of the appeal. The record was no longer sufficient for determining the mother's fitness and right to primary physical custody of the children. In deciding the issue in the mother's favor, Family Court relied

on evidence that the mother was self-supporting and living in her own apartment. The Court was advised that the mother had since lost her job and was living with her own mother.

Matter of Kennedy v Kennedy, 107 AD3d 1625 (4th Dept 2013)

Denial of Visitation with Incarcerated Parent Affirmed

Family Court denied the father's petitions for visitation at the correctional facility where he was incarcerated, but allowed petitioner to communicate in writing with two of his children. The Appellate Division affirmed. Respondents in the consolidated appeals, the mother and maternal grandmother of one of petitioner's children and the mother of another of petitioner's children, rebutted the presumption in favor of visitation by establishing, by a preponderance of the evidence, that visitation would be harmful to the children. Petitioner had never met the children. He was essentially a stranger to them. Additionally, the counselor of one of the children testified in detail as to how visitation would be detrimental to her welfare and the other child's mother testified that the child was afraid of seeing petitioner and had been in therapy since he learned of the proceedings.

Matter of Brown v Terwilliger, 108 AD3d 1047 (4th Dept 2013), *lv denied* __ NY3d __

Orders Awarding Visitation to Father and Paternal Grandparents Modified

Respondent mother appealed from two Family Court orders. The first order granted petitioner father increased visitation, among other things. The Appellate Division modified. The father established a change in circumstances warranting a modification of the access provisions in the parties' separation agreement. The record established that the mother interfered with the father's telephone communications with the children. It was in the children's best interests to increase the father's visitation. However, the court abused its discretion with respect to certain aspects of the revised visitation schedule. The award of parenting time for the father each and every weekday morning before school was not in the children's best interests because it created instability and was likely to increase tension between the parents. Additional provisions of the same ordering paragraph were ambiguous, confusing and unnecessary and were modified so that each parent was responsible for making childcare arrangements during his or her respective parenting time. The court further abused its discretion in awarding the father both Memorial Day and Labor Day weekends each year. The order was further modified so that the mother had parenting time on Labor Day weekend each year. The second appeal pertained to the paternal grandparents' visitation order. To avoid conflict with the parents' order of custody and visitation, the order was modified so that the grandparents' monthly Sunday visitation occur during the father's parenting time in odd-numbered months and during the mother's parenting time in even-numbered months. The order was further modified by vacating that part of the first ordering paragraph that directed that the grandparents have one summer weekend of visitation during the mother's parenting time.

Matter of Dubiel v Schaefer, 108 AD3d 1093 (4th Dept 2013)

Supervised Visitation Order Reversed

Family Court directed that respondent father's visitation with the parties' children be supervised. The Appellate Division reversed on the law and remitted the matter to Family Court. Family Court erred in relieving respondent's assigned counsel after the modification petition, which sought full legal custody of the three children at issue, was amended to seek only a modification of respondent's visitation. While the appeal was pending, the Appellate Division held that respondents in visitation proceedings were entitled to assigned counsel.

Matter of Brown v Patterson, 108 AD3d 1131 (4th Dept 2013)

Adjudication of Neglect Constituted Change in Circumstances

In a proceeding pursuant to, among other things, Family Court Act article 6, Family Court determined that petitioner mother should have sole custody of the subject child. The Appellate Division affirmed. In the first appeal, the father appealed from the order that granted mother sole custody on the modification petition and, in the second appeal, he appealed from the dispositional order on the neglect petition. With respect to the second appeal, the court properly concluded that DSS established by a preponderance of the evidence that the child was a neglected child. The evidence established that the child's emotional condition was impaired as a result of the father's "bizarre and paranoid behavior," which resulted in the child being frightened and depressed. The child's out-of-court statements were adequately corroborated by the father's statements to the DSS caseworker and the child's testimony. Regarding the first appeal, the adjudication of neglect constituted a change in circumstances that warranted a determination whether a modification of the custody arrangement set forth in the parties' joint custody order was in the best interests of the child. The court properly determined that it was in the child's best interests for the mother to have sole custody.

Matter of Christy S. v Phonesavanh S., 108 AD3d 1207 (4th Dept 2013)

Denial of Modification Petition Error; Appellate Division Granted Petition

Family Court denied the father's petition for modification of a prior custody order, among other things. The Appellate Division modified by granting the petition and remitted the matter to Family Court to establish a visitation schedule with the mother. The Court addressed the cross appeal first and rejected the mother's contention that Family Court erred in finding her in civil contempt of the court's 2001 order. It was undisputed that the order prohibited her from moving out-of-state with the parties' child without the permission of either the father or the court, and that the mother moved to Maine in August 2011 without such permission. With respect to the father's appeal, the court's determination that it was in the best interests of the child to remain in the custody of the mother lacked a sound and substantial basis in the record. The court abused its

discretion in failing to draw the strongest inference that the opposing evidence permitted against the mother based upon her failure to appear for the hearing. Although the court properly determined that the father failed to take steps to enforce his right to visit with the child, the court failed to credit the testimony of the mother's family that the mother interfered with the father's ability to visit the child; that the mother disparaged the father in the presence of the child; that, despite the court's order granting telephone access to the child, the access lasted only two weeks; that the mother was verbally abusive to the child; that the child was afraid of the mother; among other things. Further, the evidence established that the father had a home, a job and paid child support. Although the court properly determined that the child barely knew the father, the court erred in failing to give any weight to the 14-year-old child's preference to live with the father rather than the mother.

Matter of Lara v Sullivan, 108 AD3d 1238 (4th Dept 2013), *lv denied* 22 NY3d 949

Mother Properly Granted Sole Custody of Parties' Three Children

Family Court awarded petitioner mother sole custody of the parties' three children with visitation to respondent father on alternate weekends. The Appellate Division affirmed. The award of sole custody to the mother had a sound and substantial basis in the record. The father's contention that the AFC failed to advocate for the children's interests was unpreserved and without merit. The court did not abuse its discretion in allowing testimony concerning events that predated the prior custody order. In determining the best interests of the children, the court was vested with broad discretion with respect to the scope of proof. The delay between the conclusion of the hearing and the court's decision, by itself, did not require reversal.

Matter of Brown v Wolfgram, 109 AD3d 1144 (4th Dept 2013)

Splitting Placement of Children Affirmed

Family Court awarded the parties joint custody, awarded primary physical custody of two children to respondent father and primary physical custody of one child to petitioner mother. The Appellate Division affirmed. The mother's contention that the court abused its discretion in splitting custody of the children was rejected. The court's determination, which was entitled to great deference, was supported by extensive factual findings and warranted the conclusion that the needs of the children were best met by the court's disposition.

Matter of Button v Allen, 109 AD3d 1158 (4th Dept 2013), *lv denied* ___ NY3d ___

Mother Had No Rights Over Child Adopted by Father and Father's Wife

Family Court dismissed the petition of mother to modify her visitation rights set forth in a prior order. The Appellate Division affirmed. The court did not err in dismissing the petition without a hearing. While this proceeding was pending, an order was entered in

Surrogate's Court granting respondent father's and his wife's petition seeking adoption of the child by respondent's wife. Upon entry of that order, the mother's parental rights ceased and she lacked standing to prosecute a visitation petition regarding the subject child. Although it appeared from the record that respondent and his wife failed to provide required notice of the adoption proceeding to the mother, the court lacked the authority to vacate or ignore the adoption order. Rather, the mother must seek relief from the adoption order in the court that rendered that order.

Matter of Benzin v Kutty 109 AD3d 1175 (4th Dept 2013)

Modification of Prior Order Awarding Father Physical Custody of Child Upheld

Family Court granted father's petition seeking to modify a prior order and awarded him primary physical custody of the parties' child and prohibited all contact between the mother's live-in fiancé, a level one sex offender, and the child. The Appellate Division affirmed. The contention of the mother that testimony about her fiancé's statement to his counselor were privileged was without merit because the fiancé authorized his counselor to disclose privileged communications. The court properly allowed the fiancé's counselor to testify about the underlying facts of the fiancé's sexual abuse conviction. The testimony was not inadmissible hearsay because it was not offered for the truth of the matter asserted therein and was relevant to the mother's state of mind. The court's determination to award primary physical custody to the father was in the best interests of the child and had a sound and substantial basis in the record. The record supported the court's determination that the father was better able to provide for the child's emotional and intellectual needs. Additionally, the court properly weighed against the mother that she resided with a sex offender and allowed him to have unsupervised contact with the child.

Matter of Weekley v Weekley, 109 AD3d 1177 (4th Dept 2013)

Mother Failed to Establish Post-Surrender Visitation Agreement Was Enforceable

The mother petitioned to enforce an agreement providing post-surrender visitation with the child. Family Court dismissed the petition on the ground that further visitation between the mother and the child was not in the child's best interests. The Appellate Division affirmed. The mother failed to establish that the agreement was enforceable. The mother's contention was rejected that the agreement was enforceable pursuant to Social Services Law Sections 383-c and 384. The Social Services Law unequivocally provided that subsequent to the adoption of the child, enforcement of any post-surrender contact agreement shall be in accordance with Domestic Relations Law Section 112-b. The Domestic Relations Law, in turn, provided in relevant part that such agreement "shall not be legally enforceable after any adoption approved by a court pursuant to this article unless the court entered an order pursuant to this section incorporating those terms and conditions into a court-ordered adoption agreement." The mother failed to establish that the terms of the agreement were incorporated into the court-ordered adoption agreement. In any event, the court shall not enforce an order incorporating a post-surrender contact agreement, unless it found that the enforcement was in the

child's best interests

Matter of Kaylee O., 111 AD3d 1273 (4th Dept 2013)

Supervised Access Proper Where Mother Violated Prior Order by Absconding With the Child

Family Court modified an existing custody and visitation order by requiring that respondent mother's access to the subject child be supervised. The Appellate Division modified and remitted for further proceedings. In 2009, the court modified a prior custody order by awarding sole custody of the subject child to petitioner father and granting liberal access to the mother. In making the 2009 order, the court determined that there was a change in circumstances inasmuch as the mother repeatedly frustrated the father's access and the mother failed to follow court orders. The instant order limited the mother's access to supervised visitation based largely upon the court's finding that the mother, without notifying the father and in violation of the 2009 order, absconded with the child, leaving the country for a period of 39 days. The mother's violation of the 2009 order and her pattern of continued violation of court orders constituted a sufficient change in circumstances. The court's determination that unsupervised visitation would be detrimental to the child had a sound and substantial basis in the record. The mother put the child at risk of emotional and intellectual harm by absconding with her, causing her to miss over a month of school, and failing to appreciate the importance of the child's relationship with the father. However, the court erred in failing to set a supervised visitation schedule. Therefore, the matter was remitted to determine the access schedule and whether sibling visitation should occur.

Matter of Green v Bontzolakes, 111 AD3d 1282 (4th Dept 2013)

Visitation Petition Properly Dismissed With Prejudice

Family Court dismissed with prejudice the father's petition seeking visitation with his daughter. The Appellate Division affirmed. Under the unique circumstances of the case, the court erred in taking judicial notice of the alleged fact that his daughter was a severely abused child under Social Services Law Section 384-b (8) (a) (iii) (A). However, the court properly dismissed the petition with prejudice. Inasmuch as there was an existing order of protection prohibiting petitioner from having contact with his daughter until June 22, 2018, the court was without authority to award petitioner visitation.

Matter of Shaw v Seals-Owens, 111 AD3d 1284 (4th Dept 2013), *lv denied* ___ NY3d ___

Evidence Former Live-in Boyfriend Abused Child Constituted Change in Circumstances

Family Court modified the parties' existing custody arrangement by transferring primary physical placement of the children from respondent mother to petitioner father. The

Appellate Division affirmed. The father met the burden of establishing a change in circumstances sufficient to warrant an inquiry into whether the best interests of the children called for a change in circumstances by submitting evidence, among other things, that the mother's former live-in boyfriend abused one of the children. The court's determination with respect to the best interests of the children was based upon a totality of the circumstances and had a sound and substantial basis in the record.

Matter of Kelsey v Kelsey, 111 AD3d 1338 (4th Dept 2013)

Court Did Not Place Undue Emphasis Upon Evidence of Father's Extramarital Relationship

Family Court modified a prior custody order by, among other things, awarding petitioner mother sole custody and primary physical residency of the parties' children. The Appellate Division affirmed. The father's contention was rejected that the court placed undue emphasis upon evidence of his private immoral conduct. The record established that the court did not consider the moral implications of the father's extramarital relationship. Instead, the court carefully considered the evidence only in evaluating the father's history of impulsiveness and his inability to put the needs of the children before his own. Indeed, the court properly determined that evidence of the father's infidelity or sexual indiscretions was not relevant except in those contexts.

Matter of Lawson v Lawson, 111 AD3d 1393 (4th Dept 2013)

Modification of Prior Order Awarding Father Physical Custody of Child Affirmed

Family Court transferred primary physical placement of the subject child from respondent mother to petitioner father. The Appellate Division affirmed. The court properly determined that the child's downward slide in school performance and the child's referral for mental health treatment for behaviors exhibited in school and at home constituted a change in circumstances sufficient to warrant an inquiry into the child's best interests. Further, there was a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award primary physical placement to the father. The child performed poorly at school for four years while living with the mother. The child's teacher and school counselor testified that the child reported that he stayed up late watching television, which was attributed as a cause of the child's fatigue. Indeed, the teacher testified that the child sometimes fell asleep in class or was required to go to the school nurse's office to nap. The mother was unemployed and relied on others for transportation. In contrast, the father was employed and able to provide a more stable home for the child.

Matter of Brewer v Soles, 111 AD3d 1403 (4th Dept 2013)

Father's Cross Petition Granted Where Domestic Violence in Mother's Household

Family Court awarded petitioner mother sole legal and physical custody of the parties'

child. The Appellate Division vacated the order, granted respondent father's cross petition, in part, by awarding him primary physical custody of the child, and remitted the matter to Family Court to fashion a visitation schedule for the mother. The incidents of domestic violence in the mother's household constituted a sufficient change in circumstances to warrant modification of the prior custody order. Furthermore, modification was warranted because the parties' prior parenting time arrangement would no longer be practical upon the child's attainment of school age. It was in the child's best interests to award primary physical custody of the child to the father. Although the mother had been the primary residential parent since the child's birth, the violent and abusive behavior of the child's uncle in the mother's home created a dangerous environment for the child.

Matter of Pecore v Blodgett, 111 AD3d 1405 (4th Dept 2013)

By Requiring Posting of Undertaking, Court Properly Imposed Meaningful Sanction to Ensure Visitation Occurred

Family Court denied the mother's petition for a modification of custody. The Appellate Division affirmed. Although the mother met her burden of proving a change in circumstances because the parties' relationship had deteriorated and the child had missed numerous visitations with the mother, the record supported the conclusion that a change in custody would not be in the best interests of the child. By requiring the father to post an undertaking in a specific amount, the court properly imposed a meaningful sanction based on the father's failure to comply with orders concerning her visitation rights, to ensure that visitation occurred.

Matter of Smith-Gilsey v Grisanti, 111 AD3d 1424 (4th Dept 2013)

Children Could Not Force Mother to Litigate Abandoned Petition

Family Court dismissed the petition for modification of a custody order. The Attorney for the Children appealed from a decision dismissing various petitions filed by the parents of two children. Although no appeal lies from a decision, the notice of appeal was treated as valid and the appeals were deemed as taken from the seven orders in the respective appeals that were entered upon the single decision. The children were not aggrieved by the orders in six of the appeals because the orders dismissed petitions filed by one parent alleging that the other parent had violated an order of custody or which sought a personal order of protection against the other parent. Thus, those appeals were dismissed. The mother did not take an appeal from the order in the remaining appeal, which dismissed the mother's petition seeking modification of a custody order. The children, while dissatisfied with the order, could not force the mother to litigate a petition that she had since abandoned. "[C]hildren in custody cases should [not] be given full-party status such that their consent is necessary to effectuate a settlement...There is a significant difference between allowing children to express their wishes" to the court and allowing their wishes to chart the course of litigation [citation omitted]. Thus, this appeal was affirmed.

Matter of Kessler v Fancher, 112 AD3d 1323 (4th Dept 2013)

Reversal Not Required Where Father Was Unrepresented When Court Granted Temporary Order

Family Court granted petitioner mother sole custody and primary physical residency of the subject children. The Appellate Division affirmed. Respondent father's contention was rejected that the court erred in transferring temporary custody of the younger child to the mother while the father was not represented by counsel. The father was unrepresented due to his own inaction. The record established that, during two prior court appearances, the court advised the father of his right to counsel and gave him a referral for assigned counsel. At the third appearance, when the father again appeared without counsel, the court granted the temporary order upon the motion by the Attorney for the Children. Assuming, arguendo, that the court erred in deciding the motion, reversal was not required because the order on appeal was issued following a subsequent evidentiary hearing at which the father was represented by counsel.

Matter of Stearns v Crawford, 112 AD3d 1325 (4th Dept 2013)

Reduction of Mother's Visitation in Best Interests of Children

Petitioner mother sought to modify visitation with respect to her four biological children. Respondent, petitioner's sister, had custody of the children, and she in turn sought to reduce petitioner's visitation. Following a hearing and an in camera interview with the children, Family Court granted the relief sought by respondent and reduced petitioner's visitation to three visits per year. The Appellate Division dismissed the appeal insofar as it concerned the oldest child, who had attained 18 years of age, and otherwise affirmed. The court's determination that the best interests of the children were served by a change in visitation had ample support in the record. Respondent, who supervised petitioner's visitation with the children, testified that petitioner did not regularly avail herself of the opportunity to visit the children despite an order allowing her monthly visitation. Respondent further testified that, when petitioner did visit with the children, the visitation was a negative experience for the children. The court gave proper weight to the children's wishes, which, although not controlling, must be considered, particularly where, as here, the children were of sufficient age to articulate their needs and preferences to the court.

Matter of Golda v Radtke, 112 AD3d 1378 (4th Dept 2013)

FAMILY OFFENSE

Dismissal of Petition Reversed

Family Court dismissed the mother's petition without prejudice. The Appellate Division reversed, reinstated the petition and remitted the matter for further proceedings. There was no basis for the dismissal of the petition due to "remote" allegations inasmuch as some of the respondent paternal grandmother's offending conduct set forth in the petition occurred only 12 days before the petition was filed. There was likewise no basis for the dismissal of the petition as a "delay tactic" on the eve of trial because the court could have proceeded with the hearing scheduled for custody and visitation and considered the family offense petition at a later date. Respondent's challenge to the appealability of an order dismissing a petition "without prejudice" lacked merit.

Wiley v Greer, 103 AD3d 1218 (4th Dept 2013)

Respondent Committed Family Offense of Disorderly Conduct; Audio Recording of Incident Properly Admitted in Evidence

Family Court issued an order of protection in connection with its determination that respondent husband committed acts that constituted the family offense of disorderly conduct against petitioner wife. The Appellate Division affirmed. Petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of disorderly conduct. Although respondent's conduct did not take place in public, section 812 (1) specifically stated that disorderly conduct included disorderly conduct not in a public place. In addition, disorderly conduct may be committed when a person recklessly created a risk of annoyance or alarm through violent or threatening behavior. Thus, the respondent's contention that the statute required more than a risk was rejected. The Acting Family Court Judge did not abuse her discretion in refusing to recuse herself where respondent's claim of bias was not supported by the record. There was no evidence that any alleged bias had resulted in an opinion on the merits of the case on some basis other than what the Judge learned from her participation in the case. The court did not err in admitting in evidence an audio recording of the incident made by the parties' son. The eavesdropping statutes were implicated only when the recording was made by a person not present thereat. The parties' son, who made the recording from his bedroom, was present for the purposes of the statutes.

Matter of McLaughlin v McLaughlin, 104 AD3d 1315 (4th Dept 2013)

Respondent Committed Family Offenses

Family Court granted a protective order to petitioner upon a finding that respondent committed the family offenses of assault in the third degree, harassment in the second degree, and disorderly conduct. The Appellate Division affirmed. The court's findings were supported by a preponderance of the evidence. The testimony presented

established that respondent kicked petitioner in the face, resulting in bruises, swelling and a cut lip requiring stitches, and that while on top of petitioner he put his hands around her neck to prevent her from breathing. The court's determination that respondent was not acting in self-defense was supported by the record and could not be disturbed.

Matter of Dietzman v Dietzman, 112 AD3d 1370 (4th Dept 2013)

JUVENILE DELINQUENCY

Restitution Award Reduced Where Theft of Item Not Alleged in Petition

Family Court ordered respondent to pay restitution in the amount of \$740. The Appellate Division modified by reducing the amount of restitution to \$730. With one minor exception, the court's restitution award was supported by a preponderance of the material and relevant evidence. The evidence was sufficient to support the court's determination of the fair and reasonable cost to replace the property or repair the damage caused by respondent. However, the theft of a \$10 bottle of vodka was not alleged in the petition and, as such, was not properly part of the restitution award.

Matter of Joshua R.S., 103 AD3d 1228 (4th Dept 2013)

Finding Supported by Sufficient Evidence on Issues of Identification and Serious Physical Injury

Family Court adjudicated respondent to be a juvenile delinquent upon his admission that he committed an act that if committed by an adult would constitute the crime of criminal sale of a controlled substance in the fifth degree. The Appellate Division affirmed. The court's finding that respondent committed an act that if committed by an adult would constitute the crime of gang assault in the second degree, as an accomplice, was supported by legally sufficient evidence on the issues of identification and serious physical injury. The victim testified that he was attacked initially by an individual other than respondent, and other people joined in the attack. With respect to the issue of identification, an eyewitness testified that respondent was one of the individuals who encircled the victim and engaged in the attack on him. With respect to the issue of serious physical injury, the victim testified that his vision was impaired as a result of the attack, and the court admitted in evidence the victim's certified hospital record, which indicated that the victim sustained a collapsed lung and fractures of the ribs and left orbital.

Matter of Justin G., 104 AD3d 1329 (4th Dept 2013)

Jurisdictionally Defective Petition Dismissed on Appeal

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed an act that if committed by an adult would constitute the crime of criminal sale of a controlled substance in the fifth degree. The Appellate Division reversed and dismissed the petition. A juvenile delinquency petition is legally sufficient on its face when "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged" (FCA § 311.2 [3]). A conclusory statement that a substance seized from a defendant was a particular type of controlled substance did not meet the reasonable cause requirement. Rather, petitioner was required to provide factual allegations that established a reliable basis for inferring the presence of a controlled substance. Here,

the petition alleged that respondent knowingly and unlawfully sold a controlled substance, i.e., Adderall and the conclusory statements of respondent's classmate and an officer that the substance was Adderall. Those statements were not supported by evidentiary facts showing the basis for the conclusion that the substance was actually Adderall.

Matter of Brandon A., 105 AD3d 1365 (4th Dept 2013)

Determination that Petition Not Jurisdictionally Defective Affirmed

Family Court adjudged respondent to be a juvenile delinquent based upon his admission that he committed acts that if committed by an adult would constitute the crime of criminal mischief in the fourth degree and placed him on probation for a period of twelve months. The Appellate Division affirmed. Respondent's contention was rejected that the petition was jurisdictionally defective because the allegations of the factual part of the petition consisted solely of hearsay, in violation of Family Court Act Section 311.2 (3). The petition stated that the information contained therein was derived from statements and admissions of respondent and/or statements and depositions of witnesses filed with the court. Those statements included confessions from respondent and his accomplices, as well as depositions of various other witnesses. There was no support in the record for respondent's assertion that the statements in question were not actually filed with the petition. Respondent's assertion was refuted by the clerk of the court, who submitted an affidavit in support of petitioner's motion to strike that portion of respondent's reply brief in which he made the assertion.

Matter of Casey C. T., 107 AD3d 1579 (4th Dept 2013)

Evidence Legally Sufficient to Establish Respondent Intended to Cause Physical Injury

Family Court adjudicated respondent to be a juvenile delinquent based upon a finding that he committed acts that, if committed by an adult, would constitute the crime of assault in the third degree. The Appellate Division affirmed. Although a different result would not have been unreasonable because respondent testified to a version of the incident different than that presented by petitioner, there was no basis to disturb the court's resolution of witnesses' credibility.

Matter of Isaac J., 109 AD3d 1176 (4th Dept 2013)

ORDER OF PROTECTION

Petition For Modification of Stay-Away Order of Protection Reinstated

Petitioner father sought modification or vacatur of a stay-away order of protection against him. Family Court dismissed the petition. The Appellate Division reversed and reinstated the petition. Upon the father's default, the court terminated the father's parental rights with respect to two of his children and issued the order of protection that is the subject of this appeal. The order of protection required the father to stay away from the children until the youngest reached the age of 18. Ten years later he filed the instant petition claiming "changed circumstances." The court dismissed the petition on the ground that the father lacked standing because the presumption of regularity applied to the termination proceeding, including the order of protection, and the father failed to meet his burden of establishing that he was not served with notice of the petition seeking the order of protection or the order itself. Here, the father had standing because he did not seek access to his children, but rather he sought to modify or vacate the order of protection and the order terminating his parental rights was separate and distinct from the order of protection. The court improperly dismissed the petition because DSS had the burden to show that it properly served the father so as to obtain jurisdiction over him with respect to the order of protection and DSS failed to submit a process server's affidavit of service and the record was otherwise devoid of evidence that the father was served with the petition giving rise to the order of protection or the order of protection itself.

Matter of Anna B., 105 AD3d 1399 (4th Dept 2013)

Willful Violation of Order of Protection Affirmed

Family Court found that respondent father willfully violated an order of protection and committed him to a jail term of six months. The commitment was stayed for a period of six months on the condition that respondent not violate the order of protection. The Appellate Division dismissed the appeal from the order insofar as it concerned commitment to jail and otherwise affirmed. Petitioner mother established by clear and convincing evidence that respondent willfully violated the terms of the order of protection. Respondent's challenge to the commitment was moot because that part of the order expired by its own terms.

Matter of Ferrusi v James, 108 AD3d 1083 (4th Dept 2013)

PATERNITY

Paternity Petition Properly Dismissed

Family Court dismissed the paternity petition. The Appellate Division affirmed. Contrary to the contentions of the AFC and petitioner, the court was not required to apply the doctrine of equitable estoppel to bar the mother from denying that petitioner was the father of the subject child. A nonbiological, nonadoptive third-party does not have standing to seek visitation when a biological parent who is fit opposes it, and equitable estoppel does not apply even where the nonparent had enjoyed a close relationship with the child and exercised some control over the child with the parent's consent.

Matter of White v Wilcox, 109 AD3d 1145 (4th Dept 2013)

TERMINATION OF PARENTAL RIGHTS

Father Not Denied Effective Assistance of Counsel

Family Court terminated respondent father's parental rights. The Appellate Division affirmed. The court rejected father's contention that his attorney's failure to seek a stay of the court's proceeding based upon the pendency of the father's appeal from the judgment convicting him of murdering the mother constituted ineffective assistance. An order terminating parental rights on the ground that a parent was convicted of murdering the other parent may be affirmed notwithstanding an appeal of the conviction. Further, during the dispositional phase of the proceeding, the father's attorney stated that the father did not oppose the TPR. Therefore, the allegation that counsel's failure to seek a stay was an error - rather than a strategic decision made by counsel - was speculative.

Matter of Dalton A. B., 103 AD3d 1181 (4th Dept 2013), *lv denied* 21 NY3d 949

Respondent's Parental Rights Properly Terminated on Ground of Mental Illness

Family Court terminated respondent father's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that the father was then and for the foreseeable future unable, by reason of mental illness***, to provide proper and adequate care for the child. The unequivocal testimony of petitioner's expert witness, a psychologist, and other witnesses established that the father was so disturbed in his behavior, feeling, thinking and judgment that, if his son was returned to his custody, his son would be in danger of becoming a neglected child. Moreover, although the father participated in several treatment programs, he was unable to overcome his significant limitations.

Matter of Christopher B., 104 AD3d 1188 (4th Dept. 2013)

TPR Affirmed; Derivative Neglect Properly Determined

Family Court terminated respondent mother's parental rights and ordered that the child be freed for adoption. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and child. Furthermore, the court properly determined that the child was a neglected child based upon the derivative evidence that three of the mother's other children were determined to be neglected children, including the evidence that the mother failed to address the mental health issues that led to those neglect determinations and the placement of those children in a foster home. The court properly denied the mother's request for a suspended judgment. A suspended judgment is a brief grace period designed to prepare the parent to be reunited with the child. The court's assessment that the mother was not likely to change her behavior was entitled to great deference.

Matter of Lillianna G., 104 AD3d 1224 (4th Dept. 2013)

Despite Mother's Partial Participation in Services, TPR Affirmed Where Mother Had No Realistic Plan to Care for Child and Was Unlikely to Change Behavior

Family Court terminated respondent mother's parental rights. The Appellate Division affirmed. The court did not abuse its discretion in determining that a suspended judgment was not in the child's best interests. Although the mother participated in some of the services offered by petitioner, she failed to address successfully the problems that led to the removal of the child and continued to prevent his safe return. The mother also did not have a viable plan for the child while she was incarcerated. Therefore, the record supported the court's refusal to grant a suspended judgment inasmuch as the mother had no realistic feasible plan to care for the child and she was not likely to change her behavior. The Appellate Division rejected the mother's contention that she was denied effective assistance of counsel, inter alia, on the grounds that her attorney allegedly failed to call the child's maternal grandmother as a witness during the dispositional hearing. The mother did not meet her burden of demonstrating that the alleged failure resulted in actual prejudice. There was no support in the record for the mother's contention that the child's maternal grandmother was willing or able to care for the child while the mother was incarcerated.

Matter of Dahmani M., 104 AD3d 1245 (4th Dept 2013)

Parental Rights Properly Terminated on Ground of Permanent Neglect

Family Court terminated respondent father's parental rights with respect to his child on the ground of permanent neglect. The court considered the appropriate factors, including the special circumstances of an incarcerated parent, in determining that the child was neglected. The father failed to demonstrate any commitment to the responsibilities of parenthood and demonstrated a fundamental defect in his understanding of proper parenting responsibilities. Petitioner was not required to guarantee that respondent succeed in overcoming his predicaments but, rather, he must have assumed a measure of initiative and responsibility.

Matter of Aiden J. W., 105 AD3d 1334 (4th Dept 2013)

Court Did Not Abuse Its Discretion in Denying Adjournment

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. The court did not err in denying respondent's request for an adjournment to present psychological evidence. The court had already adjourned the proceeding for three months to allow respondent to call her own expert, and she failed to do so. Further, respondent did not demonstrate that the testimony of her expert would have been material and favorable to her.

Matter of K'Quamere R., 106 AD3d 1444 (4th Dept. 2013)

Respondent's Parental Rights Properly Terminated on Ground of Mental Illness

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of demonstrating by clear and convincing evidence that the mother was then and for the foreseeable future unable, by reason of mental illness ... to provide proper and adequate care for the child. Respondent was pregnant with the subject child when her vehicle was struck by a pickup truck. She sustained a traumatic brain injury, which caused diminished cognitive abilities. Petitioner submitted unrefuted expert testimony that, as a result of respondent's injuries, she suffered from a mental condition that rendered her unable to care for the child because respondent was functioning at the level of an eight-year-old. Petitioner's expert also testified that respondent's mental condition would not improve.

Matter of Destiny V., 106 AD3d 1495 (4th Dept. 2013)

Suspended Judgment Not Appropriate

Family Court terminated respondent father's parental rights with respect to his child. The Appellate Division affirmed. The father stipulated to the finding of permanent neglect, but contended that a suspended judgment would have been in the child's best interests. The evidence supported the court's determination that termination of the father's rights was in the best interests of the child and that the father's negligible progress in addressing his chronic substance abuse was not sufficient to warrant further prolongation of the child's unsettled familial status.

Matter of Alexander M., 106 AD3d 1524 (4th Dept 2013)

Respondent's Parental Rights Properly Terminated on Ground of Mental Illness

Family Court terminated respondent mother's parental rights on the ground of mental illness. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that the mother was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child. The psychologist appointed by the court testified that the mother had schizophrenia, paranoid type. He characterized her prognosis as bleak based upon her lack of insight into her illness or her need for treatment, and her refusal to take prescribed medication. The psychologist further concluded that if the child was returned to the mother he would be at imminent risk of harm.

Matter of Roman E.A., 107 AD3d 1455 (4th Dept 2013)

No Good Cause For Substitute Counsel

Family Court terminated respondent father's parental rights with respect to the subject child. The Appellate Division affirmed. The court did not err in denying respondent's request for new assigned counsel. The right to assigned counsel under the Family Court Act is not absolute. Here, respondent failed to establish that good cause existed necessitating dismissal of his assigned counsel.

Matter of Destiny V., 107 AD3d 1468 (4th Dept. 2013)

Termination of Respondent's Parental Rights on Ground of Mental Retardation Proper

Family Court terminated respondent mother's parental rights to her three children having determined that the mother was then and for the foreseeable future unable, by reason of her mental retardation, to provide proper and adequate care for the children. The Appellate Division affirmed. Petitioner met its burden of proof at the fact-finding hearing. A psychologist who conducted a court-ordered evaluation of the mother testified that the mother functioned at a very low level and that her IQ score of 63 placed her in the first percentile. The psychologist further testified that the mother's low IQ had remained unchanged over time, and he explained that it is highly unusual for an IQ score to change dramatically absent some type of trauma. Furthermore, the mother lacked a basic intellectual understanding of the needs of a child and was unable to recognize and identify the fundamental tasks of parenting. Despite the services made available to her, the mother demonstrated very little improvement in functioning effectively as a parent. The mother failed to present any contradictory evidence with respect to her intellectual capacity.

Matter of Joseph A.T.P., 107 AD3d 1534 (4th Dept 2013)

Parental Rights Properly Terminated on Ground of Permanent Neglect; Dissent Would Have Reversed Because Petitioner Misdiagnosed Mother and Child, Among Other Things

Family Court terminated respondent mother's parental rights to the subject child on the ground of permanent neglect. The Appellate Division affirmed. The court properly determined that petitioner made diligent efforts to reunite the mother with the child. Among other things, petitioner arranged for a psychological assessment of the mother, arranged for therapy sessions for the mother and various services for the child, and provided the mother with parenting, budgeting, and nutrition education training. Petitioner also provided the mother with supervised and unsupervised visits with the child. Most significantly, petitioner arranged for a child psychologist to meet with the mother on several occasions in her home to provide parenting training. The court properly determined that the mother failed to plan for the future of the child. While the mother participated in the services offered by petitioner and had visitation with the child, the evidence established that she was unable to provide an adequate, stable home for the child and parental care for the child. The dissent would have reversed reasoning that petitioner failed to prove by clear and convincing evidence that it made the requisite diligent efforts to strengthen the mother's relationship with the child given that it was undisputed that petitioner misdiagnosed both the mother and the child. Further, assuming, arguendo, that petitioner met its burden of proof with respect to diligent efforts, it failed to prove by clear and convincing evidence that the mother failed to plan for the child's future.

Matter of Cayden L.R., 108 AD3d 1154 (4th Dept 2013)