

# **Legal Updates for CPS and Child Welfare December 2009**

*Monday, December 14, 2009*

**Handout Materials**



**New York State  
Office of  
Children & Family  
Services**

New York State  
Office of Children and Family Services  
and  
PDP Distance Learning Project

**LEGAL UPDATES FOR CPS AND CHILD WELFARE  
DECEMBER 2009**

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12/14/09 TELECONFERENCE

**SELECTED CHILD WELFARE CASELAW**

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**REMOVALS AND GENERAL ISSUES IN ABUSE and NEGLECT**

**Matter of Jesse J. 64 AD3d 598, 882 NYS2d 487 (2<sup>nd</sup> Dept. 2009)**

The Second Department reversed a Richmond County Family Court's FCA §1027 order which placed 6 children in foster care. Citing **Nicholson**, the Appellate Court found that there was insufficient evidence that the children would be at imminent risk while the matter was pending. The lower court failed to consider if the risk to the children could be mitigated by reasonable efforts. There must be a balancing of the trauma of foster care placement against the risk of neglect in the home. The appeal was pending for a year during which time the children remained in foster care. At that point one child was paroled his non respondent father, 4 other children were paroled to their respondent father and the eldest child was paroled to the respondent mother while the fact finding was pending. The court found that the removal of the 6 children from the mother was unwarranted and remanded the matter for a review of the custodial arrangement that would be in the best interests of the children.

**Matter of Tumari W., 65 AD3d 1357, 885 NYS2d 753 (2<sup>nd</sup> Dept. 2009)**

The Second Department reversed Richmond County Family Court's parole of a child to a non-respondent father. The mother was the respondent in a neglect petition and the child was first removed and placed as a foster child with an adult sibling. The non respondent father then appeared and ACS was directed to

investigate him as a placement resource. ACS had no objection to the father taking custody of the child but the mother objected as the father indicated that he intended to take the child to his home in St. Thomas in the US Virgin Islands. The lower court “paroled” the child to the father and ruled that it had no authority to enter an order that he not leave the state as he was not a party. The Second Department reversed. The ICPC should have been used. The child was in the custody of ACS as a foster child and New York State case law mandates that even when it is a parent who is seeking the child, an ICPC investigation must be done when the sending agency – ACS or the court – is placing the child with a parent across state lines. The court should have the information of the ICPC investigation in order to determine that the placement was safe and proper. Also the lower court erred in issuing this order when the child’s attorney was not present due to a medical condition. The lower court should not have paroled the child to the father without input from the child’s attorney. Further it is not fair to the respondent parent, for the court to allow the nonrespondent parent to remove the child from the jurisdiction before there has even been a determination of neglect. The respondent parent would have substantial difficulty in obtaining custody back if the father takes the child out of the country. The Appellate Court distinguished situations in which a nonrespondent parent files an Art. 6 petition and also acknowledged that in some such situations, ICPC process might not be needed.

**Matter of Donovan C., \_\_\_AD3d\_\_\_, 884 NYS2d 863 (2<sup>nd</sup> Dept. 2009)**

A nonrespondent mother moved in Kings County Family Court, with the support of ACS, for custody of her children who were the subjects of a neglect petition against the father. The lower court denied her motion and awarded temporary custody to the father and only provided the non respondent mother with ACS supervised visits. On appeal the Second Department concurred. The mother’s position was heard fully by the lower court. She moved to intervene and was represented by counsel who vigorously cross-examined witnesses, called

witnesses, introduced documents and provided a summation. The lower court was only considering temporary custody while the matter was pending and so the court was not required to hold a full custody hearing. Here the lower court was well aware of the history of the family having presided over several prior matters concerning the family since 2005.

**Matter of Stephiana UU., \_\_\_AD3d\_\_\_, \_\_ NYS2d\_\_\_ dec'd 10/22/09 ( 3<sup>rd</sup> Dept. 2009)**

The Third Department reviewed a finding of neglect and an order that the Columbia County DSS need not offer the parents reasonable efforts toward reunification. The Art. 10 petition was brought in February of 2008 regarding 4 children. The same children and one other child of the parents had been the subjects of a neglect proceeding in 2004 in Dutchess County. In that prior proceeding there had been allegations of sexual abuse that had been dismissed but the children had spent several years in foster care and the parents had been ordered to attend sexual non-offender training and the father had been ordered to obtain anger management counseling. After several years in foster care under the prior Dutchess order, four of the children were returned to the parents. In 2008, the family was living in Columbia County and Columbia County DSS filed a new neglect proceeding alleging sexual abuse, excessive corporal punishment as well as other neglectful actions. Some of the allegation in the 2008 petition reflected events that had occurred prior to the 2004 petition and the parent's raised collateral estoppel issues.

The Third Department first found that neglect was proven without even considering the old allegations. There was proof that the children were subjected to recent physical violence and emotional abuse. The father told the children that they were a burden, the mother failed to give one child with special needs appropriate medicine. The oldest child had depressive disorder and PTSD.

Further collateral estoppel is not appropriate at although the two DSS' are in privity given their same responsibilities, but there was no proof that the allegations that were stricken by the Dutchess Court were the same allegations in the petition before the Columbia court. The only clear allegation stricken from the Dutchess petition was that the oldest child sexually abused her brothers and that the parents did not protect the children. Therefore that was the only allegation that the current DSS was precluded from relitigating. Even though much of the sexual abuse alleged in the current petition predates the first petition, the failure to seek treatment for the children persisted. The excessive corporal punishment acts also predated the Dutchess petition but had not been alleged in the Dutchess petition and these old actions were relevant to the allegations of current neglect in Columbia County.

Although the respondent parents did not preserve the issue of the "no reasonable efforts" FCA §1039-b order the court did comply with the procedures required to issue this order. The respondents indicated that they would not comply with the services that the DSS was offering and the court advised them that if they continued to take the position that they would not comply, that the court would consider a request by DSS to not be obligated to provide services for reunification. The court gave them more time and when the parents continued in their position that they would not engage in services and DSS had filed a written motion – the court properly ordered DSS to be relieved from efforts to reunify.

## **NEGLECT**

### **Matter of Andre G., 64 AD3d 913, 882 NYS2d 749 (3<sup>rd</sup> Dept. 2009)**

The Third Department reversed a derivative neglect from Schoharie County. In 2005 the father had been found to have neglected a child as a result of domestic violence. Although the mother was not adjudicated to have neglected, the child was placed in foster care. The father was ordered to "stay away" from the child's

home. Thereafter the mother had 2 more children fathered by another man. DSS became aware that the original respondent father was having contact with the mother and her two new children and filed an Art. 10 petition alleging derivative neglect by both the mother and the father. Since the mother was never found to have neglected the first child, she could not be found derivatively neglectful of her 2 subsequent children and the Third Department reversed the finding against her. The conduct of the father was that he was in the presence of the mother and her (but not his) two new children – this conduct did not violate the prior order that had ordered only that he “stay away” from the first child’s home as the first child did not live with the mother but was in foster care. Also proof of a violation of an order of protection is not proof of neglect per se.

**Matter of Errol S., \_\_ AD3d \_\_, 886 NYS2d 664 (1<sup>st</sup> Dept. 2009)**

A Bronx father neglected his children by committing acts of domestic violence against the children’s mother in their presence. The acts included threatening the mother with a firearm. One of the children witnessed the acts, another child was present but asleep nearby and therefore both were at imminent risk of harm.

**“Dirty” House**

**Matter of Devin N., 62 AD3d 631, 882 NYS2d 409 (1<sup>st</sup> Dept. 2009)**

The First Department reversed a New York County Family Court’s neglect adjudication against a grandmother regarding her 5 grandchildren and her 3 great grandchildren. The First Department found that there was no proof of imminent danger. The apartment was crowded with garbage bags of clothes that lined a living room wall and the kitchen was in disarray . However, this was temporary as she had taken in her daughter and five grandchildren who had nowhere to go. The conditions were not unsafe or unsanitary although it less than ideal. There was no proof that the children were in imminent danger of impairment. One

infant was in a locked room with a person who was intoxicated and was smoking a cigarette but there was no proof that this isolated instance had put the child at imminent risk. There was no proof that the grandmother even knew that the individual was smoking a cigarette near the infant. Both CPS and the police said the infant was in good condition.

**Matter of Iyanah D., 65 AD3d 927, 885 NYS2d 79 (1<sup>st</sup> Dept. 2009)**

The First Department reversed a neglect finding regarding a Manhattan father. The allegations were that his apartment was cluttered with plastic bags of clothes and appliances and that there were dirty dishes in the sink and an odor from dirty cat litter. These conditions are unsanitary, but standing alone are not enough to support a finding of neglect. The father claimed that the bags were temporary in expectation of a move. There may have been a history of sanitary problems in the home but the record did not reflect any history – only the caseworker’s observations of a one time home visit. The one child was only a month old and there was no evidence that these conditions had placed her at any harm. The caseworker had not even inspected the infant’s room. The father claimed that the infant was never brought into the living area and that her room was cleaned daily. The caseworker returned to the home and removed the infant 2 weeks after making the original observations but there was no record made in court as to the condition of the home at that date – including if the bags had been removed. A second child was born during the pendency of the original petition and made the subject of a derivative petition about a year later but since there was no neglect regarding the first child, there can be no derivative regarding the second.

**Parental Use of Drugs**

**Matter of Charisma D., \_\_\_ AD3d \_\_, \_\_\_ NYS2d \_\_ dec’d 11/5/09 (1<sup>st</sup> Dept. 2009)**

The First Department reversed a neglect finding by New York County Family Court. The children lived with their mother. The police located one glassine

envelope of a small quantity (misdemeanor level) each of heroin and cocaine as well as a digital scale in the apartment. There were a number of related adults in the apartment at the time and none of the drug related items were in plain view. The mother and the grandmother both told the police that the drugs were the grandmother's and that the scale was as old boyfriend's who no longer lived in the home. This evidence is not sufficient to show that the children were neglected.

**Matter of Fernando S., 63 AD3d 610, 883 NYS2d 469 (1<sup>st</sup> Dept. 2009)**

A Bronx father failed to provide adequate guardianship and supervision of his children. He admitted in federal court that he sold drugs and possessed loaded firearms in the home with his children.

**Matter of Jasmine B. \_\_AD3d\_\_, 886 NYS2d 162 (1<sup>st</sup> Dept. 2009)**

The First Department concurred that a Bronx father neglected his children by using drugs in the home, refusing to attend rehab and by forcing the oldest daughter from the home without providing food or shelter for her. Although the father claimed that this child was a delinquent, he is still obligated to see to her welfare. The father also used physical violence on the older children and all these behaviors support a derivative finding regarding the youngest child.

**Excessive Corporal Punishment**

**Matter of Maddesyn K., 63 AD3d 1199, 879 NYS2d 846 (3<sup>rd</sup> Dept. 2009)**

The Third Department reversed a dismissal of a neglect petition by St. Lawrence County Family Court. The middle child in this family had unusual bilateral bruises on her jaw which looked as though someone had grabbed her face. The parents admitted they were the caretakers of the child at the time of her injuries. The

older child gave an out of court statement that the father was “sometimes mean” to the middle child and made a choking gesture with her hands to her throat. The middle child also had a series of unusual injuries other than just the bruises on her face. She had a subdural hematoma, retinal bleeding and an infarct or dead brain tissue. She had a gash on her lip. These injuries all occurred within a short period of time. The parents gave a variety of accidental reasons for the child’s various injuries including that she had a seizure and fell on the sidewalk. The Appellate Court found that the extent and number of the child’s injuries made it more probable that at least some of the injuries were not accidental. The other children were derivately neglected.

**Matter of Isaiah S., 63 AD3d 948, 880 NYS2d 528 (2<sup>nd</sup> Dept. 2009)**

The Second Department affirmed Nassau County Family Court’s adjudication of neglect. The mother used excessive corporal punishment on her son by striking him on his arms with a belt buckle and other objects. The child’s out of court statements were corroborated by the caseworker’s observation of the injuries and by the out of court statements of two siblings. The mother’s denial lacked credibility. The two siblings were derivately neglected.

**Matter of Kaitlynn I., 64 AD3d 654, 883 NYS2d 126 (2<sup>nd</sup> Dept. 2009)**

The Second Department concurred with Queens County Family Court that a mother neglected her daughter and derivately neglected her son. The girl had numerous bruises on her body. The medical expert testified the injuries were not consistent with accidental causes and that they would have been inflicted by being hit with a blunt, flexible instrument. The mother was not able to provide a credible explanation to rebut the prima facie evidence of neglect.

**Matter of Jazmyn R. \_\_\_AD3d\_\_\_, \_\_\_NYS2d\_\_\_ dec'd 11/12/09 (1<sup>st</sup> Dept. 2009)**

A New York County mother neglected her daughter by beating her with two intertwined belts which left a buckle shaped bruise and puncture wounds on the child's arm. The mother's failure to testify at the fact finding allowed the strongest inference to be held against her.

**Parent's Mental Health**

**Matter of Patrice S., 63 AD3d 620, 882 NYS2d 409 (1<sup>st</sup> Dept. 2009)**

New York County Family Court's determination of neglect was affirmed on appeal. The mother was repeatedly hostile to her 8 year old daughter . The child had a history of behavioral problems. In front of the child, the mother made repeated statements that she could not handle the child and that someone else should take her if they thought they could do a better job. The evidence demonstrated that the mother's hostile behavior toward the child was part of the reason for the child's emotional issues. The mother had a history of mental health problems and would not consider anger management, parenting services or mental health treatment. Her conduct was emotionally abusive to the child and placed the girl at imminent risk.

**Matter of T-Shauna K., 63 AD3d 420, 879 NYS2d 462 (1<sup>st</sup> Dept. 2009)**

A New York County Family Court's granting of a summary judgment motion for neglect of a newborn was affirmed. The mother in the past had failed to follow recommendations about her psychiatric illness and had been hospitalized. She had also been found to have educationally neglected her older two children who had 50 unexcused absences in the school year. She had a lack of insight into her need for treatment although she had more recently complied with treatment. The neglect as to the older three children was proximate in time and it could be concluded that the problems still existed.

**Matter of Kazmir K., 63 AD3d 522, 882 NYS2d 402 (1<sup>st</sup> Dept. 2009)**

The First Department affirmed New York County Family Court's neglect finding regarding a father with mental health issues. The father had a long history of mental illness including prior suicide attempts. He made another suicide attempt which resulted in his being hospitalized. While in the hospital, the father made no arrangements for his 13 year old son's care. The father failed to testify at the fact finding and an inference can be drawn from that. Although this father is clearly concerned for his child, this concern does not obviate the risk of harm in not planning for his son's care.

**Matter of Stephon Elijah G., 63 AD3d 640, 881 NYS2d 426 (1<sup>st</sup> Dept. 2009)**

The First Department concurred with Bronx County Family Court that a mother neglected her child such that the child needed to be placed out of the home. The mother had a history of psychiatric and drug abuse issues. She had failed to comply with an earlier neglect finding from 2005 regarding another child who was ultimately adopted. She did not seek treatment for her continuing issues. She used marijuana while pregnant with this child. At times she is unable to meet even her own needs due to her mental confusion.

**Matter of Elijah NN. \_\_\_AD3d\_\_\_, \_\_\_NYS2d \_\_\_ dec'd 10/22/09 (3<sup>rd</sup> Dept. 2009)**

The Third Department affirmed a finding of neglect regarding a Delaware County mother but was critical of the court's consideration of post petition incidents in the fact finding. The mother had both physical and cognitive problems – including multiple sclerosis, seizure disorder, borderline IQ, an inability to retain memories and a brain injury. The DSS was assisting her during her pregnancy. Adult Protective and Public Health services provided the mother with scheduling,

transportation, medication and financial management. The DSS was the mother's rep payee of her SS benefits as the mother would spend her whole check on cigarettes and marijuana without some intervention. She did not have a stable living arrangement and moved frequently during her pregnancy. The DSS filed an Art. 10 petition one day after her baby was born. At first the mother and the baby were placed together in a foster home and later the baby was placed separately.

During the factfinding, the DSS provided evidence of events that had occurred after the petition had been filed. These included the mother's behavior, memory lapses and poor parenting skills that had been observed at the time she had been placed in foster care together with the newborn. The mother's counsel objected to any evidence on incidents that occurred after the petition and the court ruled that it would consider the post petition evidence to the extent that it demonstrated the mother's impairments prior to the petition. The Appellate Court ruled that consideration of the post petition events was inappropriate unless there was a motion to conform the pleadings to the proof or without the filing of another petition. Since there was no such motion or new pleading, the post petition information should only have been used at the dispositional phase.

However, the prepetition evidence was sufficient to prove neglect in any event. The use of marijuana during the pregnancy was not enough alone but proof the severe problems that the mother's cognitive deficits and memory issues caused demonstrated her inability to provide a minimum degree of care for the baby and well as herself. She could not manage her own health care needs, her finances or maintain stable housing. She abused alcohol and had a violent relationship with her own mother. A psychologist who evaluated the mother testified that she would be unable to parent the child safely without the constant presence of another person. Even the mother admitted in her testimony that she could not care for her son without assistance.

## ABUSE

### **Matter of Tristan R., 63 AD3d 1075, 883 NYS2d 229 (2<sup>nd</sup> Dept. 2009)**

The parents in this Kings County matter were found to have abused and neglected their children. The 8 year old girl and the 10 year old boy both gave “independent, consistent, detailed, and explicit” out of court statements of sexual abuse by the father. Medical evidence corroborated their statements as did the testimony of an expert in sexual abuse. The children did “vaguely” recant the statements both out of court and in court. The lower court found that the 8 year old’s testimony was not helpful in determining if her original statements or her recantations were the truth but that the 10 year old’s testimony was credible. On appeal, the Second Department found the recantations of both children to be incredible and not sufficient to undermine the credibility of their original statements. The original statements were detailed and explicit and consistent with each other and there was evidence suggesting various reasons why the children had then recanted. The father testified on direct but then failed to return to court to face cross examination and the court can take an adverse inference for his failure. The mother also neglected the children. A third child was derivately neglected.

### **Matter of Aaron McC., 65 AD3d 1149, 886 NYS2d 408 (2<sup>nd</sup> Dept. 2009)**

A Suffolk County grandmother was found to have abused one grandchild and derivately neglected another. While in the grandmother’s care, the child sustained a left parietal diastatic skull fracture, bilateral subdural hemorrhages and diffuse retinal hemorrhages in both eyes. These injuries would not ordinarily occur without abuse or neglect of some type and the grandmother failed to rebut the presumption of culpability.

## ARTICLE TEN DISPOS and PERMANENCY HEARINGS

**Matter of Deborah EC., 63 AD3d 1724, \_\_\_NYS2d\_\_\_ dec'd 6/12/09 (4<sup>th</sup> Dept. 2009)**

A Genesee County mother and father were found to have neglected their son. The child was first placed with a family friend and then later placed in foster care. Ultimately the mother's rights were terminated. The father was incarcerated until 2013 and his current wife – the child's stepmother – filed an Art. 6 petition for custody of the child as well as a "modification" petition under Art. 10 also seeking to have the child placed with her under Art. 10 as an alternative. The lower court heard both petitions together and ruled that the stepmother would not be given custody under the 6 or the 10 as she had emotional issues and a history of relationships with men involving domestic violence and substance abuse. The father and the stepmother appealed arguing that the court had not applied the appropriate evidentiary standards. The Fourth Department found that "assuming arguendo" that she needed to, the stepmother had established extraordinary circumstances. Therefore the Art. 6 petition should be focused on the child's best interests and the Art. 10 modification petition would also be based on the child's best interests standard. Although the child had bonded to some degree with the stepmother, the lower court did not abuse its discretion in ruling that the child should remain in foster care. It was proper for the court to consider the fact of the father's incarceration and the possibility that he may continue a life of crime and substance abuse. The lower court subsequently terminated the father's rights to the child and the Fourth Department affirmed that as well. Given that custody to the stepmother was not a realistic or feasible plan, the father was required to make other arrangements for the long term care of his son and his only plan was ongoing foster care.

**Matter of B., 25 Misc 3d 513 (Family Court, Onondaga Cty 2009)**

Onondaga County DSS filed a successful motion to vacate a dispositional order made by Family Court. As a private custody case between two parents evolved, the child's attorney filed a neglect petition alleging that the mother misused drugs and alcohol and had an untreated mental condition. At that point in time, the father had Art. 6 custody of the child and so the DSS declined to join as a petitioner on the neglect petition, feeling that the aid of the court was not necessary as the child was being cared for by a safe parent, the father. The mother defaulted in the Art. 10 proceeding and the court made an adjudication of neglect. For the disposition, the mother again failed to appear and the court ordered DSS supervision of the mother as well as an order of protection. The county then filed to vacate the supervision order citing FCA§ 1055-b for the proposition that a court cannot order the supervision of a parent after a neglect adjudication if the other parent has been given Art. 6 custody. The County added that the mother had not been located or even seen and that the child is safe with the father. The child's attorney opposed vacating the other saying that the court did not make findings concerning the child's safety as required by the statute and that since the Article 6 custody award was not at the same time as the Art. 10 dispo, the statute should not apply as the Art. 6 was not under the Art. 10 dispo section but is a spate order. The court commented then when there is an order of custody to a nonrespondent parent at the same time that the court orders supervision to assist the respondent parent to reunite, there is an apparent inconsistency in the overall goal. The court also reviewed the purposes behind the 2009 changes in §1055-b and determined that it was the intent of the legislature that when there are both Art. 10 and Art, 6 matters pending and the court grants an Art. 6, that the DSS should not be ordered to provide any services or supervision as safe permanency has been achieved. The court also found that the child would not be at risk if the mother was not under supervision as the father was properly caring for the child and the father's Art. 6 custody order provided that the mother was to have no contact with the child.

**Matter of Justin R., 63 AD3d 1163, 881 NYS2d 305 (2<sup>nd</sup> Dept. 2009)**

Westchester County Family Court was affirmed on an order that DSS be permitted to authorize that a child placed in care on an Art. 10 be given the psychotropic medication risperdal over the objections of the child's father. The parties and the child were all represented by counsel and the court held a full hearing. DSS provided clear and convincing evidence that the benefits of the treatment outweighed any adverse side effects and were superior to any less intrusive alternative treatments.

**Matter of Patrice S., 63 AD3d 620, 882 NYS2d 409 (1<sup>st</sup> Dept. 2009)**

A New York County mother argued that the court erred in changing a child's goal to adoption without consulting with the child. The First Department noted that the amendment requiring consultation took effect after the permanency hearing in this matter and that in any event the child had been in care for over 22 months when the court changed the goal. No compelling reason was shown as to why the child should not be freed for adoption. The mother had continued to engage in the same behavior that had led to the child's placement and would not undergo the mental health therapy that had been recommended. The record supported the child's goal being changed. The First Department noted that since the appeal, the mother has engaged in therapy and a new permanency hearing has been scheduled.

**Matter of Amanda G., 64 AD3d 595, 882 NYS2d 490 (2<sup>nd</sup> Dept. 2009)**

The Second Department reversed Suffolk County Family Court's decision to return a child to his mother. The foster parents appealed the order. The Second Department found that the foster parents had a right to participate in the lower court proceeding and had a right to appeal the court's decision to remove the

child from their foster home and return the child to the mother. The Appellate Court found that the lower court did not determine the best interests of the child and instead had a preconceived opinion and a lack of impartiality. The matter was remanded for a new hearing before another Judge.

**Matter of Andrew L., 64 AD3d 915, 883 NYS2d 607 (3<sup>rd</sup> Dept. 2009)**

The Third Department reversed a finding of a violation by Clinton County Family Court. The children had a history of custody switches between parents and there were neglect findings at various times against both parents. In April of 2007, the children were living with the father and the mother had been living in Florida for about a year. The father neglected the children and they were placed in foster care. He surrendered the children 8 months later. As part of the children's permanency hearing, the court ordered the mother to attend weekly parenting classes in Clinton County. One month later, a violation petition was filed against her for not attending and the court found a willful violation by the mother and imposed a 15 day jail sentence. The Third Department reversed saying that the violation was not willful. The mother lived in Florida where she was raising two children who both had medical issues. She and her husband were employed but had modest incomes. The DSS did not fund weekly travel from Florida to Clinton County and it was stipulated that she could not afford to pay for the travel herself. She did come twice to Clinton County in the relevant two month period and attended the parenting class each time. No offer was made for her to attend a parenting class in Florida or to attend class via electronic communication. In fact, the mother did attend a parenting class on her own in Florida. Although the mother had served her sentence, the Appellate Court found that the issue was not moot and reversed the violation order. The mother also appealed the court's decision to change the children's goal to adoption but that issue was moot. By the time of the appeal, the mother had surrendered one of the children and had accepted a finding of permanent neglect and a suspended judgment on the other two.

**Matter of Duane H., \_\_\_ AD3d \_\_\_, \_\_\_ NYS2d \_\_\_ dec'd 10/22/09 (3<sup>rd</sup> Dept. 2009)**

The Third Department reviewed a violation proceeding from Clinton County Family Court. The mother had been held in willful violation of a court order that she not have contact with the child. The court found that she had mailed the child a photograph with a message. The child's sister in law took responsibility for the action at the hearing but the lower court rejected that testimony as lacking credibility and the Appellate Court gave deference to that assessment of credibility. The Family Court had sentenced the mother to 60 days in jail and the sentence had already been served so the challenge that the sentence was too harsh for the action was moot.

**Matter of Blaize F., 64 AD3d 936, 886 NYS2d 506 (3<sup>rd</sup> Dept. 2009)**

A Clinton County father appealed the terms of a supervision extension order. His son and 2 stepdaughters had been placed in the care of their mother after a 2006 finding that he had sexually abused one of the stepdaughters. The father's access to his son was limited in that his visitation, including telephone calls, were to be supervised. The father objected to the supervision of his contact with his son. The Third Department affirmed the lower court's order that contact should be supervised. The co-facilitator of the sex offender program that the father was enrolled in testified that the father continued to deny that he had sexually abused the stepdaughter and had made little progress in dealing with his anger and was vindictive and intimidating. The father testified at the hearing that the sex abuse did not happen – and the court found that he was not truthful and that he had been found in contempt in the past for not following the court's directives,

**Matter of Owen AA., 64 AD3d 953, 882 NYS2d 568 (3rd Dept. 2009)**

A Cortland County mother appealed the lower court's decision to deny her motion for a return of her child to her care. Although the mother had in fact completed almost everything that the court order had required of her, it was not in the child's best interests to be returned to her care. "Termination of a child's placement .....is not contingent upon nor compelled by the simple completion of a checklist..... Instead, the physical, mental and emotional well-being of the child is the paramount concern and the parent must establish that the return of the child protects these interests." Although the mother had substantially complied with the court's order and had in fact sought out and obtained services beyond the order, she still had not had an unsupervised visit with the child. Her parenting counselor still said that the mother needed direction to meet the child's basic needs. She had been homeless only a few months earlier and her housing should be stable for a longer period before a return of the child. She had held a job for one week at the time of the hearing but had been fired from two other jobs in the last months, She had limited cognitive abilities and no family support.

**Matter of Tristram K., 65 AD3d 894, 884 NYS2d 655 (1<sup>st</sup> Dept. 2009)**

The First Department concurred with New York County Family Court that a child who was in foster care with an aunt and uncle should be released to the permanent custody of the aunt and uncle after the court held a combined permanency and Article 6 hearing. Extraordinary circumstances existed to overcome the mother's objection to the custody order. The mother originally had fled to China with the child -- absconding during a unsupervised visit after a neglect matter. The child had now lived with the aunt and uncle for long time and had bonded with them. They are providing him with a stable, loving and supportive home. The mother may still be allowed visitation in a future review by the court. The appellate court noted that the lower court had suggested that the child be allowed to have mail, email, photographs and video so that the child would not forget the mother to prepare for a time when in person visitation may be permitted.

**Matter of Cristella B., 65 AD3d 1037, 884 NYS2d 773 (2<sup>nd</sup> Dept. 2009)**

The Second Department stayed and then reversed a Suffolk County Family Court's order to return children to the care of the parents. Three children had been removed in September 2006 based on allegations that the oldest of the three had been sexually abused by older siblings and that the mother did not protect her from the abuse. There was no finding against the father. The children were placed in foster care. DSS sought to have the children's goal continue as a return to the parents while the children's law guardian thought the oldest child should have an APPLA goal and that the two younger children should have a goal of adoption. After the permanency hearing, the lower court ordered the children to be returned home to the parents within a matter of days. The Second Department reversed ruling that a return of the children was not in their best interests. None of the children are likely to successfully reintegrate into the parents' home. Although the older siblings who sexually abused one of the three children were no longer in the home, due to incarceration or deportation, the children are still traumatized about the abuse and the mother's refusal to believe that the abuse happened. The oldest child did not want to return home and the younger two wanted to be adopted and did not even want to visit the parents. They all continued to be upset that the parents had not protected them and the children's therapists said that the mother was not capable of meeting the needs of the children. The children were not attached to the mother and she did not understand what they had experienced. The court should hold a new permanency hearing with psychiatric forensic evaluation and a home study and should review all available options for the children, including adoption.

**TPR GENERAL**

**Matter of La'Derrick W., 63 AD3d 1538, 880 NYS2d 805 (4<sup>th</sup> Dept. 2009)**

A Jefferson County Family Court's termination was reversed and remanded as the defense attorney's motion to withdraw as counsel was granted when the

respondent failed to appear for the fact finding. The lower court erred in granting the motion as the mother had not been given notice of the motion to withdraw. The mother is to be reassigned counsel for a new fact finding.

**Matter of Tiara B., 64 AD3d 1181, 881 NYS2d 352 (4<sup>th</sup> Dept. 2009)**

An Oneida County mother failed to appear at the hearing on the alleged violation of her suspended judgment but was represented by counsel. Although her counsel did not participate, counsel was present and so that matter was properly a default and can only be reopened by motion. The motion to reopen the default was properly denied as she failed to establish a reasonable excuse for her failure to appear and a meritorious defense.

**ABANDONMENT**

**Matter of Jasper QQ., 64 AD3d 1017, 883 NYS2d 344 (3<sup>rd</sup> Dept. 2009)**

The Third Department affirmed a father's termination from Columbia County. The two children were in care since 2000 after the father was convicted of assault in the second degree of his 4 year old stepdaughter. After serving his prison sentence, the father moved to Syracuse and then to the state of Arkansas where he lived after 2006. DSS filed to terminate on both abandonment and permanent neglect grounds and the Appellate Division concurred that both grounds were proven by clear and convincing evidence. The father argued that the court should not have held the TPR hearing in his absence. However the court had clearly informed him of the date of the hearing, that he could appear in person or apply to appear electronically and he did neither nor did he retain an attorney. The agency provided diligent efforts in that the worker contacted the father via telephone and letters both before and after he moved out of state. He was offered full reimbursement for round trip travel to see the children for a period

of time and thereafter was offering assistance to defray the cost of coming to see the children. The caseworker also offered to help with public assistance or employment should he wish to return to the state. Mental health services and family counseling were also offered. The father was also properly found to have abandoned the children in that he did not visit for the most recent 6 months despite being offered weekly visitation. During that period of time, he did travel and take vacations but did not attempt to visit his children. He occasionally talked to the children on the phone and by email but this is insufficient to defeat an abandonment.

### **MENTAL ILLNESS and MENTAL RETARDATION TPR**

#### **Matter of Dominique M., 62 AD3d 503, 879 NYS2d 409 (1<sup>st</sup> Dept. 2009)**

The First Department concurred with the Bronx County Family Court that a mother's rights should be terminated as she was too mentally ill to safely care for her child. The expert testified, with no rebuttal, that the mother was currently mentally ill and would be unable for the foreseeable future to properly care for the child. The fact that the psychologist had not seen the mother for six months before his testimony was not error as he was able to support his conclusion with detailed testimony about the mother's long mental health history. On appeal, the mother claimed that the court should have appointed a GAL but there was no indication that the mother did not understand the nature of the proceedings or was incapable of adequately defending herself.

#### **Matter of Susan Elizabeth Z., 62 AD3d 469, 877 NYS2d 891 (1<sup>st</sup> Dept. 2009)**

A New York County mother's parental rights to her children were terminated on the basis of the mother's inability to care for the children due to mental illness. The court appointed psychologist reviewed 11 years of the mother's mental

health records, interviewed her and gave her testing. His opinion was that she was mentally ill, had significant cognitive impairments, poor insight and a poor prognosis. The mother's expert did interview her some 8 months after the court appointed expert but those findings need not be credited over the court appointed expert's findings as the respondent's expert did not review the mother's extensive records and knew nothing about her mental health history or her cognitive impairments.

**Matter of Jasmine Pauline M., 62 AD3d 483, 879 NYS2d 407 (1<sup>st</sup> Dept. 2009)**

The First Department affirmed New York County Family Court's termination of a mother's rights based on mental illness and mental retardation. The expert testimony by the court appointed psychologist was that her mental condition made her unable to care for her child for the foreseeable future. The expert had interviewed the mother and reviewed all her medical records. The mother's adaptive skills had improved but not to the point that she could ensure the safety of the child. The court was not required to issue any order regarding post termination visitation. (note: no reference made to the 4<sup>th</sup> Dept's **Kahlil S.** ruling)

**Matter of Maleeka Abdullah M., 65 AD3d 1045, 884 NYS2d 872 (2<sup>nd</sup> Dept. 2009)**

A Brooklyn father lost his parental rights due to mental illness. The court appointed psychologist interviewed the father for 2 and a half hours and reviewed all his treatment records as well as a previous forensic report and the agency's records regarding the child's case. The father suffers from paranoid schizophrenia and believes he is the victim of witchcraft perpetrated by many people including past Presidents of the US. He has no insight regarding his mental illness, and has stopped taking medication. He is unwilling to take his medication even if that were a condition to a return of his child.

## PERMANENT NEGLECT

### **Matter of Carlos R., 63 AD3d 1243, 879 NYS2d 829 (3<sup>rd</sup> Dept. 2009)**

The Third Department affirmed a Tompkins County termination of a mother's rights after ruling that the agency need not demonstrate diligent efforts. The mother had her parental rights terminated to two other children. As the agency was still making efforts to return a third child to his father, they did not file to terminate the mother's rights as the third child until later when the father had surrendered. At that time, the agency moved for a no reasonable efforts order against the mother based on the prior TPRs and the lower court granted the motion. The Third Department concurred and indicated that a hearing on the NRE was not necessary as the statute does not specifically require it and there was no question her parental rights had been terminated regarding the other children. The lower court was very familiar with the mother's history of substance abuse and her failed efforts at rehabilitation.

### **Matter of Naomi G., 65 AD3d 1344, \_\_NYS2d\_\_ (2<sup>nd</sup> Dept. 2009)**

The Second Department concurred with Orange County Family Court that a father permanently neglected his daughter. The agency offered diligent efforts but the father denied paternity on 3 occasions, did not visit the child for 8 months and did not complete mental health treatment, parenting classes or a domestic violence program.

### **Matter of Roberto C., \_\_AD3d \_\_, \_\_NYS2d\_\_ dec'd 11/13/09 (4<sup>th</sup> Dept. 2009)**

The Fourth Department agreed with Oneida County Family Court that DSS did not prove diligent efforts had been offered to a father and therefore the termination petition was properly dismissed. The father had been incarcerated and the original goal had been to return the child to the mother to which the father

agreed. The DSS merely offered the father visitation and gave him copies of the permanency hearing reports talking about services for and the progress of the mother. It thereafter became apparent that the mother was not going to resolve her issues and at that time, the father offered his parents as a custodial option and the DSS found that they were appropriate. Given the father's situation he did cooperate with DSS but they did not provide him with needed diligent efforts.

**Matter of Anastasia FF., \_\_\_AD3d\_\_\_, \_\_\_NYS2d\_\_\_ dec'd 10/22/09 (3<sup>rd</sup> Dept. 2009)**

A Broome County father had his parental rights terminated to his two children. He was incarcerated for most of the time the children were in care. He argued that the DSS did not provide him with diligent efforts particularly with visitation. The Third Department commented that visits for incarcerated parents are not required if the children are very young and trips to a penal institution are not in their best interests. Also the caseworker did provide updates about the children's progress and conditions and arranged for him to have weekly visits. The caseworker also providing him with counseling and enrolled him in a DV program (one of his incarcerations was for stabbing the children's mother). These were appropriate diligent efforts. The father however did not complete a program for violence issues - which was vital to his ability to parent the children in the future. A suspended judgment was not appropriate as the father has failed to address the issues that led to their placement .

**TPR DISPOS**

**Matter of Evelyse Luz S., 62 AD3d 595, 879 NYS2d 438 (1<sup>st</sup> Dept. 2009)**

New York County Family Court held a hearing regarding the status of the unwed father in a termination of the mother's rights. The First Department concurred that the consent of the father was unnecessary but remanded the matter for a

new dispositional hearing on the issue of the child's placement. The First Department ruled that the evidence did not support the child being adopted by the foster mother. The child had originally lived with the 50 year old paternal grandmother in a stable home. The grandmother was certified as a foster mother but at a point in time when the grandmother had to have hip surgery, the child was removed from her and placed with a non related foster mother. While recovering from surgery, the agency did not take any action to continue the relationship between the child and the grandmother. The grandmother claimed that she phoned the agency repeatedly but did not get a response. She claimed she was unable to physically go to the agency. Once she was able to get around, visits with the child were reinstated but the child was not placed back in her home. The child did become bonded to the foster mother who is taking good care of her and meets her special needs but this child has a biological relative who is capable of caring for her and has continued to request that the child be with her. The lower court should hear independent expert testimony regarding the question of short term trauma for the child of being moved out of the foster home against the long term benefit of the child living with the grandmother who will permit contact with siblings who reside with a maternal grandmother as well as contact with the current foster family. The Appellate Court noted that it's comments on the previous appeal by the mother in this case (**Matter of Evelyse Luz S. 57 AD3d 329 (1<sup>st</sup> Dept. 2008)**) were not binding as the father's appeal was not at that time before the court.

**Matter of Dennis A., 64 AD3d 1191, 882 NYS2d 624 (4<sup>th</sup> Dept. 2009)**

The Fourth Department agreed with Wyoming County Family Court that a mother had violated her suspended judgment and that her rights should be terminated. The DSS proved that she violated the terms by a preponderance of the evidence, Although each violation viewed separately may be trivial, the violations taken together as a whole demonstrate a lack of commitment and inability to make significant progress.

**Matter of Fatima G., 64 AD3d 652, 883 NYS2d 130 (2<sup>nd</sup> Dept. 2009)**

Suffolk County Family Court terminated the parental rights of a mother to her five children and the Second Department upheld the termination. The mother continued to use drugs after the children were removed and did not complete drug treatment. The county offered diligent efforts by providing drug rehab. Although she had completed a parenting program and had enrolled in a substance abuse program, these limited efforts are not enough to warrant a suspended judgment.

**Matter of Jaleel F., 63 AD3d 1539, 881 NYS2d 242 (4<sup>th</sup> Dept. 2009)**

The Fourth Department reversed and remanded for disposition the father's status in a mother's termination. The DSS alleged that he was a notice father only but he was not provided notice of the mother's dispositional hearing date. The father had appeared at every proceeding where he had been given notice. Due process required that he be given notice of the mother's dispositional hearing so that he may argue that he is a consent father and/or that he may have best interest evidence to provide if he is only a notice father.

**Matter of Shad S., \_\_\_AD3d\_\_\_, \_\_\_NYS2d\_\_\_ dec'd 11/13/09 (4<sup>th</sup> Dept. 2009)**

The Fourth Department did agree that a Erie County mother had violated her suspended judgment in that she failed to obtain suitable housing, failed to attend 2 out of three appointments with the child's psychologist and failed to provide timely documentation that she was employed and in mental health treatment. She also did not have the requisite skills to assist the child with his unique educational needs. However, due to "new facts and allegations" in that the court became aware that during the pendency of the appeal, the child was no longer in a preadoptive home and now did not want to consent to being adopted,. Based on this new information, the Fourth Department remanded the case for a

new dispositional hearing as termination may not be in the child's best interests. (Although not noted in the decision, DSS counsel advises that the "new facts and allegations" were brought to the appellate court's attention via a letter that the 9 year old child's law guardian directed to the appellate court after briefs had been filed , advising that the child's placement in an adoptive home had disrupted and that the child did not want to be adopted)

### **POST TERMINATION CONTACT**

**Matter of Tryston M. \_\_\_AD3d\_\_\_, 885 NYS2d 824 (4<sup>th</sup> Dept. 2009)**

While affirming the Jefferson County Family Court's termination of a mother's parental rights, the Fourth Department continued its position that Family Court has jurisdiction to order post termination contact and returned the matter for a **Kahlil S. 35 AD3d 1164** hearing.

### **ADOPTION ISSUES**

**Matter of KJ v KK 873 NYS2d 867, 2009 NY Misc LEXIS 204 (Orange County, Family Court 2009)**

An Orange County adoptive mother filed a family offense petition on behalf of her adoptive child against the birth mother of the child. It was alleged that the adoptive mother had approached the child in public asking for a hug and told the child that she had been following her around and taking photos of her. The child was afraid. In denying the respondent's motion to dismiss, the court ruled that the parties have an "intimate relationship" in that the respondent is her biological mother.

**Matter of Shirley E., 63 AD3d 1231, 879 NYS2d 640 (3<sup>rd</sup> Dept. 2009)**

Just before the filing of a termination of parental rights matter, a Chenango County grandmother filed for custody of the child who was in foster care. The court held a fact finding hearing and denied the grandmother custody. The parents then surrendered the child for adoption with the condition that the child be adopted by her foster parents. The grandmother appealed. The Third Department ruled that the grandmother could not override the decision of the parents to surrender the child to be adopted by someone else. Also a grandmother has no special right to custody over a foster parent parent selected by the agency. Further, a court should not grant custody of children who have been freed for adoption. The grandparent's request for custody is moot at this point.

**Matter of Theresa BB., 64 AD3d 977, 882 NYS2d 580 (3<sup>rd</sup> Dept. 2009)**

The Third Department upheld the dismissal of a grandmother's custody petition. The children were Native American children who were placed in foster care with the St. Regis Mohawk Tribe by St. Lawrence County Family Court. The mother died and the grandmother then field for custody of the children. The father surrendered his parental rights on the condition that the children be adopted by the foster parents. The court properly dismissed the grandmother's petition for custody without a hearing. The grandmother has no special right to custody that allows her to override the birth parent's decision to consent to the agency placing the children for adoption. The grandmother's sole remedy is to see an adoption. The grandmother did not preserve any argument that the court violated the provisions of the ICWA.

## MISCELLANEOUS

### **Matter of Matthew L., 65 AD3d 315, 882 NYS2d 291 (2<sup>nd</sup> Dept. 2009)**

The Second Department ruled that the court can issue a PINS probation sentence that extends beyond the child's 18<sup>th</sup> birthday.

### **Matter of Mark T. 64 AD3d 1092, 882 NYS2d 773 (3<sup>rd</sup> Dept. 2009)**

The Third Department was highly critical of a child's attorney in an appeal of a private paternity matter. The child attorney on appeal was not the same one who appeared for the child at the lower court proceeding. When the Appellate Court questioned the child's attorney at oral argument, he admitted he had never met the child nor spoken to the child but had merely decided on the argument he would make based on his reading of the record. The questions had been asked as the appellate child's attorney took the opposite position to that taken by the trial child's attorney. The appellate counsel indicated he was taking the position as he thought that position was in the child's best interests. The child was 11 years old. The Third Department found that the child was entitled to competent counsel who would talk to him, advise him of his options, determine his position for the appeal and argue his position, as well as keep him advised of the appeal process. Further, nothing in the record would support the attorney substituting his judgment for his clients. The attorney was relieved and a new attorney for the child for the appeal was appointed..

## **CASES ON RELATIVE INTERVENTION**

**By Margaret A. Burt 11/09**

In the Matter of Arnetta S., 186 AD 2d 519, 589 N.Y.S.2d 327 (1st Dept. 1992) Bio-aunt's petition for custody of child freed for adoption dismissed.

In the Matter of Rodriquez, 180 AD 531, 579 N.Y.S. 2d 404 (1st Dept. 1992) Second cousin's petition for custody denied where child had been with preadoptive family for last four years.

Ruiz v Puerto Rican Association for Community Affairs, 174 AD 2d 542, 571 N.Y.S. 2d 717 (1st Dept. 1991) Maternal grandmother sought intervention in adoption of child surrendered with express condition that grandmother not be given child - petition dismissed.

In the Matter of Chiquita J., 170 AD 2d 353, 566 N.Y.S. 2d 54 (1st Dept. 1991) Maternal grandmother allowed to intervene in dispositional hearing of TPR but court denies custody to grandparents and grants guardianship to DSS.

In the Adoption of A. By K.S., 601 N.Y.S. 2d 762 (N.Y. County Fam. Ct. 1993) Uncle's petition to adopt, filed during the TPR is dismissed and child remains in foster home.

In Re Guardianship of Tiffany Malika B., 626 N.Y.S. 2d 184 (1st Dept. 1995) Aunt's custody petition dismissed after mother's rights terminated, child with foster family whole life and bonded.

In Re Nicole E., Family Court, Bronx County, reported at NYLJ 3/21/95 at p. 27 Although the court placed three brothers with the grandmother who had been caring for them at the time of the TPR, court allowed younger sister to stay with foster parents where she had been placed her whole life for the eventual adoption by them.

Matter of Catherine JJ v Charlotte II, 216 AD 2d 752, 628 NYS2d 826 (3rd Dept. 1995) Dismissed maternal grandmother's petition for custody of child mother had surrendered. Grandmother had her parental rights to mother terminated 15 years earlier.

Matter of Rockland DSS o/b/o Charles H., 207 AD 2d 788, 616 N.Y.S.2d 521 (2nd Dept. 1994) Maternal grandmother's custody petition dismissed as DSS had already been granted guardianship but could file for visitation or seek adoption.

In the Matter of Jonathan N.W., 140 Misc. 2d 216, 530 N.Y.S. 2d 501 (Surr. Ct. Nassau County 1988) Grandparents not permitted to intervene in fact-finding of TPR.

Matter of Mary Liza J. V Orange County DSS, 198 AD 2d 350, 603 N.Y.S. 2d 331 (2nd Dept.

1993) Great grandmother's petition for custody of two freed great-grandchildren dismissed where they had lived with two separate foster families for over three years.

Matter of Cynthonia T., 198 AD 2d 111 (1st Dept. 1993) Maternal grandmother granted permission to intervene after TPR but has no preemptive right to custody.

Matter of the Adoption of A., 158 Misc. 2d 760, 601 N.Y.S. 2d 762 (Family Court, New York County 1993) Uncle's custody petition, filed after child freed and placed in adoptive home, dismissed. Court will hear uncle's adoption petition and foster parent adoption petition sequentially with law guardian participation in both.

Matter of Jessica N., 202 AD 2d 320, 609 N.Y.S. 2d 209 (1st Dept. 1994) Allows adoption of black handicapped foster child by white lesbian foster mother who has cared for her since birth over three years ago and denies adoption by black grandmother who is adopting sibling.

In Re guardianship of Tiffany Malika B., 626 N.Y.S. 2d 184 (1st Dept. 1995) Dismissed aunt's custody petition in favor of foster parent adoption petition

In Re Maria Elizabeth A., 631 N.Y.S. 2d 334 (1st Dept. 1995) Not necessary to give birth mother adjournments of dispositional hearing on TPR to "look" for family members who may want to adopt.

Matter of Paula L. v John Doe., 634 N.Y.S. 2d 525 (2nd Dept. 1995) Denied grandmother's request for visitation with child who had been adopted three years earlier.

Matter of Elizabeth YY v Albany DSS, 644 N.Y.S. 2d 856 (3rd Dept. 1996) Denied paternal aunt's custody petition in favor of foster parent that had child for more than 2 years even though DSS had never asked aunt to take custody earlier.

Matter of Jennifer A., 650 N.Y.S. 2d 691 (1st Dept. 1996) Denied aunt's petition for custody over adoption petition from 67 year old foster mother, aunt had little contact, foster mother was healthy and active and had always cared for child.

Matter of Genoria, 650 N.Y.S. 2d 830 (3rd Dept. 1996) Dismissed cousin's custody petition after child had been freed - only an adoption petition can be brought regarding a freed child.

In Re Alma R., 654 N.Y.S. 2d 748 (1st Dept. 1997) Dismissed grandmother's custody petition where foster mother had cared for the child almost all of her life and was the agencies choice for adoption

Matter of Gladys "B"., 274 AD2d 689, 710 NYS2d 725 (3rd Dept. 2000) After TPR filed against mother, maternal aunt filed for custody - court should first hear the TPR against the mother, then a dispositional hearing on adoption by foster parent vs custody by aunt; adoptive parents win - strong emotional bond, lived there since birth, happy and secure with adoptive parent, no bond

with aunt who has only visited occasionally

In re John C., 718 NYS2d 314 (1st Dept. 2000) Grandmother filed for custody of child in foster care, lost case and while custody petition was on appeal, child was freed for adoption; custody petition must dismissed now - grandmother could seek to adopt

In Re Adoption of Karon J., 293 AD2d 404, 741 NYS2d 37 (1<sup>st</sup> Dept. 2002) Child had been with foster mother since birth - 5 years - when freed for adoption, foster mother files as does grandmother - child is to be adopted by foster mother and grandmother does not have special standing, fact that she could have intervened earlier does not justify giving her child now

Matter of Pleasant Edward G., 749 NYS2d 176 (2<sup>nd</sup> Dept. 2002) - Denied the grandmother's guardianship petition for foster child - child has lived whole life with foster parents and is doing well - unnecessarily disruptive to move him

Matter of Patience B., 306 AD2d 473, 761 NYS2d 304 (2<sup>nd</sup> Dept. 2003)- Dismissed aunt's petition for custody that had been filed after dispo completed on TPR, adoption is only option

Matter of Wesley R., 307 AD2d 360, 763 NYS2d 76 (2<sup>nd</sup> Dept. 2003) - Relatives who had adopted 4 sibs of 5<sup>th</sup> child wanted to adopt 5<sup>th</sup> child who had been mistakenly placed with non-related foster family who also wanted to adopt, foster family had child for 2 years but and child did visit with relatives - court ordered that an independent psychological eval of child needed to be done

Matter of David B., 768 NYS2d 618 (2<sup>nd</sup> Dept. 2003)- After mother surrendered child and foster mother petitioned for adoption aunt appeared seeking custody - aunt had child's 5 siblings in her custody - aunt had been repeatedly asked in past if she wanted child and had said no - she had "essentially waived any right to intervene" - foster home is only home child has ever known

Ella J. v Iva J., 4 AD 3d 527, 771 NYS2d 719 (2<sup>nd</sup> Dept. 2004) - After child had been in care for 2 years, relative files custody petition and shortly after agency files TPR - court considered the custody petition at the time of the TPR dispo and appropriately gave child to foster parents to adopt "a nonparent relative takes no precedence for custody over adoptive parent selected by an authorized agency"

Matter of Karen AO., 6 AD3d 1100, 775 NYS2d 630(4th Dept. 2004) - TPR pending and grandmother files a custody petition, law guardian moves to dismiss custody petition, App Dive says court correctly considered custody during the dispo phase of the TPR - did agree that court should not have ordered visitation with grandmother without a hearing given that law guardian objected.

Moorhead v Coss 17 AD3d 725, 792 NYS2d 709 (3<sup>rd</sup> Dept. 2005) - Children had been in care for over 3 years when both parents surrendered, grandmother then filed for custody but agency

wanted children to be adopted - App Div says no error for court to have dismissed custody petition as grandmother had no standing to seek custody of children who had been surrendered for adoption.

Gregory B.v ACS 800 NYS 2d 486 (Family Court, Richmond County 2005)- court gave custody of 14 year old freed child to grandfather - no adoptive resource for child

Mu'Min v Mitchell 19 AD3d 116, 797 NYS2d 818 (4<sup>th</sup> Dept.. 2005) - Grandmother filed for custody of child in care while TPR pending, lower court dismissed custody petition and freed child for adoption - grandmother appealed custody dismissal - App Div says it is moot as child is now freed

In re Luz Maria V. 803 NYS2d 544 (1<sup>st</sup> Dept. 2005) - Grandmother files for custody of several children, some freed for adoption, one infant more recently placed, lower court gave infant to grandmother's custody and left older children to be adopted - App Div reversed on youngest child - should also be freed for adoption as in child's best interests to stay with foster mother- grandmother has no special standing at this stage

In Re Tristram K., 804 NYS2d 83 (1<sup>st</sup> Sept. 2005) - in an Art. 10 against mother, relatives file for Art. 6 custody and lower court grants - App Dive reverses lower court grant of custody saying that court had no authority to issue and Art. 6 custody order in an Article 10 dispo unless there was parental consent or a full hearing with extraordinary circumstances and best interests findings

In Re Zarlina Loretta J., 804 NYS2d 313 (1<sup>st</sup> Dept. 2005) - father argues in his TPR that child should go to his sister and not be adopted by foster family - no - aunt knew that child had gone into care and did not come forward, aunt knew father had serious problems

Matter of Carl G., 807 NYS 505 (4<sup>th</sup> Dept. 2005) - grandfather files for custody while TPR pending, App Div says lower court should consider the custody as part of the TPR petition although on the merits it was in child's best interests to be freed for adoption

Matter of Takylia 807 NYS2d 130 (2<sup>nd</sup> Dept. 2005) - child should be adopted by foster parents who have had child for more than 1 year - not a cousin as bio relatives have no special preference

Matter of Savon Tryphenia G. 26 AD3d 821, 809 NYS2d 740 (4<sup>th</sup> Dept. 2006) - aunt files adoption petition for foster child freed for adoption, petition must be dismissed as agency must consent to the adoption and here agency did not consent

In Re Jacqueline Sharon L., 26 AD3d 250, 810 NYS2d 143 (1<sup>st</sup> Dept. 2006) - Children with a grandmother under an Art. 10 dispo, aunt files for custody and court grants custody to aunt as a permanency goal for the children, App Div reverses, ruling that court cannot give aunt Art. 6 custody over mother's objection without an extraordinary circumstances and best interests

hearing

Matter of Debra VV 26 AD3d 714, 811 NYS2d 457 (3<sup>rd</sup> Dept. 2006) - mother has terminal illness, children are also subjects of an Art. 10 petition, aunt appears and can take children - is told by agency that she cannot have foster care status but can have Art. 6 custody - court grants custody and Art. 10 dismissed, OCFS uphold refusal to give the aunt foster parent status in fair hearing, reversed by App Div who rules that agency had obligation to help aunt get foster parent status if she did qualify for that status, given mother's illness

Matter of Felicity II 27 AD3d 790, 811 NYS2d 465 (3<sup>rd</sup> Dept. 2006) - App Div reversed lower court for granting relative Art. 6 custody after child had been in care for a while on a neglect - 3<sup>rd</sup> Dept. rules that while Art. 10 dispo to help mother gain child, court cannot grant Art. 6 custody to a non-parent (**this case now overturned by further caselaw and new statutes**)

Matter of Donna KK 7/13/06 (3rd Dept. 2006) - - if an Art. 6 is filed by relative while Art. 10 pending, correct action is to hold Art. 6 until after Art. 10 fact finding and then do Art. 6 – with appropriate extraordinary circumstances finding – comment is made that the Art. 10 finding could serve as basis for extraordinary circumstances

Matter of Gordon BB 818 NYS2d 692 (4<sup>th</sup> Dept. 2006) – – if an Art. 6 filed by a relative after a TPR has been filed, correct to hear Art. 6 as an alternative to adoption in the dispo of the TPR – here court correctly gave custody to relative even though foster parents wished to adopt - although relatives have no greater right to child over adoption by foster parents, test between the two is best interests and here relative was better for child

Matter of Savon Tryphenia G 26 AD3d 821 (4<sup>th</sup> Dept. 2006) – – after foster child freed, non caretaker relative files to adopt and is opposed as adoptive resource by DSS – should be dismissed as court cannot entertain an adoption petition of a foster child without consent of agency

Matter of Tristram K. 36 AD3d 147, 824 NYS2d (1<sup>st</sup> Dept. 2006) – – relatives cannot “intervene” in an Art. 10 without parental permission – although do not need parental permission to file an Art. 6 or be awarded child under 1017

Matter of Matthew E 41 AD3d 1240, 839 NYS2d 87 94<sup>TH</sup> Dept. 2007) – - Erie County order granting Art. 6 custody to a grandfather of foster child in care on an Art. 10 “modified” – court failed to find extraordinary circumstances (child was in foster care due to multiple fractures at 3 months of age!) and court “impermissibly favored the grandfather based on his biological connection to the child” - court was critical that Grandfather had not petitioned for 5 or 6 months after placement and had only seen child one hour per week, supervised. Said foster parent's Art. 6 custody petition should only have been dismissed “without prejudice” – no further comment made on “right” of foster parents to file an Art. 6 custody petition.

Matter of Seth Z. 45 AD3d 1208, 846 NYS2d 729 (3<sup>rd</sup> Dept. 2007) – – Third Department reverses itself in *Felicity II*. - child was placed in foster care upon a finding of neglect against his mother - maternal aunt and her husband wanted the child to be placed with them. They requested a FCA 1017 placement and also filed an Art. 6 petition. DSS opposed relatives - relatives were not entitled to a hearing on the 1017 request as the statute does not provide for one -the relatives were not entitled to a hearing under FCA 1028-a as the DSS took the position that they would not qualify as foster parents and the 1028-a hearing is only available to relatives who are being denied a placement for *other* reasons than failure to qualify as foster parents . The relatives in fact did not even request foster parent status. But – should have granted the relatives a hearing on their Art. 6 custody petition. Warren County DSS relied on *Felicity II* arguing that the Third Department had held there that no petition of custody could be filed after an Art. 10 disposition unless the parents consents. *Felicity II* reversed as subsequent changes to FCA 1017(2)(a)(i) “recognize and accept an interplay between Family Court Act Articles 6 and 10”.  
**(note new statute essentially resolves this issue)**

Matter of DA., 18 Misc3d 200 (Family Court, Onondaga County 2007) – DSS wanted to move child from foster home to relatives after child had been in care over 2 years – court denied, child had formed a strong bond with foster mother, only mother he has ever known, child would be severely distressed – DSS ordered to start TPR

Matter of Courtney B. 47 AD3d 808, 649 NYS2d 179 (2<sup>nd</sup> Dept. 2008) – Child was placed with paternal grandmother while mother completed drug court – DSS and LG then wanted child returned to mother after she completed program – father and parental GM wanted child to stay with GM – court ruled that mother has superior right to GM and the placement was only meant to be temporary and child should now be returned

Matter of Colleen F., 49 AD3d 1226, 845 NYS2d 257 (4<sup>th</sup> Dept. 2008) – Adopted child whose adoptive mother had then been criminally convicted of sexually abusing another foster child, bio aunt and uncle seek custody – child who is now 13 does not want to go with them and wants to stay with adoptive family, court says custody to relatives who had tried to obtain child 3 years earlier at time of adoption and would maintain child’s connections to bio and adopted siblings, adoptive mom in jail, adoptive dad ill and not involved in child’s care

Matter of Linda S., 50 AD3d 905, 856 NYS2d 174 (2<sup>nd</sup> Dept. 2008) – GM filed an Art. 6 while Art. 10 pending re two children in foster care, parents surrender the two children at dispo of Art. 10 conditional on foster parents adopting. Court properly dismissed GMs custody petition

Matter of Amber B. 50 AD3d 1028, 857 NYS2d 590 (2<sup>nd</sup> Dept. 2008) – GMs Art. 6 properly dismissed where children were in care since 2002 and ACS intended to file TPRs and children wanted to be adopted in foster homes. GM not unfit but had no relationship with children before they went into care and no relationship for the first 3 years they were in care.

Matter of Rita T. 49 AD3d 327, 854 NYS2d 344 (1<sup>st</sup> Dept. 2008) – GMs Art. 6 was properly denied where children had been in foster care most of their lives and were now freed for adoption and foster mother wanted to adopt, GM had not visited very frequently, did not understand special needs and had history of child neglect herself

Matter of Deborah F., 50 AD3d 1213, 855 NYS2d 299 (3<sup>rd</sup> Dept. 2008) – GM filed for custody after TPR had been filed – custody considered in TPR dispo and denied – child should be freed for adoption instead – no presumption in favor of relatives at this point, no presumption for any dispo but what is best for child – GM had not been able to care for child when she had to go into care, also did not seek visitation with child for 1<sup>st</sup> 6 months of care, GM was not supportive re mother’s neglect and danger to child, GM’s kids had been in foster care, GM did not understand child’s special needs, child bonded to foster family and not to GM

Matter of Keierka H., dec’d 6/10/08 (1<sup>st</sup> Dept. 2008) – GMs request for custody of freed child denied, GM has only seen child once since placement, neglected this child and others herself, foster mother meeting child’s needs and wants to adopt.

Matter of Gabriel James Mc., 60 AD3d 1066, 877 NYS2d 126 (2<sup>nd</sup> Dept. 2009)  
Family Court properly held out of state GM’s Art. 6 petition for custody in abeyance until the ICPC home study was returned, mother’s motion to dismiss the custody petition was properly denied, court does not need the mother’s consent to ultimately issue a custody order if the proper findings are made.

Matter of Deborah EC., 63 AD3d 1724, \_\_\_NYS2d\_\_\_ dec’d 6/12/09 (4<sup>th</sup> Dept. 2009) mother and father neglected -later placed in foster care, mother’s rights terminated - father incarcerated until 2013- stepmother files an Art. 6 petition for custody and petitions under Art. 10 for an Art. 10 placement as an alternative- both denied – App div says “assuming arguendo” that she needed to, the stepmother had established extraordinary circumstances and the both petitions should focused on the child’s best interests - child had bonded to some degree with the stepmother but child should remain in foster care – can consider father’s incarceration, life of crime and substance abuse.

Matter of Tristram K., 65 AD3d 894, 884 NYS2d 655 (1<sup>st</sup> Dept. 2009)  
Child in foster care with an aunt and uncle should be released to the permanent custody of the aunt and uncle after combined permanency and Article 6 hearing - extraordinary circumstances as mother originally had fled to China with the child -- absconding during a unsupervised visit after neglect matter - child lived with the aunt and uncle for long time, bonded with them - stable, loving and supportive home.

Matter of Shirley E., 63 AD3d 1231, 879 NYS2d 640 (3<sup>rd</sup> Dept. 2009)  
GM files for custody of the child in foster care - fact finding hearing held on the Art. 6 and denied - parents then surrendered with the condition that the child be adopted by her foster parents - GM appealed. GM cannot override the decision of the parents to surrender the child to be adopted by someone else – GM has no special right to custody over a foster parent -should not

grant custody of children who have been freed

Matter of Theresa BB., 64 AD3d 977, 882 NYS2d 580 (3<sup>rd</sup> Dept. 2009)

mother died while children in foster care – GM filed for custody – then father surrendered on condition children be adopted by the foster parents – GM’s petition dismissed without a hearing – GM has no special right to custody that allows her to override the birth parent’s decision

## **Recent Caselaw on Access to Sexual Predator**

**Margaret A. Burt, Esq. 2009**

### **Matter of Anndrena 13 Ad3d 1164, 787 NYS2d 766 (4<sup>th</sup> Dept. 2004)**

A Cattaraugus County neglect finding was upheld by the Fourth Department. The respondent neglected his girlfriends's 15 year old daughter. He has prior convictions of sexual abuse of children. This child is at risk of sexual abuse because this respondent is in her home and is "unreconstructed sexual abuser who denies his guilt in the prior incidents" (citing **Kasey C. 1182 AD2d 1117 (4<sup>th</sup> Dept. 1992)**)

### **Matter of Alan FF., 27AD3d 800, 811 NYS2d 158 (3<sup>rd</sup> 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 Ahmad H., 46 AD3d 1357, 849 NYS2d 140 (4<sup>th</sup> Dept. 2007)**

The Fourth Department found a derivative neglect adjudication was appropriate regarding two children even though the original finding on which it was based was from 1989. Although 17 years had passed since the Onondaga County father had been found to have neglected other children in his care, this original finding had been based on sexual abuse of those children. There is no indication that the father's "proclivity for sexually abusing children" has changed. The father is a convicted sex offender and has never been in a treatment program despite much advice that he get treatment. He is on probation with a condition that he have no contact with children under 18 years of age and there is an order of protection that he stay away from another child that is in the custody of the respondent mother. This man has a fundamental defect in his understanding of parenthood and even 17 years between the Art. 10 petitions is not too remote in time.

**Matter of Selena J. \_\_AD3d\_\_, 825 NYS2d 749 (2<sup>nd</sup> Dept. 2006)**

The Second Department upheld Queens County Family Court's neglect adjudication against a mother. The mother allowed a cousin access to her home and her children even after a counselor informed her that the younger's child had revealed that the cousin had her buttocks. The mother choose not to believe the child. A few months later she learned that the cousin had sexually abused her 14 year old daughter and she still allowed him access to the home. A reasonable prudent parent would have taken steps to protect the children.

**Matter of Mary MM 38 AD3d 956, 831 NYS2d 273 (3<sup>rd</sup> Dept. 2007)**

The Third Department affirmed a finding of neglect regarding a Broome County mother. The mother's 8 year old daughter had been the victim of sexual abuse by a 13 year old boy in another state. DSS found a convicted sex offender at the family home on two occasions after specifically advising the mother on the first occasion that the offender, who was about to begin a prison sentence, should not be in the home. The DSS brought both a sexual abuse petition against the convicted offender who appeared to be residing in the home and a neglect petition against the mother. DSS was unable to prove the sex abuse but the lower court did make a finding of neglect against the mother. The Third Department agreed that the

mother was neglectful even though there was no proof that the current paramour had abused the child. The mother had a known history of associating with sex offenders. The child's father had been a convicted sex offender, she had dated a man convicted of indecent exposure and she was aware that this new boyfriend had plead guilty to sexual abuse in the first degree and was about to be incarcerated as a second felony offender. Allowing this man to be in the presence of her child is more than sufficient for find that she neglected the child. Further it was appropriate to place and keep the child in foster care given that the mother "has used what Family Court charitably termed "extremely poor judgment" in associating with known sex offenders". Until the mother and the child receive counseling and services, it is in the child's best interests to remain in foster care.

**Matter of Kayla F., 39 AD3d 938, 833 NYS2d 742 (3<sup>rd</sup> Dept. 2007)**

The Third Department reversed a sex abuse and neglect findings against two parents. An Otsego County father had been placed on probation due to a criminal conviction involving photographing girls undressing in the locker room at the high school where he worked. A condition of his probation was that he not be responsible for the care of any child although he was permitted to live at home with his two children. His 7 year old daughter was in special education and was diagnosed with anxiety and selective mutism and it was alleged that she told a school counselor that she had been alone with her father and that he had put his penis between her legs. The child told the caseworker and law enforcement that she had been alone with her father but did not repeat any allegations of sexual abuse. The older brother also alleged that he knew that his sister had been alone with the father and that he had been alone with the father on at least 2 occasions. Otsego County Family Court found that the father had abused the daughter and derivately neglected the son and that the mother had neglected both children by allowing them to be alone with the father. The Third Department found that the out of court statement by the child about sexual abuse was not sufficiently corroborated, There was no medical evidence offered and there was no expert witness called to interpret any behavior on the part of the child. Given the child's problems, there would need to be specific interpretation of any behaviors of the child. The child did not repeat the allegations to the caseworker or to law enforcement - although that in and of itself would not serve as corroboration as repetitious out of court statements by the same child are not enough. The court can take a strong negative inference from the father's lack of testimony but that cannot be used to corroborate the child's out of court statement. Since the child's out of court statements were not corroborated, abuse can not be adjudicated and neither

can the derivative neglect on the son as there was no underlying abuse for the basis. As to the mother, one parent permitting the child to have contact with the other parent in violation of an order of protection may be, but is not automatically, neglect. Here there was no order of protection and no court had ruled that this father was a danger to his own children. The probation terms specifically allowed him to live in the same house as the children. The mother testified that she had no reason to not trust him with his own children as she had never been aware of any sexual contact. She did know that he had been convicted and what the probation conditions were but leaving them alone with the father on a few occasions is not proof that she failed to exercise reasonable care.

**Matter of Christian F. 42 AD3d 716, 838 NYS2d 451 (3<sup>rd</sup> Dept. 2007)**

The Third Department affirmed Tompkins County Family Court's dismissal of neglect proceedings against a grandmother and her boyfriend. The boyfriend was a convicted sex offender and the grandmother knew of the conviction. She had custody of her young granddaughter. The petition against the boyfriend was appropriately dismissed as he had never been legally responsible for the child. It was also appropriate to dismiss the petition against the grandmother as she kept the boyfriend away from the child and in fact terminated her relationship with the boyfriend. (Note: the child was in the home for 15 months before she terminated the relationship) While exposure of a child to a known sex offender can constitute neglect, the grandmother's testimony that she did not allow contact between the boyfriend and the child was believed by the lower court.

**Matter of Krista LL, 46 AD3d 1209, 849 NYS2d 398 (3<sup>rd</sup> Dept. 2007)**

The Third Department agreed with Columbia County Family court that a mother had neglected her two children based on her response to her oldest child when the child disclosed that the stepfather was sexually abusing her. When the older girl told her mother of the sexual abuse, the mother's initial response was appropriate. She took the child to counseling and called the state police. Thereafter her conduct was neglectful. She refused to believe that the sexual abuse occurred even when her husband confessed that he had done it. She repeatedly accused the child of lying and breaking up the family. She used excessive corporal punishment on the girl when the girl refused to recant. The mother convinced the younger child that her older sister was lying. After the stepfather was released from jail, the mother had the older child go live with friends and then permitted the father to return to

the home where he was in contact with the younger child. This mother failed to provide any assistance to her daughters over this obvious emotional issue. The mother placed the two girls in imminent risk.

**Matter of Jessica P., 46 AD3d 1142, 848 NYS2d 412 (3<sup>rd</sup> Dept. 2007)**

A Columbia County mother neglected her three children by living with her mother and her mother's boyfriend when she had reason to be suspicious of the boyfriend's potential for sexual abuse. After the mother had left the grandmother's home, her oldest daughter revealed that the grandmother's boyfriend had been sexually abusing her for a long time. Both the mother and the grandmother were found to have neglected the children and the mother only appealed. The mother knew that another family member had accused the boyfriend of raping her when she was 17 years old. The mother also had been subjected to unwanted sexual advances by the boyfriend and admitted to being scared to be alone with him. "Most notably", on at least two occasions while living in the home with the boyfriend, the mother asked her daughter if "anything bad" was happening with the boyfriend. Given these concerns, it was neglect to continue to live in the home with the boyfriend, to allow him to be alone with the child and to allow him to bathe the child. The mother claimed that the out of court statements of the child were not corroborated. However, the mother was not charged with sexual abuse, only neglect, and she in fact conceded that the child had been sexually abused. The mother's neglect is based on her failure to take action to protect the child based on her own fears and suspicions about the boyfriend and therefore corroboration of the undisputed sexual acts are not required.

**Matter of Ian H., 42 AD3d 701, 840 NYS2d 202 (3<sup>rd</sup> Dept. 2007)**

In a case of first impression, the Third Department reviewed evidentiary issues in a neglect matter from Tioga County. The father in this matter lived with his wife and twin sons. The mother operated a day care in the home and although the father was not an employee of the day care, he did assist from time to time in the care of the day care children. The father was criminally charged with sexually touching two female day care children and DSS then filed an Art. 10 petition alleging that this behavior resulted in derivate neglect of his own children. The proof of the sexual abuse included the taped interview of a 7 year old who had attended the day care until she was about 5 and who disclosed sexual penetration as well as the out of court statements of a 3 year old who alleged touching when the father assisted

her in toileting. The out of court statements that the DSS used to establish the allegations were statements by children who themselves were not the subjects of the petition. The Third Department found that the term “child” in FCA 1046 (a)(iv) is not limited by its’ definition to only children named in the petition. The father also argued that the out of court statements were not adequately corroborated but the Third Department disagreed. The children’s statements cross corroborated each other and the spontaneous circumstances of the out of court statement of the 7 year old also corroborated. The 7 year old former day care child saw the TV report of the father being arrested and was told that he was being arrested for touching little girls and she spontaneously declared “just like he did to me” . The respondent also admitted that he had placed his hands in the vaginal area of the two current day care children under the guise of checking them for wetness and this also supported the older child’s statement that he had touched his penis to her vagina while in the bathroom. Lastly, the respondent failed to take the stand and this also added corroboration and allowed the court to draw a strong negative inference. The father argued that his request to have the 7 year old former day care child testify in court should not have been denied. The lower court acknowledged his obligation to balance the rights of the father against the emotional well being of the child and had all the parties brief the issue and concluded that the child’s age and emotional well being indicated that she should not be made to testify. The derivative neglect finding regarding his own two children was based in the neglect of the day care children as it showed his impaired level of judgment as to appropriate parenting and it was perpetuated on multiple victims when his own children were in the same home.

**Matter of Brian I., 51 AD3d 792, 858 NYS2d 286 (2<sup>nd</sup> Dept. 2008)**

The Second Department affirmed Orange County Family Court’s adjudication of neglect against a father and the placement of the children in foster care. The father had been criminally convicted of multiple sexual crimes against other children which demonstrated an impaired level of parental judgment as to create a substantial risk of harm to the children.

**Matter of Nassau County DSS v J.P., 21 Misc3d 1126(A) (Family Court, Nassau County 2008)**

Nassau County Family Court granted a summary judgment of derivative neglect against a father who had been criminally convicted of sexually abusing the 14 year old “best friend” of his own daughter. His three children were in the home when the acts were committed. The court ruled that it would hold a hearing to determine if the father was a person legally responsible for the victim child to determine if a finding of abuse could be made as to that child.

**Matter of Neithan CC., 56 AD3d 1000, 867 NYS2d 758 (3<sup>rd</sup> Dept. 2008)**

The Third Department agreed with Clinton County Family Court that a convicted sex offender neglected his live in girlfriend’s 7 year old child. The respondent had been convicted in 1998 of a felony due to his repeatedly subjecting his former girlfriend’s child to sexual abuse. He is classified as a level three sex offender. He did participate in sex offender treatment while incarcerated. He admitted that he was instructed not to have unsupervised contact with children and not to drink alcohol. The respondent has been alone with the subject child by his own admission, “numerous times” and he continues to consume alcohol.

**Matter of Bethanie AA., 55 AD3d 977, 866 NYS2d 372 (3<sup>rd</sup> Dept. 2008)**

A Columbia County stepfather neglected his 17 year old stepdaughter by having sex with her and by not preventing his father, the child’s step grandfather also having sex with her. The child had become pregnant at age 17 and an abuse and neglect petition was filed. The abuse allegation was withdrawn when the evidence indicated that the child was 17 and had “consented” to the sexual contact such that no penal law had been violated and therefore no sexual abuse could be proven. However, the stepfather had lived with the child since she was 4 years old and had treated her as a daughter, therefore his admission that he had, albeit consensual, intercourse with her and may have impregnated her constitutes behavior which is “grossly inappropriate”. Further he was aware that his own father had been seen in a sexual situation with the child when she was 15 years old and he had done nothing about it. He failed to satisfy his parental responsibilities to this child and did not provide her with proper supervision and guardianship. His judgment is significantly flawed and his behavior also resulted in a substantial risk of harm to his step son and his own daughter who also live in the house and who are therefore derivately neglected.

**Matter of Nassau County DSS v J.P., 21 Misc3d 1126(A) (Family Court, Nassau County 2008)**

Nassau County Family Court granted a summary judgment of derivative neglect against a father who had been criminally convicted of sexually abusing the 14 year old “best friend” of his own daughter. His three children were in the home when the acts were committed. The court ruled that it would hold a hearing to determine if the father was a person legally responsible for the victim child to determine if a finding of abuse could be made as to that child.

**Matter of Kirk V., 60 AD3d 4271, 874 NYS2d445(1<sup>st</sup> Dept. 2009)**

New York County Family Court properly dismissed a neglect petition ruling that the aid of the court was not necessary given that the older brother who had allegedly sexually abused the younger brother had not lived in or visited the family home for over four years before the decision was issued. ACS was unable to articulate what disposition that were seeking as against the parents given that the older brother had long since been out of the home.

**Matter of Patricia B., \_\_AD3d \_\_, \_\_NYS2d \_\_ dec’d 4/21/09 (2<sup>nd</sup> Dept. 2009)**

A Nassau County mother neglected her children as she was aware that one of her sons had sexually abused one of her other children but continued to allow that son to live in the home. The dispositional order of supervision with an order of protection that son who had abused a child could not have contact with the children except in therapeutic counseling was appropriate but could only issued for the duration of one year with a possibility of ongoing extensions.

**Matter of Kole HH., \_\_AD3d \_\_, 876 NYS2d 199 (3<sup>rd</sup> Dept. 2009)**

A Broome County father was arrested for sexually abusing the mother’s cousin’s 9 year old daughter who was on occasion in the home. Ultimately the criminal charges were dismissed. The father and mother were alleged in Family Court to have neglected their own two boys. The mother had consented to a neglect order but the father requested a hearing. The lower court found that the 9 year old had been sexually abused in the home but dismissed the petition regarding the two sons as the father had not been a person legally responsible for the 9 year old and therefore this could not form the basis of a derivative finding regarding the sons. The abused child testified in court, albeit unsworn, and her statements were supported by tapes on her interviews with caseworkers in which she provided graphic descriptions of the sexual activity that were clearly inappropriate for her age. The Third Department ruled that the proven abuse of the 9 year old could in fact provide the legal basis for a derivative finding even though the father had not been a person legally for the victimized child. The father’s behavior demonstrates

an impaired level of parental judgment to the extent that his own children are at risk. He lacks the capacity to care for and protect his own children.

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