

Satellite Teleconference

September 27, 2005

Update on CPS Legal Issues 2005

Handouts and Materials

CASELAW UPDATE IN CHILD PROTECTIVE ISSUES

Reported Cases from July 2004 – July 2005 (cites current as of July 2004)

Teleconference Agenda for September 27, 2005

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I. GENERAL ABUSE AND NEGLECT ISSUES

Matter of Emily R., 2004 Slip Op 51468U, 2004 Misc LEXIS 2343 (Family Court, Suffolk County 2004)

Suffolk County DSS brought a neglect petition against both parents alleging that the mother was mentally ill and that the father failed to protect the child from the mother. At a FCA §1029 hearing, the CPS worker testified that she did not think the child was at imminent risk and the defense counsel then made a motion for summary judgement to dismiss the petition. The court found that although the CPS worker's testimony had resulted in a decision not to issue an order of protection, it was not dispositive of the underlying neglect. The court did grant a motion by DSS to have the mother examined pursuant to CPLR § 3121(a) prior to the fact-finding.

Matter of Anthony K., 11 AD3d 748, 783 NYS2d 418 (3rd Dept. 2004)

After one day of the fact finding hearing, a Clinton County mother advised the Judge that she wished to "fire" her appointed counsel. The court allowed her to continue pro se and made a finding of neglect that resulted in her five children being placed in foster care. The mother appealed to the Third Department claiming that she should not have been allowed to proceed pro se as she was "not competent" to make that decision. The Third Department indicated that a litigant who is competent to proceed in a matter is competent to make a decision to proceed pro se. Here the Family Court had given the mother ample warning of the dangers of proceeding without counsel. The lower court commented that the appointed attorney was experienced and a good advocate. The court offered the mother the opportunity to hire private counsel. The mother did have mental health issues, that were part of the maltreatment concerns, but she was competent to waive her right to counsel. She cross examined witnesses and called witnesses on her own behalf. She advocated for herself.

Matter of Catherine G. v County of Essex 3 NY3d 175, 785 NYS2d 369 (2004)

The Court of Appeals reversed the Third Department's decision in this closely watched case. The petitioner mother sought to file a late notice of claim against the Essex DSS and other mandated reporters for their alleged failure to call the SCR regarding the sexual

contact that her 14 year old son had with her daughters. The Court of Appeals ruled that the mother should not be allowed to file late as the claim is meritless. A 14-year-old brother is clearly not a “person legally responsible” under 1012(g) and therefore no mandated reporter would have been required to call the hotline. It makes no sense to require mandated reporters to report a situation when they know the abuser can not be the subject of a report. The mother was handling the situation and obtaining services for the children.

Matter of Justin J. 13 AD3d 933, 788 NYS2D 193 (3rd Dept. 2004)

While the Third Department agreed that the father had violated the temporary order in an Article Ten, the court felt the sentence was too harsh and modified it. The father and mother in this Clinton County matter had 6 children between them. The children were placed in foster care temporarily while a petition alleging excessive corporal punishment, failure to supervise, medical neglect and use of illegal substances in front of the children was pending. The temporary placement order also limited visits to those arranged by the caseworker and supervised by someone approved by the caseworker. About two months after the temporary order was issued, a violation petition was filed. The parents had gone to a local shopping mall and the oldest child – a 14-year-old boy – approached them at the mall. There was no evidence that the parents knew the child would be there and at first they encouraged the child to stay away from them. The child followed them around and spoke with them. The father gave the child money and sat with him while he ate some food. The court imposed a sentence of 60 days in jail for the father and 10 days in jail for the mother. After serving 13 days, the father’s sentence was stayed while the matter was appealed. The Third Department found that neither FCA§ 1072 and 846-a are appropriate sections to apply sanctions in this type of temporary order. Thirty days in jail for criminal contempt is authorized but given the child’s age and the apparently unplanned contact essentially pursued by the child, a sentence of 60 days is unauthorized and unwarranted. The time already served is sufficient punishment.

Matter of Christian T., 12 AD3d 613, 785 NYS2d 93 (2nd Dept. 2004)

The Second Department affirmed the denial of a father’s motion to reopen an Article Ten fact-finding where he had failed to appear. The father claimed that he lost his date slip but this was the same excuse that he gave when he successfully moved to vacate a prior order entered on default. Further he made no effort to find out the date. He willfully refused to appear.

Matter of Precyse T., 13 AD3d 1113, 788 NYS2d 542 (4th Dept. 2004)

Monroe County Family Court erred in denying a father’s motion to reopen a default neglect matter. He had failed to appear at the fact finding but he now alleged that he had a reasonable excuse for the default and a meritorious defense.

Matter of Devon W. and Lindsay L., 9 AD3d 830, 779 NYS2d 690 (4th Dept. 2004)

The Fourth Department affirmed a neglect finding from Chautauqua County. Two children lived with their mother and her boyfriend. The boyfriend acted as a “functional equivalent of a parent” therefore he was a “person legally responsible” under FCA §1012(g). The boyfriend neglected the children by using excessive corporal punishment on one child on at least one occasion. The children lived in an environment of substance abuse and domestic violence. The court ordered that the boyfriend have no contact with the children.

Matter of Chandler D., 16 AD3d 684, 791 NYS2d 451 (2nd Dept. 2005)

The Second Department reversed a Nassau County Family Court ruling that it should not have dismissed an Article Ten petition without holding a fact-finding hearing.

II. NEGLECT - GENERAL

In Re Cheyenne S., 11 AD3d 362, 782 NYS2d 746 (1st Dept. 2004)

A Bronx County mother neglected her children. She failed to protect the children from excessive corporal punishment by the children’s uncles. One of the uncles lived in the home. Although the mother was “loving and caring”, she did not meet the children’s mental health and educational needs. The court placed one child with a non-respondent father and the other children were placed in foster care. The court properly suspended the mother’s visits with the children as the visits caused the children emotional stress and were not in their best interests.

Matter of Caleb C., 11 AD3d 469, 783 NYS2d 121 (3rd Dept. 2004)

The Clinton County Family Court found that a mother had neglected her child by leaving the child with a day care provider for four days without advising the day care provider when she would return. The Third Department agreed that the situation was neglect. The mother had not told the day care provider that she would not be coming back and she did not leave any clothing, food or medicine for the child. Her whereabouts were unknown and she did not give the day care provider any information about how to reach her. The 3-year-old child was greatly distressed when the mother did not return for him. When DSS finally located the mother she would not provide any names of any family members and she objected to the child going to stay with his grandparents. She also would not consent to a foster care placement although she offered no other alternative for the child’s care. She would not cooperate with DSS to provide her with some mental health counseling although she admitted that she was overwhelmed, suicidal and abusing alcohol.

Matter of Jemila PP., 11 AD3d 964, 785 NYS2d 185 (3rd Dept. 2004)

A Columbia County Family Court finding of neglect was reversed by the Third Department. Originally, DSS brought a sex abuse petition against the father and the court made a finding of severe abuse. The father was ordered to complete a mental health evaluation and participate in any recommended treatment as well as participate in sex offenders' treatment. The order also prohibited contact with the child and the mother. This dispositional order expired after a year without any petition to extend the order. Several months later, DSS brought a neglect petition alleging that the father was neglectful as he had not completed the sex offender treatment and he continued to refuse to accept responsibility for the sex abuse. The Columbia County Family Court made a finding of neglect and ordered him to continue in therapy and to have no contact with the child until she was 18. The Third Department ruled that this was error. The failure to complete the program was not neglect. The prior order did not order him to complete the program in a year and the program he was involved in ran longer than a year. Further, it is not "neglect" to fail to acknowledge sexual abuse. The failure to acknowledge may be a significant issue in a subsequent termination but it is not neglect in and of itself. The agency should have moved to extend the original order and they offered no explanation for not having done so. Their mistake does not permit the court to make a new finding. This is nothing really more than a second finding for the same original action. The court also noted that in the meantime, the father had completed the sex abuse program and supervised visitation was being recommended. The court remitted the matter for a hearing on visitation.

Matter of Anndrena, 13 AD3d 1164, 787 NYS2d 766 (4th Dept. 2004)

A Cattaraugus County neglect finding was upheld by the Fourth Department. The respondent neglected his girlfriend's 15-year-old daughter. He has prior convictions of sexual abuse of children. This child is at risk of sexual abuse because this respondent is in her home and is a "unreconstructed sexual abuser who denies his guilt in the prior incidents" (citing **Kasey C., 182 AD2d 1117 4th Dept. 1992**) Any error made in the admission of incompetent opinion evidence or hearsay was harmless.

Matter of Shanasia H., __AD3d__, 797 NYS2d 556 (2nd Dept. 2005)

The Second Department ruled that Suffolk County Family Court erred in not ordering a medical examination for the child under FCA § 1027(g). The statute requires that the court order a medical exam in all cases concerning abuse and allows the court discretion to order one in cases concerning neglect.

Matter of Heather S., __AD3d__, 797 NYS2d 136 (2nd Dept. 2005)

The Dutchess County Family Court's failure to give the respondent the warnings required by FCA § 1052 c is not fatal error given that the order of disposition can contain the warnings. The court properly allowed the children to testify outside of the parents'

presence given that the parents' attorneys were present and were allowed to cross-examine the children. The court can only order a stay away provision until EACH child's 18th birthday, not the youngest child's 18th birthday for all.

Matter of Rakim W., 17 AD3d 376, 793 NYS2d 76 (2nd Dept. 2005)

The Second Department concurred that these Dutchess County parents were neglectful in that they let a child stay at the maternal grandparent's home despite being aware that the mother's younger sister had been removed from the grandparents due to excessive corporal punishment. CPS had told the parents not to let the child stay with the grandparents. The child also was in the fifth weight percentile for a child of his age and the mother admitted that she "forgot to feed" the child.

In Re Ashante M., ___AD3d___, 797 NYS2d 68 (1st Dept. 2005)

A father neglected the children by failing to ensure that the mother had successfully completed her court ordered drug treatment. Even if the agency did not notify the father of the mother's continuing problems, the father had a parental duty to make sure the children were safe.

Matter of Kayla C., ___AD3d___, 797 NYS2d 559

The Second Department agreed with Suffolk County Family Court that this baby had been neglected. A medical expert provided evidence that the baby's physical condition and her weight improved after she was hospitalized. This evidence along with proof of the mother's hostility and her resistance to attempts to assist her led to a proper finding that the child was suffering from failure to thrive. The mother's claim that the child spit up her formula was not an adequate explanation for the child's condition.

Matter of Heather D., 17 AD3d 1087, 794 NYS2d 243 (4th Dept. 2005)

A Niagara County finding of neglect against a father was affirmed by the Fourth Department. The father had "become highly intoxicated, locked himself in his apartment with two week old Heather, and then passed out." The child was crying and the police had to force open the door when the father could not be roused. The child was at obvious risk had there been an emergency.

III. NEGLECT – NEWBORNS

Matter of Markus MM., 17 AD3d 747, 792 NYS2d 704 (3rd Dept. 2005)

A Cortland County neglect adjudication was affirmed by the Third Department. In October of 2003 the mother had been found to have neglected her three children. She was 7 months pregnant at the time and as part of the disposition, the court ordered that

she get prenatal care and refrain from using any alcohol or nonprescribed drugs. The next month, she gave birth to this baby at home and the child was removed immediately. The new baby tested positive for cocaine and while that fact is not in and of itself enough to support a finding of neglect, it is when combined with her failure to follow through with the court ordered prenatal care. Also she hid in her apartment and attempted to evade the police when the baby was born, which deprived the child of immediate medical attention. Added to these factors is the recent prior neglect finding regarding her older children.

Matter of Hunter YY., __AD3d__, 795 NYS2d 116 (3rd Dept. 2005)

The Third Department upheld a Clinton County Family Court derivative neglect finding regarding the mother's newborn fifth child. The mother's fourth child had been removed from her care years earlier on a variety of neglect issues. Subsequent hearings had resulted in rulings that she had not addressed those issues, which had resulted in that child's placement, and that she was in violation of court orders. Although she did contact the agency and seek preventive services during her pregnancy with this fifth child, she did not follow any of the recommended services. She would not sign releases, she would not attend mental health appointments and did not complete a parenting course. The prior finding of neglect demonstrated fundamental flaws in her understanding of the duties of parenthood, she had not improved and this was sufficiently close in time to warrant a derivative finding regarding the newborn. The child was placed with his father and the mother was given supervised visits.

Matter of Angel DD., __AD3d__, 796 NYS2d 429 (3rd Dept. 2005)

A father neglected his child when he allowed the mother to care for the child. He knew that she had had 7 other children (fathered by others) who had all been removed from her and that she did not have custody or visitation with any of her children. He also knew that she was on parole. He claimed that her past was not his concern.

Matter of John QQ., __AD3d__, 6/9/05 (3rd Dept. 2005)

The Third Department found that a mother had neglected her newborn. The mother had a long history of substance abuse and her parental rights of her 3 other children had been terminated. She was not currently in drug rehabilitation program and she admitted using crack in her last trimester. She failed to testify and deny the issues. Although the court ruled that the mother and child's hospital records, which showed a positive toxicology, were not properly certified and were therefore inadmissible, there was sufficient evidence to make the finding nonetheless.

IV. DOMESTIC VIOLENCE and EMOTIONAL NEGLECT

Matter of Davin G., 11 AD3d 462, 782 NYS2d 763 (2nd Dept. 2004)

The Queens County Family Court's dismissal of neglect petition against a father was appropriate where there was an isolated incident of domestic violence and the children were not present. Other injuries that had occurred to one child were in fact an accident.

Matter of Todd D., 9 AD3d 462, 780 NYS 2d 180 (2nd Dept. 2004)

The Second Department agreed with Kings County Family Court that a grandmother had neglected her two grandchildren but dismissed one of the allegations in the petition. The Second Department found that there was credible evidence that the grandmother's apartment was in deplorable and unsanitary condition that resulted in imminent danger to the children. However, the Appellate Division reversed a second allegation regarding the grandmother's violent conduct toward her own daughter, the children's mother. The court found that the behavior in question was not severe enough nor was it repetitive such that it could serve as a basis for neglect. There were no allegations of any injuries or that the grandmother's behavior toward her own daughter impaired the grandchildren or put them in imminent danger of being impaired.

Nicholson v Scopetta, 3 NY3d 357, 787 NYS2d 196 (2004)

In the long awaited Court of Appeals decision regarding domestic violence and neglect, the court issued a lengthy decision answering the three questions posed by the federal courts about the interpretation of New York State law. The sole allegation that a parent allowed a child to witness domestic abuse against that parent does not constitute neglect. The Court indicated that there would also have to be proof that the child was impaired or in imminent danger of impairment and that this impairment was causally connected to the parent's actions. Further the parent's actions or inactions would have to be reviewed in light of how a "reasonable and prudent" parent would behave under the circumstances of the situation. This may include the risks attendant with trying to protect themselves or the child. The Court pointed out that neglect could include a situation where the victim parent acknowledged that the children knew of the repeated domestic violence and lacked awareness of the impact on them. It could also include a situation where the children were exposed to regular and extremely violent conduct that required several instances of official intervention and where caseworkers testified to the children's fear and distress caused by the violence. In discussing the question of when a child should be removed from the home in a domestic violence situation, the Court spoke of the need for the Family Court to identify the existence of a risk of serious harm and weigh if reasonable efforts could keep the child safely in the home as well as to balance the risk of harm that removal might bring. The Court urged the use of § 1022 requests for the Family Court to remove the child as opposed to §1024 emergency removals by the agency. The Court indicated that § 1024 removals should only be used where the agency believes that the

child is at imminent risk of a harm occurring before a §1022 order can be sought. The Court indicated that it would be very rare that a §1024 emergency removal would be appropriate in a domestic violence case. The Court also ruled that the statute does not require that expert evidence be used to prove the imminent risk of neglect to a child who observes domestic violence but that it may be “difficult” to prove the connection without expert testimony.

Matter of Richard T., 12 AD3d 986, 785 NYS2d 169 (3rd Dept. 2004)

The Third Department reviewed a Columbia County Family Court neglect finding where domestic violence was alleged. The mother of 14 and 8-year-old boys had been court ordered to visit them under the supervision of the maternal grandmother. During a visitation, the mother, who apparently blamed the grandmother for trouble between her and the children, instigated a physical altercation with the grandmother in front of the children. The elder child attempted to intervene between the two women and the younger child was visibly crying and shaking when he telephoned his father to come to the scene. The father had to separate the two women and observed both children to be visibly upset. Citing *Nicholson*, the Third Department found the mother’s behavior was neglectful. The court pointed out that unlike the plaintiffs in *Nicholson*, this mother was not a victim of domestic violence, she was the aggressor in the violence and also there was proof that the children were visibly impacted by the violence. The Appellate Division also cited the *Nicholson* “reasonable and prudent parent” standard and said that no reasonable and prudent parent would attack the children’s grandmother in front of him or her.

Matter of Paul U., 12 AD3d 969, 785 NYS2d 767 (3rd Dept. 2004)

A Columbia County mother had obtained an order of protection directing the father to stay away from her and the child based on her allegations that the father was violent. A second order of protection in another matter was also issued that required that he stay away from them. One month after obtaining the order of protection, the mother left the child with the father claiming she had no money to care for the child. DSS brought a neglect action against the mother alleging that she left the child with the father in violation of the court’s orders and knowing that the father was violent. The court’s finding of neglect and placement in foster care was affirmed by the Third Department. Citing *Nicholson’s* “reasonable and prudent parent” test, the Third Department ruled that leaving the child with a man she knew to be violent was neglectful. She did not simply fail to shield the child from her own abuse but she placed the child with a man she knew to be violent.

Matter of Christine II., 13 AD3d 922, 787 NYS2d 182 (3rd Dept. 2004)

The Third Department affirmed a Chemung County neglect finding against a mother due to a pattern of emotional neglect of her 6-year-old. The mother was involved in custody battles with the father. She pressured the child to tell people that she, the child, wanted to live with her mother. The mother told her daughter that she would abandon her forever if she told people that she wanted to live with her father. She told the child to lie about

being abused by her father and told her to call the police and say she had been abused. She told the child to steal from the father. She hit and threatened the child. Several witnesses testified to this behavior on the mother's part. The mother failed to testify. The child answered questions in front of the Judge and the attorneys although outside of the parents' presence. The Third Department concurred that the mother's behavior was neglectful and that the court was correct in placing the child with the father. Citing **Nicholson**, the Third Department ruled that this was a parent who repeatedly engaged in conduct that caused the child extreme emotional distress. The child had made earlier allegations against the father but these were the types of allegations that the mother was pressuring her to make.

Matter of Larry O., 13 AD3d 633, 787 NYS2d 119 (2nd Dept. 2004)

The Second Department reversed a Suffolk County Family Court's decision that an act of domestic violence constituted neglect. The parents were involved in an altercation in the kitchen while the child was asleep in the bedroom. No proof was offered that there had been a pattern of domestic violence. An isolated instance of domestic violence outside of the child's presence is not neglect. However, the court did not take testimony on the other allegation in the petition that the father had left the child unattended while the mother was out. The court remanded the case to Suffolk for testimony on that issue.

Matter of Julianne XX., 13 AD3d 1031, 786 NYS2d 835 (3rd Dept. 2004)

Columbia County DSS brought a neglect petition against a mother. They alleged that she had engaged in domestic violence in front of her three children, had abused alcohol in front of the children and had violated court orders regarding contact with the father. The mother did not dispute the actions but maintained that this was not neglect and both the lower and appellate court agreed. The summary judgement motion to dismiss the petition was affirmed as the petition failed to state a cause of action. Alleging that she used alcohol in the presence of the children is not neglect as there were no allegations that she lost her self control and placed the children in any harm. Allegations that she had allowed the two daughters to have contact with the son's father in violation of a prior order of protection may expose her to a contempt finding in the other matter but is not neglect per se. The DSS attorney's unsubstantiated affidavit about the details of these events has no evidentiary value.

Matter of Shaylee R., 13 Ad3d 1106, 787 NYS2d 553 (4th Dept. 2004)

The Fourth Department affirmed neglect finding against a father in a domestic violence matter. The police officers and the caseworkers gave credible testimony that the mother had red marks on her neck and throat. The 5-year-old child gave out of court statements to CPS that she was scared because her parents were fighting in her presence. The father admitted to numerous instances of domestic violence and acknowledges that he was charged with a violation of an order of protection.

In Re Taisha R., 14 AD3d 410, 788 NYS2d 357 (1st Dept. 2005)

The mother was neglectful as she regularly used marijuana while caring for her 2 children and pregnant with a third. She did this to calm herself down after arguments with the father. She would not enroll in a drug treatment program. She also told one child not to disclose that the father had engaged in repeated acts of domestic violence. The child was fearful and distressed about the violence.

Matter of Ravern H., 15 AD3d 991, 789 NYS2d 563 (4th Dept. 2005)

The Fourth Department reviewed a neglect finding against a Cayuga County mother and overturned the finding on two of the allegations. The children were 18 months and 6 weeks old and the DSS alleged in the petition that an older child had died “under suspicious circumstances” and also that the mother had “engaged in” an incident of domestic violence in front of the children. The Fourth Department ruled that these two allegations did not support a finding of neglect. The first child had died when mother used a love seat pushed up against the wall as a makeshift crib and the child was found dead between the love seat and the wall. However, the autopsy report ruled that the child had died of SIDS. As to the incident of domestic violence, the mother was holding the toddler when her boyfriend chased her and closed her hand in the door, breaking her finger. The boyfriend also picked up the mother by her head and bit her on the face as she tried to leave. He then pushed her so that she fell onto the child. Citing **Nicholson**, the Fourth Department found that DSS had not offered any proof that the mother was responsible for exposing the children to this violence. The proof offered was only that the boyfriend was violent – and the court commented that the boyfriend was given an ACD on his neglect petition.

Matter of Daniel GG., 17 AD3d 722, 792 NYS2d 710 (3rd Dept. 2005)

The Third Department dismissed a Columbia County neglect petition against the mother where the proof was that the child, mother and father had an argument in one room, then the mother pushed the custodial grandmother three times in another room when the child was not present. There was no evidence that the grandmother had been harmed or that the child, who was playing in an another room, was affected in any way by what had happened to the grandmother.

Matter of Eryck N., 17 AD3d 723, 791 NYS2d 857 (3rd Dept. 2005)

Following a two-day FCA§ 1028 hearing, Tompkins County Family Court granted a motion for a summary judgment finding of neglect against the mother. The Third Department reversed and remitted the matter for a fact-finding hearing. The testimony at the §1028 was that the mother had left the marital residence after being assaulted by the father in front of the children. This was at least the fourth time she had been physically abused by him. She obtained an order of protection, had him arrested and left the home with the children, but later law enforcement observed the father at the marital residence

where she had returned. The children were placed with a grandmother and a neglect petition was filed. Family Court found that the children were at imminent risk and also granted summary judgement as to neglect based on the non-hearsay portions of the § 1028. The Third Department commented that the **Nicholson** decision had come down since the lower court had heard the case. The Appellate Division ruled that there was no testimony presented regarding the effect, if any, that the domestic violence had on the children and remitted the matter for a full fact finding.

Matter of Senator NN., 11 AD3d 771, 783 NYS2d 105 (3rd Dept. 2004)

The Third Department agreed with Clinton County Family Court that a mother with mental health issues had neglected her 3-year-old child. Two reports of maltreatment were made after the mother called 2 different professionals at the county health department. She ranted and screamed on the phone about the child's ears. She threatened loudly that the medical community was mistreating her child, at times using unintelligible language. The child could be heard whining in the background. State troopers testified that later that same day the mother was yelling and pounding her fist in front of the child. She almost had to be restrained and was ultimately arrested on mental hygiene issues. Although the child had no medical condition with his ears, the mother had an unfounded obsession about them. The child had adopted this delusional belief that something was wrong with his ears. The mother was ultimately diagnosed with bipolar disorder, mixed personality disorder, antisocial and possibly schizotypal features. While in her volatile mental state, she was unable to adequately provide proper supervision and care to the child. The child was genuinely threatened by the mother's inability to control her emotional state even in his presence.

V. Excessive Corporal Punishment

Matter of Frank Y., 11 AD3d 740, 783 NYS2d 123 (3rd Dept. 2004)

The Third Department concurred with Chemung County Family Court that a father had neglected his children by failing to obey the terms of a prior order. Previously the mother of these four children (all under 7 years old) was found to have neglected them by using excessive corporal punishment. The father had also been alleged to be neglectful but he had been granted an ACOD. The children had been placed with him with an order of protection that the mother was not to be with the children unless she was supervised by the agency. A violation petition and a new neglect petition were filed against the father after the mother was found in the home with the children. The father was neglectful, as he had been told repeatedly by the court and by the caseworkers that the mother posed a danger to the children. He was fully aware that there was a court order that she was to have no contact with the children unless the agency was involved. The proof showed that he in fact was regularly allowing her access to the children. Also the father had violated the court's prior order of protection as he had used corporal punishment on the children. He used a belt and had spanked the children. One child told workers that the father had hit him with a belt and another child stated that she had been hit by a belt and that she had seen the other children hit. A third child also gave out of court statements

that confirmed the other two and also said that the father had punched him, used a belt on him and hit him with a vacuum cleaner cord. The children's out of court statements corroborated each other. They were clearly able to differentiate time periods to specify that this had happened when they lived with just the father.

In Re Nicole H., __AD3d__, 783 NYS2d 575 (1st Dept. 2004)

A Bronx mother neglected her two children in that she inflicted excessive corporal punishment on one and derivatively neglected the other. The child made an out of court statement that the mother hit her repeatedly, punched her in the head and face, pulled her hair and shoved her into a bookcase. These out of court statements were testified to by the caseworker who also corroborated the statements with her own observations of a bruise and laceration on the child's face. Photographs of the injuries taken at the hospital were also admitted into evidence. The child protective report from a mandated reporter was properly admitted into evidence and also supported the child's information. The mother failed to testify and the court can draw the strongest inference from that failure. Given the "nature and severity" of the acts toward the one child, a derivative neglect finding with respect to the second child was proper. The injured child was placed in foster care and the other child remained in the mother's care but under supervision.

VI. ABUSE - PHYSICAL

In Re Benjamin L. 9 AD3d 153, 780 NYS2d 8 (1st Dept. 2004)

New York County foster parents were found to have abused and neglected a three-year-old foster child who died after sustaining serious burns due to immersion in scalding water. The foster parents' position was that the child had been left unattended in the tub for a brief moment and that he had turned the hot water on himself. The foster parents' claimed that the child's very serious behavioral problems resulted in him not screaming or attempting to get out of the tub. They produced an expert who testified on their behalf that this was feasible. The court found their expert unconvincing. The agency's experts testified that the burns indicated that the child was restrained in the scalding water. At the very least there would be evidence that he screamed or attempted to get out of the tub if he had turned the water on himself. The foster mother had given different versions of the incident. The foster child's brother's hearsay statements were improperly admitted into evidence, as he had not been named as a derivatively abused child in the petition: however, this was harmless error.

Matter of Angelique M., 10 AD3d 659, 781 NYS2d 705 (2nd Dept. 2004)

The Second Department agreed with Queens County Family Court that the father had abused one child but reversed neglect findings. The six-month-old sustained suspicious fractures of her right femur while in the father's care. The father could not reasonably explain the injury and the injury was unlikely to have occurred accidentally. The neglect

finding on this baby was inappropriate, as neglect was not alleged in the petition or at the hearing. Further the father should not have been held to be derivatively neglectful of two other children who were named on the petition. These children were not his children and no proof was provided that he was legally responsible for them. They were only the children of a babysitter.

Matter of Nyomi A. D., 10 AD3d 684, 783 NYS2d 596 (2nd Dept. 2004)

The Second Department ruled that a Suffolk County Family Court finding of abuse was appropriate where the medical evidence established that the child had hymeneal injuries and the respondents' explanations were not credible. This child was also neglected in that they failed to seek medical and psychiatric treatment for her. However, a finding of abuse relative to burns sustained by a second child who was not in the care of the respondents was unwarranted. The child was in the care of a babysitter at that time and they can not be held responsible. However, the failure to take the child for a medical appointment the day after the burn was neglect. Lastly, the Family Court erred in issuing an order of disposition without holding a hearing and the matter was remitted for a dispositional hearing.

Matter of Infinite G., 11 AD3d 688, 783 NYS2d 656 (2nd Dept. 2004)

The Appellate Division agreed that a Queens mother had abused one child and derivatively neglected the other. The child who was abused was born 3 months prematurely. The baby stayed in the hospital for over 2 months after her birth and then went home to the mother. Injuries were discovered during a routine medical follow up appointment less than 2 weeks after the baby went home. The child had retinal hemorrhaging and subdural bleeding and was diagnosed with "shaken baby syndrome". Both parents were the sole caretakers at the time and could offer no explanation for the child's injuries. The mother appealed her finding. The Second Department indicated that as she could not offer any reasonable explanation for the injuries, she did not rebut the presumption of abuse.

Matter of Aniyah F., 13 AD3d 529, 788 NYS2d 119 (2nd Dept. 2004)

A Queens County Family Court dismissal of an abuse petition against an aunt and a mother was reversed by the Second Department. The 5-month old girl had a subdural hemotoma, a scalp hemotoma, a circular scar on her forehead, healed fractures of 2 bones in her arm and a lip abrasion. The baby was in the care of the mother and the aunt when she was injured. They were unable to offer an adequate explanation for the child's injuries and therefore the court should have found them both to be abusive. They were legally responsible for the child and the injuries were not accidental.

Matter of Randy V., 13 AD3d 920, 786 NYS2d 823 (3rd Dept. 2004)

The Third Department affirmed a Chemung County Family Court physical abuse and medical neglect finding. An 18-month-old child was in the care of her father and paternal grandmother while the mother was at work. The child sustained 1st and 2nd degree burns on her back in the shape of a steam iron – including steam holes. Neither the father nor the grandmother brought the child to a doctor until the mother arrived some 5-7 hours after the child had been burned. The doctor testified that the injury was not consistent with accidental contact with an iron but that the iron had been pressed on the child’s skin. The child would have screamed and cried in pain for some time. The father was uncooperative with the investigation and provided CPS with conflicting versions of what had happened. He also failed to testify. The Appellate Court rejected the father’s claim that the lower court had exhibited a predisposition against him.

In Re Rashard D., 15 AD3d 209, 791 NYS2d 1 (1st Dept. 2005)

A New York County mother instructed her 12-year-old son to go into a bank and give the teller a note that read “Give me \$30,000 or I will shoot you.” The child did as he was instructed and robbed the bank. The teller, who was in on the plan, turned over the money to the boy and he brought it back to the mother. Everyone was arrested and the mother pled guilty to Grand Larceny Third Degree and Endangering the Welfare of a Child. The lower court found that the mother had committed neglect but not abuse of the child as the “risk of physical injury was too attenuated”. The Appellate Division reversed and found abuse. The mother had created a substantial risk of the child’s death. The police had testified that their policy and protocol was to enter a bank during a robbery with guns drawn and at the ready. The child was simply “lucky” that he had not been shot and the mother had intentionally put her child in a situation where there was a substantial risk of serious harm.

Matter of Alyssa C.M., 17 AD3d 1023, 794 NYS2d 224 (4th Dept. 2005)

An Erie County finding of abuse and derivative abuse was sustained on appeal to the Fourth Department. The child, a fourteen-month-old boy, had second degree burns to his back, abdomen and the soles of his feet, which were in various stages of healing. The medical evidence indicated that these were inflicted burns and that some were in the pattern of a space heater in the mother’s home. The mother claimed that the other respondent told her that the child had accidentally burned himself on the heater. The mother claimed that a day after she had been told this, she had a friend take the child for medical attention. The child also had bruises all over his body, including adult finger marks on either side of his head and both his eyes were black. There were multiple lacerations to his liver that were consistent with the force of an adult kick or punch and could not have been inflicted by a child. The medical expert testified that in his medical opinion the child had been abused. The mother failed to rebut the presumption that she

was culpable for the injuries. Her testimony that she was unaware of the injuries until the child was taken for medical care was incredible. The older four-year-old sister was derivatively abused given the level of risk to her.

In Re Jayvon L. __AD3d__, 795 NYS2d 31 (1st Dept. 2005)

This Bronx County respondent had pled guilty to depraved indifference murder of one child having inflicted fatal burn and other injuries to the little girl and therefore the Family Court properly found that the other child was derivatively severely and repeatedly abused

Matter of Ilene M., __AD3d__, 796 NYS2d 87 (1st Dept. 2005)

The First Department affirmed a Bronx County Family Court adjudication of abuse and neglect against a mother of 9-month-old twins. Each of the children had a fractured limb. The medical proof was that the injuries could not have been sustained without maltreatment and the mother could not offer a credible explanation.

VII – ABUSE- SEXUAL

Matter of Raymond M., 13 AD3d 377, 786 NYS2d 94 (2nd Dept. 2004)

An Orange County sexual abuse finding was affirmed on appeal. The father had sexually abused the two daughters and derivatively neglected the son. The out of court statements of the daughters and the father's statement to the police corroborated each other. The element of the intent to obtain sexual gratification can be inferred from the circumstances. The court also properly took a strong negative inference against the father for his failure to testify.

Matter of Besthani M., 13 AD3d 452, 785 NYS2d 717 (2nd Dept. 2004)

The Second Department affirmed a Kings County Family Court finding of sexual abuse against a father. The child's consistent out of court statements were corroborated by her unsworn in camera testimony as permitted in **Christine F. 74 NY2d 532 (1989)**

In re Fatima M., 16 AD3d 263, 793 NYS2d 329 (1st Dept. 2005)

The First Department reversed a New York County finding of sexual abuse and neglect regarding five children and remitted the matter for a new hearing to allow parents an opportunity to present a defense. Here, the child who had complained of the abuse had a history of psychiatric problems and hospitalizations. The Appellate Court found that there was no clear proof that the child's problems were related or not to any abuse. In the

original disclosure, the child had been asked leading questions by a school social worker that believed the child was being abused. The child recanted the abuse on several occasions and also accused numerous other persons of having abused her. There were no physical findings consistent with abuse. The court had ordered that all interviews with the child were to be videotaped but that order had been ignored. This deprived both the court and defense counsel of the opportunity to examine the methodology used to interview the child. The court improperly denied the father's request for an independent evaluation of the children given that both the agency and the law guardian presented their own experts and there was no evidence that the children would have suffered any appreciable harm being interviewed by respondent's experts. The defense should have been allowed opportunities to cross-examine on the issue of the impact of the child's mental health on the allegations.

Matter of Nathaniel II __AD3d__, 795 NYS2d 780 (3rd Dept. 2005)

Chemung County Family Court properly determined that the father had sexually abused his daughter. The child's out of court statements regarding age inappropriate sexual knowledge as well as her physical depiction of her father's movements and her drawings were all corroborated by two other children who testified that the father slept with the child and were also corroborated by the father's obviously false statements to law enforcement. The child told her preschool teacher that the father pulled down her pants and slept on top of her every night. Without any prompting the child lay on the floor and demonstrated the fathers back and forth movements. The child drew pictures of a penis and said it was the father's "bug" and that "wet stuff" came out of the bug and went onto her stomach and pillow. The fact that the child also told stories about monsters in her room was a reflection of a young child's imagination and did not undermine her credibility

VIII. DISPOSITIONAL ISSUES in ARTICLE TEN

Matter of Elizabeth A., 13 AD3d 615, 787 NYS2d 109 (2nd Dept. 2004)

The Second Department affirmed a Kings County Family Court finding of neglect. The mother had a long-term pattern of not providing care and guidance. The mother had a history of alcohol dependence, and mental illness. The court correctly placed the child with the maternal grandmother who was planning on moving to Nevada. The grandmother had cared for the child for most of the child's life. When the child was with the mother, she was withdrawn, mute, sad and delayed. After the placement with the grandmother the child "flourished" and had significantly increased verbal skills. Her grades improved and she was cheerful and optimistic. It was in the child's best interests to go and live with her grandmother in Nevada along with her sister and extended family.

In Re Linda J. v Nakisha P. 10 AD3d 287, 781 NYS2d 20 (1st Dept. 2004)

A New York County Family Court neglect disposition was reversed by the First Department. A four-year-old was left locked in his room while his mother visited her boyfriend in another part of the apartment building. The child's grandmother and maternal aunt were in the apartment with the child but had no key to the locked door. It was not clear if the child was being punished or simply contained. The court found the mother to be neglectful and the grandmother to have failed to protect the child. Meanwhile a paternal grandmother had filed for Article 6 custody of the child while the Article 10 was pending. Without a hearing, the court granted Article 6 custody to the paternal grandmother. The Appellate Division reversed saying that the disposition on an Article 10 proceeding can only be for a year. Such an order can only be granted after a hearing on the child's best interests. If the court wanted to grant full Article 6 custody to the grandmother then there should have been a full custody trial – particularly in light of the rather controverted allegations in the neglect.

Matter of Gabriel A., 5 Misc3d 479, 781 NYS2d 874 (Family Court, Queens County 204)

A Queens County father's actions caused the death of his 6-month-old child. The court found him to have severely abused that child and derivatively severely abused a 3-year-old sibling. The father had pled guilty to manslaughter second degree and has admitted that he caused the child's death. The sibling was in the care of the mother. ACS requested a dispositional order that father was to have no contact with the surviving child until he was 18. Queens County Family Court ruled that it did not have authority to issue a 15-year order of protection against the parent. ACS cited the Appellate Division cases to the contrary but the court rejected all those decisions as being incorrect. The court claims that the law should be amended to clearly state that such an order could be granted against a parent.

Matter of Ashley B. 2005 WL 1021565 (Family Court, Suffolk County 2005)

Suffolk County Family Court held that it had authority under §1056(1) to issue an order of protection against the grandfather who was a respondent in this matter until the child turned 18 years old. The court found that the language in § 1056(4) does not limit such an order to a person who is not related to blood or marriage, it simply extends that ability to non-relatives. The Court pointed out that since it has the power under custody and visitation cases to issue an 18-year order, that it most certainly has the same power in child abuse and neglect cases.

NOTE: The problem with the wording between §1056(1) and §1056(4) has been argued for over a decade with different courts interpreting this differently.

Streetman v Brown 11 AD3d 753, 783 NYS2d 126 (3rd Dept. 2004)

Three Clinton County children had been placed in separate foster homes due to parental neglect. The maternal grandmother lived out of state and sought custody of the oldest child. The mother, who was in jail, supported the placement. The father, who was under a no contact order, did not support the placement and neither did DSS. The grandmother had offered a homestudy from Maryland that was favorable but both the lower court and the Appellate Division agreed that it was not in the child's best interests to be placed with the grandmother. Although there were extraordinary circumstances given the parent's behavior, the grandmother was not a suitable placement for the child as compared to foster care. The child is 7 years old and has serious mental and emotional disabilities. Grandmother has resided with her current husband for over 25 years. When her own children were young, he was an active alcoholic. She also had a difficult relationship with an ex-husband. Due to these problems, she had given up custody of her own daughter- this child's mother - when she was less than 2 years old. This child was out of her care for over 5 years and she only visited the child 2-3 times during that period. The court properly considered this grandmother's failure to control or change the environment in which her own children were raised. Her current husband had serious health problems and would be the child's caretaker when she worked. It was not error for the court to fail to order alcohol evaluations as it was not contested that the husband had stopped drinking a few years earlier.

Susan FF v Maryann FF 11 AD3d 757, 783 NYS2d 669 (3rd Dept. 2004)

Sometime after Clinton County Family Court had made a neglect finding and placed two children in foster care, the maternal grandmother petitioned for custody. The Third Department affirmed the Family Court's dismissal of the grandmother's petition for failure to establish a prima facie case. Family Court did not err in admitting three prior indicated reports from the 1980's regarding the grandmother's care of her own children. These reports, although remote in time, were relevant as to the grandmother's history of ignoring her own children's best interests. Further the grandmother had recently assaulted the children's mother in the presence of the children. The grandmother's residence is actually owned by her elderly boyfriend who is in poor health. One of the children would have to share a room with a 27 year old disabled uncle. The grandmother is unemployed and is in poor health herself. She relies on her elderly ill boyfriend for transportation she does not have a driver's license. She also has a bad temper. She is not strongly bonded with one of the children. The court did not err by failing to order forensic evaluations of the grandmother and her boyfriend. They did not ask for the evaluations and there was a homestudy performed. Although continued foster care placement is not ideal, granting this grandmother custody is not in the children's best interests.

Matter of SH 6 Misc2d 851, 788 NYS2d 575 (Family Court, Onondaga County 2005)

Onondaga Family Court granted a motion under FCA § 1039-b regarding both parents in this matter. The court had found that the child was neglected as well as severely and repeatedly abused. The father had been convicted of Sodomy in the Third Degree regarding this child's half sibling and he had also had a previous termination regarding one of his children. The court ruled that the agency had the burden to show that the facts warranted a finding of aggravated circumstances and that then the burden shifts to the respondents to show that efforts at reunification would be in the best interests of the child. The court ruled that the burden of proof was clear and convincing (other courts have ruled it to be preponderance). The father sodomized and sexually abused the stepchild over a three-year period and the mother was aware of the activity and did not protect the child or seek help. DSS proved a prima facie case under two grounds, given that the father had been criminally convicted of sodomy and also had a prior TPR. The father argued that there should not be a "no reasonable efforts" order against him regarding his own child as he was involved in a sexual offenders program in prison. The court did not give this much weight, as an experienced or even certified sex offender therapist did not run the program. The mother had admitted that she knew her son was being sexually abused and therefore she also severely abused the child. She was receiving services at the time that this was occurring but she told no one – she did not even call the hotline anonymously. The mother claimed that she was a victim of domestic violence and that she was now participating in services. However, she had recently asked a caseworker why the father could not return to the home. The court ruled that there was clear and convincing evidence to issue a "no reasonable efforts" order regarding both of the parents and ordered that a permanency hearing be held within 30 days.

Matter of Chelsea K., 15 AD3d 794, 790 2d 273 (3rd Dept. 2005)

The parents in this Clinton County matter consented to a finding of neglect but appealed the court's dispositional decision to place the child in care. One of the allegations in the petition was that the respondents had sexually abused an unrelated 12-year-old child who was not a subject of the petition. This particular allegation had not been consented to in resolving the neglect petition. However during the dispositional hearing, the caseworker testified to some statements that the 12-year-old had made about the incident and also testified that the respondent parents had been indicted for that incident. The court did, at least partially, rely on this information in the dispositional decision. The Third Department ruled that hearsay is admissible in a dispositional hearing and no objections were made to this material. There was also no conflict of interest given that the father's attorney had previously represented the same 12 year old's father in other matters. This issue had been raised early in the proceedings and all the parties had determined that the father of the 12-year-old was not going to be called as a witness.

IX. USE OF REPORTS

John A. v Bridget M., 16 AD3d 289, 791 NYS2d 421 (1st Dept. 2005)

The First Department reviewed a New York County hotly contested private custody case between the parents of twin girls. The mother claimed that the father was sexually abusing them and the father claimed that the mother had fabricated the allegations. The lower court had changed custody to the father finding no merit in the allegations. The case had interesting facts and resulted in a multitude of opinions from the bench, but in the midst of the court's comments was a reference to the CPS worker who testified as the investigation and "unfounding" of the report against the father.

Matter of J.H. v K.H. 2005 WL 1310084 (Family Court, Westchester County 2005)

In a contested private custody case, DDS records and a caseworker were subpoenaed regarding unfounded reports made against the father. DSS moved to quash the subpoenas regarding unfounded reports and the court ruled that SSL § 422(4)(a) allows the court to order the production of "unfounded" material and is not limited to "indicated" or "pending" reports.

NOTE: This decision is another in the continuing trend of courts who are ordering local DSS to turn over unfounded material and to testify about unfounded investigations. These decisions are being made under a variety of interpretations of various confusing statutes. This decision appears to be in direct conflict with how prior cases have interpreted SSL § 422(5) and FCA § 651-a. Local DSS attorneys are continuing to spend an inordinate amount of time responding to and arguing against this growing trend. Courts and litigants are frustrated with what they view as pointless resistance by the agency to disclose records relating to the parties' issues before the court. This area needs more statutory clarity!

X. FAIR HEARINGS

Matter of Diane P., FH #4005406Q (6/29/04)

New York Foundling hired a woman who had an 11 year old indicated child abuse report. The incident had also resulted in a Family Court adjudication of abuse. The employee challenged the indication in a fair hearing. Relying on the Family Court adjudication, the ALJ continued the indication, but ruled that the indicated report was not "reasonable related" to employment in childcare or as a foster or adoptive mother and therefore will not be revealed to any employer. The ALJ claimed that the woman had accepted responsibility and demonstrated remorse. She had been married for 10 years and lived with her husband and son.

Matter of Sandra V., 9 AD3d 891, 779 NYS2d 375 (4th Dept. 2004)

The plaintiff in this matter brought a CPLR Article 78 action against OCFS relative to fair hearing on an indicated report. The Fourth Department found that the decision to refuse to unfound the indication was rational and supported by substantial evidence. Hearsay evidence of maltreatment is relevant and probative and can constitute substantial evidence. Here there were two conflicting versions of the events and although the subject's version may be viable, the court will not substitute its judgment where there was a rational supported decision to the contrary.

Matter of Castelloux v OCFS, Erie County DSS and SCR 16 AD3d 1061, 791 NYS2d 755 (4th Dept. 2005)

The Fourth Department rejected an Erie County appellant's Article 78 claim that an indicated CPS report should have been unfounded by the OCFS fair hearing. The Appellate Division found that the father had struck his son, causing lacerations and bruises. A one-time incident of excessive corporal punishment is sufficient for an indicated report where the child was both physically and emotionally harmed by the father's behavior. Hearsay evidence is admissible in a fair hearing.

Priday v Erie County DSS and OCFS 17 AD3d 1013, 794 NYS2d 213 (4th Dept. 2005)

An Erie County woman brought an Article 78 petition to annul the denial of her request to unfound an indicated CPS report, or in the alternative, to rule that it was not reasonably related to her employment with children. The CPS report indicted that she had ingested Valium in an apparent suicide attempt and that she had sent her 10-year-old daughter to a pizzeria alone at night. The woman now wanted to obtain employment in the child care area. She argued that she had had a "bad reaction" to the drug. DSS progress notes showed that she had admitted that it had been a suicide attempt and that she admitted sending the child out alone at night. Although there are portions of the decision that refer to her having a bipolar disorder that is unsupported by the record, that does not warrant annulment of the otherwise supported determination not to unfound the report.

REMOVAL ISSUES

By Margaret A. Burt, Esq.

ALWAYS MUST CHECK FOR RELATIVE OPTIONS MUST PLACE SIBS TOGETHER UNLESS EXPERT OPINION DOCUMENTED

FCA 1021 Consent (do not confuse with voluntary placements under SSL 384-a)

- receipt for child - best to get if you can
- written consent to DSS, cops – must give “rights” and contact info to parent
- must have decided child is abused or neglected
- copy of the signed consent must be attached to petition
- petition must be filed w/in 3 court days - can return child, if neglect
- must do a 1027 one day after petition filed and get a court order that finds reasonable efforts to prevent, best interests – parent can have 1028 if no attorney to assist at 1027

FCA 1022 Pre-Petition Court Order

- parent not present to ask for consent or asked for consent and refused
- must notice parent of intent to seek court order if can be located
- court must hear on the day DSS asks and order must find imminent danger, reasonable efforts to prevent, best interests – petition filed 3 court days after
- not enough time to petition - enough time/safety to seek court order
- federal court decisions and Court of Appeals say DSS should do 1022 instead of 1024 if time and safe – must justify why not
- if parent not present or without attorney at 1022 (most common) then court must hold 1027 one day after petition filed, if no attorney at 1027, can still have a 1028

FCA 1024 Emergency Removal

- can be done by DSS, cops (not docs or hospitals- they only “hold” until CPS takes action or at most until next business day)
- parents can be present or not
- must have decided child abused or neglected and imminent danger and not enough safe time for 1022
- must tell parent of rights, if present - give notice of 1028
- must inform court ASAP and must file petition by next court day - court can grant 3 days but only upon order with “good cause” shown
- may return child if neglect
- imminent danger. reasonable efforts, best interests must be proven and in court order

FCA 1027 Post Petition Hearing

- always done if no court ordered the removal - so do this with all 1021 and 1024 removals
- also done where 1022 removal but parent was not at 1022 or was there but had no attorney
- must show imminent risk
- court can place in foster care or not and can also place with relative, “suitable person” or other parent under Art. 10 or Art. 6
- court can issue o/p along with or instead of
- court can review issues re medical exams and photos
- court often issues temporary orders re visitation

FCA 1028 Request for Return

- parent can request at any time after a removal unless already had a 1027 with attorney present
- if asked, court must grant w/in 3 court days
- focus is on imminent risk - sometimes used to force issues of visitation, relatives or o/p alternatives
- parent can really always ask for any order to be modified in any event

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The CLE roster and evaluation should be FAXed to:

Marti Murphy @ 518-472-5133

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Continuing Legal Education Evaluations

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	<u>Poor</u>	<u>Average</u>	<u>Excellent</u>		
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How would you rate the instructor? Margaret Burt, Esq.	1	2	3	4	5
How would you rate the quality of this tele-training?	1	2	3	4	5
How would you rate the written materials?	1	2	3	4	5

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