

**Legal Updates for CPS  
and Child Welfare  
October 2012**

*Tuesday, October 2, 2012*

**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 2012

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**10/2/12 TELECONFERENCE  
SELECTED CHILD WELFARE CASELAW**

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

**Matter of N. Children 86 AD3d 572 (2<sup>nd</sup> Dept. 2011)**

Kings County Family Court erred in granting a summary judgment motion adjudicating neglect based on the testimony in the FCA §1028 hearing. Since that hearing allows hearsay that may not be permitted in a fact-finding, it cannot serve as the only basis for a summary judgment adjudication.

**Matter of Prince Mc. 88 AD3d 885 (2<sup>nd</sup> Dept. 2011)**

A Kings County Family Court's denial of a mother's request for a FCA §1028 hearing was reversed on appeal. The mother previously waived her right to a FCA §1028 hearing but the statute clearly says that even if the hearing is initially waived, a request can be made for such a hearing at any time during the pendency of the proceeding.

**Matter of Destiny EE. 90 AD3d 1437 (3<sup>rd</sup> Dept. 2011)**

The Third Department reviewed a respondent mother's argument that the Ulster County Family Court did not have jurisdiction over a neglect petition and affirmed the lower court's decisions. The mother had two boys and in 2001 was residing with them in Ulster County. Allegations of abuse and neglect were filed against her and her husband at that time alleging the husband's sexual abuse of the older son (who was his stepson). The children were placed in foster care until 2003 and a 3<sup>rd</sup> child, a daughter, was born to the mother. In 2003 the children were returned to the mother care with an order of protection that the father – whose location was unknown - have no contact with the sons. DSS supervised the mother and children until 2005 when the orders ended. The mother and children then relocated to Wisconsin. Approximately 18 months later, the mother returned to Ulster County and within a month filed an Art. 6 petition in court alleging that the father was living in Mississippi, that she had sent the younger son to visit him and that the husband was now refusing to return the younger son to her. The mother complained in her papers that the father was using drugs, the father's girlfriend had struck the child and that the father would not let the child return to the mother's home. In response to her disclosure of this information, DSS filed an Art.10 petition against the mother for having allowed her younger son to go to the father in the first place, given the sexual abuse history. The lower court issued a warrant for the father's arrest and the younger son was returned to NYS. All three children were

placed in foster care in 2007 and the mother admitted her actions were neglectful. In 2009 DSS filed to terminate her parental rights. The mother argued that the 2007 admission should be vacated as that court did not have jurisdiction in 2007. She claimed that NYS was not the children's home state as she and the children had only been back in NYS for about a month when the Art. 10 petition was filed. The lower court denied to motion to vacate and the mother appealed.

The UCCJEA controls in this matter. No other jurisdiction but NYS ever issued a custody order affecting these children and no applications for such relief were ever made anywhere else and therefore NYS had proper jurisdiction. These children did not in fact have a "home state" at the 2007 commencement of the Art. 10 as they were no longer living in Wisconsin and had not yet lived in NYS the requisite 6 months. Wisconsin did not have jurisdiction under UCCJEA as the children were no longer living there and no parent lived there. Although the mother now claimed in 2009 that her 2007 return to NYS was only intended to be "temporary", all evidence is to the contrary – her actions were those of a person who intended to return to the NYS area that she had left only 18 months earlier. No other state exercised jurisdiction over the children who had the requisite "significant contacts" in NYS. The prior proceedings had taken place for over a 4 year time period and the DSS, the court and all the attorneys – including the very same attorney for the children – were very familiar with the children, the family and their history. All three of the children had been born in NYS and had lived their whole lives here save for the 18 month period in Wisconsin. The other fathers of the children resided in NYS.

Lastly, the mother argued that the prior finding should be vacated based on the recent Court of Appeals ruling in *Afton C.*, 17 NY3d 1 (2011) regarding neglect and access to sexual predators. This was also rejected by the Third Department. The father in this matter had in fact sexually abused the subject child who was then in his care. The mother acknowledged that when she sent her younger son to see his father in Mississippi it was with the knowledge that the father had anally raped the child's older brother, forced that child to perform oral sex on him, forced that child to "hump" on him and she had actually seen the older child try to run from the father when the father had his pants down around his ankles.

**Matter of Bridget Y. 92 AD3d 77 (4<sup>th</sup> Dept. 2011)**

In another case involving the UCCJEA, jurisdictional questions rose relating to a neglect matter that had begun in the state of New Mexico and wound up in Chautauqua County Family Court. Four sisters - 15 year old twins and their 13 and 11 year old sister – were alleged to be neglected by their father and their adoptive stepmother in the state of New Mexico. The father was alleged to be a well to do doctor. The allegations were fairly serious in that the children had been harshly disciplined including that they had been left with no adult supervision in a garage and one point and in a trailer at another point with limited food and water, clothing or bedding and limited access to bathroom facilities and that this occurred for weeks at a time. When this was discovered by the authorities in the state of New Mexico, the parents were charged criminally with seven counts of felony child abuse. The New Mexico court ordered that the parents could not have contact with the children while the charges were pending but allowed the parents to make a "safety contract" and send the children to live with relatives in Chautauqua County.

Within a few weeks of the arrest, the CYFD (the New Mexico DSS equivalent) indicated that they would not be taking any action from their perspective and that they were exercising no legal authority over the children. The parents then advised the Chautauqua County relatives that they intended to move the children, perhaps back to New Mexico to reside with a work colleague of the father's. The NYS relatives responded by filing an Art. 6 petition in Chautauqua County Family Court. The parents responded by moving in the New Mexican court for the custody action to be heard there claiming that under the UCCJEA New Mexico was the children's home state. At that time, the parents indicated they wanted to place the children in the care of friends in the state of Ohio. The Chautauqua County DSS filed an Art. 10 petition against the parents alleging that the parents were simply moving the children around the country to continue to intimidate and isolate them. Chautauqua County Family Court issued an order assuming emergency jurisdiction under DRL §76-c and granted temporary custody to the NYS relatives. The New Mexico court responded by issuing an order that they were assuming jurisdiction and that New Mexico was the children's home state. (Counsel informs us that the New Mexico Judge was later convicted for taking bribes) Further the New Mexico court ruled that the parents still had the right to arrange to place the children with other caretakers in Ohio who were adequate and appropriate. Chautauqua County Family Court responded that the children were at risk as no neglect proceeding was pending in New Mexico and the children had no legal representation there either. New Mexico fired back ordering that the children were to be moved to Ohio. The two courts continued to issue orders that each was the proper jurisdiction. Chautauqua County Family Court ultimately issued an order that the parent's attempts to remove the children from the NYS relatives was neglect and placed the children in the custody of the relatives under DSS supervision. By the time the parents appealed that order to the Fourth Department the two older girls had turned 18. The appellate court declared that the issues concerning those girls were now moot. As to the younger children, the appellate court concurred that the NYS court had acted properly in retaining jurisdiction as under UCCJEA, there was proper emergency jurisdiction even though New Mexico had been the children's home state. The children had been at imminent risk and the New Mexico courts had not acted to assure the protection of the children. Two Fourth Department Justices dissented and found that there was no reason for a NYS court to assume temporary emergency jurisdiction as the New Mexico court had already assumed proper jurisdiction over the children before the New York court had.

**Matter of Serenity S., 89 AD3d 737 (2<sup>nd</sup> Dept. 2011)**

The Second Department reversed the Kings County Family Court's denial of a motion by ACS to place a young baby in foster care and ordered the child to be placed. The child was the subject of a derivative neglect petition filed when she was born. The mother's four older children were already in foster care due to the mother's drug use. The lower court had released the baby to the mother and the child's father while the Art. 10 was pending. Less than two months after this temporary release, ACS moved to place the infant in care due to an incident at the homeless shelter where the family was living. At the FCA §1027 hearing, the lower court erred in refusing to take judicial notice of the prior neglect findings against the mother. Further, the lower court also erred when it ruled both the mother and the shelter staff provided credible testimony about the triggering event. In fact, the witnesses' descriptions were wildly disparate. The Second Department credited the staff at the shelter who described the mother as being physically

aggressive and intoxicated while carrying the baby who was improperly dressed. The staff testified that the mother abruptly left the shelter at night with the child and without proper provisions for the child. The prior four neglect adjudications and the shelter supervisor's description of the incident provided a preponderance of evidence that the child's life or health were at imminent risk such that the child needed to be placed in care during the pendency of the petition.

**Matter of Shernise C. 91 AD3d 26 (2<sup>nd</sup> Dept. 2011)**

The Second Department found FCA §1027(g), which requires the court to order medical examinations in abuse cases, unconstitutional as it was applied to a 16 year old subject of an abuse petition. The 16 year old had given birth to a baby when she was 13 years old. Two years later, DNA tests showed that her stepfather was the biological father of the toddler. The 16 year old, her 2 year old baby and the 16 year olds 4 year old sister were all removed from the home and abuse and derivative abuse petitions were filed against the stepfather and mother. At the first appearance, the Kings County Family Court ordered, as per §1027(g), forensic medical examinations of all the children including the taking of color photographs of any visible areas of trauma. The 16 year olds attorney obtained a stay of the order and appealed. The Second Department found that the statute – due to the mandatory language of it – violated the 16 year olds Fourth Amendment's rights. The Appellate Court found that the statute provided no discretionary review by the court about the necessity of the order. Here DNA testing had already proven that the child had been sexually abused by her stepfather. Subjecting her to an intrusive medical procedure was unnecessary and had only the remotest possibility of revealing any additional evidence of abuse given the amount of time that had gone by. This intrusive search of her body is unreasonable and violates her Fourth Amendment rights.

**Matter of Jovan W. 92 AD3d 888 (2<sup>nd</sup> Dept. 2012)**

A Kings County mother appealed a FCA §1028 order questioning if there is authority at that point to order that she undergo a mental health evaluation. The Second Department found the issue moot as there had been a fact finding and a neglect adjudication in the meantime.

**Matter of Ethan Z. 93 AD3d 733 (2<sup>nd</sup> Dept. 2012)**

The Second Department reversed Kings County Family Court's summary judgment adjudication of neglect by a father and remanded the matter for a fact-finding. The summary judgment was partially based on evidence submitted at the FCA §1028 hearing. Since a removal hearing allows hearsay evidence that a fact finding would not permit, summary judgment is not proper. In this case, most of the evidence at the §1028 was hearsay. The father is entitled to have time to prepare his case and respond to the allegations in a fact finding.

**Matter of Giannis F., 95 AD3d 618 (1<sup>st</sup> Dept. 2012)**

The First Department affirmed a decision by Bronx County Family Court that the subject child of the petition would be permitted to testify at the fact finding through two way closed circuit television, subject to contemporaneous cross examination. The allegations were that the child had been sexually abused by her step brother for years and that her mother had not protected her. The mother denied that these events had occurred and sought a fact finding. The lower court properly balanced the due process rights of the respondent with the mental and emotional impact on the child. The caseworker provided an affidavit based on her multiple interviews with the child. Also presented was information from the social worker at the child's treatment facility that described the potential trauma to the child as well as a possible inability to testify accurately if the testimony was in front of the parent. The court need not hold a hearing on the issue as the mother failed to present any evidence that contradicted the caseworkers' assessment of the child.

**Matter of Elisha M.W., 96 AD3d 863 (2<sup>nd</sup> Dept. 2012)**

Kings County Family Court properly balanced the due process rights of the respondent with the mental and emotional health of the child and allowed the subject child to testify against her father via closed circuit television. A respondent parent does not have an absolute right to be physically present at every stage of an Art. 10 proceeding.

**GENERAL NEGLECT**

**Matter of Nyia L., 88 AD3d 882 (2<sup>nd</sup> Dept. 2011)**

An adoptive mother from Brooklyn neglected her child. The mother had taken the child to the hospital for a mental health evaluation and then upon the child's discharge, the mother refused to take her home. ACS offered the mother services, including some respite care arrangements but the mother refused the services and would not visit or communicate with the child. The mother was unwilling to have the child back in her home or have anything to do with the child and said adopting the child was the "biggest mistake" she had ever made. The Second Department concurred that such behavior was neglect on the part of the mother.

**Matter of Alyson J., 88 AD3d 1201 (3<sup>rd</sup> Dept. 2011)**

The Third Department concurred with Broome County Family Court that a mother of seven children had neglected them. The 7 children ranged in ages from a newborn (who added to the petition during the proceeding) to 10 years old. There were four different fathers but none of them lived with the family. Multiple witnesses testified to the unsafe conditions of the home. It was described as unsanitary and even "unlivable". There was garbage, dirty diaper, animal and human feces and dirty dishes all over. The bathrooms were not cleaned. The floors were sticky

and food was left out. There were flies and cockroaches. Although services were offered for over a year, the conditions continued. The children went to school with dirty faces and clothes, lice in their hair and they smelled. The teachers would have to bathe them and give them clean clothes. The oldest children, a 10 year old and a 7 year old had toileting issue. The 10 year old was not toilet trained and wore diapers and the 7 year old frequently had accidents in his clothes. Other children at school reacted negatively and the boys would have to be sent home sometimes due to their odor. The children were also unsupervised - they fought with each other and ran "rampant". Children who were too young were allowed to carry the infant and the 3 year old was found playing in the street. Sex offenders and other questionable people were allowed around the children.

Some of the children were placed in foster care and some with relatives and the two oldest children remained at home under the supervision of DSS. The children's attorney adequately represented them. Attorneys for children are allowed to advise the court that their assessment of the best interests of the children deviates from the children's stated position. This attorney had represented the children for some time and he did specifically advise the court in the dispositional attorney that he was deviating from their position and did advise the court specifically as to the children's expressed position as well.

**Matter of Taylor C., 89 AD3d 405 (1<sup>st</sup> Dept. 2011)**

A Bronx mother neglected her one month old baby by pushing the child such that the infant slid across the floor from one room to another. This single incident is enough to demonstrate that the child is at risk. A negative inference can be drawn by the mother's failure to appear and testify in court. The lower court did not need to adjourn the fact finding as the mother had been told of the date, had frequently not appeared in the past with no explanation and provided incorrect contact information. She was represented by counsel.

**Matter of Kinara C., 89 AD3d 839 (2<sup>nd</sup> Dept. 2011)**

The Second Department affirmed Queens County Family Court's adjudication of a father to have medically neglected his daughter. The child had diabetes and the evidence showed that the father was aware that she needed assistance and he did not monitor her insulin nor make sure she was compliant with the medical regimen. The father did not ensure she went to her medical appointment and in an 8 month period, the child missed 8 of 21 appointments. During that same period, the child had to be hospitalized on 3 occasions due to elevated blood sugar. The father did not make sure that the child had her medication and her monitoring devices. The lower court did err by incorporating the testimony from the FCA §1028 hearing into the fact finding without a finding that the witnesses were unavailable. However this was harmless error as the evidence at the fact finding alone was sufficient to make the finding. Although the father failed to appear for the last 2 days of the fact finding hearing, the lower court did not err in failing to grant defense counsel an adjournment where no reason was presented for the father's failure to appear.

**Matter of Anastacia L., 90 AD3d 452 (1<sup>st</sup> Dept. 2011)**

The First Department agreed that a man neglected his children as he was a level three sex offender who had committed past sex offenses against children and he was now with the subject children unsupervised. There had been a recommendation that he obtain sex offender counseling in a prior neglect proceeding but he had not done so. The court used this point to distinguish this from the *Afton C.* ruling.

**Matter of Alexis H., 90 AD3d 1679 (4<sup>th</sup> Dept. 2011)**

An Onondaga County Family Court adjudication that a mother neglected her 3 children was affirmed on appeal. The Fourth Department did correct the order and vacated references to an old alcohol incident because the lower court had not referred to this issue in its oral decision. However, the mother did neglect the children because she did not maintain a safe residence for the children. The home was unsanitary and the mother had long term mental illnesses. She failed to comply with treatment for both her mental illness and her substance abuse. The mother failed to take the stand and that should be held against her. The children need not be actually injured as long as near or impending injury or impairment is demonstrated as here.

**Matter of Andre B., 91 AD3d 411 (1<sup>st</sup> Dept. 2012)**

A Bronx father neglected his 2 week old baby by shaking him forcefully “like a rag doll”. He also fed the infant bananas and referred to him as a “devil child”. Given these risks to the child, proof of actual harm to the child was not necessary. This behavior reflects such a flawed understanding of proper parenting that he presents a risk of harm to any child in his care and therefore the older boy is also derivately neglected. The court placed the baby in foster care and the older child with his mother.

**Matter of Alexis AA., 91 AD3d 1073 (3<sup>rd</sup> Dept. 2012)**

A Clinton County father appealed the Family Court’s decision that he had neglected two of his three children but the Third Department affirmed. The two children were toddlers and the father did not properly supervise them when he was the caretaker. One of the children was left unsupervised on a porch staircase and fell to the concrete below, injuring his head. The same child was burned on an exposed baseboard heating unit when he was left in a room unsupervised. The older toddler bit the younger child all over his body, some of them severe bites. The older toddler hit his head on the sidewalk. The father also did not stop the children from eating off the floor or licking puddles in the street. The children were properly placed in foster care due to these incidents as well as due to the unsafe condition of the home which was littered with garbage and debris and was unsanitary and unsuitable for young children.

**Matter of Clarissa S.P., 91 AD3d 785 (2<sup>nd</sup> Dept. 2012)**

The Second Department concurred with the trial court that a Brooklyn mother neglected her children. The mother repeatedly left her two youngest children – who were less than 2 years old – with no provisions for their care, no information about where and how long she would be gone or how to reach her. She also was belligerent, abusive and violent toward her own grandmother – the children’s great grandmother in the presence of these two young children. The children would become visibly upset and cry. The mother did not testify at the fact finding and this allowed the court to take the strongest inference against her. This neglect supported a derivative finding on the older two children as she evinced a fundamental defect in her understanding of the duties of parenting.

**Matter of Claudina E.P., 91 AD3d 1324 (4<sup>th</sup> Dept. 2012)**

The Fourth Department affirmed Erie County Family Court’s adjudication of neglect regarding a mother. The mother violated an order of protection that forbid the father from contact with the children. She left at least one of the children with the father although she knew his violent tendencies and was aware of the order of protection that he was to stay away from the children until further order of the court.

**Matter of Makayla L.P., 92 AD3d 1248 (4<sup>th</sup> Dept. 2012)**

A Steuben County father neglected his child. The father had been convicted of attempted sodomy on the 1<sup>st</sup> degree when he was 21 years old for sexually abusing his 12 year old retarded stepsister. He was designated a level two sex offender. He was released from prison 2 years earlier but he did not engage in or complete sex offender treatment although he had been told that he needed to do so. After his release from prison he exhibited violent and unlawful behavior. He was convicted of assaulting the child’s mother by biting, pinching and threatening to kill her. He led the police on a high speed chase with the mother in the car. He was driving over 80 miles an hour with no license as he was being pursued by the police. The courts have had to issue several orders of protection against him in favor of the mother, his own mother and the foster parents. The court distinguished *Afton C.* 17 NY3d 1 (2011) and said that the circumstances of the father’s sex offense and his reckless behavior since were factors that supported the finding of neglect. The Court of Appeals had made it clear that a prior conviction arising from the sex abuse of a young relative may be sufficient for the neglect finding regarding the respondent’s own children.

**Matter of Santino B., 93 AD3d 1086 (3<sup>rd</sup> Dept. 2012)**

An Ulster County educational neglect finding was upheld on appeal. The parents neglected their two sons by not assuring their attendance in school which resulted in the children flunking courses and repeating grades. The boys were 14 and 12 years old. The younger child was absent 37 times and tardy 72 times between September and April. Most of his grades were Fs. The

parents would not cooperate with the school about this child's issues and would not allow him to be tested for learning disabilities. The older boy was absent 30 days in the same period and tardy on 30 other days and was suspended for another 10 days due to his behavior. He was repeating 7<sup>th</sup> grade having flunked four subjects the year before and the parents had refused to enroll him in summer school. He was now failing 6 subjects. The parents also refused to have this child tested by the CSE. The parents did bring the children to a psychologist but did not tell him about the absentee problem. The parents made no voluntary efforts to deal with the situation and although some recent improvement had occurred, this was only due to the court having issued temporary orders.

**Matter of Justin A., 94 AD3d 575 (1<sup>st</sup> Dept. 2012)**

The First Department concurred with Bronx County Family Court that a father had neglected two of his children and derivatively neglected the third. He did not make sure the children were properly fed and given suitable medical attention such that the children were diagnosed with failure to thrive. One of the children was admitted to the hospital for accidental injuries and gained weight, demonstrating that the child was not being given proper nourishment at home. The father not only did not make sure the children were properly fed but he also left the mother to deal with the various complex medical issues the children had even though he knew that the mother had previously been found to have neglected one of the children by not giving him prescribed medication. This failure on the part of the father to provide proper basic care for two of his children justified the derivative finding on the third.

**Matter of Lamarcus E., 94 AD3d 1255 (3<sup>rd</sup> Dept. 2012)**

The Third Department affirmed an adjudication from Otsego County Family Court that a father had neglected his 7 year old son. The father, who had sole custody of the child, was being supervised by DSS when he advised the caseworker that he intended to move out of state and did not want to bring his son with him. He wanted to place the child in foster care voluntarily but with no plan as to how or when he would resume caring for the child. DSS refused the voluntary placement. The father offered to leave the child with the mother but the mother was permitted only limited supervised visitation with the child by court order. He offered to leave the child with neighbors. The father had not told these neighbors that this placement would be long term. He did not know the last names of these neighbors, they had no bed for the child and they intended to use parental grandparents as babysitters who had previously been determined to be inadequate caretakers by the court. None of these plans were acceptable or safe for the child. When the father made it clear he intended to leave even though no adequate plan having been made for the care of the child, DSS filed a neglect petition and the court placed the child in foster care. The father then in fact left the state and the child remained in foster care. The evidence demonstrated that the father's behavior was not that of a reasonable and prudent parent. He told the caseworker that the child was "too much to handle" and that he did not want to deal with inevitable visitation issues with the child's mother after he relocated to another state. He continually indicated to the caseworker that he simply wanted to place the child in foster care so

he could move to be with a girlfriend and to obtain employment. He had been court ordered not to move the child from the state but advised the caseworker that even if that order was modified to allow him to take the child, he did not want to do so. The father argued on appeal that the county should have taken the child into foster care on a voluntary basis. Such a placement is only appropriate where the parent cannot care for the child – not where the parent does not want to care for the child. This father knew that the child would be put in foster care if he moved out of state and he moved with that knowledge. He clearly intended to abdicate his parental obligations and had never made any safe plan for the child. The plans he offered reflected a “glaring and fundamental misunderstanding” of his responsibilities as a father. The father repeatedly told the caseworker and others that he would move no matter what and that nobody could tell him not to go.

Lastly the father’s plans impacted the child. The child had done fairly well in the father’s care but after the father made his plans to move, the child became depressed, not eating, staring out the window and had behavioral problems at school. The Appellate Court found that the evidence presented proved the father’s blatant unwillingness to provide proper care for his son.

**Matter of Kaila A., 95 AD3d 421 (1<sup>st</sup> Dept. 2012)**

A Manhattan father neglected his child by committing acts of violence against the mother in the child’s presence. The child made out of court statements that she had seen him “choking, kicking and slapping” her mother in one incident and hitting her on another. These statements were corroborated by the caseworker’s testimony as well as admitted records. To the extent that some of the evidence was hearsay, no objection was raised at trial. The child was also educationally neglected as she had missed 59 days of school in a 2 year period. The father claimed he was unaware of the level of absenteeism but the lower court rejected that.

**Domestic Violence**

**Matter of Ajay Sumert D., 87 AD3d 637 (2<sup>nd</sup> Dept. 2011)**

The Second Department upheld a Queens County Family Court adjudication of neglect regarding a child’s father. The father hit the mother in the face while the 2 year old child was present. The blow was so hard that the mother could not move her jaw or chew afterwards. The child began crying when the father hit the mother. A month later while the mother was holding the child, the father punched the mother in the stomach, cursed her and told her he would kill her if she left. These acts in front of the child placed the child in imminent danger of impairment.

**Matter of Aliyah B., 87 AD3d 943 (1<sup>st</sup> Dept. 2011)**

The First Department affirmed all the decisions of the New York County Family Court in this matter. The mother neglected her children by committing acts of domestic violence against the

father while the children were present. One child made out of court statements about the violence which were corroborated by the father, the mother's daughters' and the police officer's testimony. An expert is not needed to show that these violent acts exposed the children to imminent risk of harm. Further the children were educationally neglected. One child missed 64 out of 181 days of school and was late 38 times. The school had contacted the mother numerous times about the issue. The court correctly determined that the children should be placed with the father. The mother would not cooperate with the agency and would not address the domestic violence she had perpetrated. The father had cooperated with family services and was trying to create a stable home for the children. It was also appropriate for the court to order that the mother could not have contact with the children for a year. Lastly, the court did not err in allowing the father to move to Pennsylvania with the children. The mother did not preserve the issue and the evidence demonstrated that it was in the children's best interest in any event. The father moved to his sister's home to improve the children's lives and CPS there had assessed the sister's home and found it to be safe and appropriate for the children. The children also wanted to remain with their father in Pennsylvania.

**Matter of Sabrina D., 88 AD3d 502 (1<sup>st</sup> Dept. 2011)**

The First Department affirmed a neglect finding on a Bronx father. He threw a glass vase or fish bowl at the child's mother which resulted in the item shattering near the child. He also allowed the child to be in the sole care of the mother knowing that the mother abused heroin and crack cocaine.

**Matter of Ariella S., 89 AD3d 1092 (2<sup>nd</sup> Dept. 2011)**

The Second Department concurred with Queens County Family Court that a mother had neglected her child. The mother engaged in domestic violence against the father in the child's presence. She walked past the father's house with the child in a stroller despite having obtained an order of protection against the father. The father saw them and the father removed the child from the stroller and took her into his home. The mother did not contact the police but instead pursued him into the home, engaged him in a physical fight and stabbed him with a knife. At some points the child, who was less than 6 months old was present and at another point, the child was left unattended outside a closed door.

**Matter of Jaden C., 90 AD3d 485 (1<sup>st</sup> Dept. 2011)**

The First Department reversed a neglect adjudication regarding a New York County father. The father walked with his 8 month old baby and the baby's mother from his home to the maternal grandmother's home and then after placing the child on a bed, indicated he would be leaving. This started an argument with the mother and her mother then blocked him from leaving the apartment. The father claimed that he tried to get out of the apartment but an uncle announced he was going to murder him, grabbed a gun and fired at the father. The gun jammed. The father then grabbed a box cutter and cut the uncle and the uncle in return pistol whipped the father

causing him injury. While this fight was occurring the uncle's girlfriend stood by holding the baby. The father did get away and contacted the police and the baby was not injured. The lower court ruled that the father showed poor judgment in going to the location with the mother and the baby as the father had reason to believe that drug dealing was going on and that the situation could become dangerous. The First Department disagreed and ruled that no evidence was presented that the father knew that the uncle would be there or that there would be a fight. Although the emergency room doctor's notes said that the father knew the uncle was a drug dealer and kept drugs and weapons at this apartment, there is no information as to the source of that claim and no indication that the person who claimed this was under any business duty to report. The father and the uncles' criminal record can't sustain a finding of neglect and the fact there was a fight does not make the father neglectful unless there is some proof that the father was the aggressor or that he brought the gun into the situation. The father's decision to simply accompany the mother and baby to the apartment was not neglect.

**Matter of Imena V., 91 AD3d 1067 (3<sup>rd</sup> Dept. 2012)**

A Chemung County father appealed the neglect finding relative to his 3 children and 2 stepchildren. He claimed that the lower court incorrectly denied his FCA §1051(c) motion that the aid of the court was no longer needed. The father had relocated to Ohio over a year earlier and the mother had custody of the children who were the subjects of the petition. The Third Department concurred with the lower court that as the father still had visitation with his children and the children are all still minors, the aid of the court was needed as the finding of neglect could be important in future proceedings. The father also argued that neglect was not proven and the Appellate Court disagreed with him on that as well. The father had engaged in repeated domestic violence against the mother and this was often witnessed by the children. In one incident he pinned her to the floor and forcibly removed her clothing against her will while two of the children were present. One child described an incident where the father hit the mother in the face, threatened to kick her in the face and slammed her finger in the door. This child expressed fear for her mother's safety and indicated that this scared her. Another child said that the father "would not stop smacking his mom" and described an incident where the father punched the mother into a wall and that child said he had tried to push his father away from his mother to protect her. The father was also aware that a babysitter for the children used marijuana while caring for the children and brought crack cocaine into the home and the father did nothing to stop this.

**Matter of Imani O., 91 AD3d 466 (1<sup>st</sup> Dept. 2012)**

The First Department reversed a neglect adjudication from the Bronx County Family Court. There was not adequate proof that the father had neglected the 2 children – who were 3 months and 2 years old - through domestic violence. There was no admissible evidence that there had been any violence in front of the children. The mother did not testify in the fact finding and her out of court statements about what occurred were inadmissible hearsay as against the father. ACS offered into evidence written police reports that stated that there was a family history of domestic violence in front of the children. However, these written reports did not state how this

information was known. Unless the information came from a source who had a business duty to so inform the police officer, then it was inadmissible hearsay. The written report did not state at what incident or incidents the children were present. The officer who prepared the report did not testify and so the origin of his claim that the children were witnesses was not known. Although the 3 month old had a bruise on the scalp, there was no evidence offered as to how this had been sustained.

**Matter of Jayden B., 91 AD3d 1344 (4<sup>th</sup> Dept. 2012)**

Oswego County Family Court dismissed a neglect petition against a respondent but the dismissal was reversed on appeal. The Fourth Department found that there was sufficient evidence that the children were in imminent danger of emotional impairment based on the domestic violence in the home. The co-respondent mother, in her admission to neglect, had admitted that she and the respondent had engaged in disagreements and arguments in front of the children and that the children were sometimes afraid. The police testified that they arrived at the home where the mother and the respondent had been having a loud argument and had struck each other. The mother had a scratch on her neck which she said had happened while they were “fighting”. The officer saw a one year old in a bedroom, crying, “shook up” and “scared”. Evidence was presented that the police had appeared at the home several times for reports of domestic violence. A neighbor testified that she heard loud fighting at least once a week and saw the police come to the home about once a month. The neighbor had also seen the mother and children locked out of the house. The day care provider testified that the 5 year old had told her about the fighting and she observed the mother to have a large bruise on her face which the mother claimed had happened in a bar. After the mother left, the 5 year old told the day care provider that the respondent had hit his mother.

The lower court found that none of this evidence corroborated the 5 year olds out of court statements about the violence in the home. The Appellate Court disagreed and found that the child’s statements were admissible and were corroborated by the other evidence provided. The child’s statements to the caseworker occurred at the father’s home after the child would not talk at the mother’s home. The child told the caseworker that he did not want to talk at the mother’s because the mother kept walking in and out and could hear. The child told the caseworker that the mother and respondent fought often and the child’s body language changed as he described the violence. He said that the respondent had locked the mother and the children out of the house. The child used “Barbie” dolls to demonstrate the fighting he had seen. He used the dolls to show hair pulling and pushing and then used a doll to represent the police coming to stop the fighting. The respondent failed to appear for the fact-finding hearing and therefore failed to testify. The lower court should have found a strong presumption against him for his failure to testify. The younger child was at imminent risk of neglect given his proximity to the violence and the ongoing pattern of violence both children at imminent risk of emotional neglect.

**Matter of Jadalynn HH., 93 AD3d 1112 (3<sup>rd</sup> Dept. 2012)**

The Third Department affirmed a St. Lawrence County neglect finding on a summary judgment motion. The father of a 3 month old infant had been found, at various times between 2006-2008,

to have neglected four of his prior children. When the mother was 7 months pregnant with this child, the father tackled her, put her in a headlock and punched her in the stomach such that she required medical attention. After the child was born, he restrained the mother in a chair, screaming at her. He hit her in the face while he was holding the baby. The father was criminally charged and had pled guilty to these incidents and was incarcerated. The motion papers describing the prior family court and criminal court findings proved his continuous pattern of acute domestic violence on both adults and children and in violation of orders of protection.

**Matter of Ilona H., 93 AD3d 1165 (4<sup>th</sup> Dept. 2012)**

Erie County Family Court was reversed on appeal. The proof presented was that the father struck the mother in one incident when the child was 8 months old. The father claimed that this had occurred outside the presence of the child and no evidence was offered to refute that. There was no evidence presented that the child was impaired or in danger of being impaired due to this isolated instance.

**Matter of Chaim R., 94 AD3d 1127 (2<sup>nd</sup> Dept. 2012)**

The Second Department reversed neglect findings against a Brooklyn mother and father of two young children. The police were called to the home after the parents were arguing and fighting. When the police arrived, the mother was sitting calmly on the couch and the father was standing nearby holding the 7 month old. There was a 2 year old in the bedroom. Neither child was crying. Both parents were arrested for assault and the mother first said the children were not present during the argument but later said they were. At the fact-finding, the arresting officer testified about the scene. No proof was offered that the children were impaired in anyway during the altercation between the parents. The parents did not testify. The lower court found that they had neglected the children and ordered supervision and services. Although the supervision order has ended, making an appeal on that issue moot, the adjudication of neglect was reversed. There was not sufficient evidence that the children were impaired or in imminent danger of being impaired.

**Matter of Kelly A., 95 AD3d 784 (1<sup>st</sup> Dept. 2012)**

The First Department affirmed a Bronx County Family Court's adjudication of neglect. The mother attacked the father in the presence of the children. She hit him over the head multiple times when the father was bending down to pick up the 1 year old. The father passed out due to the mother's attack and the 6 year old, crying, tried to help her father by tending to his wounds. When the caseworker talked to the little girl over the next weeks and months about the incident, she would become "visibly upset and emotionally distraught." Both children were placed at imminent risk of physical harm and the 6 year old suffered emotional harm. The children were placed in the father's custody without supervision and the mother was given supervised

visitation, ordered to obtain specified services and not to engage in domestic violence in the presence of the children or the father.

**Matter of Xiomara D., 96 AD3d 1239 (3<sup>rd</sup> Dept. 2012)**

The Third Department affirmed a summary judgment derivative neglect adjudication regarding a newborn. The child was the 6<sup>th</sup> child of the parents whose 5 older children were in foster care. There had been 2 prior finding of neglect 2 years earlier after the court found that the parents had committed mutual acts of repeated and escalating domestic violence in the children's presence. The parents had been ordered to participate in domestic violence and anger management counseling. Orders of protection had been issued that they were to stay away from her each. This child was conceived in violation of that order. The orders of protection had since expired and the parents were now living with each other. The father had not completed any domestic violence or anger management counseling. In the last year, he and the mother had a domestic incident that resulted in a response by the police. The mother had completed a domestic violence course but was asked to repeat it as the instructors did not feel she had benefitted from the course. This all established that the conditions which had led to the prior orders removing the older children still remained. At the time of the dispositional hearing, there had been yet another incident of domestic violence between the two of them, resulting in mother breaking two windows and being criminally charged. The father continued to take the position that he would not engage in any program for victims of domestic violence and did not see the need for an order of protection. It was appropriate to keep the 6<sup>th</sup> child in foster care.

**Matter of Jeaniva W., 96 AD3d 622 (1<sup>st</sup> Dept. 2012)**

A Bronx County father neglected his 3 year old daughter by hitting the child's mother in the head during a heated argument in a van with the toddler present. The father and mother exited the car and continued to fight. The father hit the mother several more times in the face. He broke her nose, bruised and bloodied her face. Bystanders had to intervene. The child told the CPS worker and a social worker that she saw her father hit her mother in the face. Witnesses described the child as being sad and upset when she talked about what she saw.

**Excessive Corporal Punishment**

**Matter of Joseph C., 88 AD3d 478 (1<sup>st</sup> Dept. 2011)**

A Bronx stepfather neglected his stepson and derivately neglected his own 2 year old son. He punished the child by requiring him to hold himself in a "push up" position and he also made the 11 year old kneel on uncooked rice grains for extended periods of time. These forms of punishment are not appropriate. The stepfather argued that the stepson was not injured by these punishments but the court found that the absence of actual injury does not preclude a finding. The step father testified that this was "not his finest parenting moment". This statement

demonstrated that the stepfather did not appreciate the seriousness of the events or that the punishments were grossly disproportionate to the stepson's behavior. This punishment of the 11 year old demonstrated a "sufficiently faulty" understanding of his parental duties" that it warranted the inference that the toddler is in danger. However, the court cautioned that if there were future complaints of abuse or neglect concerning the biological son, they should be consider "on their own merits" and future evaluations should not be "unduly influenced" by the derivative finding. The stepson was placed in his own father's custody.

**Matter of Steven M., 88 AD3d 1099 (3<sup>rd</sup> Dept. 2011)**

A Columbia County father neglected – but did not abuse - his son by using excessive corporal punishment when the child had toileting failures. After visitation with his father, the child returned home with bruises and welts on his back and buttocks. The evidence included photographs and medical documentation and the mother testified that the father had told her that he hit the child with a leather strap. The Third Department found that the injuries did not rise to the level of abuse but did constitute neglect. The Appellate Division also ruled that the situation did not warrant the lower court issuing an order for no visitation for a year and conditioning further visitation only if the father engages in programs and services. A one year of no contact is a drastic remedy that is not warranted and while a court can order counseling as part of an order, it cannot order counseling before visitation will be allowed.

**Matter of Nicholas W., 90 AD3d 1614 (4<sup>th</sup> Dept. 2011)**

An Ontario County Family Court adjudication that a father had neglected his son was reversed on appeal and remitted back to Family Court for a fact finding hearing. The father had pled guilty to assault in the 3<sup>rd</sup> degree in criminal court in front of the same Judge that was hearing the neglect petition in Family Court. The court found that "there was no allocution concerning the conduct underlying the conviction" and therefore the conviction could not form the basis of a summary motion for neglect in Family Court. Further, although one incident of excessive corporal punishment could be enough to establish neglect, here there was no proof offered that the father intended to hurt the child or that there was a pattern of excessive corporal punishment.

**Matter of Alanna S., 92 AD3d 787 (2<sup>nd</sup> Dept. 2012)**

The Second Department reversed Richmond County Family Court's dismissal of an excessive corporal punishment petition against a mother and a male respondent who was described by the court as being frequently in the home and who babysat the children. The proof presented supported the fact that the male hit one of the children on the leg with a broom and caused scarring. He also pinched the same child hard enough on the back to leave a raised mark. The mother neglected the child in that she did not protect the child from the male even after she was aware of his excessive corporal punishment. Further the male babysitter verbally abused the mother in the children's presence. The mother was derivatively neglectful of the five other children given her failure to protect the one.

**Matter of Benjamin VV., 92 AD3d 1107 (3<sup>rd</sup> Dept. 2012)**

An Otsego County father of three boys was found to have neglected the oldest child and this finding was affirmed on appeal. However, the derivative findings as to the younger children were reversed. The father had intervened when the 15 year old struck the 10 year old. In the altercation with the father, the 15 year old sustained an injury to his eye. While the father claimed the injury was accidental in that the teen had fallen on some furniture during the scuffle, the son said his father had hit him in his eye. The boy did not testify in court but his out of court statements were corroborated. Two witnesses from the hospital repeated that the child said he had been hit in the eye by his father. The teen gave a sworn statement to the sheriff and told his mother that same information. The Sheriff's Investigator on the scene, who was a trained emergency technician, said the injury was consistent with being punched in the eye and inconsistent with falling on furniture. The hospital records, admitted into evidence, also indicated that the child had been punched in the eye by the father. The evidence included photographs of the injured eye.

However, the Appellate Division reversed the derivative neglect findings on the 2 younger brothers. There was no pattern of neglectful behavior which would demonstrate a fundamental flaw in the father's judgment about parenting. The 15 year old does have a history of conflict with the father.

**Matter of Delehia J., 93 AD3d 668 (2<sup>nd</sup> Dept. 2012)**

A Westchester County Family Court adjudication of neglect was affirmed on appeal. The mother struck the 5 year old girl 6 times with a belt. The child sustained a laceration which required medical attention. The mother failed to testify and therefore the court could draw a negative inference against her. This was sufficient to find the child neglected and the 2 siblings derivatively neglected. The lower court did err in allowing into evidence the CPS intake report with the source redacted but the error was harmless as the mother was not prejudiced and the court relied on other evidence to make the finding.

**Matter of Iouke H., 94 AD3d 889 (2<sup>nd</sup> Dept. 2012)**

The Second Department affirmed Queens County Family Court that 2 parents had neglected their 6 children. The father hit one of the girls in the face with a belt. The child's out of court statements were corroborated by the caseworker's observations of the child's injuries on her face as well as out of court statements by the siblings who said they saw the father hit their sister in the face with a belt. The mother neglected the child as well as she knew or should have known about the excessive corporal punishment and did not protect the child. The parents' lack proper understanding of parental responsibility and therefore the derivative finding on the other 5 children was appropriate.

**Matter of Oluwashola P., 95 AD3d 778 (1<sup>st</sup> Dept.2012)**

The First Department reversed the New York County’s dismissal of a neglect petition and made a finding of excessive corporal punishment. The four year old child told the caseworker that his mother beat him with a cord for breaking a toy. The out of court statements of the child were corroborated by a letter the mother wrote to her boyfriend in prison where she wrote that she had just beaten the child “like it was judgment day” for having broken a toy. At fact finding, the mother claimed that she was “joking” in the letter, that this was how she felt but not what she actually had done. The letter, however, was consistent with what the child had disclosed. The fact that there were no bruises visible on the child when the caseworker saw him a week later is not dispositive.

**Parental Mental Illness**

**Matter of Amber Gold J., 88 AD3d 1001 (2<sup>nd</sup> Dept. 2011)**

A Queens County parents neglected their child in that the mother was mentally ill and paranoid which put the child in imminent danger of becoming impaired and the father should have known of the mother’s behavior and failed to take steps to protect the child.

**Matter of Ariel C. W.-H. 89 AD3d 1438 (4<sup>th</sup> Dept. 2011)**

A Monroe County mother argued on appeal that she had not neglected her children but the Fourth Department affirmed the Family Court adjudication. While the neglect proceeding was pending, the mother’s rights to an older child were terminated on the grounds of mental illness. As the petition for these two younger children was based on her inability to care for the children based on her ongoing mental illness, the TPR of the older child was relevant. Further there was evidence that the mother continued to have mental health issues and was hospitalized on two occasions after the TPR of the older child. The lower court did not err in conforming the petition to the proof upon the motion of DSS as such motions are to be liberally granted and mother’s counsel conceded that there was no surprise or prejudice in granting the motion to add information regarding events that had occurred subsequent to the filing of the petition. The mother’s attorney did not preserve for review the argument that the lower court had no authority to issue an order of protection in favor of the DSS caseworkers and the appellate court declined to address the issue “in the interests of justice”

**Matter of Joseph A., 91 AD3d 638 (2<sup>nd</sup> Dept. 2012)**

The Second Department not only reversed a neglect finding by the Richmond County Family Court but criticized the amount of time the matter had taken. The children were 10 and 12 years old at the time the petition was filed alleging that the mother had neglected them. The Second Department ruled that although there was proof offered that the mother was mentally unstable, there was not adequate proof that the children’s condition was impaired or in imminent danger of being impaired. Mental illness alone cannot support a finding of neglect –there must be a casual

connection to harm or imminent harm to the children. There was vague and contradictory proof as to the children being left alone for long periods of time while the mother, a single parent, worked in New Jersey. However both children had near perfect attendance in school and were doing well academically – even doing better than grade level in some subjects. The children were up to date on medical appointments and vaccinations and were of appropriate height and weight. The children had been removed from the home and placed in non-kinship foster care that was at a location that limited the contact between the boys and their mother. It was 17 months after the removal before the fact finding began and the fact finding itself took another 16 months to try. (The appeal added another 9 months to the children remaining out of the home) The appellate court indicated that the issues in the case were not complicated and the actual amount of time it took to actually try the case was not lengthy and that this was an “inordinate” amount of time to resolve this matter. The Appellate Court ruled that since the children would now be reunified with a mother that they had not lived with for over 3 years, that the mother had to accept appropriate services.

**Matter of Briana S., 91 AD3d 447 (1<sup>st</sup> Dept. 2012)**

The New York County Family Court’s adjudication of neglect was affirmed on appeal. The mother would be unable to care for her infant children as she was mentally retarded, mentally ill, exhibited poor impulse control and impaired judgment. She was depressed and not compliant with her medications. She has been repeatedly admitted to psychiatric hospitals. These problems resulted in her not taking one of the infants to medical appointments until he became so dehydrated that he had to be hospitalized. Expert testimony about the mother’s mental illness and how it affected or not her ability to care for the children was not needed.

**Matter of Joseph MM., 91 AD3d 1077 (3<sup>rd</sup> Dept. 2012)**

The Third Department reviewed a neglect adjudication against two Schenectady County parents of a newborn. The parents lived in special supportive housing provided by the Schenectady County Association of Retarded Citizens when they had a baby. Although both parents were mildly mentally retarded, intellectual limitations alone are not neglect, there must be proof of factors which tend to show imminent danger to the infant. The infant had neurological deformities and medical problems. DSS proved that the neither parent could care for this special needs baby as both parents were not only mentally retarded but had a history of domestic violence and angry outbursts. The father had a seizure disorder and was partially paralyzed. He had epilepsy, cerebral palsy, depression and a personality disorder. The mother’s cognitive limitations made it difficult for her to do the routine things needed for a baby, she was impatient and had to constantly be reminded as to what needed to be done for the baby. She did not understand the baby’s issues and would feed the child incorrectly. On at least one occasion, she pretended that the baby had finished a bottle when she had in fact discarded the formula. The mother left the infant unattended on a couch. She had neglected her own hygiene and her nutritional needs while pregnant and she also engaged in self-mutilation, had poor impulse control and anger management issues. The mother was a risk to herself as well as to others,

including the baby. The home was in a “state of squalor” and were refusing services and help from the Association of Retarded Citizens. They did not testify on their own behalf.

**Matter of Anton AA., 91 AD3d 1064 (3<sup>rd</sup> Dept. 2012)**

The Third Department affirmed Otsego County Family Court’s adjudication that a mother neglected her newborn infant. The mother was developmentally disabled and mentally ill. She did not take prescribed medication for her mental illness. She had been living in a motel when she gave birth to the child and had no permanent shelter for the child and no winter clothing for him. After the child was born she was ejected from the motel and was living in a camp ground. There was ongoing domestic violence between the mother and the child’s putative father during the pregnancy. In one incident, just 2 months before the child was born, the father grabbed the mother, throwing her down and physically assaulting her which resulted in his being arrested. However, the mother continued – even at the fact finding – to deny that the baby’s father was violent toward her and minimized his conduct. Previously the mother had been adjudicated to have neglected an older child who when that child was one month old suffered a broken leg at the hands of another boyfriend. At that time the mother was unwilling and uncooperative with services that led to that older child being removed. This was relevant evidence of the pattern of impaired judgment the mother demonstrated in regard to her choice of paramours.

**Matter of Cerenithy Ecksthine B., 92 AD3d 417 (1<sup>st</sup> Dept. 2012)**

The First Department extensively reviewed a New York County Family Court’s determination that a father’s mental health put his 2 year old and his 4 month old at imminent risk of neglect. The evidence of his years of mental illness was overwhelming. He had been hospitalized multiple times and had been diagnosed as bipolar. He had a history of violent physical assaults against his family members. He was noncompliant with medication and treatment. Although there was no proof he had harmed the children, expert testimony was that his disorders would worsen in the kind of demanding environments that young children bring. Dealing with those challenges would likely result in gross lapses in his impulse control. Although he had not been hospitalized in two years, he was not in treatment or compliant with medication. The children’s mother and foster mother testified to the father’s recent threatening behaviors. The children were at risk due to his prior behavior pattern of explosive outbursts and his inability to control himself.

**Matter of Isaiah M., 96 AD3d 417 (1<sup>st</sup> Dept. 2012)**

A Bronx mother neglected her child. The mother had auditory hallucinations telling her a demon wanted to her to harm the boy. After being taken to a hospital, she signed a “temporary release” for ACS to put the child in foster care. The mother was involuntarily committed to the hospital for a month based on her delusions, psychotic and bizarre behavior. She did not have insight

into her condition. She had experienced delusions about demons since her own childhood. Her judgment was strongly impaired and this exposed the child to a substantial risk.

### **Parental Drug and Substance Abuse**

#### **Matter of Nasiim W., 88 AD3d 452 (1<sup>st</sup> Dept. 2011)**

The First Department agreed with New York County Family Court that a mother neglected her son and that the child should be released to the father with no supervision needed. The evidence demonstrated that on one occasion at 7:15AM the mother was intoxicated and holding a “24 ounce can of beer” and approached the child who was with the stepmother and screamed and cursed and attempted to grab the child. On another occasion the mother went to the apartment of the father and the stepmother and was under the influence of alcohol and demanded to see the child. She was told to leave and she then vandalized the apartment lobby. She also showed up at an agency family conference meeting slurring her speech, smelling of alcohol, drooling and unable to participate in the conference. The child reported that the mother was intoxicated during his visits and that she drank alcohol mixed with fruit juice from a glass bottle. This behavior triggers FCA §1046(a)(iii) and therefore ACS need not actually demonstrate the impact or imminent impact on the child. Even though the child was not present for some of these events, this is on no consequence. The mother did not testify on her own behalf and presented no evidence that she was voluntarily and regularly participating in a recognized alcohol program. Her position was that she did not misuse alcohol and only drank “socially”.

#### **Matter of Virginia C., 88 AD3d 514 (1st Dept. 2011)**

The Bronx Family Court’s finding that a mother derivatively neglected her newborn was affirmed on appeal. Two prior orders had found the mother to have neglected her other children and she had failed to complete a drug treatment program. On cross examination the mother admitted to using cocaine even after the petition had been filed. The mother had opened the door to such post petition testimony when she testified on direct that even though she had left several drug treatments programs she did complete one and that she had never used drugs again and had not tested positive for drugs. In any event, the lower court based its finding on the failure to obtain drug treatment, not on post petition use of drugs. The court had also ordered that the mother was to stay away from the child and not communicate with the child or her caretaker except during agency supervised visitation. The mother also appealed that disposition but the Appellate Division found the issue moot as the order had expired. They did comment that if had not been moot, they would have reversed that order as it was made without any evidentiary basis and without the mother having an opportunity to be heard.

#### **Matter of Madison PP., 88 AD3d 1102 (3<sup>rd</sup> Dept. 2011)**

The Third Department reviewed a neglect finding regarding a Clinton County child. Although both parents were found to have neglected the child, only the mother appealed. The appellate

court concurred that DSS had proven neglect. The mother had a long standing problem with prescription drug abuse. There had been previous findings related to older children. The mother conceded that she had been addicted to pain medications but claimed not to be using them currently. However the DSS had filed the petition after she had appeared at the DSS offices in an apparent intoxicated condition and drug testing showed the presence of opiates and oxycodone. DSS therefore established a prima facie case and the mother failed to offer any evidence in rebuttal. There had also been repeated acts of serious domestic violence between the parents and the mother refused to acknowledge the serious ongoing nature of the violence or to remove the child from the situation. She continued to live with the father despite the fact that she was well aware that he would drink and be violent toward her. She let him move back in after his release from jail where he had been due to assaulting her. The DSS had cross appealed arguing that the court did not have authority to place in the dispositional order that they were required to bring a violation proceeding if the mother was not compliant with treatment but the Third Department found that issue moot as the order had expired.

**Matter of Niviva K., 89 AD3d 1027 (2<sup>nd</sup> Dept. 2011)**

Queens County Family Court found a father to have neglected his child and the Appellate Division concurred. He knew of the mother's drug use and failed to exercise a minimum degree of care to "ensure that the mother did not abuse drugs during her pregnancy". The Second Department has historically found fathers to be neglectful based on a failure to prevent the mother from using drugs during her pregnancy – see Matter of Carlene B. 61 AD3d 752 (2<sup>nd</sup> Dept. 2009), Matter of Catina B., 26 AD3d 327 (2<sup>nd</sup> Dept. 2006) and Matter of K. Children 253 AD2d 764 (2<sup>nd</sup> Dept. 1998)

**Matter of Nicholas M., 89 AD3d 1087 (2<sup>nd</sup> Dept. 2011)**

A Suffolk County father neglected his son by leaving the child alone with the mother when he knew the mother was intoxicated on more than one occasion. He did not stop the mother, when she was intoxicated, from pushing the child in a stroller at night in an area with no sidewalks. He also engaged in domestic violence against the mother in the child's presence.

**Matter of Colton A., 90 AD3d 747 (2<sup>nd</sup> Dept. 2011)**

The Second Department reversed a neglect adjudication regarding a Suffolk County mother. The mother had been prescribed pain medications but there was no evidence presented that she had been advised by her doctor not to drive while taking the medication. There was not a preponderance of evidence that she neglected her children by driving under the influence of the pain medication. Although there was an out of court statement by one of the children that he had to supervise his siblings while the mother slept, this was not corroborated in any way. The mother established that she in fact she supervised the children appropriately.

**Matter of Keoni Daquan A., 91 AD3d 414 (1<sup>st</sup> Dept. 2012)**

The First Department upheld a New York County Family Court’s neglect adjudication against a father. He was appropriately found to be a “person legally responsible” for the children in the home that were not his own. He was the mother’s long term boyfriend, the father of some of the children and a regular visitor to the home. He watched the children, helped with their homework and took them to the doctor. He neglected the children by his drug use. He admitted that he regularly smoked marijuana and this is prima facie evidence of neglect. There is no need to prove the impact of his drug use on the children unless he rebuts by showing that he is “voluntarily and regularly participating in a drug treatment program” FCA § 1046(a)(iii). Although he claimed in the FCA §1028 hearing that he was in a drug treatment program, he never provided any proof of that.

**Matter of Jessica L., 93 AD3d 522 (1<sup>st</sup> Dept. 2012)**

The First Department reversed a neglect finding against a Bronx father. The father’s two children – age 16 and 9 – lived with their mother. The children went to school regularly and never complained about the mother using drugs. The father was involved in the children’s lives and saw them every week. He knew that the mother had a drug problem in the past and was suspicious that she might be using again as she was not working and slept a lot. He then made an anonymous call to the hotline claiming that the mother had not taken the child to the doctor for a rash. CPS determined that the rash had in fact been treated but the 16 year old told the CPS worker that she suspected her mother was using drugs. The mother was asked to take a drug test. The father, “significantly”, advised the CPS worker that the mother had taken the 16 year old out of school to go with her to the drug test. The father feared that the mother might have a plan to use the daughter to provide clean urine for the screen. The mother did in fact test positive for cocaine. Although ideally the father should have contacted the hotline when he originally was suspicious that the mother was using again, parental neglect is not about the ideal – but the minimum. Here the father did not “turn a blind eye” to the mother’s possible neglect- in fact it was his call to the hotline that started the investigation and therefore he was not neglectful. Otherwise the father is placed in a “Catch-22 situation” – if he did not call the hotline the children might be harmed, but if he did call, he risked being labeled neglectful for not having called earlier. Although he should have called sooner, he did make the right choice and his behavior did not rise to the level of neglect.

**Matter of Jones v Jones 34 Misc3d 1226 (A) (Family Court, Kings County 2012)**

Kings County Family Court dismissed a neglect petition against a mother that alleged that she neglected her children due to her “oral ingestion of marijuana”. A newborn baby’s positive tox for marijuana along with the mother’s admission to prior marijuana use is not sufficient to prove neglect where there is no evidence that the baby or the older siblings were impaired or at imminent danger of being impaired. There is no casual connection to the children proved. A prima facie case under FCA § 1046 (a)(iii) was not proven as there was no evidence about the

quality of the marijuana or the frequency of her use or the effect on her. There was no proof that she used marijuana in front of the children or even that she was under the influence in front of the children. To the contrary, it appeared that the older children were with a grandmother when she used marijuana during her pregnancy. Further the mother's expert testified that the amount of marijuana the mother used would not have had the effect described in the wording of FCA §1046(a)(iii).

**Matter of Bianca P., 94 AD3d 1126 (2<sup>nd</sup> Dept. 2012)**

A Suffolk County father neglected his daughter by drinking while the child was in the car with him and failing to put her in a child seat or restraint. He also neglected his son by allowing that child to ride in a car with a friend when he knew or should have known that the friend was intoxicated.

**Matter of Messiah C., 95 AD3d 449 (1<sup>st</sup> Dept. 2012)**

The First Department affirmed a derivative neglect regarding a New York County mother's newborn child. The mother had a 13 year history of drug abuse and her three older children were in foster care. The mother's rights to one child were terminated. She used drugs until at least half way through the pregnancy of this child and did not attend drug treatment for the last 2 months of the pregnancy. Two weeks before the birth she did enroll in an inpatient program but this was not enough to outweigh her lengthy history of narcotic use.

**PHYSICAL ABUSE**

**Matter of Kayden E., 88 AD3d 1205 (3<sup>rd</sup> Dept. 2011)**

The Third Department affirmed an Otsego County Family Court adjudication of severe abuse, derivative severe abuse and neglect as well as a dispositional order that there need not be "no reasonable efforts" made for reunification. The baby in this case was extensively injured – acute skull fracture, massive trauma to her brain, multiple rib fractures and a fractured leg. These injuries were life threatening and required extensive medical intervention. The baby had permanent injuries including severe seizure disorder, impaired vision, spastic quadriplegia. She will cognitively remain an "infant" for as long as she lives. The medical evidence indicated that the baby was injured within 24 hours of being brought to the hospital and that she had suffered blunt force trauma that was not accidental. The father claimed the baby must have been injured accidentally but the medical experts did not agree. The parents were the sole caretakers of the baby during the relevant time period. Given the "aggravated circumstances", the lower court properly found that the agency need not offer any reasonable efforts to reunify this abused infant with her parents.

**Matter of Delilah E.H., 89 AD3d 575 (1<sup>st</sup> Dept. 2011)**

A stepfather abused his stepson by deliberately placing the child's hand on a stove burner for playing with matches. The child made consistent out of court statements about this and also drew a picture of a stove burner and placed his hand on it to demonstrate. The child had second degree burns and blisters and was not taken to a hospital for almost 24 hours after he was injured. He had epidermal loss on two fingers of his left hand and had to be given pain medications. Given the nature of what the stepfather did and the substantial risk of protracted impairment to the target child, derivative findings regarding the two siblings was appropriate.

**Matter of Jaiden T.G., 89 AD3d 1021 (2<sup>nd</sup> Dept. 2011)**

The Second Department affirmed Kings County Family Court's dismissal of a child abuse petition against a mother. The four month old infant had a "greenstick fracture" of the right arm and prior to the petition, the mother offered multiple and inconsistent possible explanations. ACS filed res ipsa petitions against the mother and her boyfriend. The medical evidence was that such a fracture in a child of that age would not normally occur accidentally and the mother's pre-petition explanation that the child fell off a bed days earlier was not consistent with such an injury. However, at the fact finding hearing the mother provided credible proof that she was not at home when the child would have been injured and that the other respondent – her boyfriend – was the caretaker at the time. The Second Department had issued a stay of the child's placement out of the home, but affirmed the lower court's dismissal of the petition against the mother such that the child was returned.

**Matter of Alaysha M., 89 AD3d 1467 (4<sup>th</sup> Dept. 2011)**

The Fourth Department affirmed that a Chautauqua County man derivately abused his living children based on his severe abuse one of the children which resulted in that child's death. Derivative abuse is appropriate given the nature and severity of the abuse that occurred to the deceased child. Since the father surrendered his parental rights to the children, his argument on appeal that the court erred in granting a FCA §1039-b "no reasonable efforts" order was considered moot.

**Matter of Autumn P., 93 AD3d 457 (1<sup>st</sup> Dept. 2012)**

A New York County father abused and neglected his six month old daughter. The infant had three leg fractures, a subdural hematoma and a cut to her mouth. This pattern of serious and unexplained injuries occurred when the father was the caretaker and the parents provided no explanation for most of the injuries.

**Matter of Wyquanza J. 93 AD3d 1360 (4<sup>th</sup> Dept. 2012)**

The Fourth Department affirmed Erie County Family Court's determination that a mother had abused and neglected her 2 month old and derivately abused and neglected her two year old. The infant had fractures of the left humerus, the right humerus, the left tibia and several ribs. The injuries were inflicted at different times. The mother failed to rebut the prima facie case of abuse. This level of impaired judgment created a substantial risk of harm to any child in her care.

**Matter of Amire B., 95 AD3d 632 (1<sup>st</sup> Dept. 2012)**

A New York County mother abused and neglected her baby. The infant had a spiral fracture of her right leg that would not ordinarily occur absent abuse, establishing a prima facie case. The mother was unable to rebut by failing to offer a credible, reasonable explanation of the injury. The mother gave varying accounts of the incident and the court did not find her or her expert credible, while finding the ACS expert credible.

**Matter of Leonardo V., 95 AD3d 1343 (2<sup>nd</sup> Dept. 2012)**

A Nassau County father was convicted of murdering the mother of his son. The Second Department concurred with the lower court that this justified a summary judgment motion for a severe abuse finding. However, as to the mother's child, that the respondent was legally responsible for but not the father of, the Second Department modified the adjudication from a severe abuse finding to an abuse finding ruling that SSL § 384-b(8)(a)(iii)(A) defines severe abuse as only applying to a parent and the respondent was not a parent to this second child.

**SEXUAL ABUSE**

**Matter of Kimberly Z., 88 AD3d 1181 (3<sup>rd</sup> Dept. 2011)**

The Third Department reviewed and upheld sex abuse and neglect adjudications from Delaware County Family Court. The 15 year old daughter made out of court statements that her father had been drinking, came into her bedroom, sexually molested her and bruised her arm. She climbed out of a window and ran to a neighbor's home. She gave a subsequent written statement to the police. This corroborated her out of court statements as did the visible bruise on her arm, her behavior in climbing out of the window for help and her uncharacteristic demeanor after the incident. Further, the younger child made out of court statements that he saw his father enter his sister's room late at night and heard his sister crying and then saw his father leave her room. The father also admitted to the police that he had gone into the daughter's room to kiss her goodnight and that he "guessed" he fondled her but did not remember as he had had a lot to drink. The father was able to remember many other details of that night. Neither the father nor the mother testified on their own behalf.

The child and her younger brother as well as the mother all confirmed that the father drank to excess when he was not working. He would consume some 18 beers in a sitting, becoming loud and aggressive such that the children were fearful of him. The father's behavior warranted a derivative finding regarding the younger son. The mother was neglectful in that she was not a "protective ally" to the 15 year old after she disclosed the abuse. In fact the mother persuaded the teen to recant the allegations. Further she neglected both children by denying the father's drinking problem and failing to appreciate the effects his drinking were having on the children.

**Matter of Lydia C., 89 AD3d 1434 (4<sup>th</sup> Dept. 2011)**

A Steuben County father sexually abused his child. The child's out of court statements were corroborated in several ways. First the child's two therapists both testified that the child exhibited the behaviors of a sexually abused child and that the child's statements were credible. The child was consistent in her out of court statements as to what occurred. Further the child provided in court unsworn "testimony" and faced cross examination. (Counsel informs us that this 4 year old child was deaf and provided this testimony via close circuit and through an interpreter) DSS was not required to disclose in the petition itself that they intend to call expert witnesses. The Appellate Court also agreed that the father should not have visitation with the child given that he refused to get sexual offender or mental health treatment. One of the child's therapists said visitation would be harmful for the child and the child testified that she did not want to see her father or to return to his home. The child was placed in the home of the mother. The court was not required to order a FCA §1034 investigation regarding the mother's home as there was no evidence or allegations that the child had been maltreated in any way in the mother's home.

**Matter of Chelsey B., 89 AD3d 1499 (4<sup>th</sup> Dept. 2011)**

The Fourth Department affirmed an Erie County Family Court adjudication of severe abuse on a clear and convincing level. The father sexually abused his older daughter. This was proven by her out of court statements to school personnel which was corroborated by medical proof of sexual intercourse and by the testimony of a validator. The father's failure to take the stand can be held against him. The lower court also properly found the other child to be derivatively abused.

**Matter of Kennedy M., 89 AD3d 1544 (4<sup>th</sup> Dept. 2011)**

An Erie County father neglected his two children. The sole witness in the matter was the father's adult stepdaughter who testified that the father had sexually abused her for years starting when she was 15. This was an appropriate basis on which to determine that the children currently in the respondent's care were derivatively neglected. The stepdaughter also testified that the respondent engaged in domestic violence in front of the children as well. The respondent failed to preserve any argument that the attorney for the stepdaughter should not have

participated in the fact finding. Further, the court properly admitted the stepfather's substance abuse treatment records as the records were relevant to the adjudication.

**Matter of Branden P., 90 AD3d 1186 (3<sup>rd</sup> Dept. 2011)**

A Clinton County father was properly adjudicated to have sexually abused his son and derivatively abused and neglected the other children. The child testified under oath in court about the father having subjected him to anal intercourse. The child demonstrated the position he assumed when the abuse occurred by leaning over the arm of a chair with his head toward the floor. The son had made the same out of court statements about anal penetration to the CPS worker and the police investigator and had previously demonstrated to them the physical position the father had him assume for the abuse. The child's out of court statements and in court testimony was supported by other statements by the other children. Corroboration also was presented by witness' descriptions of the child's behavior. One daughter told school employees that the father had sexually abused her and that her brother told her that the father had sexually abused him. Another daughter also made out of court statements that both her brother and sister had told her about being sexually abused. This sister observed that after her brother had been in the father's company he "picked at his butt", was quieter than usual and played roughly. The maternal grandmother testified that the boy told her of being sexually abused and that she observed the child "picking at his butt", openly masturbating and having nightmares where he screamed and woke covered with hives. In rebuttal the father brought in witnesses from his family members that testified that the father was not present around the child during the time frame that the child indicated the sexual abuse had occurred. However, the father did not substantiate this himself as he did not testify. The court can draw a negative inference from this. Although the child's sworn testimony was somewhat confused and inconsistent, the child had some mental limitations, this was understandable. Although he was 11 years old, the child functioned on the level of first grader and could not tell time.

**Matter of Miranda F., 91 AD3d 1303(4<sup>th</sup> Dept. 2012)**

A Cattaraugus County man was criminally convicted for raping his stepdaughter and the Fourth Department affirmed the Family Court's summary judgment adjudication of abuse. However, the derivative findings regarding his two biological daughters were reversed as the DSS motion papers did not allege any facts to support the derivative findings other than the conviction for the rape of the stepdaughter. Although DSS did not provide non-hearsay evidence of the criminal conviction in its motion papers, the Family Court Judge was the same Judge who heard the criminal case and therefore could take judicial notice of the conviction. The attorney for the stepdaughter argued that the stepfather's appeal should be dismissed as she was never served a copy of the notice of appeal but that defect is excused as she clearly knew of the appeal, filed a brief and appeared for oral argument.

**Matter of Kylani R., 93 AD3d 556 (1<sup>st</sup> Dept. 2012)**

A New York County father sexually abused and neglected his stepdaughter and derivately abused and neglected his own two children. The stepdaughter's in court testimony "amply corroborated" her out of court statements of his abuse. There were only "peripheral inconsistencies" as to dates and times. Even though the father's biological child was an infant when the abuse occurred and his younger biological child was born after the abuse had occurred, these two children are derivatively abused and neglected as his actions demonstrate defective parental judgment and poor impulse control.

**Matter of Janiece B., 93 AD3d 1335 (4<sup>th</sup> Dept. 2012)**

The Fourth Department concurred with Erie County Family Court that a father abused the children. The out of court statements of the children were cross corroborated both as to the nature and the progression of the sex abuse. The inappropriate sexual knowledge of the children further corroborated the allegations of his sexual abuse.

**Matter of Alaysha E., 94 AD3d 988 (2<sup>nd</sup> Dept. 2012)**

A Suffolk County father sexually abused his daughter. The child's out of court statements were corroborated by her consistent sworn in court testimony. The father also neglected the child as he was highly intoxicated in her presence and the father did not dress her appropriately for cold weather.

**Matter of Leeann S., 94 AD3d 1455 (4<sup>th</sup> Dept. 2012)**

The Fourth Department affirmed an Oneida County Family Court sex abuse adjudication against a father. The child's out of court statements were corroborated by the testimony of an expert who opined that the daughters' consistent statements about the abuse were reliable and were similar to ones made by abuse victims. This behavior also supported a derivative neglect adjudication regarding the son.

**Matter of Aliyah G., 95 AD3d 885 (2<sup>nd</sup> Dept. 2012)**

The Second Department reversed a Kings County Family Court dismissal of a sex abuse petition. The three year old child had contracted gonorrhea while in the care of the respondent parents and the parents failed to offer an adequate explanation. Unexplained evidence that such a young child has a sexually transmitted disease is prima facie sex abuse. This abuse and neglect of the 3 year old sufficed to establish derivate abuse and neglect of the sibling.

**Matter of Jada K.E., 96 AD3d 744 (2<sup>nd</sup> Dept. 2012)**

Kings County Family Court dismissed a sex abuse petition against a father and a neglect petition against a mother and ACS appealed the dismissal. The Second Department agreed with Family Court that neither allegation was proven. The out of court statements of the child alleging sex abuse were not corroborated. The other child's out of court statements did not corroborate her sister. She, in fact, denied that there had been sexual behavior and said her sister was lying. Although the child alleging the sex abuse had also drawn a picture that did represent what she said had happened, she did this at the request of law enforcement and as part of her accusation. The drawing was just a repetition of the child's claim and therefore is not separate corroboration. The mother's neglect petition was also properly dismissed. The mother did allow the father to drive her and the children home from day care one day when there was an order of protection in place forbidding his contact with the children. However, there was an emergency situation and the father's contact was minimal. The children were not impaired or threatened. A violation of a court order is not in and of itself neglect.

**Art. 10 Dispositions and Permanency Hearings**

**Matter of Jose T., 87 AD3d 1335 (4<sup>th</sup> Dept. 2011)**

An Erie County AFC for a 14 year old youth in foster care appealed the Family Court's determination that the child's goal should be adoption. The attorney had requested at the permanency hearing that the teen's goal be APPLA and not the goal the DSS sought – adoption. The youth testified that he did not want to be adopted, despite the DSS' diligent efforts to counsel him to agree to an adoption. He wished to remain in his foster home where he felt safe and happy and where he was allowed to continue his relationship with a brother. His foster family was willing to be his APPLA permanency resource. The lower court had ordered that the child's goal be adoption but the Fourth Department reversed and ruled that the proper goal for the child was APPLA.

**Matter of Lavalley W., 88 AD3d 1300 (4<sup>th</sup> Dept. 2011)**

An Erie County AFC for a 16 year old youth in foster care appealed the Family Court's determination that the child's goal should be adoption. The attorney had requested at the permanency hearing that the teen's goal should be APPLA and not the goal the DSS sought – adoption. The youth testified that he did not want to be adopted, that the caseworkers had pressured him into agreeing to be adopted in the past, however he was not intending to consent to an adoption even if DSS located an adoptive family for him. He testified that he was happily living with a foster mother who was fine with keeping him in her home until he achieved independence. He liked the 17 year old foster brother he had in the home and his foster mother was willing to be his APPLA permanency resource. The lower court had ordered that the child's goal be adoption but the Fourth Department reversed and ruled that the child's goal should be APPLA.

**Matter of Thurston v Skellington 89 AD3d 1520 (4<sup>th</sup> Dept. 2011)**

The Fourth Department reversed an Oswego County Family Court's order of Art. 6 custody to a grandmother after the child had been in foster care. DSS and the AFC had opposed the grandmother being given custody and argued that it was in the child's best interests to remain in foster care and the Appellate Court agreed. The grandmother loved the child and could provide a minimally fit home but she lacked the capacity to provide for the child's proper emotional and intellectual development. The grandmother had a history of indicated reports involving medical neglect, educational neglect, unsafe housing and inadequate food regarding her own children. For significant periods of time the grandmother's children had been in foster care. The grandmother currently was unemployed and lived on public funds, she had several health issues and did not drive. She had a limited education. The child has significant special needs and the caseworkers, a clinical psychologist who evaluated the grandmother and a psychiatric social worker all expressed concern that the grandmother could not handle the child's needs. The foster mother, the principal, the child's social worker and DSS workers all testified that the child's behavior deteriorated with increased visitation with the grandmother. The Appellate Court said that while foster care is not an ideal situation for a child, here it is in the best interests of this child to remain in care and not be placed with his grandmother.

**Matter of Charles K. 90 AD3d 1183 (3<sup>rd</sup> Dept. 2011)**

A Cortland County child was placed in foster care in 2009 due to neglect by the child's mother. The child's incarcerated father sought visitation with the child in April 2010. The child was at that time three years old and the visit would require a 9 hour round trip car ride. The child had only seen her father twice in prison before she was 2 years old. The lower court denied visitation as not being in the child's best interests. She had no preexisting relationship with the father and he had never played any significant parental role in her life. The father appealed but while the case was on appeal, the child was freed for adoption and the visitation question was ruled moot by the Third Department as "... there is no authority for allowing or ordering visitation once petitioner's parental rights were terminated...."

**Matter of Tashia ZZ. 90 AD3d 1201 (3<sup>rd</sup> Dept. 2011)**

When a freed Clinton County foster child who was almost 18 years old had a permanency hearing scheduled, the Family Court, sua sponte, indicated that it questioned if the child had the mental capacity to consent to her own continuation in foster care when she turned 18. The DSS then applied for and obtained in Surrogate's Court, a guardian appointed to her for the limited purpose of consenting to her remaining in care. When the matter then appeared on the Family Court calendar, the girl had in fact turned 18 and the lower court then refused to allow the appointed guardian to consent at that point, ruling that she had in fact been discharged from care as she had turned 18 before there was any consent. The DSS kept the child in care – she had nowhere else to go, had been in an RTC and then a therapeutic foster home – and appealed the

court's ruling. Before the appeal was heard, the court allowed the child to formally reenter foster care under the new proceedings in FCA § 1055 (e). Further the young lady was then adopted by her foster mother. The Third Department ruled that the appeal of the Family Court ruling on the consent to continuation in care was moot.

**Matter of Telsa Z., 90 AD3d 1193 (3<sup>rd</sup> Dept. 2011)**

These two Clinton county girls' cases have been appealed some 4 times to the Third Department. This now is an appeal by the mother regarding a permanency hearing as it related to one of the children. The court ordered that the child continue in care and the mother continue to have no visitation with the child. This child, who had been repeatedly sexually abused by her father, had such serious mental health issues that she was placed in a residential treatment center. The experts treating her there opined that the child should not see her mother. The child had made inconsistent progress and could not handle any stress well. The mother had completely failed to communicate with or work with the child's therapists. It was not in the child's best interests to see the mother. The DSS made reasonable efforts toward reunification by offering the mother mental health services, sex offender counseling, family safety education and parenting classes. The DSS also offered financial help for all the services. The mother had repeatedly failed to participate in the services.

**Matter of Tsulyn A., 90 AD3d 748 (2<sup>nd</sup> Dept. 2011)**

A Westchester mother appealed the Family Court's change of goal from reunification to adoption. The Second Department affirmed the goal change. The child had special needs and had been in foster care with a grandmother for more than half her life. The mother had not resolved her anger management and mental health issues.

**Matter of Alexis M., 91 AD3d 648 (2<sup>nd</sup> Dept. 2012)**

The Second Department reversed a Kings County Family Court decision to place a child, who had been in foster care, into the custody of a nonrespondent father upon his Art. 6 petition after an adjudication that the mother neglected the child. Since the father lived out of state and the court was in effect placing the child out of state as a disposition to the Art, 10 and the Art.6, the court was obligated to seek an ICPC approval from the father's state which had not been done.

**Matter of Liliana G., 91 AD3d 1325 (4<sup>th</sup> Dept. 2012)**

The Fourth Department reversed an Erie County Family Court's ruling that DSS need not offer reasonable efforts toward reunification. Although there was proof that the respondent mother's rights to two older children had been terminated, the mother argued that the DSS caseworker had testified at the removal hearing that the child could be safely returned to the mother. Further the

Judge had commented on the record when she issued a summary judgment on the underlying neglect that she would conduct a dispositional hearing to determine how the mother had progressed since the prior terminations and to see “what she’s doing” in respect to this new child. The court never conducted such a hearing but simply issued “no reasonable efforts” needed to be made toward reunification. Although FCA §1039-b does not require a hearing, given these facts, the court should have held a hearing to determine if providing reasonable efforts to reunify was not be in the child’s best interests. The respondent has a due process right to such a hearing when allegations are raised regarding genuine issues of fact about the child’s best interests. The matter was remanded for a hearing.

**Matter of Dakota F., 92 AD3d 1097 (3<sup>rd</sup> Dept. 2012)**

During a permanency hearing, the St. Lawrence County DSS sought a change in the child’s goal from reunification to placement for adoption. The court issued an order ruling that the “.....permanency goal for the child is approved as follows: Concurrent plan of return to parent and placement for adoption”. The mother appealed the order and the Third Department reversed on two grounds. First, although the law does not actually require the presence of the child in court for her permanency hearing, the court is required to find some age-appropriate way to consult with the child. Here the child was 6 years old and even if the court did not find it appropriate for the child to come to court, the record should demonstrate that the court elicited the child’s position by asking the AFC and the record does not reflect that the court asked. The second issue is that the court should not have issued concurrent and contradictory goals. The statute clearly says that court is to set a goal – singular, not plural. The list of goals in the law is separated by the word “or” not “and” clearly demonstrating that there is to be one goal. The goals set are inherently contradictory and the DSS cannot do both. The correct action is to set one goal for a child and yet direct DSS to engage in concurrent planning if the court wishes the DSS to provide services toward alternative options.

**Matter of Kristin M., 92 AD3d 1101 (3<sup>rd</sup> Dept. 2012)**

A Columbia County respondent mother appealed the Family Court’s finding that she had violated the court’s order of protection and committed perjury. The Third Department affirmed that the proof was sufficient that the mother had allowed one of the children’s fathers to have access to a child after being ordered to allow no contact. The caseworker testified that the child had told her that the father had been at the house and had in fact made the child pancakes the night before. The caseworker asked the child why the caseworker had not seen the father at the home that night. The child told her that the father was hiding in a closet when the caseworker came by and that the child was told not to tell. These out of court statements by the child were corroborated by the caseworker who had seen several pairs of men’s shoes in the hallway at the mother’s home that night, had seen the child eating pancakes and that she had observed that there were several large closets in the home. The court also spoke with the child in camera and the child told the Judge that the father visited the home and sometimes made the child pancakes. Some of the child’s statements to the Judge were inconsistent with prior statements but there

was sufficient evidence to prove by a clear and convincing level that the mother had violated the court's order that the father have no contact. The court commented that the level of corroboration of the child's out of court statement is relatively low. There only needs to be evidence that tends to support the reliability of the child's previous out of court statements. Also in a footnote, the Third Department commented that the child's in camera testimony was done with the AFC and a court reporter present only and the court told the parties in open court what the child had said and the mother's attorney did not make a request to question the child.

**Matter of Alexis AA., 93 AD3d 1090 (3<sup>rd</sup> Dept. 2012)**

The Third Department reversed Clinton County Family Court's grant of custody to a mother after a permanency hearing. The parents have 2 children and prior to the neglect petitions had joint legal custody of the children with the mother having physical custody. Both parents admitted they had neglected the children and the children were placed with grandparents under the Art. 10. The mother thereafter completed her mental health and substance abuse treatment and everyone agreed that the children should be returned to her. At the permanency hearing the court ordered the children to be returned to the mother as everyone had agreed but sua sponte ordered that the mother would have sole legal custody and the father would have visitation. The father appealed. The lower court erred. Under Art. 10-a the court can discharge the children back to a parent, but the court cannot issue a separate custody order that modifies the original custody order between the parents without agreement by the parties or the existence of an Art. 6 petition requesting that change. The father is entitled to proper notice and an opportunity to present evidence. The fact that the lower court thought this change in the custody was in the children's best interests does not change the fact that the father had due process rights to argue against any change in the prior custody.

**Matter of Cleophus B., 93 AD3d 1241 (4<sup>th</sup> Dept. 2012)**

The Fourth Department ruled that Oneida County Family Court had authority to release a child to a non-respondent father under DSS supervision. The mother was adjudicated to have neglected the child but allegations against the father were dismissed. The father then moved for summary judgment that the child should be immediately returned to him and the Family Court denied his motion. The Appellate Court agreed that since the child had at that point been in foster care for 9 months, that the lower court was correct was in holding a hearing to determine if the father had a present ability to care for the child. At the hearing both DSS and the ATF raised issues and claimed there were extraordinary circumstances but the lower court ruled disagreed and released the child to the now non-respondent father but under supervision by DSS, including random substance abuse screening. The father failed to comply with the screening requirements and the child was continued in foster care. On appeal, the father did not claim he had complied with the terms of the child's release to him but argued that the lower court was without authority to issue supervision orders regarding a non-respondent parent. The Fourth Department found that under FCA §1054(a) the court had authority to release the child to a parent and put that parent under supervision regardless of the fact that the parent was not a respondent.

**Matter of Mark RR., 95 AD3d 1602 (3<sup>rd</sup> Dept. 2012)**

After a Cortland County mother was found to have neglected her children, the children were placed with their father while the mother completed various service programs. When she had finished the programs required of her, DSS sought to have the court order modified and the children returned to her. However, the father filed for custody of the children and the lower court awarded him custody. The mother appealed. The Third Department affirmed the custody order. The mother's neglect adjudication constituted a change of circumstances. She hit one of the children and caused severe bruising and she was unable to understand or deal with the children's special needs. Since living with the father, the children had done much better. The older child made significant progress in school and the father is very involved in the children's medical and educational needs. Although the mother did make significant progress, the evidence showed that she may not be able to handle the stress of the children's return.

**Matter of Reeves v Erie County DSS 96 AD3d 1471 (4<sup>th</sup> Dept. 2012)**

The Fourth Department ruled that a stepfather does not have standing to seek visitation of his stepchildren in foster care.

**GENERAL TPRS**

**Matter of Kenneth L., 92 AD3d 1245 (4<sup>th</sup> Dept. 2012)**

A Jefferson County mother argued that the Family Court erred in reinstating the TPR petition when there had been a substantial failure of a material condition in the surrender she had signed. Such an argument was waived however as her trial counsel conceded that the petition could be reinstated. Conceding that point was not ineffective assistance of counsel as any other position was unlikely to be successful. Further, the mother then failed to appear for the fact finding and the dispositional hearing on the reinstated TPR and after 45 minutes of waiting, the attorney asked to be relieved of his representation to preserve the mother's ability to seek to reopen the default. This also was not ineffective assistance of counsel as it was a tactical decision the attorney made. Also, the mother did not offer needed proof to reopen the default. She did not provide a reasonable excuse for not being there – even if she was unable to find transportation, she did not contact anyone about her inability to get to court. Her attorney stated on the record that he had not heard from her. She also did not demonstrate that she would have a meritorious defense or why she waited 4 months to move to reopen the default.

**Matter of Harmony P., 95 AD3d 1608 (3<sup>rd</sup> Dept. 2012)**

The Third Department affirmed a St. Lawrence County Family Court's determination that a father's permanent neglect termination did not require proof of diligent efforts as per FCA § 1039-b. The father had his rights terminated to another child earlier and therefore reasonable

efforts did not need to be offered or proven in the termination of this child. The father argued on appeal that the court should have held a hearing on the question of the “no reasonable efforts” ruling. The Third Department found that the statute does not require a hearing but acknowledged that prior decisions have held that the court should hold a hearing on the questions as per due process if there are “genuine issues of fact” brought by the respondent’s answering papers. Here there are no genuine issues of fact about the prior termination – it occurred. The father argues that there were genuine issues of fact regarding the child’s best interests, health and safety and likelihood of reunification. The Third Department disagreed with the father’s argument. The Family Court knew the father’s situation and knew of his lengthy court involvement. The DSS had told the court about the child’s situation so that information was already known also. The lower court did listen to the father’s information about his attempts to resolve his problems but these things had not occurred until more than a year after the relevant TPR time period. His efforts were belated and it was not clear if he really had resolved his issues even though he had now completed substance abuse and sex offender treatment. The lower court had sufficient information before it to make a decision and a hearing was not necessary.

**Matter of Hailey ZZ., 19 NY2d 422 (2012)**

The Court of Appeals definitively ruled on the issue of court ordered post termination visitation in this much anticipated decision. This Tompkins County termination of an incarcerated father’s rights was the backdrop for the final showdown between the Appellate Divisions over the question of the Family Court’s authority to order that a parent whose rights were terminated by the court would continue to have rights of visitation with the child. Since the 2006 decision by the Fourth Department to reverse long standing precedent and order that Family Court did have such authority in *Kahlil S.*, 35 AD3d 1164 (4<sup>th</sup> Dept. 2006), the child welfare world was split on this issue. In the Fourth Department, litigated TPRS in all causes of action except severe and repeated abuse, had the potential of a “Kahlil hearing”; that is the Family Court would have to consider any application by the birth parent for an order of ongoing visitation if termination was being ordered. In the Second Department such hearings had also been occurring based on *Matter of Selena C.*, 77 AD3d 659 (2<sup>nd</sup> Dept. 2010) which adopted the Kahlil stance. The Third Department definitively ruled that there was no such authority and it was a Third Department decision that the Court of Appeals finally issued the ruling that ends the discrepancy between the Departments. The Court of Appeals found that there is no statutory support for such authority to order post termination visitation unless there is a voluntary surrender of the child where the parties negotiate and agree to such visitation. Family Court has no authority to include any such condition of ongoing contact in any dispositional order under SSL §384-b.

The Court also reviewed the actual termination of the father’s rights in this matter and also affirmed the Third Department’s decision that there was clear and convincing evidence that he had permanently neglected his daughter. The father had been incarcerated the entire time the child had been in foster care, which was 2/3 of her life. The agency offered diligent efforts. The father would be in prison until at least June of 2011 and more likely later, possibly until 2018. The father was unable to identify any relatives that appeared able to safely care for the child.

The was an 8 page dissent by Justice Pigott who disagreed with the majority on both issues, first indicting that in his opinion the DSS had not offered diligent efforts in that the evidence presented did not show that they had diligently looked for other non foster care family placements for the child or made the father aware of the urgent need for him to do so. On the issue of authority to order post termination visitation, Justice Pigott said “reasonable opinions on it differ” and that the court has inherent discretionary power of what is in a child’s best interests and in his view “the Fourth Department had it right.”

**Matter of Drevonne G., 96 AD3d 1348 (4<sup>th</sup> Dept. 2012)**

The Fourth Department ruled that the Family Court could choose to terminate the parental rights of one parent even if doing so would not free the child for adoption. The father in an Erie County termination was determined to have abandoned his three children and he argued on appeal that the court could not terminate his parental rights since the mother’s rights were not terminated and therefore his termination would not free the children for adoption. The SSL clearly encourages placing children in permanent homes but it does not prohibit terminating parental rights even where that would not free a child for adoption.

**ABANDONMENT TPRS**

**Matter of Amaru M., 87 AD3d 1069 (2<sup>nd</sup> Dept. 2011)**

Kings County Family Court’s dismissal of an abandonment petition against a mother was reversed by the Second Department who determined that she had in fact abandoned the child. While the mother did remain in communication and visit with her other children who were in foster care, but she did not substantially communicate with the agency about or visit this subject child during the relevant 6 month period. She was not discouraged or prevented in any way.

**Matter of Chartasia Delores H., 88 AD3d 460 (1<sup>st</sup> Dept. 2011)**

A Bronx father abandoned his child. He admitted that he had no contact with the child or the agency for the relevant 6 months and his incarceration is no defense. Diligent efforts do not need to be shown in abandonment terminations and the agency need not even prove that it gave notice to the father of the child’s whereabouts. The child should be adopted by her foster mother whom the child has lived with for years , wants to adopt the child and has a safe, stable, loving home where the child has thrived. The father’s prison sentence will continue until the child is an adult. Although the paternal grandmother sought custody of the child, the grandmother herself had serious reservations about her ability to care for the child.

**Matter of Baby Girl Hope 2011 NY Slip Op 21386 (Family Court, Queens County 2011)**

A mother abandoned her infant daughter at the hospital shortly after the birth, claiming that she wanted to invoke the “Baby Safe Haven” law. She refused to give her name or any identifying

information. The child was taken into care on a neglect petition and adjudicated neglected after service was made by publication and no one came forward. After 8 months with no contact from anyone, an abandonment termination was filed and a motion was made to dispense with service. The Family Court ruled that service by publication was necessary as there were no provisions in law to modify in any way the service requirements for a so called safe haven baby.

**Matter of Beverly EE., 88 AD3d 1086 (3<sup>rd</sup> Dept. 2011)**

A Cortland County child was placed in foster care at birth in 2007. At that time the mother named a particular person as the father but DNA tests showed that he was not the father. Over a year later, the mother's rights were terminated. Three months later, DSS brought a paternity petition against the respondent and DNA testing showed him to be the child's father. An order of filiation was entered 6 months after the filing of the paternity petition and DSS then filed abandonment proceedings against the father 2 months after the paternity adjudication. The respondent had never visited or communicated with the child who was now over two years old. The respondent argued that he had only just been adjudicated some two months earlier and the mother had originally lied about someone else being the father and it was unfair not to give him more time. The Third Department did not find the father's argument persuasive. He had known of the possibility of his being the baby's father since the pregnancy and had talked to the mother about it. He never took any action to determine if he was the father, never sought a DNA test, never visited, never supported the child. He certainly had good reason to believe that he was the child's father both before and during the relevant 6 month period as the paternity proceeding was pending during that time. Even after the DNA test showed he was the father, he still did nothing. The Third Department affirmed the abandonment termination.

**Matter of Lily LL., 88 AD3d 1121 (3<sup>rd</sup> Dept. 2011)**

A Schenectady County dismissal of an abandonment petition against a father was reversed on appeal. The child had been placed with the paternal grandfather shortly after the child's birth and a removal from the mother. The father had been incarcerated at that time but one month after he was released, the father told the grandfather that he would "assign his rights" to the child to the grandfather and thereafter the father had no significant contact with his daughter. At the most recent permanency hearing, the father's visits were changed such that they could only occur at DSS offices. However, he did not visit the child and the DSS brought an abandonment proceeding. The only time he had seen the child in the relevant 6 months was when the grandfather had the child with him when he dropped some furniture off at the fathers. Even if he had seen the child on two other occasions as he claimed, this would not be enough to defeat the abandonment. The father did not support the child and did not communicate with the grandfather about the child. The lower court dismissed the petition ruling that the father did not have a lawyer during the relevant 6 months – including at the time of the permanency hearing change in his visitation provisions. The Third Department ruled that DSS was not obligated to prove that he had a lawyer in order to prove the statutory grounds of abandonment.

**Matter of Jamaica M., 90 AD3d 1105 (3<sup>rd</sup> Dept. 2011)**

The Third Department affirmed Schenectady County Family Court's termination of a father's rights. It was undisputed that he had been incarcerated and had no contact with the two children for the relevant 6 months. He was able to make telephone calls and send letters from the prison and he in fact did so. Prior to his incarceration both the caseworker and the foster care agency worker had provided him with contact information. The father claimed that the workers did not try hard enough to locate him and that he did not know he could contact the children. DSS need not prove diligent efforts in an abandonment termination and his incarceration did not relieve him of his duty to communicate with the workers about the children.

**Matter of Ryan Q., 90 AD3d 1263 (3<sup>rd</sup> Dept. 2011)**

A Schenectady County termination of an incarcerated father's rights to his son was upheld by the Third Department. The child was with relatives during the time in question. There was a period when the father was out of jail and he did have three one hour supervised visits with the child. He also sent one letter to the caseworker as well as one card and one voice mail to the relative caretakers. The Third Department found that this contact was not enough to defeat an abandonment. Although the father claimed to have made many more contacts, the lower court did not find his testimony regarding these other contacts credible.

**Matter of Maria E., 94 AD3d 1357 (3<sup>rd</sup> Dept. 2012)**

A Rensselaer County father abandoned his daughter. The child went into foster care at birth due to the mother's mental health issues and the DSS learned the respondent father's name from the mother within a month of the infant's placement. Caseworkers persistently tried to contact the respondent for 2 years while he went in and out of prison. He never answered any letters, asked about the child or provided any contact information about his many moves. He has never visited or attempted contact with the child in any way. The child had been in foster care 21 months when the DSS brought paternity proceedings and established the respondent's paternity and at 24 months of placement, DSS brought an abandonment petition. The father claimed on appeal that the 6 months for abandonment purposes should not run until he was declared the child's father but the Appellate Court rejected that argument. The father had known of the child's existence and the possibility that he was the father for almost a year. Although in an abandonment termination, the agency is not obligated to prove diligent efforts, the proof showed that the caseworkers searched the inmate data bases, welfare management records and the putative father registry to try to locate the father. The DSS wrote some 17 letters to his addresses, they met him at the mother's home and at the local jail and told him of his rights. The father admitted receiving letters. Once, after the child had been in care close to 2 years, he mentioned that his mother in NYC might take the child, but there was no response to letters sent to her.

## **MENTAL ILLNESS and MENTAL RETARDATION TPRS**

### **Matter of Dileina M.F., 88 AD3d 998 (2<sup>nd</sup> Dept. 2011)**

The Second Department upheld termination on both mental illness and permanent neglect grounds regarding a Kings County mother. A licensed psychologist interviewed the mother and reviewed her records and testified that the mother had mood disorder, post traumatic stress disorder and a personality disorder. The mother had poor insight into her problems and her prognosis of ever being able to safely care for the children was poor. Given her long standing pattern of functioning and her behaviors, the expert's opinion was that the child would be at risk of neglect if placed back in her care.

The mother was also properly found to be permanently neglectful of the child. The agency had provided diligent efforts by providing individual and family therapy, financial assistance for rent and food, encouraging her to take her medications and to keep her rent current and to obtain employment. The mother failed to attend visitation and therapy on a regular basis. She did not take her medications and did not obtain steady employment or stable housing.

### **Matter of Royfik B., 89 AD3d 1423 (4<sup>th</sup> Dept. 2011)**

A Wayne County mother's rights were properly terminated on the grounds of mental illness. Both the experts and the caseworker who supervised visitation established that the mother was currently mentally ill and that the child would be in danger of neglect if returned to the mother's home. A social worker from the mother's day treatment program did testify that she had made some progress but she provided no evidence one way or another of the issue of the mother's ability to parent this child.

### **Matter of Darius B., 90 AD3d 1510 (4<sup>th</sup> Dept. 2011)**

An Erie County mother appealed the termination of her parental rights. The Fourth Department agreed that there was clear and convincing evidence that she was presently and for the foreseeable future unable to safely parent her children. Even though the court appointed expert had, at one time, indicated that the mother should have another chance, the expert based that opinion on information the mother had given him. Once the court appointed psychiatrist was made aware of the inaccuracies in the information the mother had given him, his opinion changed and he was clearly recommending that her parental rights be terminated. An adverse inference can be drawn due to the mother's failure to take the stand and she also offered no contradictory expert opinion on her ability to care for the child.

### **Matter of Burton C., 91 AD3d 1038 (3<sup>rd</sup> Dept. 2012)**

The Third Department affirmed an Essex County Family Court termination on mental illness grounds. The mother of two children was examined by two psychologists who did testing,

reviewed the records and interviewed the mother. Both experts found her presently mentally ill and unable to safely care for her children currently and for the foreseeable future. The children also had significant special needs and were developmentally disabled. One psychologist found that the mother had a personality disorder, anxiety, extreme feelings of abandonment and a dependency on relationships with inappropriate men. She was unable to make good decisions and put her need for a relationship with a man above the safety of her children, including exposing the children to sex offenders. Medication or other services would not improve the mother's problems in this regard. The second psychologist opined that the mother had a borderline personality disorder, depressive disorder, anxiety disorder and had low intellectual functioning. This leads to the mother having poor impulse control, self image problems, inappropriate judgment, poor decision making and poor interpersonal functioning. While the mother is motivated to change her behaviors to obtain the return of her children, she simply cannot do so given her mental illness. The mother in this matter had made some recent improvements but both psychologists took the position that she was and would continue to be incapable of safely caring for the children. No contradictory opinions were offered. A dispositional hearing is not required in a mental illness termination.

**Matter of Paulidia Antonis R., 93 AD3d 502 (1<sup>st</sup> Dept. 2012)**

The First Department affirmed a Bronx County Family Court termination of a mother's rights on mental illness grounds. Two psychologists reviewed the mother's medical records and interviewed her. They testified that she suffered from schizoaffective disorder which impacted her ability to parent safely. She was currently unable to parent and would not be able to do so for the foreseeable future. The mother's expert did not agree with the diagnoses but this expert had not thoroughly considered the mother's extensive records.

**Matter of Michele Amanda N., 93 AD3d 610 (1<sup>st</sup> Dept. 2012)**

A Bronx County mother's mental illness made her presently, and for the foreseeable future, unable to safely parent her child. The expert testimony was that she had a long standing paranoid schizophrenic condition and could not meet the child's needs. The expert had a 90 minute interview of the mother, a 50 minute period of testing, reviewed her prior mental health treatment records going back to her adolescent years and prepared a detailed report.

**Matter of Hope K., 96 AD3d 864 (2<sup>nd</sup> Dept. 2012)**

There was clear and convincing evidence that a Kings County mother was too mentally ill to be able to safely care for her child for the foreseeable future. The court appointed psychologist interviewed the mother and reviewed a prior report of another court appointed psychologist. He also reviewed hospital records and the records from the original neglect proceeding. The expert testified that the mother had severe depression with psychotic features as well as a personality disorder. He opined that if the child was returned to the mother, there would be a risk of neglect as the mother was unable to meet the child's needs due to her mental illness and she also lacked insight into her illness.

## PERMANENT NEGLECT

### **Matter of Christopher John B., 87 AD3d 1133 (2<sup>nd</sup> Dept. 2011)**

A Nassau County termination petition for two parents was dismissed and the dismissal was affirmed on appeal. The Second Department agreed that the DSS had not provided diligent efforts to the parents and that also there was not adequate proof that the parents had failed to plan or failed to maintain contact. The original placement had been on neglect admissions by the parents that the children had been exposed to some form of sexual activity by relatives of the parents. The agency required that the parents admit responsibility for the children's abuse but this was unreasonable given that the parents had always denied any direct involvement or knowledge of the abuse – and the adjudication on their neglect plea did not include their participation or knowledge. The parents were never told what the goal was that they needed to accomplish to have the children returned and were not asked to participate in any particular therapy toward that end. No services were offered to address the sexual abuse and diligent efforts were not made to provide appropriate contact and visitation with the children. The foster parents undermined efforts towards reunification and the agency did not move the children. The parents on the other hand, visited the children when they were allowed to do so and substantially complied with what the workers asked of them including individual therapy, family therapy when these were made available. They maintained contact with the caseworkers and had adequate housing.

### **Matter of Jacob E., 87 AD3d 1317 (4<sup>th</sup> Dept. 2011)**

Steuben County Family court properly ruled that DSS need not prove diligent efforts in a permanent neglect termination based on the court granting a motion for a FCA §1039-b order that DSS need not make “reasonable efforts” toward reunification. DSS proved clearly and consistently that the mother had her parental rights terminated to an older child. Further mother continued to fail to cooperate with any treatment programs for mental health and substance abuse issues. The mother was unsuccessful in proving that any reasonable efforts were in the child's best interests and was not contrary to the child's health and safety and would likely result in timely reunification and therefore could not defeat the motion.

### **Matter of Janell J., 88 AD3d 512 (1<sup>st</sup> Dept. 2011)**

A New York County mother's rights were appropriately terminated. The agency proved clearly and convincingly that it had offered diligent efforts. The caseworker referred the mother to counseling, parenting skills, and anger management. She also provided visitation for the mother. The mother did complete many of the services but she “failed to gain insight into her parenting problems”. She essentially made no progress in her counseling. Termination for adoption is in the best interests of the children as they have lived for several years with a foster mother who wishes to adopt them. The children have thrived in the foster mother's care.

**Matter of Kie Asia T., 89 AD3d 528 (1<sup>st</sup> Dept. 2011)**

The First Department agreed with Bronx County Family Court that a mother was unable to demonstrate parenting skills despite completing the recommended services and her parental rights were terminated. She failed to consistently visit the children and would not separate from the father. The father was unable to remain sober and would show up for visits with the children smelling of alcohol. He did not complete anger management and one of the issues in the placement was domestic violence. The children were in a stable, nurturing foster home that wanted to adopt them where they had lived for over 3 years.

**Matter of Jamel Raheem B., 89 AD3d 933 (2<sup>nd</sup> Dept. 2011)**

The Second Department affirmed the termination of a Nassau County mother's rights to her son. Since the mother had no contact with the DSS and did not provide them with information on her whereabouts for some 7 months during the relevant period, the DSS was excused from having to prove that they provided diligent efforts as per SSL§ 384-b(7)(e)(i). Within 3 months of the child's placement in care, the mother left her drug treatment programs, relapsed into drug use and was arrested for selling drugs. She, therefore, failed to plan for the child's return. Her current plan to find an apartment and a job as a chef was not realistic or viable. The child should be adopted by the foster mother who has cared for him his whole life and with whom he is bonded. There is no real relationship between the child and the birth mother.

**Matter of Jonathan NN., 90 AD3d 1161 (3<sup>rd</sup> Dept. 2011)**

The Third Department reviewed and affirmed a permanent neglect matter from Chemung County Family Court. The respondent mother argued that the requisite "one year" period had not occurred. Although for the last 8 months of the relevant time period the child had been in foster care, the period before then the child was actually in an Art. 10 custody placement. (Although of course the Court of Appeals and the Appellate Divisions have recognized so called *Dale P.* TPRs since 1994 wherein the child was in Art. 10 custody the relevant time period, the respondent apparently was arguing that the year could not consist of partially foster care and partially Art. 10 custody) However since the parties stipulated to a subsequent TPR petition being filed after the child had in fact been in foster care for the full year the Third Department ruled the issue moot.

The respondent also claimed that the agency did not offer diligent efforts but the Third Department disagreed. Parenting classes, domestic violence counseling, mental health counseling were all offered. The caseworker kept the mother informed of the child's progress, modified the visitation schedule to accommodate the mother's schedule and provided gas voucher and bus passes. The caseworker also repeatedly advised the mother of the importance of keeping in touch with the child and of keeping her home sanitary and safe. The mother did participate in some services and did end a violent relationship with the father however she failed to complete

most of the programs and was not in regular attendance with her mental health appointments. She did not maintain safe housing, moving frequently and routinely having unsafe and dirty living areas – including dog feces, urine and debris in the home. She routinely missed visits – sometimes for weeks at a time - and did not have appropriate excuses for doing so. When she did visit with the child, she was inappropriate and the child would have nightmares and be stressed. This would decrease when the visits did not occur. The court did provide the mother with a four month suspended judgment period but she was unable to resolve her issues and continued to have inconsistent visitation despite significant efforts on the part of the caseworkers and foster parents to help with the visitation. She also did not improve her unsafe home environment. The four year old boy had not lived with this mother for most of his life. His mother actually caused him significant distress as opposed to his foster family who wanted to adopt him.

**Matter of Angelina BB. 90 AD3d 1196 (3<sup>rd</sup> Dept. 2011)**

A Schenectady County Family Court termination of a father’s rights were affirmed on appeal. DSS offered diligent efforts by arranging visitation every week. Even after the father moved out of the county, DSS brought the child to him for visitation. He was provided with bus tokens for visits and parenting training was set up. The father missed 9 visits in the 25 out of 22 month period and failed on 4 occasions to advise DSS of his not coming for the visitation. As the father was a heroin addict, DSS also set up substance abuse programs with a service plan to coordinate the programs. The father however relapsed and continued to use drugs. He failed to complete several drug programs set up for him. He was criminally convicted for possessing and selling prescription drugs. He also refused to end a relationship with a drug abusing woman. When told that this relationship might impact his ability to get his child back he told the caseworker he would “take his chances.” There was no point in offering a suspended judgment as the child has been in the same foster home for over 4 years and they would like to adopt her. The father continues the ill-advised relationship with his girlfriend. Although he has recently enrolled in new programs to fight addiction, it is too late and he has demonstrated that he continues to put his own interests above those of his child.

**Matter of Emily Rosio G., 90 AD3d 511 (1<sup>st</sup> Dept. 2011)**

Bronx County Family Court terminated the parental rights of a mother and the First Department affirmed. The agency made diligent efforts by referring her to programs that would fulfill the service plan and by repeatedly reminding her of the need to complete the programs. The mother however did not complete the individual counseling that was mandated. She was emotionally unstable and this resulted in stress to the child who was developmentally delayed. The mother continued to deny the reasons for the child’s placement and her role in that and did not gain insight into in parenting and into meeting the child’s special needs. The child is thriving with her foster mother who wants to adopt her and who can and meet her special needs.

**Matter of Jacelyn TT., 91 AD3d 1059 (3<sup>rd</sup> Dept. 2012)**

The Third Department concurred that the out of state father of a Clinton County child had permanently neglected her. The father lived in North Carolina when the child went into foster care and continued to do so until after the TPR was filed. Despite the father being in another state, DSS offered him diligent efforts. The caseworker called and wrote to the father, keeping him informed of the child's status and progress. The caseworker set up weekly phone call sessions between the father and the child and offered travel assistance for the father to come to Clinton County. She scheduled visits with the child when the father did come and repeatedly talked to the father about what he needed to do to have the child placed in his care. The caseworker told the father how to obtain services in North Carolina and recommended mental health and substance abuse evaluations, parenting classes and domestic violence services. Further she evaluated relatives that the father suggested could be resources to assist him should the child be returned. The caseworker did recommend that the father move to Clinton County to establish a relationship with his daughter. The father failed to plan. He routinely failed to be present for the weekly phone call with the child, missed meetings with the caseworker and did not engage in any of the recommended services. He only visited the child when he was required to be in Clinton County anyway for court appearances. The quality of these limited visits was very poor –he would not interact with the child, would not even acknowledge her and would simply leave the visit for no apparent reason. None of the relatives he suggested would assist him with or take custody of the child were willing to do so.

**Matter of Syles DD., 91 AD3d 1054 (3<sup>rd</sup> Dept. 2012)**

A Schenectady County mother's rights were terminated and this was affirmed on appeal. The child was removed due to excessive corporal punishment and the agency offered diligent efforts consisting of: parenting classes, individual counseling, domestic violence counseling, anger management, and help temporary shelter. The DSS provided weekly visitation, transportation to visitation and to all services, regular service plan reviews and counseling with the child.

The decision was quite detailed in its examination of the mother's failure to plan for the child's return. The mother acknowledged being upset with DSS for the removal and not cooperating with their offered services at first. She also refused to enroll in a parenting class in case she obtained employment and the classes conflicted with any potential job hours. She did eventually take and finish parenting classes some 17 months after the child was removed. She refused to engage in preventive services as she believed the court had not specifically ordered her to do so although she claimed she would engage in them if it was required. She continued to have altercations with her fiancé that required police involvement but she refused to engage in domestic violence or anger management services. She refused to move to a domestic violence shelter but complained that the DSS did not help her with housing. She continued to live with her fiancé even though there was domestic violence. The mother claimed that this inappropriate and violent man would be a resource to help her care for her son when he was returned. She attended less than half of the child's counseling sessions and would not attend ADD evaluation procedures for the child. The mother did have weekly visitation that had even increased at one point to weekend unsupervised overnights. However, she had a disagreement with the foster

mother over transportation such that the visitation had to be rearranged. The mother actually refused overnight weekday visits as she did not want to get up in the morning to help the child get to school. In one 6 month period, she only saw the child once due to her personal conflicts with her fiancé. She missed 44 of 66 visits during the relevant time. The child would fight with other children after scheduled visits - both when the mother showed and when she did not. The court said: “Although respondent had reasons for missing many of her visits and appointments, stability is important for this child, especially in light of his special needs. Her reasons for missing visits are irrelevant to him: any missed visit leaves him feeling unloved or forgotten and the possibility that respondent might not show up causes him anxiety before every visit.”

There was no reason to offer a suspended judgment even though the mother had obtained employment and had attended some of the service offered. She continued to put her work schedule ahead of visitation, refused to work with service providers on the issue of the child’s medication and demonstrated more concern about her “rights” and about her role in DSS decision making then showing concern about her child’s situation. The mother was in denial about the child’s issues and believed that his attachment and adjustment disorders would be resolved by returning the child to her. The foster mother wants to adopt the child and the child is attached to his foster brothers.

**Matter of Marquise JJ., 91 AD3d 1137 (3<sup>rd</sup> Dept. 2012)**

A Cortland County father was incarcerated while his son was in foster care and the Third Department affirmed a permanent neglect termination. Prior to the incarceration, the father did not live with the child but he did have contact with him. When the mother and child relocated from the NYC area to Cortland County, they did not tell the father. But, the Cortland County CSEU began to look for the father to address paternity and child support issues. Shortly thereafter the child was placed in foster care. Within 2 months of the child’s placement in foster care, DSS located the father in prison and advised him that the child was in care. Thereafter the caseworker made diligent efforts with the father even before he was adjudicated. The caseworker regularly sent permanency reports, wrote to the father asking him about his plans and situation and responded to any contact by the father. The caseworker attempted to set up phone contact between the father and the child where it was possible and advised the father to communicate with the child by letter as well. On appeal, the father argued that the DSS should have provided visitation in the prison. But the father did not ask for visitation and given the child’s young age and the distance to the prison, visitation would not have been in the child’s best interests. The father failed to plan. While he made some attempts to keep in contact with the child, these attempts were sporadic and inconsistent. He only phoned the child for a brief period of a few months and only sent the child two cards. He had over 2 more years to serve on his sentence and he offered two resources – his aunt who on two occasions declined to take the child and his girlfriend who had never had any relationship with the child and who the father only identified with a first name.

The father argued that he should have been given a suspended judgment but he had over 2 more years to serve in prison. A suspended judgment can only be ordered for one year and then for another year under extraordinary circumstances. So the suspended judgment would have to end

by law before the father was in a position to possibly be released. Although the aunt did appear at the dispositional hearing and offer to take the child, she testified that she did not have enough money to adopt the child and would want him to be placed with her as a foster parent so she could receive a foster care subsidy. The child had not seen the aunt in years and had no relationship with her and this placement would keep the child in foster care as well as require the child to move to NYC. The child was doing well in school, engaged in sports and attending counseling. He visited his mother, who lived in Cortland County, on a weekly basis. He had a close relationship with his foster family – including with an adopted child in the foster home. The family wanted to adopt him. It was in the child’s best interests to be freed for adoption by the foster home.

**Matter of Gerald G., 91 AD3d 1320 (4<sup>th</sup> Dept. 2012)**

The Fourth Department affirmed an Erie County mother’s termination. The DSS offered diligent efforts but the mother was unable keep the home suitably clean, did not budget properly or demonstrate proper parenting. The experts presented by both sides testified that the mother was not in a position to parent the children at the time of the hearing. She attended parenting and domestic violence programs but did not benefit from them and argued with the service providers. The children had been in foster care for 4 years. When removed from her home, the boy was nervous and uncontrollable and the girl was not growing physically as she should but both children were now thriving in the foster home. Although the mother had made some progress by the time of the dispositional hearing, it was not enough to warrant consider any other option except freeing the children to be adopted.

**Matter of Jyashia RR., 92 AD3d 982 (3<sup>rd</sup> Dept. 2012)**

Tompkins County Family Court terminated the parental rights of a father to his two daughters. He had consented to a finding of neglect and the children had been in care for about 18 months. The DSS offered diligent efforts in that they referred the father to mental health counseling and parenting programs. He was given a caseworker and a family worker both of whom assisted him to obtain services and to supervise weekly visits. The workers demonstrated proper parenting techniques for him during the visits. DSS also offered service plan reviews and family team meetings. The father claimed that DSS should have helped him locate a new mental health counselor when he maxed out of a short term (14 month) program. However he did not act upon his counselor’s recommendation that he obtain more counseling nor did he ask the agency to help him locate a new therapist.

The father did participate in the programs but did not benefit from them, continuing to take the position that the children should not have been removed. He rarely contacted the agency who often could not reach him by phone or mail as he failed to provide timely and accurate information about his residence and roommate arrangements. He took over a year to locate suitable housing. When he did obtain housing, he first provided an inaccurate address, later when the caseworker visited the home, it was clear he was not living there as the electricity was not even turned on. He frequently arrived late for visitation or would cut the visits short –

disappointing the children. He could not supervise them or attend to their needs during the visits. When the visits were able to be moved to his residence, he would not agree to expanding them beyond an hour citing his long working hours. He was offered weekend visits with the children if he could locate a suitable family member or friend to supervise but he never followed up with that possibility. He did not involve himself in the older child's school program and did not attend parent meetings or speak with the foster parents about this child's well being. The father never showed any real insight into the reasons for the children's placement. The children had been in the same placement since coming into care and the foster family wanted to adoption them.

**Matter of John B., 93 AD3d 1221 (4<sup>th</sup> Dept. 2012)**

The Fourth Department affirmed Erie County Family Court's termination of a mother's rights. The mother only attended 31 of the 52 visits scheduled for her during the first year the children were in foster care. Some of the visits did not occur due to mother's improper hygiene and some because she had a fever. The mother complained about pain in various parts of her body and had fevers but would not seek medical attention although urged by DSS to do so. She failed to complete parenting classes, substance abuse and mental health treatment but claimed this was due to depression and serious physical illness. Given her fevers and complaints of physical illness, DSS required that the mother provide medical documentation that she did not have a contagious disease such that visitation would be suitable. She did not produce medical documentation and so the visits remained suspended for the year before the filing of the TPR. A mental health diagnoses is not sufficient to establish a lack of ability to physically plan for her children. The mother failed to produce evidence of her claim that she had physical illnesses that rendered her unable to plan for the children.

**Matter of Naisha J.V., 94 AD3d 416 (1<sup>st</sup> Dept. 2012)**

Bronx County Family Court's termination of a father's rights to his two daughters was affirmed on appeal. The agency offered ample diligent efforts by creating a service plan tailored to his needs and providing referrals to treatment programs. The father did complete an anger management program but did nothing to comply with the service plan. He was incarcerated repeatedly during the children's placement. The children were in care due to his sexual abuse of them and he would take no responsibility for these acts, even knowing that this would mean a serious bar to reunification. The children had been in care over 4 years and were doing well in their kinship foster home. A suspended judgment is not warranted given his denial of the sexual abuse, how long the children have already been in foster care and the fact that the foster family wants to adopt. The children need permanency and stability.

**Matter of Ronald Anthony G., 94 AD3d 424 (1<sup>st</sup> Dept. 2012)**

A New York County father permanently neglected his two children. The agency was not required to offer the father diligent efforts toward reunification as his parental rights to seven other children had already been terminated. None the less, the agency did offer him diligent efforts by referring him for mental health services and encouraging him to use the shelter system to obtain housing. The father failed to plan for the children's future. He refused to accept that he suffered from schizophrenia and would not seek and treatment. Although he was homeless, he refused to use the shelter system to obtain housing. The children are 3 and 4 years old and have been in foster care since birth. They are bonded to a stable and loving foster family who wishes to adopt them.

**Matter of Essence S., 94 AD3d 526 (1<sup>st</sup> Dept. 2012)**

The First Department affirmed the dismissal of permanent neglect petitions against both a mother and a father for failure to prove that the agency offered them diligent efforts toward reunification. The agency did not offer the mother a service plan that was designed to fit her circumstances. The agency offered as proof letters regarding services sent to the mother – but the letters were not addressed to the mother's address. The only witness on the stand for the agency was a caseworker who testified about events over 2 years old and did not have records and did not have personal knowledge about the events. The agency had also suspended the mother's visitation rights. Foster care agencies do not have authority to end parental visitation without a court order. Certainly the agency cannot suspend visits and then in the termination take the position that the mother failed to visit. As to the father, no diligent efforts were proven. The agency only met with him one time.

**Matter of Darryl Clayton T., 95 AD3d 562 (1<sup>st</sup> Dept. 2012)**

A New York County mother's rights to her son were terminated and this was affirmed on appeal. The agency was excused from diligent efforts to reunify as the efforts to do so would be detrimental to the child under SSL §384-b(7)(a). An expert in child psychology and trauma testified that the child had been traumatized by watching his mother allegedly kill his father. The child had experienced intense post-traumatic stress disorder after supervised visits or phone call with his mother and so those were terminated. Despite not having to provide diligent efforts, the agency did so. They offered the mother a service plan that included therapy, domestic violence treatment, parenting skills and anger management. The mother failed to obtain housing, complete the anger management or therapy programs and she failed to gain insight into her role in the child's placement. The child was with a loving foster home where they provided appropriate care and wanted to adopt him. The child had not seen the mother in about 2 years and did not ask for her. The expert testimony was that reunification would harm the child.

## TPR DISPOS

### **Matter of Jahquavius W., 86 AD3d 576 (2<sup>nd</sup> Dept. 2011)**

Orange County Family Court correctly terminated a mother's rights after finding that she violated the terms of her suspended judgment. A suspended judgment can be revoked if there is a preponderance of evidence that the parent has violated or failed to comply with one or more conditions. It is the parent's obligation to demonstrate that they are making progress in overcoming the problems that led to the placement. Literal compliance is not enough. Here the mother failed to comply with three of the conditions.

### **Matter of Alicia E.E., 86 AD3d 663 (3<sup>rd</sup> Dept. 2011)**

The Third Department affirmed Albany County Family Court's disposition in a severe abuse termination. The father who was serving a prison sentence for the physical abuse of this 5 year old child, argued for a suspended judgment. Severe abuse termination dispositions must be proven on a clear and convincing level as opposed to dispositions in all other TPR grounds. The Appellate Division agreed with the trial court that it was in the child's best interests to be freed for adoption. The foster family had been meeting the child's special needs, she is doing well in school and other activities and they want to adopt her. The father on the other hand has been convicted twice for physically abusing this child and is incarcerated for that until at least 2014. The criminal court also issued an order of protection that he have no contact with the child until she is 18.

### **Matter of Vanisha J., 87 AD3d 696 (2<sup>nd</sup> Dept. 2011)**

A Kings County grandmother appealed the Family Court dismissal of her Art. 6 custody petition when the court freed her grandchildren to be adopted by her foster parents. The Second Department affirmed. SSL § 383 (3) grants preference to foster parents who have had a child in their home for over a year and no preference is provided for relatives. The children have been in the foster parent's home for over 5 years and they had already adopted two of the children's siblings.

### **Matter of Chartasia H., 88 AD3d 576 (1<sup>st</sup> Dept. 2011)**

Bronx County Family Court properly denied a grandmother's petition for custody in favor of freeing a child to be adopted by a foster mother. The grandmother has no preemptive right to custody of the child and lived several hundred miles away from the child. She had only seen the child two or three times and not at all in the last several months. The child has lived with the foster mother for several years and is a part of the mother's immediate and extended family. Her home is loving and stable and the child has thrived there, overcoming some of the initial problems she had had upon placement.

**Matter of Chase F., 91 AD3d 1057 (3<sup>rd</sup> Dept. 2012)**

In this Tompkins County matter, the Third Department ruled that a father cannot appeal the lower court's decision to deny a grandparent's Art. 6 petition in a TPR disposition as only the grandparent can appeal that decision. Further as the defense attorney did not raise the issue of a suspended judgment, this issue is not preserved for appeal.

**Matter of Alexandria A., 93 AD3d 1105 (3<sup>rd</sup> Dept. 2012)**

The Third Department concurred with Delaware County Family Court that a mother had violated the terms of her suspended judgment. The Appellate Court acknowledged that the violation was brought only some 3-4 months after the suspended judgment order had been entered but indicated that where there are substantial violations to the order, the DSS need not wait until further along in the one year order to file the violation and seek termination. Here the mother violated the terms by missing meetings with the caseworker and visits with the child. The mother also was terminated from treatment by her mental health counselor for failing to attend sessions. The mother continued to abuse prescription medication.

**Matter of Jhanelle B., 93 AD3d 1201 (4<sup>th</sup> Dept. 2012)**

The Fourth Department affirmed the Oneida County Family Court's termination of the parental rights of a mother after she admitted to violating the terms of her suspended judgment. The lower court did not hold a hearing but that was not error as the record showed that the court had already considered the children's best interests when it granted the suspended judgment. The trial court had advised the mother that she would lose her parental rights if she violated the terms. Further the mother did not request a further dispositional hearing.

**Matter of Gianna W., 96 AD3d 545 (1<sup>st</sup> Dept. 2012)**

The First Department remanded a TPR dispositional hearing to Bronx County Family Court for a new hearing. The lower court had heard a violation of suspended judgment matter and limited the proof only to matters that had occurred prior to the filing of the violation petition. The court should have permitted evidence about events up to the date of the violation hearing. In this matter, the mother alleged that she had complied with most of the agency requirements and had visited the child every weekend, remained sober and had steady employment since she had been released from prison. The violation alleged was that she had not obtained suitable housing and the Appellate Court commented that such a violation could result in a termination. The mother claimed she had obtained suitable housing by the time of the violation hearing and the court would have heard that if it had allowed evidence about what had occurred between the filing of the violation and the hearing.

## **SURRENDERS and ADOPTIONS**

### **Matter of Kristian J.P., 87 AD3d 1337 (4<sup>th</sup> Dept. 2011)**

A Cattaraugus County couple sued under DRL §112-b to enforce their post adoption contact agreement. The Fourth Department ruled that the lower court properly determined, after a full hearing, that it was no longer in the best interests of the children to enforce the agreed upon contact. The birth parents had been expressly warned when they signed the surrenders that the post adoption contact was subject to a modification if it was no longer in the children's best interests. In an issue of first impression, the Fourth Department ruled that the lower court had authority to issue an order of protection to keep the birth father away from the children and the adoptive couple. Since an enforcement of contact under DRL § 112-b is in the nature of a visitation order, the court had authority to issue an order of protection. The Family Court had not specified how long such an order would issue and so the Fourth Department found that the order could continue until the 18<sup>th</sup> birthday of the child.

### **Matter of Mia T., 88 AD3d 730 (2<sup>nd</sup> Dept. 2011)**

A father to a Suffolk County foster child signed judicial surrenders that included conditions that the children would be adopted by their foster mother, that he would have monthly visits with the children and a visit on Father's Day that he could communicate by phone with the children and he could send pictures and cards. Before the children were adopted, the foster mother filed a petition to rescind the surrender or in the alternative to vacate the contact agreements in the best interests of the children. The lower court held a hearing and vacated the visitation terms of the surrender. The father appealed and the Second Department reversed. FCA §1055-a permits any party to file a petition to enforce the agreement terms before the adoption but it does not give the court the power to terminate or vacate the agreement. The court can refuse to enforce the contact agreement if someone files to enforce the agreement and only if that is in the best interests of the children. Further the foster parent is not a party to a surrender of a birth child and cannot seek to vacate a surrender. The foster mother had no standing to seek to vacate the contact agreement.

### **Matter of Markies V., 93 AD3d 802 (2<sup>nd</sup> Dept. 2012)**

Rockland County Family Court rejected the DSS application for a surrender of a foster child as there was no identified adoptive home for the child. The Second Department reversed and remitted the matter back to Family Court. The statutes regarding conditional surrenders of children in foster care all contemplate that there may or may not be an identifiable adoptive home. SSL § 383-c. The court is to review the terms of a conditional surrender and determine if they are in the child's best interests but the statute "does not contemplate that a court may reject the petition simply because no preadoptive home has been found.

**Matter of Dennis 34 Misc3d 1219(A) (Family Court, Queens County 2012)**

Queens County Family Court denied a request by an adult who had been adopted as a child to open his adoption file. DRL § 114 (4) requires a physician's certification that a review of the adoption records is required to address a serious physical or mental illness. Here there was only a letter from the adult adoptee's psychiatrist that the petitioner was being treated for a mental illness and had borderline intellectual functioning but no information as to why adoption records would be needed or necessary.

**Matter of Baby Boy J., \_\_\_ Misc3d \_\_\_, dec'd 5/23/12 (Surrogate's Court, Erie County)**

In a private adoption proceeding, the Erie County Surrogate Court ruled that Indian Child Welfare Act notice requirements to notice the child's possible tribe did not apply as the birth mother was voluntarily surrendering the child. The purpose of the notice to the tribe must be balanced with the parent's right to anonymity where the parent is voluntarily surrendering the infant. The court is still required to follow ICWA even though it need not notice the tribe. The court further found that the placement requirements of ICWA need not be followed either based on good cause. The mother does not live on the tribe's land. The baby was given to the adoptive parents the day after his birth and so he never lived with the mother or on tribal land, the birth mother wishes the child to be adopted by this non-Indian couple who will be providing her with post adoption contact and who plan to educate him about his Indian heritage.

**MISCELLANEOUS**

**Matter of Ojofeitimi v OCFS 89 AD3d 854 (2<sup>nd</sup> Dept. 2011)**

The Second Department concurred with a fair hearing decision that a CPS report should remain indicated. In a daycare center run by the subject of the report, children were left unattended and a two year old escaped from her playpen and scratched an eight month old in a highchair on the face. The eight month old was bleeding and needed medical care.

**Matter of Lamarcus E., 90 AD3d 1095 (3<sup>rd</sup> Dept. 2011)**

An Otsego County father appealed a neglect finding against him. The Third Department did not review the substance of the appeal as it ruled that the child's attorney on the appeal had denied the child effective assistance. The child was a 9 year old boy and is still represented in Family Court by his original trial counsel. Counsel on appeal admitted that she had never met with the 9 year old client. She claimed that she communicated with the trial counsel and in that way represented the child's position. There was no indication that the child's attorney was in fact not arguing the child's position but the Third Department found it to be ineffective assistance of counsel that the appellate attorney had not met with the child, consulted and counseled him about

the appeal. The appellate court appointed a new attorney for the child and ordered that the appeal proceed when the new attorney was aboard.

**Matter of Jairy R v Jeffery H., 34 Misc. 3d 448 (Queens County Family Court 2011)**

A Queens PINs youth was placed in care and his placement was extended two times until his 18<sup>th</sup> birthday. After the last extension had expired, the youth moved the court to order ACS to file for another extension or the issue an order that he could reenter foster care. The Family Court ruled that ACS could not file for an extension of a PINs placement order that had already expired as FCA § 756-a(a) clearly requires such a petition to be filed at least 60 days before the expiration unless good cause is shown and in no event after the placement has expired. The decision to file for a PINs placement extension is a decision rested solely with ACS and the court may not compel the Commissioner to perform such a discretionary act. The Family Court further found that Article 10-B which permits the return of a former foster child into care contains nothing which demonstrates it was intended to apply to PINs proceedings. The statute is silent and the legislative history says nothing about its applicability to PINs or JD proceedings. Social Services Law makes clear distinctions between children who are placed in care due to abuse and neglect and those in care due to PINs or JDs and treats them differently in different situations. The court cannot legislate even if expanding the new re-entry provisions to apply to PINs placed children would be a good idea.

**Matter of McDermott v Bale 94 AD3d 1542 (4<sup>th</sup> Dept. 2012)**

An Orleans County AFC appealed a Family Court order in a private custody case where the two parents had stipulated to an agreement. The AFC had indicated that he did not agree with the stipulation and the court accepted anyway. The Fourth Department dismissed the appeal, ruling that an AFC does not have to consent in a private custody case if the two parties stipulate to an agreement. It was not as though the court ignored the AFC's opinion. The court and the parents listened to the objections he had and in fact made some modifications based on those objections. An AFC cannot force the parties into litigation by holding up a settlement that both parents want and is approved by the court. Children should be allowed to express their wishes but their wishes cannot "scuttle a proposed settlement". In private custody cases, the child is not even entitled to counsel.

**Matter of Bianca S., 36 Misc3d 478 (Family Court, Monroe County 2012)**

Monroe County Family Court ruled that if a placed PINs youth was found to have violated the court's order, placement could be extended beyond the youth's 18<sup>th</sup> birthday in the same way that a non-placed PINs youth who violated a supervision order can be placed after his/her 18<sup>th</sup> birthday.

**Southerland v City of New York 2012 WL 1662981 dec'd 5/15/12 (2<sup>nd</sup> Cir. 2012)**

In this ongoing § 1983 action against ACS and an individual caseworker (Mr. Woo) regarding the issue of the caseworker allegedly knowingly or recklessly making false claims in order to obtain a court ordered removal of the plaintiff's children, the 2<sup>nd</sup> Circuit affirmed a summary judgment for the City on the allegations of violations of the father's substantive due process rights but vacated the summary judgment as the father and the children's alleged violations of Fourth Amendments rights, violations of procedural due process and unlawful seizure. The children were in care for four days before Family Court held a removal hearing and this did not violate substantive due process but issues of fact exist regarding whether the caseworker did knowing make false statements which resulted in the Family Court removing the children. The plaintiff father in this lawsuit was eventually found to have sexually and physically abused his children. The dissent commented that while "The panel would send Mr. Woo to a jury for an assessment of his liability and the damages he should pay. I would shake his hand." ACS is seeking cert on this from the US Supreme Court.

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Time: 1pm - 4pm

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