

Legal Updates for CPS and Child Welfare October 2011

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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 OCTOBER 2011

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10/26/11 TELECONFERENCE
SELECTED CHILD WELFARE CASELAW

By: Margaret A. Burt, Esq. 9/20/11

REMOVALS and GENERAL ABUSE AND NEGLECT

Matter of Martha A., 75 AD3d 476 (1st Dept. 2010)

The First Department reversed New York County Family Court's FCA§ 1028 ruling that three of the mother's five children be returned to her pending an Art. 10 fact finding. The proof proffered at a second § 1028 hearing on an amended petition, filed after the court ordered the children home the first time, was that the mother had a history of not protecting her children from sexual abuse. The 12 year old girl had been sexually abused by a man in his late 20's that the mother had allowed to sleep overnight in the child's room. The 14 year old girl had been sexually abused by her stepfather. The 12 year old and the 10 year old girls had been sexually abused by a family friend. The 12 year old had been sexually active since she was 9 and had been videotaped performing a sexual act on a 14 year old boy. The man who was alleged to have had sex with the 12 year old, had also had sex with the oldest girl – now 19 – and had impregnated her on two occasions when she was 14. The 14 year old indicated that this same man had also touched her and asked for sex. The 14 year old told the mother that her 12 year old sister admitted the man had had sex with her when she was questioned about a “hickey” on her neck. The mother herself had also slept with this man although she knew that he had previously raped and impregnated her eldest daughter at age 14.

This man, who had sexual contact with the mother, two of the girls and attempted contact with a third, also allegedly had a sexually transmitted disease and the mother did not seek medical treatment for any of the children or report the incidents to the police. It was the 14 year old who disclosed what was going on to the police and ultimately caseworkers. The mother indicated she did not want the child's head to be “messed up” by reporting the incidents and that she did not want the children growing up to “hate men”. The mother claimed and that she had a

good relationship with and trusted this young man who had had sex with 2 of her underage daughter, impregnating one of them twice. The mother's behavior and impaired judgment places the children at imminent risk of harm and then should remain in care until a resolution of the Art. 10 petition.

Matter of Cristella B., 77 AD3d 654 (2nd Dept. 2010)

A Suffolk County AFC appealed the lower court's denial of her motion for an order that the DSS caseworkers not interview her child client on issues other than safety ones without 48 hours notice to her. Legal Aid in New York City filed an amicus brief. The attorney for the child argued that the county had taken an opposing position in a contested permanency hearing for the child and that letting the caseworker talk to the child in such a situation amounted to a denial of the child's right to counsel. The lower court disagreed as did the Second Department. Rules of Professional conduct only prevent attorneys – not caseworkers – from communicating with represented parties. The agency is entrusted with the child's care and this request by the child's attorney would be a significant restriction on the caseworker. DSS has a constitutional and statutory obligation to a foster child which is significantly different than an attorney or another party in a civil action. The DSS must conduct family assessments and service plans and include children in these discussions. The caseworker is required to have face to face contact with the child within time constraints to assess safety but also well being, permanency needs and to help the child with social, emotional and developmental needs. There is a mandate for the DSS to do more than simply assess immediate safety of a child in foster care and that requires communication with the child.

Matter of Erica B., 79 AD3d 425 (1st Dept. 2010)

A Bronx father was appropriately a respondent in an Art. 10 case even though he did not have custody of the children and in fact there was an order prohibiting his contact with the children. A parent does not have to have custody of a child to be neglectful. Here the father knew the mother was not properly caring for the children.

Matter of Natalie L., 79 AD3d 487 (1st Dept. 2010)

Bronx County Family Court granted a mother's FCA§ 1028 motion for the return of her child and ACS appealed and the First Department affirmed. ACS did not prove that the child would have been at risk to her life or health if she was returned

to the mother. Any risk was eliminated by the lower court's temporary order that the mother and child live in a domestic violence shelter away from the father while being provided services and with ACS making weekly visits. The harm that would be inflicted on the child by any removal from her mother was appropriately weighed in the lower court's decision.

Matter of Jermaine H., 79 AD3d 1720 (4th Dept. 2010)

The Fourth Department reversed a Monroe County Family Court's order that DHHS certify a caregiver as an emergency foster home. The child had been removed from the parent and DHHS supported the child being placed in the home of a family friend who was also caring for half siblings of the child. The AFC moved for and the court ordered that DHHS certify the caregiver as an emergency foster home so that she would receive an immediate foster care subsidy for the child. The lower court ruled that FCA § 1017 (2)(a)(iii) gave the court the power to order DHHS to make an eligible person an emergency foster home. The Fourth Department reversed, ruling that 1017, when read in totality, did not give the court authority to order DHHS to make someone an emergency foster home. Neither the statute nor 18 NYCRR 443.7(a) require that DHHS must certify a home on an emergency basis but only require that DHHS certify a foster home in the person is qualified. The court "impermissibly encroached upon the powers granted by section 398 of the Social Services Law" to local districts. Family Court does not have the power to issue an order directing executive agencies to take specific action which is discretionary to them. The child's attorney supported the lower court decision and Legal Aid of Buffalo had also filed an amicus brief.

Matter of Lucinda R., 85 AD3d 78 (2nd Dept. 2011)

In a case that has the NYS child welfare world buzzing, the Second Department reversed Queens County Family Court and ruled that a respondent mother was entitled to a FCA § 1028 hearing when the court ordered the children to be placed with a non respondent father while the Art. 10 petition was pending. The Appellate Court found that the lower court's placing of the child with the non-respondent parent constituted a "removal" by the court even though the children were not placed in the care of ACS. The children, 6, 4 and 9 months were wandering NYC streets alone in the early morning hours in February when a police officer spotted them. ACS placed the children in foster care on an emergency basis at 3:30AM that morning and then filed a neglect petition against the custodial mother. The court "paroled" the children to the care of the non-respondent father who lived with his mother, the children's grandmother. (The decision does not

mention, but it has been indicated that the father had also filed an Art. 6 petition) Four months later, the mother orally moved for a FCA §1028 hearing, arguing that the children could now be safely returned to her care while the Art. 10 was pending. The lower court ruled that she was not entitled to a §1028 – and the required the 3 day time period - as the children were not “removed” given that they had not been put in foster care. The AFC moved for a FCA §1061 hearing to modify the court’s order regarding the placement with the non respondent father but that hearing was adjourned repeatedly, for over a year and a half and was not ultimately held until the day of the oral argument of this appeal! While the appeal was pending, the lower court did finally release the children to the mother’s care, some 20 months after the children were removed and 16 months after the mother had asked for the §1028.

The issue is one likely to occur again so despite the children having been returned, the matter should not be ruled moot. The Appellate Court analyzed the word “removal” as it is used in the various statutes in the child welfare area and determined that it does not always refer only to a placement in foster care. It can refer to governmental interference such as when a child is taken from their home by local government or by courts. Since the court ordered the children to live with the father against the mother’s wishes, it was in fact a “removal” from the mother that entitled the mother to a FCA § 1028 hearing within 3 days of her request.

(NOTE: The troubling issue that has everyone talking is how what would normally be a custodial best interests analysis between two parents now becomes an “imminent risk” standard that benefits the respondent parent. The non-respondent parent who does the “right” thing by seeking custody upon learning of accusations of neglect will now have a higher burden of proof if the custodial parent opposes. Why should the respondent parent maintain custody if there isn’t proof of imminent risk but there is the requisite best interest that would normally provide the other parent with Art. 6 custody?)

Matter of Leroy R. 84 AD3d 485 (1st Dept. 2011)

The First Department reversed a Bronx County Family Court’s decision in a FCA §1028 hearing to release a child to the respondent father. The lower court had ruled that although the child was at imminent risk if released to the mother , there was not such risk if released to the father provided there was a no-contact order regarding the mother. The lower court had ordered that ACS work with the father to make appropriate arrangements to have the child cared for without contact with

the mother. The First Department strongly disagreed, as there was “disturbing testimony” of the father’s behavior. The father told the caseworker by phone that she was a “bitch” and that he would “fucking kill” her if she took his child. He told hospital personnel that he wanted to kill everyone at the hospital and everyone in the world. The hospital social worker was so afraid that she locked herself in her office. On the day of the hearing, the father was heard at the courthouse saying that he would “kill all the motherfuckers” associated with taking his son and that he would “get” all the workers and the lawyers on the case. He specifically said that he would “gut the pretty one like a fish” - referring to the ACS caseworker. The father also told the mother not to speak to the caseworkers and not to move off the bench while they waited for the case to be called.

This behavior of the father “raises questions” about how the workers would be able to work with the father to make “appropriate arrangements” without themselves being at risk. His behavior was “hostile and hateful” and suggests that a placement with the father may be as much of an imminent risk as placement with the mother. Any doubt concerning the father’s conduct must be resolved in favor of protection of the child.

Camreta v Greene dec’d 5/26/11 (US Supreme Court 2011)

In a disappointing “non-decision”, the US Supreme Court , did not rule on the merits of an appeal by county officials from the 9th Circuit. A CPS worker and county deputy sheriff appealed from the 9th Circuit decision that their interview of a 9 year old girl at her school in connection with allegations of sexual abuse violated her 4th amendment rights regarding unlawful seizure when the school interview was conducted without a warrant, parental consent or exigent circumstances. Although there were no money damages awarded as the lower court had found the officials immune due to the fact that the prior law in this area had not been clear, the lower court indicated that it now clearly ruling so that officials would be on notice for the future that such interviews of children were in violation of the constitution. Since this decision had far reaching impact on the child welfare system, most certainly in the 9th Circuit, the officials appealed to the US Supreme Court. Some forty states (not NYS) joined in the plaintiffs brief. The child did not cross petition but there were many amicus briefs supporting the 9th Circuit decision as well. The Court made no ruling on the merits, first commenting that the officials had been found immune and therefore were not harmed and as such, generally most such appeals are not heard, In any event, the Court found that this case is now moot as the child plaintiff not longer has any stake in the lower court’s holding. She is soon to be 18 and she needs no protection from any

interviewing practices of the officials. There is no controversy to review as the behavior complained about will not again occur to her. The Court did vacate the 9th Circuit decision since the officials were in effect denied an opportunity to have the case reviewed which will now as the Court indicated “clear the path for re-litigation”. Hold tight – of course this issue will now have to come back again!

Matter of Alan C., 85 AD3d 912 (2nd Dept. 2011)

The Second Department reversed Kings County Family’s Court’s denial of a respondent father’s FCA §1028 request for a return of a child. The Second Department indicated that the lower court had found that the agency had not made reasonable efforts to prevent the placement in that the agency did not explain offered services to the father and then held that it against him when he refused the services. Further, the lower court also based its refusal to return the child on bruises the child had sustained. However the father had explained that the bruises were accidental and this was corroborated by a school guidance counselor who testified that the child engaged in aggressive play fighting with his friends. There was no proof that this explanation was not true. Lastly, ACS had waited 6 weeks after observing the bruises on the child before claiming imminent risk and there had been no further injuries in the meantime. ACS failed to show that this child was in imminent danger.

Matter of Alexandria X., 80 AD3d 1096 (3rd Dept. 2011)

A Schoharie respondent was the father of three children and the mother had another child from a prior relationship. The mother’s child suffered a serious injury to his eye as a result of a chemical burn and also had a groin injury. The mother had been found to have abused the child due to the groin injury and the lower court also found that the father had abused the boy and derivatively neglected his own three children. He appealed arguing that he was not a “person legally responsible” as it related to the mother’s child. The Third Department affirmed the lower court’s ruling. While the statute does not include people who have fleeting care of a child such as an overnight visitor or a supervisor of a play date, it does encompass paramours and other nonparents who perform childcare duties that are parental. Initially the mother lied about her relationship with the father and claimed they did not have a romantic relationship. However, the mother was pregnant with the respondent’s child when this child was injured. He, by his own admission, saw the child and the mother daily, took the boy shopping and treated him like a son. He was the person who put the child to bed the night of the child’s eye was injured and he claimed that the child had been injured by Vick’s medicine that he had applied to a machine. The father further claimed he tried to wash the

child's eye with water and he drove the child and the mother to the hospital for treatment. There was evidence that he had been alone with the child when the injury occurred. All of these behaviors demonstrate that he was acting as the functional equivalent of a parent in a familial setting and therefore he was a person legally responsible as per FCA §1012 (g).

Matter of Robert B.H., 81 AD3d 940 and 82 AD3d 1221 (2nd Dept. 2011)

Kings County Family Court properly vacated an order of protection issued in an Article 10 matter on behalf of the agency caseworkers who had been threatened by the respondent father. Under FCA § 1056, caseworkers are not persons in whose favor an order of protection can be issued and therefore a court cannot find a respondent in violation of an order which was void ab inito.

Matter of Sheena B., 83 AD3d 1056 (2nd Dept. 2011)

ACS brought a neglect proceeding regarding a 17 year old girl, alleging that her father refused to allow the child to return to the home. While the matter was pending, the child was placed in a foster home for pregnant teens. She then gave birth and she and her baby were placed in a foster care mother and baby program. She then turned 18 and ACS made a motion under CPLR §3217 (b) to discontinue the proceeding arguing that the aid of the court was no longer needed given her age. The AFC opposed the motion arguing that the child wanted to stay in foster care. Kings County Family Court granted the motion and the AFC sought and obtained a stay pending their appeal. The Second Department reversed ruling that the lower court continued to have jurisdiction over any neglect that had occurred before she turned 18 even after she had turned 18. Further that the court can, with a youth's consent, keep a child in foster care until age 21 and that by dismissing the petition, the court was not assessing if the youth needed such an order.

Matter of Gabriella UU., 83 AD3d 1306 (3rd Dept. 2011)

While under an extended order of supervision from an Art. 10 disposition from Otsego County Family Court. The mother, father and four children relocated to Delaware County. Otsego County DSS then filed another Art. 10 petition and the children were placed in care. The mother moved to transfer the case to Delaware County and the Otsego County Family Court denied the transfer, ultimately adjudicated neglect and kept the children in care. The mother appealed and the Third Department reversed, ruling that the transfer should have been granted as all of the family were residents of Delaware County. Under FCA §1015(a) a neglect

petition is properly filed in the county where the child or the custodian reside. The children were stayed in care and the matter was remitted to Delaware County Family Court.

Matter of Tiana G., 84 AD3d 1375 (2nd Dept. 2011)

On appeal from the Suffolk County Family Court, the Second Department concurred that Family Court need not adjourn an Art. 10 proceeding because a criminal court proceeding is pending as well. Further the District Attorney is not a necessary party to the family court proceeding.

GENERAL NEGLECT

Matter of Joshua Hezekiah B., 77 AD3d 441 (1st Dept. 2010)

Even though the New York County Family Court had subsequently vacated the order of disposition in a neglect matter, the First Department did not find the issue of the neglect adjudication moot. The custodian of the child was a maternal grandfather who neglected the child by failing to feed him properly such that the child was diagnosed failure to thrive. The grandfather also failed to obtain medical treatment for the infant's condition. Although the lower court had erred by failing to qualify the respondent's pediatrician witness as an expert, this was harmless error as the witness was not competent given that he had only examined the child after the filing of the petition.

Matter of Christy C., 77 AD3d 563 (1st Dept. 2010)

A Bronx father neglected his daughter by failing to protect the child from the mother who was mentally ill with substance abuse problems that caused her to behave erratically. The agency's argument that the appeal should be dismissed as it is not a final order since the court's order is ongoing through permanency hearings is not correct as FCA§ 1112(a) allows an appeal as of right from any intermediate or final order in an Art. 10 matter.

Matter of Kaleb U., 77 AD3d 1097 (3rd Dept. 2010)

Columbia County Family Court was affirmed by the Third Department in its decision that a mother and her fiancé had neglected her son. The child, who has leukemia, was placed in the care of his father and visitation for the mother was supervised. The finding was based on an evening where the mother was intoxicated and engaged in bizarre behavior in a moving car. With the child in the

back seat watching, the mother hung out of the car window, singing and yelling and she hit her fiancé in the face when he tried to restrain her. The child was upset by this. Later the mother punched the fiancé and gave him a black eye and a bloody nose and although the child did not witness this, he was aware of it and frightened by his mother's behavior. On another occasion the child was present when the mother and the fiancé were arguing and began to choke each other in the child's presence. The child attempted to intervene and told the fiancé to "let go of my mommy". The child made out of court statements that indicated that the mother had aggressive behaviors, often after drinking. She had a tumultuous relationship with the fiancé. Given the child's special vulnerability, the mother did not provide a minimum degree of care.

Matter of Tomasa Z., 77 AD3d 1102 (3rd Dept. 2010)

The Third Department affirmed that two Clinton County parents neglected their newborn baby . The mother is mildly mentally retarded and has a seizure disorder which causes her to become unaware of her surroundings if she has a seizure. She has difficulty meeting her own basic needs including personal hygiene, taking meds, preparing food and basic housekeeping. There have been arguments and domestic violence between her and the child's father. Although the mother has been cooperative in parenting programs, she herself admitted that she was not ready to take care of an infant and did not know what to do to care for her. Her own testimony revealed the severely limited understanding she had of basic parenting concepts. The father admitted to domestic violence and did not seem to appreciate the limitations the seizure disorder of the mother's may have – for example he said he would "catch" the baby if the mother had a seizure. He intended to work out of the home and leave the baby with the mother, believing that the mother was capable to care for the child alone. He did not think the child needed to be in a day care arrangement and showed a lack of insight into the limitations of the mother.

Matter of Nikita W., 77 AD3d 1209 (3rd Dept. 2010)

A Columbia County father neglected his two daughters based on his sexual fondling of one of their friends during a sleep over. The 10 year old girl was sleeping in the bed with one of the daughters and the child testified in open court that the father had untied her top and fondled her breasts and attempted to put his hands in her pants. The child's school counselor, a CPS worker and a validation expert all testified to out of court statements that the girl made as well. Although the Third Department pointed out that the credible testimony of the child was enough to have made the finding that she had been fondled and that therefore the

respondent's own daughters were neglected, the appeal focused on the testimony of the validator.

The validator in this matter gave an opinion that the child's "spontaneous, coherent, logical, detailed and contextually embedded" disclosure was "consistent with accounts of known sexual abuse victims". The validator used the Yuille Step Wise Protocol to interview the child. The child gave detailed descriptions of what she was wearing, body positions, how the touching occurred and provided gestures to describe the incident – all indicative of the child having actually experienced the abuse. Further the child testified that she pretended she was asleep while it happened which is a "typical dynamic" for sex abuse victims. Although the validator used the term "credibility" she explained that her method was not a credibility determination but that she used that term loosely in talking about the child's statements.

Matter of Alexandra J., 77 AD3d 1299 (4th Dept. 2010)

An Erie County Family Court finding of neglect regarding a mother was affirmed on appeal. The mother attempted suicide by taking an overdose of prescription medication while her children were on a weekend visit to their father's. The mother was unconscious when the children returned from the visit and they could not wake her the next morning when they needed to be taken to school. When the mother did awake later that morning, she was unable to drive them to school and school officials came to the home to get the children. The mother was admitted to a psychiatric ward for five days. The mother's "voluntarily-induced drug stupor" resulted in the children not being properly supervised and neglected.

Matter of Brianna R., 78 AD3d 437 (1st Dept. 2010)

Bronx County Family Court ruled that a mother had derivatively neglected her baby based on a neglect finding from 2007 where the mother had left a 9 month old unsupervised in a bathtub with running water and that infant had drowned. The First Department agreed that the prior neglect was not too remote in time as it had been adjudicated less than 2 years before this petition was filed. The mother's lack of judgment that had resulted in the death of her 9 month old created a substantial risk of harm to this new baby and the mother did not prove that her judgment had improved. Although the court also admitted evidence about two prior neglect findings from 2005 and 2006, this was not error; or if so was harmless as the court specifically based the derivative finding on the 2007 drowning. The new baby was placed in foster care.

The mother had completed parenting skills and bereavement counseling and submitted to random drug testing but would not exclude the father from the home who refused to participate in a parenting course. The fact that she now claimed to be willing to separate from the father was properly excluded in the fact finding as she took this position after the filing of the petition. Further, any error in the lower court refusing into evidence a letter regarding a mental health evaluation that mother's lawyer offered, was harmless as the mother had not been ordered to seek such an evaluation and her having had such an evaluation or not was not considered by the court in its fact finding.

Matter of Dave D., 78 AD3d 829 (2nd Dept. 2010)

The Second Department affirmed Kings County Family Court's determination that a mother had neglected her son. She should have known that her son was in imminent danger of being sexually abused and did not act to protect the child. The child made out of court statements that his mother was aware of the abuse and these statements were corroborated by the mother's own admissions.

Matter of Anastasia C. 78 AD3d 1578 (4th Dept. 2010)

The Fourth Department modified a neglect finding on a Cattaraugus County mother as to her three children. The Appellate Court concurred that there was adequate proof that the mother had failed to protect the children from the father. The child's out of court statements that she was sexually abused by her father were corroborated by the testimony of the doctor who said the child's physical symptoms were consistent with sexual abuse. Further a psychologist testified that the statements the child had made in the interview with the caseworker, which were videotaped, were credible. The videotape was appropriately admitted into evidence based on the testimony of the interviewing caseworker. The mother neglected the children based on her failure to take any action regarding the abuse by the father.

The Fourth Department did find that the other cause of action in neglect was not proven. These other allegations were that the children were attending school in dirty and inappropriate clothing and that the older boy was not being given medication as prescribed. The Appellate Court found that there was no evidence offered concerning the financial status of the mother and her ability to provide adequate clothing and there was insufficient evidence of the older child's need for medication and the appropriate dosage of any medication.

Matter of Lah De W., 78 AD3d 523 (1st Dept. 2010)

A New York County mother appealed the finding of neglect made against her but the First Department affirmed the adjudication. The mother had five children aged 1 to 14. The 14 year old boy was speech impaired and developmentally disabled. She and the children lived in a homeless shelter where she left the children unattended on several occasions. She also allowed the children to ride the subway at night without adult supervision, failed to bring them to several medical appointments and continued to use marijuana, even after the petition had been filed. There was a dissent by one of the Justices who agreed with the AFC that the oldest child should not have been adjudicated as neglected. The mother having allowed him and the 11 year old to ride the subway alone at night was poor judgment but not neglect. The 14 year old was in his grade level at school, was well cared for and healthy and had ridden the subway alone on prior occasions. He was able to communicate with adults and there were only brief periods in which the younger children were left in his care.

Matter of Christopher R., 78 AD3d 523 (1st Dept. 2010)

New York County Family Court was affirmed on a neglect adjudication by the First Department. The mother had a long history of mental illness and would not seek treatment. She had been hospitalized on multiple occasions and testified that she would not take medication or treatment even if that meant that the children could not be returned to her. She had kept one child out of school for a month before she received approval to do homeschooling. The lower court consolidated the dispositional hearing with a custody petition filed by the non respondent father and properly gave the father custody. The mother had not addressed her mental health conditions and the children were doing well in the care of the father and were properly attending school.

Matter of Jonathan S., 79 AD3d 539 (1st Dept. 2010)

The First Department agreed that a New York County mother had neglected her children based on her mental illness. The mother had a recurrent major depressive disorder and had increasing and frequent thoughts of killing herself and of drowning the children in a bathtub. There was also a history of numerous incidents domestic violence in the presence of the children. Expert testimony was not needed to show that her mental illness had affected her ability to care for the children.

Matter of Noah Jeremiah J., 81 AD3d 37 (1st Dept. 2010)

In a lengthy opinion with a dissent, the First Department reviewed a New York County Family Court neglect finding regarding a newborn. The majority affirmed the finding agreeing that the premature HIV positive infant was at imminent risk of neglect if placed into the mother's care. The mother had a history of mental illness which had resulted in a finding of neglect a year earlier and the placement of her two older children in foster care. The mother has bipolar mood disorder and has on occasion missed medication. The majority opinion focused on the mother's greater need for medication since the delivery of the baby and that even one missed dose could leave her less capable of caring for a baby, particularly a premature baby who needs medication for his HIV status. The dissent noted that the mother was very cooperative with her mental health treatment, had not tested positive for illegal drugs, was polite and used proper hygiene. She kept appointments and informed her therapists if there are issues with her medications. The dissent opined that there was no real proof that the mother could not care for the infant with services and assistance in place.

Matter of Anthony TT., 80 AD3d 901 (3rd Dept. 2011)

A St. Lawrence County father neglected his two sons due to the father's mental illness resulting in the children being placed with the mother and the father being limited to one hour supervised visitation a week. The father's mental illness resulted in him believing that the mother and the government were conspiring to track him and had implanted devices in his body such as infrared in his eyes. He engaged in an "extensive tirade" about this in the court room. He had convinced the children of these hallucinations and the children were showing signs of mental illness and hostility toward the mother for her supposed actions. The father had threatened to kill the mother in front of the children and the police. He told the caseworker that he would go after the mother and that he wanted her off the face of the earth. He told the caseworker that he lied to his doctors and did not take his medications.

Matter of Jose Luis T., 81 AD3d 406 (1st Dept. 2011)

The First Department reversed a New York County neglect finding. The baby had suffered a "single nondisplaced oblique fine-line fracture" of his femur. Although this is a res ipsa injury, rebuttal evidence was offered that the injury could have occurred accidentally when the mother bent down to pick up garbage while the infant was in a "snuggly" on her chest. Further any injury could have been exacerbated when later that day the pediatrician performed a "Barlow-Ortolani" procedure during a well baby visit.

Matter of Dontay B., 81 AD3d 539 (1st Dept. 2011)

The First Department reversed a neglect finding from New York County Family Court and dismissed the petition against the mother. The child's father struck the child in the face when the mother was at work. There was no proof that the father had ever hit or harmed the child before. ACS alleged that the mother knew the father was violent in that there were prior domestic incident reports. However, these reports were only unsworn hearsay allegations. Further the mother was not neglectful for failing to leave the father after the incident. Although the father was later convicted of endangering the welfare of a child based on this prior incident, there was no serious physical injury and the child did not need medical treatment. The incident was mild and not part of a pattern. It was a single incident of excessive corporal punishment and the mother therefore was not neglectful for failing to remove the child from the home after it happened. The agency itself allowed the child to remain in the mother's care while the case was pending – albeit with a court order that the father not be present in the home.

Matter of Deshawn D.O., 81 AD3d 961 (2nd Dept. 2011)

A Richmond County father and stepmother were adjudicated to have neglected the stepfather's son. They used excessive corporal punishment on him and punished him by restricting his food intake and making him sleep on the floor. They also engaged in domestic violence in front of him. The child ran away numerous times and was afraid to return home. He indicated that he feared he would hurt himself or someone else if he was made to return. The lower court properly allowed the child to testify outside of the presence of the respondents, given the court's conclusion that the child would suffer emotional trauma if he was forced to testify in front of them. He did testify in front of all the attorneys and was cross examined.

Matter of Joshua UU., 81 AD3d 1096 (3rd Dept. 2011)

A Columbia County respondent lived with his wife and two children and the wife's seven other children. They were being supervised under an ACD due to the deplorable conditions in the home when the 14 year old daughter of the mother alleged that the mother's boyfriend had inappropriately touched her some three years earlier. The lower court found both parents to be neglectful. The Third

Department affirmed the neglect adjudication, ruling that the child's out of court statements about the inappropriate touching were corroborated. The child had told an aunt that the respondent had touched her breasts in the past and the aunt told the mother of this. The mother did ask the respondent if he had done this and told him that she would have nothing to do with him if he had, he replied that this "would be fine with him" without denying what had occurred. The child told the caseworker that in the fall some two years earlier, the respondent had touched her breasts outside of her clothes and tried to touch her crotch outside her clothes but she crossed her legs and told him "no". The mother testified that the child first told her the boyfriend had not touched her, but then the child told her therapist that he had and recently had also told her mother that it did occur. Some degree of corroboration can be found in the consistency of the child's statements although repetition to several persons does not in and of itself provide sufficient corroboration. The out of court statements were also corroborated by the respondent's prior criminal convictions for the rape of his own daughter from another relationship, for which he served three years in prison, as well as his lack of denial when confronted by the mother. Further the conditions in the home also supported a neglect finding. The home was not safe for the younger children as pencils and scissors were left where the children crawled. The home was dirty and had a foul odor and the children were often in dirty clothes and had dirty faces. There was partially eaten food left on the railings outside of the home.

Matter of Thomas M., 81 AD3d 1108 (3rd Dept. 2011)

The Third Department affirmed Otsego County Family Court's adjudication of neglect against the mother of a teenage boy. Both parents had been found to have neglected the child but only the mother appealed. In response to a CPS report, the home was found to be in total disarray, unsafe and extremely cluttered and the father was intoxicated. The home was so bad that the mother was told she would need to relocate to a shelter with the boy. The child also indicated that twice his father had put his hands around the child's neck in a choking fashion and that his mother knew of this but had not done anything to protect him despite the fact that the father had also been violent to the mother. The father was told to stay away from the mother, child and the apartment but the mother continued to speak to the father and allowed the father to come back for at least one night which visibly upset the boy. The mother had told a caseworker that if the father came back to live with her, she would find the boy somewhere else to live. The mother knew the father had an alcohol problem and was violent to her but she minimized his conduct in putting his hands on the child's throat by saying that the father had not in fact choked the child.

Matter of Telsa Z., 81 AD3d 1130 (3rd Dept. 2011)

On its third review of this Clinton County Family, the Third Department found that the mother had neglected the children by failing to protect them from the father's sexual abuse. The Appellate Court had previously remitted this matter after the lower court had removed the children from the non-respondent mother during the dispositional hearing on the father's sexual abuse petition. Since the prior petition had only been against the father, the Appellate Court had found that the lower court did not provide the then non-respondent mother with due process. The Appellate Court did stay the placement of the children in foster care and upon the remitter, the lower court ordered a FCA §1034 investigation against the mother which resulted in this neglect petition against her. The Third Department added a detailed foot note to this decision to explain more fully this prior ruling, stating that a Family Court does have authority to place children who have found to be neglected or abused in foster care even as against a non-respondent custodial parent but there must be due process – including a hearing – for the non-respondent parent. The Appellate Court repeated as per its prior ruling that the lower court erred in using FCA §1035 to remove the children from a non-respondent parent, effectively finding her to have neglected the children when there had not been an actual neglect petition filed against her.

When the case was then remanded, the Family Court found that she had neglected the children and the Third Department now affirmed that adjudication. The older sister – who had been 8 years old at the time – disclosed to several adults that her father was sexually abusing her. She also indicated that her mother had “peeked” in the bedroom door and the window on several occasions while the father was actually committing the abuse. The mother's response to seeing what he was doing to her daughter had been to go into her own bedroom and pretend to be asleep. The younger sister corroborated these out of court statements of her older sister by acknowledging that the mother would “peek” when the 8 year old was being abused. The little girl also said her mother would often sleep on a couch between the parents' bedroom and the children's and that she did this to see if the father was going into the girl's bedroom. Also the younger daughter said that her mother had told the girls to sleep with a family dog to protect them from the father. The mother exhibited no surprise when authorities informed her that the this child had disclosed the sexual abuse. The 8 year old also disclosed that her parents told her she was “bad” and that they would go to jail if she told anyone about what the father was doing. The child was fearful of going to jail herself. The mother had previously been found to have neglected two older daughters when she had allowed another earlier boyfriend to continue to have access to them knowing that he had sexually abused one of them. She had violated a court order regarding

those older daughters that had ordered her to keep the boyfriend away from them. She had eventually surrendered her rights to these girls. She had also been found to have neglected yet another daughter who was in foster care at the time of this petition.

Matter of Paige K., 81 AD3d 1284 (4th Dept. 2011)

The Fourth Department affirmed a derivative neglect adjudication regarding a Oswego County man as it related to his girlfriend's daughter. The adjudication was by summary judgment based on his having been found to have abused the girlfriend's son by murdering that child. Given these circumstances, summary judgment was appropriate - there were no triable issues of fact.

Matter of Thomas C., 81 AD3d 1301 (4th Dept. 2011)

A Onondaga County mother neglected her children by making false accusations of neglect against their father and involving the children in her "antagonistic conduct toward the father." The mental or emotional condition of the children was in imminent danger of being impaired by her behavior.

Matter of Kennya S., 82 AD3d 577 (1st Dept. 2011)

A New York County neglect finding against a mother was reversed on appeal. The First Department ruled that the mother having lied and taken responsibility for hitting the child when the father had done it, did support a finding of neglect against the mother. The child was not in imminent danger from the mother's false statement.

Matter of Charlie S., 82 AD3d 1248 (2nd Dept. 2011)

The Second Department affirmed Queens County Family Court's neglect adjudication against a father. The father did not seek mental health care for his son even though he was aware of the child's behavioral problems at elementary school – including inappropriate sexual contact with other boys. The father had been advised by the school principal, the guidance counselor and the ACS caseworker that the child needed counseling but he failed to arrange for it. Further the child had disclosed to the caseworker and the school principal that his father had touched his buttocks inappropriately. The father failed to take the stand in his own defense and a negative inference can be drawn. Lastly, the fact that the child testified and

recanted his claims of the inappropriate touching did not require that the lower court dismiss the petition.

Matter of Tyler MM., 82 AD3d 1374 (3rd Dept. 2011)

An Otsego County mother and her 19 year old boyfriend neglected her children. The mother had 2 sets of twins – 16 year old boys and 14 year old girls and a younger son. Another younger son lived with his father. The twins and the mother lived with the 19 year old boyfriend who was not the father of any of the children. The boyfriend was a person legally responsible despite the fact that he was only a few years older than the older twins. He had lived in the home for over a year, he was often alone with the children and he cooked, cleaned and helped the children get ready for school. The children were neglected by both of the respondents. The boyfriend smoked marijuana with at least one of the children. Three of the children smoked marijuana in the home – there was a strong smell of marijuana in the home, particularly in one of the children’s bedrooms. The caseworker observed a partially smoked marijuana cigarette. There were empty beer cases scattered all over the house, including in one of the older twin’s rooms. The mother acknowledged that the children were probably drinking beer and smoking marijuana while she was at work and had told the children’s father that there was nothing she could do to stop the teenagers. The older children made out of court statements to their father that they were using marijuana and drinking beer at the mother’s house. The mother also admitted that she was letting one of the 14 year old girls sleep in her bed with a boyfriend and that it was okay because the 14 year old had said they were not having sex. The lower court appropriately placed the respondents and the teens under supervision of DSS and limited the presence of the youngest child in the home to daylight hours and when an adult was present. There was no abuse of discretion in the lower court’s ruling that it was not relevant line of questioning on why a PINs petition had not been filed instead of a neglect petition.

Matter of Alexander M., 83 AD3d 1400 (4th Dept. 2011)

The Fourth Department reversed Oneida County Family Court’s determination that a father had neglected his child based on telephone calls to hospital staff where he threatened to remove the child from the hospital. The child was not injured or in imminent danger of injury based on these phone calls to the hospital. However, the Fourth Department did affirm that the father had neglected his son by failing to address his, the father’s, long term drug abuse. There were prior orders in this matter had that the court took judicial notice of regarding the father’s drug abuse and his long standing inability to deal with this problem.

Matter of Afton C., 17 NY3d 1 (2011)

The Court of Appeals concurred with the Appellate Division that Dutchess County Family Court erred in finding that a father has neglected his five children, all aged under 14, where he had pled guilty to Rape in the Second Degree for having had sex with a child under the age of 15 and also had pled to Patronizing a Prostitute under the age of 17. Further, the mother did not neglect the children by failing to remove the children from the home or by failing to inquire of the father the circumstances of the criminal convictions. The father had served one year in jail and was now listed as a level three sex offender. He had not been ordered to obtain any sexual abuse counseling. The Court of Appeals ruled that there is no presumption that an untreated sex offender, even where the victim was a child, residing in the home with his own children is neglectful, without other proof of the current risk to his children. Even the fact that the father would not discuss the allegations or exhibit insight into his behavior was not sufficient – nor was his invocation of the Fifth Amendment and his evasive answers in the Family Court proceeding sufficient. The Court did comment that perhaps proof that the father needed treatment, or had been ordered to obtain treatment and had not, might have established the link of risk. Further, they commented that a neglect finding might be appropriate where the conviction stemmed from the sexual abuse of unrelated children who were in the care of the parent. The concurring opinion commented that the petitions may well be proven in such situations if the facts of the conviction or the reasons for his designation as a level three sex offender were more clearly introduced in the Family Court action.

Matter of Chassidy CC., 84 AD3d 1443 (3rd Dept. 2011)

A Rensselaer County Family Court's neglect adjudication of a respondent was affirmed. The respondent was on probation and was required to obtain treatment for substance abuse and remain sober. However he continued to use marijuana and alcohol and was found to have violated his probation. He repeatedly left his daughter unsupervised and alone in a room in the homeless shelter the family lived in at the time. The child was placed in the custody of a grandmother.

Matter of Sophia M.G.K., 84 AD3d 1746 (4th Dept. 2011)

A newborn Monroe County child was derivately neglected given that she was born just 2 months after the court had adjudicated the mother to have neglected her other children. The mother had yet to address the mental health issues that had resulted in the older children's placement. The court did however err in ordering

the mother to comply with treatment recommendations from a report not entered into evidence. The court did not err in refusing a request for an adjournment of the hearing so that the mother and an unspecified witness could testify as the defense attorney offered no specific reason why the mother was not present and why any other witness had not been subpoenaed in advance.

Matter of Jamoneisha M., 84 AD3d 650 (1st Dept. 2011)

The First Department affirmed the Bronx County Family Court's finding of neglect against a mother. The mother left her child with an inadequate caretaker and did not provide any contact information. The child told the caseworker that her mother had burned to the child's arm – although not intentionally – and this was corroborated by the report to the hotline. The mother did not obtain proper treatment for her own mental health issues. This was proven per admitted hospital records that had post dated the petition by a few days but demonstrated her failure to seek needed treatment before the petition. The mother had also been found previously to have neglected another child and this also tended to show that her inappropriate, neglectful behavior was ongoing.

Matter of Ariel B., 85 AD3d 1224 (3rd Dept. 2011)

A Broome County mother neglected her two children. The mother was mentally ill and had stopped taking her meds. She was erratic and violent. She bit her older child on the arm, leaving a mark that was still visible the next day. In another situation she put her hands on the child's throat, scaring the child. In response to the children leaving a messy room, she threw a table down the stairs into the area where the children were located. She had fits of anger in front of the children on a regular basis and she perpetuated numerous acts of domestic violence, many in front of the children. The mother did not testify at the hearing and so an adverse inference can be drawn as well.

Matter of Jamarra S., 85 AD3d 803 (2nd Dept. 2011)

A Suffolk County newborn was derivately neglected when he was born just 8 months after the court had terminated his mother's rights to a sibling. The subject child was born 2 months prematurely and had a compromised immune system. The mother had no appropriate housing. Only 8 months earlier, the mother had lost parental rights to an older sibling and the mother provided no proof that she had resolved the issues resulting in the TPR in the intervening 8 months.

Matter of Zachary T., 85 AD3d 1663 (4th Dept. 2011)

The Fourth Department concurred with Genesee County Family Court that a father neglected his son by failing to protect him from being sexually abused by an older brother and a cousin. The child and the older brother testified that the father knew of the sexual abuse but had done nothing to prevent it. Also the child was derivatively neglected due to the father having sexually abused a nephew when the families shared a home. The father was a person legally responsible for the nephew at that time.

Matter of Draven I., 86 AD3d 746 (3d Dept. 2011)

A Montgomery County mother neglected her children by driving with them in the car when she had failed to take her medication needed for her seizures. She had one seizure that had resulted in a car accident and the children had to be left in the care of a nearby person while she was transported to the hospital. The home was also dirty and unsafe with garbage and food strewn about, piles of dirty dishes and “numerous plastic bags” in the reach of a 20 month old child.

Substance Abuse

Matter of Dakota CC., 78 AD3d 1430 (3rd Dept. 2010)

A Chemung County Family Court finding of neglect regarding a father and his son was affirmed on appeal. The father abused alcohol and failed to provide the child with adequate supervision. The child had complete freedom to sneak out of the house and use drugs himself and he tested positive for marijuana at 12 years of age. The child’s mother and the caseworker both testified to the father’s ongoing alcohol abuse and prior indicated reports for neglect. When the caseworker went to the home in response to the child’s positive drug screen, the child was alone and unsupervised and the father appeared from a neighbor’s home in a visibly intoxicated state. The father claimed the child’s test results were “bogus” and that he was unaware that the child was using drugs. The child had 38 unexcused absences from school and 5 suspensions. The lower court should not have taken judicial notice of the father’s prior criminal record without providing him with an opportunity to challenge the relevancy nor should the court have included allegations in the decision that were not in fact proved but these were harmless errors.

Matter of Joseph Benjamin P., 81 AD3d 415 (1ST Dept. 2011)

The First Department concurred with New York County Family Court that a father neglected his child as he should have known of the mother's substance abuse and failed to do anything to protect the child. It is not a defense that he father failed to inquire more fully into his suspicions or that he elected to "turn a blind eye" to what she was doing.

Matter of Sadiq H., 81 AD3d 647 (2nd Dept. 2011)

A Queens' father was appropriately adjudicated to have neglected his child. The father regularly used crack cocaine including in the presence of the child. This establishes a prima facie case of child neglect pursuant to FCA §1046 (a)(iii) and no actual nor risk of impairment to the child need be proven. Further the father was aware of the mother's use of drugs when she was responsible for the care of the child and he did nothing regarding that.

Matter of Maria Daniella R., 84 AD3d 1384 (2nd Dept. 2011)

On appeal from Richmond County Family Court, the Second Department agreed that a mother's repeated use of marijuana can form the basis of a neglect adjudication. The two oldest daughters' out of court statements of the mother's drug use cross corroborated each other as did the mother's admission to the caseworker that she smoked marijuana.

Domestic Violence as Neglect

Matter of Kevin M.H., 76 AD3d 1015 (2nd Dept. 2010)

A Suffolk County father neglected his children by verbally abusing the mother in front of the children and making unfounded reports about her and her boyfriend to the hotline. He engaged in "obstreperous behavior" which impaired the children or placed them in imminent danger of impairment.

Matter of Gianna C.E., 77 AD3d 408 (1st Dept. 2010)

The First Department affirmed New York County Family Court's adjudication of a father as having neglected his 2 month old child. The father punched the child's mother repeatedly in the head and face while she was three feet from the baby. The baby had been released from the hospital just days earlier, was lying on a bed and was both on a heart monitor and receiving oxygen.

Matter of Ja'Mes G., 77 AD3d 484 (1st Dept. 2010)

A New York County father neglected his child by engaging in acts of domestic violence against the mother in the child's presence. The child was placed with the mother under ACS supervision.

Matter of Alfonzo H., 77 AD3d 1410 (4th Dept. 2010)

Onondaga County Family Court dismissed a neglect petition on the close of petitioner's proof for failure to establish a prima facie case. On appeal, the Fourth Department restored one of the causes of action and remanded but concurred with the dismissal of the other. As to the allegation that the father had neglected the child due to exposure to domestic violence, the Appellate Court agreed that there was no proof offered that the child's condition was impaired or in imminent danger of being impaired due to the father's violence against the mother. However, the court restored and remanded the allegation that the father abused alcohol to the extent that he was not able to safely care for the child. Proof had been offered that the police had intervened at the home on several occasions when the father was intoxicated and violent toward the mother.

Matter of Jared S., 78 AD3d 536 (1st Dept. 2010)

The First Department agreed with Bronx County Family Court that a father had neglected his children. He engaged in acts of domestic violence against the children's mother and threatened to kill one of the children by placing two knives at the child's throat. Even though this was a single act of domestic abuse it was sufficient given how strongly impaired his judgment was in exposing the child to substantial harm. The children were placed in the custody of the mother under the supervision of ACS and the father was ordered to attend parenting and batter's programs.

Matter of Michael N., 79 AD3d 1165 (3rd Dept. 2010)

The Third Department agreed with Tioga County Family Court that a father had derivatively neglected his son. There were allegations that the father had engaged in domestic violence with the child's mother in front of the child on two occasions. Without objection from the defense, DSS asked the court to take judicial notice of numerous certified records of Chemung and Tioga Counties that showed several prior determinations of abuse and neglect of other children that had been in the father's care. These included the prior sex abuse of a girlfriend's child and the prior termination of his parental rights to two of his biological children. There were also records of his extensive history of domestic violence involving women in previous relationships. The father did not take the stand to defend or explain himself. His lawyer simply waived any further hearing and agreed to "move

straight to a dispositional” hearing. The court properly made a finding against the father given that the “extensive documentation of the respondent’s past abuse and neglect of several children, both unrelated and biological, all emanating from successive turbulent relationships with different women, sufficiently demonstrates a consistent pattern of neglect...” The adjudications were proximate in time in that they all occurred within the 4 years before the birth of this child and within 8 years of this proceeding.

Matter of Alfonzo T., 79 AD3d 1724 (4th Dept. 2010)

The Fourth Department reviewed again a petition regarding this father and mother in a domestic violence situation in Onondaga County. After the Fourth Department had upheld the lower court’s dismissal of the portion of the neglect allegations involving domestic violence, DSS filed a new petition alleging that this young child was exposed to a series of domestic violence incidents between the parents. However, all but one of these allegations could have been raised in the prior dismissed action and therefore they are barred on res judicata grounds. If DSS had exercised due diligence, they would have discovered these prior incidents and included them in the prior petition. DSS cannot continue to bring successive petitions alleging the same theory of neglect until they obtain the result they want with the child’s status remaining undetermined. The lower court did err in dismissing one allegation that occurred after the prior petition. The father pushed the mother onto the bed while he was wielding a knife and while the child, then six months old, was lying on the bed. This incident could be neglect on the part of the father and that part of the petition is restored and remanded.

Matter of Armani KK., 81 AD3d 1001 (3rd Dept. 2011)

The Third Department affirmed the Otsego County Family Court’s adjudication of neglect against the mother of three children. The mother engaged in domestic violence with her boyfriend, who was the father of her youngest child. She knocked out a window in one situation and smashed a car window, while intoxicated, in another. She left the children alone and unsupervised in another situation where there had been an altercation which resulted in broken glass from a thrown coffee pot on the floor. In that situation, she drove off and was convicted of driving with her ability impaired by alcohol. The older two children told the worker that they had witnessed many fights between the mother and her boyfriend where there was yelling, cursing and where the mother and her paramour had smacked, kicked and pushed each other. There was a pattern of alcohol abuse and domestic violence but the mother continued to live with the boyfriend. The violence did occur sometimes in front of the children and sometimes the mother was the one who instigated it. Her behavior was not that of a reasonably prudent

parent. While the matter was pending, the mother gave birth to a fourth child and that child was appropriately found to have been derivatively neglected.

Matter of Amoreih S. 84 AD3d 1246 (2nd Dept. 2011)

The Second Department reversed a neglect finding against a Suffolk County mother. The evidence presented was that the parents were arguing while the father had one child – an infant – in a baby carrier. A friend of the mothers attempted to grab the baby and the baby fell out of the carrier. The parent’s argument had not included any physical contact between the parents and was only this single incident.

Matter of Paige AA., 85 AD3d 1213 (3rd Dept. 2011)

A Warren County father neglected his daughter when he, in the mother’s apartment in violation of a stay away order, choked the mother during a physical altercation. While he choked her, he stated that he wanted her dead. The child was standing right behind him screaming and crying. A neighbor woke up hearing the commotion and heard the child screaming. The lower court did not find credible the father’s claim that he was choking the mother in self defense. Further there was a shoe box of marijuana and drug paraphernalia within the child’s reach which was a threat to the child’s safety. The court did not find credible the father’s claim that he did not know the box was there as it was not his but a friend’s who he had previously told not to bring his drugs into the home but to leave the drugs out in the car.

Matter of Ndeye D., 85 AD3d 1026 (2nd Dept. 2011)

A Queens father neglected his toddler when the father, while holding the child, hit, shoved and screamed at the mother. There had been other acts of domestic violence, including slapping the mother and some of these occurred in the presence of the child.

Matter of Joseph RR., 86 AD3d 723 (3rd Dept. 2011)

Delaware County Family Court was affirmed on its neglect adjudication against a mother who allowed her boyfriend to continue to reside in the home despite the domestic violence that the children observed. She refused the DSS offer of preventive services. The caseworker asked her if she would choose her boyfriend or her children and she hesitated in her answer and then said, “my children, I guess”. The children reported that the boyfriend frequently drank and there were

constant arguments. During one argument, the boyfriend grabbed a gun from on top of the refrigerator and discharged it several times while the children watched. He also grabbed the three year olds wrist and with his pocket knife in hand and told the toddler that he would cut off her finger for picking her nose. Several times he locked the three year old out of the house at night for crying. The mother was a witness to her boyfriend's extreme and violent behavior and she therefore did not exercise the care of a reasonably prudent parent to protect them. The mother's children were placed with their respective non-respondent fathers.

Unsafe Home

Matter of Isaiah D., 29 Misc3d 1215 (A) (Bronx County Family Court)

Bronx County Family Court dismissed a petition for failure to prove a prima facie cases of neglect. A mother and father were arrested when police located 7 zip lock type bags of marijuana under the bath room sink of their home. The marijuana was in a glass container with a lid and in a lower cabinet with a simple pull knob. The parents had a two year old in the home that was walking and able to manipulate with his hands. However, there was no proof that the marijuana was owned by the parents, or that they even knew it was there or that it posed an imminent risk to the child.

Matter of Leah M., 81 AD3d 434 (1st Dept. 2011)

A Bronx father neglected his children when law enforcement found guns and ammunition in the home in reach of the children. The respondent's 5th Amendment rights were not violated by the negative inference against him for his failure to testify even though he had criminal charges pending.

Matter of Jaylin E., 81 AD3d 451 (1st Dept. 2011)

A New York County 21 month old child was neglected by his mother when the toddler was found in an apartment while the police executing a search warrant. There was marijuana in the bedroom where the child slept and the child's body, clothing and hair smelled strongly of marijuana. Some of the adults in the apartment were selling marijuana which placed the child where dangerous activity was happening.

Matter of Aria E., 82 AD3d 427 (1st Dept. 2011)

A Bronx mother neglected her child by remaining in the home with the child while the father engaged in criminal activity. She did not protect the child from the

danger of being present while criminal activities were conducted. The court properly drew a negative inference from her failure to testify and this does not violate her 5th Amendment rights. Although the mother complied with the agency's request for domestic abuse counseling, she continued to deny any responsibility for her neglect and lacks insight. Therefore the child's placement with a maternal great-grandmother is justified.

Matter of Eugene L., 83 AD3d 490 (1st Dept. 2011)

The Bronx parents of a three month old infant neglected him by selling cocaine out of the apartment. Law enforcement had engaged in two undercover buys of cocaine in the apartment and when searching with a warrant, located a large quantity of cocaine, empty zip lock bags and cash. The respondents did not object to the hearsay testimony regarding the drug buys nor did they testify in their own defense.

Excessive Corporal Punishment

Matter of Amelia W., 77 AD3d 841 (2nd Dept. 2010)

Richmond County Family Court was affirmed in its adjudication that a mother had neglected her three children. The mother knew that her boyfriend had inflicted excessive corporal punishment on two of the children in the presence of the third and knew that he had been ordered to stay away from the children in an order of protection. The mother had also been ordered to move the children out of the boyfriend's home. However, three weeks after the order, the mother moved back into the home with the boyfriend. The appeal in this matter was not moot even though the court had issued a suspended judgment in the disposition of this matter as the order was silent as to the legal consequences of the expiration of the period of suspension and so that judgment of neglect did not expire.

Matter of Justyce M., 77 AD3d 1407 (4th Dept. 2010)

The Fourth Department reversed Monroe County Family Court's dismissal of a excessive corporal punishment case. The lower court had found that the mother struck the six year old girl on the buttocks and accidentally hit her in the face. The Fourth Department found that the evidence showed that the mother told the police that she hit the child in the face with a belt when the child failed to watch her little brother. The child told the caseworker that her mother had hit her in the face with a belt and that the mother had also thrown a toy at her that struck her face. The

child's cheek had a small cut and was red and the child had a cut above her lip. The mother also told the caseworker that she had "whooped" the child with a belt for failing to pick up clothes. The mother would not agree to stop any "whooping" of the child. The mother also told the caseworker that she had removed the child from school that day as the child had lost the mother's car keys but that the mother had not "whooped" her since the mother knew the caseworker was coming over. This evidence was sufficient to find that the mother had used excessive corporal punishment on the child and that the child was neglected.

Matter of Jack P., 80 AD3d 812 (3rd Dept. 2011)

An Ulster County mother used excessive corporal punishment on her two sons. She hit and punched them when she was angry, screamed obscenities at them and humiliated them. The children were afraid of her. The older child, who is blind on one eye, testified to one incident where she slapped and pushed him and his head hit the wall. She then pushed him to the ground and pounded him with her fists. The younger child saw this and testified that it scared him and caused his stomach to hurt. The court did not abuse its discretion regarding the mother's request for the older child's probation records to be subpoenaed. The court reviewed the records in chambers and determined that there was nothing in them that related to the mother's claim that the child had told Probation that the allegations were not true. Further the court did not err in proceeding with the third day of testimony in this matter when the mother claimed she could not attend due to back pain. Parties do not have an absolute right to be present at all stages of a civil proceeding, even an Art. 10 petition. Here the mother had failed to appear before and had disobeyed prior directives of the court. The court did reopen the proof and allowed the mother to testify.

Matter of Parker v Carrion 80 AD3d 458 (1st Dept. 2011)

The First Department reviewed a New York County fair hearing determination that a report should remain indicated and determined that the report should be unfounded and sealed. The only witness who testified was the mother who stated that her daughter had been asked to get her materials to do her homework and the child slammed the door of her room and began to throw things around and cry. The mother found a "child's belt" and while attempting to use it to hit the child on her bottom, the child was accidentally hit in the face with the buckle. The mother had grabbed for the child and the child tried to run away. The mother claimed she never intended to hit the child in the face and there was a scratch on the face which was gone in a day or two after some over the counter medicine had been put on. The ALJ never specifically ruled that the mother had intended to hit her child in

the face but did find that the mother had acted in anger and struck the child. The Appellate Division found it was not neglect where the mother had not intended to hit the child in the face, the child had not needed medical treatment, and there was no proof the mother had ever used excessive corporal punishment in the past

Matter of Alex R., 81 AD3d 463 (1st Dept. 2011)

A finding of neglect including excessive corporal punishment by New York County Family Court was affirmed on appeal. Two children told the caseworker that the mother had hit one of them with a broomstick and also hit the children with her hand and a belt. The caseworker saw injuries on the child and was present when the mother told the police that she had struck the child. There were photos of the child's injuries. Further the mother admitted that she had not taken the children to a doctor or a dentist for over a year, which was corroborated by the medical records. There was no food in the refrigerator or the cabinets.

Matter of Xavier II., 81 AD3d 1222 (3rd Dept. 2011)

Sullivan County Family Court found that the actions of a father were neglectful after he testified that he had hit his son four times with a belt on one occasion. However, the court determined that the aid of the court was not needed and dismissed the petition under FCA § 1051 c . The father appealed and the Third Department dismissed the appeal, finding that the father had not been aggrieved. No adjudication of neglect occurred so the father has no prejudicial impact in any future proceedings.

Matter of Senande v Carrion 83 AD3d 851 (2nd Dept. 4/12/11)

The Second Department unfounded an indicated report of excessive corporal punishment where the mother struck the child a couple of times with a slipper after the child was disobedient and the child sustained a dime sized mark on her upper thigh.

Matter of Chanyae S., 82 AD3d 1247 (2nd Dept. 2011)

ACS and the child's attorney both appealed Queens County Family Court's dismissal of neglect allegations against a father. The Second Department reversed ruling that the credible evidence demonstrated that the father had choked the child in response to an argument as to her babysitting the younger children. This action is excessive corporal punishment. However, since the child is now 18 years old, a dispositional hearing is unnecessary.

Matter of Ameena C., 83 AD3d 606 (1st Dept, 2011)

A Bronx mother neglected her two older children by using excessive corporal punishment. This also derivatively neglected her two younger children. The two older children told the caseworker that the mother had hit them both with a broomstick, prodded one child in the ear with the broomstick, punched one of the children and rammed her head through a wall. These out of court statements were corroborated by the caseworker. The caseworker observed bruises on both children. One child had a swollen arm and a scabbed ear and there was a large hole in the wall.

Matter of Padminie M., 84 AD3d 806 (2nd Dept. 2011)

The Second Department concurred that a father had neglected his 15 year old daughter by hitting her several times with a pole which resulted in bruising on her back and arm. However, the proof did not show that the mother had inflicted any corporal punishment or that she had failed to protect the child. Under the circumstances here, the incident also does not support a derivative finding as to the child's sibling.

Matter of Naomi J., 84 AD3d 594 (1st Dept. 2011)

The First Department agreed with New York County Family Court that a father used excessive corporal punishment on his daughter and derivatively neglected his son. The child had been beaten and had bruises on her arm and under her eye. The child's out of court statements were corroborated by a teacher's observations of the bruises. The girl was placed in foster care and the boy was placed with his non-respondent mother under ACS supervision.

Educational Neglect

Matter of Annalize P., 78 AD3d 413 (1st Dept. 2010)

A New York County mother educationally neglected her child. The child had 5 excused and 24 unexcused absences during the school year and these absences adversely affected her academic performance

Matter of Regina HH., 79AD3d 1205 (3rd Dept. 2010)

A 14 year old Sullivan County girl was neglected by her mother and placed in foster care. The Third Department agreed with Family Court that the mother had educationally neglected the child. The child had missed 50 out of 88 days of

school and was late on 5 other days. The mother claimed that the child had medical and anxiety issues which made it difficult to get her out of bed in the morning. The mother did not have medical documentation of the absences and no one but the mother had witnessed the alleged anxiety attacks. The child had told some people that she stayed home to take care of her mother and that she did not want to leave her mother. The child was failing all her classes. The mother testified that she had been told that the child would have to attend every day for the rest of the year and all summer long in order to be promoted to the next grade. The mother minimized the situation and did not call the caseworker as recommended when the child would not get up in the mornings. Further, the mother had mental health problems, was paranoid and would not accept any help. The child was not allowed to socialize with children of her age and was unusually meshed with the mother. Both the teen and her mother each thought the other would not be able to function and would need therapy to cope with any separation. The mother did not have gas to cook with for one month and had let all the light bulbs burn out in the home. There was no hot water for a month and the child was unable to shower.

Matter of Shannen AA., 80 AD3d 906 (3rd Dept. 2011)

An Ulster County mother was found to have neglected her daughter after a series of Art. 10 matters. Originally given an ACD on two occasions, the mother violated the ACDs and also was adjudicated to have neglected the girl again in a second petition. The original acts occurred when the child was 14 and the mother had difficulty with her and sent her to live with a paternal uncle and aunt. The mother did not check out the home of the relatives. In fact the aunt took the child and her own children to a hotel within a week of the child arriving, apparently due to safety concerns with the uncle. The mother did not know where the child was and did not attempt to find her or call the police, taking the position that it was the child's responsibility to contact her. After finding out that the child was at the motel, the mother let her remain there for five weeks even though she knew that the child's father, a registered sex offender, was there and having contact with the child. The mother was also aware that the child was not going to school. When the child returned home, the mother learned she had been raped at the hotel and yet obtained no medical care for the child for several days and then only when the police insisted. These actions were neglectful.

The second petition was also appropriately adjudicated as neglect. The mother failed to ensure the child was attending school even though she was 14 years old. The mother gave various reasons for the child not attending including that the child

had been threatened and that she had a medical condition. The mother ignored the plans and directions of the DSS caseworkers regarding these issues. The child did not meet with an assigned tutor as the mother allowed the teen to move to her boyfriend's family's home which was out of the school district. The child failed all her classes as she did not take her final exams. This educational neglect was in addition to a lack of guardianship and supervision in that the mother allowed the girl to spend unsupervised overnights with her boyfriend which resulted in the child becoming pregnant. She then permitted the child to move in with her boyfriend after the baby was born and live in unsanitary and inappropriate conditions. Regardless of the mother's claim that the teen refused to return home, the mother had an obligation to provide a minimum degree of care and supervision to her. The younger child in the home is derivatively neglected.

Medical Neglect

Matter of Samuel DD., 81 AD3d 1120 (3rd Dept. 2011)

An Albany County mother neglected her school age son by failing to deal with his mental health issues, including suicide threats. The child had been removed from one school due to an altercation and moved to a smaller school environment. He had many behavioral problems and was suspended. He would put things in electrical outlets, tried to saw through a computer power cable, used a scissors to try to cut his tongue, stood on a file cabinet, tried to pull a bookcase onto himself and made attempts to hurt himself, other students and staff. He was dismissed from the school as they feared they would not be able to keep him or others safe. The mother did not consistently appear at meetings with the school and would not arrange for the child to have a recommended mental health evaluation. The lower court had ordered that the mother had to get a mental health assessment for the child and for herself and follow recommendations as a condition of the child's remaining in her care while the matter was pending. When she did not do so, the court placed the child in care in order to obtain an evaluation of the child. That evaluation resulted in a determination that the child suffered from an extreme form of hyperactivity and attention deficient disorder and possibly had bipolar disorder. The expert pediatrician prescribed medication for the child and discussed it at length with the mother but the mother did not fill the prescription, failed to come to a subsequent appointment for the child and failed to discuss the issues further with the doctor. In fact, she would not even answer the doctor's subsequent questions about the child's status. The doctor testified that this behavior was unreasonable and meant the child was at risk. The mother did not obtain her own mental health assessment but the child's doctor expressed concerns about the mother's mental

health and how it was affecting the child. The mother lived in a shelter and had told staff that she suffered from PTSD.

While a parent may have concerns about medication for her child, this mother failed to present any evidence as to what her concerns were, failed to demonstrate that her refusal to allow the child to have counseling or be medicated was in his best interests. She failed to provide any evidence of a second opinion. In fact, she did not even testify herself. The evidence instead was that the child would benefit from medication and therapy which would reduce the likelihood of him injuring himself or others and increase the potential for his education.

Matter of Alanie H., 83 AD3d 1066 (2nd Dept. 2011)

The Second Department reversed a Kings County Family Court adjudication of medical neglect. The four month old boy had been in the hospital for meningitis and had fluid drained from his brain. Upon his release, the parents were told that his enlarged head would decrease within a week. Three days later, the mother called the doctor late at night and indicated that the child had vomited and that his head was still enlarged. The doctor said he could not diagnose the situation over the phone and said the parents “should probably” take the child to the ER. The parents instead waited until the morning to take the child to the doctor. They checked the baby’s temperature which was normal and monitored him for most of the night. When they did take him to the doctor in the morning, the baby was admitted into the hospital and had another procedure to drain fluid from his brain. There was no medical testimony presented that the child was impaired by waiting until the morning to seek the medical attention or that this placed the child in any imminent danger.

Matter of Jalil McC. 84 AD3d 1089 (2nd Dept. 2011)

A Queens’ grandmother neglected her grandson by refusing to take him back into her home when the hospital where the child had been admitted indicated that the child was ready to be discharged. The child had been brought to the psychiatric ward by the grandmother who had legal custody. The hospital informed her that the child was ready for release and the grandmother refused to take the child back, refused to meet with the hospital staff and indicated that she would accept any allegations of neglect. Her failure, as the child’s legal custodian, to either allow the child back into her home or arrange some other appropriate care is neglect.

Matter of Jamiar W., 84 AD3d __, dec'd 5/31/11 (2nd Dept. 2011)

A Queens County mother was adjudicated for neglecting both her twin sons. The Second Department agreed that she had failed to set up or participate in one child's needed medical procedures. The child was born with hydrocephalus and needed a shunt and required the services of a neurologist, neurosurgeon and a pediatrician. The child's twin was diagnosed at 2 years of age with acute myelocytic leukemia and admitted to Sloan Kettering hospital and the mother only visited him about once a week. She also did not participate in discharge planning which resulted in the toddler staying 3 months longer in the hospital than was needed for his medical condition. This was not only medical neglect but emotional neglect as well.

PHYSICAL ABUSE

Matter of Jacob B., 77 AD3d 936 (2nd Dept. 2010)

The Second Department affirmed Suffolk County Family Court's abuse adjudication. DSS' medical expert testified that the child's multiple fractures were intentionally inflicted and that the child did not suffer from any bone disease. The child was in the mother's care when the fractures occurred and therefore the "burden shifted" to the mother to rebut the prima facie case of abuse. The mother was unable to explain her son's injuries.

Matter of Jezekiah R.A., 78 AD3d 1550 (4th Dept. 2010)

The Fourth Department modified a severe abuse finding from Erie County Family court and reduced it to an abuse finding. The father had been found to have severely abused a baby girl of the mother's but raised no issues concerning that child so that portion of the appeal was dismissed. He had also been found to have severely abused his son and derivatively abused his other son. The son had shaken baby syndrome and had a fracture of his femur, bilateral subdural hematomas and retinal hemorrhages. The injuries would have been inflicted at different times. The father would not testify at the fact finding. This is sufficient proof by a preponderance that the father abused the child or allowed someone else to do so. However, since the child was also in the care of the mother and the grandparents and no proof was deduced as to how the child actually was injured, there was not clear and convincing proof that the father severely abused the child. Severe abuse requires proof of serious physical injury but also proof that the child was abused by reckless or intentional acts under circumstances evincing a depraved indifference to human life and there was not such evidence offered.

Matter of Alexander F., 82 AD3d 1514 (3rd Dept. 2011)

The Third Department agreed with Columbia County Family Court that a father had physically abused his child. The father was living with his two children and his wife's three children from another relationship along with the maternal grandparents and a maternal aunt. They were all in a hotel as the grandparents home, where they had been living, burned down. The children's mother was incarcerated. The youngest child suffered bilateral subdural hematomas, bilateral infarctions of the brain, substantial loss of brain tissue and several rib fractures. The child will suffer from severe brain injury and other permanent disabilities. The medical evidence was that the injuries were caused by violent shaking, slamming against a hard surface or a deceleration injury and at least one of the injuries had occurred not more than 3 or 4 days before the child was taken to the hospital.

The father claimed that he had not had contact with the child during that period of time and that he took the child to the hospital when the aunt told him the child was acting oddly. He claimed a babysitter watched the child. The caseworker testified that the oldest child told her that he had overheard the grandparents say that the father had hit the child on the head with a TV remote and had hit the child on the back. The court found that the father's claim that a babysitter was watching the child was not convincing and that in fact the evidence showed that he was the child's caretaker during the 3 days before the child was taken to the hospital. Further the oldest child's out of court statements corroborated the medical proof.

Matter of Leon K., 83 AD3d 1069 (2nd Dept. 2011)

The Second Department continues to rule that the Art. 10 finding of severe abuse requires a finding that diligent efforts have been made and fails to see any distinction in a severe abuse termination ground and a severe abuse Art. 10 finding. The Queens' mother in this matter pled guilty to assault in the second degree for the injuries she inflicted on her son. Queens County Family Court then granted a motion for summary judgment for a finding of abuse and severe abuse for the injured child and derivative for the two siblings. The Second Department previously reversed the severe abuse findings ruling that ACS had not proven "diligent efforts". On remittal, ACS argued that "reasonable efforts" were not required as per FCA 1039-b and the lower court concurred and ruled that a hearing was not needed. Yet again, the Second Department cites that FCA §1051(e) refers to SSL §384-b(8)(a) for the definition of "severe abuse" and that definition of course discusses "diligent efforts" and therefore no finding of Art. 10 severe abuse can be made without proof of "diligent efforts" being made to keep the family

together or without a prior ruling that reasonable efforts are not required. ACS then argued on this appeal, that the lower court did in fact excuse reasonable efforts based on their being “aggravated circumstances” and therefore the finding of diligent efforts is not required. Since the criminal conviction for second degree assault does not require proof of a “serious physical injury”, there can be no decision that reasonable efforts are to be excused in this case without a hearing. The mother is entitled to a full hearing on the issue if reasonable efforts should be excused such that diligent efforts need not be proven in order for a finding of severe abuse to be made.

NOTE : This child was severely injured by his mother over 6 years ago and this case has now gone up on appeal 3 times and the mother has since had another child and had that child removed from her surely the amount of time and energy expended here demonstrates why the statutory definition of “severe abuse” for Art. 10 purposes needs clarification!!

Matter of Keara MM., 84 AD3d 1442 (3rd Dept. 2011)

The Third Department affirmed a neglect and abuse adjudication against a Clinton County mother and a neglect finding on the father regarding two children. The parents’ six week old son had a fractured left upper arm and collar bone, fractures in his upper and lower left leg, fractures in both bones in his right arm and six broken ribs. The medical evidence was that a child of this age could not have so injured himself and that the injuries would have likely occurred in 3 or 4 separate incidents of trauma. The mother and the father were the child’s primary caretakers. The maternal grandparents and a friend also lived in the house but they provided very limited care and there was no evidence that they had injured the baby. A paternal grandmother also cared for the child briefly for two periods but she testified and there was no indication that she was responsible. The mother admitted in criminal court that she had jerked the baby’s arm and had broken it but also offered other explanations at times that were incredible and implausible. The mother had also told the father that she has “smacked” the child across the face shortly before the child’s injuries were revealed and the father had also noticed bruises on the child’s legs. The father denied that he had ever hurt the baby but reported that the mother had been violent towards himself and had thrown the older child onto the bed on one occasion. The court did not err in drawing a negative inference in the mother’s failure to testify, regardless of the fact that her sentencing on her criminal pleas was pending. There is a strong policy in favor of resolving abuse proceedings quickly. She also did not preserve that issue for appeal by not

requesting an adjournment in any event. The negative inference was minimal in any event given the weight of the evidence against the mother.

SEXUAL ABUSE

Matter of Justin CC., 77 AD3d 1056 (3rd Dept. 2010)

A Chemung County mother and father were found to have abused and neglected the mother's daughter and their three sons. The 14 year old girl disclosed at school that she was regularly slapped, whipped with a belt and had her hair pulled. She described being whipped with her pants and underwear pulled down and with her brothers being made to watch. She was also made to "pick cherries" in which she was required to stand with her arms outstretched and to simulate picking cherries off a wall – a version of a painful military exercise. The child indicated that both her mother and the father had punished her in this way. The mother did admit to the use of a belt and to the "cherry picking" as well as to not intervening when the father used these punishments. Two of the brothers gave out of court statements which cross corroborated each other that all three of the brothers were hit with belts by both parents as well as that they had been made to watch the discipline of the sister. The teenage girl was placed in foster care and a neglect petition filed. The mother surrendered the child for adoption 5 months later.

A few months after her placement, the girl revealed to her foster mother that the father of her brothers had been sexually abusing her for several months before she was placed in foster care. The neglect petition was amended to add the sexual abuse allegations. The child provided sworn in court testimony outside of the presence of the parents but with full cross examination. (the transcript of that testimony was provided to the respondents' counsel for purposes of this appeal as per a prior appeal) The child's testimony was deemed credible and the father's "string of denials" not worthy of belief. The Appellate Court concurred that the mother had neglected all of the children and that the father had abused the girl and neglected and derivatively abused all of the children. The father could not appeal the court's order that he was prohibited from contact with the boys since he had consented to that order.

Matter of Shardanae T.L., 78 AD3d 1631 (4th Dept. 2010)

A Wayne County father sexually abused his daughter. The out of court statements of the girl were corroborated by the testimony of a "sexual abuse validator" as well as by the child's "age-inappropriate knowledge of sexual conduct."

Matter of Alston C., 78 AD3d 1660 (4th Dept. 2010)

Cattaraugus County Family Court was affirmed by the Fourth Department regarding a father's sexual abuse of his child. The child's unsworn out of court statements were corroborated by statements the father made to the State Police as well as the testimony of a psychologist who "determined that the contextual details of the child's statements were consistent with a description of actual events".

Matter of Miranda HH., 80 AD3d 896 (3rd Dept. 2011)

The Third Department affirmed a sex abuse case from Albany County in a detailed review of the proof. There were 3 daughters but the allegations focused on the middle child who was about 8 years old at the time of the petition. The parents were living together but their relationship was deteriorating. The mother noticed that the child was excessively masturbating and continued to question the child repeatedly about inappropriate touching. The child had been abused many years earlier by a baby sitter. The child did finally disclose that her father had touched in her the shower. The mother waited 5 days to tell law enforcement and then, significantly, brought the child to the police on the day that the father had filed for custody. The child signed a written statement at the police station that her father had touched her on two occasions – once when she was "2 or 3 or 4" when she was in the bathtub and once when she was 7 in the living room. The child's third grade teacher testified that the child engaged in inappropriate masturbation in the class room and seemed unaware she was doing so. The child told a licensed clinical social worker that her father touched her and the clinical social worker also testified that the child's frequent and public masturbation activity was behavior similar to other patients she has counseled regarding sexual abuse.

The child and two year older sister both testified in camera, unsworn but cross examined. There the child testified that the father had touched her 3 times – once when she was 2 or 3 years old in his bedroom, once when she was older in her bath and once in her bedroom. When the child was asked how this made her feel, she said "unhappy" and then added "relaxing too at the same time". The older sister testified that she had seen the father touching the middle sister "in a bad way" years earlier when the older sister had looked into a partially opened bedroom door. The Appellate Court also reviewed the father's evidence. He called John Yuille, a forensic psychologist, to the stand (Yuille is a well known sex abuse expert and the Third Department has repeatedly indicated its support of the John Yuille "Step Wise" protocol for interviewing child sexual abuse victims) and Yuille criticized the interviews of the child for not having been videotaped. He indicated that the inconsistencies in the child's statements meant either that the child was not telling the truth or that it did happen and the child is unwilling or

unable to provide details. Yuille indicated that in some cases a child may blend common features of multiple acts of sexual abuse and in doing so drop minor differences. Yuille also indicated that the child having spontaneously referred to the “relaxed” feeling during the incident tends to indicate a real experience. He further claimed that her masturbating could be explained by sex abuse but also by anxiety, substance abuse or brain damage. The father also called a sex abuse consultant who testified that she interviewed the child who told her in two different interviews that the father had touched her twice and then changed it to three times. The father testified that he never touched the child sexually and that that he had heard the mother tell the child repeatedly to say that he had touched her. The mother testified that she had left the children alone with the father after the child had supposedly told her that she was being touched and that she waited and only after he had filed for custody, did she bring the children to the police. Also she admitted that she told the oldest child that if they did not go to the police that the father would get custody. The mother had been untruthful in some other respects and had also attempted to manipulate a drug test.

Lastly the court reviewed the witnesses that the child’s attorney called including psychologist Eileen Treacy. (a well known sex abuse expert). Tracey testified that it was not unusual for child victims to both love and hate the abuser similar to how this child behaved. Also she said that where children were coached they tended to only claim to hate the abuser. Treacy claimed that the child’s desire to visit the father and her unhappiness with her mother for claiming that she did not want to visit him was evidence that this was not a coached case. The excessive public masturbation indicates that she is “over-sexualized”. Further, her spontaneous description of the touch being “relaxing” indicated that the touching did have positive aspects for the child which can also enhance the child’s conflict about disclosing.

The Appellate Court found that the child’s out of court statements were corroborated by the in court testimony of the child and the other witnesses despite the inconsistencies of the child regarding the number of incidents, the timing of the incidents and the locations as well as the mother’s possible ulterior motives. The lower court observed that the inconsistencies suggested not that the child was not telling the truth but that the child had been sexually abused many times by the father. The testimony of both Yuille and Treacy supported that the spontaneity and sensory detail the child gave in chambers gave credence that the child was recalling incidents that had actually happened. Further the court found the father’s testimony to be not credible.

Matter of Selena R., 81 AD3d 449 (1st Dept. 2011)

A Bronx County Family Court sex abuse finding was affirmed but the excessive corporal punishment neglect was reversed. The child's out of court statements of sexual abuse were corroborated by the four year boy's inappropriate knowledge of ejaculation as well as both children's verbal sexual acting out, drawings and aggressive outbursts. However, the allegation of excessive corporal punishment was not proven.

Matter of Rebecca FF., 81 AD3d 1119 (3rd Dept. 2011)

The Third Department agreed that a Columbia County father had sexually abused his adopted stepdaughter when she had been a child and therefore derivately neglected his own two children. The stepdaughter was now in her 20's and disclosed that she had been sexually abused by him for a long time starting when she had been around 10 years of age. She testified that he had sexually abused her for over an eight year period – more than 20 times but less than 100 times. Also a licensed psychologist testified that this was a “positively validated case of childhood sexual victimization”. The respondent failed to testify and so an adverse inference can be drawn. The sexual abuse of the adopted stepdaughter when she was a child in his care, demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to his daughters who are still children.

Matter of Iyonte G., 82 AD3d 765 (2nd Dept. 2011)

The Second Department reversed Queens County Family Court's sex abuse adjudication. The out of court statements of the 8 year old child that her stepfather had placed his penis in her mouth and used “crude and obscene” language to tell he wanted her to do, were not sufficiently corroborated. The fact that the father failed to testify creates a strong inference against him but cannot serve as the corroboration.

Matter of Andrew W., 83 AD3d 727 (2nd Dept. 2011)

A Queens County father was found to have sexually abused his daughter and derivately neglected her two brothers. The Second Department affirmed ruling that the child's out of court statement was corroborated by the child's brother's out of court statements that he had witnessed the abuse. Also an expert in “clinical and forensic psychology” who specialized in child abuse testified about evaluations of the children and this provided more corroboration. Finally the lower court could draw a negative inference from the father's failure to testify.

Matter of Nicholas J.R., 83 AD3d 1490 (4th Dept. 2011)

The Fourth Department affirmed a Cattaraugus County sex abuse adjudication against a mother. The child's out of court statements made to a caseworker and a psychologist were videotaped and were credible. Although repetition itself is not sufficient corroboration, it enhances the reliability of the out of court statement. The statements were also corroborated by an evaluation psychologist who found the statements of the child to be credible. The court did not err in denying the mother the ability to put evidence in regarding alleged excessive corporal punishment by the father as it was not relevant to the issue of mother's sexual abuse of the child. Although the order of protection has now expired and the issue is moot, the court should not have conditioned the contact with the mother on the therapist's opinion.

Matter of Jeshaun R., 85 AD3d 798 (2nd Dept. 2011)

Kings County Family Court's dismissal of a sexual abuse petition was affirmed by the Second Department. The child's out of court statements that she was sexually abused by her father were not sufficiently corroborated. ACS offered the out of court statements of the child's sister but this was not sufficient as the sister's statements were not reliable, were not consistent with the other child's statements and did not independently describe the detail of the alleged sexual acts. The sister was not able to "independently provide any detail about any particular incident..." Further, the alleged victim child's medical records did not provide any collaboration particularly as to the claim of sexual intercourse. Lastly the father's testimony record regarding his touching of the child does not corroborate the child's out of court statements as there was no proof that his touching had any sexual intent and such intent cannot be inferred based on the circumstances of the touching.

Matter of Bethany F., 85 AD3d 1588 (4th Dept. 2011)

The Fourth Department affirmed the Erie County Family Court's sex abuse adjudication. The child's out of court statements as to the father's sexual abuse of her were corroborated by the expert testimony of a court appointed mental health counselor who "validated" using the Sgroi interview methods. A Frye test was not necessary as the use of the Sgroi methodology is not novel and has been accepted by the NYS Court of Appeals as well as other Appellate Divisions. The counselor testified that "all" counselors in the field used the Sgroi methods.

Matter of Jayann B., 85 AD3d 911 (2nd Dept. 2011)

The Second Department reversed Dutchess County Family Court's ruling on a sex abuse matter. The lower court had dismissed the petition without a fact finding hearing, ruling that the petition failed to state a cause of action but on appeal the matter was remanded for a fact-finding. The allegations were that the mother's live in boyfriend had in 2004 been indicated for sexually abusing his 8 year old nephew. The respondent was now living in this mother's home with her child 6 years later. The respondent denied that he had sexually abused the nephew, in fact denied that he even knew that there had been an indicated report of this nature despite evidence that he did in fact know. Further, the respondent acknowledged that he had never attended any treatment program for sexual abuse. The petition was in the nature of a derivative allegation and there were no allegations that he had directly harmed the subject child of this petition. The Second Department ruled that the allegations were sufficient to require the lower court to hold a fact finding hearing.

ART. 10 DISPOSITIONS and PERMANENCY HEARINGS

Matter of Bianca QQ., 80 AD3d 809 (3rd Dept. 2011)

While ruling that the mother's appeals of a permanency order that continued her children in care were moot as the mother had agreed to custody to relatives; the Third Department did reverse the Clinton County Family Court's ruling that the DSS had not engaged in "reasonable efforts to reunite" the children. The Appellate Court indicated that while the DSS permanency report could have been more detailed in regard to dates services were offered, nonetheless the DSS had offered reasonable efforts to reunite. The efforts consisted of arranging individual counseling for the mother, placing her on a waiting list for an anger management therapy, referring her to a parenting class and providing her with financial assistance to attend her appointments. Also, the mother was out of state and unavailable for services for a month and a half during the time period.

Matter of Taylor EE., 80 AD3d 822 (3rd Dept. 2011)

In this Clinton County Family Court appeal of a permanency hearing on a 15 year old freed child, the Third Department did agree with the lower court that the agency had not engaged in reasonable efforts to achieve the child's goal of APPLA. The child had developmental delays and he was in a residential facility.

He will not be able to function in a traditional home environment. DSS had not been able to locate any relatives willing to adopt the youth. The child's goal was placement in an adult residential facility with a significant connection to an adult resource. The agency had not been able to find an adult resource for the youth. They had asked if someone at the residential facility would be the resource but the facility said no, that would violate their policies on boundaries with staff. On the day of the permanency hearing, the caseworker asked the woman who had adopted the child's siblings if she would be a resource and she said she would think about it. This was not sufficient effort. There was no record of when DSS had asked the facility and how long the facility took to respond and there was no record of DSS asking the relatives who had not wanted to adopt, if they would want to be resources. The youth had lived in the community for 13 years before going into placement and DSS made no record of attempting to locate any adults he may have had a prior relationship with to see if they would be his resource. DSS had a negative view of the youth based on the comments made in the permanency report and this may have "infected" the process and led to the lack of efforts to find him a resource.

Matter of Jacelyn TT., 80 AD3d 1119 (3rd Dept. 2011)

A Clinton County non respondent father appealed the Family Court ruling in a permanency hearing that had changed the goal to placement for adoption. The ruling is not moot even though further permanency orders will supersede this order since further proceedings and agency services will be altered by this ruling. The lower court does have the authority to modify a goal even if none of the parties ask for the goal to be modified. The agency only recommends a goal and it is the court who decides what the goal will be at each permanency hearing. The father is a non respondent but he has counsel and chose not to offer any evidence or cross examine any witness in the permanency hearing and he has never filed for Art. 6 custody. The agency has provided him with diligent efforts by suggesting he take parenting classes, by keeping him informed of the child's progress and by repeatedly asking him what plan he wants for the child's future custody. He told the worker he did not want custody and did not respond to the caseworker's ongoing requests that he make plans for the child. The father was also unresponsive to the caseworker's suggestions about improving his relationship with the child at visits by playing games with and asking questions of the child. Instead he would barely interact with the child and once tried to leave the 45 minute visitation three times. Under the circumstances the lower court did not abuse its discretion in changing the goal.

Matter of Destiny EE., 82 AD3d 1292 (3rd Dept. 2011)

Ulster County Family Court was affirmed in changing the goals of three children to adoption. The mother had allowed her son to go and stay with his father in Mississippi knowing that the father had been previously found to have sexually abused the mother's oldest child. When the father would not return the child to her, the mother went to Family Court to seek the child's return, revealing his location, which resulted in a neglect finding against her and the placement of all three of her children in foster care. The children have now been in care 18 months and the mother has made no meaningful progress in resolving her issues. The mother is not consistently attending mental health therapy, stopped attending employment counseling, did not have housing appropriate for overnight visits with the children and instead of working, essentially would hang out with friends at a grocery store. The supervised visitation is not going well as the mother was not able to manage the children's behavior or address their issues. She continued to deny that the oldest child had been sexually abused by her husband. She did not understand the children's needs, the reasons the children were in foster care and had not complied with the service plan. The children need permanency.

Matter of Christopher G., 82 AD3d 1549 (3rd Dept. 2011)

The Third Department reviewed a discharge of 2 Ulster County children from foster care and determined that it was a "trial" and not a "final" discharge. The older child had been the subject of a suspended judgment on a permanent neglect and the younger child had been born and placed in care on a neglect disposition after the older child was in care. At their mutual most recent permanency hearing, the court had continued the order of placement for both of them and had continued a goal of return to parent. A few months before the next scheduled permanency hearing, the caseworker wrote a letter to the court indicating that the children were being returned to the mother on a "final" discharge. No party responded with any objection and the children went home. The court clerk sent a letter to all counsel that the upcoming permanency hearing was canceled as the children had been returned home. Three months later, DSS filed to revoke the suspended judgment regarding the older child and alleged violations in the dispositional order as to the younger child and requested a removal of the children from the home. Although the mother did agree to the removal of the children, she argued that the petition had to be dismissed as the children had been "finally" returned and the court orders alleged to be violated were no longer in existence. The lower court ruled that the return home had only been a "trial discharge" and the Appellate Court concurred. Since the last order had not specifically given the DSS authority to do a "final

discharge” upon 10 days written notice as is required by FCA §1089, the return of the children was not in fact a final discharge but a “trial” discharge as without a specific court authorization, the DSS can only do a “trial” discharge. The permanency hearing should not have been canceled as the children were still in foster care and the court clerk’s letter had no legal effect. The court retained jurisdiction over the children to proceed on the allegations that the court orders had been violated.

Matter of Quinton GG., 82 AD3d 1557 (3rd Dept. 2011)

Three Broome County children had been placed in foster care and after the parents had completed programs aimed at substance abuse, they had been returned home. After the return, the mother repeatedly struck the father in the head with a frying pan. He had been drinking excessively, The children were present in the family trailer when this occurred. This resulted in several relatives filing for Art. 6 custody of the children and shortly thereafter, DSS also filed a new Art. 10 petition. The lower court entered Art. 6 custody orders with the mother’s consent such that two children were placed with one relative and the third child went to another relative. DSS was not informed or provided notice of this. The mother then moved to dismiss the Art. 10 petition, alleging that the aid of the court was not needed. She alternatively requested summary judgment that there were no triable issues or that she be granted an ACD. The lower court dismissed her petition and the Third Department concurred. The court should not dismiss the Art. 10 petition where the Art. 6 will not resolve the issues. If the Art. 10 petition were dismissed, the Art. 6 orders could be modified without notice to DSS and DSS had no ability to supervise the children or the mother. Further the allegations of domestic violence in front of the children raise a triable issue and the petition should not be dismissed on a summary judgment motion. Lastly, no ACD can be ordered without the consent of DSS.

Matter of Telsa Z., 84 AD3d 1599 (3rd Dept. 2011)

On its **fourth** review of this family, the Third Department affirmed the dispositional and permanency order as against the mother. The Appellate Division ruled that there was no harm to the mother when the court held the dispositional hearing and the permanency hearing at the same time. Further the lower court was justified in keeping the children in care and in denying the mother any visitation. The father has now surrendered the children. The continued placement away from the mother is appropriate given that she was aware that the father had sexually abused the 8 year old daughter. The mother had actually witnessed the sexual abuse and had threatened the child not to tell anyone. The mother had previously

surrendered her rights to two other daughters after they had been sexually abused by a prior boyfriend and she had violated court orders to keep that man away from those girls. An evaluation of the mother resulted in a recommendation that she engage in extensive services and therapy but she has not done so. She has also not asked about the children or their progress. She has refused to take a sex offender assessment, parenting classes or educational programs for non-offending parents of sexually abused children. The mother continues to indicate that she has doubts that the child was in fact sexually abused and has recently stayed with the father and helped him with his medical issues. She minimizes her continued relationship with the father, is dependent on him and fails to see the harm he caused the children or her role in failing to protect them. She is not employed and lives on disability benefits in a home that is unsafe for the children. There is no electricity or running water.

The older child has very serious problems, has been repeatedly hospitalized for extreme and unsafe behavior including suicidal ideation. She is currently in a residential therapeutic setting, is on many medications, has a personal social worker and is not even able to address her sexual abuse issues yet. The mother has had no contact with her since 2009 and the therapist believes that any contact would be harmful to the child. The younger child is in a foster family home and is doing better but is in therapy and has behavioral problems, is withdrawn and anxious. The girls see each other but there are problems as sometimes the older child can mistreat the younger one. The younger child's counselor opposes any visitation with the mother as she believes that will also harm the sibling relationship. The mother has never contacted anyone – teachers, counselor, social worker – about the younger girl's status. Return of these children to the mother at this time is not in their best interests' "under any conceivable circumstances". Under these "extreme circumstances" denial of all visitation is an appropriate exercise of discretion.

TERMINATION of PARENTAL RIGHTS

GENERAL

Matter of Eileen R., 79 AD3d 1482 (3rd Dept. 2010)

The Third Department concluded that Broome County Family Court had violated a father's rights and reversed an abandonment termination as to his four children. The father was incarcerated in Pennsylvania and the court allowed him to "appear" by telephone for the first appearance at which time the court told him that the court

would not “allow testimony by telephone” and that the case would proceed in the father’s absence and that the court would make its decision based on the DSS’ evidence. This statement by the court made it clear that the court was not intending to allow the father to provide evidence on the issue. The court then appointed counsel for the father. Father’s counsel did not object to the court’s decision and did not request that the father be able to present evidence or testimony by telephone, deposition or any other means. The attorney did not request adjournments to enable him to review transcripts with the father prior to cross examining the DSS witnesses. It was apparent that the defense attorney’s attempts at cross examination were not comprehensive as they lacked input from the father. The court did adjourn on the first day of the hearing as defense counsel did not know the father was still in prison and had expected him to be there and another adjournment was also granted as DSS had not produced certain records. These were not adjournments that allowed the defense counsel to consult with the father about his testimony. Also on the first day, the court admitted that there had been an inadvertent order issued that the father be allowed to appear by telephone. The court made no record as to why this order was issued, why the court was not going to comply with it and the father’s attorney made no objections.

The father was simply not allowed to present any defense. His unsworn comments at the first appearance suggested he had intended to argue that he had made contact with the children. The court’s blanket policy of not allowing testimony by phone, even though it is not required, instead of considering the available options meant that the father was denied his due process right to present his case. Further his lawyer’s failures amounted to ineffective assistance of counsel.

Matter of Kathleen K., Court of Appeals 6/9/11 (2011)

The Court of Appeals ruled that for a parent in a TPR to waive counsel, there must be an unequivocal and timely application to represent themselves and the court must make a “searching inquiry” from the respondent as to why he or she wanted to proceed without counsel. Here the father did not seem to understand if he was in fact the one making the decision and his lawyer offered no explanation as to why the father was seeking to proceed pro se. Further the father made the application after the hearing had already commenced. At such a time, the right to proceed pro se should be granted under only the most compelling circumstances. The concurring opinion commented that a parent who seeks to proceed pro se on a TPR may not only be harming themselves but also their children.

ABANDONMENT

Matter of Jayquan J., 77 AD3d 947 (2nd Dept. 2010)

The Second Department reversed the Kings' County Family Court's dismissal of a TPR petition and ruled that a father had in fact abandoned his child. The father had not been noticed by the agency to the original removal or the subsequent permanency hearings and this was an "inexcusable dereliction" on the part of the agency. However, this error did not change the fact that the father had abandoned the child. He was not prevented or discouraged from contacting the agency or the child. Any efforts he did make to determine his child's status were minimal, sporadic and insubstantial. He did not maintain regular communication or provide financial support. His incarceration did not absolve him of his responsibility to maintain regular contact and attempt to provide support within his means.

Matter of Dior H., 77 AD3d 1066 (3rd Dept. 2010)

An Ulster County father abandoned his child. During the 6 month period in question, the foster mother and the DSS caseworker both testified that the father had no contact with the girl. The caseworker indicated that in the relevant time period, the father contacted her once, the day before the TPR was filed in response to a request from her that he give her his phone number. The father and some relatives testified that there was some contact in the relevant time period but they were not consistent with each other and displayed significant confusion about the dates of the contact. The father also claimed that he did not know the child was in foster care and thought the child was with relatives. DSS conceded that it sent some letters to the wrong address for the father even after they had been provided with his correct address but there was evidence that the father had received the correspondence or had had it read to him. The father may have had some insubstantial contact with the child during the time period but not sufficient to defeat abandonment. He was like a "friendly but irresponsible uncle" who dropped in and out of her life when it was convenient for him.

Matter of Le'Airra CC., 79 AD3d 1203 (3rd Dept. 2010)

The Third Department concurred that an Albany County father who was incarcerated during the child's foster care stay had abandoned the child. During the six months relevant to the issue, he did not contact the child or the DSS worker. The father claimed that he had requested information about the child himself or through his attorney when he was in court on various matters and that he read

letters and permanency reports that the caseworker had sent him. The court concluded that this was minimal and insubstantial contact that could not defeat an abandonment. Although there were some restrictions on the father's ability to use the phone while in prison, he made no attempt to call the caseworker whose name he knew. The caseworker indicated that she would have accepted a collect call if he had called. The father admitted that he could have written to the caseworker but did not do so until he had been served with the TPR petition. Further the Appellate Court concurred with the Family Court that it was appropriate to sustain objections to the father's attorney's questions about diligent efforts as diligent efforts need not be proven in an abandonment case.

Matter of Omar Saheem Ali J., 80 AD3d 463 (1st Dept. 2011)

A Bronx father abandoned his child as he did not contact the agency or the child in any way for the 6 months prior to the fling. The father had been ordered to have no contact with the child until he completed a mental health evaluation. However, he was still obligated to maintain contact with the agency about the child and should have taken steps to see the child again after he finished the evaluation. A suspended judgment would not have been appropriate as the child was in a loving foster home where his special needs were being met and they wished to adopt him
NOTE: There is no statutory authority for the court to grant a suspended judgment in an abandonment termination.

MENTAL ILLNESS/RETARDATION TPRs

Matter of Kasja YY., 77 AD3d 1100 (3rd Dept. 2010)

A Schuyler County mother's parental rights to her child, who was in placement with a relative out of state, were terminated and the child was freed for adoption. The mother has a borderline personality disorder, a factitious disorder, a depressive disorder, a posttraumatic stress disorder and borderline intellectual functioning among other things. The court appointed psychologist is a board certified forensic examiner who did an extensive clinical examination of the mother in 2007 and updated it in 2009 and did an "exhaustive review" of her records. He concluded that she would not be able to adequately care for her child for the foreseeable future based on her mental health issues. She was unable to differentiate herself from others and to distinguish reality from fantasy and her behavior was erratic. The borderline personality is a lifelong condition and she has not previously accepted and or followed through with treatment. She is uncooperative and

unwilling to accept her condition or try to address it. The fact that the mother had recently claimed to be willing to engage in the intensive therapy that had been recommended for the last two years and that she had begun therapy with a new counselor is not sufficient to rebut the overwhelming evidence. Lastly, the court did not err in failing to consider post termination visitation. (citing old 3rd Dept. cases that the court does not have authority to order post termination contact)and not mentioning the 4th Dept's *Kahlil S.* decision)

Matter of Alyssa Genevieve C., 79 AD3d 507 (1st Dept. 2010)

The First Department affirmed New York County Family Court's termination of a mother's rights on mental illness grounds. The mother has multiple mental health diagnoses of long standing duration. She has schizoaffective disorder, bipolar type, a borderline personality disorder and is paranoid and combative. The child has special needs in that she has a serious development disorder, is autistic and has spinal dysplasia. The court appointed psychologist testified that given the mother's issues and the child's special needs, the child would be at risk of neglect. Even the mother testified that she knew that she would need support and would not be able to care for the child on her own. The mother was very motivated, committed and showed a great effort attempting to deal with her mental condition but sadly this was not enough to be able to handle the extraordinary needs of this particular child. While it may be possible that at some time in the future, the mother might be able to safely parent, this possibility is not sufficient.

Matter of Erica D., 80 AD3d 423 (1st Dept. 2010)

The First Department affirmed the Bronx County Family Court's adjudication of the termination of a mother's rights on mental retardation grounds. The mother had an IQ of 48 which the expert described as "extremely low". Her daughter child has Down Syndrome. The mother is unable to meet the child's needs. The issue of the lower court's limitation on the mother's proffered testimony of her abilities as it related to another child was unpreserved. In any event the testimony would have been from lay witnesses and based on general anecdotal information.

Matter of Vincent E.D.G., 81 AD3d 1285 (4th Dept. 2011)

The Fourth Department affirmed the termination of a mother's rights on mental illness grounds. The court appointed psychiatrist testified that the mother had schizoaffective disorder and a substance abuse problem that worsened it. The disorder could be treated with medication but the mother refuses to take meds and

will not acknowledge that she has a mental illness. If she was undergoing proper treatment she might be able to function and even care for child but that it only a mere possibility and not enough to defeat the proof. The court did not abuse its discretion in denying the mother a separate dispositional hearing as one is not required in a mental illness termination.

Matter of Cayden L.R., 83 AD3d 1550 (4th Dept. 2011)

The Fourth Department affirmed Jefferson County Family Court's termination of a father's rights on mental retardation grounds. Two psychologists testified that the father is mildly mentally retarded and that this renders him incapable of safely caring for his child. The father offered no evidence to the contrary. On appeal, he argued that termination was not in the child's best interests because it did not result in the child being freed for adoption. However the Appellate Court ruled that a termination is still permitted even if the child is not freed. Further the father did not prove that post-termination contact was in the child's best interests.

Matter of Anthony WW., 86 AD3d 654 (3rd Dept. 2011)

The Third Department reversed a St. Lawrence County Family Court's mental illness termination as to the 3 children of a father. The proper foundation was not laid for the admission of the opinions of the two psychologists. The experts were not asked the question (usually referred to as *Sugden* questioning) as to if the hearsay evidence they relied on was normally relied upon within the profession. This is required so that the court can understand how the expert assessed and formed opinions and how the hearsay fit into the overall opinion. Further, one of the evaluations was for the purpose of offering recommendations for services, not to evaluate the ability to provide safe care for the children and therefore should not have been admitted. Also the court was critical about the DSS decision to file this mental illness petition while a suspended judgment from a prior permanent neglect adjudication was pending. Apparently there was no violation pending on the suspended judgment and there was evidence that the father – as well as the mother – were in fact making progress.

SEVERE ABUSE TERMINATIONS

Matter of Brendan N., 79 AD3d 1175 (3rd Dept. 2010)

The Third Department affirmed a father's termination of his parental rights on severe abuse grounds after he was convicted of murdering the child's mother. A Columbia County boy was placed in foster care after a finding of neglect against his parents. At the time, the paternal grandmother sought to become the child's foster parent or in the alternative to have visitation and both were denied. The child had been in care just over a year when the father was arrested and charged with murdering the mother. DSS then brought terminations against the father on both permanent neglect grounds as well as severe abuse grounds. The paternal grandparents filed a custody petition. Before the TPR hearing, the father was convicted of murder in the second degree and sentenced to 25 years to life. The grounds of severe abuse were proven by the father's conviction for murdering the mother and by proof that the DSS had offered diligent efforts toward the father. Before the murder, he was given supervised visitation, referred to various treatment programs and was provided transportation for both. He was included in service plan review meetings. After the murder and his incarceration, DSS kept him updated with the child's status and progress and offered to help him engage in services in the prison. The child has been with the same foster family for most of his life. The foster family wishes to adopt the child and it is in his best interests to be adopted. It was not error for the court to dismiss the custody petition of the grandparents as the grandparents continued to plainly and repeatedly state that they did not believe that their son had murdered the child's mother. Even after being informed that this belief was hindering any ability for them to visit the child, never mind gain custody, their professed belief in their son's innocence did not change. The grandparents further filed a private adoption petition after the child was freed and that too was appropriately dismissed as a private adoption petition can not be filed when the child is in the care of an agency.

Matter of Kailynn WW., 80 AD3d 839 (3rd Dept. 2011)

A Chemung County termination of a father's rights on severe abuse grounds was affirmed on appeal to the Third Department. The father pled guilty to second degree assault based on his having repeatedly struck this baby girl on her head and body. The lower court then properly granted the DSS' motion for summary judgment of Art. 10 severe abuse based on the criminal conviction and ordered DSS relived from engaging in reasonable efforts to reunite the child with the

father. The mother surrendered the child. The DSS then brought a TPR on severe abuse grounds and the court held a “fact finding” hearing which the Appellate Court claimed was, in reality, a dispositional hearing since the court had already made the Art. 10 finding of severe abuse. The DSS was not required to show diligent efforts given the prior order of no efforts and such an order can retrospectively excuse diligent efforts where such efforts would have been detrimental to the best interest of the child as here. The hearing demonstrated that the child had special needs and was making progress in her foster home. The court also allowed the father to present any evidence as to the child’s best interests and reviewed the father’s capacity to care for the child and the availability of any relatives for placement. The lower court correctly concluded that it was in the child’s best interests to be freed for adoption.

Matter of Alicia EE., 86 AD3d 663 (3rd Dept. 2011)

The Third Department affirmed a severe abuse termination of a father’s rights to his daughter based on a summary judgment motion. The father was convicted of assault in the second degree and aggravated assault on a person less than 11 due to his physical abuse of his daughter and is incarcerated until at least 2014. There is also a criminal order of protection that prohibits contact until she is at least 18. Family Court found severe abuse and relived the DSS of doing any diligent efforts to reunify and then granted a summary judgment motion to terminate on severe abuse. The father argued that the motion should be stayed until his had appealed his criminal conviction. The Third Department found that this argument was moot as he had, by the time of this appeal, lost his criminal appeal. The father also argued that the lower court should have given him a suspended judgment but the Appellate Division agreed that this was not in the child’s best interests. The father’s situation - his convictions, his incarceration, the prohibition from any contact did not warrant a suspended judgment. The child is doing well in the foster home where they want to adopt and are meeting her special needs.

PERMANENT NEGLECT

Matter of Prince McM., 77 AD3d 582 (1st Dept. 2010)

The First Department agreed with Bronx County Family Court that a mother’s rights to her children should be terminated. The mother had attended programs that the agency had set up for her but she did not make the changes needed for the children to be able to return home. She continued to live with the father and denied that he had sexually abused her children despite the fact that three children

had disclosed abuse over a long period of time as well as the fact that the father had been adjudicated – twice – for child abuse. The mother claimed she would separate from the father but had never obtained her own housing. All of the children are in stable foster homes and two of them are in pre-adoptive homes. The children deserve a “realistic opportunity to free themselves from a troubled past.”

Matter of Ronnie P., 77 AD3d 1094 (3rd Dept. 2010)

A Cortland County mother lost her parental rights to her two sons. Clear and convincing evidence was offered of diligent efforts. DSS developed a case plan and offered various programs and counseling services to the mother and provided weekly visitation. She was encouraged to establish a safe and suitable home and to end her relationship with her boyfriend who was drug addicted and had physically abused and mentally traumatized the children. DSS also provided the children with counseling. The mother claimed on appeal that DSS was not diligent in that they did not set up the joint counseling sessions with the children that her therapist recommended. However, the therapist only recommended the joint counseling because the mother told her that she had ended her relationship with the abusive boyfriend, which was not true. The therapist would not have recommended the counseling change if she had known the truth. Also the fact that the DSS sought to suspend visitation did not mean that had not offered diligent efforts as the mother had pressured the children during the visits to recant their statements about the abuse and neglect and told them to tell the caseworkers that they wanted to go home.

The mother failed to plan even though she participated in many of the recommended programs. She failed to benefit from the programs. In particular, she failed to end her relationship with her drug addicted paramour and continued to lie about it. She failed to realize the seriousness of the situation and would minimize or deny the injuries to the children as well as her role in their placement in foster care.

Matter of Ayodeji W., 78 AD3d 1563 (4th Dept. 2010)

A Steuben County mother’s parental rights were appropriately terminated. DSS provided mental health, parenting and family counseling for the mother. They also provided supervision and transportation for visitation. While termination was in the child’s best interests, the lower court did properly provide for post termination contact between the mother and her son.

Matter of James U., 79 AD3d 1191 (3rd Dept. 2010)

The Third Department affirmed the termination of a mother and father's rights to their son in a "no reasonable efforts toward reunification" matter. The parents' rights to two other children had previously been terminated and those terminations were affirmed on appeal. Another child had been voluntarily surrendered by both of them. This child had been in the care of the mother under DSS supervision but was placed in foster care when she violated the court's order that the father – who had sexually abused another daughter at two years of age - have no contact with the child. After this child came into foster care, the lower court ordered that DSS need not make any reasonable efforts toward reunification with the mother based on the mother having had her parental rights to other children terminated in the past. The mother appealed that order and both parents appealed the subsequent termination of their parental rights on permanent neglect grounds.

The Family Court did not err in ordering that "no reasonable efforts" needed to be made toward the mother given that the siblings had been freed via a termination order. As the mother was unwilling to acknowledge the risk of the father and failed to protect the child from that risk, the court's order was not inappropriate. Since there was such an order, the agency did not need to prove "diligent efforts" but did need to prove that the mother had failed to plan for the child's return.

The mother continued to suffer from periodic mental instability. She abused alcohol and did not stay on her medication. She admitted allowing the father to repeatedly violate the order that he stay away from this child. She had resumed living with the father after the child was removed, refusing all services. The father had never completed sex abuse counseling even though he had been engaged in such counseling for 10 years. Neither parent had any insight into the reasons for the child's placement in foster care and they were not meaningfully benefitting from any services. The mother's claim that she will now move away from the father is not credible. The child has a long and stable relationship with the foster parent who meets his needs and wants to adopt him. The paternal aunt and uncle did file a custody petition which was denied by the court and the parents have no standing to raise that issue.

Matter of Alexa L., 79 AD3d 1290 (3rd Dept. 2010)

The Third Department upheld a termination of a Columbia County mother's rights to her twin daughters based on both abandonment and permanent neglect. The

children had spent a good deal of their lives being raised by a maternal aunt but when she could no longer care for them, the twins were placed in foster care based on the mother's default neglect finding. It was undisputed that the mother had no contact with the two girls during the relevant 6 months. For the one twin, the mother claimed she did have some limited contact with the caseworker but in fact multiple certified letters from the caseworker sent to the mother were returned unclaimed. This twin had medical conditions and the mother also had no contact with any medical providers about the child's status. As to the second twin, the mother had been prevented from seeing her by court order. The second twin has serious emotional issues – including reactive attachment disorder - based on the mother's erratic relationship with the child. The mother claimed that DSS had required that she had to first meet with the child's therapists, submit to drug and alcohol evaluations and mental health assessments and become involved in needed programs before she would be allowed to see the child. The mother claimed she was willing to do that but was involved in an abusive relationship that made it impossible for her to attend. That may partially account for her difficulties, but it does not explain why she did not even come to court in reference to the child. The mother also permanently neglected the second twin. The agency had offered her diligent efforts, including parenting and anger management, but the mother did not make real efforts to participate in any programs.

The court correctly terminated parental rights as to the second twin and did not offer a suspended judgment. The child had serious vulnerability stemming from her relationship with the mother and it was difficult for the child to form attachments as she harbored hopes of a return to her mother. The child had just begun to adjust to her foster home and spoke of an interest in adoption, as she had her own concerns about her mother's ability to care for her. It was in her best interests to be freed for adoption. The attorney for this second twin argued that the court should have ordered post termination visitation for this child and the mother but the Third Department (without citing *Kahlil S.*) ruled “.....there is no statutory authorization for allowing those visits once respondent's parental rights were terminated....”

Matter of Yasiel P., 79 AD3d 1744 (4th Dept. 2010)

In this Erie County appeal, the Fourth Department rejected the argument that the modifications to SSL § 384-b regarding permanent neglect grounds and parents who are incarcerated or in patient for substance abuse should have a retroactive application to terminations that occurred before the effective date. Further the

court found that the DSS had offered diligent efforts and the mother failed to complete her service plan. The mother had no viable plan for the child, made only minimal efforts to see the child and seemed indifferent toward the child.

Matter of Kenneth Frederick G., 81 AD3d 645 (2nd Dept. 2011)

On appeal from Dutchess County Family Court, the Second Department affirmed the termination of a father's rights. The agency had made diligent efforts for the incarcerated father by advising him of the child's progress, asking him to participate in planning for the child and reviewing the alternative resources that the father identified for the child. The father was not able to provide a realistic alternative to foster care and everyone he suggested as a caretaker – including his mother – was not appropriate. The child was bonded to the foster family and they want to adopt him.

Matter of Victorious LL., 81 AD3d 1088 (3rd Dept. 2011)

The Third Department affirmed the termination of an Ulster County father's rights. He had been frequently incarcerated while the child had been in foster care – there were only 15 days in the relevant period where he was either not in jail or in an inpatient facility. Despite this, the agency offered diligent efforts by advising him repeatedly of the need to get substance abuse treatment, by providing numerous visitations and by transporting the child to visits at the father's residential treatment. The caseworker arranged for the father to be present at 2 service plan reviews, provided him with photographs of the child and let him know how the child was doing. The caseworker located temporary housing for the father when he was not in a facility. The father did not complete a substance abuse program, he was re-incarcerated due to ongoing confrontations with the child's mother. The father did not understand the child's special needs due to the mother's substance abuse during the pregnancy and accused the foster parents of trying to get more money for the child by saying the child had special needs. After the fact finding, the father was discharged from another drug treatment program and tested positive for drugs. A suspended judgment was not warranted.

Matter of Kaiden AA., 81 AD3d 1209 (3rd Dept. 2011)

Cortland County Family Court terminated a father's rights to his son and this ruling was affirmed by the Third Department. The mother and her boyfriend abused the child and the mother ultimately surrendered her rights. The father was

incarcerated soon after the child went into care and had been incarcerated when the child was younger as well. DSS did provide him with diligent efforts. The caseworker learned he was incarcerated and informed him of the child's placement in care and thereafter informed him of the child's health and progress and provided copies of all permanency hearing reports. The caseworker responded to the father's letters and phone calls and sent photos of the child. When the father suggested his sister as a resource for the child, the caseworker investigated that possibility and determined it would not be appropriate given the sister's child protective history. Although the agency did not provide visitation, given the child's young age (toddler and preschool during the period in question) and the long distance the child would have had to travel to see the father in prison, visitation was not in the child's best interests. Also the caseworker did not provide rehabilitative services but that is not required when a parent is incarcerated. The father had had no contact with the child since the child was 16 months old and the father never consistently followed up on a petition for visitation. In a 21 month period, the father contacted the caseworker only four times and never sent the child any cards, letters or gifts. The father's only plan for the child was to wait in foster care for years until the father served his sentence. This is not in the child's best interests and will not mean permanency.

Matter of Nicholas R., 82 AD3d 1526 (3rd Dept. 2011)

A St. Lawrence County child had been placed in foster care due to the domestic violence between his parents. The Family Court ultimately terminated parental rights and the Third Department affirmed. The agency offered diligent efforts by devising separate service plans for the two parents. The caseworker met with each of them and reviewed the plans, kept them apprised of the child's situation and made referrals for services and offered help in obtaining the services. The father indicated he would only go to services because they were court ordered. In response to being questioned, the caseworker told this to the serviced provider. This was simply relaying honest information and did not "sabotage" him and delay him on the service waiting list. There was an order of protection in effect that the father was to have no contact with the child so the caseworker was not obligated to provide visitation. The caseworker did encourage the mother to obtain mental health services, it was the mother's unwillingness to engage in appropriate services that caused delay.

While the mother did engage in many of the services offered, she did not gain any insight. She continued to have contact with the father when it was his violence that

had caused the removal of the child. She made no plan to protect the child from the father that would permit a safe return. She did not engage in mental health counseling and did not complete the anger management program. She continued to express anger toward the caseworkers and had a physical fight with a neighbor that resulted in the police being called. The father continued his violent behavior including breaking into the mother's apartment and slashing her furniture with a knife while she hid in the closet. There was no reason to offer a suspended judgment to either parent.

Matter of Trestin T., 82 AD3d 1535 (3rd Dept. 2011)

A Cortland County father's parental rights were properly terminated. He was incarcerated for attempted rape when the child was born. The child was placed into care at birth. The agency caseworkers offered diligent efforts to the incarcerated father by developing a service plan and keeping him informed of the child's progress. The caseworker met with the father at prison as well as spoke with him by telephone and as well as with the father's counselor at prison regarding the father's progress in various programs. The father had agreed that he would not have any visitation with the baby until the father had completed a sexual abuse program in the prison which he never completed. The caseworker also investigated relatives that the father suggested as placement options for the child but none were suitable. The father did maintain contact with the caseworker regarding the child but he made no realistic plan for the care of the child. He was not eligible for release for at least another year and the child had already been in care for several years. The father had no alternative for the child but foster care. The child had no real relationship with the father but was bonded to the foster family who had cared for him since his birth.

Matter of Hailey ZZ., 85 AD3d 1265 (3rd Dept. 2011)

The Third Department affirmed the termination of an incarcerated father's rights to his child. DSS offered diligent efforts by arranging for visitation, keeping in contact with him about the child's status, providing service plans and investigating relatives as placement resources. None of the resources offered were appropriate. A sister suggested had been hot-lined and a girlfriend was only offered as a resource after the TPR had been pending three months. Other relatives the father suggested at the dispositional hearing had never had any relationship with the child. The father could not be released for at least two years after the hearing at a

minimum and the child had already been in care for 20 months. It is in the child's best interests not to remain in long term foster care awaiting the father's release but to be adopted in the foster home with her half sister. The father's request for post-termination contact with the child was "properly denied as unavailable in a contested termination proceedings."

TERMINATION DISPOSITIONS

Matter of Selena C., 77 AD3d 659 (2nd Dept. 2010)

In a short but significant decision, the Second Department joined the Fourth Department in ruling that Family Court has authority to order post termination visitation. In this Kings County mental illness termination, the mother requested that the court consider ordering that she be allowed visitation with the child after the termination. The Second Department agreed that while there was "... no statutory authorization..." for such visitation the courts "...have inherent authority to provide for visitation between and adopted child and a member of his or her birth family where such visitation is in the best interests of the child and does not unduly interfere with the adoptive relationship.." The Second Department then cited the Fourth Department's 2006 Kahlil S. decision

NOTE: As of this point the Fourth Department and the Second Department are specifically in direct conflict with the Third Department on this critical issue.

Matter of Krystal B., 77 AD3d 1110 (3rd Dept. 2010)

A Schenectady County matter was reversed and remanded by the Third Department. The parents of three children had admitted to permanent neglect and consented to a suspended judgment that involved them cooperating with substance abuse treatment programs, submitting to random drug testing, attending every visitation or providing a documented excuse if they missed a visit. Four months after the suspended judgment had been issued, DSS moved to revoke alleging non compliance. The parents admitted to the non compliance and the lower court freed the children for adoption after a hearing and the parents appealed. The violation of a suspended judgment does not require the court to terminate parental rights and the court must consider the best interests of the child. Here the Third Department found that the lower court had not reviewed the children's best interests and had in

fact refused to allow testimony on the children's status and progress in their foster care placements, finding that such testimony was not relevant. The court did not hear evidence on the children's relationship with the parents or how termination would affect the children.

The parents expressed a desire to still work toward the children's return and offered mitigating testimony about their admitted non compliance with the suspended judgment. The parents claimed that they refused the random drug screenings on advice of an attorney who was representing them in a personal injury action they had brought against DSS for serious injuries one of the children had received while in foster care. The parents called the caseworker when they had to miss visits but the caseworker never asked them for any written documentation. The parents claimed that the caseworker did nothing to help them obtain appropriate counseling programs when they had trouble locating programs. The DSS caseworker and the two foster care agency caseworkers agreed that DSS had stopped providing any services to the parents once the TPR had begun. The matter was remanded for a new dispositional hearing.

Matter of Christian Anthony YT., 78 AD3d 410 (1st Dept. 2010)

The Second Department agreed with Bronx County Family Court that a mother had violated the terms of the suspended judgment and that her parental rights to her three children should be terminated. Three months after granting the suspended judgment, a violation was filed. Although the mother was making efforts to technically comply with the terms of the suspended judgment, she had emotional and intellectual limitations which interfered with her being able to accomplish what was necessary. She did not have the skills needed to support and advocate for her three special needs children. She was unable to cooperate with agency caseworkers and would often become angry without appropriate restraint, storming out of meetings and threatening agency personnel. Although the agent may have lapsed in its efforts to assist the mother, the burden is on the parent in a suspended judgment to show progress at all times during the suspended judgment period.

Matter of Xionia VV., 78 AD3d 1452 (3rd Dept. 2010)

The Third Department finally specifically addressed the Fourth Department's 2006 *Kahlil S.* ruling on the authority of the Family Court to order post termination visitation. The father in this Chemung County case appealed his termination solely on the grounds that he should have been granted post termination contact with the child and cited the Fourth Department's ongoing rulings in this regard. The Third

Department, citing its own cases specifically stated that “Family Court had no authority to grant it (post termination contact) in this adversarial proceeding...” Even though the Appellate Court made this clear statement, they also added that the father had not raised and preserved the issue at trial and that he had “at best” an “attenuated” relationship with the child with somewhat limited contact over the years the girl had been in foster care and the father had been in prison.

Matter of Lauren L., 79 AD3d 1172 (3rd Dept. 2010)

In an appeal of a suspended judgment, the Third Department concurred with Clinton County Family Court that the court had authority to order as a condition of the children’s return to the mother, that the mother move from out of state to Clinton County. A 9 year and her 11 year old sister had been in foster care in Clinton County for over 2 years after their father had neglected them. The father surrendered his parental rights. When the children went into foster care, the mother was living out of state and she continued to live out of state in three different states and in at least 4 different residences. A permanent neglect petition was filed against the mother and a suspended judgment was ordered. The mother made progress under the suspended judgment but the court ordered the children to continue in care because the mother refused to relocate to Clinton County . Ultimately the court ruled that the children would not be returned to the mother unless she relocated to the County and the mother appealed that order.

While the matter was on appeal, the mother did relocate and the children were returned to her. However the Third Department ruled that the matter was not moot as the terms of the current supervision order required that the mother remain in Clinton County with the children. Under the factual circumstances, this order was not an abuse of discretion. The children were well supported in the community. The caseworkers had long term relationships with the children and the mother and knew their respective needs. The children were in counseling relationships that were going well and should not be interrupted. The county was paying for the counseling. The children were supported in their current schooling where there had been exceptional attention to the children’s unique situation. They were in the middle of an academic year. The sisters other sibling was in Clinton County and they had a meaningful relationship with that sibling. The children had lived all of their lives – except for two years some years earlier – in Clinton County and moving them was not in their best interest. The mother on the other hand resided in Vermont although she had lived also in Florida and Connecticut during the time that the children had been in foster care. The mother did not have a job in Vermont and her husband was in the military and deployed overseas. Her children,

by her current husband, were preschoolers and would not have any interruption of schooling to relocate to Clinton County. The requirement to relocate is not unconstitutional as the state has a compelling interests in seeking the best interests for children who have been neglected and surrendered by one parent and have remained in foster care for years. There was no requirement that this order involve the ICPC as the court had determined that it was not in the children's best interests to be moved.

Matter of Sean S., 79 AD3d 1760 (4th Dept. 2010)

The Fourth Department affirmed an Oneida County mother's termination on mental illness grounds finding that the lower court did not err in denying the mother's request for post-termination visitation given that the evidence demonstrated that any contact would have been contrary to the child's best interests.

Matter of Carolyn S., 80 AD3d 1087 (3rd Dept. 2011)

A Tompkins County grandmother appealed the denial of her custody/visitation petition that had been heard in the TPR dispositions of the children's parents. Her petitions had been consolidated and heard at the same time as the TPR dispo and the lower court had freed the children for adoption by their foster parents. The Third Department concurred with the procedure, finding that the Art. 6 petition should be consolidated with the TPR dispo where, as here, it had been filed at the time of the TPR. Also, the lower court properly provided the mother with a full evidentiary hearing. Her due process was not violated and the lower standard of proof at a dispositional hearing did not prejudice the court's assessment of the children's best interests. Although the terminations provided the threshold extraordinary circumstances for a non-parent custody petition, it was not in the children's best interests to be placed in the custody of this grandmother.

The grandmother had a long relationship with the children and they had periodically lived with her, her other teenage daughters and her boyfriend due to the mother's drug problems. However, when the mother had neglected the children and the children had been placed with the grandmother, she had violated court orders and let the children reside with the mother. The children were in the mother's home for possibly a month before this was discovered and at a time when the mother had recently failed to complete drug treatment. The caseworker expressed "grave concerns" that the grandmother would allow the children to be with the mother in unsafe situations again. Further the evidence showed that the grandmother had been inappropriate in front of the children in disagreements with

the caseworker and the foster parents. The caseworker testified that she felt threatened by the grandmother and an incident with the foster parents had resulted in the police being called. The children have bonded with the foster parents and are happy and thriving in school. One foster parent has a graduate degree in psychology whereas the grandmother has an 8th grade education. Even visitation is not in the children's best interests given the grandmother's open hostility with the foster parents and her vocal opposition to the adoption. The court did not abuse its discretion in declining to hold a Lincoln hearing with the children, which their lawyer opposed. The children had gone through much emotional turmoil and there could be harmful affects to them. The court was well aware that the children did love and felt attached to the grandmother. The children's attorney had a long standing relationship with the children and actively represented them and her position will not be second guessed.

Matter of Shania D., 82 AD3d 1513 (3rd Dept. 2011)

Tompkins County Family Court correctly terminated parental rights and did not issue a suspended judgment as it related to a mother and her two children. Although the mother participated in the programs offered by the agency, and had appropriate housing and was employed, she refused to recognize that her relationship with an abusive boyfriend was a bar to the children's safe return. The children had been in care for 2 years and she continued the relationship, trying to hide it from the caseworkers. She placed "more importance on this relationship than on her children's well-being". She also made questionable parenting decision during visits. The children were thriving in a kinship placement where the family wanted to adopt.

Matter of Tumario B., 83 AD3d 1412 (4th Dept. 2011)

Although the Fourth Department agreed that Onondaga County Family Court did not err in failing to enter a suspended judgment for this mother in this matter, the court did remand the case for a hearing on post termination contact. The mother did not request this in the lower court and only argued for it for the first time on appeal but the Fourth Department found that in the interest of justice the matter should be remitted for a hearing on that issue. The evidence suggested that the adoptive parents might support such visitation and the AFC also supports it. Currently the adoptive parents do visitation already with the birth mother regarding a sibling that they have already adopted.

Matter of Hassan E., 83 AD3d 1653 (4th Dept. 2011)

An Erie County mother violated numerous terms of her suspended judgment and a preponderance of evidence supported that termination was in the best interests of the children. The mother did not ask the court to consider post-termination contact and did not prove that any contact would be in the child's best interests.

Matter of Mya B., 84 AD3d 1727 (4th Dept. 2011)

In affirming a termination of an Onondaga County father's rights, the Fourth Department indicated that she the father did not ask for post-termination contact rights, he did not preserve the issue and in any event he failed to establish that it would be in the child's best interests.

Matter of Jane H., 85 AD3d 1586 (4th Dept. 2011)

The Fourth Department agreed with Onondaga County Family Court that there was no reason to issue a suspended judgment as the mother was unlikely to change her behavior. The mother failed to ask for post-termination contact and in any event there was no proof that such contact was in the best interests of the child.

FATHERS RIGHTS

Matter of Washington v Erie County CS., 83 AD3d 1433 (4th Dept. 2011)

While an Erie County child was in foster care, a father was noticed, after a series of delays, that he may be the child's father. He came forward and was adjudicated. Thereafter he filed an Art. 6 petition for custody of the child and the court combined that petition with a permanent neglect petition against the mother, hearing it with the dispositional. The lower court dismissed the father's petition saying he was a notice father and it was not in the child's best interests to be placed with him as he had had very little contact with the child. On appeal, the Fourth Department reversed and remanded the matter to be heard before a different judge. The father's custody petition was not simply a part of the mother's TPR and he was entitled to a hearing regarding if there were extraordinary circumstances as against custody with DSS and then a review of best interests. The father may well have been a notice father as it related to the mother's TPR but that did not mean he was not entitled to a full custody determination as an adjudicated father.

MISCELLANEOUS

Allen v Ciannamea 77 AD3d 1162 (3rd Dept. 2010)

A Rensselaer County mother brought a personal injury action in Supreme County against a landlord on behalf of her children alleging damages due to exposure to lead based hazards. In her EBT, the mother admitted that the children had been in foster care for 14 months during the relevant period of time due to abuse but was unable to provide any more detail. She also refused to sign any releases to allow the defendants to obtain Rensselaer County DSS records. The Supreme Court signed a subpoena duces tecum for the records to be produced for an incamera examination. DSS sent the records to court with a certification that they were records as they related to the CPS investigation. The records contained Family Court orders and reports from some involved agencies. The Supreme Court then determined that the records could not be produced for the defendants as per SSL §422 and the defendants appealed.

The Third Department reversed. The Appellate Court found that SSL §372 may allow disclosure of information. SSL §422 applies only to CPS investigation information and not all information that might relate to rehabilitative and preventative services provided to the children as a result of a CPS investigation. That information may be disclosable under SSL §372 in that information about foster care services is disclosable if a Supreme Court Justice orders a disclosure after notice and hearing to all interested parties. The matter was returned to Supreme Court for a determination if the information in the records is about the children's stay in foster care and what if any information should be disclosed under SSL § 372 procedures.

Matter of Michael TT., 78 AD3d 1446 (3rd Dept. 2010)

A 17 year old freed foster child placed with Cortland County DSS was arrested for stealing his foster family's car. He pled guilty and was in jail and then was transferred to a substance abuse treatment program with the understanding that he remain there as a condition to not being sentenced to prison. The DSS then brought an OTSC seeking to terminate the placement of the child based on the fact that he would either be in a long term treatment facility or prison and either way, the DSS could not supervise him or provide him with services. Family Court granted the order finding that the youth had "forfeited his right to be in the

guardianship and custody” of DSS by committing a crime. The Third Department reversed. The teen was a freed child and although parents have procedures to revoke surrenders, DSS has no procedure to “revoke” its guardianship of a child under SSL §384. Also SSL § 398 requires DSS to supervise children until they are 21, are discharged to parents or relatives or are adopted and none of those things has occurred. There is no exception for criminal behavior and the agency’s argument that it might be liable for the youth’s criminal behavior or that it will keep the child on a ‘aftercare’ caseload are not sufficient.

Matter of Sing W.C., 83 AD3d 84 (2nd Dept. 2011)

In a case of first impression, the Second Department ruled that Family Court had authority to order ACS to do an investigation or home study where a private person sought guardianship of a “child” who was over 18 but under 21 years of age. The youth was a young man originally from Hong Kong who alleged that he had been abandoned by his parents in the United States and his older brother had filed for guardianship status and sought the court to make the findings necessary to provide the youth with an ability to seek special immigrant juvenile status. (SIJS). ACS argued that since the youth was over the age of 18, it had no authority to perform any investigation and would have no authority to provide assistance should there be a need. The Second Department reviewed FCA § 255 and concluded that Family Court did have authority as FCA §661(a) has been expressly extended to allow guardianship until 21 with the youth’s permission and that therefore the word “child” in Social Services law includes youth between 18-21 for whom SIJS is sought as those youth are alleging that they have been abused or neglected and are in need of protection. Further FCR 205.56 states that the court can order any “authorized agency” to interview people and provide information to the court to aid in a FCA 661 petition. The court distinguished *Matter of Amrhein v Signorelli 153 AD2d 28 (2nd Dept. 1989)* where they had ruled that the Surrogate’s Court lacked authority to order DSS to conduct investigations and home studies of persons who sought guardianship of orphaned children. Although the appellate court recognized that the lower court might also have used other resources – notable the probation department – to perform such investigations, the lower court was not obligated to choose one service over the other.

People v Spicola 16 NY3d 441 (2011)

The Court of Appeals affirmed the criminal convictions of a defendant for sodomy, sexual abuse and endangering the welfare of a minor in regard to behavior that the 13 year old victim claimed had happened some six years earlier. The Court found that testimony from a nurse practitioner and a clinical social worker

relating to the Child Sexual Abuse Accommodation Syndrome and its relationship to the child's delayed reporting and other behaviors was admissible. For child welfare purposes, there is a good discussion of the CSAAS including a discussion of (and implicit continued endorsement of) *Nicole V* 71 AY2d 112 (1987)

Matter of Corrigan v Orosco 84 AD3d 955 (2nd Dept. 2011)

The Second Department reversed Suffolk County Family Court's order of a FCA §1034(1) investigation in a private custody case. The Appellate Court found that "... there was absolutely no indication of abuse, neglect or maltreatment" raised in the pleading or the proceedings and therefore Family Court "improvidently exercised its discretion" in ordering DSS to do a CPS investigation. The court found unpreserved the question of unlawful discrimination. The couple were a married same sex couple where one partner was the biological mother of the children and one was the adoptive mother.

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