

**Legal Updates for
CPS and Child Welfare
October 2013**

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Handout Materials



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

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

LEGAL UPDATES FOR CPS AND CHILD WELFARE OCTOBER 2013

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**10/1/13 TELECONFERENCE
SELECTED CHILD WELFARE CASELAW
Margaret A. Burt, Esq. 8/23/13**

REMOVALS and GENERAL Abuse and Neglect Issues

Matter of Jewelisbeth JJ., 97 AD3d 887 (3rd Dept. 2012)

The Third Department reversed Rensselaer County Family Court's dismissal of an Art. 10 petition. The father was alleged to have neglected the children. At the fact finding, DSS offered only a certificate of disposition from a criminal case that indicated that the respondent had pled guilty to assault charges, then DSS rested and argued collateral estoppel. The respondent then filed a motion to dismiss alleging correctly that the certificate of disposition in and of itself was insufficient to establish a factual connection to the Art. 10 allegations. DSS filed a response to that motion that attached the transcript of the criminal plea colloquy. Although the transcript clearly demonstrated the factual nexus between the plea and conviction and the allegations in the Art. 10 petition, the lower court dismissed the petition, apparently believing that it could not reopen the proof. The Third Department reversed, saying it was an abuse of discretion for the court to not allow the DSS to put the transcript in. There was no indication that this would have caused any undue delay and it did not prejudice the respondent. This was a serious situation involving children who had been hospitalized due to the respondent's behavior.

Matter of Austin M., 97 AD3d 1168 (4th Dept. 2012)

The Fourth Department reversed Oswego County Family Court's refusal to remove a child as well as the lower court's order of unsupervised visitation with another child. Oswego County DSS sought the removal of two children from their father. The court held a FCA §1027 hearing and removed the son but refused to remove the daughter. Also, in opposition to a DSS motion, the court ordered that the father could have unsupervised visitation with the son. The Appellate Division was critical of the lower court having apparently applied a best interest test and not an imminent risk determination as the statute requires in making the removal decisions. Although under this best interest test, the lower court had removed the son, the Appellate Division agreed that the son should have been removed under an imminent risk standard in any event.

At the 1027 hearing the evidence was "overwhelming" that the father had slapped the boy in the face with such force that the child still had marks the next morning. The lower court had found that it was not clear who had injured the child but the Appellate Division disagreed. The medical evidence was that an adult would have had to make such a mark and there were only 2 adults in the home. The father had first given various explanations for the injury, then said he might have done it when he "blacked out" and then ultimately admitted he did it. The child first

said his 4 year old sister hit him but then said his father hit him and that his father told him to say that his sister had hit him. Further there was evidence that the father often lost his temper with the children and that the son had prior episodes of bruising. The caseworker had seen the child cower in the presence of the father when the father was angry and had heard the child plead with the father not to hit him. This evidence was enough to warrant the removal of the son but it was also enough evidence the daughter should also have been removed.

The Appellate Court also reversed the lower court's order that the father could have unsupervised visitation with the son finding that there was not a sound and substantial basis in the record to warrant unsupervised visitation with the child while the case was pending. It is not in the best interests of the children to have unsupervised visits given that the evidence showed that the father was not caring for his son in a safe manner and there was a threat of future harm.

The Appellate Division also reversed the Oswego Family Court's determination that the DSS had not made reasonable efforts to prevent the placement but that the lack of reasonable efforts was appropriate. The lower court had reasoned that the father needed anger management counseling and that DSS had not provided it but that this was excusable as the need for such counseling was not clear until the incident that warranted the removal. The Appellate Court found that logic flawed and ruled that DSS had in fact provided the father with numerous services. As to his discipline issues DSS specifically had provided an intensive family coordinator who worked with the father 7 hours a week, a preventive worker who met with him several times a month, set up a mental health evaluation and gave him financial assistance, transportation assistance, food vouchers and case work counseling.

Lastly the Appellate Division found that the lower court had erred in failing to issue the order of protection that DSS had sought. The court should have in fact ordered, as DSS requested, that the father was not to use any corporal punishment on the children.

Matter of Bree W., 98 AD3d 522 (2nd Dept. 2012)

The Second Department reversed Kings County Family Court's temporary order of one hour unsupervised visitation with the mother while an abuse matter was pending. The Art. 10 petition alleged that the mother and father abused their infant daughter who was less than 3 months old. The baby had multiple rib fractures, a left wrist fracture, a punctured lung and had fluid in the lungs as well as pneumonia. The parents had been the sole caretakers. The fact finding had not yet been commenced when the court held a permanency hearing and ordered that the mother could have one hour of unsupervised visitation with the child every day. ACS sought and obtained a stay and the Second Department did reverse. The "safer course" which serves the best interest of the child is to have supervised visitation until the full fact finding and final determination of the allegations.

Matter of Jaiden J., 98 AD3d 667 (2nd Dept. 2012)

The Second Department reversed Suffolk County Family Court's adjudication of abuse. The child did not testify in court and the only evidence of abuse were hearsay statements of the child from other witnesses. Given that, the court erred in denying the father's request that the court allow the child's testimony before the Grand Jury to be admitted into evidence. The father claimed that the child had given inconsistent accounts of what had happened when the child testified before the Grand Jury. The matter was remitted for a new fact finding.

Matter of Bradley M.M., 98 AD3d 1257 (4th Dept. 2012)

Oneida County Family Court was reversed by the Fourth Department. The lower court entered a default finding of neglect when the father failed to appear for his fact finding. However, the father's attorney had appeared and had indicated that he had his clients' authorization to proceed in the matter. Therefore the matter was not a default and the court erred in not holding a hearing. The matter was remitted for a hearing.

Matter of Chavah T., 99 AD3d 915 (2nd Dept. 2012)

After Rockland County DSS filed an Art. 10 petition against a father based on allegations that the father had sexually abused an unrelated teenage boy, the question of the father's ability to have visitation with the subject child resulted in several orders. At first the Family Court ordered that the father had to leave the home and stay at least 500 feet away from this child while the Art. 10 was pending. The court then modified that order about two and half months later to allow the father to visit at DSS offices under supervision by DSS or supervision by court approved supervisors paid for by the father. Just a few weeks later, the court again modified the visitation order and allowed visitation to occur in the home every day for 5 hours on each day with the mother supervising. DSS appealed and the Second Department reversed. The allegations against the father raise a concern for the safety of the child. The mother should not be used as a supervisor of the visitation as she does not believe the sexual abuse allegations against the father. The "safer course" is to maintain the visitation outside the home and supervised by DSS or court approved supervisors.

Matter of Ceawanya W., 100 AD3d 406 (1st Dept. 2012)

The First Department reversed a sex abuse adjudication from Bronx County Family Court, ruling that the respondent was not a person legally responsible for the child. The child and the siblings were in the legal custody of their adoptive parents during the time that the abuse took place. The respondent was the grandson of the adoptive parents and there was no evidence at all that he had functioned in a parental role to the children.

Matter of Obed O., 102 AD3d 575 (1st Dept. 2013)

The First Department affirmed a FCA §1027 removal order placing the children in foster care where the allegations were educational neglect and there had been prior educational and medical neglect findings. The agency had been offering reasonable efforts to the family and the children continued to have excessive absences and tardiness. The First Department had stayed the placement under terms and conditions and the parent was complying with the terms. The

First Department continued the stay for 60 days with the idea that if the parent continued to comply, then there could be a motion to vacate the order of placement.

Matter of Mylasia P., 104 AD3d 856 (2nd Dept. 2013)

In affirming Westchester County Family Court, the Second Department ruled that family court does not lose jurisdiction of a neglect case even though the child turned 18 during the proceedings. Further DSS is not barred from commencing and maintaining an Art. 10 proceeding against a respondent even though the NYS OCFS deemed the report on the same facts to be unfounded.

Matter of Moona C., 107AD3d 466 (1st Dept. 2013)

New York County Family Court properly permitted one of the children to testify at the fact finding *in camera*. The social worker provided an affidavit that the child would likely be traumatized and would have trouble testifying accurately about the excessive corporal punishment if she had to do so in front of the respondent. The respondent claimed that the social worker did not have the expertise or experience to make such an assessment but that goes to the weight and not the admissibility of the affidavit. The lower court properly balanced the due process rights of the respondent and the emotional well-being of the child and permitted the child to testify outside of the respondent's presence but subject to cross examination by the defense attorney after consultation with the respondent.

GENERAL NEGLECT

Matter of Hannah U., 97 AD3d 908 (3rd Dept. 2012)

The Third Department reversed a neglect finding from Clinton County Family Court that had resulted from an Art. 10 petition that had been filed by the attorney for the children at the direction of the lower court. DSS had not chosen to file a petition in the matter and in fact opposed the petition. After the adjudication, the respondent father appealed. The father had had prior issues and had been under DSS supervision at times but DSS had permitted the father to resume custody of the children. The court then gave the children's attorney permission to file a new Art. 10 petition. The petition alleged that the father of the 5 year old and 2 year old neglected them as he was an untreated sex offender who had violated his probation terms. The Appellate Court stated that the father's status as a registered level 2 sex offender stemming from a 2004 incident, does not constitute neglect of his own children per se as the Court of Appeals has held in *Afton C.* He was not even in fact an untreated offender as he had successfully completed two offender programs in 2007 and 2008 – more than 2 years before this petition was filed. While the lower court concluded that the father had not meaningfully benefitted from the programs, the evidence did not in fact demonstrate that. The counselor testified that the father had benefitted from the programs and there were no allegations of any sex related offense since the original offense in 2004. It was solely the court's own belief that the counselors in the DSS referred program that the father had attended were not qualified and did not run a meaningful or

successful program. Further, the allegations that the father had violated his probation were not connected to any neglect or risk of neglect to the children. Three years before the current neglect petition, and before one of the children was even born, the father had been convicted of one incident of DWAI and one of DWI. However these allegations were dealt with in prior neglect petition some three years earlier. There was no evidence that refuted the father's claim that he had not drunk any alcohol since 2007. While it was true that the father had falsified some AA attendance slips for his probation officer, there was no evidence presented that this action had created any actual or imminent impairment to the children. The father had not been under any supervision by DSS for over 2 years and his probation had ended over a year earlier. He had complied with DSS supervision in the past and had complied with all court orders.

Matter of John R. v NYS OCFS 97 AD3d 958 (3rd Dept. 2012)

An Albany County indicated CPS report was not expunged upon a fair hearing and the Third Department concurred that it should remain indicated. Four years earlier, the mother had been told by her brother that he had sexually abused her eldest daughter who was autistic. The mother had not called the police but has called the child's doctor who told them to work with the school psychologist. A few weeks later, the mother reported the situation to both the school and the hotline. The uncle was arrested and pled guilty to sex abuse in the first degree and was sentenced to 2 and a half years in prison and post release supervision. CPS told the mother that she was not to allow any contact between the children and the uncle in the future. After the uncle was released from prison, the mother did allow some contact. The children reported that they sometimes saw their uncle near their home and greeted him as the mother told them they were allowed to "say hi" if they saw him at the home or at church. The uncle telephoned the home and the child who had been abused was allowed to answer the phone even though the caller ID identified the uncle as the caller. The youngest child was, on one occasion, sent to the uncle's apartment to borrow a tool. The mother admitted that she would have acted differently had the abuser not been her brother. Substantial evidence supports the determination that the children were at risk due to the mother's failure to exercise a minimum degree of care.

Matter of Kiera R., 99 AD3d 565 (1st Dept. 2012)

A New York County mother neglected her teenage daughter. The child would frequently leave home for days at a time. The mother did not provide for adequate alternative living arrangements such that the child was sometimes living on the street. The mother had been advised to seek professional counseling and therapy for the child, whose behavior seemed to be out of control. The mother failed to do so. Any appeal from the dispositional order of supervision is moot as the child is now 18 years old.

Matter of Alexander L., 99 AD3d 599 (1st Dept. 2012)

A New York County mother neglected her son in several ways. She did not provide a stable home for him as she and the child lived in the NYC homeless shelter system for 5 years. She unreasonably refused to accept suitable housing. The mother also abused alcohol and was erratic and violent toward her son and others. Lastly, she took the child out of therapy abruptly.

He had been in weekly psychotherapy sessions for over 3 years and his emotional state was fragile. The child was put at imminent risk of neglect based on this mother's actions.

Matter of Khaliyah Vjelytt W.D., 99 AD3d 602 (1st Dept. 2012)

A Bronx County mother neglected her child by assaulting a police officer in the child's presence. There was no basis to disturb the lower court's credibility assessment. There was no reason to provide the mother with a suspended judgment given that she had not completed services.

Matter of Michelle L., 101AD3d 455 (1st Dept. 2012)

A Bronx mother neglected her children when she allowed her husband to babysit one of the children. Her husband had thrown lighter fluid on her and threatened to set her and the stepchildren on fire. She also knew he had "poked" one of the children with a knife when that child had tried to intervene as the husband and she were fighting. Lastly, she was aware that he had smoked marijuana in the home. One child was placed with a maternal grandmother and the other was allowed to stay with the mother but under ACS supervision.

Matter of Clayton OO., 101AD3d 1411 (3rd Dept. 2012)

The Third Department reviewed Saratoga County Family Court's dismissal of a neglect petition that alleged that a mother had neglected her son and derivatively neglected her daughter. The Appellate Court found that Family Court erred in the dismissal of the neglect petition regarding the son. The mother had a series of discipline problems with her son and she told him he had to leave her home and live with someone else. The child went to live with an older half brother and then resided in "deplorable conditions" in a motel with his dying father. The mother refused all efforts by DSS to return the child to her home, telling DSS that the child was better off in foster care where he eventually ended up. Both the half brother and the father died but the mother continued to take the position that the child was better off in foster care and that she did not want him in her home. She continued to take that position at the fact finding of the Art. 10 and in fact indicated she would be willing to sign a judicial surrender of the child. Family Court found that the child and his sister were not neglected and dismissed the matter. The Third Department disagreed finding that a parent who is not willing to make any reasonable efforts to work with DSS in a situation where a child does not have a place to live is putting that child in imminent danger and is a neglectful parent. The mother did not act as a reasonable and prudent parent. The Appellate Court said that this behavior did not establish derivative neglect of the sister. In any event the sister is now in foster care due to a subsequent Art. 10 finding of direct neglect of her.

Matter of Ariel P., 102AD3d 795 (2nd Dept. 2013)

The Second Department affirmed a Queens County Family Court's dismissal of a medical neglect petition. The mother in this matter was unwilling to cooperate with the recommended course of psychiatric treatment for her child. However, the court is not to act as a surrogate parent in the context of determining if the parent's choice of medical treatment is "right" or "wrong" is refusing a particular treatment for the child but whether the parents has provided an

acceptable course of treatment. Here it was not proven that the mother failed to provide an acceptable course of treatment. The mother was concerned about the medication that the doctors were recommending and preferred that the child be treated at a private hospital. There is no evidence that her choices in this regard were not reasonable or appropriate or resulted in the child being in imminent danger of neglect.

Matter of Ariel P., 102 AD3d 795 (2nd Dept. 2013)

The Second Department reversed a medical neglect adjudication of a Queen's mother. Family court had found that the mother failed to cooperate with medical recommendations to provide necessary medical care for her child's mental illness. However, the Appellate Division found that there was not a preponderance of evidence that the mother failed to provide an acceptable alternative treatment. In the context of medical neglect, it is not the court's role to determine if the parent has made a "right" or a "wrong" decision in looking at alternatives for treatment but to determine if the parent had provided an acceptable course of treatment. No evidence was offered that the mother's concerns about the medication recommended or her desire that the child be treated at another hospital was unreasonable behavior. Further there was not a preponderance of evidence that the mother's choices resulted in the child's condition being impaired or at imminent danger of impairment.

Matter of Rosemary V., 103 AD3d 484 (1st Dept. 2013)

A Bronx father neglected his children when he left his 9 and 10 year old home alone to go out for a drug transaction where he was arrested. He was in police custody for 5 or 6 hours and did nothing during that time to see to it that his children were safe. The children had locked themselves out of the apartment and had to go to a stranger's apartment to seek help. Even though they were not harmed, they were in imminent danger of being harmed. The father's failure to testify allowed the strongest inference against him.

Matter of Kayden H., 104 AD3d 764 (2nd Dept. 2013)

The Second Department ruled that the neglect adjudications against a Kings County mother and grandmother should have been dismissed as the aid of the court was not necessary under FCA § 1051 c. A seven month old baby was left in the kitchen sink by the child's grandmother. The water was running in the sink and by the grandmother asked the mother to watch the child while she went out of the room. The mother was in another room about 10 feet away. Within moments, while both mother and grandmother were out of the kitchen, the water temperature spiked and the baby was burned. Following the incident the mother completed all the services that ACS had required of her including therapy and parenting classes and ACS was not asking for her to complete any additional services. The grandmother, on her own, attended parenting classes. The child had been returned to the home with ACS' consent before the fact finding. (The Art. 10 petition was pending for 18 months.) ACS had been supervising home visits, the child was not left unsupervised and there were no safety concerns. The pipes in the building had been replaced such that the water temperate did not spike. The child was no longer at risk of neglect and therefore the aid of the court was no longer needed and the petition should be dismissed.

The dissent argued that leaving a seven month old alone in a kitchen sink, particularly when the respondents were aware of the problem of temperature spikes in the apartment's water, just lacked simple common sense. While the mother and grandmother regret the incident and have undergone training, such lack of common sense should require a finding so that there can be supervision by the agency. A neglect finding should be maintained where respondents are neglectful as it may be significant in any future proceedings.

Matter of Salvatore M., 104 AD3d 769 (2nd Dept. 2013)

The Second Department concurred with Suffolk County Family Court that a mother neglected her child. She made repeated unfounded claims that the father was abusing the child. The child was subjected to multiple medical examinations as well as to police and caseworker interviews. The mother withheld visitation from the father. Even after the child was removed, the mother would "relentlessly scrutinize" the child for signs of abuse during supervised visitation. The mother's disposition included a mental health evaluation.

Matter of Ceanna B., 105 AD3d 1044 (2nd Dept. 2013)

An Orange County mother neglected her children by encouraging them to make false allegations of sexual abuse against the father and alienated the children from the father.

Matter of Lanelis V., 102 AD3d 441 (1st Dept. 2013)

A New York County mother neglected her child and was put under supervision with an order to obtain therapy and to not interfere with the father's visitation. The mother subjected the child to repeated intrusive physical and mental examinations based on the mother's claim that the father had sexually abused the child. There was no evidence that the child was being abused as all of the charges were thoroughly investigated. Also, the child made occasional statements that she was lying and that her mother told her to make the statements. The child's descriptions were vague and fanciful. There was no reason to provide the mother with a suspended judgment given that the mother persisted in making these unfounded charges which were harmful to the child and harmed the child's relationship with her father.

Matter of Izayah J., 104 AD3d 1107 (3rd Dept. 2013)

The Third Department affirmed a neglect finding against a Chemung County father. The respondent was watching his girlfriend's son and daughter and the girlfriend was pregnant with twins that he had fathered. While in his care, the son was injured. An orthopedic surgeon testified that the child had a spiral tibia shaft fracture with bony fragments, including a large butterfly fragment. In his opinion such an injury would be the result of a high energy significant force – like an ATV accident or a downhill bicycle crash and could not occur with a fall down a flight of stairs as the respondent claimed. The father said that he was sleeping lightly – "dazing" - on the couch when he heard thumps and discovered that the child had fallen down the stairs. He offered no medical proof that contradicted the expert's opinion.

Further, the father neglected the twins after they were born prematurely. They remained in the NICU for four months after their birth due to their serious health issues. The parents needed to have hands on training from medical personnel as to feeding issues and fussiness and identifying when medical intervention may be needed. The father however, did not visit the children often, did not stay long when he visited and rarely participated in feeding them. During the 15 days before they were discharged, he only visited twice. Also, on two occasions the father became explosively angry while at the hospital such that staff were frightened and intimidated and security had to be called. He shouted, made threats and swore at the NICU personnel on both occasions, one resulting in him being placed in isolation and on another occasion he himself called police to the NICU. The treating physician had indicated “grave concerns” about the safety of the twins given these incidents and the father’s lack of involvement in the babies care. The father testified that he was not employed as he suffered from “ADHD, ADD and anxiety” and had difficulty staying awake during the day and maintaining a schedule. He testified that he would “learn how to stay awake” and that there was “nothing special” about the twins’ medical needs. The court properly found the twins to be at risk of neglect as well.

Matter of Elijah J., 105 AD3d 449 (1st Dept. 2013)

A Bronx mother left her 4 year old and her 15 year old with their 21 year old brother for over a week with insufficient food, clothing or shelter. She also regularly misused marijuana. Given the presumption under FCA § 1012 (f)(i) (b), ACS need not prove that the marijuana actually impaired or put the children at imminent impairment. The fact that the mother entered a drug treatment program after the time period in question is not a defense.

Matter of Assata P., 105 AD3d 746 (2nd Dept. 2013)

Westchester County Family Court was affirmed by the Second Department regarding a neglect adjudication against a mother of two children. The mother exhibited erratic behavior in that she left her 16 year old home alone while she took another child out of state. She did not provide any details about how long she would be gone and had made no plans or where she would stay. While out of state, the other child was injured and the mother refused medical treatment. The mother did not leave sufficient monies for the child and did not have sufficient funds to get back with the other child. She said that she had to leave as “the government was going to kill her” and that her sister in law had put a hit out on her, that she was on a list of terrorists and that the CIA was after her. The mother had told the children that she was tired of living given that people were constantly after her and she spent money staying in hotels to hide out. The mother had spent the money that the children needed for school clothing and supplies to go out of state.

Matter of Alexandria S., 105 AD3d 856 (2nd Dept. 2013)

An Orange County father neglected his children by engaging in acts of domestic violence against the mother in their presence. This impaired them or put them in imminent danger of impairment. The father engaged in a pattern of intimidation against the mother. Further the father repeatedly used cocaine thus invoking a prima facie case of neglect under FCA §1046

(a)(iii) . With such a prima facie case, no actual impairment or specific risk of impairment need be proven. The father did not testify and offered no proof to rebut the presumption. The Appellate Court found that the fact that the children were never in danger and were clean, well fed and not at risk does not rebut the presumption in the statute.

Matter of Teresa L., 106 AD3d 1008 (2nd Dept. 2013)

A Richmond County mother educationally neglected her child. The child had excessive unexcused absences which had a detrimental effect in that she was retained in the sixth grade. Family Court properly admitted the child's school records into evidence as they were properly certified as business records.

Matter of Amondie T., 107 AD3d 498 (1st Dept. 2013)

A Bronx mother and father neglected three children. The mother locked her 17 year old son and her 15 year old daughter out of the house for substantial periods of time, including overnights and did not give them clothing, food or money. The father knew or should have known of this and he also did not give them food, clothing or money. The fact that the father worked at night and that the mother was in charge of the children's discipline, did not absolve him of his responsibility to make sure the children were not being neglected by the mother. Further it was neglectful for the mother and the father to tell the caseworker that they did not want the children to be returned to the home but instead wanted to voluntarily place them with an uncle. A voluntary placement is only appropriate when the parent cannot care for the child, not when they are simply unwilling to do so. By their behavior, the 16 year old daughter was also derivatively neglected. The fact that the 17 year old turned 18 when the matter was pending does not warrant a dismissal as he was less than 18 when the petition was filed and the youth wanted to continue in his foster care placement.

Matter of Joshua J., 107AD3d 893 (2nd Dept. 2013)

The Second Department reversed a neglect finding regarding a Westchester father. The child had been placed in foster care due to neglect by his mother and at a permanency hearing, the child was placed in the care of the "nonparty" father who consented to cooperate with DSS supervision, including unannounced home visits. About a month after the placement with the father, the child's day care made a hot line report regarding the father. In response to the report, two DSS workers went to the father's apartment where he refused to let them in. The police were called and they eventually forced their way into the apartment and the child was removed from the father. The father had a knife and a baseball bat under his bed and although the child was clean, healthy and safe, he did have a small bruise under his eye. DSS filed a neglect petition against the father. The father claimed that he did not let anyone into his apartment after 9:00PM as a safety precaution. He had been concerned that the DSS workers and even the police were actually people impersonating officials to gain access to his apartment and do him and his son harm. He testified that he had even called the police station and had been told that there were no police officers that had been sent to his residence. He also said that the knife and baseball bat were for personal safety and that the mark under the child's eye had been there when the child was first placed with him. The Westchester Family Court found that the father

had neglected the child by refusing to abide by the conditions of the court ordered release – specifically by refusing to open the door to DSS and to keep the child safe.

On appeal, the Second Department reversed. There was no evidence that the child was impaired or in imminent danger of impairment based on the father’s refusal to let DSS into the apartment on a specific night. In fact the testimony was that the child was healthy, clean and safe and the evidence about the nature of the bruise was ambiguous and was not what the lower court had based its findings on any way.

Matter of Mary YY., 108 AD3d 803 (3rd Dept. 2013)

A St. Lawrence County father neglected his infant daughter. The baby was born 2 months premature, weighed less than 3 pounds and had a cleft palate. While the infant remained in the hospital to gain necessary weight, the parents had been counseled regarding specific feeding instructions due to the baby’s difficulties in eating. The father knew that the child had great difficulty in obtaining adequate nourishment and therefor needed to be fed consistently. The father lived in the same home as the mother and the child but he made no attempt to feed the child nor to ensure that the child was obtaining proper nourishment. The child’s weight “appeared to be stalling” after she was discharged to the parents and they were told to take the baby to the hospital. At the emergency room, the father refused to consent to some of the lab tests. He left the hospital with the baby against the medical advice that the child needed to be admitted for failure to thrive. DSS then removed the baby and placed the baby in the hospital where the child gained weight. The father neglected the child by failing to ensure proper nutrition and to provide appropriate medical care.

Domestic Violence

Matter of Dezerea G., 97 AD3d 933 (3rd Dept. 2012)

The Third Department affirmed a Clinton County finding of neglect as well as the dispositional order. When the child who was the subject of the petition was approximately 2 years old, the mother was granted sole custody of her and the father was forbidden any unsupervised contact with the child until she was 18 years old. The father was to stay at least 1,000 feet away from the child except when being supervised by specified individuals. These orders were at least partially based on the father’s violence toward the mother. Approximately four years later, the mother and the father were living together with the child and DSS filed a neglect petition against them. The child was placed in foster care with a maternal relative. After finding the parents to be neglectful, the lower court, in a combined dispositional/permanency hearing, changed the child’s goal to placement with a fit and willing relative and ordered that the both parents visitation was to continue to be supervised. The parents both appealed various aspects of the adjudication and the orders.

The Appellate Court concurred that the child had been neglected. The father had a history of violent behavior and the mother continued her relationship with him and this affected the child. The father's behavior included raping the mother while the child was in the father's vehicle, attacking and choking the mother while the child was sleeping in the same house. The father had a criminal history that included assault, criminal contempt and endangering the welfare of a child. Both parents had consented when the child was a toddler to the court order that the father have no unsupervised contact with the child but in fact the father had continued contact with the child and lived with the child after the court order. The mother minimized the conduct of the father, continued her and the child's relationship with the father. The parents encouraged the child to lie and engage in deceit. The child would be told to hide in the bathtub with the mother when the police came so that the police would not find them at the father's home. The child was aware that the father would run and hide in the bathtub or out into the orchard when the police came to the home. The mother kept the child out of school, falsely claiming the child was ill so that the child could accompany the mother to pick up the father at the hospital. The child made out of court statements that her father used pills, that the police "hated" her father and wanted him to go to jail. The child would shut down, change the topic or recant when discussions about her father's presence were brought up. Further the child's behavior in school deteriorated when the father was in the home and when the child was involved in the deceit of hiding the relationship but improved when she was removed from the home.

Since the parents consented to the maternal relative being granted legal custody after the filing of the appeal, the issues as to the disposition are moot. However the lower court had correctly modified the child's goal at the time of the combined disposition and permanency hearing to placement with a fit and willing relative. The mother continued to place the relationship with the violent father over her child's safety and given that she had already had 15 years of counseling - it was unlikely that would ever change.

Matter of Anthony S., 98 AD3D 519 (2nd Dept. 2012)

The Second Department affirmed Suffolk County Family Court that a mother neglected her child. She had testified that she and the father had a long history of domestic violence and the child had witnessed at least one incident where the father had choked the mother and the mother had bitten the father. The child had told the caseworker that he had seen the parents hitting each other on numerous occasions that that he was frightened by these actions.

Matter of Cherish C., 102 AD3d 597 (1st Dept. 2013)

A New York County grandmother neglected her grandchild by engaging in an act of domestic violence against the child's mother in the child's presence. A police officer testified that he witnessed the grandmother be violent toward the mother while the mother was holding the child which caused the child to cry.

Matter of Anthony FF., 105 AD3d 1273 (3rd Dept. 2013)

The Third Department affirmed Chemung County Family Court's determination that a mother had neglected her four children. Her current husband is not the father of any of the children but

the two of them did engage in a violent domestic incident with the children present. The mother was not solely a victim of the domestic violence. Although the stepfather did instigate the incident and was violent toward the mother, she wielded a baseball bat and chased the stepfather with it, alleging hitting him with it. Following the incident, the mother minimized what had happened, tried to get charges against him dropped and placed partial blame on the children for what had happened. She allowed the stepfather back in the home, allowed him to be around at least one of the children in violation of the court order and instructed the child to keep the contact a secret. The mother failed to exercise a minimum degree of care that resulted in an imminent danger to the children.

The mother also educationally neglected her second oldest child. The child had extensive absences from school and was repeatedly tardy. She did not cooperate with the school to address the situation, her explanations were not credible and the child's academic progress and special needs were adversely affected by the absences.

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

The Fourth Department reversed a neglect adjudication on an Onondaga father. The only evidence offered was out of court statements made by the mother to the police and to the caseworker about a domestic dispute. These statements are not admissible against the father as there is no hearsay exception as to him. There is no non-hearsay proof that the child was impaired or in imminent danger of impairment.

Matter of Nia J., 107 AD3d 566 (1st Dept. 2013)

A New York County mother neglected her children. She engaged in an altercation with a man while two of her three children were present. The evidence demonstrated that the mother was holding two knives while she argued with the man. A witness to the scene saw the children present on a bed and that they "appeared to be crying" and that one child was "shaking from the situation". This sufficiently demonstrates that the children's emotional well being had been impaired by witnessing the mother's behavior. Further, the mother left two of her children with a shelter worker for a three hour period after the worker had agreed to watch the children for a brief period only. She did not check in at any time to see if the worker could continue to watch the children and in fact, the worker had to call ACS for an emergency removal. The mother's third child was derivatively neglected by these actions even though that child was not living with the mother when these events occurred.

Excessive Corporal Punishment

Matter of Angelo P., 98 AD3d 908 (1st Dept. 2012)

A 20 month old Bronx toddler was found to have severe bruising after being left in the care of the mother's boyfriend. The boyfriend offered no satisfactory explanation for the bruises. He was a person responsible in that he saw the child on average 4 times a week and functioned as a father figure to the boy. He bathed and fed the child and changed diapers. Since he was legally

responsible for the child, he was also responsible to seek medical attention for the child when the injuries were discovered.

Matter of Aniya C., 99 AD3d 478 (1st Dept. 2012)

A New York County mother neglected her daughter when she beat her with a belt that left bruises and marks on her neck, arms and legs. The child told the CPS worker what happened and the caseworker observed the injuries and took photos. The child's medical records contained signed diagrams showing the location and size of the marks and bruises that were still visible on the child's body 3 days after the incident. To prove excessive corporal punishment, ACS need not demonstrate that the child sustained a "significant injury".

Matter of Jeremy H., 100 AD3d 518 (1st Dept. 2012)

The First Department affirmed New York County Family Court's adjudication of neglect and derivative neglect regarding a mother and her three children. Two of the children described excessive corporal punishment. The boy said he got hit in the head with a closed fist and that he got the "worse" of the punishment. The girl said her mother hit her with a belt, a ruler and a spoon that felt like "a rock". The children's statements were consistent with each other. The caseworker saw healing marks on one child's arms and the daughter's medical records described numerous scratches that would not have occurred in the normal course. The mother failed to testify and so a negative inference could be drawn. This inappropriate and excessive corporal punishment justified a derivative finding regarding a third child. The children were removed and placed with the maternal grandmother. Visitation was limited to biweekly supervised visits at the agency as the mother had not visited consistently in the past and her mental condition appeared to be deteriorating.

Matter of Gabriel J., 99 AD3d 543 (1st Dept. 2012)

Bronx County Family Court adjudicated a mother and her boyfriend to have neglected her two children and on appeal, the First Department affirmed. The boyfriend inflicted excessive corporal punishment on the children. The children made out of court statements that the boyfriend had, among other things, kicked one child in the groin hard enough to leave a bruise. This was corroborated by medical records as well as the mother's testimony that she observed a bruise the next day. The boyfriend failed to take the stand and this created the strongest possible inference against him. The mother knew or should have known of the boyfriend's behavior and did not protect the children and so she also neglected them.

Matter of Mia B., 100 AD3d 569 (1st Dept. 2012)

The First Department affirmed a neglect finding against a New York County mother. The mother's 22 month old toddler had extensive bruising on her legs, buttocks, lower back and elbow in various stages of healing that were documented in hospital records. The aunt of the children testified that she confronted her sister about the bruises on her niece and that her sister said "These are my kids and I raise them the way I want. If they act up, I'm going to hit them." The lower court properly inferred that this was an admission particularly since the mother failed to testify at the fact finding and provide any other explanation for the toddler's injuries. The

mother later told the caseworker that she had not been home for three days and had left the children in the care of the maternal grandmother and that the grandmother must have injured the child. She also told the caseworker that the grandmother had a history of maltreatment, was bipolar and did not take her meds. If this version of events was true, she still had neglected her child as the bruises had occurred over a period of time and she should have known about the grandmother's neglect and she did not behave as a prudent parent and protect the children. This bruising on her 22 month old supported a derivative finding on her younger child. Lastly the court did not err in granting the mother's application to proceed pro se as the court made a searching inquiry to assure that the mother was knowingly, intelligently and voluntarily waiving her right to an attorney. The children were properly placed in foster care and supervised visitation was suspended as the mother was engaging in erratic behavior including attempting to take the children from the foster mother at a visit. The mother refused to undergo a mental health evaluation.

Matter of Amerriah S., 100 AD3d 1006 (2nd Dept. 2012)

The Second Department concurred with Richmond County Family Court that a father had neglected his 5 year old daughter by hitting her in the face several times with his hand causing scratches and bruises. The child's out of court statements that her father had hit her face ten times were corroborated by the observations of law enforcement and the caseworker who described the child's facial injuries. The mother admitted to the investigators that the child had told her she had been hit by the father and the father also made an out of court statement that he had hit the child. The mother also neglected the child as she knew the father inflicted excessive corporal punishment and did not protect the child. These parents fail to understand their parental responsibility and therefore their other two children are derivatively neglected.

Matter of Marie A.P., v Nassau County DSS 100 AD3d 1003 (2nd Dept. 2012)

A Nassau County indicated report was unfounded by the Second Department. The subject mother hit the child on her buttocks with a child's belt to discipline her. There was no injury, no substantial risk of injury, no prior allegations of any type of abuse or maltreatment.

Matter of Andrea M., v NYSOCFS 100 AD3d 899 (2nd Dept. 2012)

The Second Department ordered an indicated report to be unfounded and sealed. The subject mother in this matter did not neglect her stepdaughter and her son. The evidence showed that the stepdaughter was engaged in an angry and protracted argument with her father and then the stepdaughter began to beat the mother who was holding her infant son and trying to leave the room. The mother only struck the stepdaughter to protect herself and the baby.

Matter of Pria J.L., 102 AD3d 576 (1st Dept. 2013)

The First Department reversed a finding that a mother had neglected her 12 year old daughter. After the child argued with her mother, the mother provided the child's adult brother with a belt with which he hit her legs. There is no evidence that there was any significant physical harm to the child or any emotional harm. The child's "provocative" behavior resulted in an overreaction

on the part of the brother that the mother did not prevent. This was an isolated incident and not a pattern of behavior.

Matter of Tiara G., 102 AD3d 611 (1st Dept. 2013)

A New York County mother neglected her three children. Two of the children told the worker that the mother inflicted corporal punishment on them and the third child had been beaten with hands or a belt that left a mark that was still visible a year later. The children's out of court statements were corroborated by the caseworker's observations of the marks. The mother also failed to pick up one child from the police after she had been arrested. The mother was erratic and aggressive and had a prior neglect adjudication.

Matter of Phillips N., 104 AD3d 690 (2nd Dept. 2013)

The AFC for three children appealed a Queen's County Family Court neglect adjudication as it related to their mother. The father had been granted an ACD but the mother's matter had gone on to a fact-finding where the lower court had found that the mother hit the daughter in the face with a shoe and a hanger, causing visible injury. The AFC had first moved that the petition be dismissed arguing that the aid of the court was not necessary and alternatively for a suspended judgment but the family court denied both motions. The Second Department affirmed the denial. Although the mother had successfully completed a parenting skills program and anger management counseling, the aid of the court was still needed to order supervision of the family particularly given that the mother continued to deny responsibility for the child's injuries. A suspended judgment also was not appropriate given the mother's failure to accept responsibility.

Matter of Joshua J.P., 105 AD3d 552 (1st Dept. 2013)

The First Department affirmed a neglect finding based on excessive corporal punishment from New York County Family Court. The respondent used belts, cords and other objects frequently to discipline the child. The child had a scar on his thumb from the discipline which was excessive. The child testified in court. His testimony was also corroborated by the physical evidence as well as admissions by the respondent to the caseworker that she might have struck the child on the six or seven times she disciplined him with a belt.

Parental Mental Illness

Matter of Princess Ashley C., 96 AD3d 682 (1st Dept. 2012)

A Bronx mother neglected her children and the court properly placed them in the custody of a paternal aunt. The mother had long standing mental health issues. She suffered from major depression, anxiety and trichotillomania. The latter is an anxiety disorder that resulted in her pulling out her hair and peeling the skin off her feet. She would not comply with treatment and so her condition deteriorated. She had no insight into how this impacted her children. In fact the children were not properly supervised, had excessive school absences and often did not have enough to eat. There was no abuse of discretion in the lower denying the mother's motion to have an independent social worker examine the children regarding visitation. The children have

already repeatedly told therapists, social workers, caseworkers and their own attorney that they did not want to see their mother and that stance has not changed. While the mother did not object and thus did not preserve the combining of the dispositional hearing with the aunt's custody petition, it was not error in any event. The lower court considered both a dispositional order on the Art. 10 and the aunt's custody petition as options and determined that provided custody to the aunt was in the best interests of the children given that they were thriving and wanted to stay there.

Matter of Nhyashanti A., 102 AD3d 470 (1st Dept. 2013)

A newborn child was derivately neglected by her Bronx mother when there had been a neglect finding only 10 days before the child's birth regarding older siblings. This was sufficiently close in time to support a conclusion that the mother's parental judgment was still impaired. She had not completed her mental health evaluation or her anger management program and had not been compliant with her mental health treatment for at least a year.

Matter of Aamir L., 102 AD3d 786 (2nd Dept. 2013)

A Brooklyn mother was hospitalized in a psychiatric unit when she gave birth to her second child. The lower court found that she neglected both of her children and the ruling was affirmed on appeal. The mother had refused to comply with treatment for her mental health and would not take prescribed medications. Her failure to take the medications resulted in her exhibiting severe psychotic symptoms such that she could not care for an infant. This also supported a finding of derivative neglect regarding the older child.

Matter of Shay-Nah FF., 106 AD3d 1398 (3rd Dept. 2013)

The Third Department found that a Schenectady County mother neglected her newborn baby. The mother had depressive disorder, post traumatic stress disorder and bipolar disorder. When the child was born, the older two children were already in foster care and while the matter was pending, the mother consented to a permanent neglect adjudication as to them and was given a suspended judgment with supervised visitation. The older children had been in care for over a year and a half when this matter was brought as to the newborn. While the Art. 10 petition on the infant was pending, the court allowed her unsupervised visitation with the baby as long as no one else was in the home. The mother violated that order. When the caseworker made an unannounced home visit, she found the father hiding in the bathroom. The baby was derivately neglected in that the mother's history with the older children included excessive corporal punishment, failure to treat her mental illness, failure to obtain suitable housing and medical care. She continued to not obtain proper mental health care while pregnant with this child and was aggressive with the older children on visits. She did not obtain prenatal care until her last months of pregnancy. She had poor impulse control and anger management issues which had led to her slapping the two year old in the face causing injury and punching the three year old in the face and back, causing injury. She continued to have problems obtaining and keeping a suitable residence and was looking for a new apartment at the time of the hearing due to a physical altercation with a neighbor. She had just obtained income the month before the fact

finding. Her visitation with the older children continued to be supervised as she would use inappropriate force and would yell at them. She had only completed 30% of the parenting sessions designed to help her learn appropriate discipline.

Matter of Alexis S.G., 107AD3d 799 (2nd Dept. 2013)

On appeal by ACS and the AFC, the Second Department affirmed Kings County Family Court's dismissal of a neglect petition. Although the mother suffered from bipolar disorder when each of the two children were born, there was not sufficient proof that this issue resulted in harm or potential harm to the children. Further the prior neglect findings against the mother regarding older children were not sufficient for a derivative finding on these two younger children. The prior findings were not so proximate in time that there could be a reasonable conclusion that the issues still existed. Nor was there evidence that the prior neglect findings evinced a fundamental defect in the mother's understanding of the duties of parenthood. Lastly, ACS did not demonstrate that the mother had failed to address the mental health issues that led to the prior neglect finding.

Parental Substance Abuse

Matter of Stevie R., 97 AD3d 906 (3rd Dept. 2012)

A Cortland County mother neglected both of her children and her live in boyfriend neglected the younger child who he had fathered. The mother had a long history of serious drug abuse and had failed to complete drug treatment. During her pregnancy with the youngest child, she agreed to a drug and alcohol assessment that DSS recommended that she have but she did not complete it. She lost her medical insurance coverage and then discontinued any prenatal care. When the child was born, the mother tested positive for opiates and amphetamines. The mother denied using drugs and provided implausible arguments about why her drug tests were positive. She neglected both the newborn baby and the older boy who had lived with her during the pregnancy. The children were properly removed and placed in the custody of the maternal grandmother. The father also was appropriately adjudicated as having neglected the infant as he lived with the mother during the pregnancy. He knew or should have known that she was abusing drugs. He failed to exercise a minimum degree of care to ensure that the mother did not abuse drugs. He also did not take the stand at the hearing and the strongest inference can be made against him.

Matter of Samaj B., 98 AD3d 1312 (4th Dept. 2012)

The Fourth Department upheld Monroe County Family Court's finding that a mother had neglected her son. Citing FCA §1046(a)(iii) that proof of repeated misuse of a drug to the extent of "a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence or a substantial impairment of judgment, or a substantial manifestation of irrationality" is prima facie evidence of neglect, the court agreed that the admission by the mother that she used Suboxone on numerous occasions, buying it on the street when she could and prostituting to obtain money to purchase it constituted prima facie evidence

that her son was neglected. She did not rebut the statutory presumption and the argument that DHS should have had to prove that Suboxone was a “drug” is not preserved for review. Further the court did not err in admitting the CPS report to the hotline into evidence as the report was made by a mandated reporter and is therefore admissible under FCA § 1046(a)(v).

Matter of Jared M., 99 AD3d 474 (1st Dept. 2012)

The First Department affirmed Bronx County Family Court’s adjudication of neglect relative to a respondent and his girlfriends’ children. Police went to the apartment building where the respondent, the girlfriend and the girlfriend’s two young children lived in response to reports of a strong odor of marijuana. Police also smelled the marijuana coming from the respondent’s apartment and when the respondent opened the door, the marijuana was in plain view. The respondent was arrested and the apartment was searched. There were large amounts of marijuana in the home as well as over 130 individual bags of marijuana. This conduct places the children in imminent danger of neglect and it does not matter that the two children were not at home at the time that the police searched the apartment.

Matter of Kierra C., 101 AD3d 993 (2nd Dept. 2012)

A Suffolk County father neglected his child as he “knew or should have known 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”. Further, the father was also a substance abuser.

Matter of Diamond J., 102 AD3d 784 (2nd Dept. 2013)

The Second Department affirmed Kings County Family Court’s dismissal of a neglect petition. ACS failed to prove that the mother’s drug use caused impairment or imminent danger of impairment to the children. (NOTE: The lack of any factual details in the decision make it fairly useless for precedential value but the matter did involve parental use of marijuana; the ACS sought to appeal this decision to the Court of Appeals to attempt clarification on the issues involved in the use of marijuana and parental neglect but the appeal was not accepted)

Matter of Darcy Y., 103 AD3d 955 (3rd Dept. 2013)

An Ulster County father neglected his children by not preventing the children’s mother from driving while intoxicated with the children in the car. The mother, father and two children attended a family wedding. They were present at the wedding some seven hours and the father testified that he and she were not together the entire time and he did not see her “directly” consume alcohol. He claimed that he did not smell any alcohol on her breath and she did not seem intoxicated. The mother and the father left the wedding with the mother driving and the two children and a niece as passengers. The car was stopped by the police due to an equipment violation and the officer detected a strong odor of alcoholic beverages. The mother was arrested for DWI. Both parents were alleged to be neglectful and the mother admitted she had been driving her children while under the influence of alcohol with a BAC of .10%. The

mother accepted an ACD but the father went forward with a fact finding. While the father claimed he was not intoxicated, that was not the issue. The court found the police officer's observations credible along with the mother's admissions as to her condition. The father neglected the children as he allowed them to ride in the car while the mother was driving when he knew or should have known that the mother was intoxicated.

Matter of Alyssa WW., 106 AD3d 1157 (3rd Dept. 2013)

Cortland County Family Court granted a motion for summary judgment for neglect regarding a father as it related to his two daughters based on a consent finding the father had entered in Tompkins County Family Court. The Tompkins finding was on allegations that he had used meth and marijuana such that he was incapable of caring for four other children who were in his care. The prior neglect was proximate in time - less than one month earlier. The Tompkins County fact finding determination and all related documents were submitted with the summary judgment motion that indicated that the father used meth and marijuana daily while the children were in his care. Drugs were present in the home where the children had access to them. He called the children names when under the influence and allowed a drug dealer to come into the home and use and sell drugs from the home. There were two prior indicated reports of child neglect and his use of drugs was long standing. This established a prima facie case of derivative neglect. The father argued that the two Cortland children were not in the home where the Tompkins neglect occurred but this argument does not raise factual questions that would require a hearing.

Matter of William N., ___ Misc 3d ___, dec'd 5/31/13 (Kings County Family Court 2013)

Kings County Family Court dismissed a neglect petition against a father and a mother. While the mother tested positive for marijuana when the child was born, the child tested negative and was healthy and normal and therefore not neglected. There was no evidence presented of any risk to him. Since the mother's use of marijuana was not neglectful, the father's failure to prevent her from smoking marijuana is also not neglectful. Although the mother had consented to a finding of neglect regarding her other children at around the time she was seven months pregnant, the consent cannot be used to form the basis of a derivative finding on the infant as it was a consent and not an admission. The court finds that a consent to a neglect finding is similar to a *nolo contendere* pleas in criminal court and cannot be used as the basis of a derivative adjudication in the future. The court acknowledges that there is no other case law on this point as it relates to Art. 10 consent orders but finds it would be a violation of due process to treat a consent as though it was an admission and use it in a subsequent derivative action. (Note: ACS advises that this decision is on appeal)

Matter of Camarrie B., 107 AD3d 409 (1st Dept. 2013)

New York County Family Court was affirmed by the First Department. The lower court granted a summary judgment motion for a finding of derivative neglect regarding a newborn baby. The mother had been found to have neglected six older children just 10 months earlier. The prior finding had been due to her daily use of marijuana, for more than 19 years, among

other things, and it was sufficiently close in time to support the court's conclusion that her parental judgment had not changed. Further her older six children had remained placed in care through two permanency hearings as the proof was that the mother had failed to complete ordered drug treatment and refused drug testing.

PHYSICAL ABUSE

Matter of Matthew O., 103 AD3d 67 (1st Dept. 2012)

In a highly significant decision, the First Department affirmed a *res ipsa loquitor* physical abuse finding against both parents and the child's nanny in a Bronx matter. The 5 month old baby girl was brought to the hospital for a swollen left arm. There it was discovered that the baby had seven fractures in various stages of healing - two left elbow fractures, a left wrist fracture, a fractured left tibia and fibula, and two skull fractures. The elbow fractures were recent, perhaps in the last week and they were corner bucket handle fractures, which are not accidental and are common in very violent shaking or tearing. It was very unlikely that the baby's siblings would have the strength to cause the injuries. The left wrist fracture was between two weeks and three months old. This injury and the ones to the legs all would have caused significant pain and swelling. The skull fractures appeared to be "very recent". The baby was also underweight and had moderate malnutrition – likely due to a loss of appetite due to all the pain she was in from the various injuries. The medical testimony was that all of the fractures were inflicted on the infant.

The two parents and the nanny were the only caretakers of the baby. The nanny had worked for the family in their home for some 8 years and worked 12 hours a day, 5 days a week. The fact finding consisted of 11 witnesses over a 42 day hearing. The nanny testified that she did not inflict any injury on the baby and claimed that she thought the baby appeared to be injured on several occasions and that she told the mother of this. The nanny testified that the parents were uninvolved with the children and that the mother was "disengaged" as a mother. The parents testified that until the baby was born, that the nanny had been a good nanny for their other children but appeared to become distracted and distant after this baby was born – perhaps due to personal and family problems. They testified that they did not harm the baby and that the "only explanation" is that the nanny had harmed the baby although the mother admitted that she had never seen the nanny behave in any manner that would have resulted in the baby's injuries.

Since none of the three respondents denied being the caretakers of this infant and since none of them took responsibility or were able to specifically testify that they had seen another injure the baby, the lower court determined that they were all responsible for the baby's abuse and also made derivative findings against all three regarding the siblings. The respondents all appealed arguing first that the child's injuries were not proven to be abuse and also that since ACS was not able to prove exactly when the injuries occurred and who specifically had caused them, the petitions should have been dismissed. The Second Department concurred with the lower court.

The injuries to the infant were abuse as the medical proof was that at less than 6 months of age, someone inflicted enough force on the baby to cause seven different fractures to her bones by violent shaking or tearing and that the child was in pain and resulted in crying and loss of appetite. These injuries created a substantial risk of injury that could likely cause death, disfigurement or impairment and were clearly child abuse.

Significantly, the Appellate Court held that ACS was not required to prove exactly when each injury occurred and who the caretaker was at each event. A prima facie case of child abuse was proved against all three caretakers given that the abuse was ongoing, apparently happening over at least a 3 month period and the three respondents were the infant's caretakers at that time. It became their burden to rebut the evidence of the abuse. The court differentiated the situation where there was one sole injury to a child and where it may then become significant to know what caretaker of the three had responsibility for the infant at the time of a sole injury. In this type of a factual pattern a "presumption of culpability extends to all the child's caregivers" particularly in cases where the caretakers are "few and well defined". To do otherwise would "automatically immunize entire households where multiple caregivers share responsibility for child care." Although here all three denied committing the abuse, none of them denied being the child's caretakers in the time period and none of them overcame the presumption. The three siblings were derivatively neglected based on this abuse given the repeated and severe injury inflicted on the infant.

Interestingly, the baby and another young sister had been removed from the home at the time of the petition. The Art. 10 case itself was pending in the Bronx County Family Court for over 5 years and then was on appeal for another 2 years. However, eight months after the removal, the younger sister had been returned to the parents. The subject baby was returned to the parents care, over ACS objection, 11 months after her removal. Some three years after the alleged incidents, the court discontinued all ACS supervision of the family.

Matter of Tyler S., 103 AD3d 731 (2nd Dept. 2013)

The Second Department reversed an abuse adjudication from Kings County Family Court. The nine week old child sustained an acute subdural hematoma and a left orbital fracture head injuries and swelling to the left eye and the MRI also disclosed a chronic subdural hematoma with old hemorrhage that appeared to be about a month old. The mother claimed that the child slipped from her hands when she lifted the wet infant out of his bath and fell from the mother's waist level to the floor, landing on his face. ACS presented two experts. The first was a board certified pediatrician who was certified in child abuse pediatrics and he testified that the two acute injuries probably happened due to the same trauma and also while "rare" could be "compatible" to the fall that the mother described. Relying heavily on the MRI report, this expert testified that the mother's version did not explain the older injuries. The second witness was a board certified radiologist and neuro-radiologist who testified that the acute injuries did not appear to be caused by the fall the mother described as they did not appear to be recent. He also testified that if any infant had both a subdural hematoma and an orbital fracture from a single fall, the injuries would be on opposite sides of the head which was not true with this child. The mother offered a board certified diagnostic pediatric radiologist who testified that

all of the child's injuries could have occurred from the fall the mother described and that she had once before seen such injuries in a child who had fallen. The family court credited the ACS expert witnesses and adjudicated the mother to have abused the child. The Appellate Division reversed, ruling that although there was a prima facie case of abuse proven, it was rebutted by the mother's proof via her expert who testified that the injuries could have been accidental trauma as the mother described. It was undisputed that the mother presented as a concerned parent, was forthcoming and cooperative with the medical professionals and the caseworkers involved. Witnesses testified that she was loving and caring as a mother and that she had no prior child protective history.

Matter of Heaven A., 38 Misc 3d 1219 (Bronx County Family Court 2013)

Where a Bronx mother was responsible for the death of her son, the court finds that the deceased child and the mother's other child are severely abuse and abused. The deceased child was hit, kicked and punched by his mother resulting in some 30 contusions, bruises, and scars in acute, healing and healed stages. He had a lacerated intestine and hemorrhaging and contusions to his bowel, his kidney, pancreas and stomach that had resulted in peritonitis. He had scars and marks due to a lit cigarette lighter and a hot fork being applied to his skin. He was in effect beaten to death over a five day period. The mother who was the child's sole caretaker, acted recklessly and intentionally and with depraved indifference to his life. She never obtained any medical treatment for the child who would have been in excruciating pain. The court determined it would hold a dispositional hearing to determine if there should be a FCA §1039-b(b)(1) order that no reasonable efforts need to be made to reunite the surviving child with the mother.

Matter of Amir L., 104 AD3d 505 (1st Dept. 2013)

Not only did the First Department concur with the New York County Family Court's dismissal of abuse in this matter, but it also reversed the lower court's finding of neglect. The five month old child had a fractured femur. ACS' medical expert testified that the injury was intentionally inflicted but the parents argued that the child had rolled off the couch that day for the first time ever. The ACS' expert's opinion was undercut by the testimony of the respondent's expert and an article in the Journal of Pediatric Orthopedics published in 2000 which described two different instances of six month old babies fracturing their femurs from falling off a bed in one case and a sofa in another. The article claimed that 62% of the time abuse was not a factor in the fractures in infants studied. The respondents' expert found that the injury could have occurred as the parents described and that the parent's care of the child prior to the injury and their response after the injury both weighed against a finding of abuse. On review, the Appellate Court determined that the respondents' had rebutted the presumption. While the fractured femur established a prima facie case of maltreatment, the father testified that he went to dispose of a soiled diaper and the child rolled over for the first time ever and fell off the couch. The respondents' experts' testified that this most likely caused the child to suffer a hairline fracture of his femur which later progressed to an oblique fracture. Although the

respondents' had shown some inconsistency in their accounts of the child's symptoms, this was not enough to substantiate that their abuse caused the injury.

The lower court had dismissed the abuse but found neglect based on the parents' failure to provide a credible explanation and their failure to seek timely medical care as they waited a week after the fall off the couch to seek medical treatment. However, here the Appellate Court disagreed with this ruling again based on the respondents' expert witness who testified that the leg of a five month old baby is chubby and the swelling associated with a break may not be apparent. If the original break was a hairline one, it may have caused little or no pain until it had progressed to the full fracture. The respondents' presented a video of the child filmed the week after the fall off the couch which showed the child rolling over and moving his leg with no evident discomfort. Sometime later in the evening of that day of the video tape the child's injury became a full fracture and the child woke in distress during the night, causing the mother to call the pediatrician the next day who advised bringing the baby to the emergency room. Even at the emergency room, the child's pain scale was registered an only a 2 or 3 out of 10. The child had no other broken or healing bones and no other abnormalities or injuries and was up to date on all immunizations and had been given appropriate and timely medical care. The First Department reversed the neglect adjudication.

Matter of Dashawn W., 21 NY3d 36 (Court of Appeals 2013)

The Court of Appeals reviewed two significant issues in a severe abuse case. First the court held that the phrase "circumstances evincing a depraved indifference to human life" in SSL § 384-b 98)(a)(i) does not mean the same thing as has been currently interpreted in the Penal Law. Second, the court held that a showing of diligent efforts is a prerequisite to a finding of severe abuse unless there is a finding that these efforts would be detrimental to the best interests of the child. The Kings County matter that brought these issues to the Court of Appeals involved injuries to a five month old. The baby has a shifted and fractured collar-bone and four partially healed ribs. There was also a five year old sibling with excessive ("too many to count") welts to his body from corporal punishment by being hit with a black wire or cord. The expert medical testimony was that the injuries to the five month old were due to child abuse and not caused by any of the accidental possibilities suggested by the parents. The father had previously been found to have abused one of the older children in 1994 when that child was then four month old. This had resulted in bilateral subdural hematomas, four fractured ribs and a fractured wrist and skull. The lower court had dismissed the severe abuse allegations believing that the Court of Appeals decisions on the interpretation of "depraved indifference" in the criminal area, applied to the Social Services Law language as well.

The Court clarified that the "depraved indifference" language in the Social Services definition of severe abuse is not the same as the interpretation of those words in the Penal law. A child can be severely abused by ***reckless or intentional*** acts by the parent. Here the baby was struck or beaten on at least two different occasions at least two weeks apart. The father knew that the risk of this action toward an infant was life threatening, he knew what he had done years earlier when he had beaten the child's older brother. He had utter disregard for the life and health of

this baby. The baby would have been in constant pain and yet he did not seek medical aid even after he claimed he noticed he injuries. He provided unbelievable explanations for the injuries and failed to testify at the fact finding. His behavior constitutes severe abuse of this baby.

At no time did ACS offer the father “diligent efforts” to strengthen and rehabilitate the relationship. The Court of Appeals reviewed the wording in FCA § 1051 (e) and 1012 (j) and determined that the Art. 10 definition of severe abuse imports the entirety of the SSL § 384-b (8)(a)(iv) definition of severe abuse or else the legislature would have said so** and that therefore the definition includes the requirement of proof of diligent efforts. However, the SSL section also says that the diligent efforts can be excused when they are found to be detrimental to the best interest of the child. Therefore for the social services district to prove a matter of severe abuse, it must prove by clear and convincing evidence that the parent committed the abusive act and must also prove that diligent efforts to reunite the family were not made as it would have been detrimental to the child’s best interest or that the efforts were made and were unsuccessful and are unlikely to succeed or that the court had previously determined that the reasonable efforts to reunite the family were unnecessary. Here the court had no problem finding that diligent efforts to encourage the parental relationship would be detrimental to the child’s best interests.

** NOTE: The Court of Appeals suggests in its decision that perhaps the legislature did intend to allow the court to issue an order that no efforts were necessary without having first to expend those efforts but claimed this is not what the words actually say. The legislature has now passed A2600/S4082 and has done just that, clarifying that the “diligent efforts” portion of the definition in SSL law is not included in the Art. 10 definition. This bill would resolve the “diligent efforts” part of the *Dashawn W.* case contrary to the Court of Appeals decision. The bill is awaiting the governor’s signature and if signed would be law effective immediately.

Matter of Nicholas S., 107AD3d 1307 (3rd Dept. 2013)

The Third Department reviewed a severe abuse finding from St. Lawrence County. The respondent lived with his girlfriend and five children – two of which were his biological children. In 2008 one of the children was discovered to have bruising on his buttocks caused by the respondent and the girlfriend spanking him with kitchen implements and a neglect petition was filed. Thereafter one of the respondent’s biological children was visiting his mother and he was discovered to have second degree burns on his back, abdomen and chest and bruises on his face and a healing fracture to his left arm. A second petition was filed alleging severe abuse and neglect. The one child was found to be neglected based on the bruised buttocks and the biological child was found to be abused and severely abused and the other children were found derivatively neglected, abused and severely abused.

The neglect was proven by the child’s out of court statements and the multiple witnesses to the bruising on his buttocks as well as the photographs of the injuries. Derivative neglect as to the sibling was appropriate as this demonstrated an impaired parental judgment. The medical proof as to the biological child who was burned was that the burns were not consistent with accidental

contact but were indicative of the child being pushed or pressed against a hot solid object. The burns had not been given any medical treatment and would likely result in a permanent scarring over much of the child's body. The child's fractured arm was healing and would have been sustained a few weeks earlier. The child had received no medical attention and could not straighten out his arm and was in pain. The bruising on the child's eyelids, ears and face were not consistent with normal childhood activity and were indicative of abuse. The father could offer no explanation for the injuries other than to say they were accidental and claimed that his girlfriend's attentions to the injuries were the only medical attention he thought the child needed. The medical expert testified that the failure to seek medical treatment increased the odds of infection and the child would have been in pain. For these reason the Third Department concurred that the child had been abused but cited the Court of Appeals ruling in *Dashawn W.* as described above and ruled that the severe abuse finding had to be dismissed as the DSS did not offer proof of diligent efforts nor seek the required order of the efforts being detrimental.

NOTE: As described above, the legislature as responded to the *Dashawn W.* case by passing legislation that will clarify that the Art. 10 definition of severe abuse does not borrow that portion of the SSL definition that includes proof of diligent efforts. The bill will go into effect immediately upon the governor's signature.

SEXUAL ABUSE

Matter of Gloria M., 96 AD3d 1060 (2nd Dept. 2012)

A Rockland County father sexually abused his daughter. This act demonstrated such a flawed understanding of his duties as a parent that all the children in the household were derivatively neglected. The Family Court did not abuse its discretion in closing the courtroom to the public during certain portions of the fact finding. Further there was no violation of the father's constitutional rights in allowing the subject child to testify outside of the father's presence. The father's attorney remained in the courtroom and did cross examine the child. The court had reasonably concluded that the child would suffer emotional trauma if she had to testify in her father's presence. There was sound and substantial basis for the court's decision to place the children with DSS.

Matter of Olivia C., 97 AD3d 910 (3rd Dept. 2012)

Schoharie County Family Court's sexual abuse and neglect adjudication against a mother and her boyfriend was affirmed on appeal. The mother had four children and her eldest daughter alleged that the boyfriend had raped her on two occasions when she was 12 years old. The mother allowed contact between her boyfriend and the children despite the fact that she knew he had pending criminal charges against him in Maine alleging that he had sexually abused his biological daughter. The child in this petition gave convincing out of court statements about the two rapes to a caseworker and another interviewer. She provided detail and described the circumstances. Her out of court statements were corroborated by the fact that the respondent had, by the time of the fact finding, pled guilty to gross sexual misconduct regarding his sexual

abuse of his biological daughter in Maine. He was in fact by then, incarcerated in Maine. The lower court correctly determined that the mother was not credible when she denied that she knew he was facing these charges in Maine at the time she allowed him contact with the children.

Matter of Fay GG., 97 AD3d 918 (3rd Dept. 2012)

A Broome County Family Court sex abuse finding was upheld on appeal as was the dispositional order regarding the father even though the child in care had already reached his 18th birthday. The petition concerned the father's then 17 year old daughter and his 16 year old son. The daughter testified that her father had forced her to put her hand on and stroke his erect penis. Both children stated that the father physically assaulted them and threw furniture and other things at them. The father admitted to having sexually abused the daughter many years earlier. The father had also failed to obtain vision and dental care for the son who needed glasses and had several cavities. The father failed to testify on his own behalf and a strong inference can be drawn against him. There was ample evidence of abuse and neglect.

Both children had turned 18 years old by the time of the dispositional hearing. The son chose at that time to remain in foster care and the lower court issued an order that the father could have supervised visitation and ordered that the father needed to participate in anger management counseling, and obtain a sexual abuse evaluation and a mental health assessment. The father appealed arguing that the lower court had no further jurisdiction over him. The Third Department found that although the son had a low intellect and significant mental health problems, he did knowingly consent to stay in foster care after he had turned 18. It was not beyond Family Court's jurisdiction to direct the father to participate in services since DSS has continued responsibility of the youth given this decision to remain in care. The caseworker indicated that the father could be helpful to the youth when he ultimately transitioned out of foster care and should be in a position to be of assistance. Further the father wanted to be able to visit and be involved in the youth's service planning. Since now the court's supervision order over the father has expired, his participation in the services is a voluntary choice but the father's failure to participate in services could reduce his role with the youth as the youth remains in the legal care of DSS.

Matter of Loraida R., 97 AD3d 925 (3rd Dept. 2012)

A Schenectady County mother sexually abused her 9 year old daughter and derivatively abused her younger son. Both the mother and the daughter were developmentally delayed. The mother was aware that the child was complaining of pain and discomfort in the genital area and was advised by the school that the child needed to be taken for medical attention immediately. The mother waited some 48 hours to take the child to a doctor. There it was discovered that there was bleeding and significant trauma to the child's genital area and thighs consistent with multiple attempts to penetrate the child's vagina and her anus. The medical experts offered by DSS opined that the injuries were evidence of sexual abuse and had occurred in time frames when the mother was the caretaker. The mother provided the testimony of a doctor who had not examined the child but viewed photographs of the child's injuries and indicated that in his

opinion the injuries could have been caused by nonsexual blunt force trauma or a bacterial infection or both although he also stated he could not rule out sexual abuse. Although the mother did testify, she offered no explanation for her daughter's injuries. There was no basis to disturb the lower court's 10 findings. The mother had agreed to an Art. 6 physical custody order to the father with supervised visitation granted to her. The mother was also placed under Art. 10 supervision for a year. As that supervision order had ended, any issue was moot.

Matter of Shade B., 99 AD3d 1001 (2nd Dept. 2012)

Using a res ipsa loquitor argument, both Kings County Family Court and on appeal, the Second Department, found that the parents had sexually abused their four year old. The child tested positive for vaginal gonorrhea at 4 years of age and had been in the care of her parents.

“Unexplained evidence that a young child suffers from a sexually-transmitted disease suffices to establish a prima facie case of child abuse.” The vaginal culture performed on the child is the “diagnostic gold standard” and does not yield false positives. In counseling the child described a “ghost” touching her private parts and then also identified her father. The child became very anxious in the counseling session and said that her mother told her she would not be allowed to go home if she talked about who gave her the “boo-boo” and she pointed to her vagina. The parents failed to rebut ACS' prima facie case.

Matter of Kyanna T., 99 AD3d 1011 (2nd Dept. 2012)

The Second Department affirmed a sex abuse finding from Kings County Family Court. The proof showed that the male respondent sexually abused one of the children in the presence of another child. The victim child's out of court statements were corroborated by her in court testimony, the out of court statements of the child who witnessed the abuse and by expert opinion evidence. The lower court did not err in excluding the male respondent and the respondent mother from the court room when the victim child testified as the court reasonably concluded that the victim would suffer emotional trauma if required to testify in their presence. The respondents' attorneys were present and did cross examine. The male respondent abused the one child and that behavior warranted the derivative abuse finding regarding the child who witnessed the abuse as well as derivative neglect findings regarding the other two children. The respondent mother neglected the victim child by failing to investigate the allegations of the child who witnessed the event and continuing to allow the male respondent around the children. This behavior resulted in a finding that she had derivatively neglected the other children.

Matter of Ramsey H., 99 AD3d 1040 (3rd Dept. 2012)

The St. Lawrence County respondent in this matter lived with 5 of his biological children and one stepchild. Another bio child as well as a child of his former wife visited the home every other weekend. The child of his former wife was a 10 year old girl who disclosed to her mother that the respondent was sexually abusing her when she visited the home. The child made out of court statements that the respondent had been sexually abusing her since she was 7 years old. The respondent was also arrested and charged criminally but went to trial and was acquitted. The Third Department affirmed the Family Court's ruling that he had abused, severely abused

and neglected the child and had derivatively abused, severely abused and neglected the other children based on his sexual abuse of the target child.

The child testified in Family Court and described the date and detailed circumstances of how he had separated her from the other children by pretending to have her clean the upstairs of the home while the other children cleaned downstairs and then forced her to submit to intercourse and threatened her not to tell anyone. This event had happened when she was 10 years old and she described in detail two other similar events that had occurred since she was 7 years old. Her in-court testimony was consistent with her out of court statements. The lower court found her credible. The DSS also called her pediatrician as a witness. He had examined her and found that she expressed no discomfort when he inserted his index finger into her vagina – an action which he indicated should cause a child of her age to “cry out in pain”.

The respondent argued on appeal that he was not a person legally responsible for the child. The Appellate Court disagreed. The child visited him every other weekend and called him “daddy”. He supervised her and was left alone to care for her and the other children at times. He also argued that the Family Court should have allowed him to re-open the proof to present three witnesses that he said had testified at his criminal trial. Again the Appellate Court disagreed. The respondent did not make this motion until 6 months after the Family Court matter had concluded and the three witnesses had testified at a criminal trial that was held before the Family Court fact finding. It was not new evidence and it was irrelevant or would have not produced a different result. His attorney had chosen not to call the three witnesses and this could have been legitimate trial strategy.

Matter of Joanne II., 100 AD3d 1204 (3rd Dept. 2012)

A Saratoga County father of 4 children sexually abused his 4 year old daughter and therefore derivatively abused his 3 other children. The 4 year old disclosed to the paternal grandmother and then to a counselor, a sheriff’s investigation and a CPS worker details about the abuse. The child exhibited dramatic and disturbing personality and behavioral changes which resulted in the respondent father’s own mother taking the child to see a therapist. There the child used dolls to show the grandmother and the therapist what the father had done. The grandmother confronted her son later that day and he said he was going to “blow” his “head off” and wrote out what he claimed was a will. The child’s out of court statements were corroborated by a clinical psychologist specializing in sexual abuse who evaluated the child and testified that the child disclosed the sexual contact to her, stated it had happened “a bunch of times” and stated that she did not want to see her father anymore. The child was able to draw pictures and use dolls to show the expert what had happened. The psychologist testified that the child’s descriptions of the abuse, such as the “naïve” quality of the child’s language showed that she had not been coached and was, in the opinion of the expert, demonstrating behavior consistent with sex abuse victims. The mother of the younger child, who was 2-3 years old during this time period - also told the caseworker that this younger child had redness in the vaginal and rectal areas after visiting with the father. This child also had sudden and disturbing behavioral

changes after overnight visitation with the father. The lower court found these witnesses credible and the father not credible when he testified that he did not have sexual contact with the child. The proof was sufficient for a finding of sexual abuse and derivative abuse.

Matter of Lori DD v Shawn EE., 100 AD3d 1305 (3rd Dept. 2012)

A Schenectady mother brought a petition to modify the custody order with the father, claiming that the father had been sexually abusing the child. DSS then also filed an Art. 10 against the father with the same allegations. All parties stipulated, including DSS, to allow the Art. 6 to go forward first with an agreement that DSS would then withdraw its petition if the mother was given sole custody. The mother also indicated that she wanted permission to relocate to Panama with the child. The Appellate Division concurred with the Family Court that given the allegations in the Art. 6, it was appropriate to apply the evidentiary standards of a FCA Art. 10 and found that the child's out of court statements were admissible and were corroborated.

When the child was approximately 11 years old, she made numerous statements about the father sexually abusing her and stated that this had been going on for an extended period of time. The mother saw dramatic changes in the child's behavior – she had panic attacks, would cut herself and be unable to sleep. The child saw a therapist weekly for two years and the therapist opined that the child demonstrated symptoms typical for sexually abused children including anxiety, guilt, self-harming behaviors, suicidal thoughts and knowledge of sexually activities that were not normal for her age. Further the child was ambivalent about the father – she loved him and missed but also strongly feared him and stated that she was worried that he would “come after her again”. These confused feelings are typical when a child has been abused by a close relative. The therapist saw no evidence that the mother coached the child to fabricate the abuse. The therapist was highly credible and persuasive. Although the father denied the abuse as well as other alleged neglect of the child, he also denied domestic violence in her presence and yet he was serving a 3 year prison term for assaulting his girlfriend. The child had only a healthy relationship with the mother and the move to another country for an indefinite period of time was in the child's best interests.

Matter of Raygen D., 100 AD3d 1413 (4th Dept. 2012)

The Fourth Department concurred with Cattaraugus County that a respondent had sexually abused a 5 year old girl that he was “parent substitute” for and that this behavior also derivatively neglected his own 2 year old daughter. The out of court statements of the 5 year old were corroborated by an evaluating psychologist who testified that the child's statements to the psychologist and to the caseworker while being interviewed on videotape were credible. Also the respondent failed to testify and the court properly drew a strong inference against him. His sex abuse of the 5 year old demonstrated a total lack of understanding of the parental role such that his own 2 year old was in imminent danger of harm.

Matter of Dayanara V., _ 101AD3d 411 (1st Dept. 2012)

A Bronx County Family Court's adjudication of abuse and derivative abuse against a father was affirmed but the abuse finding against the mother was modified to a neglect finding. The 13

year old eldest child testified in court that her father had sexually abused her on three occasions when he was drunk. Both the caseworker and a pediatric specialist indicated that the child had told them similar accounts. The child was subjected to extensive cross examination and was found to be credible. The father abused this child and derivatively abused the younger children by this action. He also neglected the children in that he punched the oldest child in the stomach for seeing a boy and had a sibling punch her in the eye. The mother was not abusive however, only neglectful. She interrupted a sexual abuse incident – the last one – and the child then told her of the sexual abuse by the husband. The mother then yelled at the father, who did not sexually abuse the child again. However, the mother did not report what had happened, did not make the father leave the house and this put the children at risk, particularly when the father drank. Therefore the mother did not act as a reasonably prudent parent and she neglected the children. The eldest child was put in the care of ACS with an order of protection against the father and the younger children were placed in the care of the parents under supervision.

Matter of Jani Faith B., 104 AD3d 508 (1st Dept. 2013)

A New York County Family Court sexual abuse finding was affirmed on appeal to the First Department. The child testified that her stepfather kissed her while using his tongue. This act is legally sufficient to establish sexual contact under Penal Law § 130.00. The child's credible in court testimony is sufficient proof and does not require further proof of a physical injury or any corroboration. The child further testified that the stepfather had been smoking marijuana and drinking prior to the incident. The father failed to take the stand and offer any innocent explanation for his behavior and the court can draw a negative inference that his actions were for the purpose of gratifying his sexual desires. The son was derivatively abused in that he was present in the apartment and in fact walked into the room when the stepfather was abusing the child. The respondent's parental judgment and lack of impulse control are so defective that there is a substantial risk of harm to any child in his care.

Matter of Leah R., 104 AD3d 774 (2nd Dept. 2013)

The Second Department concurred with Kings County Family Court that a father sexually abused his then 6 year old daughter and derivatively abused her sister. The child's out of court statement describing sexual abuse by her father were corroborated sufficiently including with the testimony of the child's cousin and her half sister, both of whom testified that the father had sexually abused them in a similar manner years earlier.

Matter of Amber C., 104 AD3d 845 (2nd Dept. 2013)

A Kings' County Family Court sexual abuse adjudication was affirmed on appeal. The child's out of court statements that her father sexually abused her were corroborated by an expert in clinical and forensic psychology, with a specialization in sexual abuse, who evaluated the child and opined that the child exhibited the known behaviors of sexually abused children.

Matter of Nicole G., 105 AD3d 956 (2nd Dept. 2013)

The Second Department affirmed Rockland County Family Court's dismissal of a sex abuse petition. The child, when she was 14 years old, made out of court statements that her father had

sexually abused her. She repeated this information to the social worker at school, law enforcement, the CPS worker and in a handwritten narrative statement. Although these witnesses cross corroborated each other, there still must be competent nonhearsy, relevant evidence to corroborate the child's multiple out of court statements. Here, the child adamantly refused to come to court and testify, even though she was subpoenaed. Further the DSS' expert in child sexual abuse did not provide corroboration as she was unable to identify the generally accepted professional protocols used to interview children and how they compared to the protocol she used. Also, the expert testified that the child's "behavior" and "affect" were consistent with that of a sexually abused child but she did not actually render an expert opinion that the abuse likely occurred.

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

Jefferson County Family Court was affirmed on appeal to the Fourth Department. The father sexually abused and neglected two of the children and derivatively neglected another. The lower court did err in admitting the written report of the social worker who performed the sexual abuse assessment as it was a prior consistent statement that simply bolstered her trial testimony. However, this was harmless error as the court did not appear to rely on it.

Matter of Karina L., 106 AD3d 439 (1st Dept. 2013)

A Bronx man sexually abused one of the children in this matter. He admitted to two social workers that he had touched the child's breast and kissed her on the mouth. The respondent's purpose was sexual gratification as it can be inferred from the conduct itself.

Matter of Ashley M.V., 106 AD3d 659 (1st Dept. 2013)

New York County Family Court was affirmed on appeal to the First Department. The child in this matter testified in court that her father sexually abused her. The fact that she had no physical injury does not require a different result. The lower court found her credible and any inconsistencies were minor. Further the out of court statements of her brothers that the father would send them to the park while keeping the daughter home supports the child's testimony that her father would arrange to be alone with her in order to abuse her. The father failed to testify and a negative inference can therefore be drawn. The finding of sexual abuse against the daughter showed such a fundamental lack of understanding of the duties of parenthood that a derivative abuse finding regarding the two brothers was appropriate.

Matter of Trenasia J., 107AD3d 992 (2nd Dept. 2013)

A Kings County man was a person legally responsible for his niece and ACS proved that he had attempted to sexually abuse her in his home while his own two young daughters were at home. He was the sole adult caring for the children at the time. This behavior supports a finding of abuse as to the niece and also supports a finding of derivative neglect regarding all three of his children.

ART 10 DISPOS and PERMANENCY HEARINGS

Matter of John B. v Patrice S. NYLJ 7/27/12 (Nassau County Family Court 2012)

Nassau County Family Court modified a child's permanency goal to APPLA even though the DSS and the AFC both recommended a goal of legal guardianship with the foster parents seeking to obtain guardianship. The father objected, and the Family Court agreed, that if the court determined that the child cannot return home, and that there are no grounds to TPR, then the child should be given the goal of APPLA as the law does not contemplate foster parents being given guardianship. The court found that the permanency goal of guardianship contemplates a relative seeking guardianship of a child – not a foster parent. The court cited *Michael B.* 80 NY2d 299 where the Court of Appeals concluded that the foster care system does not contemplate granting custody to foster parents (barring an agreement by all parties) as to do so would undermine the very purpose of the foster care process. If guardianship for foster parents over a parental objection as in fact an accepted permanency option, there would be little incentive for any foster parent who wanted to adopt a child to cooperate with the reunification goal.

Matter of Ascension C.L., 96 AD3d 1059 (2nd Dept. 2012)

Kings County Family Court correctly continued the goal of adoption after a child had been in care since she had been 10 days old - for over 2 years. The mother came significantly late to most visits and left one visit before it even started. She used profanity in front of the child and was belligerent toward the foster care agency staff. She had not allowed an inspection of her home for more than a year and when it was inspected, there were no window guards for the child among other problems. She completed a parenting skills course but had not followed up on any mental health referrals. The child was bonded with his foster parents who address his special needs.

Matter of Kobe D., 97 AD3d 947 (3rd Dept. 2012)

The Third Department reversed Clinton County Family Court's modification of the permanency goal in a permanency hearing and modified the lower court's ruling on visitation as well. The three children had been in care for over 2 years due to the mother's inability to control the children, provide for their emotional needs and stop them from being physically violent to each other. At the third permanency hearing all parties were advocating that the goal should remain reunification and that the mother should begin unsupervised visitation in her home. The lower court disagreed and ordered that the goals be changed to adoption and that the visitation remain supervised. In response to the court's order the parties agreed to start the visitation in the home albeit supervised while the mother's counsel appealed the Family Court order. The Appellate Court disagreed with the rulings of the lower court. The mother did have depressive disorder that was likely to last over a year but the caseworker and the therapist both testified that the mother had made progress, had implemented newly acquired parenting and coping skills. She has stable housing and is trying to locate a larger home for the children to return, although she does need financial assistance to pay her rent. She has completed parenting classes, goes to her group and her individual therapy sessions as well as family therapy with the children. The

mother has acknowledged her poor parenting in the past and is able to describe what she needs to do to better supervise and communicate with the children. It is true that the children are concerned about unsupervised visits and returning home – and the children’s attorney did change position on the appeal and was then supporting the adoption goal. However, the caseworker did testify that the children were comfortable at visitation and that this would improve if there were more opportunities for the mother to show the children that the relationship could improve. The mother continues to have problems that need to be improved but there is not the kind of record of a failure to engage in or benefit from services that warrants changing the goal to adoption. Further the court erred in not allowing some unsupervised visitation. The mother planned appropriate activities for the children, was attending their functions, including religious services and holidays at the foster parents. There was no evidence presented that the mother had been inappropriate during visitation and unsupervised visits should be permitted.

Matter of Gloria DD., 99 AD3d 1044 (3rd Dept. 2012)

Cortland County Family Court found that a mother had violated a prior dispositional order and that her two children should be placed in foster care. On appeal, the Third Department agreed. The mother had been found to have neglected the children in 2008 and then again in 2010. The neglect was due to her exposing the children to her violent relationship with her boyfriend as well as educational neglect. The dispositional order allowed the children to remain in her care under the supervision of DSS. She was to participate in counseling, follow recommendations of the children’s counselor, insure the children attended school and not allow anyone else to live in the family home. The boyfriend was also found to have neglected the children and a no-contact order of protection was issued against him that extended until the children were each 18 years old. Two months later, DSS filed a violation petition alleging that the mother was continuing her relationship with the boyfriend, was not insuring that the children were getting to school and was not making sure they were being fed properly. The children were placed in foster care and the court ordered that all visits were to be supervised.

The Third Department cited FCA § 1072 (a), 1052 (a)(iii) and 1055(a)(i) that after a neglect adjudication, placement in foster care is based on a “best interests” standard, not an imminent risk standard. The mother here was continuing her relationship with the boyfriend and did not appreciate the negative impact this had on the children. She was not meeting her treatment goals nor were the children meeting their goals while in her care. The mother argued on appeal that the court erred by allowing into evidence the hotline report that alleged the children were being abused in foster care. Although the lower court did not specifically rule, as per SSL §422(4)(A)(e), that the record was necessary to determine an issue before the court, it was not error here. The testimony was that one of the children denied any abuse by the foster parents and had indicated that she believed her mother made a false report. The unfounded report was therefore relevant as it related to the mother’s conduct being not in the children’s best interests. The mother also argued that the children were denied effective counsel but the Third Department disagreed with that as well. The AFC repeatedly told the court that the children did

want to return home to the mother. The AFC visited the children on numerous occasions and discussed what their positions were on father and grandparent visitation as well.

Matter of Eric Z., 100 AD3d 646 (2nd Dept. 2012)

The Second Department reversed a Queens County Family Court's refusal to grant a suspended judgment in an abuse case. The Art. 10 petition alleged that the parents, who had both attended medical school in China before emigrating to the United States, had abused and neglected their second child. The child had a left front-parietal subdural hematoma and a few bilateral retinal hemorrhages. The mother claimed the child had fallen off a bed. The pediatric neurosurgeon indicated that the injuries were not consistent with the mother's explanation. The child was removed and the Family Court denied the parents FCA §1028 request for a return. The parents then consented to an abuse finding as to the mother and a neglect finding as to the father. The court indicated it would "consider" a suspended judgment and both parents made motions for a suspended judgment and attached letters from three doctors all claiming that based on their examination of the child and discussions with the parents, they did not believe that the injuries were from child abuse. There was also a letter from a doctor who was both a Professor of Neurosurgery from Penn State University and the Director of Pediatric Neurosurgery at Penn State Medical Center. This doctor reviewed the child's records and opined that the child had a condition called benign external hydrocephalus which meant the child could sustain subdural bleeding from a minor trauma like falling off a bed and that there was no reason to conclude that the child had been abused. Yet another doctor's letter was submitted that he agreed with the alternative diagnoses and that there was no way to know for sure if this was what had caused the injuries as there had not been any image studies of the child before the accident. The Family Court denied the motions for a suspended judgment and released the child to the parents under supervision.

On appeal, the Second Department stated that a suspended judgment requires parents to comply with terms and conditions. The Second Department then stated : "If the terms and conditions are complied with, the petition is dismissed at the conclusion of the suspended judgment period, despite the fact that a finding of neglect of abuse has been made" * The respondent parents here had no prior criminal or CPS history and had complied with all court ordered services. A suspended judgment was in the child's best interests.

*NOTE: Many of us child welfare workers have wanted a clearer definition of how a suspended judgment actually works in an Art. 10 proceeding and perhaps these comments help. However, the Second Department only cites as statutory authority FCA §1053, which does not in fact describe the actual operation of a suspended judgment. Although the Practice Commentaries are cited, no case law is cited.

Matter of Brianna L., 103AD3d 181 (2nd Dept. 2012)

A Queens County mother and her children's attorney both appealed a decision by the Family Court on the disposition of a neglect matter. The mother had criminal charges as well as this Art. 10 petition for excessive corporal punishment of her 6 year old son and derivative neglect

regarding an 8 year old sister. The mother pled guilty to Endangering the Welfare of a Child in criminal court and was given a conditional discharge requiring her to follow the ACS service plan. The criminal court also issued an order of protection that she could have no contact with the son for five years. A month later, the mother consented to a neglect finding in Family Court. At the disposition, ACS took the position that the mother was now capable of caring for the children and then the parties obtained an amended order of protection from the criminal court. The criminal court order of protection for no contact for five years read the same except it now included the hand written words “subject to Family Court”. The lower court took the position that this amended order still did not allow the Family Court to actually return the child without an express removal of the stay away provisions of the order. The lower court then determined that although it was in the best interests of the children to be returned to the mother, the court had no jurisdiction to do in effect overrule the criminal court so and therefore the court returned the two children to their father. The criminal court thereafter completely rewrote the order of protection and deleted the stay away provision and also wrote that the criminal order was subject to all subsequent Family Court orders of custody and visitation and the Family Court then released the child to the mother’s custody. However the parties continued the appeal of the original order arguing that it was not moot as it is an important issue likely to recur. On appeal, the Second Department reviewed in detail the special purpose of Art. 10 proceedings, the fact that Family Court is in a unique position to rehabilitate parents and to have children’s wishes brought to the court’s attention by an AFC – that Family Court is about the best interests of children. Family Court is best suited to determine children’s best interests and its authority should not be circumscribed by a criminal court order that clearly uses language to express future amendment of its terms by Family Court.

Matter of Kevin M.H., 102 AD3d 690 (2nd Dept. 2013)

The Suffolk County IDV Court erred in dismissing a DSS petition to extend supervision of a father who had previously been found to have neglected the children by regularly exploiting them in his marital and custody disputes by harassing and aggressive behavior. The DSS sought to continue the supervision order and the court dismissed the petition without a hearing. DSS was entitled to a hearing to present their “good cause” for wanting the supervision extended.

Matter of Jayden QQ., 105 AD3d 1274 (3rd Dept. 2013)

In a significant decision, the Third Department held that the court can issue a FCA §1039(b) order against a non respondent parent. In this St. Lawrence County matter, the child was removed from the mother shortly after his birth and the mother was alleged to be neglectful and she later consented to a finding. The father was determined to be the infant’s father and was placed on notice of the neglect proceeding and the permanency hearings thereafter. The DSS offered the father visitation and services to see if the child could be placed with him but those services were not successful and thereafter DSS moved under FCA § 1039(b)(6)(e) for an order to terminate reasonable efforts toward the father based on his having had his parental rights to two children previously terminated. Family court granted the motion and the father appealed. The Third Department found that the statute was intended to expedite permanency for children.

The father was on notice of the mother's neglect and advised that he had rights to seek custody and that he could have his parental rights terminated even though he was not a respondent. The language of the statute and the underlying purpose of the statute support the authority of the court to issue such an order as against a non respondent parent. FCA § 1039 –b (b)(6) does not unconstitutionally distinguish between parents who surrendered their child and parents whose rights were terminated. A termination results from a showing that a parent is unable to provide a normal family home for the child and that future foster care is inappropriate. However, a surrender makes no such determination and may involve an agreement for ongoing contact. A court ordered termination means the parent no longer has any legal right to post termination contact. Therefore a FCA §1039-b order is limited to parents whose rights to ongoing contact with another child have been already indisputably terminated.

Matter of Michaelica Lee W., 106 AD3d 639 (1st Dept. 2013)

The First Department agreed with Bronx County Family Court that there were extraordinary circumstances to deny a father custody of a child that he had originally voluntarily placed in care. The father had placed his then seven week old daughter in care claiming that he was having fainting spells and worried that he might not be able to care for her safely. However he did not seek medical attention for his alleged condition for over four months and he left the child in care for over two years before seeking a return of custody. The child was now six years old and has lived with her foster mother since she was seven weeks old and was bonded to the foster mother. Expert opinion was offered that the child might suffer emotionally if removed from the foster home and that there were issues with the father's financial and housing circumstances. Further the father had several incidents where he became unjustifiably enraged in the child's presence. The Appellate Division commented that the lower court did not put "undue emphasis" on the father's criminal conviction for rape and similar crimes against four other children some 30 years ago which had resulted in a level 3 sex offender status. *Afton C.* is distinguished as the court did not make the custody decision solely on the father's sex offender status.

Matter of Skyler C., 106 AD3d 816 (2nd Dept. 2013)

After determining that ACS' motion for summary derivative neglect was properly granted regarding a Queen's County mother's newborn, the Second Department also affirmed the lower court's FCA § 1039-b ruling that the agency was not obligated to provide reasonable efforts to reunite. The statute says that the court "shall" make a finding that reasonable efforts are not required where one of enumerated circumstances exists – including the circumstance here that the mother had had her parental rights terminated involuntarily in the past. The mother in this matter had lost her parental rights to two other children. Further the statute does indicate that the court shall issue the order "unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future." The only reasonable interpretation of this exception is that once the local district proves one of the enumerated circumstances, the burden shifts to the parent to establish the applicability of the

exception and this is true for all of the enumerated circumstances of the FCA 1039-b order. In this matter, the mother did not establish the applicability of the exception.

Matter of Julian P., 106 AD3d 1383 (3rd Dept. 2013)

Columbia County Family Court erred in ordering separate goals for the mother and the father of the children. After the permanency hearing, the court ordered that the goal was reunification as to the mother only and ordered the DSS to commence permanent neglect proceedings against the father. Both the DSS and the father appealed with the support of the AFC. The court is to choose only one goal for a child at a permanency proceeding. The statute contemplates that a TPR of a parent would only be commenced if the child's goal is adoption. To require the DSS to bring TPR proceedings against one parent when the goal is to return the child to the other parent is not consistent with the overall goal of TPRs which is to free children for adoption. There is no point in ordering a TPR when it would not free the child for adoption. Further the lower court erred in suspending the father's visitation with the children. Although his relationship with the children before their placement included infrequent visitation, since they were placed he regularly attended weekly supervised visits and was loving, affectionate, engaged and "extremely appropriate". The father participated in the service plan reviews and contacted the caseworkers frequently about how the children were doing. He did continue to have difficulties with his drug abuse but there was no evidence that this caused any difficulty with his visits. There was no evidence that the visitation was detrimental or harmful to the children. He currently had plans to enter inpatient treatment. Lastly, the court erred in failing to have an age appropriate consultation with the children, the oldest of whom was 6 years of age. The AFC opposed the goal of reunification but did not state a reason for this position nor indicate what the children's preferences actually were. Although the court was not obligated to directly speak to the children, the court is required to and did not ascertain their wishes.

GENERAL TERMINATION ISSUES

Matter of Arianna I., 100 AD3d 1281 (3rd Dept. 2012)

The Third Department reviewed a Cortland County TPR regarding two children and affirmed the mother's finding of permanent neglect but reversed the termination and ordered a suspended judgment. The Appellate Court also affirmed the termination on abandonment grounds of one father but reversed the termination on permanent neglect grounds on the other father finding that the DSS had not made diligent efforts.

As to the mother, diligent efforts were made. The caseworker met with the mother monthly to discuss the service plan, and also set up visitation and arranged various services. The mother did not complete mental health counseling, did not complete substance abuse counseling and continued to have contact with a violent paramour. She did not fully cooperate with the caseworker. So a permanent neglect finding was warranted. However, the Appellate Court found that a suspended judgment was in the children's best interests and reversed the lower court's termination disposition. The mother "faithfully adhered" to the weekly visitation schedule and acted appropriately with the children who benefitted from the contact. The

children have a strong emotional attachment to the mother and have expressed a desire to live with her. The mother has obtained suitable house and says she will participate in the counseling she previously did not finish. “Significantly, the attorney for the children states that they have not fared well in foster care and the foster parents are not seeking to adopt them”. The matter as to the mother is remitted to determine the detail of a suspended judgment order.

As to the father of the oldest child, the Appellate Court upheld an abandonment termination. The father denied he abandoned claiming that he went to the DSS offices and asked for contact with the child and was told he had to file in court for contact and then received no assistance to do so. He claimed that DSS effectively prevented and discouraged him from contact. The court found the caseworker’s description of the meeting more persuasive. The caseworker said she gave the father reports detailing the service plan, letters about the child’s foster care placement and his child support obligations and copies of relevant correspondence. She did tell him he needed to go to Family Court to file for visitation and she was concerned that he had never had custody of this child, that he lived with a woman who had a CPS history and that he was recently released from prison. But this one contact in the office was the only contact he ever made with DSS and he never made any other attempt to contact DSS or to gain access to the child. He abandoned the child.

As to the father of the younger child, the Appellate Court reversed the termination, ruling that DSS had not provided diligent efforts to this incarcerated father. The caseworker received a letter from the incarcerated father within a month of the child entering foster care indicating that he felt the mother had neglected the child and that he wanted the child to be placed with a family member and not in foster care. The caseworker knew that the paternal uncle had sought custody of this child but the caseworker did not investigate this as an option. The father requested visitation with the child and stated he would seek custody when he was released from jail. The caseworker did not make any attempt for arranged any contact between the child and her father and the caseworker did not make any arrangements to meet with the father herself.

Matter of Cadence SS., 103 AD3d 126 (3rd Dept. 2012)

In a case of first impression, the Third Department ruled that one parent does not have standing to file a TPR against the other parent, even if the allegations are severe abuse based on the murder of a sibling to the child. The Third Department affirmed Albany County Family Court’s dismissal of a mother’s petition to TPR the rights of her child’s father who had been convicted of manslaughter in the death of her other child. Greene County Family Court had found the father to have abused the deceased child by violently shaking her and hitting her head against the bathtub causing her death. The Greene County Family Court found that the subject child was derivatively neglected. Although the surviving child was briefly in the custody of the grandmother during the investigation of the death, the child was returned to the care and custody of the mother who eventually relocated to Albany County. After the father was sentenced to prison, the mother filed a termination on severe abuse grounds and joined Albany DSS and Greene County DSS as parties. The mother also argued that there need not be a

showing of diligent efforts. The Third Department concurred with the trial court that there is no authority for one parent to obtain a termination of parental rights of the other parent.

Although SSL §384-b (3)(a) does state that “a relative with care and custody of the child” can bring a termination proceeding, this does not include a parent. The mother has custody of this child due to her inherent right as a fit parent. The statute is intended to apply to children who are court ordered out of their parent’s custody and in foster care or in the custody of relatives. The statute is intended to provide permanency for children who are not with their parents. The statute is intended to be used to free children for adoption – children who are not with their parents. “While the phrase “a relative with care and custody of the child” is not defined, it can only be interpreted – consistent with the legislative purpose – to mean a *nonparent* relative with care and custody of a child who could be freed for adoption.” There is no doubt that this man severely abused the sibling but that provides no dispositional alternative other than committing the child or suspending judgment and this child is already committed to the care of her mother. “Simply put, termination of parental rights, a predicate for adoption, is not a statutory option for a parent of a severely abuse child to pursue against the abusive parent where the child has remained in the care and custody of the non-abusing parent.”

Abandonment

Matter of Angela N.S., 100 AD3d 1381 (4th Dept. 2012)

The Fourth Department affirmed a Niagara County Family Court termination of a father’s rights on abandonment. It was undisputed that the father had no contact with the child in the relevant 6 months and that the father had years earlier relocated out of state. The father claimed that he spoke regularly to the mother who told him about how the child was doing but he made no attempts to see the child even though he visited friends several times in the Niagara Falls area. Although he claimed to not know for a significant period of time that the child was in foster care, he had been served with the original neglect petition and never responded to it and he made no attempts to see the child at the mother’s home where he claimed he believed the child was living. Although the caseworker did nothing to facilitate contact, diligent efforts to encourage the father to maintain contact need not be proven. The father claimed to have made phone calls to the caseworker once he learned the child was in foster care and that these calls were not returned. These calls do not rise to the level needed to defeat an abandonment petition. The father was served with the abandonment petition and failed to appear in court and show his interest and concern for over 11 months, showing up finally only on the day of the mother’s fact finding.

Mental Illness and Mental Retardation TPRs

Matter of Isis S.C., 98 AD3d 905 (1st Dept. 2012)

The First Department affirmed a mental illness termination of a New York County mother’s rights to her child. The expert had lengthy interviews with the mother and reviewed her mental

health records. The mother suffers from a long standing schizoaffective disorder and a major depression. She is unable, due to her condition, to care for her child who has special needs. Although the mother is currently in remission, she has a long standing pattern of noncompliance with meds and treatments and it was deemed “highly likely” that she would become delusional again.

Matter of B.Mc. 99 AD3d 713 (2nd Dept. 2012)

The Second Department agreed with Nassau County Family Court that both parents in this matter were too mentally ill to be able to care for their child for the foreseeable future. A psychologist testified that upon interviewing the mother and reading her records that the mother suffered from schizoaffective disorder, bipolar type. She has serious and ongoing deficits in her ability to parent and had a lack of insight into her illness. The father was also interviewed and he suffers from “personality disorder, NOS with schizoid and paranoid features”. The father is socially detached and has a pattern of distrust and suspiciousness as well as no insight into his limitations as a parent. He has refused repeated recommendations that he obtain psychotherapy. Both parents were presently and for the foreseeable future unable to parent the child safely. The parents also permanently neglected the child. Diligent efforts were offered which included developing a service plan, offering regular visitation and referrals to a parenting class but the parents failed to plan for the child’s future.

Matter of Adrianahmarie SS., 99 AD3d 1072 (3rd Dept. 2012)

A Clinton County Family Court termination of birth parents’ rights to their two daughters on mental illness grounds was affirmed by the Third Department. There was clear and convincing evidence that both parents were mentally ill and would not be able to safely care for the children in the foreseeable future. The court appointed clinical psychologist interviewed both parents on two occasions and administered psychological and personality tests as well as reviewed DSS and service provider records and Family Court orders. He also reviewed the mother’s mental health records, a prior psychiatric assessment and records from a psychiatric hospitalization. The testimony was that the mother suffered from bipolar II disorder, anxiety disorder and a borderline personality disorder. She was impulsive, had emotional over -reactivity, excessive anger and a history of tumultuous and violent interpersonal relationships. There was a long history of domestic violence between her and the father whose relationship had been ongoing since she was 16 and he was 30. She had a strong need to enter into and remain in relationships despite negative consequences. Her mental illness and impulsivity negatively affected her parental judgment and she placed her own needs above the children. She was at high risk of putting the children in neglectful situations and there was little indication that she would be able to stop making bad choices. The expert did indicate that some aspects of her mental illness might be amenable to treatment but the Appellate Court agreed that the “mere possibility” that she might improve at a later date is not a sufficient defense.

The father has anxiety disorder and an antisocial personality with narcissistic features. The father was deceitful, irresponsible, impulsive, irritable and aggressive. He engaged in criminal behavior, lacked empathy or remorse, was willing to exploit people and was self centered. He

denied responsibility for anything related to the matter. Children in his care would be at risk of abuse or neglect. The father also would not meaningfully engage in treatment, was resistant to any changes and opposed to any recommendations to improve his behaviors.

Matter of Rosie Shameka S.R., 102 AD3d 480 (1st Dept. 2013)

The First Department agreed with New York County Family Court that the mother's mental illness made her presently and for the foreseeable future, unable to care for her daughter. The psychiatrist who examined the mother had a two hour interview with her and reviewed all her records. The expert testified that the mother suffers from a chronic major depressive disorder and cannot comprehend how her illness is harmful to the child. The agency also submitted a report from a psychologist who had also interviewed the mother and reviewed her records as well as conducted testing and concluded that the mother has a depressive disorder and a personality disorder and would pose an ongoing risk to the child.

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

An Erie County mother had been pregnant with the subject child when she was in a car accident and sustained a traumatic brain injury which caused her to have diminished cognitive functioning. After she gave birth to the child, the baby was placed in foster care with the maternal grandparents. Due to the tragedy of the accident, the mother is presently and for the foreseeable future, unable by reason of mental illness to properly care for the child. The child would be in danger of being neglected if placed in the mother's care. There was unrefuted expert testimony that the mother's injuries have resulted in her functioning on the level of an 8 year old child and that this will not improve.

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

A Niagara County mother appealed the termination of her parental rights to her three children. A court ordered expert testified that the mother functioned at a very low level and had an IQ of 63. This IQ had not changed over time and that it would be highly unusual for anyone's IQ to change absent a traumatic event. The mother's mental retardation was documented back to her early childhood. The mother lacked a basic intellectual understanding of the needs of a child and could not essentially attend to the fundamental tasks of parenting. While the mother and her family members did claim in their testimony that she did appropriately care for the children, no expert evidence was offered that contradicted the information about the mother's low IQ and her limited functioning. The court did not err in denying her request for post termination contact as the court has no authority to do so.

Severe Abuse Termination

Matter of Daltun A.B., 103 AD3d 1181 (4th Dept. 2013)

Steuben County Family Court properly terminated the rights of a father to his three children on severe abuse grounds due to his criminal conviction for murdering the children's mother. His pending appeal of the murder conviction does not warrant a different result and his counsel was

not ineffective for his failure to seek a stay of the Family Court proceedings based on the pendency of the appeal. There was no merit to the premise that the father's counsel was ineffective given that any such motion would not have been successful. Further, during the dispositional phase of the termination, father's counsel advised the court that the father did not oppose the termination.

Permanent Neglect

Matter of Dakota Y., 97 AD3d 858 (3rd Dept. 2012)

In 2002, a St. Lawrence County father had his parental rights termination to three children after they had been in foster care for his having repeatedly sexually abused his then 10 year old daughter. He had also been criminally convicted, based on a plea of guilty to sodomy in the first degree and served some years in prison and was classified as a level two sex offender. In 2008, he fathered another daughter, who was placed in foster care at birth based on a neglect proceeding against the father and the mother. The Family Court properly relived DSS of any obligation to make reasonable efforts to reunite with this daughter due to the prior termination of his parental rights. No hearing on that issue was necessary as there was no genuine issue of fact. The Third Department concurred that his parental rights to this child should now be terminated as well. The father failed to plan for the child's future. He participated in services but continued to minimize his sexual abuse of the eldest daughter. Despite his plea of guilty regarding the sexual abuse, he claimed there had been only one act of "reciprocal" oral sex with his 10 year old daughter and blamed his wife, his mother and the daughter herself for making up allegations that there was anything more. He took the position that the situation was blown out of proportion and that he was an "exception" to the rule that incest offenders needed years of treatment to be safely in family situations again with supervision. His plan for the child was that she simply remain in foster care until he was deemed a safe caretaker. A suspended judgment would have been inappropriate.

Matter of Neal TT., 97 AD3d 869 (3rd Dept. 2012)

A Tompkins County Family Court termination of a mother's rights to her two children was affirmed on appeal. The children had been removed when they were 12 and 8 years old, complaining that the mother's behavior was unpredictable, that she hit them, locked them in their rooms and withheld food. During the placement, the children strongly expressed a desire to not see their mother and would frequently refuse to participate in visitation. The agency offered diligent efforts by referring the mother to mental health counseling and parenting classes and by providing a therapist for the children and setting up visitation. The caseworker encouraged the reluctant children to speak to their mother on the phone and to write to her and try to tell her of their feelings. The caseworker counseled the mother on how to try to engage the children in conversation and held numerous family team and service plan meetings. Despite offering referrals for mental health counseling, the respondent was turned away twice from services after denying that she had any mental health issues and denying that she needing any counseling. Even at the time of the TPR, the mother still claimed that she had no mental

health issues and did not understand why the children feared her, claiming that the foster parents had “brain washed” the children. The mother claimed that she should have been given therapeutic visitation with the children but the children’s therapist told the mother that she, the mother, would have to be engaged in her own therapy before the children could really engage in any therapy with her. There was no abuse of discretion in denying the mother’s request for a suspended judgment. The mother had continuously failed to deal with her longstanding mental health issues, did not understand her children’s response to her neglect of them and blamed others for her situation. It was not in the best interests of the children to retain parental rights as prior to and after any visitation with her, the children were distressed, would hysterically cry, not sleep, were incontinent and would wet the bed. The children have been diagnosed as suffering from PTSD. They are thriving in foster care with parents who wish to adopt them.

Matter of James J., 97 AD3d 936 (3rd Dept. 2012)

A Broome County termination of a father’s rights is one of the first appellate decisions to interpret the modification of SSL § 384-b(7)(a) that the court take into account the “special circumstances” of parental incarceration. The Third Department affirmed the termination despite the father’s claim that reasonable efforts were not offered to him while he was incarcerated. When this father of five was in prison, and after he had been in prison for years, the children were all removed and placed in foster care with maternal relatives. Eight months after the children were placed in care, the father was released from prison but then on a parole violation he was re-incarcerated just five or six months later. While incarcerated, DSS filed TPR petitions and the father was still incarcerated at the fact finding, although he was released by the dispositional hearing. The Third Department commented that when facing the situation of an incarcerated parent, the caseworker should be letting the parent know how the child was doing, should also develop an appropriate service plan, investigate any relatives the incarcerated parent suggests, respond to the parent’s inquires about the child and facilitate telephone contact with the parent and the child. Here DSS conceded that during the times that the father was incarcerated, the caseworker did not remain in contact with the father. However during the six month period that the father was out on parole, the caseworker did offer services. The caseworker met with the father the day after his release from prison and set up regular visitation with the children. The father and the children visited at various locations including at the father’s apartment. The small apartment was not suitable for overnight visits but the caseworker urged the father to obtain employment and rent a larger apartment so that the children could visit overnight. The caseworker also contacted the father’s parole officer and worked with the father to also comply with the parole conditions. The caseworker recommended classes and educational programs and provided enrollment information. The father did attempt to cooperate but he violated his conditions of parole and therefore he “squandered that opportunity” to become a resource for his children when he violated his parole by using drugs and having contact with the children’s mother. The father was well aware that the children were in foster care with relatives and during his periods of incarceration, he did not regularly communicate with the children or seek any visitation. The DSS did provide reasonable efforts in the context of the situation and at the time of the fact finding, the father

was back in prison and unable to formulate any plan or alternative for the children. Although at the time of the dispositional hearing, the father had been out of prison for two months, a suspended judgment would have been inappropriate. He did not even have an apartment and had not completed a substance abuse evaluation. The children at that point had been in foster care for over 2 years, 20 months of which the father had been incarcerated. The children were doing well and the relative foster parents wanted to adopt.

Matter of Fatoumata D., 100 AD3d 464 (1st Dept. 2012)

New York County Family Court was affirmed on appeal to the First Department. The parent's rights were terminated to their two children. The agency offered diligent efforts. The parents claimed that the agency did not assist them properly as English was a second language. However this issue was not preserved and in any event the mother testified in English, communicated with her children in English and never objected to the services being offered in English. The father testified that he understood English and that he got clarification from service providers if he did not understand something. The court also provided the father with an interpreter in court when the attorney noted that the father was not testifying in his native Sonike. The parents did not ever obtain insight into the nature of their children's severe psychiatric and developmental disorders. The father failed to attend the service programs, was consistently late for the visits and missed dozens of medical and educational appointments for the children. The children lived with their foster family for 7 years. The foster parents have obtained training to deal with the children's special needs and they wish to adopt them. The father appropriately did not receive a suspended judgment. He had even missed several visits between the fact finding and the dispositional hearing and he defaulted in his appearance at the dispositional hearing.

Matter of James WW., 100 AD3d 1276 (3rd Dept. 2012)

The Third Department affirmed a Rensselaer County termination of a mother's rights to her son. The child was removed at birth due when he tested positive for drugs. At first the child was placed with a paternal grandmother but a few months after that the caseworker discovered on a visit to the grandmothers that the child was not in fact living there but was being cared for by an individual who had a prior indicated report. Further the grandmother's apartment was permeated with the smell of marihuana. The child was then placed in a foster home where the child remained and no request was made to move him out of this foster home by the mother. A permanent neglect petition was filed against the mother and after the first witness was called, the mother decided to and in fact signed a judicial surrender. Shortly thereafter she moved to withdraw the surrender claiming that she had been under the influence of drugs when she signed it and claiming for the first time that she was Jewish and that the child should be placed in a Jewish foster home. The lower court allowed her to withdraw the surrender and the permanent neglect matter proceeded. The Third Department concurred that the evidence demonstrated that the agency had offered diligent efforts. The caseworker made numerous attempts to set up visitation but was unsuccessful in getting the mother to visit the child. The agency offered help with substance abuse issues but the mother refused to go and refused to comply with the court's dispositional orders. She was advised repeatedly of her obligations to comply with the orders.

In fact from the time the child was placed with the grandmother, the mother made no attempt at all to deal with her drug problems. She would frequently miss court appearances and when at court, she appeared to be under the influence of drugs and did not participate. She claimed to have planned for the child by advocating that the child live with the grandmother but the grandmother was in fact an unsuitable resource.

The mother argued that the child had to be moved to a Jewish home but the Appellate Court disagreed. FCA § 116 and SSL §373 regarding religious preferences for placement are subordinated to the best interests of the child. Here the mother first mentioned a Jewish placement after she had already surrendered the child and the child had been in care for almost 18 months. She had not mentioned this earlier and had advocated for the child to live with the paternal grandmother who is not Jewish. The mother's two older children had been freed for adoption and she had not mentioned a Jewish placement then. This child has a sister in foster care and she has not mentioned a Jewish placement in regard to that sister. The child has a strong emotional attachment to the current foster parents and has thrived there. While it is true that adoption by the current foster parents would separate this child from his sister, the sister needs specialized medical care and it would not be in this child's best interests to be separated from his foster home and placed in the sister's.

Matter of Charles K., 100 AD3d 1308 (3rd Dept. 2012)

A Tompkins County Family Court termination of a father's rights was upheld on appeal. The DSS offered appropriate diligent efforts to the incarcerated father. The caseworker provided him with permanency reports, told him about his rights and responsibilities and helped facilitate written communication with the children. The caseworker sent him photographs of the children and wrote him detailed letters about the children's activities and their health and what their foster care placement was like. The father suggested his mother in NYC as a placement resource and the caseworker contacted her promptly and although the NYC agency was slow to respond to a request for a home-study, the caseworker encouraged the grandmother and then the father's sister to establish relationships with the children with a potential for possible placement. The caseworker tried to get the grandmother and the aunt to communicate with the children and to come and visit the children and offered them transportation assistance to come upstate. The caseworker contacted the father when the relatives did not maintain communication with DSS. In the end the relatives showed no real interest and were unsuitable. The father's only other suggestion was placement with his girlfriend – but the girlfriend was homeless and had no relationship with the children at all. While it was true that the caseworker did not provide the father with visitation, this was justified. Given their young ages – both were less than 9 years old, the distance to the prison, the emotional and behavioral difficulties that they had in adjusting to foster care and in visiting their mother, who was also later incarcerated, it would not have been in the children's best interests to visit the father in prison.

Matter of Michael JJ., 101 AD3d 1288 (3rd Dept. 2012)

A Tompkins County Family Court order freeing two children for adoption from their parents was affirmed by the Third Department. As to the father, diligent efforts were made. He was

offered a sex offender evaluation, alcohol treatment and programs to resolve his anger management issues. The father however failed to do any of that and remained resistant and uncooperative. Although he had a history of sexual encounters with underage girls and a criminal conviction for such activity, he refused a sex offender evaluation. His claim that the caseworker should have tried harder and explained why he needed to go for such an evaluation, is meritless given that the caseworker repeatedly asked him to go and he vehemently refused. There was considerable testimony that the father continued to drink despite the fact that he did not fail any screening for alcohol or drugs. The father failed to testify on his own behalf at the fact finding and so a strong inference can be drawn by the court.

The mother as well permanently neglected the children. She resided with a paramour who had a history of sexual abuse and would not separate from him nor would he get services. The caseworker was not obligated to work to get the paramour services as the duty is toward the parent to assist reunification with the parent, not the paramour. The mother argued that there was no non-hearsay evidence that the paramour was a sex offender. The caseworker however testified that the paramour had admitted to him that he did have a history of sexual offenses, including a criminal conviction for sexually abusing his own daughter. Although his testimony was offered not for the truth but for the limited purpose of establishing the caseworker's good faith belief that the children should not be returned to the mother unless she lived apart from the paramour. The caseworker also testified that he himself had investigated a CPS report against the paramour at one time and had indicated the report for sexual abuse of the paramour's son. This evidence is of course not hearsay at all. The paramour did not testify and no evidence was offered that refuted the caseworker's testimony. The mother never conceded that the paramour was a sex offender and said it was "a lie" but she did acknowledge that the caseworker told her that the paramour was a sex offender and that living with him was the most significant barrier to her obtaining the children back. The mother did not testify at the fact-finding and so the strongest inference can be inferred.

The mother also contended that the children had problems in the foster home and that the court cut her off in developing that issue as the dispositional hearing. While the court did cut off the testimony in this area, that only occurred after much testimony about the foster home's stability and appropriateness and the children's progress there. A dispositional hearing is about if the children should be freed for adoption, not about who should adopt them. There was no reason to offer the mother a suspended judgment. At the dispositional hearing, she was still living with the paramour and simply claimed that she planned to move out but did not yet have a habitable home and did not know the last name of the roommate she claimed she would be living with when this alleged plan to move out would occur.

Matter of Gena S., 101AD3d 1593 (4th Dept. 2012)

The Fourth Department had a mixed response to an appeal by an incarcerated mother of the termination of her parental rights. The court agreed with the Genesee County Family Court that the mother had failed to plan for the children in that she only offered a friend as a resource for the children until she was released from prison and could resume custody. This was not a

realistic and feasible plan and therefore she permanently neglected the children. However as to the oldest child who was one month shy of her 14th birthday when the children were freed, the Appellate Court reversed the termination disposition. This child is now 15 years old and continues to take the position that she will not consent to being adopted. Her attorney indicated that the child “has no real bond with anyone” except for the incarcerated mother and the child’s sisters. It is highly unlikely that the child would ever be adopted given her age and her position. Given these new facts, it is not clear if termination of the mother’s rights is in the best interests of this oldest child and a new dispositional hearing is warranted for this child. It does not matter if the other siblings are freed for adoption

Matter of Johanna M. 103 AD3d 949 (3rd Dept. 2013)

An incarcerated Tompkins County father permanently neglected his two children. The father has been in and out of prison on a consistent basis since before the children were born and throughout nearly the entire time since the children were born. The DSS offered diligent efforts to the father. A service plan was developed while he was in prison. During the brief periods when he was out of prison and in the community, DSS held family team meetings to discuss the service plan. The caseworker also provided referrals to a mental health evaluation, substance abuse and domestic violence counseling – all issues the related the children’s removal. The father was sent permanency reports, continuously advised of the children’s health and progress and regular visitation was offered at the prison with assistance offered for the cost of the transportation. The father did maintain regular contact with the children through visitation and phone calls and letters but he failed to address the issues and develop a realistic plan for the children. When out of prison for brief periods he squandered his opportunities by relapsing into drug use and testing positive for marihuana, opiates and amphetamines. He had no plan to obtain employment or suitable housing. He engaged in criminal activity which landed him back in prison. In effect, the father’s current plan was that the children would stay in foster care – their past foster parent being the paternal grandmother and now the paternal aunt – until such time as he has finished his prison term and thereafter at some point rehabilitated himself. This is not an acceptable plan even though the children are with his sister – this is still a foster care placement - and the children deserve permanency. Although these children have a relationship with their father, he has never parented them and they have been in foster care nearly all of their lives thriving with the grandmother and now the aunt who wishes to adopt them.

TPR Dispositions

Matter of Bradley A., 97 AD3d 931 (3rd Dept. 2012)

The Third Department concurred with Schoharie County Family Court that a father’s rights to his son should be terminated. The father had sexually abused the boy’s two older sisters and the children were removed from the home in 2008. Among other issues, this youth witnessed some of the sexual abuse of his sisters. The older sisters are now over 18 years old. The father is still in prison for the crimes against the daughters and there is an order of protection in place

precluding any contact with the son. Although the youth is now an older teen, he objects to his father still having parental rights as this means that the father is still entitled to information about him such as copies of the child's permanency reports. The youth's counselor testified that the termination of the father's rights will help the boy's recovery efforts and be in his best interests. The attorney for the child is also advocating a termination. Other cases have not freed youth so close to 18 years old but those have been cases where the youth has maintained a connection to the parent unlike this situation where the youth has no relationship with the father and wishes none.

Matter of Trinty J., 100 AD3d 504 (1st Dept. 2012)

The First Department reversed New York County Family Court's termination of a mother's rights and remanded for a suspended judgment order to be crafted. The mother had done all that was asked of her in the service plan. She had completed her drug treatment program, a parenting skills course, a mental health evaluation and was attending an aftercare program. The 3 year old child was bonded to the foster mother but she had only been in the home 18 months. For five months, the mother had not missed any biweekly visits even though to visit the child she had a 4 hour round trip commute through 3 states. The quality of the visits was improved and the child was engaged and interacting and called her "mommy". Significantly the mother was close to year of sobriety – the longest she had have been sober since starting drug use when she was a teenager. She had an extensive support network and had consistent employment and long term transitional housing and was looking for permanent housing. No expert testimony was provided that reunification would be harmful to the child and the mother had not been advised about the child's recently discovered special needs. The mother stated she would find the right schooling for the child. The mother had a realistic plan for the child, the child was still very young and had only been with the foster mother for 18 months. The mother should be given a second chance with a suspended judgment.

Matter of Elsa R., 101AD3d 1688 (4th Dept. 2012)

In a significant decision regarding the interpretation of the Court of Appeals *Hailey ZZ* decision, the Fourth Department found that Monroe County Family Court erred in ordering post termination visitation to occur 6 times a year for a terminated mother. The Family Court had issued the order of post termination visitation and entered it on June 25, 2011 but the Court of Appeals ultimately did reverse the Fourth Department's *Kahlil S.* decision in June of 2012. The DHS then argued on appeal that the order for post termination visits had been made in error. Since the Court of Appeals decision did not announce a "new" rule of law, the ruling applies retroactively and the post termination order is in error. The mother of the two children along with the AFC for one of the children had also appealed, arguing that the court should have granted a suspended judgment but the Fourth Department agreed with the trial court that a suspended judgment was not in the child's best interests.

Matter of Malik S., 101 AD3d 1776 (4th Dept. 2012)

The Fourth Department remanded a mother's termination to Onondaga County Family Court on the mother's allegation of new circumstances. The finding that she had violated the terms of the

suspended judgment that she had been granted was appropriate. She had in fact violated numerous terms of the suspended judgment. The DSS was not required to provide medical or psychological evidence regarding the child's best interests for the mother's rights to be terminated. However at the time of the appeal, the adoptive placement had disrupted and the child was in a group home with no adoptive placement identified. Further the child now indicates that he does not want to be adopted. Also the child has reestablished contact with a maternal grandmother who is expressing interest in pursuing legal custody of the child. Given these new circumstances, it is no longer clear if termination is in the child's best interests and that matter is remitting for a new hearing. (NOTE: It took 16 months for this violation of a suspended judgment appeal to be resolved and the adoption plan disrupted during that limbo time)

Matter of Michael M., 103 AD3d 471 (1st Dept. 2013)

The First Department affirmed Bronx County Family Court's dismissal of a grandmother's custody petition as opposed to freeing the child for adoption by the foster mother. The foster mother met the child's special needs, wanted to adopt and had provided the child with a positive environment. The child had been with the foster mother for five years and wanted to be adopted. He did not want contact with the grandmother who he had not seen in the five years.

Matter of Sandra N., v ACS 103 AD3d 591 (1st Dept. 2013)

New York County Family Court freed two children for adoption and denied a great grandmother's alternative petition for custody. There is no presumption that it is in the child's best interests to have custody awarded to a relative when the foster parents with whom the child has been living wish to adopt. Each of these two children has thrived in the foster home they are in where their needs have been met and where they are loved. The court appointed expert did express some reservations about one of the families but the court determined that the foster family loved the child and desired to adopt him. The great grandmother minimized the children's special needs and problems with language and developmental delays.

Matter of Jalil U., 103 AD3d 658 (2nd Dept. 2013)

The Second Department reversed a termination of the parental rights of a Suffolk County mother. The mother's first child was placed in care in 2008 and her newborn twins were placed in care in 2009. The mother admitted to neglect and in 2010, the DSS filed to terminate parental rights to all three children. In 2011, the mother admitted to permanent neglect and consented to a suspended judgment for one year. The court, while complimenting the mother on her "amazing progress", ordered that the mother was to comply with DSS supervision, attend and participate in psychotherapy and counseling and follow all recommendations. She was also to attend a parenting skills program and follow their recommendations and to participate in unsupervised visitation. Six months into the suspended judgment the DSS filed a violation and the lower court found that the mother had violated the terms of the suspended judgment and terminated parental rights. The appellate court reversed. A suspended judgment is meant to be a "second chance" for the parent, a "brief grace period" for the parent to prepare for the child's

return. The parent must prove that they have made progress and not merely show that attempts have been made.

The Appellate Court found that there was no a preponderance of the evidence that the mother had failed to comply with the terms. The mother was already in therapy and she continued that therapy. She was attending a parenting program for “challenging children”. The DSS did not prove that they had advised the mother about attending medical appointments for the two younger children and therefore the court erred in finding that her limited attendance at these appointments was a violation. Further the lower court expressed appropriate concern about the mother’s behavior at court when she learned that she might lose her parental rights but the evidence demonstrated that she did discuss this episode in her therapy as recommended by the caseworker. Although she had not completed the parenting program, the suspended judgment had not specified when she was to have completed the program. The lower court erred in finding that the mother had violated the terms of the suspended judgment. Since the appeal took 15 months, the Appellate Division remanded the matter for a new dispositional hearing to review the present circumstances to see what appropriate disposition should be ordered. If it is in the best interests of the children to terminate parental rights, then a new suspended judgment should not be ordered.

Matter of Joseph P.S. v NYC ACS 104 AD3d 484 (1st Dept. 2013)

A New York County grandfather was entitled to review agency information about the foster family upon his discovery demand. The grandfather had filed an Article 6 custody petition in response to the foster parent seeking to have the child freed for adoption. The Family Court properly reviewed the records and redacted portions that were not relevant such as identification of the family members and their locations and limited the disclosure to things that were relevant to the dispositional/custody proceeding.

Matter of Kimble G.H., 108 AD3d 534 (2nd Dept. 2013)

The Second Department concurred with Suffolk County Family Court that a father violated a suspended judgment. The court can revoke a suspended judgment if the court finds by a preponderance of the evidence that the parent failed to comply with one or more of the conditions. The parent is obligated to show that progress has been made to overcome the problems that had led to the placement and complying with literal provisions of the suspended judgment is not enough. The father failed to comply with the terms that required him to attend and regularly participate in a substance abuse treatment program and to visit the children consistently.

UNWED FATHER’S RIGHTS

Matter of Shatavia Jeffeysha J. 100 AD3d 501 (1st Dept. 2012)

A New York County father’s consent was not necessary for the child to be freed for adoption. He had not maintained substantial or repeated contact with the child. The father claimed he

held himself out to be the father and lived with the child for 2 or 3 years before she was placed in *foster care* but that is not the test – he had not lived with her for at least 6 months during the year immediately preceding her placement for *adoption*. Even if he were a consent father, he abandoned the child. The child should be freed for adoption by the foster mother and there is no indication that the father is capable of caring for the child.

Matter of Angelina K., 105 AD3d 1310 (4th Dept. 2013)

The Onondaga County Family Court determined correctly that the birth father in this stepfather adoption did not have to consent. The process should be approached in a two step manner – first is the father a consent father at all, and if he is a consent father, then has he abandoned. While it is not clear that the lower court approached the issues in this way, nonetheless the outcome was correct. The father had been given supervised visitation but had not exercised it. He had not seen the children in over 3 years and had not sent any gifts to the children in many years. He made no child support payments to the mother except for a garnishment of his income tax refund a few years earlier. The father therefore did not meet the DRL § 111 (1)(d) qualifications for a consent father. Even if he did have a right to consent, he had also abandoned the children as he had no contact with the children in the most recent six months. Although the father argued that he should not have been limited to only the most recent 6 months, the court did in fact allow him to offer his proof that he was prevented and excluded. The court simply did not find that proof credible.

Matter of Bowie v Erie County Children’s Services 105 AD3d 1312 (4th Dept. 2013)

After the mother of his child rights’ were terminated on abandonment grounds and he was determined to only be a “notice father”, the father in this Erie County matter filed an Art. 6 petition for custody of the child. His petition for custody was dismissed. On appeal, the Fourth Department ruled that the issue of his being a “notice” vs a “consent father was not before the court in the Art.6. In any event, the father did not have a substantial relationship with the child and was not a consent father. The father’s argument that the DSS had not complied with FCA §§ 1017 and 1021 to promote the father’s relationship with the child is not before the court either and those sections of law are only appropriate when a child is initially removed and not at this stage.

SURRENDERS and ADOPTIONS

Matter of Brown v Westfall 2012 NY Slip Op 51598 (U) (Yates County, Family Court 2012)

A Yates County birth mother sued the adoptive parents to enforce the contact terms of a judicial surrender she had executed for a child in foster care. There had been an agreement for annual visitation but it required that the birth mother call the adoptive parents to set up the visitation. The birth mother admittedly did not make the call as agreed and testified that she had lost the number for the adoptive parents when she had to obtain a new phone. The birth mother did call DSS to obtain the adoptive parents number again but did not reach them until after the time

frame that had been set for her to make the annual contact with the adoptive parents. Although this is a breach of the terms, the Yates Family Court found that the birth mother's excuse was not unreasonable and the annual visitation should still occur. Prior to the surrender, the birth mother had visited the child twice a week for 2 years and after the surrender, the birth mother had a successful visit with the child as per the agreement.

Matter of Jordan T., 97 AD3d 755 (2nd Dept. 2012)

The Second Department affirmed a Suffolk County Family Court dismissal of an adoption petition. When a child is in foster care, DSS must consent in writing to the child's adoption. DRL § 11191(f), 112 (2)(c). The petition to adopt this foster child did not have the consent of Suffolk County DSS and so it must be dismissed.

Matter of Yary 100 Ad3d 200 (1st Dept. 2012)

The First Department considered a matter where a freed child placed in foster care was the subject of an adoption petition where the foster care agency had not consented to the adoption. The child had been in foster care due to her mother's neglect since 2006. On the day of the mother's TPR in 2010, the mother unexpectedly suffered a heart attack and died. The child's father was not a consent father. The court issued an order freeing the child for adoption and granting ACS and the foster care agency authority to consent to an adoption. The foster mother ultimately filed to adopt the child with the agency's consent. A maternal aunt from out of state filed a guardianship petition for the child, which was dismissed as the child had been freed. The aunt then responded by filing a private adoption petition. The agency moved to dismiss the aunt's adoption as there was no agency consent and Family Court denied the motion ruling that the petition was for a private adoption which did not require the agency's consent. The First Department reversed. Despite how it was characterized, the aunt was not filing a private adoption as the child was in the care and guardianship of the agency due to the court's prior order. Clearly the statute requires that the agency must consent to the adoption of any child in their care and guardianship. Without that consent, the court has no jurisdiction over the adoption petition and it must be dismissed. The lower court does not have jurisdiction to consider the two competing adoption petitions and make a best interests decision as the aunt's petition is not properly even before the court. The court still of course makes a best interest analysis of the one adoption petition it does have before it – the foster parents petition. The aunt may of course challenge the agency's refusal to grant their consent through a fair hearing and a subsequent Art. 78 if she wishes. (NOTE: The Fourth, First and Second Depts. have now all clearly ruled the same on this issue)

Matter of Andie B., 102 AD3d 128 (3rd Dept. 2012)

In a significant decision, the Third Department has held that post adoption contact agreements (a "PACA") can be incorporated into an adoption order in a private adoption under DRL § 112-b. The Appellate Division reversed Broome County Family Court's denial of a motion to incorporate a PACA into the adoption order. All the parties, birth mother, adoptive parents and the lawyer for the child were in agreement that the PACA was in the child's best interests. The Third Department acknowledged that DRL § 112-b, regarding the legality and enforceability of

PACAs, is found under title 2 of the adoption article labeled “Adoption from an Authorized Agency” but the title is not part of the act and nothing in the statute limits its application to agency adoptions. Further it refers to not prohibiting the parties in the all chapter 3 proceedings from entering into PACAS and chapter 3 includes procedures for private adoptions. The adoption court must follow the procedures outlined in DRL § 112-b and the court must determine that the PACA is in the best interests of the child.

Adoptive Couple v Baby Girl 2013 WL 3184627(US Supreme Court 6/25/2013) (case is commonly known as the “Baby Veronica” case)

In a much anticipated decision, the US Supreme Court reviewed the application of the Indian Child Welfare Act in a private adoption. The birth father of the child was a member of a federally recognized tribe and the child was eligible to be a member. He opposed the adoption and argued that the ICWA applied and therefore the ICWA protections of the heightened standard of proof - beyond a reasonable doubt - and proof of active efforts and the adoption placement preferences all came into play. Applying ICWA the South Carolina Supreme Court had awarded the child to him. The US Supreme Court reversed, with a slim majority ruling that the heightened standard of proof did not apply to a parent who never had prior legal or physical custody of the child. Further that “active efforts” need not be proven when a parent abandons a child before birth and has never had physical or legal custody of the child. The preferences for adoptions are not triggered until some party within the placement preferences also seeks to adopt the child. Justice Breyer’s concurring opinion notes that the case does not involve a father who was visiting or paying child support or being prevented from paying child support or was deceived about the existence of the child.

MISCELLANEOUS

Matter of Alexandra D. v Santos 97 AD3d 746 (2nd Dept. 2012)

The Second Department reversed Nassau County Family Court’s dismissal of a petition for sibling visitation. The Family Court erred in ruling that there was no standing. DRL§ 71 permits a sibling to file for visitation with a whole or half sibling. Where the petitioner is a minor, then a “proper person” may seek the relief on the child’s behalf. This petition was brought by a brother and sister who wish to have visitation with a half brother and as such have standing to commence a proceeding. The sibling’s attorney is a proper person to file the petition on their behalf.

Matter of Jessica B. v Robert B., 104 AD3d 1077 (3rd Dept. 2013)

In a private visitation petition filed by an older sister seeking visitation for herself and her brother of another sister, the Third Department remanded the matter back to the lower court to hold a *Lincoln* hearing to ascertain the wishes of the younger sister regarding the visitation request by her siblings. The younger sister was in the custody of an uncle and the older sister and brother lived in Massachusetts with the brother being in the care of the Dept. of Children and Families there, placed with the older sister. The Broome County Family Court denied the

petition and the attorney for the brother appealed arguing that the court should have held a *Lincoln* to determine the wishes of the younger sister as to the visitation. The AFC representing the youngest sister had indicated at trial that a *Lincoln* was unnecessary as he was conveying her wishes. The AFC for the youngest sister on appeal however argued that the child's wishes were not accurately conveyed by her trial counsel. The younger sister is 14 years old and although her wishes are not determinative, this is an unusual situation and her insight may prove helpful.

Matter of Jefry H., 102 AD3d 132 (2nd Dept. 2012)

In a significant decision, the Second Department held that the re-entry provisions of FCA § 1091 can be applied to a PINs youth who wishes to return to care. The Appellate Division reversed a Queens County dismissal of the youth's petition to reenter care. The lower court had pointed out that the reentry statute was in the Art. 10 section of the FCA and made no comment about either PINs or JD or voluntary placements as being impacted by reentry provisions. (Note: There is a reference to reentry in the destitute child sections of law) The court detailed the youth's situation in that he had been placed in foster care as a PINs and had subsequently left foster care on his 18th birthday and went to live with his mother who now, 9 months later, could no longer house him and relatives could not either. The foster care program he had been with told him that they would welcome him back and that he could finish high school with them. It did not appear that ACS opposed his return to care, only that the Family Court believed there was no jurisdiction to do so as his original placement had been on PINs. ACS submitted a brief supporting the return to care and Lawyers for Children submitted an amicus brief. The youth was clearly a "former foster care" youth and therefore the provision of FCA §1091 applied to him. SSL § 383-c(1) defines a child in foster care as a child who is in care under Art. 3,7,or 10. The Appellate Court further stated that the new law was not actually placed in Art. 10 per se but there instead Art. 10-B was wholly created and nothing in the statute wording restricts its applicability to only youth who had been placed originally under Art. 10. The NYS Assembly memo in support of the new statute did not make any mention of its being applicable only to Art. 10 placed children. Lastly NYS OCFS has issued an ADM 11-OCFS-ADM-02 in which they interpreted the new statute as applying to both JD and PINs placements as well as Art. 10 placements.

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

The Fourth Department reversed Ontario County Family Court in a private custody case. The grandmother had physical custody of the child and the mother filed for a modification of visitation. The lower court did not advise the grandmother that she was entitled to counsel including appointed counsel if she was indigent. The Fourth Department joins the Second and the Third Department in ruling that respondents' in visitation proceedings are entitled to counsel.

Wynn v Little Flower Children's Services 106 AD3d 64 (1st Dept. 2013)

The First Department reversed the lower court and dismissed a motion for summary judgment by defendant Little Flower who has been sued on the issue of failing to remove a particular

foster child from their home. A 6 year old foster child set a fire that resulted in the deaths of the foster parents and his 4 year old sister and severe injuries to a 3rd foster child. Foster parents should have a reasonable expectation that if an agency is aware that a child is a fire setter that the child will not be placed in their home or will be removed upon notice of the issue and the foster parent's request. This "duty to remove" is a reasonable expectation of the parties and of society or else foster parents would bear a disproportionate risk. As the allegations in this matter present a question of fact as to whether the agency did have such notice, the motion for summary judgment was dismissed and the matter can proceed to trial.

Matter of Khan-Soleil v Rashad 108 AD3d 544 (2nd Dept. 2013)

In reviewing a Kings County Family Court's ruling in an Art. 8 Family Offense matter, the Second Department ruled that a child's out of court statements regarding alleged abuse by a parent were not admissible under FCA § 1046 (a)(vi). The court acknowledged prior Appellate Division rulings that such out of court statements were permitted in custody proceedings where there were allegations of abuse or neglect.

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