

“NO REASONABLE EFFORTS” FOR REUNIFICATION ARE REQUIRED

By Margaret A. Burt

In voluntary, PINS, JD and Article 10 placements in foster care, Family Court is empowered to make a finding at the request of the agency that “reasonable efforts” will not be required to be made by the agency to prevent or eliminate the need for an original placement in foster care or to return the child to the home after a child has come into care based on three different sets of circumstances. There are provisions in Article 10 that describe the motion to bring on such a ruling, although the sections of law related to the three other types of placements do not actually describe the procedures that would be used. The statute language stresses that the court must make such a finding if any of the following circumstances are presented. The court can deny the motion even where the circumstances are presented if the court makes specific findings that:

- Reasonable efforts would be in the best interests of the child and
- Reasonable efforts would not be contrary to the health and safety of the child and
- Reasonable efforts would likely result in reunification in the foreseeable future

It is not clear if the findings that allow the court to deny the no reasonable efforts motion are applicable for all no reasonable efforts motions or only those based on a prior termination.

The situations in which a “no reasonable efforts” order may be sought are:

1. Aggravated circumstances:

The parent of a child has subjected the child to the actions described in the termination ground for “severe abuse” or “repeated abuse”. (SSL 384-b(8)) The severe abuse situation would require proof that the child has been subjected to abuse finding in which the behavior included was reckless or intentional acts by the parent, evidenced by depraved indifference, which resulted in serious physical injury to the child OR where the court finds that the child has been sexually abused as a result of parent’s acts of committing activity or knowingly allowing activity that would constitute felony sex act against the child OR where the parent has been criminally convicted of crimes described below and the victim was their child or a child for whom the parent was legally responsible.

NOTE: This category in effect includes several serious kinds of sexual and physical abuse even though there has not been a criminal conviction.

“Repeated abuse” behavior is also included in this category. This would be a situation where the child has been physically abused which has resulted in physical injury based on the parent’s own acts or the child has been subjected to sex abuse in which the behavior is encompassed in the definitions for felony sex offenses and there was an abuse finding regarding another child of the parent or one they were legally responsible for within the last five years OR the parent was convicted of a felony sex offense against the child or a sibling or another child that they were legally responsible for within the five years preceding.

If there is a determination of “no reasonable efforts” based on the aggravated circumstances category, the TPR petition can be filed immediately using the “severe” or “repeated” grounds. Diligent efforts to reunify would not have to be proven in the fact finding BUT the court can not “commence” the fact finding on the termination until the child has been in care a year AND the actions of the parent during that year shall be considered. In some serious kinds of cases of sexual or physical abuse, the agency may choose to seek an order not to attempt to reunify and to instead set up for a termination on the severe or repeated grounds, although the termination can

not be actually tried until the child has been in care for a year. Presumably, the parent could use that year to attempt to resolve their issues.

2. Certain criminal convictions :

The parent of a child has been convicted of :

- ◆ Murder in the First or Second Degree and the victim was a child of the parent or
- ◆ Manslaughter in the First or Second Degree and the victim was a child of the parent and the parent's actions were voluntary or
- ◆ Attempting, soliciting, conspiring or facilitating the above two categories and the victim or intended victim was a child of the parent or another child of the parent or
- ◆ Assault in the First or Second Degree or the crime of Aggravated Assault upon a Person less than 11 years old of Attempting to Commit any of these crimes and the victim was a child of the parent or another child of the parent and the victim sustained serious physical injury or
- ◆ Convictions from other jurisdictions which include the same essential elements of the NY penal sections and the victim was a child of the parent

Note: There must be a criminal conviction to use this category. If there is a guilty plea then such a ruling may be obtained quickly. Without a plea, the ruling must await the conviction. Clearly, it would be to a district's benefit to establish a good relationship with the DA's office regarding these type of cases. Also, when there is no criminal charge or no conviction seems imminent, it may be possible to use the aggravated circumstances category above to get the ruling if the activity in questions fits in that description. There is no procedure for obtaining criminal record checks of parents without their release therefore there is no way to check about convictions not otherwise known to agency.

3. Prior involuntary termination of a sibling:

The parental rights of the parent were involuntarily terminated regarding a sibling or half sibling of the child(ren) in question.

Note: There is no mention of other jurisdictions' TPRs in this category and no method is provided to learn of other jurisdictions' TPRs. Also there is no "mirror" TPR ground so obtaining such a ruling will still mean waiting the time period appropriate to the termination ground used.

If the court rules that no reasonable efforts are required due to one of the circumstances above then:

1. Court must hold a permanency hearing within 30 days of the finding that reasonable efforts were not required. In this hearing, the court must determine the appropriateness of the agency's permanency plan - if the child will be returned to the parent, if the child should be placed for adoption and a termination petition filed, if the child should be referred for legal guardianship, if the child should be permanently

placed with a fit and willing relative, or if the child should be placed in another planned permanent living arrangement based on compelling reasons.

2. Agency must take steps to finalize the permanency plan for the child. The court must access at this time, and at every subsequent permanency hearing on the child, that the agency is engaging in reasonable efforts to achieve the permanency goal for the child. This would include filing a termination petition in accordance with SSL 384-b if the goal is adoption and the parents are not willing to surrender the child for adoption. In situations in which the court makes a no reasonable efforts finding due to one of the parental criminal convictions, SSL 384-b(3) (1)(i) and 384b(3)(1)(v) require DSS to file to terminate parental rights unless the child is placed with a relative, there is a compelling reason not to file or the agency has not provided the services necessary. Current NYS law - under SSL 384-b(4)(e) - permits the filing of a severe abuse termination as soon as there was a criminal conviction or other act of severe or repeated abuse although the court can not hold the actual fact hearing on any termination petition in this category until the child has been in care for a year.

3. Health and safety of the child are the paramount concern in determining reasonable efforts.

Note: There is no definition provided on what a “no reasonable efforts” ruling specifically means to the relationship of the agency and the parent while the time period for any possible TPR has not yet occurred. It seems to mean that the agency need not provide any services to the client in connection to reunification. Some Judges have viewed the visitation issue as separate. Some districts do offer services even though the court has ordered that no efforts are necessary where the client still asks for agency assistance.

Copyright Margaret A. Burt 2003

CASE LAW UPDATE IN CHILD PROTECTIVE ISSUES

Reported Cases from July 2002- July 2003 (cites current as of July 2003)

Teleconference Agenda for September 22, 2003

Margaret A. Burt, Esq.

I. General Issues

Matter of Naomi R., 296 AD2d 503, 745 NYS2d 485 (2nd Dept. 2002)

Queens County Family Court modified a 1027 order and allowed the father to have visitation with his 4 children as long as the wife supervised it. The agency objected and requested that the visits continue to be supervised only by the caseworker as had previously been ordered. On appeal, the Second Department agreed with the agency and reinstated the 1027 order that required the father's visits to be supervised by the caseworker. The allegations in the underlying petition were that the father had sexually abused one of the children. He had been ordered to remain out of the home while the petition was pending. As the order out of the home was appropriate, it was also appropriate to supervise any contact. It was not appropriate to allow the supervision to be done by the mother, as she did not believe that the sex abuse had occurred. The "safer course" was to have the agency supervise until the fact-finding.

In Re Christopher W., 299 AD2d 268, 751 NYS2d 2 (1st Dept. 2002)

The First Department agreed with the Bronx County Family Court that the respondent in this matter was a person legally responsible for purposes of an Article 10 petition. While at the home for an overnight stay to braid her hair, the child was scalded in the bathtub and ultimately died. No evidence was presented about the frequency of the child staying at the respondent's home. However, the respondent was related to the child and the evidence permitted "an inference of substantial familiarity" between the child and the respondent's children. Given the severity of the direct abuse to the child, who died, the court did not abuse its discretion in the derivative finding regarding the respondent's children.

People v Mooney __ Misc2d __ NYLJ 10/29/02 at 19 (Supreme Court, Bronx County 2002)

An ACS CPS worker interviewed a mother after she had been arrested and was waiting at the precinct. The worker administered no Miranda warnings. In the context of the criminal case, the Bronx County Supreme Court suppressed the statements made to the

CPS worker. Although the worker was not strictly speaking an agent of the police, the questioning took place after the mother had been arrested and questioned by the police. The worker would not have been there to question her but for the arrest. The mother had a psychological history and was on psychotropic medication. The statements that she made to the police were also suppressed as they had clearly been informed that she had counsel and should not be questioned. (No comment was made regarding the use of these statements in any Article 10 proceeding)

People v Green __AD2d __, 6/12/03 (3rd Dept. 2003)

In a criminal prosecution for sexual abuse, the father's admissions to the CPS worker were ruled inadmissible as in violation of the father's right to counsel. The father had been arrested, arraigned and was in jail awaiting further criminal procedures. While at the jail to visit someone else, a Sullivan County CPS worker saw the father. The worker had not talked to the father previously. She introduced herself to the father and told him that she knew he had an attorney and specifically mentioned his attorney by name. She told the father that he did not have to talk to her but he agreed to talk and made several statements. The CPS worker was a member of a "team" along with state police and sheriff investigators who investigated sexual or physical abuse matters together. Given that the CPS worker had an agency relationship with law enforcement and that the team worked together through an agreed upon structure, it was the understanding that incriminating statements would be communicated to other members of the team. At the time the CPS worker spoke to the father, she and law enforcement were well aware that he had counsel and could not waive his right to counsel without counsel's presence. The regulatory mandate that a CPS worker conduct a face to face interview of the subject cannot overcome the subject's constitutional rights if the CPS worker is an agent for the police at the time of the interview. In this matter, the admissions to the CPS worker were not used in the direct case but were used to impeach the defendant after he denied the sexual abuse on the stand. However, the criminal trial court erred in not instructing the jury to only consider the admissions to the CPS worker on the issue of the defendant's credibility. (No comment was made regarding the use of the statements in any Article 10 proceeding)

Youngok Lim v Sangbom Lvi 299 AD2d 763, 751 NYS2d 617 (3rd Dept. 2002)

The Third Department reviewed the Tompkins County Family Court's admission of unfounded CPS reports in a private custody case. The mother in this case had made numerous CPS reports against the father. In his pleadings, the father argued that these reports were all intentionally and falsely made. At the hearing, a CPS worker was allowed to testify and the reports were admitted into evidence despite being unfounded. The mother claimed on appeal, that the court erred in allowing unfounded reports into evidence. The Third Department found that the unfounded reports were properly in evidence under SSL 422 (5) in that unfounded reports can be used "by the subject of the

report where such subject....is a plaintiff or petitioner in a civil action or proceedings alleging the false reporting....". Since the father had cross-petitioned for custody, he is a "petitioner" and since he alleged in his cross petition that the reports the mother made on him were "false"; both the unfounded reports and the caseworker testimony about the investigation were admissible when offered by the father.

Matter of Tyler S., 192 Misc2d 728, 748 NYS2d 215 (Family Court, Kings County 2002)

In a pending neglect matter, the agency asked Kings County Family Court to order a mental health evaluation of the respondent mother pre-fact finding. The petition alleged that the mother had neglected her 7-year-old daughter by failing to get medical treatment for the child's ADHD. The mother failed to follow up on recommendations that the child get special education. She also failed to pay the rent and the gas and electric bill. She smoked pot and would not attend drug treatment. The agency alleged that the mother was paranoid and delusional. She had made allegations that the child was sexually abused as well as other more incoherent accusations but there was no evidence that anything had occurred. Mother also left the family cat in the freezer while "playing hide and seek" with the cat. The mother acted delusional at a homeless shelter in Connecticut about one month after the petition had been filed. The child was placed in foster care in Connecticut and was then returned to NYS through the UCCJEA after the Judge called the Connecticut court. Given these circumstances, the court found that the mental health examination was "material and necessary" to the case and ordered that mother submit to an exam under FCA 251 and 1038(d). The court indicated that FCA 1038(a) did not preclude ordering a psychiatric exam.

Matter of Joseph DD., 300AD2d 760, 752 NYS2d 407 (3rd Dept. 2002)

The Third Department was "deeply troubled" by the proceedings in this Article 10 matter from Schenectady County Family Court. Allegations were made that the mother's mental illness was putting her child at risk of neglect. In the fall of 1998, the mother was observed to be verbally abusive to a group of children at her church and called them "demons" that needed prayers. A hotline report was made. When the caseworker went to the home, the respondent's child told her that his mother had blindfolded him, thrown water in his face and said he was possessed by "demons". The child wet his pants when the mother refused to let him use the toilet. DSS did a 1024 removal of the child and that day sought a court order to approve the emergency removal. The matter was sent to a JHO who ordered the removal. DSS counsel stated that the child needed protection and detailed what had been learned in the investigation – no witnesses were provided nor were the statements made under oath. The court did not ascertain if the mother was informed that such an application was being sought. The court allowed DSS a full week

to file the petition – although the statutory mandate is “forthwith”. The petition later filed did not reflect that the child had already been removed – as is required by statute. The mother appeared at court on the very next day and requested, in writing, a 1028 hearing and assignment of counsel.

She was not given a hearing within the mandated 3 days but was simply told to come back to court 6 days later. On that date, there was no counsel present or assigned for the mother, although a law guardian had already been assigned. The JHO made no mention of the requested 1028 hearing and told the mother to hire an attorney or to “make application” for an assigned attorney. Mother was not appointed counsel until 25 days after she had originally asked for an attorney. At that date, her attorney did ask for a 1028 hearing and the court scheduled one – now fully a month after the removal and after the mother’s initial written request for the hearing. The requested 1028 was then repeatedly adjourned – apparently without objection by defense counsel. Ultimately the request was withdrawn some 6 weeks after the child had been removed. The fact-finding was then scheduled but was adjourned several times and ultimately was finally held some 9 months after the child had been removed. During this entire time, there was neither visitation nor any further request by defense counsel for the child to be returned.

The fact-finding hearing resulted in a finding that the child was neglected based on mother’s mental health. The child was fearful of the mother based on her behavior. A clinical psychologist who examined the mother and the child testified that at the time of the event the mother had been in need of treatment for her mental health and that she had placed the child in imminent psychological danger. At the time of the fact finding hearing the court ordered supervised visitation. This was the first time she had been allowed to see the child since he was removed 9 months earlier. A dispositional hearing was not held until 5 months later at which time the court heard testimony from a new psychologist and also heard from the child in camera. The court returned the child under a one-year order of supervision finding that the incident was a “single psychotic episode”. and the mother appealed. The child at that point had been held “temporarily” in care for 14 months.

The Appellate Division did affirm the finding that the mother had neglected the child and affirmed the disposition as well but detailed all of the ways that the procedures were unacceptable. The court stated that a JHO has no authority to grant an ex parte order of removal. The mother was continually denied her right to a 1028 hearing by the Court simply “repeatedly” overlooking her specific request for this statutorily prescribed hearing. The mother was also improperly represented in that her attorney did not pursue her right to a 1028 hearing nor were there any objections to the “inordinate delay” in the ultimate resolution. Different attorneys -5 in total - repeatedly represented the mother from the public defender’s office. The attorneys who represented mother never even asked for visitation with the child until the child had been in care over 2 1/2 months and then, when it was denied, did not ask again until 6 months later. The court did note that the counsel who appeared at mother’s fact finding did represent the mother properly during that proceeding.

The court commented that if this had been a criminal matter, the pretrial delay would have to have been considered in a question of the violation of the right to a speedy trial. The court stated "...we are deeply troubled at the manner in which respondent's case was handled including, among other things, the misuse of a JHO at the removal stage, Family Court's failure to hold – without good cause shown – a prompt hearing where a temporary removal order had been made, inadequate representation by respondent's counsel during the pretrial period, lack of continuity of presiding judges, JHOs and attorneys, and the continuing inordinate delays which continued throughout the child protection proceeding." While affirming the neglect and the disposition, the court's last comments were that the parent was treated unfairly and that there was a harm done them by the unnecessarily long separation which is of an "irreparable nature".

Matter of Mercedes R., 300 AD2d 664, 751 NYS2d 788 (2nd Dept. 2002)

A Queens father made a motion for summary dismissal of an Article 10 petition. He claimed that the petition should be dismissed as an earlier petition had been filed. His motion was denied, as was his request for temporary visitation. On appeal, the Second Department affirmed. A second petition was not barred given that the first petition had not alleged the conduct contained in the allegations of the second petition. The denial of visitation issue is moot given that while on appeal, the matter was resolved and visitation was now allowed. However, the court commented that since the father later admitted the abuse alleged in the second petition, the court's order of no visitation pending the fact-finding was apparently appropriate.

Matter of Jimmy and Crystal D., 302 AD2d 892, 753 NYS2d 789 (4th Dept. 2003)

A Wyoming County father appealed a neglect finding against him. He argued that DSS was estopped from the neglect, as there had been a previous custody proceeding that had included witnesses from DSS. The Fourth Department disagreed. The custody matter had gone to a hearing the day after DSS had filed the neglect petition. DSS was not a party to the custody action and therefore did not have a full opportunity to litigate the issues raised in the neglect petition.

Matter of Jonathan M., __AD2d__, 761 NYS2d 280 (2nd Dept. 2003)

The Second Department reversed Suffolk County Family Court's dismissal of a neglect petition. The petition was filed before the child turned 18. The Family Court however dismissed the petition without holding a fact finding when the child turned 18. The Appellate Division ruled that the court must hold a fact finding and could then dismiss the matter only IF it finds that the aid of the court is not needed. Here the child wished to consent to a placement. The Second Department reinstated the petition and remanded it

back to Family Court for a fact finding.

II. General Abuse

Matter of Rosina W., 297 AD2d 639, 747 NYS2d 45 (2nd Dept. 2002)

A Kings County Family Court abuse finding was reversed by the Second Department. The father of a 17-year-old girl confronted her about her bad behavior. She pushed the father and turned away from him. He slapped her in the face causing swelling and a bloodshot eye. The Appellate Court indicated that it did not “condone” the father’s behavior but found that it was not abuse given the teenager’s age, the circumstances, the isolated nature of the incident and the fact that there were no serious injuries. **NOTE:** No comment was made about the question of this being neglect as opposed to abuse.

Matter of Marc A., 301 Ad2d 595, 754 NYS2d 45 (2nd Dept. 2003)

ACS appealed a dismissal of an abuse petition by Kings County Family Court. The Second Department reversed and made a finding of abuse. A pediatrician who had child abuse training testified that the 7 year-old girl had a round burn on her shoulder blade that was from a cigarette burn or a circular metal object. The burn would have resulted from the hot item being pressed into the skin for 5-10 seconds. The doctor testified that the child told him that the father had hurt her. The doctor concluded that within a reasonable degree of medical certainty the child had been abused. The child’s parents claimed the child had fallen onto a stucco wall and the caseworker did admit on the stand that it was possible that the child had inflicted the injury on herself. The Family Court dismissed the petition finding that the injury was “minor” and that it could have possibly been “self-inflicted”. ACS obtained a stay keeping two of the three subject children in care and the third with a nonrespondent father while they appealed to the Second Department. The Appellate Division ruled that the parent’s explanations were “simply unreasonable and unacceptable” and concluded that abuse was proven as well as derivative neglect regarding the two siblings. The court ordered the children to remain out of the home until the matter was returned for a dispositional hearing.

Matter of Alijah C., 302 AD2d 838, 755 NYS2d 757 (3rd Dept. 2003)

The Third Department found that the Chemung County Family Court ruled correctly when it dismissed an abuse petition filed regarding a deceased child. Since a deceased child is no longer in need of protection, there is no purpose to filing a petition regarding that child and it should be dismissed. The court clarifies that, of course, the abusive death of a child could support a derivative petition regarding living siblings.

III. Sex Abuse

Matter of Cassandra C., 300 AD2d 303, 750 NYS2d 322 (2nd Dept. 2002)

The Second Department affirmed a Suffolk County finding of sexual abuse. The respondent had sexual contact with the child and had transmitted nude photos of her over the internet. The child had made out of court statements to the police, the caseworker and the therapist. The therapist testified that the child's disclosures and behaviors were consistent with those of sexually abused children. The therapist described her methodology and what she had observed. A boy that was born 4 months later was also found to be derivatively neglected. The respondent failed to show that the conditions that led to the underlying abuse no longer existed.

Matter of Shaun X., 300 AD2d 772, 751 NYS2d 631 (3rd Dept. 2002)

A Clinton County sex abuse finding was affirmed by the Third Department. The respondent had sexually abused his girlfriend's son. This activity also supported a finding of derivative neglect of his own daughter. The court said it was "beyond dispute" that sexual abuse of one child is enough to support the derivative finding regarding other children. The Appellate Division also agreed that a dispositional order of no contact with the daughter was appropriate given the sexual abuse of the girlfriend's son as well as prior sexual abuse of a stepdaughter. Further the respondent had left his daughter alone while he had sexual contact with the boy – this action alone was neglectful of her. The court indicated that only the "most compelling" circumstances should result in ending visitation. But here this father's right to visitation with his young daughter must yield to protect the child from a father who has an inability to demonstrate parental responsibility. The court properly prohibited all contact with the daughter for a year and required the respondent to undergo counseling.

IV General Neglect

In Re Simone M., 298 AD2d 171, 749 NYS2d 484 (1st Dept. 2002)

The First Department upheld a Bronx County Family Court finding of neglect against a mother. The child claimed that she fell on a rock and sustained marks to her arm but this explanation was due to coaching and pressure from the mother. Previously the child had told a teacher that her father had hurt her. The lineal marks were not consistent with a fall on a rock. There had been previous instances of binding and hitting the child. The marks themselves were not mere scratches and required medical attention. The parents had failed to seek medical attention although they were repeatedly asked to do so by the caseworker. Two years earlier, another child in this home had died after being scalded by hot water when left alone in the bathroom with the water running. The mother would

not answer questions about this previous incident and claimed it was an accident.

Matter of Hannah UU., 300 AD2d 942, 753 NYS2d 168 (3rd Dept. 2002)

St. Lawrence County Family Court made a finding of neglect regarding a mother who had been frequently hospitalized over a 37-month period due to a pattern of suicidal ideation and suicide attempts. At one point she apparently took an overdose of Vicodin and fell unconscious, leaving her 3-year-old son unattended. Two months after the finding and the toddler's placement in foster care, the mother gave birth to a daughter. DSS filed a derivative petition immediately after the birth and moved for summary judgement, which was granted. The Third Department affirmed the summary judgement derivative finding. Although the mother had begun a laudable involvement in therapy and services, it had only been 8 weeks since the prior finding that her mental condition was such that she could not care for her toddler.

Matter of Soma H., __AD2d __,761 NYS2d 684 (2nd Dept. 2003)

Queens County Family Court dismissed a neglect petition against a mentally ill father but the Second Department reversed, found neglect and remanded the matter for a dispositional hearing. A finding can be made based on a parent's mental illness even though there has been no showing of past or present harm to the child. The father was schizophrenic and delusional. He heard voices urging him to kill people and to molest his children. He thought these voices were real. This happened on a daily basis even when he is took his medication. The father's psychiatrist testified that the father should not be allowed to care for a child unless another adult was directly supervising him.

Matter of Heather WW., 300 AD2d 940, 753 NYS2d 183 (3rd Dept. 2002)

The Appellate Division agreed with Madison County Family Court that a mother's lack of response to her paramour's behavior was neglect on her part. The boyfriend engaged in a continuous habit of walking around the house naked as well as masturbating in a bedroom with the door open such that the children could see him. He also had problems with alcohol and would often be drunk when engaging in this behavior. On one occasion while intoxicated, he placed his head on the daughter's leg and licked her leg. One child informed her mother of the nudity and masturbation. The parties stipulated to the facts and it was mother's position that she had done nothing neglectful. The court disagreed and found that although she had told him to stop the behavior, she had not asked him to move out, she continued to leave the children with him and she never asked again about any continuance of the behavior. She was aware of his ongoing drinking problem. After the agency obtained an order of protection ordering the boyfriend to have no contact with the children, the mother placed the child in foster care rather than end her relationship.

The court also commented that the placement in foster care was in the child's best interests as the dispositional hearing demonstrated that the child was doing better in school and the mother testified that she continued to have a relationship with the boyfriend and saw no harm in having the child live in the same home.

In Re Hadja B., 302 AD2d 226, 753 NYS2d 721 (1st Dept. 2003)

The First Department affirmed a New York County finding of neglect against a mother for excessive corporal punishment. The child's sworn in camera testimony corroborated her out of court statements that her mother had hit her with various objects causing her to bleed and leaving marks. The child was examined in camera out of the presence of the mother. However, mother's counsel was allowed to cross exam the child after being given time to consult with the mother about the child's testimony. This was appropriate given that the caseworker had provided an affidavit that the child would not be able to give clear and accurate testimony in the presence of the mother.

Matter of Luis B., 302 AD2d 379, 754 NYS2d 571 (2nd Dept. 2003)

Queens County Family Court dismissed a neglect petition filed for failure to prove a prima facie case. The Second Department reversed, reinstated the petition and remanded the matter for further fact finding. Under FCA 1046 (a) (iii), ACS had established that the mother abused substances. The mother did not show that she was voluntarily and regularly participating in a recognized rehab program. Therefore, under the statute, a prima facie case for neglect had been established

Matter of Iris B., __AD2d__, 756 NYS2d 740 (1st Dept. 2003)

The First Department overturned a New York County neglect finding. The mother had a prior finding of neglect of an older child and a prior history of drug abuse. However the mother did prove that she was voluntarily and regularly participating in a rehab program and there was no evidence that any current drug use was affecting this child.

Matter of Ramazan U., 303 AD2d 516, 756 NYS2d 442 (2nd Dept. 2003)

Queens County Family Court found that a custodial mother had emotionally neglected her child based on the mother's documented efforts to interfere with the father's visitation. The Second Department agreed that the mother had attempted to alienate the

child from the father and that this supported a finding of emotional neglect. The disposition of custody to the father with supervised visitation to the mother was in the best interests of the child and was supported by the evidence.

In Re Daniel L., 302 AD2d 321, 757 NYS2d 4 (1st Dept. 2003)

A Bronx County mother inflicted excessive corporal punishment on her son and verbally abused him. The child made out of court statements that the mother had hit him with various objects and had “disparaged him with epithets”. The caseworker testified to the child’s statements and also testified to her observation of a bruise on the child’s face.

Matter of Christina BB., __AD2d __, 759 NYS2d 560 (3rd Dept. 2003)

A Clinton County Family Court adjudication of excessive corporal punishment was upheld on appeal to the Third Department. The 6th grade daughter got in trouble at school and the father began to yell at her, calling her a bitch and a whore, and struck her in the face at least twice, causing a bloody lip and a bruise to her cheek that lasted several days. He then pushed her head to the kitchen counter and held a 10-12 inch knife to her throat and threatened to slit her throat if she got in trouble again. The two younger children witnessed this. The father claimed on appeal that it was an isolated incident. The Third Department finds that the behavior warranted not only a neglect finding as to the one child but derivative as to the others. It reflected fundamentally flawed parenting particularly as it was carried out in front of the younger children and accompanied by derogatory profanity.

Matter of Paul P., __AD2d __, 760 NYS2d 780 (3rd Dept. 2003)

A Broome County Family Court neglect finding against a mother was affirmed by the Third Department. In 1998 the mother had been found to have neglected her two children by allowing her then boyfriend to sexually abuse them. In 6/2001, DSS removed two subsequently born children from her home as she refused to make this same man, now her husband and a convicted sex offender, to leave the home. It is neglect to expose children to unsupervised contact with an untreated sex offender. Although she admitted the husband’s prior findings on cross-examination, the mother refused to believe that he had sexually abused the older children. She threatened to take the children out of state to avoid the court process. She was also aware that he had a drawing of a dog having sexual contact with a child.

V. Domestic Violence as Neglect

Matter of Tali W., 299 AD2d 413, 750 NYS2d 104 (2nd Dept. 2002)

Queens County Family Court granted a motion for summary judgement against a father based on his criminal court plea to an act of physical violence against the mother. The Second Department reversed and remitted the matter back to Family Court for a hearing on the merits. The Appellate Court found that the criminal plea did not include any allegations that the children were present or that they were impaired in any way by the act of violence against the mother.

Matter of Xavier C., 303 AD2d 583, 756 NYS2d 474 (2nd Dept. 2003)

The Second Department reversed a Suffolk County Family Court summary judgement of neglect regarding a father. The father had been convicted in criminal court of violent acts against the mother but nothing in his plea colloquy indicated that this had occurred in front of the children or impaired them or placed them in danger.

Matter of Eric B., 299 AD2d 754, 751 NYS2d 72 (3rd Dept. 2002)

An Otsego County neglect finding against both parents was appealed to the Third Department. The petition alleged that the parents had failed to provide adequate shelter for their 5 children ages 4-10 and had failed to provide necessary medication to one of the children. The petition also alleged that there was domestic violence occurring in front of the children. On appeal, the mother claimed that the matter was really about unsubstantiated sexual abuse. The Appellate Division found that the DSS had not sought any finding based on sex abuse. The children were neglected due to the domestic violence in the home. There was testimony by and records of the caseworkers that there had long been a problem with domestic violence in the home. The agency had been involved with this family for some time. The mother had described the violence in her sworn affidavit against the father in a family offense matter. Also the father had been convicted of second-degree harassment of the mother by criminal court. Lastly, one of the children gave out of court statements regarding the violence.

Matter of Michael G., 300 AD2d 1144, 752 NYS2d 772 (4th Dept. 2002)

The Fourth Department upheld an Erie County Family Court finding of neglect against a mother. The mother failed to follow through with obtaining a permanent order of protection although there was a history of domestic violence between her and the child's father. She continued to see the father and allowed the father to see the child and "...did

not seek refuge for herself or her child”. The day after the most recent incident of violence, she brought the child with her to meet with the father for lunch instead of seeking help from the authorities. Even after the petition had been filed, she “...continued to believe that neither she nor the child was in need of protection from the child’s abusive father...” The mother’s behavior demonstrated a lack of understanding of the impact that the domestic violence was having on her child.

In re H/R Children 302 AD2d 288, 756 NYS2d 166 (1st Dept. 2003)

The First Department reversed a neglect finding against a mother in a domestic violence situation. The mother had allowed her youngest child to go out with his father and when they returned, the father found a male visitor in the mother’s home and a fight ensued. The father cut the other male with a meat cleaver and punched and kicked the mother in the stomach. This was witnessed by at least one of the children. The mother had had a previous relationship with the father during which she had made four complaints to the police – but no evidence was offered that these complaints had been about domestic violence. Although in the past, she had also sought an order of protection from him, her testimony was that she only did that as she believed it would help her get custody. She had in fact not followed through on this past request for the order of protection after they are reached an agreement on custody. As ACS provided no specific evidence that the mother had been involved in a relationship with a history of domestic violence, the one incident that did occur was not enough proof that she failed to protect the children from emotional harm. The court commented that if evidence had been provided that there were past proof of domestic violence that the lower court would have been correct in ruling that the mother was neglectful. The mother’s alleged refusal to cooperate with ACS after the incident is insufficient to find neglect in and of itself.

Matter of Zachery M., __ AD2d __, 760 NYS2d 546 (2nd Dept. 2003)

The Second Department restored a dismissed Orange County neglect petition against a father. The DSS had filed a neglect petition against both a father and a mother with concerns about domestic violence. The Family Court dismissed the petitions. On appeal, the Second Department stated that domestic violence is a basis for neglect of children. The father here had verbally and physically abused both the child and the mother. The child was observed to have welts on his buttocks after the father had made verbal threats of physical harm to the child. When confronted with the investigation, the father was vulgar and belligerent with CPS and handled the child roughly, causing the child to cry. Also police witnesses described the mother’s allegations of physical assault on her in the child’s presence in one incident and threats to her in another incident. Mother had sought an order of protection against the father although she did not follow through with the process. The court erred in dismissing the petition against the father. The child has suffered harm and is in imminent danger of further harm as a result of exposure to episodes of domestic violence.

VI. Educational Neglect

In re Dyandria D., 303 AD2d 233, 757 NYS2d 12 (1st Dept. 2003)

The First Department concurred with New York County Family Court that a mother had neglected her daughter. She neglected her emotionally by socially isolating her, educationally by failing to provide an adequate educational environment and mentally by “creating a paranoid scenario of sexual abuse”. The child was absent from first grade over a third of the year. Her education had clearly suffered as a result. The mother claimed, but did not prove, that the child was absent from school due to harassment by other students. The mother also contended that she was homeschooling the child. The caseworker testified that the mother was not up to date in her filings to have the home school plan approved by the school board and in any event the mother was unable to demonstrate that the instruction the child was allegedly receiving at home was comparable.

Further, the child’s withdrawal from school affected the child mentally and emotionally as it had socially isolated her. Play dates stopped and the child was unable to name any friends. The child was constantly in contact with only the mother, even while sleeping. A psychiatrist testified that this was not typical of a first grade age child and that the child was “overly involved” with the mother. Lastly, the mother was unable to appreciate the emotional harm that she was doing to her child by this action and also by demonizing the child’s father and fabricating sexual abuse charges against him.

Matter of Nicole A., __AD2d__, 758 NYS2d 884 (4th Dept. 2003)

The Fourth Department affirmed an educational neglect finding from Oneida County. The DSS proved that the child was not attending school and this provided a prima facie case that the child was being educationally neglected. The mother was unable to prove her claim that the child was too ill to go to school. The mother would not cooperate with the school to provide alternative education for the child.

In re Giancarlo P., __AD2d__, 761 NYS2d 165 (1st Dept. 2003)

The First Department upheld a New York County dismissal of an educational neglect petition. The child had prolonged and unexcused absences from school, but that in and of itself did not establish neglect without a showing of parental misconduct and the harm or potential harm to the child. The evidence demonstrated that the mother was actively involved with the school seeking a special education placement for the child.

VII. Article Ten Dispositional Matters

Matter of Samia Z., 297 AD2d 385, 746 NYS2d 598 (2nd Dept. 2002)

A Queens County mother appealed a Family Court order that indefinitely suspended her visitation with her children who were in foster care. The Second Department agreed that the visitation needed to be suspended given mother's behavior. She chronically behaved in ways that caused these special needs children to become emotionally distressed. Even with a supervisor present, the mother denigrated the children and one of the fathers. Expert evidence was provided that continuing the visitation would be detrimental to the children's therapy and development.

Matter of Damien A., NYLJ 4/29/03 at 22, 2003 NY Misc. LEXIS 911 (Family Court, Suffolk County 2003)

A teenage mother and her infant were both in foster care with Suffolk County. The infant was in a local foster home while the mother was in an RTC program out of state. At a permanency hearing, the DSS argued that the teenage mother should be placed in a group home with increased visitation with the infant with an ultimate goal that she reside with the infant. The teenage mother wished to be placed in the infant's foster home and the foster mother there was willing. The DSS argued that the court did not have authority to order the specific placement. The court ordered that the teenager be placed in her baby's foster home, finding that DSS had offered no proof that this plan was improper or unsafe. The court also ruled that under various provisions in FCA Article Ten, the court most certainly had authority to specify the placement of the child.

Matter of Casey A., ___AD2d___, 755 NYS2d 79 (2nd Dept. 2003)

The Appellate Division reversed Nassau County Family Court on the issue of the timeliness of an ACD restoration. An ACD was granted on 10/22/99 for one year. Although the papers were drafted and signed before 10/22/00, the petition to restore was not actually filed until 10/25/00 and was therefore not timely and should have been dismissed

VII. Issues With Relatives

Matter of Makalia G., 299 AD2d 662, 749 NYS2d 184 (3rd Dept. 2002)

Two Otsego County foster children were placed in the custody of grandparents under DSS supervision after a finding of neglect by the mother. The placement was extended several times but then no extension petition was filed and the order ran out. Otsego County Family Court “extended” the custodial placement with the grandparents in any event and upon appeal, the Third Department reversed. The placement had expired and no extension had been filed and therefore the Family Court had no authority to “extend” the expired Article 10 custody order. The children were to be returned to the custody of the mother. The Appellate Court noted that DSS had sent the Court a letter indicating that they had no objection to the children returning to the care of the mother.

Mosher-Simons v County of Allegany 99 NY2d 214, 753 NYS2d 444 (2002)

The Court of Appeals reviewed a lawsuit filed by the mother of a 2-year-old boy who was killed by his aunt. The mother claimed that Allegany County DSS had inadequately performed a home study of the aunt. The child was placed in foster care in the spring of 1991 at seven months of age. A neglect petition was brought against his mother. Ultimately in the winter of 1992 a TPR petition was filed and a suspended judgment was granted after both parents admitted to permanent neglect. The child’s maternal aunt and paternal grandmother both filed custody petitions and the court ordered DSS to complete home studies of the relatives. The county reported to the court that both relatives could provide “safe and stable” environments for the child. The studies did not recommend a specific placement but did not oppose either placement. Family Court then held a hearing in February of 1993 and the parties all stipulated that the child would go to the aunt under the supervision of DSS. The following month, the former foster parents filed for custody. The mother opposed that petition and it was scheduled for a hearing. The child was killed three weeks later by the paternal aunt. She had beaten the then 2½-year old to death with a frying pan. The aunt was subsequently convicted of second-degree manslaughter and is serving 5-15 years. A caseworker had seen the child the day before the beating and had at that time seen abrasions on his face but had been told that the child had tripped and hurt himself. At first the mother brought federal claims against the county and others. Ultimately these claims were all dismissed in federal courts save for the claim that the County had negligently prepared the aunt’s homestudy. But then as to that allegation, the federal courts declined to exercise jurisdiction. The mother then brought state claims, which were dismissed by the Fourth Department upon the County’s summary judgment motions. The Court of Appeals ruled that res judicata relative to the federal rulings barred any consideration save for the issue of the “negligent” placement” claim. The Court noted that the homestudy did not recommend placement, it merely reported information about the home in response to a court order by the Judge. Further all the parties had stipulated to the placement with the aunt. Therefore there was no “negligent placement” by DSS. The Court then considered the question of a negligent

home evaluation. Here the Court of Appeals agreed with the County's position. Since the evaluation was done in response to a court's order, the County was functioning as an arm of the court and was therefore protected by judicial immunity. The Court placed the child, not the agency, so the agency cannot be held responsible for a "negligent placement and therefore any fact-finding done to make this placement is also protected, as it was to assist the court in making the court's decision. The court cannot perform the evaluations itself and must order DSS to do so. To rule otherwise would allow plaintiffs to get around judicial immunity for a court action by suit against those who provided information at the order of the court. County workers should not be "lightening rods" for harassing litigation aimed at the court's actions.

Matter of Autumn B., 299AD2d 758, 751 NYS2d 67 (3rd Dept. 2002)

An Ulster County child was placed in foster care due to a finding of neglect. The child's maternal great aunt filed for guardianship of the child and in response the foster parents also filed for guardianship. The lower court dismissed both petitions and kept the child in foster care. The great aunt appealed to the Third Department alleging that Ulster County DSS had not made any attempt to look for relatives before placing the child in foster care and that she should, as a relative of the child, have a superior right to the child. The Appellate Division affirmed the dismissal. Even if Ulster County had not looked for relatives, as they are required to do, the same factors that resulted in the denial of the great aunt's petition would have resulted in a denial of any 1017 placement. A relative is not entitled to preferential treatment when filing a guardianship petition. A non-parent simply does not have any superior right to custody, nor a precedence nor preference. Here the child's best interests were clearly to remain in foster care. She could not return home due to neglect and the great aunt was not a suitable placement. Although the great aunt "adores" the child and might be able to provide a "stable and loving" home, the great aunt had a "full plate". She has lupus and a history of health problems. She currently cares for 3 young grandchildren, a 12-year-old stepson and an 84-year-old grandmother in her home. Although the grandmother has subsequently died, the situation is not in the child's best interests.

In Re Nilda S., 302 AD2d 237, 754 NYS2d 281 (1st Dept. 2003)

The First Department reviewed some procedural objections in a neglect matter where a non-relative resource had sought custody of the subject child. The resource first complained that she had not been given assigned counsel. The court found that the court did not abuse its discretion under FCA 262(b) in denying her counsel and in any event she failed to disclose her claim of indigency in a timely manner. Also, the court claimed she failed to object to the matter being sent to a referee. Lastly, hearsay documents were properly before the court as the custody matter was heard in conjunction

with the neglect dispositional hearing where hearsay is admissible. Also since the neglect issues were inextricably interwoven with the custody claim, hearsay regarding the neglect claims was admissible relative to her request for custody.

Matter of Edwin SS., 302 AD2d 754, 754 NYS2d 912 (3rd Dept. 2003)

Otsego County DSS filed a neglect petition regarding 3 children after the mother and one of the fathers were arrested on federal drug and weapons charges. The court granted custody to the maternal grandfather on his Article 6 application. The respondents were then convicted in federal court and DSS moved to withdraw the Article Ten petition. The court dismissed the petition but entered a FCA 1056 order of protection prohibiting contact. On appeal by the parent and the Law Guardian, the court ruled that there was no jurisdiction to issue an order of protection once the Article Ten petitions had been dismissed. In a footnote, the court also commented that the court should not have granted the grandfather custody under FCA 1035(f) as the Article Ten petition was dismissed, although this issue was not raised on the appeal.

John KK v Gerri KK 302 AD2d 811, 755 NYS2d 513 (3rd Dept. 2003)

Warren County DSS removed 2 children from a custodial mother and filed a neglect petition against her. The non-custodial father as well as the maternal aunt both filed custody petitions for the children. The court held the fact finding and placed the children with the aunt temporarily. At the dispositional hearing, the court considered the father's custody petition but continued the children with the aunt. Several months later, the father filed again for custody but the court denied his petition. The aunt then indicated that she was not able to continue to care for the children and so the court placed the children in foster care.

On appeal, the father argued that the court had no authority to deny him custody as no Article 10 petition had ever been filed against him. The father argued that he should not have to prove his fitness if no abuse or neglect allegations have been made against him. The Third Department ruled that DSS could respond to father's Article 6 custody petition with a **Bennett v Jefferys'** "unfitness" claim even though no actual abuse or neglect petition had been filed. The court also found that it was appropriate for the Family Court to consider the father's Article 6 petition in the context of the Article 10 dispositional hearing. The burden of proof was on DSS to prove father's unfitness and did not shift to the father. The court heard testimony of the father's domestic violence in front of the children as well as father's own testimony regarding drug use. The father had not obtained any counseling for his problems and had lived at over 16 different addresses in the last 10 years. He did not go to a court ordered psychological evaluation and had not paid any child support. DSS proved he was "unfit" and therefor the denial of his Article 6 petition was appropriate.

Copyright 2003 Margaret A. Burt

Case Law on NO REASONABLE EFFORTS Motions
By Margaret A. Burt, Esq. 8/03

Matter of Marino S., 181 Misc 2d 264, 693 NYS2d 822 (Family Court, New York County 1999) **Note: see App Division decision and Court of Appeals decision**

- Manhattan Family Court made a finding of no reasonable efforts using the “severe abuse aggravated circumstances” category regarding a sex abuse case where the original abuse finding had been made in 1998 against a mother who had not prevented her boyfriend from raping her eight year old daughter
- court found it was acceptable to make finding even though Art. 10 was resolved prior to ASFA
- court also found “derivative severe abuse” and made a no reasonable efforts ruling against the mother regarding the two younger siblings of the sexually abused child
- court found it acceptable to make a finding of no reasonable efforts even though a termination of parental rights petition had already been filed and the filing of the TPR petition predated ASFA
- court noted the unlikelihood of successful reunification
- court ruled that even if the new procedures for a no reasonable efforts finding were not applicable in this case, diligent efforts could and would still be excused under prior and still applicable references in SSL 384-b

Matter of Marino S., 293 AD2d 223, 741 NYS2d 207 (1st Dept.2002)

- Completely upheld the lower court ruling above - **and now see appeal decision of Court of Appeals below**
- ACS need not offer a mother efforts towards reunification with the mother’s three children nor offer the father reunification efforts with the two children that were his
- father of the two younger children viciously raped the 8 year old half sibling causing severe internal injuries and arterial bleeding, mother had allowed her 8 year old daughter to be in the care of the father of her other two children even though she was aware that he had sexually abused the child in the past and that there had been other incidents of sexual abuse by him; also allowed the child to almost bleed to death while the mother cleaned up the crime scene and concocted a story about the child’s injuries
- given that the change in statute was remedial in nature and that NYS courts always had the power to excuse diligent efforts if they were “detrimental”before anyway - the “no reasonable efforts” procedures could be applied retroactively to cases begun before

ASFA.

- agency was not required to prove that it had engaged in diligent efforts until such time as the order of no efforts was granted - the court called that “absurd” as the lack of efforts order was based on a decision that efforts would be harmful
- lower court was correct in its ruling that the two siblings of the raped child could be found to have been “derivatively severely abused” in contradiction with the Third Department in **Amanda C.**, 281 AD2d 714, 722 NYS2d 267 (3rd Dept. 2001)

Matter of Marino S., 7/2/03 Court of Appeals - see at 2003 NY LEXIS 1767

- Court of Appeals review of significant issues in first NRE it hears
- NRE was correctly applied in a retroactive fashion in that the termination petitions were properly amended to include an allegation that the children had been severely abused under the new ASFA definition and that therefore no reasonable/diligent efforts needed to be proven - ASFA refined the law and did not impair vested rights and therefore can be applied retroactively
- NRE is also “retroactive” in that once the finding has been made, the agency need not prove it engaged in efforts until the finding - quoted the App Div as calling any other construction “absurd”
- Derivative findings of severe abuse and therefore NRE rulings as to the siblings of the injured child are appropriate in any severe abuse situation and not just homicide or assault convictions even though there is an absence of specific references to siblings in the other section it is “unthinkable” to consider that the derivative can be used in and assault but not a rape or serious injury evincing depraved indifference

Matter of Keith M., 181 Misc2d 1012, 697 NYS2d 823 (Family Court, Erie County 1999)

- Erie County Family Court made a no reasonable efforts order against a mother in a physical abuse case where the abuse petition had been filed and the fact finding held before ASFA had passed
- the dispositional hearing had not been held when the agency made a motion for a “criminal conviction” no reasonable efforts finding based on the mother’s conviction for First Degree Assault in reference to the serious injury that she had inflicted on her nine year old son
- court also found that the facts warranted a “severe abuse aggravated circumstance” no reasonable efforts finding as well
- court found that the proof of the severe abuse was at a clear and convincing level for use in any subsequent TPR, even though the Art. 10 petition had been filed before the statute allowed for a “clear and convincing” Art. 10 finding
- court made a finding of derivative neglect of a brother and further ruled that the no reasonable efforts finding applied to him as well and denied the mother’s motion to have separate law guardians appointed even though it was alleged that the brother wished to have contact with the mother and the abused child did not

- court made the no reasonable efforts ruling on the motion and attached papers and did not hold any type of a hearing
- court pointed out that the mother will be incarcerated for the rest of the child's childhood and that there is no way that reunification would occur
- court disagreed with agency's argument that no dispositional hearing need be held when a no reasonable efforts finding is made, claiming that the children may need services, there may be questions regarding placement with a relative, there may need to be a discussion of contact
- court ruled that the required 30 day permanency hearing will be held on same day as dispositional hearing

Matter of Jordy O., 182 Misc 2d 42, 696 NYS 2d 654 (Family Court, New York County 1999)

- Manhattan Family Court denied motion for a no reasonable efforts finding based on a father's TPR regarding a sibling in 1996
- four year old child had been in care from birth ; court ordered TPR to be filed in 1997, mother's rights were terminated in 1997, father's permanent neglect still pending when ASFA passed, motion then made for no reasonable efforts as to father
- court says application of no reasonable efforts to cases where the TPR was filed before ASFA is inappropriate; the permanency goal had long before been set — **this would appear to be overturned by the Court of Appeals Marino S. decision**

Matter of June S., 183 Misc2d 679, 704 NYS2d 450 (Family Court, Seneca County 2000)

- court finds that a prior TPR no reasonable efforts motion can be made retroactively regarding children who were placed prior to the passage of ASFA
- court questions the appropriateness of a no reasonable efforts motion brought after a termination of parental rights petition has already been filed - **this appears to be overturned by Court of Appeals decision in Marino S.**
- court rules that the motion shall be held until the court concludes the termination of parental rights fact finding, if the TPR is sustained, the motion will be academic, if the TPR is dismissed, the court will consider the motion at that time

Matter of Jashin H., 184 Misc2d 23, 705 NYS2d 886 (Family Court, Oneida County 2000)

- court holds that a mother's prior admission to abandonment does not constitute a prior involuntary termination for purposes of a prior TPR NRE motion
- court finds that since rights to one child were terminated after a hearing on an abandonment petition, that the prior TPR NRE motion can be based on this prior action
- court finds that a hearing should be held to determine if any of the statutory exceptions apply unless some extraordinary reason compels the finding without a hearing

- court rules that at such hearing the agency has the burden of proof by clear and convincing evidence (note: DSS counsel indicated that court later reversed on this issue)

Matter of Faith Jennifer Mae M., NYLJ 5/23/00 at 32 (Family Court, Monroe County 2000)

- court grants a prior TPR NRE motion regarding incarcerated mother and her twin daughters
- mother previously has had rights terminated to five other children and had also surrendered a sixth child, these twins had been removed shortly after birth when born positive tox and in frail health due to drug abuse during pregnancy
- the court held a hearing on the NRE motion and found that mother was currently serving a state prison sentence and had a decade long history of drug addiction and mental illness, a caseworker who had handled the mother's case for the past eleven years described her history and mother herself testified to her problems and her hopes for change
- court found that it is not likely that mother could provide a safe environment for these children and that they deserved a realistic and immediate permanency plan
- court found that mother has burden of proving all three of the statutory conditions listed to prevent the NRE finding and called it a "high hurdle to leap"

In re Fernando V., 275 AD2d 280, 712 NYS2d 537 (1st Dept. 2000)

- ACS and law guardian appealed the dismissal of a permanent neglect petition against a father regarding one of his three children. TPR had been granted in New York County Family Court against mother as to all three and against father as to two children but not the third as court agreed with father's argument that agency had not engaged in diligence of effort
- Appellate court notes that diligence could be reviewed by court in terms of efforts made toward Dad by other agencies vis-a-vis the other children but finds that diligent efforts were excused anyway due to the other siblings' TPRs
- First Dept made this finding even though the "prior" TPRs of the siblings had actually occurred after the time period in question for the TPR of the third child and no party in the matter ever argued for the NRE ruling - not even on appeal!

Matter of Amanda "C"., 281 AD2d 714, 722 NYS2d 267 (3rd Dept. 2001)

- Father appeals TPR and a NRE finding - Appellate Court finds error in the granting of the NRE motion but TPR is upheld as diligent efforts were made
- father had been criminally convicted for sexual abuse of stepson and was in prison - had been found to have neglected his own two children who were in foster care
- Third Dept. Says can not make a so called "derivative NRE" finding re other two children as they had not been found to be abused - only neglected - **this appears to be overturned by Court of Appeals Marino S. decision**

Matter of Jamal “B”., 287 AD2d 898, 731 NYS2d 567 (3rd Dept. 2001)

- Not a NRE case per se, but 3rd Dept. used the “old” diligent efforts excused section of SSL 384-b(7)(a) to excuse the admitted lack of diligent efforts by DSS in father’s TPR
- Father had been found to have abused two children by burning them in scalding hot water tub and was serving prison sentence
- Agency had offered services before father had gone to prison, father called the services “crap” and was not responsive
- Diligent efforts excused after he went to prison as he refused to accept responsibility, children feared him, he had not done anything in response to offered services before incarceration, his plans for children were totally unrealistic

Matter of Cecilia “PP”., 290AD2d 836, 736 NYS2d 546 (3rd Dept. 2002)

- A review of evidence provided in a sex abuse case against a mother showed sufficient evidence supporting child’s out of court statements and therefore App. Div. approved the aggravated circumstances NRE finding
- Mother’s conduct constituted sexual abuse in the first degree which is basis of NRE
- Court also upheld TPR based on severe abuse and no reasonable/diligent efforts needed

Matter of Mark H., 291 AD2d 934 737 NYS2d 900 (4th Dept. 2002)

- DSS was not required to prove diligent efforts in a termination case where the parents had been criminally convicted of sexual abuse.
- SSL 384-b(7)(a) meant that there need not be proof provided of diligent efforts at any subsequent TPR.

In re Kasey Marie M., 292 AD2d 190, 738 NYS2d 346 (1st Dept. 2002)

- Mother had pled guilty to murdering her 6 year old child and was serving a sentence of 15 years to life.
- permanent neglect petition - court found that no diligent efforts needed to have been offered the mother as it would have been harmful to do so. SSL 384-b(7)(a) (There was no comment as to why a “no reasonable efforts” order was not sought earlier)
- child’s mental health experts say any contact would be detrimental to the children

Matter of Sarah “TT”., 294 AD2d 627, 741 NYS2d 331 (3rd Dept. 2002)

- father admitted to sexually abusing all three of his children and had consented to a dispositional order placing the children in foster care; he had consented to an order that the agency was not obligated to offer him diligent efforts toward reunification
- father’s claim that the agency had not provided diligent efforts was rejected, given that the respondent had consented to a court order that no efforts needed to be made.

Matter of Diane NYLJ 4/8/02 (Family Court, Richmond County 2002)

- Clear and convincing finding of severe abuse based on death of one child
- motion under FCA 1039-b to dispense with reasonable efforts regarding the surviving children.
- derivative findings of severe abuse regarding the siblings and ordered that the agency need not make efforts to reunite the children with the parents
- the ruling not premature even though the criminal matter was not resolved and there was no evidence that the other children had been abused - these things are not required for the motion to be granted

Matter of Kyle M., NYLJ 7/1/02 2002 NY Misc. LEXIS 762 (Family Court, Queens County 2002)

- parents of baby serving prison sentences for murdering the 3 year old nephew in their care
- subject of this petition, was placed in foster care as derivatively abused.
- agency brought both abandonment and permanent neglect petitions to terminate parental rights
- court granted agency’s motion for summary judgement - no issues to try
- agency was not obligated under SSL 384-b(7)(a) to provide diligent efforts to the parents although no listing in “no reasonable efforts” situations in FCA 1039-b included being convicted for murder of another child in the custody of the parent - prior rulings under SSL 384-b that efforts need not be made where those efforts would be detrimental.

Matter of D’Anna KK., 299 AD2d, 751 NYS2d 326 (3rd Dept. 2002)

- newborn comes into care on a derivative neglect finding, TPR of older siblings occurs before dispo on the newborn’s neglect
- at dispo of newborn’s neglect, agency seeks a NRE based on prior TPR of older siblings
- NRE appropriate as there was a TPR prior to the motion
- parents had been allowed to offer proof that they were in compliance of services under

the other children's order but could not do so

In re Sharlese Danielle S., 304 Ad2d 469, 758 NYS2d 316 (1st Dept. 2003)

- NRE granted as to father who had been criminally convicted on Assault Second Degree regarding child

Matter of Sarah B., NYLJ 3/28/03 2003 NY Misc. LEXIS 327 (Family Court, Kings County 2003)

- parents had 2 prior termination orders and court found NRE re newest child
- court ruled that agency must prove grounds on clear and convincing basis
- once agency proves prior TPR, then burden shifts to parent to show that reunification would be consistent with child's best interests and would likely succeed in the foreseeable future - parents here did not meet that burden
- if parents had met the burden, then agency would have had to prove that parent was unfit and child's best interests would not be served by efforts at reunification

Matter of Summer S., __ Ad2d __, 758 NYS2d 889 (4th Dept. 2003)

- NRE granted during a TPR re father of 3 young children given prior TPR of 5 older children

In Re Joseluise Juan M., 302 AD2d 219, 755 NYS2d 41 (1st Dept. 2003)

- Diligent efforts were excused at a TPR hearing (although they had in fact been provided) given father's conviction for Assault Second Degree relative to his stepson

Matter of Justice and Justin T., ___ AD2d ___, 758 NYS2d 732 (4th Dept. 2003)

- Erie County mother gives birth to twins while on parole for killing her 10 month old baby in 1989
- Court makes derivative findings (neglect!) re the twins as homicide not too remote, also notes that the death of the 10 month old had occurred while mother was getting services for a pervious abuse and the 10 month old had died as a result of the mother twice slamming the baby's head against a wall
- Court says NRE on the twins based on the 1989 manslaughter 1st degree conviction

TEN NO REASONABLE EFFORTS SUGGESTIONS FOR LOCAL DSS

By Margaret A. Burt, Esq.

- Consider who should be involved in the decision to file for NRE.
- Review current cases and consider bringing motions on any pending cases, particularly if they are headed to TPR
- Consider bringing them whenever there are grounds even if you intend to provide some reunification services.
- Remember that a NRE motion will be followed by a permanency hearing and be ready with a permanent plan for the child.
- Take a strong position in court that NRE should apply to all the children derivatively and that the court must grant the NRE motion unless the parents prove the three requirements to stop the NRE. CITE MARINO S!
- If seeking NRE based on an aggravated circumstance, should strongly consider also seeking a clear and convincing level of proof and follow with an immediate filing of the TPR petition.
- Clarify what visitation will be if court grants a NRE motion.
- Discuss internally if agency will make services available anyway if court grants NRE.
- Consider how agency will be aware of any efforts of the parent in a NRE case.
- Agree on the agency's efforts to continue to keep parent involved in planning for the child, particularly if the goal is adoption.

