

Update on Legal Issues in CPS, 2006

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Participant Materials



**New York State
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and
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UPDATE ON LEGAL ISSUES IN CPS, 2006

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CASELAW UPDATE IN CHILD PROTECTIVE ISSUES
Reported Cases from July 2005- July 2006 (cites current as of July 2006)
Teleconference Agenda for September 21, 2006
By Margaret A. Burt, Esq.

General Abuse and Neglect Issues

Matter of Joseph T. 23 AD3d 334, 805 NYS2d 87 (2nd Dept. 2005)

At a fair hearing, OCFS unfounded a CPS report from Nassau County. DSS filed an Art. 10 petition in court on the same issues as contained in the unfounded report. The lower court ordered that DSS could not offer any evidence obtained during the investigation of the unfounded report. The Second Department reversed. DSS can go forward with whatever proof it has, other than offering the actual sealed report into evidence. There is no bar to DSS filing and proceeding on an Art. 10 matter due to the report having been unfounded and sealed. Family Court is not given such authority under Social Services law.

Matter of Stephanie R., 21 AD3d 417, 799 NYS2d 804 (2nd Dept. 2005)

The Second Department reviewed a sex abuse case from Suffolk County Family Court and agreed that the one child was abused but the other child was derivatively neglected, not derivatively abused. The lower court did err in not allowing the mother to testify as to the child's recantations but the error was harmless as the court had been made aware of the recantation through the child's therapist. The father's statements to the police corroborated the child's original disclosure. The evidence did support a finding of sexual abuse as to the one child but since the petition had only alleged derivative neglect regarding the sibling, and it was never amended, it was procedurally improper for the court to make a finding of derivative abuse. The Appellate Division substituted a finding of derivative neglect.

Matter of Daniel BB., 26 AD3d 433, 809 NYS2d 303 (3rd Dept. 2006)

The Third Department reviewed an abuse matter from Schenectady County. Photographs were admitted into evidence that had been taken by the medical caretakers of the child's alleged trauma due to sexual abuse, but they are now missing. The Appellate Division ruled that this did not impede their ability to review the case. The photographs only supplemented the medical testimony. The lower court admitted the results of a polygraph test into evidence as a part of a mental health evaluation of the respondent. This was harmless error. The mental health examiner indicated that the test had no impact on the evaluation. The Family Court specifically stated that the respondent's failure to pass the polygraph test did not influence the finding in any respect.

Matter of Brice L., 29 AD3d 910, 815 NYS2d 273 (2nd Dept. 2006)

Suffolk County DSS was permitted to amend their neglect petition to conform to the pleadings regarding proof of an indicated protective incident that had occurred after the petition had been filed.

Matter of Kali-Ann E., 27 AD3d, 810 NYS2d 251 (3rd Dept. 2006)

In 1996 a Warren County court granted custody of an infant to a mother. In 2001, the father filed a petition to modify the custody and while that petition was pending, the mother relocated to Florida with the child. The court granted the father sole custody and the father went to Florida and retrieved the child. The child, now 7 years old, had to be hospitalized in Warren County due to severe malnutrition, dehydration and multiple bruises. Warren County DSS brought a petition against the mother alleging that she had abused and neglected the child in both NYS and Florida. The mother was personally served in jail in Florida where she was being held on criminal charges regarding the injuries to the child. She moved to dismiss the petition alleging that Warren County Family Court had no jurisdiction. That motion was denied and after the mother plead guilty to the criminal charges in Florida, the Warren County Family Court granted a summary judgment motion for finding of abuse and neglect and issued an order of protection. The mother appealed, citing FCA § 1036c, claiming that since she was a resident of Florida and the events occurred in Florida, Warren County Family Court had no jurisdiction. The Third Department however cited the UCCJEA and found that since the initial custody determination was in NYS and the father resided in NYS and the child had resided in NYS for all but less than 6 months when she was in Florida, NYS had continuing jurisdiction, including over the acts committed in Florida. Summary judgment based on the criminal convictions in Florida was appropriate.

In Re Devina S., 24 AD3d 188, 808 NYS2d 159 (1st Dept. 2005)

The Bronx County respondent in this matter murdered the children's mother while the children were present. The First Department found this action to constitute abuse of the children and stepchildren. The court also ruled that the children would be prohibited from visiting him in prison without prior approval on the court.

GENERAL NEGLECT

Matter of Michael WW., 20 AD3d 609, 798 NYS2d 222 (3rd Dept. 2005)

The Third Department affirmed a Clinton County neglect finding regarding a father of three children. In the fall of 2000, the father, while drunk, broke a window and climbed into the home in the middle of the night. He injured the mother, wrestled the phone from her and choked her. The children heard her screams, woke up and responded to find the

scene. The mother, to avoid the father, fled to another county with the children and later on an unrelated matter, she was found to have neglected the children and the children were placed in foster care.

Three years later, the oldest child disclosed that the father had sexually abused him. The father gave a confession to the state police. Clinton County then brought an Article Ten petition regarding the sexual abuse and the earlier domestic violence. The father, who was mentally limited, claimed that his confession should not be admitted in the Article 10 proceeding as he did not understand his Miranda rights. The Third Department disagreed. "Miranda rights are irrelevant to a Family Court Act Article 10 proceeding because they are grounded in the rights to remain silent and to counsel which only apply in the context of criminal proceedings." The father's statement to the state troopers was admissible in Family Court regardless of any Miranda warnings. The court should simply assess the circumstances around the statement to determine its probative weight. Here the father testified that the police had been polite, that there were no tricks or deception and that they told him that a Judge would decide if he would be allowed to go home. When he told the troopers that he could not read very well, they read his statement to him slowly. The statement that the father made was voluntary and worthy of belief. The father's confession to the troopers was sufficient to corroborate the child's out of court statements of sexual abuse. The siblings were also derivatively abused. The court properly determined to deny the father's motion that the children testify as they were not competent to testify under oath and unsworn testimony was not warranted.

Lastly, the Appellate Division concluded that the acts in the fall of 2000 also constituted neglect and distinguished it from Nicholson. The court indicated that in this matter the aggressor in the domestic violence situation is alleged to be neglectful and not the victim. Further the children were present for the violence and were visibly upset and frightened. This one situation alone was enough to find that the father had neglected the children.

Matter of Corey C., 20 AD3d 736, 798 NYS2d 232 (3rd Dept. 2005)

The Third Department concurred with Greene County Family Court that a stepfather had neglected his stepson. The allegations were that he misused alcohol and kicked the child in the stomach. The lower court had issued an order of protection that ordered him out of the home and also ordered that DSS need not supervise. There was sufficient evidence for the finding based on the stepson's out of court statements that were corroborated by the mother's statements to the police, the responding police officer's observations and the caseworker and siblings. The siblings claimed they had witnessed the stepfather kick the child. Although the mother later recanted her original statements, the lower court correctly ruled on the credibility of that recantation. She was afraid that the stepfather would lose his job and he had previously threatened her with violence. Although there was conflicting evidence as to if the siblings had actually "seen" the kick as opposed to having "heard" the argument, Family Court had discretion to consider the significance of the conflicting statements. Even though the child did not have any physical signs of abuse, actual injury need not be proven – only imminent danger of neglect.

Matter of Krista L., 20 AD3d 783, 798 NYS2d 592 (3rd Dept. 2005)

The Columbia County Family Court found that a mother had neglected her children. It was affirmed on appeal. Her apartment was “freezing” and littered inches deep with garbage and rotten moldy food. There was a stench and flies. This problem had occurred in the past and the mother was slow to make efforts to clean up. Although the children did live with relatives, they were subjected to this squalor when they visited. The court did find that the other two counts of neglect were not proven. The father of the children had a prior criminal conviction and was a registered sex offender but the lower court erred in ruling that this created a presumption of neglect. There was no evidence presented that the criminal conviction was of a nature that would demonstrate a likelihood of inappropriate sexual contact with his child. The children claimed to feel comfortable around him. Also, the mother had not neglected her 14 year old daughter in response to the daughter’s claims that her grandfather had tried to “French kiss” her. No evidence was offered that the mother had failed to exercise a minimum degree of care in response to this allegation.

Matter of LeVonn G., 20 AD3d 530, 800 NYS2d 428 (2nd Dept. 2005)

The Second Department affirmed the Suffolk County Family Court’s finding of neglect regarding a mother who failed to pursue psychiatric treatment for her child. Her failure put the child’s emotional condition in imminent danger of impairment. The mother failed to testify on her own behalf and the court may draw a negative inference from that. Family Court appropriately conformed the pleadings to the proof at the fact finding. It was also appropriate to combine the dispositional hearing with the permanency hearing. These actions did not prejudice or surprise the mother.

In Re Perry S., 22 AD3d 234, 802 NYS2d 115 (1st Dept. 2005)

The New York County Family Court found a mother to have neglected her five children and the First Department agreed. She failed to acknowledge that three of her children had very serious emotional problems and she refused counseling for them. The two other children were derivatively neglected, as there was a substantial risk of harm to them as evidenced by her failure to deal with the other children’s problems.

Matter of Harmony S., 22 AD3d 972, 802 NYS2d 784 (3rd Dept. 2005)

Clinton County Family Court adjudicated neglect regarding a mother of two. On appeal, the Third Department concurred. One of the children lived with a grandmother under an Article 6 order and the second child was removed at birth and placed with the grandmother. The mother argued that she could not be a respondent in a neglect proceeding for the child not in her legal custody. The court found that this issue was not preserved at trial but that it had no merit in any event. The evidence showed that the mother had frequent unsupervised weekend visits with that child. She is a parent as well

as a “person legally responsible” under the statute. The mother is developmentally disabled and has mental health and anger management problems. She would not accept preventive services and did not go to mental health services that had been ordered by criminal court. She had a history of substance abuse and a history of “creating fire and smoke hazards”. When the second child was born, she did not interact or care for her and was unable to feed her. She showed no emotional attachment to her. The mother also failed to testify in her own defense. The children do not have to have actually been impaired to prove neglect – there only need be proof of imminent danger of potential impairment.

Matter of Sadjah S., 23 AD3d 246, 804 NYS2d 68 (1st Dept. 2005)

A New York County father neglected his child by not making plans for her to be cared for when the child’s mother was incarcerated. He was also verbally abusive and menacing to the mother while the child was present. He dangled the child by her shoulder while he tried to slap the mother. The First Department cited Nicholson and ruled that this case was an example of a failure of the father to provide a minimum degree of care.

Matter of Tonette E., 25 AD3d 994, 807 NYS2d 694 (3rd Dept. 2006)

The Third Department reviewed an indicated child protective report against a mother from Ulster County after OCFS refused to expunge it. A fair preponderance of the evidence did prove that the 8 year old boy was in imminent danger of neglect. The child told CPS that his stepfather had “lots of guns, pistols and rifles all over the house” under pillows and in bags. The mother consented to a police search and 11 handguns and 3 rifles were located, some loaded. The guns were under towels, around a futon and in bags. The mother claimed that she knew her husband had a “gun collection” but assumed they were in a “safe place”. Her claim that she never saw any guns lying within reach of her 8 year old was a credibility issue that the hearing officer was in the best position to resolve. Hearsay is admissible in a fair hearing and can constitute substantial evidence. The best evidence rule did not require the production of a receipt from the police for the seized weapons.

Matter of Justin J., 25 AD3d 1031, 808 NYS2d 497 (3rd Dept. 2006)

A Clinton County neglect finding was affirmed on appeal. There were 6 children in the home. The children were removed in 2003 and a temporary order of protection was issued. Within 2 months, a violation of the temporary order was filed. The lower court found that the parents had neglected the children and had violated the temporary order. The father appealed. There were numerous prior indicated reports, including some remote in time but they are relevant, particularly since the reports continued up to the month before the petition. The father used excessive corporal punishment on the children, smoked pot while caring for the children and used other drugs while the

children were in the home. He told friends that he sold the children's medications for money. He told the children's doctor that repeatedly that the children's medication was stolen, lost or fell in the toilet. The doctor would not longer give him the children's prescriptions. Their medication had to be given to them by a social worker. The father also scared a preventive worker by chasing her in his car in an "out of control" manner while she had the children in her care. The children drank urine, poked pencils in each other's ears and constantly had bumps and bruises.

Matter of Imani B., 27AD3d 645, 811 NYS2d 447 (2nd Dept. 2006)

Suffolk County Family Court was reversed by the Second Department. The evidence offered regarding the father's neglect essentially consisted of out of court statements made by the mother to a police officer regarding a domestic dispute. The out of court statements of the mother are not admissible against the father. The only other admissible evidence established that the parents had loud verbal disputes in front of their 4 month old infant. This in and of itself does not establish neglect, as there is no proof that the child's condition was in any imminent danger of impairment.

Matter of Antonio NN., 29 AD3d, 812 NYS2d 176 (3rd Dept. 2006)

The Third Department concurred with Chemung County Family Court that a mother neglected her two children by allowing the 2 and 5 year old to play outside without supervision. The children played in the yard for an extended period of time while the mother did laundry in the basement. The two year old ran into the street and was struck by a SUV. She was seriously injured and sustained brain damage. The mother was aware that the fenced yard had a gate that was often open, that the children knew how to open the gate and that they were in close proximity to a city street while unsupervised.

Matter of Joseph O., 28 AD3d 562, 813 NYS2d 213 (2nd Dept. 2006)

The Second Department affirmed a Dutchess County Family Court finding of neglect based on excessive corporal punishment and domestic violence. The father pushed the child's mother, hit one child and threw the other child to the floor. The Appellate Division reversed the finding of neglect based on the father's excessive drinking as that had not been alleged in the petition and the petition was not amended.

Matter of Demetrius B., 28 AD3d 1249, 813 NYS2d 611 (4th Dept. 2006)

An Erie County father neglected his four children by failing to make adequate plans for their care when he was incarcerated. He had left his 20 year old stepdaughter, who did not live with the children; to come to the home in the mornings and supervise the 15, 14, 12 and 7 year old's preparation for school and to feed them. He left no money for the

children nor any health care authorizations. The lower court did not err in considering allegations that had been made in a prior neglect petition that had been dismissed, as that petition had not been heard on the merits. Family Court should not have permitted testimony of prior complaints about the father but this error was harmless.

“SEXUAL NEGLECT”

Matter of Cadejah AA., 25 AD3d 1027, 809 NYS2d 598 (3rd Dept. 2006)

The Third Department concurred with Otsego County Family Court that the parents had neglected a teenage girl and a younger boy. The stepfather peeped at the teenage girl through a hole in her bedroom wall and looked in at her when she showered. The court issued an order of protection. The father admitted to the court that he had watched the daughter - although only to see if she was using drugs. The mother admitted that she had allowed the father back in the home on at least 3 occasions in violation of the order of protection. Both children were properly placed outside the home. Mother's admission of violating the court's order of protection supports a neglect finding against her and father's counsel is relived as there are no non-frivolous arguments to appeal his admission.

Matter of Alan FF., 27AD3d 800, 811 NYS2d 158 (3rd Dept. 2006)

The Third Department reversed Saratoga County Family Court's dismissal of neglect proceeding against two parents. The lower court had dismissed, on motion, a petition, which alleged that the father was living in the home with 3 children and was an untreated sex offender who had sexually abused another child. Without holding a fact-finding, Family Court had found that the allegations in the petition would not demonstrate that the father was a substantial risk to the children. The Third Department disagreed. Upon a motion to dismiss, the court must consider as true all the allegations in the petition. Here if the allegations were true the children were neglected. The petition alleged that the father was a convicted sex offender who had admitted in both Family Court and criminal court to having sexual abused an infant daughter in a prior petition. There had been a Family Court order in 2001 requiring that all contact with his children be supervised. That order had expired in 2003. In the meantime, he failed to complete any offender program and his limited intellect and mental health issues impair his ability to benefit from any program. A 2002 mental health evaluation recommended that his contact with his children be supervised. Now, he denies having sexually abused the other child. The mother is fully aware of his prior admissions, his current denial, his lack of treatment and the recommendation that he have no unsupervised contact with the children. She does not prevent unsupervised contact. Further, the petition alleged that there was domestic violence in front of the children and that the father threw one of the children into a couch. If DSS can prove these allegations, these children are neglected by both of the parents.

The court did make a comment in a footnote that the record contained no explanation why the DSS had not sought ongoing orders of supervision of this family after the original dispositional order of 2001 had ended in 2003.

Matter of Alexis C., 27 AD3d 646, 811 NYS2d 449 (2nd Dept. 2006)

The Second Department concurred with Queens County Family Court that a mother neglected her 9-year-old daughter. The child told her mother that the mother's fiancé had sexually abused her on the previous day. The mother did not believe the child and allowed the fiancé to continue to reside in the home.

“DIRTY HOUSE”

Matter of Brian TT., 29 AD3d 1228, 815 NYS2d 340 (3rd Dept. 2006)

Schoharie County Family Court found that a custodian had neglected a child. The child and his mother lived with the custodian. The custodian claimed that she did not neglect the child as she was working and the child had been left with a babysitter. She claimed that the child and the house were fine when she went to work. Approximately 8 hours later the child was found the home “reeking of urine and kerosene” alone in an “unheated room littered with cat feces and vomit”. The custodian's claim that all of this occurred after she had gone to work is incredulous. She knew that there had been problems with the heating. Others in the building said the furnace was broken for 2 days. Photos showed fifth in the home that could not have accumulated in just one day.

Matter of Erik M., 23 AD3d 1056, 804 NYS2d 884 (4th Dept. 2005)

Oneida County Family Court's finding of neglect was reversed by the Fourth Department. Although the house was generally messy and unorganized, there was no evidence that the conditions were unsafe or unsanitary. Although the lower court did not believe the mother's explanations about the home's conditions, there was still no proof of actual neglect.

NEWBORNS

Matter of Jasmine R., 8 Misc 3d 904, 800 NYS2d 307 (Queens County Family Court 2005)

In 2001 this Queens mother had been convicted of the manslaughter drowning of her daughter in a bathtub. Her son was then placed in foster care. The agency filed a mental illness termination regarding the son and while it was pending, she gave birth to another daughter. ACS filed a neglect petition regarding the newborn daughter. The court heard the TPR petition first and found through expert testimony that the mother's mental illness meant that she could not safely care for her son for the foreseeable future. ACS then moved for summary judgement regarding the newborn. The Law Guardian supported the motion. The prior TPR was fully and aggressively litigated and the mother was well aware at that time that the neglect petition was pending on her other child. The mother presented no evidence in response to the summary judgement motion that she was no longer mentally ill. There is no triable issue before the court. The respondent is estopped from relitigating the issue of her mental illness and the newborn is at risk of neglect due to it.

Matter of Kayla M., 22 AD3d 856, 802 NYS2d 755 (2nd Dept. 2005)

The Second Department affirmed a Suffolk County Family Court neglect finding. The child tested positive for cocaine at birth and had a low birth weight. The mother admitted cocaine use during pregnancy and was currently not involved in any drug treatment. She had surrendered or had her parental rights terminated to 6 of her 7 children. She failed to testify and refute the allegations.

Matter of Henry W., __AD3d ___, 815 NYS2d 797 (Third Dept. 2006)

The Third Department affirmed a Columbia County determination that a mother had neglected a newborn. The mother has schizophrenia and had her parental rights terminated to other children based on mental illness and abandonment. The mother made bizarre statements to the worker that the baby had been switched while in utero. The mother also claimed that another baby had been cut out of her and operated on and then returned to her. She also complained that an abortion and other surgery had been performed on her while she was sleeping. The mother said that the father was involved in a plot to murder her. She refused to take any medication. The court found neglect and ordered her to get mental health evaluations. After the finding, DSS moved for an order that no reasonable efforts be provided as per FCA§ 1039-b. The court granted the motion. The mother asked the court to order that the mental health evaluation be performed by a person she had selected and the court refused. A neglect finding and a "no reasonable efforts" disposition was proper as she had her parental right terminated to other children within the last 2 years due to her mental illness. This mother refuses medications and acts bizarrely. She has ongoing and acute mental health issues. The court correctly denied the mother's motion to have an evaluation from a person who did not have an appropriate degree.

Matter of Evelyn B., ___ AD3d ___, 6/29/06 (3rd Dept. 2006)

The Third Department upheld Clinton County Family Court's finding of derivative neglect regarding a mother's newborn and ninth child. The mother had over 20 years of involvement in the child welfare system. Eight of her other children had been removed from her home. Four of those children had been the subject of successful termination petitions against her in 1988 and 1998. Allegations of neglect in 2002 had been ACD'ed. There was another neglect proceeding in 2004 regarding unsupervised access to a sexual abuser. The dissent claimed that the prior TPR proceedings were too remote in time to be relevant and that the concerns of 2002 and 2004 were no longer problems.

EDUCATIONAL NEGLECT

Matter of Matthew B., 24 AD3d 1183, 808 NYS2d 513 (4th Dept. 2005)

An Erie County Family Court finding of education neglect was reversed on appeal. The child had not turned 6 years old by December 1, 2002 and thus he was not required by state law to attend school in the 2002-2003 school year. As state law did not mandate attendance, the mother had no duty to have her child attend school. Although the mother did not properly appeal the issue of the finding of educational neglect of the older daughter, the court commented that the proof did show that she was neglected in that she missed or was late 61 days between September and mid February. From mid-February until mid March, the child was either absent or only present for one class on 15 days. The respondent mother offered no proof to rebut the child's excessive absences.

Matter of William AA., 24 AD3d 1125, 807 NYS2d 181 (3rd Dept. 2005)

The Third Department agreed with St. Lawrence County Family Court that DSS had proven that the mother had neglected her son. She removed the child from school after disagreeing with school authorities about his needs. She did not enroll him in another school. She claimed that the child did schoolwork alone at home during the day and then she helped him at night when she returned from work. The child suffered from depression and ODD. She had no records of any kind to show what work she had done with him. She failed to follow any of the regulations regarding homeschooling. She had not obtained any further testing for him. She also failed to follow up on the medication for him and discontinued the use of medication without talking to his treating psychiatrist. The home was extremely cluttered to the point of being a fire hazard. She did not seek out socialization for the child and minimized the child's sexual abuse by her boyfriend. The boyfriend was in prison for the sexual abuse and the mother was storing his personal effects while he was in prison. There had been physical altercations between the child and the mother. After the fact-finding, the mother refused to sign releases for the child, would not let caseworkers in her home to check on status and would not get a mental health exam for herself. She would not set up an educational evaluation for the child. Given this, it was appropriate to place the child with relatives.

Matter of Christopher UU., 24 AD3d 1129, 807 NYS2d 186 (3rd Dept. 2005)

A Columbia County mother did not neglect her son according to both the Family Court and the Third Department. The mother agreed at first with an IEP that the child needed to be in a residential placement and allowed him to be placed. She then violated the facilities rules by showing up unannounced. Later, against the facilities recommendations, she removed the child from the facility and bought him home. The school continued to take the position that the child should be in a residential placement and was not suitable for home schooling. The school wanted DSS to take custody and place the child in the facility but DSS found that the mother was capable of arranging for the placement. The child was then re-enrolled in the facility with the agreement that mother would stay away and that DSS would “monitor” the situation. DSS then filed a neglect petition. The court dismissed the petition. Although this mother had disagreed with the educational plans, she actively engaged with the school to secure appropriate placement, which did happen. There was no evidence that the child’s education was adversely affected in any way.

Matter of Shawndalaya II., __AD3d __, 7/6/06 (3rd Dept. 2006)

A Clinton County mother educationally neglected her child when the child missed 13 out of 17 days of school. The mother was mentally ill and has an unfounded disdain for the school system. Her mental illness placed the child at imminent risk. The Third Department found that Family Court did not err in not appointing a guardian ad litem. There was no evidence that the mother was incapable of understanding the proceedings, assisting her attorney or defending herself. Neither she nor her lawyer asked for a guardian ad litem. Although the Family Court should have advised the mother of the allegations in the petition, there is no evidence that she and her lawyer were not aware of the allegations and so the error was harmless.

Matter of Benjamin K., 28 AD3d 810, 812 NYS2d 706 (3rd Dept. 2006)

Tioga County Family Court found that a mother had educationally neglected her children and the Third Department agreed. DSS filed one educational neglect petition and then withdrew it without prejudice when the mother agreed to file a PINS petition regarding the child. A second educational neglect petition was filed when the children continued to miss school. There was no error in including the allegations from the first petition in the second one as the first one had been withdrawn without prejudice. Educational neglect requires proof that there is a “significant, unexcused absentee rate that has a detrimental effect on the child’s education”. Here one child had been absent 30 days and tardy 89 days in the school year. The school had made 40 phone calls to the mother regarding the absences and she had not returned 38 of those calls. The child had failing grades. The other child had been declared a JD and had been banned from the local swimming pool. The mother was hostile to school officials about this child and failed to respond to requests that he have medical and psychological examinations. The children were unsupervised at home and were seen “roaming the streets after village curfew”. The mother frequents bars when she should be supervising her children.

Matter of Amanda K., 28 AD3d 813, 812 NYS2d 708 (3rd Dept. 2006)

A Cortland County custodial grandmother neglected her grand daughter. The child had Epstein-Barr virus and, due to a concussion, also suffered from hemiplegic migraines. The child missed a lot of school between kindergarten and the 4th grade and had been the subject of 2 PINS proceedings. After the child's medical problems were diagnosed, the treating doctors recommended that she be tutored at home. The grandmother failed to follow through on a home schooling plan. She did not file the correct paperwork on a timely basis to obtain approval for home schooling and did not administer the required standardized tests. The child did not receive credit for a full school year. The child was 15 years old when an educational and medical neglect petition was filed. By this point the child had significant unexcused absences that resulted in a negative effect in her educational progress. The grandmother had not taken advantage of special education services that were available and did not really provide any home schooling for a full year. A special needs child loses more than an average child by missing school. The grandmother also medically neglected the child by failing to follow up with needed therapy when the child threatened suicide, said she heard voices and had thoughts of killing the grandmother.

DRUGS

In Re Andrew DeJ. R., AD3d 817 NYS2d 24 (1st Dept. 2006)

The Respondent neglected the children when he was arrested in their presence. The police used a battering ram to access the family home where the respondent possessed a large amount of cocaine and drug equipment.

Matter of Amber DD., 26 AD3d 689, 809 NYS2d 657 (3rd Dept. 2006)

A Tompkins County mother neglected her child due to the mother's abuse of alcohol and drugs. Although she was in a treatment program, this was in response to a criminal drug court requirement and therefore was not voluntary. The exception of FCA §1046 regarding being in a treatment program voluntarily does not apply. The mother also engaged in sexual activity in the living room where the children could observe. The children were uncomfortable with the affection the mother showed to various men. The mother also provided alcohol to a minor and gave one of the children the mother's own prescription medication without advice from a physician.

Matter of Cantina B., 26 AD3d 327, 809 NYS2d 539(2nd Dept. 2006)

The Second Department reversed a Kings County Family Court dismissal of a neglect petition against a father. The father neglected the child in that he knew or should have

known about mother's cocaine abuse during her pregnancy. The father had told the caseworker that did not in fact know of the drug use but the father failed to appear in court and therefore failed to provide any testimony. The court was entitled to take the strongest inference against him for his failure to appear, testify and deny the petition allegations.

EXCESSIVE CORPORAL PUNISHMENT

In Re Alysha M., 24 AD3d 255, 807 NYS2d 21 (1st Dept. 2005)

A New York County neglect finding against a mother was affirmed by the First Department. The child made out of court statements that her father had hit her with a belt and that her mother was home – although not in the same room - when this happened. The child indicated that she did not talk about it to her mother, as her mother would hit her on her ear if she did not respond to the father's requests. There was medical testimony provided that the child had been the target of excessive corporal punishment. The mother admitted to the caseworker that she and the father had to discipline the child repeatedly for flushing the toilet and confronted the caseworker about "where is it written in New York State Law about how you are supposed to discipline your children? We don't maim our children". The proof permitted the court to infer that the mother knew the father had used excessive corporal punishment on the child and had failed to protect her.

Matter of Anthony WW., 26 AD3d 702, 809 NYS2d 665 (3rd Dept. 2006)

The Third Department agreed with Tioga County Family Court that the DSS did not prove that a stepfather had neglected the child. The child had been "severely spanked" causing "livid bruising" on his buttocks but there was no proof that the stepfather had done it. DSS argued that the child was in the stepfather's care and either he did it or he failed to protect the child from whoever did it. The stepfather claimed that the child's bruises came from sitting on a poorly cushioned seat during a long drive in a truck. The lower court believed that the child's mother had caused the bruising and the Appellate Division deferred to the lower court's assessment of credibility. The stepfather could also be neglectful if he failed to protect the child but this would require proof that he had failed to act as a reasonably prudent parent. No evidence was offered as to any reason the stepfather would have to know the mother was a risk to the child. The dismissal as to the stepfather was warranted.

Matter of Justin O., 28AD3d 877, 813 NYS2d 800 (3rd Dept. 2006)

A mother appealed a finding of neglect and derivative neglect from Clinton County Family Court relative to her four children. The allegations were that the father had slapped one of the children across the face. The father denied it and the mother claimed

she knew nothing of the incident. The lower court called the parents “bold faced liars”. The child’s out of court statements of the incident were corroborated by photos as well as an emergency room doctor who testified that the child had an “impressive” softball sized bruise with “deep linear marks” that would have had to have been caused by a “powerful” force. The court found that the family lived in a small trailer and therefore discredited the mother’s claim that she did not know about what happened. She neglected the child by failing to intervene or take measures to ensure the child’s safety. The Third Department reversed the finding of derivative neglect as to the other child in the home, claiming that the mother’s conduct in this incident did not evidence a fundamental flaw in her concept of parenting. The mother had appealed the adjudication, as she wanted to open a day care.

PHYSICAL ABUSE

Matter of Sanah J., 23 AD3d 385, 806 NYS2d 78 (2nd Dept. 2005)

The Second Department reversed the Kings County Family Court’s dismissal of abuse allegations where it had substituted a neglect finding. This 3-month-old baby had 11 rib fractures, a fractured arm, a fractured leg, cerebral edema, retinal hemorrhaging, subdural bilateral hematomas and bruises. The respondents could provide no reasonable explanation for the baby’s many injuries. This is abuse - not neglect.

Matter of Anesia E., 23 AD3d 465, 805 NY&S2d 623 (2nd Dept. 2005)

A Kings County Family Court abuse finding was affirmed on appeal. The mother brought her 1-year-old baby to the emergency room claiming that she was having seizures on a daily basis. The mother had taken the child to the hospital 14 times and the child had been admitted 5 times. The child had undergone many medical tests – including multiple CT scans, a spinal tap and electroencephalograms and had been given various medications. There was no medical evidence that the child had seizures. The medical testimony was that the testing had been “unnecessary” and “potentially harmful” in that the child could have developed infections or gone into respiratory arrest.

Matter of Lloyd M., 20 AD3d 536, 800 NYS2d 432 (2nd Dept. 2005)

ACS brought a FCA§ 1027 request that a 7 month old be removed pending an abuse petition. Kings County Family Court “paroled” the child to his parents. The Appellate Division stayed the return and ultimately reversed Family Court. The parents had given two different versions as to how the 7-month-old had sustained a spiral fracture of his left leg. At the removal hearing, the caseworker had testified that 3 different doctors had advised her that a spiral fracture would not be common in a child who did not yet walk, as it required a “twisting” action. There was also a prior abuse finding against these parents. There would be imminent danger to the child if he remained in the home and the “safer course” (forbidden language under **Nicholson!!**) was to maintain the child in foster care until the Article 10 hearing. An order of protection was not enough to protect this child.

SEX ABUSE

Matter of Sanjeeda M., 24 AD3d 445 , 805 NYS2d 427 (2nd Dept. 2005)

The Second Department agreed with Kings County Family Court that a father had sexually abused and neglected his child. The child's out of court statements were corroborated by the "validating" testimony of a child abuse expert and the ACS caseworker. Also the father had neglected the child by engaging in acts of violence against the mother in the presence of the child.

In the Matter of Abigail S., 21 AD3d 380, 800 NYS2d 39 (2nd Dept. 2005)

The Second Department found that this Suffolk County father had sexually abused his one daughter but reversed derivative abuse findings and substituted derivative neglect findings regarding the siblings. The Second Department ruled that evidence that one child was sexually abused was not sufficient to support a finding that the siblings were abused. (NOTE: There are many decisions to the contrary and the published case does not unfortunately clarify what facts here distinguish this case from the many others in which the siblings were found to be derivatively abused. This is particularly a problem in a potential "no reasonable efforts" case.)

Matter of Addie F., 22 AD3d 986, 802 NYS2d 791 (3rd Dept. 2005)

The Third Department affirmed a Chenango County sex abuse finding. The 6-year-old girl graphically described to a caseworker sexual abuse by the mother's boyfriend that had gone on for years. She repeated the allegations to a grandfather, a police officer and the examining physician. She did recant the allegations later. The agency offered the child's out of court statements corroborated by the testimony of a social worker who observed that the child's behaviors were those commonly manifested by child victims of sex abuse. Specifically this included her consistent and explicit age inappropriate knowledge of sexuality as well as the child's descriptions of progressively intrusive behavior. The boyfriend had admitted that the child had been sexually abused but claimed that a neighbor must have climbed into the child's window at night.

Matter of Sylvia J., 23 AD3d 580, 804 NYS2d 783 (2nd Dept. 2005)

A Queens County Family Court sexual abuse finding was reviewed by the Second Department. The court appropriately denied the father's request for the appointment of an expert to examine the child regarding the allegations of sexual abuse. The child's unsworn testimony in court was cross-examined and it corroborated her out of court statements to her mother and ACS. The court did not deny the father's constitutional rights by allowing the child to testify outside of his presence. The father's attorney was present and he did cross-examine the child.

Matter of Sasha R., 24 AD3d 902, 805 NYS2d 476 (3rd Dept. 2005)

The Third Department ruled that Broome County DSS had not proven the sexual abuse of a 13 year old girl. The child was caught engaged in sex play with her male cousin. She then claimed that her uncle had sexually abused her some 4-5 years earlier. She told this to the police, the emergency room nurse and the caseworker. The child signed a sworn statement that the abuse had happened. The Third Department ruled that the child's sworn statement was not enough to corroborate her out of court statements. No validation testimony or medical testimony was offered to support her allegations.

Matter of Q-LH., 27 AD3d 738, 815 NYS2d 601 (2nd Dept. 2006)

Kings County Family Court did not err in allowing a daughter to testify in a sex abuse case while the father kept out of the courtroom. The record established that the child would suffer emotional trauma if compelled to testify before the father. The defense attorney was present when the child testified and did cross-examine the child.

Matter of Kila DD., 28 AD3d 805, 812 NYS2d 700 (3rd Dept. 2006)

The Third Department allowed the amendment of a neglect petition to conform to the proof that abuse had also occurred. The father was alleged to have subjected his wife, the children's mother – who was also his niece - to violence while the three children were present. Schoharie County DSS was permitted to amend the petition upon proof presented that he had also sexually abused the mother, who was his first wife's sister, when she herself was a minor and in his care. He married her after she became pregnant with his child. He had physically abused one of the children as well as assaulted another niece who had been in his care. The other children were derivatively abused based on his sexual abuse of the mother when she had been a child. While, these other actions had been remote in time, they demonstrated a pattern of violent and abusive conduct against the mother and the children and showed his fundamentally flawed understanding of the duties of parenthood. The father had been given time to address the new allegations and did not request more time to respond. The Family Court Judge was not required to recuse himself based on a prior unrelated criminal matter that he had presided over where the respondent had pled guilty.

Matter of Tashia QQ., 27 AD3d 849, 812 NYS2d 182 (3rd Dept. 2006)

A Clinton County mother was found to have sexually abused her mentally limited 12 year old daughter while the child was in foster care and home on a visit. The Third Department agreed that the facts proved that the mother made her 12 year old undress in front of an adult male, touch his genitals and then allowed the man to have intercourse with this retarded preteen child. The mother then also had sex with the man while the child was present and then the three of them watched pornography. This occurred while

the child was home on an unsupervised visit. The child had been placed in foster care after having been sexually abused by her father. The child gave unsworn testimony and the mother did not testify at all. The child's out of court statements were corroborated by her in court unsworn by cross-examined testimony. Although court testimony was not as detailed and was inconsistent in minor ways with her out of court statements, the court found her to be truthful. She consistently told the significant aspects of the event. The child also reenacted the sexual activity for her therapist using dolls.

Three other children who had remained in the home after the first petition were then placed in care and the court found abuse, neglect and derivative abuse and neglect as to all four. Thereafter the mother refused to complete the sex offender treatment ordered in the disposition. She refused to admit she had abused the child. The Clinton Family Court found her in contempt and sentenced her to 6 months in jail.

Matter of Richard SS., 29 AD3d 1118, 815 NYS2d 282 (3rd Dept. 2006)

A Schenectady County abuse and neglect petition was filed against a 16 year old boy's foster parents. The Family Court dismissed the allegations after petitioner's proof, ruling that the child's out of court statements were not sufficiently corroborated. The Third Department affirmed the dismissal as to the foster father but reinstated the allegations against the foster mother and remanded the matter for the law guardian to present proof. The allegations were that the foster mother had a sexual relationship with the boy and that the foster father knew and did nothing to protect the child. The child was in the home for three months and the foster mother engaged him in a sexual relationship and pursued the sexual relationship even after he had been removed from the home. Although the mere repetition of out of court statements is not sufficient corroboration, consistency of repeated statements can be some corroboration. Here the child had given several lengthy, very detailed and consistent statements to several people including local and state law enforcement officers. He described the sexual encounters in detail and was able to provide vivid physical details about the foster mother's body. Phone records and school records supported the child's statements that the foster mother continued to pursue him after he had been removed from her care and repeatedly arranged to meet him for sexual encounters in her car and at the group home. Although it is possible that the child then recanted his claims of sexual abuse, recantation is a common recognized reaction of sexually abused children. The Appellate Division also commented that the Family Court erred in signing a subpoena, at the respondent's request, for the child's mental health records. The child's mental health was not in issue, the court did not make any findings that the material in the records was in fact necessary for the defense and the court did not define the parameters of access.

ARTICLE TEN DISPOSITIONAL ISSUES

Matter of AS 9 Misc3d 1036, 800 NYS2d 838 (Westchester County Family Court 2005)

The father in this Westchester County matter had been criminally convicted of second-degree murder in the beating death of a sibling to the child in this matter. He was serving a sentence of 25 to life. The court made a finding that this sibling was therefore derivatively abused and the agency sought a FCA § 1039-b “no reasonable efforts motion”. The father argued that no such order should issue while his murder conviction was on appeal. The court granted the motion. The intent of 1039-b is to expedite permanency for children in just this situation. Requiring the agency to undergo reasonable efforts to reunite for years while the parent appeals a 25 to life sentence for a sibling’s murder would undermine permanency for this child

Matter of Giselle H., 22 AD3d 578, 804 NYS2d 323 (2nd Dept. 2005)

The Suffolk County Family Court disposition in this neglect matter was reversed on appeal to the Second Department. The mother became intoxicated at a restaurant while eating with her child. She exhibited bizarre and irrational behavior and made delusional and hostile statements. She tried to get into her car with the child and 2 patrons attempted to stop her. She assaulted them and the police were called. She was arrested and continued to behave in a bizarre fashion at the police station. She yelled at the police, using foul and racist comments. She tried to squeeze through the food tray opening in the cell. The child was placed with relatives while the Article Ten matter was pending. The court made a neglect finding based on the allegation that she had attempted to drive while intoxicated with her child in the car. The court dismissed allegations that she had a mental illness. The court then issued a dispositional order that returned the child to the mother’s care based on an order that she obtain a substance abuse evaluation and follow through on all recommendations. The Law Guardian obtained a stay and appealed the case. The Appellate Division agreed with the Law Guardian that the child should not be returned to the mother’s care without a full substance abuse and mental health evaluations. The evidence demonstrated that the mother behaved in a very odd manner. The jail house psychiatrist indicated that it might be paranoia. The caseworker also testified that the mother also acted in a disturbing and odd manner on at least two visits and on one visit appeared to be intoxicated. **Before** the court issues a dispositional order, the court should order a complete and current evaluation of the mother that would include a substance abuse and psychiatric evaluation.

Matter of Brian H., 25 AD3d 739, 807 NYS2d 569 (2nd Dept. 2006)

The Second Department concurred with Kings County Family Court that the mother’s boyfriend did not have standing to request visitation of the mother’s child who was in foster care.

PLACEMENT ISSUES

In Re Jacqueline Sharon L., 26 AD3d 250, 810 NYS2d 143(1st Dept. 2006)

After a neglect finding against a mother, the Manhattan Family Court placed the children with a grandmother out of state. Thereafter, an out of state aunt filed a custody petition. The lower court held a combined hearing on the aunt's custody petition, along with a permanency hearing on ACS' request for an extension of placement. ACS supported the placement with either relative but the mother opposed any placement. ACS witnesses testified that the mother had not overcome her original problems and that the children were now residing with the aunt. The aunt's appearance at the hearing was excused. The mother complained that her family did not always follow up on their commitments to care for the children and wanted the court to consider a placement source in the NYC area. The court granted custody of the children to the aunt under Article 6 and discharged the children to the permanency plan of placement with a fit and willing relative. The mother appealed. The First Department reversed and ordered the matter to be returned to Family Court for a hearing on extraordinary circumstances. The aunt had not appeared at the hearing and the lower court had not made a finding regarding the issue of extraordinary circumstances in granting custody to a non-parent.

Matter of Debra VV. 26AD3d 714, 811 NYS2d 457 (3rd Dept. 2006)

Albany County DSS filed a neglect petition against a mother after her children were left alone in the home. DSS requested an emergency removal of the children. The children's aunt appeared and indicated that she was the "stand by" guardian of the children as the mother was hospitalized with a terminal illness. The aunt asked about becoming a foster parent and was told that Albany County would not make foster parent status available to her. The court then granted the aunt's request for Article 6 custody of the children and DSS withdrew its Article 10 petition. Thereafter, the aunt again sought foster care status and foster care monies to care for the children and eventually brought a fair hearing against DSS. OCFS denied the aunt foster care status, ruling that as there was no pending Art. 10 matter, there was no statutory or regulatory basis for her to be given foster parent status. On appeal to the Third Department, the ruling was reversed. The Appellate Court relied on SSL §384-a(2)(h)(ii) and found that the statute requires that DSS assist a relative who is willing and able to assume care of children whose parent is terminally ill where the relative needs foster care services to care for the children. The statute clearly requires DSS to assist such a relative in becoming a certified foster parent. The Appellate Division remitted the matter to determine eligibility for foster care payment.

Matter of Felicity II 27 AD3d 790, 811 NYS2d 465 (3rd Dept. 2006)

In a surprising decision, the Third Department ruled that Family Court could not entertain an Article 6 custody petition when an Article Ten placement disposition had already been issued and not yet “expired”. Here the court reversed Tompkins County Family Court’s placement of a child with a relative after the relative had filed an Article 6 petition for custody. The court ruled that since under Article 10, the agency has a responsibility to offer services to correct the parent’s issues, granting Article 6 custody to a nonparent before such an order is “expired” disrupts the parent’s efforts to effectuate reunification. If an Article 6 custody order was issued, then the parent would then have to show a significant change in circumstances in order to obtain the child back. This would be as opposed to complying with a reunification plan that the agency would be required to offer if the child were the subject of an Article 10 order. The court did distinguish cases in which a court granted Article 6 custody before any dispositional placement order under Article 10 and indicated that this was a proper option. The court made no comment about the situation in which a parental wants and consents to an Article 6 order as opposed to an Article 10 placement. The court also did not clarify what it meant regarding not allowing the court to order Article 6 custody until the “expiration” of an Article 10 placement order since under current law such placements do not “expire” and since current law specifically authorizes custody with a fit and willing relative as a permanency option.

Matter of Donna KK., __AD3d __, 7/13/06 (3rd Dept. 2006)

Schuyler County DSS filed a neglect petition against a mother and placed her five week old baby in foster care after mother attempted suicide and was hospitalized. Shortly thereafter, the child’s grandmother filed an Article 6 custody petition. The Family Court first directed that the child be returned to the mother. DSS sought and received a stay to keep the child in care while it appealed the order to return the child. Then the Family Court ruled, over objection, that it would hear the Article 6 petition before hearing the Article 10 petition. DSS and the law guardian opposed the custody petition of the grandmother as they believed her unfit. They were then in the posture of having to argue against extraordinary circumstances at the same time that they had alleged neglect. The court ordered that the child be placed in Article 6 custody with the grandmother. DSS then sought an obtained a stay on that order, the Third Department having not yet heard the appeal on Family Court’s order to return the child to the mother! Family Court then heard the Article 10 petition and found the child to be neglected but would not place the child deferring to the prior Article 6 order (which had been stayed) to the grandmother.

The Third Department found that it was an abuse of discretion to hear and decide the custody application before resolving the neglect petition. This action only served to force DSS to defend its position regarding foster care in an Article 6 action and interfered with the duty of DSS to try to work to returning the child to the mother. The court distinguished **Felicity II** saying that in this matter DSS was not trying to “terminate parental rights”. (Note: since **Felicity** was not a termination case, was the Third

Department referring to its position that by giving a relative Article 6 custody, DSS effectively stopped assisting the parent with reunification?) The Third Department found that in hearing the custody case first, the Family Court was disrupting the responsibility of DSS to reunite the child and parent. The better procedure, the Third Department ruled, was for the court to hear the Article 10 petition and consider the Article 6 petition as part of the disposition. The neglect finding, the Appellate Division says would then serve as the threshold extraordinary circumstances (Note: some case law states that a neglect finding is not extraordinary circumstances per se) needed by the grandmother and would have permitted DSS to more fully explore the child's placement options given the ability to use hearsay evidence in the disposition.

The court did continue the placement of the child with Schuyler County DSS and remanded the matter for a new dispositional hearing.

Matter of Alexander B. 28AD3d 547, 814 NYS2d 651 (2nd Dept. 2006)

The Second Department reversed the placement disposition in a Kings County Family Court case involving educational neglect. The children had special needs. The 17 year old was mentally retarded and the 12 year old had muscular dystrophy and was in a wheel chair. The children had each missed more than a hundred days of school while under court ordered supervision. The court placed the children in foster care upon a violation of the order of supervision. The Second Department found the situation "unique" in that the children were so bonded to the mother, who was loving and caring, that they would be emotionally damaged by being removed from her care. The 12 year old threatened to refuse to eat, bathe or change his clothes if he was placed in foster care and the 17 year old had done just that when he had been placed in foster care in the past. The evidence showed that the children would suffer emotionally upon being placed in foster care due to their strong bond with the mother. The court found that the harm posed by the removal outweighed the detriment of the educational neglect and ruled (citing Nicholson) that the Family Court needed to attempt to resolve the issue of the children's educational needs without removing them from the home.

ORDER OF PROTECTION ISSUES

Matter of Sheena D. 27AD3d 1128, 811 NYS2d 835 (4th Dept. 2006)

The Fourth Department upheld a Niagara County Family Court Article Ten disposition that ordered a respondent to stay away from his sons until they were 18 years old. The respondent had been found to have sexually abused his wife's 16 year old sister while the teenager resided with them. The court also found he had derivatively neglected his sons due to fundamental impairments in his parental judgement. The father also kept a loaded shotgun in an area that was accessible to his sons. The Appellate Division did indicate

that the lower court should have stated the grounds for its disposition in its order and also should have specifically ruled on the nature of the sexual offense against the sister in law but neither of these issues prejudiced the respondent in any way and the errors were harmless. The father's argument that the court had no authority to order him to have no contact with his sons until they were 18 was without merit. Although FCA § 1056(4) does not apply to a father, the court does have authority to issue such an order against a father under FCA §1056(1). This section allows the court to issue an order of protection that continues until the expiration of any other order. Here the order of fact-finding and disposition does not have an expiration date and therefore the court can issue an order of protection for the time specified. Such an order does not terminate his parental rights. He can move for modification of the no contact order in the future.

Matter of Collin H 28 AD3d 806, 812 NYS2d 702 (3rd Dept. 2006)

The Third Department reviewed a dispositional order from Cortland County Family Court and reversed it, overruling a string of precedent. Here the Appellate Court found that the lower court had correctly adjudicated neglect against the stepfather and mother of 3 children. The stepfather used a belt to discipline the children who were 4,5, and 8. There were linear bruises on the children's backs and legs and one child missed school due to the bruises. The children made out of court statements that were corroborated by photographs and witness' observations and well as the children's cross statements. The stepfather failed to testify. He did not claim that the mother had hit the children although other members of his family made that claim. DSS is not required to prove that the children were injured; only that the children were in "imminent danger" of harm or impairment. The stepfather stipulated to a "no contact" order but reserved his right to appeal it. The mother relocated out of state with the children and a default judgement was entered against her. On appeal the Third Department ruled, for the first time, that Family Court had no authority to issue an extended order of protection against a stepparent as it exceeds the duration of a dispositional order. This ruling overturns a long established interpretation of the statute. The Third Department found that the clear language of FCA 1046 (4) only allows such orders to be issued against a person who is a non-relative to the children. The court examined the body of caselaw to the contrary and stated that FCA 1046 does not permit an "ongoing" order of protection against a relative – here a stepfather – to the children in any section of the statute. The court modified the order of protection to only one year. The Third Department made no reference to the Fourth Department's ruling of **Sheena D.** above.

Matter of Maria G., 29 AD3d 994, 815 NYS2d 474 (2nd Dept. 2006)

A Queens County law guardian brought a motion to extend the one year order of protection that ordered a sexually abusive father to stay away from his daughter. Queens County Family Court dismissed the motion and the Second Department affirmed. Such a motion should be dismissed as the law guardian did not make any evidentiary allegations

that would warrant a hearing on a possible extension of the order of protection. (NOTE: Here is exactly the reason why there needs to be clarification of the ability to issue ongoing orders of protection. To protect this young child from a sexually abusive father, the agency or law guardian has to make a motion every year!)

Matter of Chanel Monique L., __AD2d__, 816 NYS2d 556 (2nd Dept. 2006)

The Second Department affirmed a Suffolk County Family Court order that issued an order of protection against a parent until the child was 18 years old. (NOTE: no mention was made of the two decisions above from the 3rd and 4th Depts!)

ICPC

Matter of Melinda D. __AD3d__, 815 NYS2d 644 (2nd Dept. 2006)

Shortly after a Kings County foster child's goal was changed to adoption, but before the child was freed, the foster mother, who wanted to adopt the child indicated that she wanted to relocate to Florida. The birth mother gave her consent to the child moving to Florida with the foster mother. ACS did file an ICPC application but only after the child had moved to Florida with the foster mother. ACS then sought an end to the birth mother's visitation and the birth mother requested that the child be returned to a foster home in NYS. Family Court dismissed the mother's habeas corpus petition for the child's return. Meanwhile the Florida ICPC refused to approve the placement. The mother appealed the dismissal of her petition to return the child to NYS. On the day of the appellate argument, the birth mother surrendered the child with an agreement for some visitation and communication. The Second Department ruled that the surrender on the day of the oral argument did not moot the issue. The court is concerned about premature placements when there is a failure to comply with the ICPC. Here a child remained in Florida for over 2 years with a resource who was not acceptable to the Florida authorities. Had the mother not surrendered the child, the Appellate Division would have reversed the lower court and ordered the child to be returned to NYS. The child was a legal resident of NYS who was supposedly just "visiting" the foster mother in Florida. This behavior is not a mere technical violation of the ICPC but a clear disregard for the requirements of SSL § 374-a. The best of intentions of the child welfare system and Family Court are no defense to failing to follow the requirements of an interstate foster care placement.

Matter of Ryan R., 29 AD3d 806, 815 NYS2d 221 (2nd Dept. 2006)

The Second Department reversed a Kings County Family Court Article Ten order that placed the children with a paternal aunt and uncle in New Jersey. ACS and the law guardian appealed the court's placement order. Family Court cannot place children out of state without having the ICPC process be fully completed.

2006 – New Child Welfare Legislation – By Margaret A. Burt, Esq.

Chapter 437 of the Laws of 2006 - PERMANENCY TECH AMENDMENT BILL S8435/A11792-A – Effective July 26, 2006

The most needed legislation this session was accomplished with a collaborative effort. It is meant to resolve some of the questions on last year's Permanency Law – Chapter 3 of the Laws of 2005. Some of the highlights include:

- **VERY IMPORTANT :** The issue regarding the “discharge” to parents that is permitted upon the court's order between permanency hearings has been resolved! There is clarification of the issue of “final discharge vs. trial discharge” - AND a statutory definition of “trial discharge”! When the child's goal is return to parent - the new law allows the court to grant an order to do a “final discharge” of a child to the parent between 2 permanency hearing dates upon ten days notice to the court and the law guardian. If the matter is not restored in the 10 day notice period, then the child can be sent home to the parent on a “final discharge” and the next permanency hearing dismissed and the order ended. The new bill further states that a local district also has authority to send a child home on a “trial discharge” UNLESS the court has ordered that it does not have that authority or conditions the trial discharge upon some event. Trial discharge is defined as DSS sending the child home to the parent physically but keeping care and custody of the child and keeping the next scheduled permanency hearing. When the child is older and is expected to age out of foster care with a goal of APPLA, the agency will also have the ability to “trial discharge” the child unless the court has prohibited it or conditioned it. This would mean that the child is physically discharged from care but remains in the care and custody of the child agency and the permanency hearing date remains in place. These sections provide great new clarification and options for local districts. Although the use of “trial discharges” is still a policy consideration for local districts, a clear legal definition of the practice will be very helpful. It would be a great idea to discuss these new options with your court to help fashion local policy!
- **Another very important new provision is** that the court, on motion by any party or on it's own, can issue an order to dispense with the notice to former foster parents who had the child in their home for 12 months! Many local workers asked for this provision and it would make sense to ask for such an order to be an “ongoing” one in many cases.

ALSO:

- The timing of permanency reports after suspended judgements on permanent neglect terminations will be changed. Unless the child is being freed for adoption after a violation of a suspended judgement, in which case the first freed child review will be immediately or within 30 days, if the child remains in care, then the already previously set permanency hearing date will remain.
- Siblings who come into care at different times but all under Article 10 or voluntary placements will have their permanency hearings dates coordinated by having the new child's date be scheduled with the current date for the sibling(s) placed earlier.

- There are several sections that now include a listing of what the court is to place in a permanency order – sections that were just inadvertently left out in the original Permanency Bill.
- Both violations of suspended judgements on Art. 10's and violations of supervision orders on Article 10's will toll the order until the court resolves the violation.
- There is clarification that a Voluntary Placement under SSL 358-a and a placement after a violation of a supervision Art. 10 order will require the court to set the 8 month date for the first permanency hearing. It is important to remember that voluntaries are now only 8 months long and then if the court orders the child to remain in care at the first permanency hearing, the placement becomes one under FCA Art. 10-A.
- The language clarifies that the permanency hearings are to be completed within 30 days of the scheduled date certain and deletes the language that the hearing is to be completed within 30 days of the "commencement" of the hearing.
- Once a parent has lost or surrendered parental rights, they no longer receive any report of any permanency hearing or freed child review.
- There are some changes to the language regarding appointment of counsel for indigent parents on appeal.
- Service plan dates on JDs and PINS placed with local districts are in moved in line with Art. 10 dates –BUT there is NO CHANGE in the permanency hearing and extension process for JDs and PINS placements.
- The automatic stay provision of FCA 1112 where the court orders local districts to return a child is extended to include the court doing so in a permanency hearing on an Art. 10 placed child.
- There is more clarity regarding the wording in the order that the court signs after an adoption of a child that was conditionally surrendered.

THE CPS "ACCESS BILL" S8344/A11852-A

Both houses passed a bill that drastically modifies FCA 1034(2) to allow 24 hour ability to obtain a court order to interview and observe children during an investigation! The bill can be a bit tricky to weed through so please read it carefully.

Essentially the bill greatly enlarges FCA 1034(2) by setting up 2 different legal tests for obtaining an "access" order during a CPS investigation. The bill clarifies that these orders can be obtained during an investigation into a CPS report, even though no indication or court petition may be contemplated yet. Further it clarifies that these orders can be obtained 24 hours a day via appearance in court or by phone or in person after court hours (OCA would have to set up rotating assigned Family Court Judges for after 5 and weekend requests) It would seem that obtaining such an order would be an infrequent occurrence, as most parents do let the worker see and interview the child, and others would perhaps allow access once being told of the worker's ability and intention to seek such an order. Also, it seems unlikely that there would be many occasions to use

this after court orders as many such situations could wait until the morning. But the thought is that this would be some legal clarity that in certain instances a child must be produced for an interview during an investigation.

To obtain an order to “produce the child” for an interview outside the presence of the parent or to “observe the condition” of the child – the test would be “reasonable cause to suspect that a child or children’s life or health may be in danger”. The caseworker would have to inform the parent that they are able to seek such an order and if they do choose to seek the order, the worker MAY contact law enforcement who SHALL respond, if they are contacted and who will then wait at the scene (the police could go into the house if they have their own warrant or other constitutionally permissible reason) until the order issue has been resolved. The bill details the factors the court can consider in granting such an order, including the nature of the allegations and known history with the family.

To obtain an order to “enter the home in order to determine” if the children are there or to “conduct a home visit and evaluate the home environment” the test would be “probable cause to believe that an abused or neglected child may be found on the premises”. The higher level of proof here reflects the legislatures concern for 4th amendment issues. The current reference to the “criminal standard of proof” is deleted and the other issues as above such as 24 hour access to the court for this type of order, prior notice to the parent, law enforcement response etc are the same.

ALSO:

- S 8096/A10447 – would require Supreme Court to appoint counsel for indigents in any action in which they would have been given counsel in Family Court – this could affect those of you with IDV courts. It will be effective upon the Governor signing it.
- A 08656-A – would provide a process by which adopted children whose adopted parents die when the child is still between 18-21 can have the adoption subsidy still paid to a guardian, rep payee, or in some cases to the child himself. This bill would be effective immediately and will apply to any children who are still under 21 and would have been eligible if the bill had been law when the adopting parent died.
- Chapter 185 of the Laws of 2006 - – the “one family/one judge” law – requires that the surrender, TPR or adoption of a child who has been in foster care be filed in the same court and if practicable before the same Judge that has been handling the foster care process, if the matter has not been filed before the same court, the Judges are to communicate the situation and defer to the decision of the Judge who had been handling the matter – this could affect those of you who use Surrogate’s court to do adoptions or to those of you who have multi Judge benches where cases are not continuously calendared before the same Judge. This law is effective October 24, 2006 and is applicable to any surrender, TPR or adoption filed after that date.
- S 07644 – the Child Advocacy Center bill – this bill authorized OCFS to encourage setting up CACs to interview and examine children and to help coordinate investigations for both criminal and civil procedures. The bill details basic qualifications for CACs and permits CAC to be used for investigative functions as well as medical and mental health treatment. Records can be disclosed for purposes

of investigation, prosecutions and or adjudication in any court. This bill would be in effect 180 days after signing.

- S 6681 – “foster and adoptive parent nationwide criminal records check” - this bill authorizes OCFS to make national criminal records checks on foster and adoptive parents. This bill is in effect 120 days after signed.
- S7042A/A 11854 – the “dual response” bill – this bill provides for SCR to advise the local district in any report IF the report involved allegations of physical abuse, sexual abuse, death or in any event where neglect is alleged and there are allegations physical harm from a mandated reporter and there were 2 other reports regarding that household in the prior 6 months that were indicated or pending. If a report is made in one of the abuse situations, the local district will have to notify law enforcement and there will have to be a response of a multidisciplinary team or some other coordinated response. If the report is made in the neglect situation with the two priors, the local district will have to decide if it is necessary to contact local law enforcement. Where local law enforcement is contacted, they will have to be involved in the investigation by a multidisciplinary team or by working jointly. There is a “carve out” option that this “dual response” does not have to be made where the district has a multidisciplinary team with it’s own protocols that has been approved by OCFS. This bill would be effective 120 days after it is signed.
- A11582 – the “TPR homicide” bill – enlargens the “severe abuse TPR” definition to include a parent who has been convicted for murder 1st or 2nd degree or manslaughter 1st or 2nd degree or attempted homicide of the other parent or of another child they were legally responsible for (there is already one for conviction of murder of the parent’s own child) This would mean that if there was a murder conviction and the child(ren) were in foster care or Art. 10 custody, that DSS could first seek a “no reasonable efforts” order under FCA 1039(b) and then, without the need for any time frame, file a summary judgement motion for TPR. This would be effective 90 days after signing.
- Chapter 320 of the Laws of 2006 - amends the Penal law definitions of incest and therefore amends the definition of sex abuse. The definitions of incest now include 3 different degrees. Effective November 1, 2006
- Chapter 215 of the Laws of 2006 – amends Penal Law and makes maximum periods of orders of protection under penal law longer – 8 years for felonies, 5 years for misdemeanors
- Chapter 110 of the Laws of 2006 - “Cynthia’s Law” – amends the Penal Law to create a new crime called Reckless Assault of a Child – a Class D felony for a person more than 18 to recklessly cause serious physical injury to a child under the age of 5 by shaking, slamming or throwing the child so as to impact the child’s head upon a hard surface. This law is effective November 1, 2006.
- S7660-A – a bill that would require that mandated reporters have a two hour training prior to receiving a license and be updated with a two and a half hour training every 2 years. Effective 120 days after signing.
- A11571 – a bill that would require OCFS to work with State Education and look into setting policy around educational neglect and setting model protocols for investigation. This bill would be in effect as soon as it is signed.

- S1626-A/A5058-A – a bill that would require the DA to notify CPS of criminal convictions relative to assault, homicide, sex offenses, abandonment, non-support and EWOC where the victim was a child. This bill would be in effect 30 days after signing.
- S7816 - this bill would require CPS supervisors to have specific qualifications – a college degree or 3 years relevant human services experience. CPS supervisors would also have to take a CPS supervisory course within 3 months of being hired and annual in service training. All CPS workers would have to have 6 hours of in service training every year starting in their second year. This bill is effective within 90 days of signing.
- S7643-A/A11636-A – the “CHAMP” bill – OCFS to create a network of medical providers to educate and mentor on child abuse and neglect issues. This bill would be in effect immediately.
- Chapter 372 of the Laws of 2006 – “no dual representation” – this law prohibits an attorney or a law firm from representing either a foster care or adoption agency and an adoptive parent or birth parent. It is effective June 1, 2007.
- Chapter 253 of the Laws of 2006 -- the “pet order of protection” – this new law allows courts to add language to orders of protection in all cases – JD, PINs, Art. 10s, paternity, custody, family offenses cases – that a person cannot intentionally kill or injure a “pet” or “companion animal” (“farm animals” are excluded.....) This bill is effective July 26, 2006

Some new relevant Fed law:

- Adam Walsh Child Welfare Protection and Safety Act of 2006 – expands “Megan’s Law” to expand sex offender registration to include JDs over 14 if they are responsible for actions similar to aggravated sexual abuse, also requires foster and adoptive parents to be screened with national criminal databases and state child abuse and neglect databases, creates a national registry that states have option to join of substantiated child abuse and neglect reports - Effective 10/1/08 (NYS law will need to be modified)
- Safe and Timely Interstate Placement of Foster Child Act of 2006 (Public Law 109-239) States must prepare and return homestudies in interstate cases within 60 days of receiving a request. States will receive \$1,500 incentive payment for every interstate homestudy completed and returned within 30 days. States should use the Parent Locator Service to assist in locating absent parents. States cannot prevent agencies from contracting with private agencies to conduct interstate homestudies. Foster parents and relative caregivers have a “right” to be heard in foster care proceedings – Effective 10/1/06 (NYS law will need to be changed)

Continuing Legal Education Credits Instructions

The CLE attendance roster and evaluation form is attached.

For your convenience, you may mail the CLE roster and evaluation in the same envelope you use for regular rosters and evaluations.

Thank you,

Marti Murphy
SUNY TSG
(518) 474-2424
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The UB Law School has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the state of New York for a period of March 11, 2005 – March 10, 2008. The University of Buffalo Law School has a financial hardship policy. For further information on the policy, contact:
Lisa Mueller CLE Coordinator at (716) 645-3176.

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• How would you rate this session?	1	2	3	4	5
• How would you rate the instructor Margaret A. Burt, Esq.	1	2	3	4	5
• How would you rate the quality of this presentation?	1	2	3	4	5
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What did you like about this course?

Do you have any suggestions that would improve this course?

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Name (Optional): _____ **Phone:** _____
Thank you!