NICHOLSON
PLUS TEN YEARS

CASE REVIEW

LEVELS OF INTERVENTION

REFERRAL/INVESTIGATION

Contact/interview of source(s)

Interviews of parents, children, witnesses, when available

Photographs where possible

Police reports when available

RISK/SAFETY ASSESSMENT

Factors in DV case as in any case

- Inadequate guardianship:
- Number of incidents
- Impact on children
- Injuries to the children
- Destruction of home/property
- Other issues such as condition of house, substance abuse, education, supervision of the children, food/clothing/shelter adequacy

Primary concern of Child Protective Services: safety of children

REASONABLE EFFORTS/SAFETY PLANNING

- Can we keep the children safe in the home?
  - Order of Protection via Family Offense Petition
  - Voluntary exit from home by offending parent
  - Voluntary exit from home by non-offending parent with children
  - Preventive services
- If we can’t keep the children safe in the home can we find another safe place for the non-offending parent and children to go?
  - ABW
  - Emergency shelter
  - Another family member or friend
  - Preventive services
- If we can’t keep the children with the parent, is there a relative or suitable person who can provide a safe place for the children while DHS works with the parent.

Court Involvement

Neglect Petition with Order of Supervision

- File a petition with an Order of Protection to keep the child with the non-offending/less offending parent and keep the offending parent away.

Neglect Petition with Removal

- Children placed with relative or suitable person
- Children placed in foster care

Dispositions

- Order of Supervision/Out of Home Placement
- Order of Protection
- Services/Dispositional Plan

Nicholson v Scoppetta

3 N.Y.3d 357, 2004 N.Y.

Court of Appeals decision regarding domestic violence and neglect answering the three questions posed by the federal courts about the interpretation of New York State law.

Nicholson v. Scoppetta
Facts

- Plaintiff Sharwline Nicholson started a 1983 Class Action lawsuit which was joined to actions by other plaintiffs, Sharlene Tillet and Ekaete Udoh claiming that Administration for Children's Services (ACS) unlawfully interfered "with their liberty interest in the care and custody of their children…." USDC/EDNY certified 2 subclasses—the mothers and their children and imposed a preliminary injunction "prohibit[ing] ACS from carrying out *ex parte* removals 'solely because the mother is the victim of domestic violence' or from filing an Article Ten petition seeking removal on that basis."
- The Second Circuit found that "District Court had not abused its discretion in concluding that ACS's practice of effecting removals based on a parent's failure to prevent his or her children from witnessing domestic violence against the parent … [represented] a policy … that might raise serious questions of federal constitutional law". Ultimately the Second Circuit decided not to address the constitutional questions choosing instead to send 3 certified questions to the New York Court of Appeals to address as a matter of state law.

Nicholson v. Scoppetta

1. [Neglects] “Does the definition of a “neglected child” … include instances in which the sole allegation of neglect is that the parent or other person legally responsible for the child’s care allows the child to witness domestic abuse against the caretaker”
   - If the sole allegations are that the parent is a victim of domestic and the child has been exposed, then the answer is no.
   - The agency must show “proof of actual (or imminent danger of) … impairment to the child;
   - There also has 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.
   - “Imminent danger … must be near or impending, not merely possible.”

Nicholson v. Scoppetta

- The parent's actions or in-actions 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. Minimum degree of care may depend on "severity and frequency of the violence, and the resources and options available to" the parent.
- 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 and continued to allow the abuser access to her home and the children.
- 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. (MAB)

Nicholson v. Scoppetta

2. [Removals] Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent … constitute ‘danger’ or ‘risk’ to the child’s life or ‘health’ as defined in Family Court Act Sections 1022, 1024, 1026-1028?
   - Does emotional injury from witnessing DV = imminent risk?
   - Court of Appeals held that Family Court Act Sections 1022, 1024, 1026-1028 “create a ‘continuum of consent and urgency and mandate a hierarchy of required review’ before a child is removed from home.”

Nicholson v. Scoppetta

The continuum of consent and urgency

- FCA 1021: Child can be removed upon consent if the child is abused/neglected, “because ‘many parents are willing and able to understand the need to place the child … and because resort to unnecessary legal coercion can be detrimental”
- FCA 1027: “Where the circumstances are not so exigent, the agency should bring a petition and seek a hearing prior to removal”. The court “must balance … risk against the harm removal might bring, and it must determine … which course is in the child’s best interests”
- FCA 1022: If there isn’t enough time to file a petition, the next step is not to remove but to apply for an order under 1022.
- FCA 1024: Emergency removal without court order: 1024 should be used in “only the very grave circumstance of danger to life or health”. [see page 22 of 23]

Nicholson v. Scoppetta

3. [Quantum of Proof] Does the fact that the child witnessed such abuse suffice to demonstrate that 'removal is necessary' or that 'removal was in the child's best interests,' or must the agency offer additional particularized evidence to justify removal?

- How much evidence is enough?
  - There are no presumptions that a child witnessing DV is harmed such that he/she could be deemed neglected or at imminent risk (though the Court acknowledges the harmful effects of DV on children)
  - Generally, more than one incident must be shown
  - Expert testimony is not necessary.

Nicholson v. Scoppetta

DV + ? = Imminent Risk

- 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. (MAB)

Nicholson v. Scoppetta

- 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 in-actions 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.

Nicholson v. Scoppetta

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Isolated Incident Is Not Sufficient

If the only allegation is that the parent or other person legally responsible for the child's care allows the child to witness domestic abuse against the caretaker, it is not sufficient to prove neglect

Must show effect on child

Matter of Larry O., 13 AD3d 633 (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.

<u>Matter of Davin G.,</u> 11 AD3d 462 (2nd Dept. 2004)

- Father was found not neglectful where there was an isolated incident of domestic violence and
- Children were not present

<u>Matter of Daniel GG.,</u> 17 AD3d 722 (3rd Dept. 2005)

- There was a physical altercation between respondent and the child's grandmother.
- There was no evidence of any impact of incident on child and he ostensibly was not even in same room as respondent and grandmother when incident occurred.
- The incident, which did not cause physical harm to grandmother, was isolated and of short duration.
- The court contrasts another single incident case where neglect was found: **In re Richard T., 12 A.D.3d 986 (3rd Dept. 2004)**

<u>Matter of Imani B.</u> 27 AD3d 645, 811 NYS2d 447 (2nd Dept. 2006)

- It was not neglect to have loud verbal disputes in front of a 4 month old,
- There was no proof offered that the child's condition was in imminent danger of impairment.

Matter of Eustace B., 76 AD3d 428 (1st Dept. 2010)

- Mother was found not neglectful of her child who was a "being raised as a model person and student".
- The domestic violence incident was isolated and the relationship with the boyfriend had ended.
- The child had reported being "scared and nervous" during the isolated incident of domestic violence but the court found that this statement was not sufficient to show that the child's condition was impaired or in imminent danger of being impaired.

Matter of Chaim R., 94 AD3d 1127 (2nd Dept. 2012)

- Police were called to the home after the parents were arguing and fighting. When the police arrived, the mother was sitting calmly on the couch and the father was standing nearby holding the 7 month old. There was a 2 year old in the bedroom. Neither child was crying.
- No proof was offered that the children were impaired in any way during the altercation between the parents.
- Petitioner failed to establish by a preponderance of the evidence that the children's physical, mental, or emotional conditions had been impaired or were in imminent danger of becoming impaired as a result of the incident of domestic violence between the parents.

Failure To Exercise A Minimum Degree Of Care

What would a reasonable and prudent parent do?

<u>Matter of Paul U.,</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.
- Mother is neglectful when within a month after obtaining an order of protection to keep DV father away from her and child, she left child in care of father, she knew father to be violent and court cited that she violated **Nicholson** standard of a reasonable and prudent parent and she failed to shield child from violence and placed child with man she knew to be violent.

<u>Matter of Christine II.,</u> 13 AD3d 922 (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.

Matter of Shaylee R., 13 AD3d 1106 (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 Karissa NN., 19 A.D.3d 766, 796 N.Y.S.2d 442, (N.Y. App. Div. 3d Dep't 2005)

- Respondent’s actions constituted a departure from the minimum degree of care which should be exercised by a reasonable and prudent parent in order to "prevent a risk of impairment to the child or imminent danger of impairment"
- The proof before Family Court showed that respondent, who had been recently released from a drug rehabilitation program, arrived at a visitation with her daughter in a noticeably intoxicated state. When questioned about her condition by the grandmother--who cared for Karissa during respondent's hospitalization--respondent became belligerent, swore loudly at the grandmother in Karissa's presence and repeatedly attempted to physically wrest the child from the grandmother's arms. Karissa reacted to this exchange by crying and shaking visibly.
- Respondent's failure to testify permitted Family Court to draw the strongest inferences against her with regard to the evidence presented (see Matter of Commissioner of Social Servs. v Philip De G., 59 NY2d 137, 141, 450 NE2d 681, 463 NYS2d 761 [1983]),
- [The Court found] that the proof in this record sufficiently established that respondent's actions endangered Karissa's well-being and, therefore, substantiated a finding of neglect (see Family Ct Act § 1012 [f] [i] [B]; § 1046 [b] [i]; Matter of Richard T., 12 AD3d 986, 987, 785 NYS2d 169 [2004]; Matter of Mary Ellen P. v John R., 278 AD2d 750, 752, 718 NYS2d 442 [2000]; compare Matter of Daniel GG. , 17 AD3d 722, 722-723, 792 NYS2d 710, 711-712 [2005]; Matter of Shannon ZZ., 8 AD3d 699, 701, 778 NYS2d 205 [2004]).

<u>Matter of Michael WW</u> 20 AD3d 609, 798 NYS3d 609 (3rd Dept. 2005)

- Among other issues father is neglectful where while drunk he breaks into home in middle of the night and chokes mother and wrestles phone from her.
- The children were present and were visibly upset and frightened.
- The court cited *Nicholson*

Matter of Christopher B., 26 AD3d 431 (2nd Dept. 2006)

- The Second Department upheld a Suffolk County Family Court ruling that a mother neglected her child.
- The child had witnessed regular domestic violence and ongoing drug use by the father and
- The mother lacked awareness of how this behavior impacted the child.

<u>Matter of Angelique L.,</u> 42 AD3d 569, 840 NYS2d 811 (2nd Dept. 2007)

- Mother was neglectful where children had been returned home from foster care 3 weeks earlier and on unannounced home visit children were crying as they had just witnessed boyfriend hitting mother.
- There had been a history of domestic violence in the past; The boyfriend had threatened to beat the child and kill him,
- The child asked worker to be placed back in foster care and threatened to kill the boyfriend. The other child was crying hysterically.
- The mother was found neglectful as she minimized the DV and did not want boyfriend to leave home or to press charges . The court found that mother not acting as a reasonable and prudent parent by failing to protecting children from effects of DV.

<u>Matter of Andrew S.</u> 43 AD3d 1170 (2nd Dept. 2007)

- Father was neglectful where he had verbal dispute with mom in front of children and threw computer out the window some 12-15 feet away from mother and children were, also father attempted suicide while children were in the home and children were very upset and observed father being taken away in ambulance.
- The court stated: a "neglected child" is defined as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship" (Family Ct Act § 1012 [f] [i] [B]).
- ***<u>"Significantly, actual injury or impairment is not required, and a finding of neglect may be made provided a preponderance of the evidence demonstrates that the child is in 'imminent danger' of injury or impairment"</u>*** (*Matter of Salvatore C.*, 6 AD3d 431, 432, 774 NYS2d 373 [2004], quoting *Matter of Katie R.*, 251 AD2d 698, 699, 673 NYS2d 792 [1998]; see *Matter of Rakim W.*, 17 AD3d 376, 377, 793 NYS2d 76 [2005]).

Crystal R. v. James R., N.Y. Misc. 241 N.Y.L.J. 17 (N.Y. Sup. Ct. 2008)

- The degree and extent of family violence and the child's exposure to it, is an issue of fact for the trial court.
- It is unnecessary for the petitioner in this case to establish that Crystal or James R. witnessed the moment of contact of the violent act, as the facts show that they were in close proximity to the incident to witness its disturbing result. The credible testimony revealed that Crystal saw blood in her mother's hair and on her hands. Crystal may or may not have witnessed the phone leave her father's hand, or hit the back of her mother's head, however viewing the aftermath of the violence and its effects may be worse than witnessing the act itself. Clearly, it is not the awareness of the act causing their mother's Injuries, but the observation of her bleeding and crying that Impacts upon Crystal and James. See, *In re Tali W*., 299 A.D.2d 413, 750 N.Y.S.2d 104 (2nd Dept. 2002).
- The Mother acknowledged that the children were upset that she was injured insisting that she assured them it was an accident. Considering the respondent's line of reasoning, an inquiry regarding the degree of violence that occurred reveals that the assault upon Ms. D. was severe. She was kicked in the ribs, kicked is the leg and struck In the back of the head with a telephone hard enough to cause bleeding.

Crystal R. v. James R.

- [The mother's] determined focus on getting James R., Sr. back into the house in the face of Mr. R., Sr.'s admitted intention to hit her, (while denying his intent), confirms that the aid of the court is necessary to protect the subject children. Furthermore, the respondent hit Ms. D. and without knowing what injury he may have caused, saw fit to leave the children with their mother in the aftermath of that incident.
- The respondent argues that Crystal's "crying" as observed by the police officer, did not establish that she was emotionally harmed. The Court does not need actual injury to Crystal (nor James or Dennis) to find that Mr. R., Sr.'s acts of domestic violence on November 6, 2007 placed the children at imminent risk of physical, mental or emotional harm. See, *In re Tami G.*, 209 A.D.2d 869, 619 N.Y.S.2d 222 (3rd Dept. 1994).
- "To wait until the child shows signs of actual abuse or neglect would unreasonably endanger many children". Practice Commentaries to F.C.A. § 1012, by Douglas Besharov, McKinney's Consolidated Laws of New York, Annotated, Book 29A-Judiciary part I, at page 352.

Matter of Xavier II., 58 AD3d 898 (3rd Dept. 2009)

- There was a history of violence between the respondents. In 2005, the father, a large man, had grabbed the mother by the neck, pulled her hair and covered her mouth as the mother held her 2 year old child. He yelled at and cursed the police and dented their car and was subdued by pepper spray.
- The child told the caseworker that she had been scared and that the respondent had been “mean” to her mother. The father alleged that mother had tried to stab him and burned him with an iron.

Matter of Xavier II.,

- DSS helped the mother obtain an order of protection but the mother later got the order modified so that she and the children return to him. DSS then set up a safety plan for the children to live with their grandmothers and for the parents to get domestic violence counseling. 6 months later, mother punched father in the face. 3 months after that the mother had him arrested for domestic violence only to obtain his release from jail three days later by swearing that she had lied about his abuse of her.
- During this period, the mother became pregnant with her third child, the second child of the father's. The mother abused marijuana and cocaine, did not finish a recommended parenting class and obtained no prenatal care for her youngest child.

Matter of Xavier II.,

- The continuing domestic violence between the parties and the mother's failure to see the imminent risk to the children is neglectful.
- Per the Court: "Inasmuch as the evidence failed to show that the parents' domestic violence issues have been adequately addressed, and in light of the mother's inability to recognize the imminent threat that the paramour poses to her children (*see Matter of Aiden L*., 47 AD3d at 1090-1091), there is a sound and substantial basis in the record supporting Family Court's finding that the children were at imminent risk of impairment as a result of the mother's failure to exercise a minimum degree of care (*see Matter of Paul U*., 12 AD3d at 971)."

Matter of Celine O. 68 AD3d 1373 (3rd Dept. 2009)

- Mother appealed a finding of neglect against her. The Third Department affirmed the finding of neglect against the mother and her boyfriend.
- The children were 16 and 11; they were aware of the domestic violence by the boyfriend against their mother. The boyfriend began physically abusing the mother soon after he moved in. Although the children did not see the fighting, they heard it and saw the mother's injuries and feared for their mother's safety. In one incident, the mother sought medical attention and called the police from the hospital. She promised the police that she would take the children to a shelter but instead she returned home to the boyfriend who physically assaulted her again. A few days later, the children came home from school to find the mother and the boyfriend gone. The 16 year old found a note under his pillow to call 911 and he did, fearing for his mother's safety. The mother had driven out of state with the boyfriend and left the children unattended and with little food.
- The mother minimized her actions and lacked insight into the effect the incidents had on her children. The children were placed in the care of a grandmother.

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

- Mother was found to have neglected three children. She engaged in domestic violence with boyfriend in two incidents: she knocked out a window in one situation and smashed a car window, while intoxicated, in another. She left the children alone and unsupervised in another situation where there had been an altercation which resulted in broken glass from a thrown coffee pot on the floor. In that situation, she drove off and was convicted of driving with her ability impaired by alcohol.
- The children told the caseworker that they had witnessed many fights between the mother and her boyfriend where there was yelling, cursing and where the mother and her paramour had smacked, kicked and pushed each other.
- The violence sometimes occurred in front of the children and sometimes the mother was the one who instigated it.
- The Court found that this behavior was not that of a reasonably prudent parent.

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

- The court found a mother to be neglectful where she allowed her boyfriend to continue to reside in the home despite the domestic violence that the children observed.
- She refused the DSS offer of preventive services. The caseworker asked her if she would choose her boyfriend or her children and she hesitated in her answer and then said, “my children, I guess”.
- The children reported that the boyfriend frequently drank and there were constant arguments. During one argument, the boyfriend grabbed a gun from on top of the refrigerator and discharged it several times while the children watched. He also grabbed the three-year-old child’s wrist and with his pocket knife in hand and told the toddler that he would cut off her finger for picking her nose. Several times he locked the three year old out of the house at night for crying.
- The mother was a witness to her boyfriend’s extreme and violent behavior and she did not exercise the care of a reasonably prudent parent to protect the children.

Matter of Xiomara D., 96 AD3d 1239 (3rd Dept. 2012)

- The court granted summary judgment derivative neglect adjudication regarding a newborn. The child was the 6th child of the parents whose 5 older children were in foster care.
- There had been 2 prior findings of neglect 2 years earlier after the court found that the parents had committed mutual acts of repeated and escalating domestic violence in the children's presence.
- The parents had been ordered to participate in domestic violence and anger management counseling. Orders of protection had been issued that they were to stay away from her each. This child was conceived in violation of that order. The orders of protection expired after the birth of that child and the parents were now living with each other.

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

- Neglect was found: The father had a history of violent behavior and the mother continued her relationship with him and this affected the child.
- The father had raped the mother while the child was in the father's vehicle, attacked and choked the mother while the child was sleeping in the same house. The father's criminal history included assault, criminal contempt and endangering the welfare of a child.
- Both parents had consented when the child was a toddler to the court order that the father have no unsupervised contact with the child but in fact the father had continued contact with the child and lived with the child after the court order.
- The mother minimized the conduct of the father, continued her and the child's relationship with the father. The parents encouraged the child to lie and engage in deceit. Further the child's behavior in school deteriorated when the father was in the home and when the child was involved in the deceit of hiding the relationship but improved when she was removed from the home.

Matter of Jayden B., 91 AD3d 1344 (4th Dept. 2012)

- There was sufficient evidence that the children were in imminent danger of emotional impairment based on the domestic violence in the home. There were arguments in front of the children and the children were sometimes afraid. There was testimony from police officers that they arrived at the home where the mother and the respondent had been having a loud argument and had struck each other. The mother had a scratch on her neck which she said had happened while they were "fighting". The officer saw a one year old in a bedroom, crying, "shook up" and "scared". A neighbor testified to loud fighting at least once a week, as well as police at the home about once a month. The neighbor had also seen the mother and children locked out of the house. The day care provider testified that the 5 year old had told her about the fighting and she observed the mother to have a large bruise on her face which the mother claimed had happened in a bar. After the mother left, the 5 year old told the day care provider that the respondent had hit his mother.
- The child told the caseworker that he did not want to talk at the mother's because the mother kept walking in and out and could hear. The child told the caseworker that the mother and respondent fought often and the child's body language changed as he described the violence. He said that the respondent had locked the mother and the children out of the house. The child used dolls to demonstrate the fighting he had seen.

Matter of Diamond Tyneshia B., 109 AD3d 740 (1st Dept. 2013)

"The record shows that there was an extensive history of domestic violence between the mother and father, including an incident in which the father broke down a door and hit the mother in front of the child, causing the child to tell the father to "stop" (*Matter of Jeaniya W. [Jean W.]*, 96 AD3d 622, 946 NYS2d 476 [1st Dept 2012]). Further, there is unrefuted evidence that the mother repeatedly exposed the child to the risk of witnessing such violence by allowing the father to either visit or reside with them, despite the existence of an order of protection against him. The child's out-of-court statements about the incident she witnessed were corroborated by the mother's out-of-court statements and a domestic incident report (*see* Family Ct Act § 1046 [a] [vi])."

<u>Matter of Anthony FF.,</u> 105 AD3d 1273 (3rd Dept. 2013)

"The neglect finding as to all of the children is sufficiently supported by the proof in the record. This was not, as contended by the mother, a case where the sole allegation was that she had been the victim of domestic abuse witnessed by the children (*see generally Nicholson v Scoppetta*). Although Marcus C. apparently instigated the incident and acted violently toward the mother, there was also evidence that the mother, … was observed wielding a baseball bat and chasing Marcus C., who claimed she struck him with the bat. More significantly, there was further proof that following the incident, the mother minimized Marcus C.'s conduct and attempted to have charges against him dropped, placed partial blame for the incident on the children, permitted Marcus C. in her residence and around at least one of the children after the incident in violation of a court order, and instructed the child to keep Marcus C.'s presence a secret. The record amply supports Family Court's findings that there was a preponderance of evidence establishing an imminent danger to the children's well-being and that the mother failed to exercise a minimum degree of care (*see Matter of Dezerea G. [Lisa G.]*, 97 AD3d 933, 934-935, 947 NYS2d 847 [2012]; *Matter of Shalyse WW.*, 63 AD3d 1193, 1196, 879 NYS2d 644 [2009], *lv denied* 13 NY3d 704, 915 NE2d 1179, 887 NYS2d 1 [2009]; *Matter of Xavier II.*, 58 AD3d 898, 899-900, 872 NYS2d 561 [2009])."

Matter of Kadyn J., 109 AD3d 1158 (4th Dept. 2013)

- Mother was found to have neglected her children—8 and 9 years old by exposing them to domestic violence. The police had been called to the home on "numerous occasions" for domestic violence.
- On one occasion the police arrived to find a "trail" of wet blood from the hallway into the apartment where they observed a "huge puddle" of blood as well as mother's boyfriend with a bloody arm. Police found a hunting knife with fresh blood; both the mother and the boyfriend were intoxicated. The children were in the bedroom with the door open and were awake and watching TV.
- Although the children said they had slept through the incident, they described being traumatized by all the blood and by being forced to clean up the blood. The children described seeing previous acts of violence.

Matter of Heyden Y. (Miranda W.), 119 A.D.3d 1012 (3d Dep't 2014)

In a neglect proceeding, the petitioner bears the burden of establishing, "by a preponderance of the evidence, that the child[ ]'s physical, mental or emotional condition was harmed or is in imminent danger of such harm as the result of the parent's failure to exercise a minimum degree of care" (*Matter of Daniel X. [Monica X.]*, 114 AD3d 1059, 1060, 981 NYS2d 181 [2014] [internal quotation marks and citation omitted]; *see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]; *Matter of Josephine BB. [Rosetta BB.]*, 114 AD3d 1096, 1097, 981 NYS2d 212 [2014]).

In determining whether a parent has failed to exercise the requisite degree of care, we evaluate whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then [121] and there existing" (*Nicholson v Scoppetta*, 3 NY3d 357, 370, 820 NE2d 840, 787 NYS2d 196 [2004]; *see Matter of Afton C. [James C.]*, 17 NY3d 1, 9, 950 NE2d 101, 926 NYS2d 365 [2011]).

Matter of Heyden Y. (Miranda W.)

"Viewed cumulatively, the evidence of the condition of respondent's home (*see Matter of Draven I. [Jenlyn I.]*, 86 AD3d 746, 747-748, 927 NYS2d 686 [2011]), her decision to permit the child to stay with her and the father on weekends despite the fact that she knew or should have known about his ongoing drug use (*see Matter of Taliya G. [Jeannie M.]*, 67 AD3d 546, 546, 889 NYS2d 40 [2009]) and her participation in mutual incidents of domestic violence (*see Matter of Anthony FF. [Lisa GG.]*, 105 AD3d 1273, 1274, 963 NYS2d 483 [2013]; *Matter of Xavier II*., 58 AD3d 898, 900, 872 NYS2d 561 [2009]), coupled with the strong adverse inference permitted by her decision not to testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J*., 87 NY2d 73, 79, 661 NE2d 138, 637 NYS2d 666 [1995]; *Matter of Stevie R. [Arvin R.]*, 97 AD3d 906, 907, 947 NYS2d 832 [2012]), amply support Family Court's finding of neglect (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i])."

Matter of Hailey XX. (Angel XX.), 2015 (3d Dept. N.Y. App. Div.)

- Respondent repeatedly became involved in and remained in abusive situations, and she failed to take steps to protect the children from witnessing the resulting domestic violence. Respondent and her paramour had several incidents of domestic violence that resulted in police being summoned, and then respondent would not cooperate in limiting the paramour's access to the children via a protective order or pressing charges. Although the paramour was the initial aggressor in most incidents, Family Court also credited the proof that respondent pursued and perpetrated violent acts on the paramour in the presence of the children.
- The house was also filthy and “the youngest child in a sleeper encrusted with food, bottles with curdled milk, diapers on all the children that needed to be changed and that smelled so strongly that they were characterized as "atrocious," and children not appropriately dressed and so dirty that caseworkers took turns trying to clean them.”

Nicholson Does Not Shield The Aggressor

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

- 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.
- 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 Emily I., 50 AD3d 1181 (3rd Dept. 2008)

- Mother obtained an abuse finding where she shot the father while the father was holding their 4 year old daughter.
- The mother told father she would shoot him even if child harmed
- She seriously injured father

<u>Matter of Errol S.,</u> 66 AD3d 579 (1st Dept. 2009)

- A Bronx father neglected his children by committing acts of domestic violence against the children's mother in their presence. The acts included threatening the mother with a firearm. One of the children witnessed the acts, another child was present but asleep nearby and therefore both were at imminent risk of harm.
- Per the Court: The finding of neglect was supported by a preponderance of the evidence, including testimony that respondent committed acts of domestic violence against the mother often in the children's presence (Family Ct Act § 1012 [f] [i] [B]).
- These violent acts, including threatening the mother with a firearm, which was witnessed by one of the children while the other child slept nearby, exposed the children to an imminent risk of harm (*see Matter of Elijah C.*, 49 AD3d 340, 852 NYS2d 764 [2008]; *Matter of Andrew Y.*, 44 AD3d 1063, 1064, 844 NYS2d 408 [2007])

Matter of Gianna CE., 77 A.D.3d 408 (1st Dept. 2010)

- The finding that the two-month-old infant was in imminent danger of physical injury as a result of respondent father's failure to exercise a minimum degree of care is supported by a preponderance of the evidence showing that respondent had engaged in a violent altercation with the infant's mother, punching her repeatedly in the face and head, while she was only three feet away from the infant.
- At that time, the infant was receiving oxygen while lying on a bed and connected to a heart monitor, having been released from the hospital days earlier (*see generally Nicholson v Scoppetta*)

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

- Father neglected by acts of domestic violence against the children's mother and threatened to kill one of the children by placing two knives at the child's throat.
- Even though this was a single act of domestic abuse it was sufficient given how strongly impaired his judgment was in exposing the child to substantial harm.

Matter of Briana F., 69 AD3d 718 (2nd Dept. 2010)

- Suffolk County Family Court was affirmed for adjudication a father to have neglected his children and ordering that he undergo mental health and substance abuse evaluations.
- The father had demanded that the child go and get him a knife and then held the knife to the mother's throat in front of the child which impaired or creating an imminent danger of impairment of the child.
- This event also merited a finding of derivative neglect regarding the other child

Matter of Shiree G., 74 AD3d 1416 (2nd Dept. 2010)

- Respondent neglected children when he grabbed the pregnant mother, threw her into a wall. The mother grabbed a knife and held it to the respondent's throat.
- The children were present and were terrified, screaming and crying, hysterical and trying to get to the mother.

Matter of Shiree G.

- Per the Court: "[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" by unreasonably inflicting harm or a substantial risk thereof (*Nicholson v Scoppetta*, 3 NY3d 357, 368, 820 NE2d 840, 787 NYS2d 196 [2004] [citation omitted]; *accord Matter of Alyssa OO. [Andrew PP.]*, 68 AD3d 1158, 1159, 889 NYS2d 752 [2009]; *see* Family Ct Act § 1012 [f] [i] [B]).
- Here, given the caseworker's testimony regarding the children's terrorized response to the incident of domestic violence instigated by respondent against the mother, a sound and substantial basis supports Family Court's conclusion that respondent's actions endangered the well-being of the children [705] and, thus, constituted neglect (*see Matter of Michael WW*., 20 AD3d 609, 611-612, 798 NYS2d 222 [2005]; *Matter of Karissa NN*., 19 AD3d 766, 766-767, 796 NYS2d 442 [2005]; *Matter of Richard T*., 12 AD3d 986, 987-988, 785 NYS2d 169 [2004]; *cf. Matter of Alyssa OO. [Andrew PP.]*, 68 AD3d at 1160-1161).

<u>Matter of Ndeye D.,</u> 85 AD3d 1026 (2nd Dept. 2011)

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

Matter of Ajay Sumert D., 87 AD3d 637 (2nd Dept. 2011)

- Father hit the mother in the face while the 2 year old child was present. The blow was so hard that the mother could not move her jaw or chew afterwards. The child began crying when the father hit the mother. A month later while the mother was holding the child, the father punched the mother in the stomach, cursed her and told her he would kill her if she left.
- These acts in front of the child placed the child in imminent danger of impairment.

Matter of Ariella S., 89 AD3d 1092 (2nd Dept. 2011)

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

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

- Father neglected his daughter when he, in the mother's apartment in violation of a stay away order, choked the mother during a physical altercation. While he choked her, he stated that he wanted her dead.
- The child was standing right behind him screaming and crying. A neighbor woke up hearing the commotion and heard the child screaming.

Matter of Kelly A., 95 AD3d 784 (1st Dept. 2012)

- Children were found to be neglected by the mother based upon a showing that the mother attacked the father in the presence of the children. She hit him over the head multiple times when the father was bending down to pick up the 1-year old. The father passed out due to the mother's attack and the 6 year old, crying, tried to help her father by tending to his wounds.
- When the caseworker talked to the little girl over the next weeks and months about the incident, she would become "visibly upset and emotionally distraught."

Matter of Jeaniya W., 96 AD3d 622 (1st Dept. 2012)

- A father was found to have neglected his 3 year old daughter by hitting the child's mother in the head during a heated argument in a van with the toddler present. The father and mother exited the car and continued to fight. The father hit the mother several more times in the face. He broke her nose, bruised and bloodied her face. Bystanders had to intervene.
- The child told the CPS worker and a social worker that she saw her father hit her mother in the face. Witnesses described the child as being sad and upset when she talked about what she saw. A child protective specialist and a licensed clinical social worker both testified that the child consistently maintained that she saw respondent strike her mother in the face. The child was reportedly sad and upset when recounting the incident.
- Under these circumstances, the court properly found that due to respondent's actions, the child was placed in imminent risk of physical, mental, and/or emotional harm, and had actually suffered emotional harm by what she had witnessed (*see* Family Ct Act § 1012 [f] [i]; *Matter of Jared S. [Monet S.]*, 78 AD3d 536, 911 NYS2d 339 [2010], *lv denied* 16 NY3d 705, 944 NE2d 1151, 919 NYS2d 511 [2011])

Matter of Imena V., 91 AD3d 1067 (3rd Dept. 2012)

- Father was found to have neglected his children where he engaged in repeated domestic violence against the mother and this was often witnessed by the children. In one incident he pinned her to the floor and forcibly removed her clothing against her will while two of the children were present.
- One child described an incident where the father hit the mother in the face, threatened to kick her in the face and slammed her finger in the door. This child expressed fear for her mother's safety and indicated that this scared her.
- Another child said that the father "would not stop smacking his mom" and described an incident where the father punched the mother into a wall and that child said he had tried to push his father away from his mother to protect her.

Matter of Jadalynn HH., 93 AD3d 1112 (3rd Dept. 2012)

There was a finding of neglect against a father:

- When the mother was 7 months pregnant with this child, the father tackled her, put her in a headlock and punched her in the stomach such that she required medical attention.
- After the child was born, he restrained the mother in a chair, screaming at her. He hit her in the face while he was holding the baby.
- There were prior family court and criminal court findings which established the father's continuous pattern of acute domestic violence on both adults and children and in violation of orders of protection.

Matter of Nia J., 107 A.D.3d 566 (1st Dept. 2013)

- Respondent-Mother was found to have neglected Leeana and Shamiah by engaging in an altercation with a man in front of the children while she held two knives.
- Contrary to respondent's contentions Shamiah's out-of-court statement that respondent was holding two knives while she argued with a man was sufficiently corroborated by the security guard's testimony that he saw respondent holding a knife when he arrived at respondent's apartment (*see Matter of Aliyah B. [Denise J.]*, 87 AD3d 943, 943, 930 NYS2d 2 [1st Dept 2011]).
- The security [2] guard's observations that the children were sitting on the bed and "appeared to be crying," and that one child "was shaking from the situation," is sufficient to demonstrate by a preponderance of the evidence that their emotional well-being had been impaired by the altercation they had just witnessed (*see Matter of Jessica* [448] *R.*, 230 AD2d 108, 111-112, 657 NYS2d 164 [1st Dept 1997].)

Matter of Amodea D., 112 A.D.3d 1367 (4th Dept. 2013)

- Father was found to have neglected his children; he kicked mother in the face and choked her in the presence of one child and with the other child nearby. The child who witnessed the incident told the caseworker that she was “very sad and scared” when she saw her mother’s bloody face. Both children told the caseworker that they were afraid of their father.
- Family Court's finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1345, 938 NYS2d 692 [2012]). The court found: “that the children's proximity to the altercation, "together with the evidence of a pattern of ongoing domestic violence in the home, placed [the children] in imminent risk of emotional harm" (*Jayden B.*, 91 AD3d at 1345).”

Matter of Carmine G., 115 AD3d 594 (1st Dept. 2014)

- Father neglected the child by verbally and physically engaging with the child's mother while the child was in the home. The child was aware of the violence.
- The child made statements to the caseworker that he heard his parents yelling and fighting. The mother was injured and her injuries, observed by law enforcement and the caseworker, corroborate the child's statements.

Expert Testimony Not Required

The *Nicholson* Court 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.

<u>Matter of Elijah C.,</u> 49 AD3d 340 (1st Dept. 2008)

- Father is neglectful where he is "much larger" than the legally blind mother and he committed acts of domestic violence against her in front of child
- He exposed child to imminent risk of harm
- No expert needed to prove the harm.

Matter of Enrique V., 68 AD3d 427, (1st Dept. 2009)

- A Bronx father neglected his children when he committed acts of domestic violence against the mother in their presence.
- "No expert or medical testimony is required to show that the violent acts exposed the children to an imminent risk of harm."

Matter of Niyah E., 71 AD3d 532 (1st Dept. 2010)

- A Bronx father neglected his daughter by engaging in domestic violence against the child's mother in the girl's presence.
- No expert or medical evidence needed to be presented to prove the risk to the child in these circumstances.
- The child was appropriately released to her mother under agency supervision.

Matter of Aliyah B., 87 AD3d 943 (1st Dept. 2011)

- A preponderance of the evidence supports the court's finding that the mother neglected her children by committing acts of domestic violence against the children's father in the children's presence (*see* Family Court Act § 1012 [f] [i] [B]; *Matter of Enrique V. [Jose U.V.]*, 68 AD3d 427, 888 NYS2d 747 [2009]).
- The out-of-court statements made by one of the children regarding the mother's attacks on the father were corroborated by the father's testimony, the responding police officer's testimony, and the out-of-court statements of the mother's daughters (*see Matter of Nicole V*., 71 NY2d 112, 118-119, 124, 518 NE2d 914, 524 NYS2d 19 [1987]).
- "No expert or medical testimony is required to show that the violent acts exposed the children to an imminent risk of harm" (*Enrique V*., 68 AD3d at 427).

Resources

- http://www.unicef.org/protection/files/BehindClosedDoors.pdf
- http://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html
- http://www.cnn.com/2014/09/10/living/impact-of-domestic-violence-on-children-parents/
- http://acestudy.org
- http://www.ncjfcj.org/sites/default/files/Childrens%20Exposure%20to%20Violence.pdf
- http://www.nctsnet.org/content/children-and-domestic-violence
- http://socialwork.wayne.edu/edithharris.php
- https://www.childwelfare.gov/topics/systemwide/domviolence/impact/children-youth/
- http://www.ayamm.org/english/Violence%20against%20women%203.pdf