SELECTED CHILD WELFARE CASELAW

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REMOVALS

Matter of Lucinda R., __AD3d __, dec'd 5/17/11 (2nd Dept. 2011)

In a case that has the NYS child welfare world buzzing, the Second Department reversed Queens County Family Court and ruled that a respondent mother was entitled to a FCA § 1028 hearing when the court ordered the children to be placed with a non respondent father while the Art. 10 petition was pending. The Appellate Court found that the lower court's placing of the child with the non-respondent parent constituted a "removal" by the court even though the children were not placed in the care of ACS. The children, 6, 4 and 9 months were wandering NYC streets alone in the early morning hours in February when a police officer spotted them. ACS placed the children in foster care on an emergency basis at 3:30AM that morning and then filed a neglect petition against the custodial mother. The court "paroled" the children to the care of the non-respondent father who lived with his mother, the children's grandmother. (The decision does not mention, but it has been indicated that the father had also filed an Art. 6 petition) Four months later, the mother orally moved for a FCA §1028 hearing, arguing that the children could now be safely returned to her care while the Art. 10 was pending. The lower court ruled that she was not entitled to a §1028 – and the required the 3 day time period - as the children were not "removed" given that they had not been put in foster care. The AFC moved for a FCA §1061 hearing to modify the court's order regarding the placement with the non respondent father but that hearing was adjourned repeatedly, for over a year and a half and was not ultimately held until the day of the oral argument of this appeal! While the appeal was pending, the lower court did finally release the children to the mother's care, some 20 months after the children were removed and 16 months after the mother had asked for the §1028.

The issue is one likely to occur again so despite the children having been retuned, the matter should not be ruled moot. The Appellate Court analyzed the word "removal" as it is used in the various statues in the child welfare area and determined that it does not always refer only to a placement in foster care. It can refer to governmental interference such as when a child is taken from their home by local government or by courts. Since the court ordered the children to live with the father against the mother's wishes, it was in fact a "removal" from the mother that entitled the mother to a FCA § 1028 hearing within 3 days of her request.

(**NOTE:** The troubling issue that has everyone talking is how what would normally be a custodial best interests analysis between two parents now becomes an "imminent risk" standard that benefits the respondent parent. The non-respondent parent who does the "right" thing by seeking custody upon learning of accusations of neglect will now have a higher burden of proof if the custodial parent opposes. Why should the respondent parent maintain custody if there isn't proof of imminent risk but there is the requisite best interest that would normally provide the other parent with Art. 6 custody?)

Matter of Miner __Misc 3d ___ reported NYLJ 7/7/11 at 3 (Family Court, Oswego County 3/28/11)

Oswego County Family Court weighed in on the ongoing debate on the rights of non-respondent parents. The respondent mother had consented to the children's placement in care and had made admissions that the children were neglected by her. The non-respondent father sought placement of the children and the court placed with him as an Art. 10 custodian. The court found that when a parent is not charged with the children's neglect or abuse and no evidence is presented as to abandonment or unfitness , there is a presumption of suitability for placement. The court found that the test should not be best interest but extraordinary circumstances. The question for the court should be if the non- respondent parent is "fit". Here, although there are some hygiene and safety issues and there have been transportation and appointment scheduling problems, there was no proof that the father was "unfit." The father came from out of state when he heard the children had been placed in foster care and had worked with the local DSS for months to follow recommendations to set up a home and services for the two children who had special needs. He wants to care for the children and even the fact that the children are not particularly attached to him should not be a bar to the children being with a fit parent over foster care. The children had been in care about a year when the court ordered that they be placed with the non-respondent father.

Matter of Kaitlyn B., __AD3d__, dec'd 5/31/11 (2nd Dept. 2011)

Suffolk County Family Court correctly dismissed a "nonparty's" request for a §1028 hearing as "untimely" when it was requested some 14 months after the child had been placed in foster care.

Matter of Leroy R. ___AD3d___ dec'd 5/10/11 (1st Dept. 2011)

The First Department reversed a Bronx County Family Court's decision in a FCA §1028 hearing to release a child to the respondent father. The lower court had ruled that although the child was at imminent risk if released to the mother , there was not such risk if released to the father provided there was a no-contact order regarding the mother. The lower court had ordered that ACS work with the father to make appropriate arrangements to have the child cared for without contact with the mother. The First Department strongly disagreed, as there was "disturbing testimony" of the father's behavior. The father told the caseworker by phone that she was a "bitch" and that he would "fucking kill" her if she took his child. He told hospital personnel that he wanted to kill everyone at the hospital and everyone in the world. The hospital social worker was so afraid that she locked herself in her office. On the day of the hearing, the father was heard at the courthouse saying that he would "kill all the motherfuckers" associated with taking his son and that he would "get" all the workers and the lawyers on the case. He specifically said that he would "gut the pretty one like a fish" - referring to the ACS caseworker. The father also told the mother not to speak to the caseworkers and not to move off the bench while they waited for the case to be called.

This behavior of the father "raises questions" about how the workers would be able to work with the father to make "appropriate arrangements" without themselves being at risk. His behavior was "hostile and hateful" and suggests that a placement with the father may be as much of an imminent risk as placement with the mother. Any doubt concerning the father's conduct must be resolved in favor of protection of the child.

Camreta v Greene dec'd 5/26/11 (US Supreme Court 2011)

In a disappointing "non-decision", the US Supreme Court , did not rule on the merits of an appeal by county officials from the 9th Circuit. A CPS worker and county deputy sheriff appealed from the 9th Circuit decision that their interview of a 9 year old girl at her school in connection with allegations of sexual abuse violated her 4th amendment rights regarding unlawful seizure when the school interview was conducted without a warrant, parental consent or exigent circumstances. Although there were no money damages awarded as the lower court had found the officials immune due to the fact that the prior law in this area had not been clear, the lower court indicated that it now clearly ruling so that

officials would be on notice for the future that such interviews of children were in violation of the constitution. Since this decision had far reaching impact on the child welfare system, most certainly in the 9th Circuit, the officials appealed to the US Supreme Court. Some forty states (not NYS) joined in the plaintiffs brief. The child did not cross petition but there were many amicus briefs supporting the 9th Circuit decision as well. The Court made no ruling on the merits, first commenting that the officials had been found immune and therefore were not harmed and as such, generally most such appeals are not heard, In any event, the Court found that this case is now moot as the child plaintiff not longer has any stake in the lower court's holding. She is soon to be 18 and she needs no protection from any interviewing practices of the officials. There is no controversy to review as the behavior complained about will not again occur to her. The Court did vacate the 9th Circuit decision since the officials were in effect denied an opportunity to have the case reviewed which will now as the Court indicated "clear the path for re-litigation". Hold tight – of course this issue will now have to come back again!

Matter of Alan C., __AD3d__, dec'd 6/14/11 (2nd Dept. 2011)

The Second Department reversed Kings County Family's Court's denial of a respondent father's FCA §1028 request for a return of a child. The Second Department indicated that the lower court had found that the agency had not made reasonable efforts to prevent the placement in that the agency did not explain offered services to the father and then held that it against him when he refused the services. Further, the lower court also based its refusal to return the child on bruises the child had sustained. However the father had explained that the bruises were accidental and this was corroborated by a school guidance counselor who testified that the child engaged in aggressive play fighting with his friends. There was no proof that this explanation was not true. Lastly, ACS had waited 6 weeks after observing the bruises on the child before claiming imminent risk and there had been no further injuries in the meantime. ACS failed to show that this child was in imminent danger.

Matter of N. Children __AD3d__, dec'd 7/12/11 (2nd Dept. 2011)

The Second Department ruled that the Kings County Family Court erred in making a summary judgment finding of neglect based primarily on the evidence presented at a FCA §1028 hearing. Most of the evidence admitted was hearsay and as hearsay is not admissible at a fact finding absent a recognized exception, it

cannot be used to support a summary judgment. Also the mother had no right to a summary judgment dismissing the petition as a §1028 hearing occurs before any counsel has had discovery and prepared for a fact finding.

GENERAL ART. 10

Matter of Alexandria X., 80 AD3d 1096 (3rd Dept. 2011)

A Schoharie respondent was the father of three children and the mother had another child from a prior relationship. The mother's child suffered a serious injury to his eye as a result of a chemical burn and also had a groin injury. The mother had been found to have abused the child due to the groin injury and the lower court also found that the father had abused the boy and derivately neglected his own three children. He appealed arguing that he was not a "person legally responsible" as it related to the mother's child. The Third Department affirmed the lower court's ruling. While the statue does not include people who have fleeting care of a child such as an overnight visitor or a supervisor of a play date, it does encompass paramours and other nonparents who perform childcare duties that are parental. Initially the mother lied about her relationship with the father and claimed they did not have a romantic relationship. However, the mother was pregnant with the respondent's child when this child was injured. He, by his own admission, saw the child and the mother daily, took the boy shopping and treated him like a son. He was the person who put the child to bed the night of the child's eye was injured and he claimed that the child had been injured by Vick's medicine that he had applied to a machine. The father further claimed he tried to wash the child's eye with water and he drove the child and the mother to the hospital for treatment. There was evidence that he had been alone with the child when the injury occurred. All of these behaviors demonstrate that he was acting as the functional equivalent of a parent in a familial setting and therefore he was a person legally responsible as per FCA §1012 (g).

Matter of Audrey A., 81 AD3d 724 (2nd Dept. 2011)

In October of 2008 the mother of a newborn Queen's girl was alleged to have neglected her. The petition did not identify anyone as the child's father. In June of 2009, the father appeared and requested to be adjudicated the father and to be

given custody. He was established as the father in December of 2009 and consented to be tested for drug use and to have a psychiatric evaluation. When the drug test came back positive, AC S filed under CPLR §3025(b) to amend the original petition to add the father as a respondent. The Second Department concurred with Family Court that this was not an unreasonable delay and that the father was not prejudiced.

Matter of Robert B.H., 81 AD3d 940 and 82 AD3d 1221 (2nd Dept. 2011)

Kings County Family Court properly vacated an order of protection issued in an Article 10 matter on behalf of the agency caseworkers who had been threatened by the respondent father. Under FCA § 1056, caseworkers are not persons in whose favor an order of protection can be issued and therefore a court cannot find a respondent in violation of an order which was void ab inito.

Matter of Sheena B., 83 AD3d 1056 (2nd Dept. 2011)

ACS brought a neglect proceeding regarding a 17 year old girl, alleging that her father refused to allow the child to return to the home. While the matter was pending, the child was placed in a foster home for pregnant teens. She then gave birth and she and her baby were placed in a foster care mother and baby program. She then turned 18 and ACS made a motion under CPLR §3217 (b) to discontinue the proceeding arguing that the aid of the court was no longer needed given her age. The AFC opposed the motion arguing that the child wanted to stay in foster care. Kings County Family Court granted the motion and the AFC sought and obtained a stay pending their appeal. The Second Department reversed ruling that the lower court continued to have jurisdiction over any neglect that had occurred before she turned 18 even after she had turned 18. Further that the court can, with a youth's consent, keep a child in foster care until age 21 and that by dismissing the petition, the court was not assessing if the youth needed such an order.

Matter of Alexander C., 83 AD3d 1058 (2nd Dept. 2011)

In the appeal of his PINS adjudication, a Dutchess County boy argued that the order should be reversed as the Dutchess County CPS had investigated a CPS report regarding him and had indicated it but had not filed an Art. 10 petition. The

Second Department rejected the argument finding that the issue was unpreserved, that the youth had not requested the substitution of an Art. 10 petition and that there was no evidence that the youth's truancy issues related to any acts of abuse or neglect by the parents.

Matter of Gabriella UU., 83 AD3d 1306 (3rd Dept. 2011)

While under an extended order of supervision from an Art. 10 disposition from Otsego County Family Court. The mother, father and four children relocated to Delaware County. Otsego County DSS then filed another Art. 10 petition and the children were placed in care. The mother moved to transfer the case to Delaware County and the Otsego County Family Court denied the transfer, ultimately adjudicated neglect and kept the children in care. The mother appealed and the Third Department reversed, ruling that the transfer should have been granted as all of the family were residents of Delaware County. Under FCA §1015(a) a neglect petition is properly filed in the county where the child or the custodian reside. The children were stayed in care and the matter was remitted to Delaware County Family Court.

Matter of Thor C., 83 AD3d 1585 (4th Dept. 2011)

The Fourth Department reversed Cattaraugus County Family Court's adjudication of neglect as the lower court violated the due process rights of the mother by not allowing her to testify. The lower court had reasoned that the mother had been allowed to testify in a prior matter where it was alleged that she had neglected 3 of her children by not protecting them from sexual abuse by the father and therefore she need not testify regarding this child but this child had not been included in that prior petition.

Matter of Hailey JJ., __AD3d__, dec'd 5/5/11 (3rd Dept. 2011)

A Clinton County respondent's sex abuse petition was handled in the Integrated Domestic Violence Court part of Supreme Court and he was found to have abused and neglected the child. At the same time, he was charged criminally for the same actions and the Supreme Court was also presiding over the criminal charges. The respondent appealed arguing that the criminal trial should have proceeded first and that the Court had a conflict of interest in presiding over both matters. On appeal

the Third Department ruled that the question had not been preserved. Further the defense attorney's decision not to present evidence on the Art. 10 matter or to seek an adjournment in light of the pending criminal case was not ineffective assistance of counsel but was a reasonable choice.

Matter of Tiana G., __AD3d__, dec'd 5/31/11 (2nd Dept. 2011)

On appeal from the Suffolk County Family Court, the Second Department concurred that Family Court need not adjourn an Art. 10 proceeding because a criminal court proceeding is pending as well. Further the District Attorney is not a necessary party to the family court proceeding.

Matter of Angel L.H., __AD3d___, dec'd 6/10/11 (4th Dept. 2011)

In affirming a derivative neglect adjudication from Chautauqua County Family Court, the Fourth Department found unpreserved the mother's claim that the court had allowed in post petition evidence. DSS also did not move to amend the pleadings to include the post petition evidence but the Appellate Court exercised its power and sua sponte conformed the proof to the pleadings.

NEGLECT

Matter of Jose Luis T., 81 AD3d 406 (1st Dept. 2011)

The First Department reversed a New York County neglect finding. The baby had suffered a "single nondisplaced oblique fine-line fracture" of his femur. Although this is a res ipsa injury, rebuttal evidence was offered that the injury could have occurred accidently when the mother bent down to pick up garbage while the infant was in a "snuggly" on her chest. Further any injury could have been exacerbated when later than day the pediatrician performed a "Barlow-Ortolani" procedure during a well baby visit.

Matter of Dontay B., 81 AD3d 539 (1st Dept. 2011)

The First Department reversed a neglect finding from New York County Family Court and dismissed the petition against the mother. The child's father struck the child in the face when the mother was at work. There was no proof that the father had ever hit or harmed the child before. ACS alleged that the mother knew the father was violent in that there were prior domestic incident reports. However, these reports were only unsworn hearsay allegations. Further the mother was not neglectful for failing to leave the father after the incident. Although the father was later convicted of endangering the welfare of a child based on this prior incident, there was no serious physical injury and the child did not need medical treatment. The incident was mild and not part of a pattern. It was a single incident of excessive corporal punishment and the mother therefore was not neglectful for failing to remove the child from the home after it happened. The agency itself allowed the child to remain in the mother's care while the case was pending – albeit with a court order that the father not be present in the home.

Matter of Deshawn D.O., 81 AD3d 961 (2nd Dept. 2011)

A Richmond County father and stepmother were adjudicated to have neglected the stepfather's son. They used excessive corporal punishment on him and punished him by restricting his food intake and making him sleep on the floor. They also engaged in domestic violence in front of him. The child ran away numerous times and was afraid to return home. He indicated that he feared he would hurt himself or someone else if he was made to return. The lower court properly allowed the child to testify outside of the presence of the respondents, given the court's conclusion that the child would suffer emotional trauma if he was forced to testify in front of them. He did testify in front of all the attorneys and was cross examined.

Matter of Joshua UU., 81 AD3d 1096 (3rd Dept. 2011)

A Columbia County respondent lived with his wife and two children and the wife's seven other children. They were being supervised under an ACD due to the deplorable conditions in the home when the 14 year old daughter of the mother alleged that the mother's boyfriend had inappropriately touched her some three years earlier. The lower court found both parents to be neglectful. The Third Department affirmed the neglect adjudication, ruling that the child's out of court

statements about the inappropriate touching were corroborated. The child had told an aunt that the respondent had touched her breasts in the past and the aunt told the mother of this. The mother did ask the respondent if he had done this and told him that she would have nothing to do with him if he had, he replied that this "would be fine with him" without denying what had occurred. The child told the caseworker that in the fall some two years earlier, the respondent had touched her breasts outside of her clothes and tried to touch her crotch outside her clothes but she crossed her legs and told him "no". The mother testified that the child first told her the boyfriend had not touched her, but then the child told her therapist that he had and recently had also told her mother that it did occur. Some degree of corroboration can be found in the consistency of the child's statements although repetition to several persons does not in and of itself provide sufficient corroboration. The out of court statements were also corroborated by the respondent's prior criminal convictions for the rape of his own daughter from another relationship, for which he served three years in prison, as well as his lack of denial when confronted by the mother. Further the conditions in the home also supported a neglect finding. The home was not safe for the younger children as pencils and scissors were left where the children crawled. The home was dirty and had a foul odor and the children were often in dirty clothes and had dirty faces. There was partially eaten food left on the railings outside of the home.

Matter of Thomas M., 81 AD3d 1108 (3rd Dept. 2011)

The Third Department affirmed Otsego County Family Court's adjudication of neglect against the mother of a teenage boy. Both parents had been found to have neglected the child but only the mother appealed. In response to a CPS report, the home was found to be in total disarray, unsafe and extremely cluttered and the father was intoxicated. The home was so bad that the mother was told she would need to relocate to a shelter with the boy. The child also indicated that twice his father had put his hands around the child's neck in a choking fashion and that his mother knew of this but had not done anything to protect him despite the fact that the father had also been violent to the mother. The father was told to stay away from the mother, child and the apartment but the mother continued to speak to the father and allowed the father to come back for at least one night which visibly upset the boy. The mother had told a caseworker that if the father came back to live with her, she would find the boy somewhere else to live. The mother knew the father had an alcohol problem and was violent to her but she minimized his conduct in putting his hands on the child's throat by saying that the father had not in fact choked the child.

Matter of Telsa Z., 81 AD3d 1130 (3rd Dept. 2011)

On its third review of this Clinton County Family, the Third Department found that the mother had neglected the children by failing to protect them from the father's sexual abuse. The Appellate Court had previously remitted this matter after the lower court had removed the children from the non-respondent mother during the dispositional hearing on the father's sexual abuse petition. Since the prior petition had only been against the father, the Appellate Court had found that the lower court did not provide the then non respondent mother with due process. The Appellate Court did stay the placement of the children in foster care and upon the remitter, the lower court ordered a FCA §1034 investigation against the mother which resulted in this neglect petition against her. The Third Department added a detailed foot note to this decision to explain more fully this prior ruling, stating that a Family Court does have authority to place children who have found to be neglected or abused in foster care even as against a non-respondent custodial parent but there must be due process – including a hearing – for the non-respondent parent. The Appellate Court repeated as per its prior ruling that the lower court erred in using FCA §1035 to remove the children from a non-respondent parent, effectively finding her to have neglected the children when there had not been an actual neglect petition filed against her.

When the case was then remanded, the Family Court found that she had neglected the children and the Third Department now affirmed that adjudication. The older sister – who had been 8 years old at the time – disclosed to several adults that her father was sexually abusing her. She also indicated that her mother had "peeked" in the bedroom door and the window on several occasions while the father was actually committing the abuse. The mother's response to seeing what he was doing to her daughter had been to go into her own bedroom and pretend to be asleep. The younger sister corroborated these out of court statements of her older sister by acknowledging that the mother would "peek" when the 8 year old was being abused. The little girl also said her mother would often sleep on a couch between the parents' bedroom and the children's and that she did this to see if the father was going into the girl's bedroom. Also the younger daughter said that her mother had told the girls to sleep with a family dog to protect them from the father. The mother exhibited no surprise when authorities informed her that the this child had disclosed the sexual abuse. The 8 year old also disclosed that her parents told her she was "bad" and that they would go to jail if she told anyone about what the father was doing. The child was fearful of going to jail herself. The mother had previously been found to have neglected two older daughters when she had allowed another earlier boyfriend to continue to have access to then knowing that

he had sexually abused one of them. She had violated a court order regarding those older daughters that had ordered her to keep the boyfriend away from them. She had eventually surrendered her rights to these girls. She had also been found to have neglected yet another daughter who was in foster care at the time of this petition.

Matter of Paige K., 81 AD3d 1284 (4th Dept. 2011)

The Fourth Department affirmed a derivative neglect adjudication regarding a Oswego County man as it related to his girlfriend's daughter. The adjudication was by summary judgment based on his having been found to have abused the girlfriend's son by murdering that child. Given these circumstances, summary judgment was appropriate - there were no triable issues of fact.

Matter of Thomas C., 81 AD3d 1301 (4th Dept. 2011)

A Onondaga County mother neglected her children by making false accusations of neglect against their father and involving the children in her "antagonistic conduct toward the father." The mental or emotional condition of the children was in imminent danger of being impaired by her behavior.

Matter of Shania S., 81 AD3d 1380 (4th Dept. 2011)

Erie County Family Court adjudicated a father to have neglected his newborn child and the Fourth Department affirmed. The father was homeless and had no resources or ability to care for the child. He could not provide the child with food, clothing or shelter. On appeal the father claimed as he was only alleged to be the father in the Art. 10 and therefore he was not a person legally responsible for the child but that issue was not preserved and in any event is inconsistent with his testimony at the hearing.

Matter of Kennya S., 82 AD3d 577 (1st Dept. 2011)

A New York County neglect finding against a mother was reversed on appeal. The First Department ruled that the mother having lied and taken responsibility for hitting the child when the father had done it, did support a finding of neglect

against the mother. The child was not in imminent danger from the mother's false statement.

Matter of Charlie S., 82 AD3d 1248 (2nd Dept. 2011)

The Second Department affirmed Queens County Family Court's neglect adjudication against a father. The father did not seek mental health care for his son even though he was aware of the child's behavioral problems at elementary school – including inappropriate sexual contact with other boys. The father had been advised by the school principal, the guidance counselor and the ACS caseworker that the child needed counseling but he failed to arrange for it. Further the child had disclosed to the caseworker and the school principal that his father had touched his buttocks inappropriately. The father failed to take the stand in his own defense and a negative inference can be drawn. Lastly, the fact that the child testified and recanted his claims of the inappropriate touching did not require that the lower court dismiss the petition.

Matter of Tyler MM., 82 AD3d 1374 (3rd Dept. 2011)

An Otsego County mother and her 19 year old boyfriend neglected her children. The mother had 2 sets of twins – 16 year old boys and 14 year old girls and a younger son. Another younger son lived with his father. The twins and the mother lived with the 19 year old boyfriend who was not the father of any of the children. The boyfriend was a person legally responsible despite the fact that he was only a few years older than the older twins. He had lived in the home for over a year, he was often alone with the children and he cooked, cleaned and helped the children get ready for school. The children were neglected by both of the respondents. The boyfriend smoked marijuana with at least one of the children. Three of the children smoked marijuana in the home – there was a strong smell of marijuana in the home, particularly in one of the children's bedrooms. The caseworker observed a partially smoked marijuana cigarette. There were empty beer cases scattered all over the house, including in one of the older twin's rooms. The mother acknowledged that the children were probably drinking beer and smoking marijuana while she was at work and had told the children's father that there was nothing she could do to stop the teenagers. The older children made out of court statements to their father that they were using marijuana and drinking beer at the mother's house. The mother also admitted that she was letting one of the 14

year old girls sleep in her bed with a boyfriend and that it was okay because the 14 year old had said they were not having sex. The lower court appropriately placed the respondents and the teens under supervision of DSS and limited the presence of the youngest child in the home to daylight hours and when an adult was present. There was no abuse of discretion in the lower court's ruling that it was not relevant line of questioning on why a PINs petition had not been filed instead of a neglect petition.

Matter of Ronald Anthony G., 83 AD3d 608 (1st Dept. 2011)

New York County Family Court was affirmed by the First Department. The mother neglected her 13 month old and her infant based on her untreated mental illness. She would not follow medical advice on how to feed one of the children and she lived on the street and slept in the subway.

Matter of Deanna R.G., 83 AD3d 1064 (2nd Dept. 2011)

A Richmond County mother neglected her daughter as the child had excessive school absences and the mother offered no reasonable justification for the absences. Further the mother failed to bring the child to mental health counseling even though the mother was made aware that the child needed help.

Matter of J.C., T.C. and J. C., ____Misc3d_____ (Bronx County Family Court 4/4/11)

Bronx County Family Court refused ACS' motion to dismiss a case for lack of personal jurisdiction over the respondent father. The 11 year old subject child alleged that her father had repeatedly raped her in the state of Texas. The mother and the child moved from Texas to NYC in the fall of 2010 and the father lives in Georgia but did visit the child in NYC around Thanksgiving of 2010. The Family Court ruled that jurisdiction is proper under DRL §76-c, as no other state has jurisdiction. The child and family have ties to New York State and the alleged abuse has continued in NYS in the form of the child sending, at the father's request, nude pictures of herself to him via text.

Matter of Alexander M., 83 AD3d 1400 (4th Dept. 2011)

The Fourth Department reversed Oneida County Family Court's determination that a father had neglected his child based on telephone calls to hospital staff where he threatened to remove the child from the hospital. The child was not injured or in imminent danger of injury based on these phone calls to the hospital. However, the Fourth Department did affirm that the father had neglected his son by failing to address his, the father's, long term drug abuse. There were prior orders in this matter had that the court took judicial notice of regarding the father's drug abuse and his long standing inability to deal with this problem.

Matter of Afton C., 17 NY3d 1 (2011)

The Court of Appeals concurred with the Appellate Division that Dutchess County Family Court erred in finding that a father has neglected his five children, all aged under 14, where he had pled guilty to Rape in the Second Degree for having had sex with a child under the age of 15 and also had pled to Patronizing a Prostitute under the age of 17. Further, the mother did not neglect the children by failing to remove the children from the home or by failing to inquire of the father the circumstances of the criminal convictions. The father had served one year in jail and was now listed as a level three sex offender. He had not been ordered to obtain any sexual abuse counseling. The Court of Appeals ruled that there is no presumption that an untreated sex offender, even where the victim was a child, residing in the home with his own children is neglectful, without other proof of the current risk to his children. Even the fact that the father would not discuss the allegations or exhibit insight into his behavior was not sufficient – nor was his invocation of the Fifth Amendment and his evasive answers in the Family Court proceeding sufficient. The Court did comment that perhaps proof that the father needed treatment, or had been ordered to obtain treatment and had not, might have established the link of risk. Further, they commented that a neglect finding might be appropriate where the conviction stemmed from the sexual abuse of unrelated children who were in the care of the parent. The concurring opinion commented that the petitions may well be proven in such situations if the facts of the conviction or the reasons for his designation as a level three sex offender were more clearly introduced in the Family Court action.

Matter of Chassidy CC., __AD3d__, dec'd 5/5/11 (3rd Dept. 2011)

A Rensselaer County Family Court's neglect adjudication of a respondent was affirmed. The respondent was on probation and was required to obtain treatment for substance abuse and remain sober. However he continued to use marijuana and alcohol and was found to have violated his probation. He repeatedly left his daughter unsupervised and alone in a room in the homeless shelter the family lived in at the time. The child was placed in the custody of a grandmother.

Matter of Sophia M.G.K., __AD3d___, dec'd 5/6/11 (4th Dept. 2011)

A newborn Monroe County child was derivately neglected given that she was born just 2 months after the court had adjudicated the mother to have neglected her other children. The mother had yet to address the mental health issues that had resulted in the older children's placement. The court did however err in ordering the mother to comply with treatment recommendations from a report not entered into evidence. The court did not err in refusing a request for an adjournment of the hearing so that the mother and an unspecified witness could testify as the defense attorney offered no specific reason why the mother was not present and why any other witness had not been subpoenaed in advance.

Matter of Jamoneisha M., __AD3d__, dec'd 5/26/11 (1st Dept. 2011)

The First Department affirmed the Bronx County Family Court's finding of neglect against a mother. The mother left her child with an inadequate caretaker and did not provide any contact information. The child told the caseworker that her mother had burned to the child's arm – although not intentionally – and this was corroborated by the report to the hotline. The mother did not obtain proper treatment for her own mental health issues. This was proven per admitted hospital records that had post dated the petition by a few days but demonstrated her failure to seek needed treatment before the petition. The mother had also been found previously to have neglected another child and this also tended to show that her inappropriate, neglectful behavior was ongoing.

Matter of Mariah C., __AD3d__, dec'd 5/31/11 (2nd Dept. 2011)

The Second Department affirmed Suffolk County Family Court's neglect adjudication regarding a mother. The home was deplorable and unsanitary. There was proof of excessive school absences for which the mother was unable to offer a reasonable explanation.

Matter of Ariel B., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

A Broome County mother neglected her two children. The mother was mentally ill and had stopped taking her meds. She was erratic and violent. She bit her older child on the arm, leaving a mark that was still visible the next day. In another situation she put her hands on the child's throat, scaring the child. In response to the children leaving a messy room, she threw a table down the stairs into the area where the children were located. She had fits of anger in front of the children on a regular basis and she perpetuated numerous acts of domestic violence, many in front of the children. The mother did not testify at the hearing and so an adverse inference can be drawn as well.

Matter of Jamarra S., __AD3d__, dec'd 6/7/11 (2nd Dept. 2011)

A Suffolk County newborn was derivately neglected when he was born just 8 months after the court had terminated his mother's rights to a sibling. The subject child was born 2 months prematurely and had a compromised immune system. The mother had no appropriate housing. Only 8 months earlier, the mother had lost parental rights to an older sibling and the mother provided no proof that she had resolved the issues resulting in the TPR in the intervening 8 months.

Matter of Zachary T., __AD3d__, dec'd 6/17/11 (4th Dept. 2011)

The Fourth Department concurred with Genesee County Family Court that a father neglected his son by failing to protect him from being sexually abused by an older brother and a cousin. The child and the older brother testified that the father knew of the sexual abuse but had done nothing to prevent it. Also the child was derivately neglected due to the father having sexually abused a nephew when the families shared a home. The father was a person legally responsible for the nephew at that time.

Matter of Draven I., __AD3d__, dec'd 7/14/11 (3d Dept. 2011)

A Montgomery County mother neglected her children by driving with them in the car when she had failed to take her medication needed for her seizures. She had one seizure that had resulted in a car accident and the children had to be left in the care of a nearby person while she was transported to the hospital. The home was also dirty and unsafe with garbage and food strewn about, piles of dirty dishes and "numerous plastic bags" in the reach of a 20 month old child.

Medical Neglect

Matter of Samuel DD., 81 AD3d 1120 (3rd Dept. 2011)

An Albany County mother neglected her school age son by failing to deal with his mental health issues, including suicide threats. The child had been removed from one school due to an altercation and moved to a smaller school environment. He had many behavioral problems and was suspended. He would put things in electrical outlets, tried to saw through a computer power cable, used a scissors to try to cut his tongue, stood on a file cabinet , tried to pull a bookcase onto himself and made attempts to hurt himself, other students and staff. He was dismissed from the school as they feared they would not be able to keep him or others safe. The mother did not consistently appear at meetings with the school and would not arrange for the child to have a recommended mental health evaluation. The lower court had ordered that the mother had to get a mental health assessment for the child and for herself and follow recommendations as a condition of the child's remaining in her care while the matter was pending. When she did not do so, the court placed the child in care in order to obtain an evaluation of the child. That evaluation resulted in a determination that the child suffered from an extreme form of hyperactivity and attention deficient disorder and possibly had bipolar disorder. The expert pediatrician prescribed medication for the child and discussed it at length with the mother but the mother did not fill the prescription, failed to come to a subsequent appointment for the child and failed to discuss the issues further with the doctor. In fact, she would not even answer the doctor's subsequent questions about the child's status. The doctor testified that this behavior was unreasonable and meant the child was at risk. The mother did not obtain her own mental health assessment but the child's doctor expressed concerns about the mother's mental health and how it was affecting the child. The mother lived in a shelter and had told staff that she suffered from PTSD.

While a parent may have concerns about medication for her child, this mother failed to present any evidence as to what her concerns were, failed to demonstrate that her refusal to allow the child to have counseling or be medicated was in his best interests. She failed to provide any evidence of a second opinion. In fact, she did not even testify herself. The evidence instead was that the child would benefit from medication and therapy which would reduce the likelihood of him injuring himself or others and increase the potential for his education.

Matter of Alanie H., 83 AD3d 1066 (2nd Dept. 2011)

The Second Department reversed a Kings County Family Court adjudication of medical neglect. The four month old boy had been in the hospital for meningitis and had fluid drained from his brain. Upon his release, the parents were told that his enlarged head would decrease within a week. Three days later, the mother called the doctor late at night and indicated that the child had vomited and that his head was still enlarged. The doctor said he could not diagnose the situation over the phone and said the parents "should probably" take the child to the ER. The parents instead waited until the morning to take the child to the doctor. They checked the baby's temperature which was normal and monitored him for most of the night. When they did take him to the doctor in the morning, the baby was admitted into the hospital and had another procedure to drain fluid from his brain. There was no medical testimony presented that the child was impaired by waiting until the morning to seek the medical attention or that this placed the child in any imminent danger.

Matter of Jalil McC. __ AD3d__, dec'd 5/17/11 (2nd Dept. 2011)

A Queens' grandmother neglected her grandson by refusing to take him back into her home when the hospital where the child had been admitted indicated that the child was ready to be discharged. The child had been brought to the psychiatric ward by the grandmother who had legal custody. The hospital informed her that the child was ready for release and the grandmother refused to take the child back, refused to meet with the hospital staff and indicated that she would accept any allegations of neglect. Her failure, as the child's legal custodian, to either allow the child back into her home or arrange some other appropriate care is neglect.

Matter of Jamiar W., __AD3d__, dec'd 5/31/11 (2nd Dept. 2011)

A Queens County mother was adjudicated for neglecting both her twin sons. The Second Department agreed that she had failed to set up or participate in one child's needed medical procedures. The child was born with hydrocephalus and needed a shunt and required the services of a neurologist, neurosurgeon and a pediatrician. The child's twin was diagnosed at 2 years of age with acute myelocytic leukemia and admitted to Sloan Kettering hospital and the mother only visited him about once a week. She also did not participate in discharge planning which resulted in the toddler staying 3 months longer in the hospital then was needed for his medical condition. This was not only medical neglect but emotional neglect as well.

Domestic Violence

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

The Third Department affirmed the Otsego County Family Court's adjudication of neglect against the mother of three children. The mother engaged in domestic violence with her boyfriend, who was the father of her youngest child. 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 older two children told the worker 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. There was a pattern of alcohol abuse and domestic violence but the mother continued to live with the boyfriend. The violence did occur sometimes in front of the children and sometimes the mother was the one who instigated it. Her behavior was not that of a reasonably prudent parent. While the matter was pending, the mother gave birth to a fourth child and that child was appropriately found to have been derivatively neglected.

Matter of Hannah A., ___AD3d__, dec'd 5/10/11 (2nd Dept. 2011)

A Suffolk County father neglected his children by engaging in acts of domestic violence against the mother in the presence of the children.

Matter of Amoreih S. __AD3d___, dec'd 5/24/11 (2nd Dept. 2011)

The Second Department reversed a neglect finding against a Suffolk County mother. The evidence presented was that the parents were arguing while the father had one child – an infant – in a baby carrier. A friend of the mothers attempted to grab the baby and the baby fell out of the carrier. The parent's argument had not included any physical contact between the parents and was only this single incident.

Matter of Paige AA., __AD3d__ dec'd 6/2/11 (3rd Dept. 2011)

A Warren County 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. The lower court did not find credible the father's claim that he was choking the mother in self defense. Further there was a shoe box of marijuana and drug paraphernalia within the child's reach which was a threat to the child's safety. The court did not find credible the father's claim that he did not know the box was there as it was not his but a friend's who he had previously told not to bring his drugs into the home but to leave the drugs out in the car.

Matter of Ndeye D., __AD3d__, dec'd 6/21/11 (2nd Dept. 2011)

A Queens father 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 Joseph RR., __AD3d__, dec'd 7/14/11 (3rd Dept. 2011)

Delaware County Family Court was affirmed on its neglect adjudication against a mother who 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 olds 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 therefore did not exercise the care of a reasonably prudent parent to protect them. The mother's children were placed with their respective non-respondent fathers.

Drug Use

Matter of Joseph Benjamin P., 81 AD3d 415 (1ST Dept. 2011)

The First Department concurred with New York County Family Court that a father neglected his child as he should have known of the mother's substance abuse and failed to do anything to protect the child. It is not a defense that he father failed to inquire more fully into his suspicions or that he elected to "turn a blind eye" to what she was doing.

Matter of Sadiq H., 81 AD3d 647 (2nd Dept. 2011)

A Queens' father was appropriately adjudicated to have neglected his child. The father regularly used crack cocaine including in the presence of the child. This establishes a prima facie case of child neglect pursuant to FCA §1046 (a)(iii) and no actual nor risk of impairment to the child need be proven. Further the father was aware of the mother's use of drugs when she was responsible for the care of the child and he did nothing regarding that.

Matter of Maria Daniella R., __AD3d__, dec'd 5/31/11 (2nd Dept. 2011)

On appeal from Richmond County Family Court, the Second Department agreed that a mother's repeated use of marijuana can form the basis of a neglect adjudication. The two oldest daughters' out of court statements of the mother's drug use cross corroborated each other as did the mother's admission to the caseworker that she smoked marijuana.

Excessive Corporal Punishment

Matter of Alex R., 81 AD3d 463 (1st Dept. 2011)

A finding of neglect including excessive corporal punishment by New York County Family Court was affirmed on appeal. Two children told the caseworker that the mother had hit one of them with a broomstick and also hit the children with her hand and a belt. The caseworker saw injuries on the child and was present when the mother told the police that she had struck the child. There were photos of the child's injuries. Further the mother admitted that she had not taken the children to a doctor or a dentist for over a year, which was corroborated by the medical records. There was no food in the refrigerator or the cabinets.

Matter of Xavier II., 81 AD3d 1222 (3rd Dept. 2011)

Sullivan County Family Court found that the actions of a father were neglectful after he testified that he had hit his son four times with a belt on one occasion. However, the court determined that the aid of the court was not needed and dismissed the petition under FCA § 1051 c . The father appealed and the Third Department dismissed the appeal, finding that the father had not been aggrieved. No adjudication of neglect occurred so the father has no prejudicial impact in any future proceedings.

Matter of Senande v Carrion 83 AD3d 851 (2nd Dept. 4/12/11)

The Second Department unfounded an indicated report of excessive corporal punishment where the mother struck the child a couple of times with a slipper

after the child was disobedient and the child sustained a dime sized mark on her upper thigh.

Matter of Chanyae S., 82 AD3d 1247 (2nd Dept. 2011)

ACS and the child's attorney both appealed Queens County Family Court's dismissal of neglect allegations against a father. The Second Department reversed ruling that the credible evidence demonstrated that the father had choked the child in response to an argument as to her babysitting the younger children. This action is excessive corporal punishment. However, since the child is now 18 years old, a dispositional hearing is unnecessary.
(NOTE: Since the Family Court has the authority to continue a youth in foster care and order the provision of services to the family with the youth's permission after age 18, either this youth must not have been in care, or declined to be continued in care or the Second Department's ruling is questionable and not consistent with prior rulings – see **Sheena B**. above)

Matter of Ameena C., 83 AD3d 606 (1st Dept, 2011)

A Bronx mother neglected her two older children by using excessive corporal punishment. This also derivatively neglected her two younger children. The two older children told the caseworker that the mother had hit them both with a broomstick, prodded one child in the ear with the broomstick, punched one of the children and rammed her head through a wall. These out of court statements were corroborated by the caseworker. The caseworker observed bruises on both children. One child had a swollen arm and a scabbed ear and there was a large hole in the wall.

Matter of Padmine M., __AD3d__, dec'd 5/3/11 (2nd Dept. 2011)

The Second Department concurred that a father had neglected his 15 year old daughter by hitting her several times with a pole which resulted in bruising on her back and arm. However, the proof did not show that the mother had inflicted any corporal punishment or that she had failed to protect the child. Under the circumstances here, the incident also does not support a derivative finding as to the child's sibling.

Matter of Naomi J., ___AD3d___, dec'd 5/17/11 (1st Dept. 2011)

The First Department agreed with New York County Family Court that a father used excessive corporal punishment on his daughter and derivatively neglected his son. The child had been beaten and had bruises on her arm and under her eye. The child's out of court statements were corroborated by a teacher's observations of the bruises. The girl was placed in foster care and the boy was placed with his non-respondent mother under ACS supervision.

Unsafe Home

Matter of Leah M., 81 AD3d 434 (1st Dept. 2011)

A Bronx father neglected his children when law enforcement found guns and ammunition in the home in reach of the children. The respondent's 5th Amendment rights were not violated by the negative inference against him for his failure to testify even though he had criminal charges pending.

Matter of Jaylin E. 81 AD3d 451 (1st Dept. 2011)

A New York County 21 month old child was neglected by his mother when the toddler was found in an apartment while the police executing a search warrant. There was marijuana in the bedroom where the child slept and the child's body, clothing and hair smelled strongly of marijuana. Some of the adults in the apartment were selling marijuana which placed the child where dangerous activity was happening.

Matter of Aria E., 82 AD3d 427 (1st Dept. 2011)

A Bronx mother neglected her child by remaining in the home with the child while the father engaged in criminal activity. She did not protect the child from the danger of being present while criminal activities were conducted. The court properly drew a negative inference from her failure to testify and this does not violate her 5th Amendment rights. Although the mother complied with the

agency's request for domestic abuse counseling, she continued to deny any responsibility for her neglect and lacks insight. Therefore the child's placement with a maternal great-grandmother is justified.

Matter of Eugene L., 83 AD3d 490 (1st Dept. 2011)

The Bronx parents of a three month old infant neglected him by selling cocaine out of the apartment. Law enforcement had engaged in two undercover buys of cocaine in the apartment and when searching with a warrant, located a large quantity of cocaine, empty zip lock bags and cash. The respondents did not object to the hearsay testimony regarding the drug buys nor did they testify in their own defense.

ABUSE

SEX ABUSE

Matter of Lindsay B., 80 AD3d 763 (2nd Dept. 2011)

A respondent father from Queens was found to have sexually abused his daughter in and was properly ordered to complete a sex offender program and to have no contact with his two grandchildren until he successfully completed the program.

Matter of Selena R., 81 AD3d 449 (1st Dept. 2011)

A Bronx County Family Court sex abuse finding was affirmed but the excessive corporal punishment neglect was reversed. The child's out of court statements of sexual abuse were corroborated by the four year boy's inappropriate knowledge of ejaculation as well as both children's verbal sexual acting out, drawings and aggressive outbursts. However, the allegation of excessive corporal punishment was not proven.

Matter of Rebecca FF., 81 AD3d 1119 (3rd Dept. 2011)

The Third Department agreed that a Columbia County father had sexually abused his adopted stepdaughter when she had been a child and therefore derivately neglected his own two children. The stepdaughter was now in her 20's and disclosed that she had been sexually abused by him for a long time starting when she had been around 10 years of age. She testified that he had sexually abused her for over an eight year period – more than 20 times but less than 100 times. Also a licensed psychologist testified that this was a "positively validated case of childhood sexual victimization". The respondent failed to testify and so an adverse inference can be drawn. The sexual abuse of the adopted stepdaughter when she was a child in his care, demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to his daughters who are still children.

Matter of Iyonte G., 82 AD3d 765 (2nd Dept. 2011)

The Second Department reversed Queens County Family Court's sex abuse adjudication. The out of court statements of the 8 year old child that her stepfather had placed his penis in her mouth and used "crude and obscene" language to tell he wanted her to do, were not sufficiently corroborated. The fact that the father failed to testify creates a strong inference against him but cannot serve as the corroboration.

Matter of Andrew W., 83 AD3d 727 (2nd Dept. 2011)

A Queens County father was found to have sexually abused his daughter and derivately neglected her two brothers. The Second Department affirmed ruling that the child's out of court statement was corroborated by the child's brother's out of court statements that he had witnessed the abuse. Also an expert in "clinical and forensic psychology" who specialized in child abuse testified about evaluations of the children and this provided more corroboration. Finally the lower court could draw a negative inference from the father's failure to testify.

Matter of Nicholas J.R., 83 AD3d 1490 (4th Dept. 2011)

The Fourth Department affirmed a Cattaraugus County sex abuse adjudication against a mother. The child's out of court statements made to a caseworker and a psychologist were videotaped and were credible. Although repetition itself is not sufficient corroboration, it enhances the reliability of the out of court statement. The statements were also corroborated by an evaluation psychologist who found the statements of the child to be credible. The court did not err in denying the mother the ability to put evidence in regarding alleged excessive corporal punishment by the father as it was not relevant to the issue of mother's sexual abuse of the child. Although the order of protection has now expired and the issue is moot, the court should not have conditioned the contact with the mother on the therapist's opinion.

Matter of Jeshaun R. __AD3d__, dec'd 6/7/11 (2nd Dept. 2011)

Kings County Family Court's dismissal of a sexual abuse petition was affirmed by the Second Department. The child's out of court statements that she was sexually abused by her father were not sufficiently corroborated. ACS offered the out of court statements of the child's sister but this was not sufficient as the sister's statements were not reliable, were not consistent with the other child's statements and did not independently describe the detail of the alleged sexual acts. The sister was not able to "independently provide any detail about any particular incident…" Further, the alleged victim child's medical records did not provide any collaboration particularly as to the claim of sexual intercourse. Lastly the father's testimony record regarding his touching of the child does not corroborate the child's out of court statements as there was no proof that his touching had any sexual intent and such intent cannot be inferred based on the circumstances of the touching.

Matter of Bethany F., __AD3d__, dec'd 6/10/11 (4th Dept. 2011)

The Fourth Department affirmed the Erie County Family Court's sex abuse adjudication. The child's out of court statements as to the father's sexual abuse of her were corroborated by the expert testimony of a court appointed mental health counselor who "validated" using the Sgroi interview methods. A Frye test was not necessary as the use of the Sgroi methodology is not novel and has been accepted

by the NYS Court of Appeals as well as other Appellate Divisions. The counselor testified that "all" counselors in the field used the Sgroi methods.

Matter of Jayann B., __AD3d__, dec'd 6/14/11 (2nd Dept. 2011)

The Second Department reversed Dutchess County Family Court's ruling on a sex abuse matter. The lower court had dismissed the petition without a fact finding hearing, ruling that the petition failed to state a cause of action but on appeal the matter was remanded for a fact-finding. The allegations were that the mother's live in boyfriend had in 2004 been indicated for sexually abusing his 8 year old nephew. The respondent was now living in this mother's home with her child 6 years later. The respondent denied that he had sexually abused the nephew, in fact denied that he even knew that there had been an indicated report of this nature despite evidence that he did in fact know. Further, the respondent acknowledged that he had never attended any treatment program for sexual abuse. The petition was in the nature of a derivative allegation and there were no allegations that he had directly harmed the subject child of this petition. The Second Department ruled that the allegations were sufficient to require the lower court to hold a fact finding hearing.

PHYSICAL ABUSE

Matter of Alexander F., 82 AD3d 1514 (3rd Dept. 2011)

The Third Department agreed with Columbia County Family Court that a father had physically abused his child. The father was living with his two children and his wife's three children from another relationship along with the maternal grandparents and a maternal aunt. They were all in a hotel as the grandparents home, where they had been living, burned down. The children's mother was incarcerated. The youngest child suffered bilateral subdural hematomas, bilateral infractions of the brain, substantial loss of brain tissue and several rib fractures. The child will suffer from severe brain injury and other permanent disabilities. The medical evidence was that the injuries were caused by violent shaking, slamming against a hard surface or a deceleration injury and at least one of the injuries had occurred not more than 3 or 4 days before the child was taken to the hospital.

The father claimed that he had not had contact with the child during that period of time and that he took the child to the hospital when the aunt told him the child was acting oddly. He claimed a babysitter watched the child. The caseworker testified that the oldest child told her that he had overheard the grandparents say that the father had hit the child on the head with a TV remote and had hit the child on the back. The court found that the father's claim that a babysitter was watching the child was not convincing and that in fact the evidence showed that he was the child's caretaker during the 3 days before the child was taken to the hospital. Further the oldest child's out of court statements corroborated the medical proof.

Matter of Leon K., 83 AD3d 1069 (2nd Dept. 2011)

The Second Department continues to rule that the Art. 10 finding of severe abuse requires a finding that diligent efforts have been made and fails to see any distinction in a severe abuse termination ground and a severe abuse Art. 10 finding. The Queens' mother in this matter pled guilty to assault in the second degree for the injuries she inflicted on her son. Queens County Family Court then granted a motion for summary judgment for a finding of abuse and severe abuse for the injured child and derivative for the two siblings. The Second Department previously reversed the severe abuse findings ruling that ACS had not proven "diligent efforts". On remittal, ACS argued that "reasonable efforts" were not required as per FCA 1039-b and the lower court concurred and ruled that a hearing was not needed. Yet again, the Second Department cites that FCA §1051(e) refers to SSL §384-b(8)(a) for the definition of "severe abuse" and that definition of course discusses "diligent efforts" and therefore no finding of Art. 10 severe abuse can be made without proof of "diligent efforts" being made to keep the family together or without a prior ruling that reasonable efforts are not required. ACS then argued on this appeal, that the lower court did in fact excuse reasonable efforts based on their being "aggravated circumstances" and therefore the finding of diligent efforts is not required. Since the criminal conviction for second degree assault does not require proof of a "serious physical injury", there can be no decision that reasonable efforts are to be excused in this case without a hearing. The mother is entitled to a full hearing on the issue if reasonable efforts should be excused such that diligent efforts need not be proven in order for a finding of severe abuse to be made.

NOTE : This child was severally injured by his mother over 6 years ago and this case has now gone up on appeal 3 times and the mother has since had another child and had that child removed from her – see the case below – surely the amount of

time and energy expended here demonstrates why the statutory definition of "severe abuse" for Art. 10 purposes needs clarification!!

Matter of Elijah O., 83 AD3d 1076 (2nd Dept. 2011)

The Second Department reversed Queens County Family Court's adjudication of derivative abuse and severe abuse regarding an after born child made on a summary judgment motion, ruling that the respondent mother was entitled to a fact finding hearing. Over three years earlier the mother had committed an act of abuse regarding an older half brother and had pled guilty to assault in the second degree regarding the child. That guilty plea had resulted in summary judgment findings of abuse and severe abuse regarding the injured child and derivate severe abuse regarding the 2 siblings to the child. Those proceedings were still pending over three years later and ACS then moved for summary judgment regarding this child. The Appellate Court ruled that the lower court erred in granting the summary judgment motion finding that given the amount of time that had passed since the original incident, the mother was entitled to a fact finding hearing. The court "took no position" as to what the court should rule as result of the fact finding.

Matter of Keara MM., ___AD3d___, dec'd 5/5/11 (3rd Dept. 2011)

The Third Department affirmed a neglect and abuse adjudication against a Clinton County mother and a neglect finding on the father regarding two children. The parents' six week old son had a fractured left upper arm and collar bone, fractures in his upper and lower left leg, fractures in both bones in his right arm and six broken ribs. The medical evidence was that a child of this age could not have so injured himself and that the injuries would have likely occurred in 3 or 4 separate incidents of trauma. The mother and the father were the child's primary caretakers. The maternal grandparents and a friend also lived in the house but they provided very limited care and there was no evidence that they had injured the baby. A paternal grandmother also cared for the child briefly for two periods but she testified and there was no indication that she was responsible. The mother admitted in criminal court that she had jerked the baby's arm and had broken it but also offered other explanations at times that were incredible and implausible. The mother had also told the father that she has "smacked" the child across the face shortly before the child's injuries were revealed and the father had also noticed bruises on the child's legs. The father denied that he had ever hurt the baby but

reported that the mother had been violent towards himself and had thrown the older child onto the bed on one occasion. The court did not err in drawing a negative inference in the mother's failure to testify, regardless of the fact that her sentencing on her criminal pleas was pending. There is a strong policy in favor of resolving abuse proceedings quickly. She also did not preserve that issue for appeal by not requesting an adjournment in any event. The negative inference was minimal in any event given the weight of the evidence against the mother.

ART. 10 DISPOS and PERMANENCY HEARINGS

Matter of Ayela S. 80 AD3d 767 (2nd Dept. 2011)

The Second Department agreed that Kings County Family Court properly dismissed a motion brought by the birth mother to hold the foster mother in contempt for disobeying an order that the two children be brought to weekly therapy sessions and that they be brought for visitation with other siblings. The child is in the legal custody of ACS and the agency is the legal entity required to make sure the children attend the therapy and go for sibling visitation.

Matter of Jacelyn TT., 80 AD3d 1119 (3rd Dept. 2011)

A Clinton County non respondent father appealed the Family Court ruling in a permanency hearing that had changed the goal to placement for adoption. The ruling is not moot even though further permanency orders will supersede this order since further proceedings and agency services will be altered by this ruling. The lower court does have the authority to modify a goal even if none of the parties ask for the goal to be modified. The agency only recommends a goal and it is the court who decides what the goal will be at each permanency hearing. The father is a non respondent but he has counsel and chose not to offer any evidence or cross examine any witness in the permanency hearing and he has never filed for Art. 6 custody. The agency has provided him with diligent efforts by suggesting he take parenting classes, by keeping him informed of the child's progress and by repeatedly asking him what plan he wants for the child's future custody. He told the worker he did not want custody and did not respond to the caseworker's ongoing requests that he make plans for the child. The father was also

unresponsive to the caseworker's suggestions about improving his relationship with the child at visits by playing games with and asking questions of the child. Instead he would barely interact with the child and once tried to leave the 45 minute visitation three times. Under the circumstances the lower court did not abuse its discretion in changing the goal.

Matter of Roselyn S., 82 AD3d 1249 (2nd Dept. 2011)

The Second Department reversed Kings County Family Court, ruling that the Family Court does not have the authority to compel a respondent to appear for a dispositional hearing.

Matter of Destiny EE., 82 AD3d 1292 (3rd Dept. 2011)

Ulster County Family Court was affirmed in changing the goals of three children to adoption. The mother had allowed her son to go and stay with his father in Mississippi knowing that the father had been previously found to have sexually abused the mother's oldest child. When the father would not return the child to her, the mother went to Family Court to seek the child's return, revealing his location, which resulted in a neglect finding against her and the placement of all three of her children in foster care. The children have now been in care 18 months and the mother has made no meaningful progress in resolving her issues. The mother is not consistently attending mental health therapy, stopped attending employment counseling, did not have housing appropriate for overnight visits with the children and instead of working, essentially would hang out with friends at a grocery store. The supervised visitation is not going well as the mother was not able to manage the children's behavior or address their issues. She continued to deny that the oldest child had been sexually abused by her husband. She did not understand the children's needs, the reasons the children were in foster care and had not complied with the service plan. The children need permanency.

Matter of Christopher G., 82 AD3d 1549 (3rd Dept. 2011)

The Third Department reviewed a discharge of 2 Ulster County children from foster care and determined that it was a "trial" and not a 'final" discharge. The older child had been the subject of a suspended judgment on a permanent neglect

and the younger child had been born and placed in care on a neglect disposition after the older child was in care. At their mutual most recent permanency hearing, the court had continued the order of placement for both of them and had continued a goal of return to parent. A few months before the next scheduled permanency hearing, the caseworker wrote a letter to the court indicating that the children were being returned to the mother on a "final" discharge. No party responded with any objection and the children went home. The court clerk sent a letter to all counsel that the upcoming permanency hearing was canceled as the children had been returned home. Three months later, DSS filed to revoke the suspended judgment regarding the older child and alleged violations in the dispositional order as to the younger child and requested a removal of the children from the home. Although the mother did agree to the removal of the children, she argued that the petition had to be dismissed as the children had been "finally" returned and the court orders alleged to be violated were no longer in existence. The lower court ruled that the return home had only been a "trial discharge" and the Appellate Court concurred. Since the last order had not specifically given the DSS authority to do a "final discharge" upon 10 days written notice as is required by FCA §1089, the return of the children was not in fact a final discharge but a "trial" discharge as without a specific court authorization, the DSS can only do a "trial" discharge. The permanency hearing should not have been canceled as the children were still in foster care and the court clerk's letter had no legal effect. The court retained jurisdiction over the children to proceed on the allegations that the court orders had been violated.

Matter of Nicholas V., 82 AD3d 1555 (3rd Dept. 2011)

An Essex County father, who was incarcerated, appealed a permanency hearing decision to return the child to the mother. The father had been provided visitation and his sister, the child's aunt, and a half sibling by another mother, had visitation time with the child during the father's visitation. The lower court did not abuse its discretion in denying the father a requested adjournment of the hearing. The father had known the date of the hearing for 6 months. He had adequate time to obtain the presence of witnesses to his claims that the mother had not maintained sobriety and that she was not allowing visits with the half sibling. The father had opportunity to cross examine the caseworker and the mother and he provided no evidence that the return of the child to the mother was contrary to the child's best interests.

Matter of Quinton GG., 82 AD3d 1557 (3rd Dept. 2011)

Three Broome County children had been placed in foster care and after the parents had completed programs aimed at substance abuse, they had been returned home. After the return, the mother repeatedly struck the father in the head with a frying pan. He had been drinking excessively, The children were present in the family trailer when this occurred. This resulted in several relatives filing for Art. 6 custody of the children and shortly thereafter, DSS also filed a new Art. 10 petition. The lower court entered Art. 6 custody orders with the mother's consent such that two children were placed with one relative and the third child went to another relative. DSS was not informed or provided notice of this. The mother then moved to dismiss the Art. 10 petition, alleging that the aid of the court was not needed. She alternatively requested summary judgment that there were no triable issues or that she be granted an ACD. The lower court dismissed her petition and the Third Department concurred. The court should not dismiss the Art. 10 petition where the Art. 6 will not resolve the issues. If the Art. 10 petition were dismissed, the Art. 6 orders could be modified without notice to DSS and DSS had no ability to supervise the children or the mother. Further the allegations of domestic violence in front of the children raise a triable issue and the petition should not be dismissed on a summary judgment motion. Lastly, no ACD can be ordered without the consent of DSS.

Matter of Dennis D., 83 AD3d 700 (2nd Dept. 2011)

The Second Department modified the terms of an extension of supervision of a Suffolk County father. In the fall of 2007, the father had admitted to neglect of the children based on incidents of domestic violence. He was ordered to obtain a mental health evaluation, to participate in sex offenders treatment and to have no contact with the children who were in the mother's custody. One year later DSS moved to extend the supervisions alleging that the father still had not obtained the mental health evaluation nor participated in the sex offenders program and the court extended the order. Six months after that extension, the court did allow him supervised visitation with the children, supervised by paternal grandparents. On the second anniversary of the original order, DSS moved again for an extension, still claiming that the father had never obtained a mental health evaluation . The father now wanted to court to allow supervised overnight visits and the AFC wanted the court to order that the grandparents could no longer supervise the visits,

alleging that they were negligent in their supervision. Family Court ordered the supervision order extended, did not continue the order for the mental health evaluation and allowed the grandparents to continue to be the visit supervisors, including for overnight visits. On appeal, the Second Department modified the order saying that the father needed to get the mental health evaluation completed and that nothing had changed to make that prior requirement now not necessary. Although the lower court had not abused its discretion in continuing the grandparents as supervisors of the visits, the lower court erred in allowing overnight visits before compliance with the long ordered mental health evaluation .

Matter of Nyece M., 83 AD3d 718 (2nd Dept. 2011)

The Second Department concurred with Kings County Family Court that a father had neglected the child by using excessive corporal punishment. The disposition, that required that he be excluded from the home until he completes an anger management program, is in the child's best interests.

Matter of Marquita W., 30 Misc 3d 1225 (A) (Kings County Family Court 2011)

The Kings County Family Court ruled that the statute does not permit the extension of a supervision order made under an ACD without the consent of all the parties.

Matter of Alex A.C., 83 AD3d 1537 (4th Dept. 2011)

The Fourth Department reviewed the time frames of a violation and a new petition in a Cattaraugus County neglect matter. The child had been temporarily removed from the mother while an Art. 10 was pending. Three months later, DSS agreed to a return of the child pending the hearing on the Art. 10 allegations if the mother would agree to have no contact with the abusive father and that she not allow any contact with the child. Five days later, DSS moved to restore the matter to the docket and indicated that the mother had been seen by the police in the presence of the father and with the child in violation of the order of protection on the day after the order was issued. DSS then filed a violation petitioner and also filed an amended petition neglect petition alleging the new facts while the original petition

was still pending. The mother was served with these papers some 2 weeks later while in court on the hearing on the original petition, The court held a hearing on the violation when the hearing on the original hearing ended. The Fourth Department found that the mother did have adequate notice of the allegations and her due process rights were not violated. She was found to have willfully violated the court's order and was sentenced to 6 months in jail. The sentence was stayed for a year on the condition that she not violate the court's order of protection. The mother argued that the court did not have the authority to sentence her to jail as the order she violated was not an order of supervision under FCA §1072 but the Fourth Department indicated this was moot as the order had expired.

Matter of Ashley EE., __AD3d__, dec'd 5/5/11 (3rd Dept. 2011)

Clinton County Family Court denied DSS' motion to hold the court's consultation with the child for her permanency hearing via a phone call. The child is an older freed teenager who was in a residential treatment facility in Rochester, New York. (at least 6 hours by car from Clinton County). The child had been involuntarily admitted to a hospital mental health unit when her permanency hearing was due and DSS first moved to adjourn the portion of the permanency hearing that would be the court's consultation with the child. The adjournment was granted but then shortly before the adjourned date, DSS moved to have the consultation be done by phone based on the hospital's claims that it would be unsafe to transport the child to the court. The AFC opposed the order, saying that the child wished to appear in person. The lower court ordered the child to be produced, and DSS obtained a stay from the Third Department. The AFC reversed position and supported the stay. When the DSS appeared in Family Court the next day with the stay, the lower court declined to allow the consultation to be by any means other than personal appearance and adjourned that portion of the permanency hearing until the child could appear in person after being discharged from the hospital. Since the child eventually appeared before the court and the court considered her position regarding the permanency plan, the issue is now moot. The child is also now discharged from care as she has turned 18.

Matter of Kaeghn Y., __AD3d___, dec'd 5/5/11 (3rd Dept. 2011)

A Clinton County mother appealed the disposition and permanency hearing ruling regarding her son. She has originally consented to his placement in a residential

facility and had made an admission to neglect. The lower court had ordered that the child remain in placement and that she have unsupervised visitation once per week with him and that the visit should not be on a weekend. The mother appealed the continued placement and the visitation limitations. The Third Department concurred that the child needed to remain in placement. The mother had nine indicated incidents of abuse and neglect and continued to live with her husband who had an order of protection to have no contact with her other children due to his substance abuse. The child has PTSD, mood disorders and is at high risk of sexually abusing other children. He is now doing well in the residential setting that DSS has placed him in and is receiving treatment. It is in his best interests to remain in care. However, the third Department found that the lower court's order regarding visitation ordered was too limited. Everyone, including DSS, agreed that there should be more visitation. The mother should be allowed to see the child twice a week at the facility, including once on the weekend.

The mother also argued that the court was biased in that the Judge became very involved in the examination of the witnesses. Further, the court, on its own motion, ordered the child's school records to be produced and be reviewed by an educational expert appointed by the court to advise the court about the child's educational needs. Although the Appellate Court indicated that these practices might in some circumstances present questions about the court's impartiality, the parties had not objected and the issue was not preserved and the educational records were for a legitimate interest. In a footnote, the Third Department indicated that this ruling should not be interpreted as an approval of the lower court's actions.

Matter of Kole HH., __AD3d__ dec'd 5/12/11 (3rd Dept. 2011)

A Broome County father had been found to have derivatively neglected his two sons based on his having sexually abused a nine year old relative. The father brought an OTCS while the disposition was pending to hold a new fact finding alleging new evidence. He alleged that the 9 year old female victim had now recanted the sexual abuse allegations. The lower court refused to vacate the finding and the Third Department concurred. There was no affidavit from the victim that she was in fact now denying that it had occurred – only affidavits from the respondent, the mother of the his children and the respondents mother. The lower court's disposition was affirmed and modified in part. Given that the respondent was found to have sexually abused a young child that was in his care,

supervised visitation with his own children is appropriate. Weekly phone contact with the children as well as two hours of visitation supervised by the children's mother and where only the children's paternal grandmother can be present, is appropriate. The Family Court did err in issuing an order of protection until the children are 18 as the respondent is the children's father and therefore the order of protection can only be in place for the duration and the extension of any Art. 10 order.

Matter of Telsa Z., __AD3d__, dec'd 5/19/11 (3rd Dept. 2011)

On its **fourth** review of this family, the Third Department affirmed the dispositional and permanency order as against the mother. The Appellate Division ruled that there was no harm to the mother when the court held the dispositional hearing and the permanency hearing at the same time. Further the lower court was justified in keeping the children in care and in denying the mother any visitation. The father has now surrendered the children. The continued placement away from the mother is appropriate given that she was aware that the father had sexually abused the 8 year old daughter. The mother had actually witnessed the sexual abuse and had threatened the child not to tell anyone. The mother had previously surrendered her rights to two other daughters after they had been sexually abused by a prior boyfriend and she had violated court orders to keep that man away from those girls. An evaluation of the mother resulted in a recommendation that she engage in extensive services and therapy but she has not done so. She has also not asked about the children or their progress. She has refused to take a sex offender assessment, parenting classes or educational programs for non-offending parents of sexually abused children. The mother continues to indicate that she has doubts that the child was in fact sexually abused and has recently stayed with the father and helped him with his medical issues. She minimizes her continued relationship with the father, is dependent on him and fails to see the harm he caused the children or her role in failing to protect them. She is not employed and lives on disability benefits in a home that is unsafe for the children. There is no electricity or running water.

The older child has very serious problems, has been repeatedly hospitalized for extreme and unsafe behavior including suicidal ideation. She is currently in a residential therapeutic setting, is on many medications, has a personal social worker and is not even able to address her sexual abuse issues yet. The mother has had no contact with her since 2009 and the therapist believes that any contact

would be harmful to the child. The younger child is in a foster family home and is doing better but is in therapy and has behavioral problems, is withdrawn and anxious. The girls see each other but there are problems as sometimes the older child can mistreat the younger one. The younger child's counselor opposes any visitation with the mother as she believes that will also harm the sibling relationship. The mother has never contacted anyone – teachers, counselor, social worker – about the younger girl's status. Return of these children to the mother at this time is not in their best interests' "under any conceivable circumstances". Under these "extreme circumstances" denial of all visitation is an appropriate exercise of discretion.

Matter of Amber S., __AD3d__, dec'd 5/24/11 (2nd Dept. 2011)

After a fact-finding in Kings County Family Court, a mother was adjudicated to have neglected her children by failing to provide suitable housing and failing to make sure they attended school regularly. The matter was adjourned for 6 months for the dispositional hearing while the children remained in the home. The AFC did comment at that time that the caseworker had observed recently that there was no food in the home. Two months after the adjournment, ACS brought a motion under FCA §1051 (d) to remove the children to foster care pending the dispo hearing. It was alleged that the mother had allowed the children to remain in the home even though it had been damaged by a fire that one of her adult children had set. The oldest girl, who was 17, was staying out all the time with a boyfriend, coming home only on the first of the month to take money from the mother. This child was smoking marijuana and drinking and the mother did not stop her. The 13 year old son was unsupervised, was not attending school and was also smoking marijuana and drinking. The 12 year old girl stayed out until midnight or later, went to school dirty and smelled badly. The parties argued about the circumstances orally and the court placed the children, concluding that there was a "substantial probability" that the dispo would result in a placement. The mother and the AFC opposed the placement and appealed. The Second Department affirmed the placement. The lower court was not required to hold a hearing on these issues. The court had already concluded that the children were neglected and was now concluding that the dispo would likely include placement and the court is required to protect the children pending the final dispo. The court had an abundance of information that the children needed to be protected and a hearing was not strictly required by the statute.

Matter of Carlos G., __AD3d___, dec'd 5/24/11 (1st Dept. 2011)

The First Department concurred with Bronx County Family Court that a mother was not entitled to visitation with her child while a TPR was pending. The child had been in care since the summer of 2007 when the mother, who is mentally retarded and illiterate, neglected the child. The mother had left the homeless shelter where they had been living and was now and living and sleeping in a park with her child in order to spend time with a boyfriend. The mother had failed to appear in court for the neglect proceeding. A TPR was filed in the spring of 2009 and the foster parents – who are the child's paternal aunt and uncle - wish to adopt. The mother has not seen the child in over 2 years and the foster parents do not intend to allow post adoption contact. It is not in the child's best interests to allow visitation at this point, given that if the TPR is successful, there will be no more contact.

Matter of Kleevuort C., __AD3d__, dec'd 5/31/11 (2nd Dept. 2011)

Kings County Family Court erred in not holding a dispositional hearing after an adjudication of neglect. The matter was remanded for a hearing.

Matter of Kaitlyn B., 84 AD3d 1363 (2nd Dept. 2011)

Relatives, who sought to be licensed as a foster care placement, filed in Suffolk County Family Court for a FCA § 1028-a hearing. They were properly denied the hearing as untimely. The child had already been in care for 14 months.

Matter of James GG., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

The respondent father of one of an Otsego County mother's three children appealed a dispositional order of an Art. 6 custody placement with non relatives. The Art. 6 petition had been filed shortly after the Art. 10 petition which alleged that the mother and the father had neglected the children. The mother consented to the custody order but the father opposed as it related to his child. The Third Department concurred with Family Court that there had been a showing of extraordinary circumstances and best interests to support the custody award. By

the time of the dispositonal hearing, the child had been living with the custodians for 19 months and the father had only visited his child once – 14 months before the hearing. He had written the child 3 letters and talked to the child on the phone 3 times but the phone calls had been placed by the custodians. The father had the custodians' contact information which did not change. The father moved and changed his number without telling DSS or the child's custodians. The father missed 10 of 17 court appearances – including the custody hearing. He had told the caseworker that he wanted to be "taken off the case" except to be advised of court orders. The custodians were caring safely for the child in a stable home with his half siblings. The child was doing well in school and the custodians were willing to try to keep a relationship with the father.

Matter of Destiny F., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

St. Lawrence County Family Court was affirmed in its decision that a mother violated a dispositional order of protection. The mother had been found to have neglected the child and the child was placed in the home of her grandparents. While the child was visiting, the caseworker called on the phone and could hear the mother repeatedly use profane and vulgar language in front of the child referring to the caseworker. When the caseworker questioned the mother about if she had told the child that the grandparents would be arrested and put in jail, the mother did not deny that she had said this to the child. Further, the grandmother testified that when the child had returned from a visitation with the mother, the child was extremely disruptive. When the grandmother questioned the child about her behavior, the child said she had made a "double pinkie promise" with her mother to act badly with her grandparents so that they would not want her and would give her back to her mother. These efforts to manipulate the child and to undermine her relationship with the grandparents were emotionally harmful to the child and violated the order of protection. The mother was sentenced to 60 days in jail.

Matter of Sean S., __AD3d__, dec'd 6/10/11 (4th Dept. 2011)

An AFC appealed the Erie County Family Court's change in two of three children's permanency goals and the Fourth Department reversed. The lower court had changed all three children's goals to adoption but the AFC successfully argued on appeal that the two boy's goals should be APPLA. The brothers were 16 and 15 at the time of the hearing and both brothers adamantly opposed adoption and had done so for years. Counselors, caseworkers, the foster parent and an older

sibling had all encouraged the children to change their minds and be adopted but they had singed waivers for the AFC that they did not consent to adoption. The caseworker testified that the children felt loyalty to the birth family, had a connection to their bio siblings and had recently become re-involved with their birth mother. A psychological evaluation recommended that DSS not try to force the children to be adopted. The foster parent has signed "permanency pacts" with each of the children and agreed to be their APPLA permanency resource and has assisted them with independent living skills. The referee who heard the case determined that the goal should be adoption as the children and the foster parent were not present for her to assess their positions. This does not seem to be a rationale reason to modify the goal to adoption. The AFC who had represented the brothers for a long time was present at the hearing and the evidence was undisputed that they did not want to be adopted. The sister's goal was adoption and the AFC did not oppose that at the hearing and therefore it is not preserved for argument on appeal.

Matter of Jesse QQ., __AD3d__ dec'd 7/14/11 (3rd Dept. 2011)

A Madison County father had been found guilty of the manslaughter death of his girlfriend's son and was serving 23 years in prison. In Family Court he was also found to have derivatively neglected the son they had in common. The Family Court issued an order that the father could only have visitation with the surviving child when "arranged and approved" by the mother. The father then filed an Art. 6 petition seeking visitation which was dismissed by the Family Court. The Third Department found that the dismissal was proper as the father should have filed a FCA §1061 motion to modify the Art. 10 dispositional order and named DSS as a necessary party.

TERMINATIONS OF PARENTAL RIGHTS

Matter of Williams D., 82 AD3d 882 (2nd Dept. 2011)

Queens County Family Court did not err in failing to give a mother an adjournment to provide the testimony of a caseworker. Although she had notice, the mother had not subpoenaed the caseworker and was also only speculating that the caseworker would offer favorable evidence.

Matter of Kathleen K., Court of Appeals 6/9/11 (2011)

The Court of Appeals ruled that for a parent in a TPR to waive counsel, there must be an unequivocal and timely application to represent themselves and the court must make a "searching inquiry" from the respondent as to why he or she wanted to proceed without counsel. Here the father did not seem to understand if he was in fact the one making the decision and his lawyer offered no explanation as to why the father was seeking to proceed pro se. Further the father made the application after the hearing had already commenced. At such a time, the right to proceed pro se should be granted under only the most compelling circumstances. The concurring opinion commented that a parent who seeks to proceed pro se on a TPR may not only be harming themselves but also their children.

Matter of Dominique Beyonce R., 82 AD3d 984 (2nd Dept. 2011)

Queens County Family Court correctly denied a mother's motion to vacate a dispositional order entered in default. The mother's claim that she was at the courthouse but thought the matter was at a different time was not a reasonable excuse under the circumstances and she did not allege a meritorious defense in any event.

ABANDONMENT TPR

Matter of Stephen UU., 81 AD3d 1127 (3rd Dept. 2011)

The Third Department affirmed a Broome Count Family Court's termination of a father's rights to his children. The father had claimed at the trial court that he should have a GAL appointed to protect his interests as he claimed to have a mental disability and physical limitations. The lower court correctly denied this request after having two court appointed psychiatrists conduct an evaluation where it was determined that although he had a low level of intelligence, he had a fair memory. Also the father's testimony showed that he had a general understanding of what the hearing was about and gave his reasons for his failure to maintain contact with the children. The proof did not demonstrate that he was incapable of understanding the proceedings, defending himself or assisting his attorney.

Further, he did not contact the children during the relevant time and his incarceration was not a defense. The court order limiting his contact was also not a defense as he was still able to, but did not, contact the caseworker. He never inquired of the children's status with their caretakers and never saw his son at all and his daughter only once. He provided no child support. He also claimed that his medical conditions limited his ability to maintain contact but provided no evidence to support this claim that he was unable to contact the children.

Matter of Ryan I., 82 AD3d 1524 (3rd Dept. 2011)

Schenectady County Family Court terminated a mother's rights to her son on abandonment grounds. The mother, by her own admission did not visit the child at all during the relevant 6 months. She did speak with him on the phone once and left two or three phone messages at the foster home. The messages were "incoherent and fragmented" . She never asked about the child and never sent cards, gifts or letters. She missed 2 Family Court permanency hearings and the court had terminated her visitation rights. She did ask a worker about half way through the relevant 6 months is she could have a visit but never came to the meeting the caseworker set up to discuss a visit. A month before the termination was filed, she asked again for a visit and was told the court had ended visitation and that she should file in court which she did just shortly before the TPR was filed. The mother had not known that months earlier the court had ended the visits as she had not even attempted one. This behavior, and her failure to inquire after the child evinced an intent to abandon which the mother provided no proof to counter. Her homelessness and substance abuse issues are not defenses to her failure to even stay in contact with the caseworker. She knew where the DSS office was and had even been there for other purposes during the time period.

Matter of Shavenon Edwin N. __AD3d__, dec'd 5/3/2011 (1st Dept. 2011)

Bronx County parents abandoned their child. They admitted that they had no contact with the child in the relevant 6 month period. However, the parents argued that the agency had previously required the mother to visit with an older child which meant that the mother had to be in contact with the father of that child who had raped the mother. This previous requirement may have been ill advised on the part of the agency but this does not constitute a defense to the parents not

having visited this child at all since his birth. The foster mother has had the child since birth and he resides with his biological siblings and the foster mother wishes to adopt all of them. The child's needs are being met and the foster mother loves him. The parents did nothing to create a meaningful relationship with the child. Suspended judgments are not an option in abandonment.

Matter of Kevon S., __AD3d___, dec'd 6/10/11 (4th Dept. 2011)

Although the lower court misstated the definition of abandonment – "failure to visit with *or* communicate" instead of "failure to visit with **and** communicate", it did not matter as the proof established that this Monroe County father did in fact fail to do both in the relevant 6 months.

Matter of Lamar LL., __AD3d__, dec'd 7/7/11 (3rd Dept. 2011)

A Schenectady mother abandoned her children by failing to communicate with them for the relevant 6 months. During that time, she only contacted the caseworker twice – once to ask for help in being admitted to a detox program (which she never went to) and once to schedule a meeting at the shelter where she was staying (which she never showed up at) . She did ask in one of these two conversations about the children but she did not ask to visit with them at any point. These insubstantial contacts are not sufficient to defeat abandonment. The mother failed to testify at the hearing and offer any explanation and the agency is not required to demonstrate any diligent efforts in an abandonment.

Matter of Leon CC., __AD3d__, dec'd 7/14/11 (3rd Dept. 2011)

A Broome County termination on abandonment was affirmed on appeal. The father's only contact in the relevant 6 months was a phone call message that was left saying that the father was demanding that the child be brought to the father's place of work as the father "did not like" DSS.

MENTAL ILLNESS and MENTAL RETARDATION TPR

Matter of Vincent E.D.G., 81 AD3d 1285 (4th Dept. 2011)

The Fourth Department affirmed the termination of a mother's rights on mental illness grounds. The court appointed psychiatrist testified that the mother had schizoaffective disorder and a substance abuse problem that worsened it. The disorder could be treated with medication but the mother refuses to take meds and will not acknowledge that she has a mental illness. If she was undergoing proper treatment she might be able to function and even care for child but that it only a mere possibility and not enough to defeat the proof. The court did not abuse its discretion in denying the mother a separate dispositional hearing as one is not required in a mental illness termination.

Matter of Isaiah J. 82 AD3d 651 (1st Dept. 2011)

A New York County mother's rights were terminated on the grounds of her mental illness. She was unable to safely care for the child. The psychologist provided un-rebutted testimony that the mother had schizoaffective disorder that rendered her incapable of caring for the child for the foreseeable future. The mother had repeatedly requested adjournments and any lapse in time between the evaluation and the fact finding was at her request and does not warrant a reversal. No dispositional hearing was needed to find termination to be in the child's best interests.

Matter of Cayden L.R., 83 AD3d 1550 (4th Dept. 2011)

The Fourth Department affirmed Jefferson County Family Court's termination of a father's rights on mental retardation grounds. Two psychologists testified that the father is mildly mentally retarded and that this renders him incapable of safely caring for his child. The father offered no evidence to the contrary. On appeal, he argued that termination was not in the child's best interests because it did not result in the child being freed for adoption. However the Appellate Court ruled that a termination is still permitted even if the child is not freed. Further the father did not prove that post-termination contact was in the child's best interests.

Matter of Shawn G., __AD3d___, dec'd 5/10/11 (2nd Dept. 2011)

The Second Department reviewed a Suffolk County Family Court's TPR of a mother's rights. Proceedings were brought on both mental illness and permanent neglect grounds. The lower court dismissed the permanent neglect petition as to the older two children, terminated rights on mental illness grounds for all three of the children and also on permanent neglect grounds for the youngest child and then provided a suspended judgment for the two older children. The Appellate Court modified the decisions. The Second Department concurred that the mother had permanently neglected the youngest child as the agency had offered diligent efforts and the mother had failed to maintain contact with the child and had not visited him at all for months. However, the lower court erred in finding that the mother's rights to all three of the children should be terminated on mental illness grounds. The expert testimony was that the mother was presently mentally ill to the extent that the children would be neglected in her care but the expert could not conclude that this would be so for the foreseeable future so the mental illness termination ground was not proven as to any of the children and therefore the freeing of the older two children was reversed. The court also noted that a suspended judgment is not permitted on a mental illness termination in any event.

Matter of Dominique Larissa Blue M., __AD3d___, dec'd 5/10/11 (2nd Dept. 2011)

Although Nassau County Family Court erred in admitting into evidence the report of a forensic evaluation as it contained inadmissible hearsay, this was harmless error given the other evidence presented. There was clear and convincing evidence that the mother could not care for the subject children for the foreseeable future. She suffered from schizoaffective disorder, bipolar type, and this was a chronic condition. She had a serious and ongoing inability to safely parent and she had a lack of insight into her illness and her inability to parent. She required consistent mental health interventions and was unable to manage her symptoms.

Matter of Corey UU., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

A Fulton County mother's rights were terminated on the grounds of her mental illness. Although she did not appear at the hearing, this matter was not a default as her counsel appeared and did participate in the hearing. The court appointed

psychologist interviewed the mother, reviewed information from service providers and found that the mother suffered from psychotic symptoms including delusions and hallucinations. This illness had been present for at least 3 years and had resulted in the mother's inability to maintain employment or stable relationships. Previously the mother had been diagnosed as having paranoid schizophrenia but that had been under different circumstances. She had a history of psychiatric hospitalizations and had traumatic brain injury. The mother was unable to provide any history as she could not answer simple questions and could not engage in cause and effect reasoning. She really focused only on meeting her own needs and could not understand or meet the needs of others. She posed a risk of violence to the child, was unable to keep herself safe and would not be able to provide food, medical care or shelter for a child. She would not be able to meet the developmental needs of an older child. It was highly unlikely that the mother would be able to complete long term counseling or continue a medication regime given the mother's history of failing to comply with any treatment plan. There was a high probability that her illness would worse and she would become more dysfunctional. The mother told the caseworker she only took medications when she felt like it. The mother did not follow through on programs the caseworker offered. She was aggressive to the child in visits, blaming him for his own placement in care, accusing him of lying and shouting at him. There was clear and convincing evidence that the mother is unable by reason of her mental illness able to care for her child safely now and for the foreseeable future. The mother argued on appeal that she should be given a suspended judgment to allow her time to seek treatment for her newest diagnoses but this was not preserved. (**NOTE:** there is no statutory authority for a suspended judgment in a mental illness termination) The child is in a foster home that wishes to adopt him and he wants to be adopted.

Matter of Jamiah Sharang C., __AD3d___, dec'd 6/7/11 (1st Dept. 2011)

The First Department affirmed a New York County Family Court's termination of a mother's rights. There was un-rebutted expert testimony that the mother was mentally ill to the extent that she would not be able to safely care for the child for the foreseeable future. The lapse in time between the evaluation and the fact finding was not sufficient to warrant a reversal.

Matter of Anthony WW., __AD3d__, dec'd 7/7/11 (3rd Dept. 2011)

The Third Department reversed a St. Lawrence County Family Court's mental illness termination as to the 3 children of a father. The proper foundation was not laid for the admission of the opinions of the two psychologists. The experts were not asked the question (usually referred to as *Sugden* questioning) as to if the hearsay evidence they relied on was normally relied upon within the profession. This is required so that the court can understand how the expert assessed and formed opinions and how the hearsay fit into the overall opinion. Further, one of the evaluations was for the purpose of offering recommendations for services, not to evaluate the ability to provide safe care for the children and therefore should not have been admitted. Also the court was critical about the DSS decision to file this mental illness petition while a suspended judgment from a prior permanent neglect adjudication was pending. Apparently there was no violation pending on the suspended judgment and there was evidence that the father – as well as the mother – were in fact making progress.

Matter of Phajja Jada S., __AD3d __, dec'd 7/7/11 (1st Dept. 2011)

A New York County mother's rights were terminated based on evidence that she is unable to properly care for the child now and for the foreseeable future due to her diagnoses of schizoaffective disorder. Even if that particular diagnoses is in question, her mental illness was proven in its totality. The father was not a consent father as he had not provided the child with consistent financial support or visited or communicated with the child at least monthly.

SEVERE ABUSE TERMINATION

Matter of Alicia EE., __AD3d__, dec'd 7/7/11 (3rd Dept. 2011)

The Third Department affirmed a severe abuse termination of a father's rights to his daughter based on a summary judgment motion. The father was convicted of assault in the second degree and aggravated assault on a person less than 11 due to his physical abuse of his daughter and is incarcerated until at least 2014. There is also a criminal order of protection that prohibits contact until she is at least 18. Family Court found severe abuse and relived the DSS of doing any diligent efforts to reunify and then granted a summary judgment motion to terminate on severe

abuse. The father argued that the motion should be stayed until his had appealed his criminal conviction. The Third Department found that this argument was moot as he had, by the time of this appeal, lost his criminal appeal. The father also argued that the lower court should have given him a suspended judgment but the Appellate Division agreed that this was not in the child's best interests. The father's situation - his convictions, his incarceration, the prohibition from any contact did not warrant a suspended judgment. The child is doing well in the foster home where they want to adopt and are meeting her special needs.

PERMANENT NEGLECT

Matter of Mark Eric R., 80 AD3d 518 (1st Dept. 2011)

The First Department affirmed New York County Family Court's termination of a mother's rights to her children. The agency offered diligent efforts but the mother did not make the needed changes. The mother failed to learn to control her temper, did not cooperate with the agency to allow home visits or to produce proof of legal income. She also failed to attend most of the children's educational and medical appointments. She did not accept recommendations to improve her parenting and had failed to find suitable housing. The lower court's failure to allow the testimony of a worker who had observed a few visits was harmless. The children are bonded and thriving in the foster home who wishes to adopt. The suspension of visitation during the dispositional phase did not prejudice the mother.

Matter of Joshua Jezreel M., 80 AD3d 538 (1st Dept. 2011)

A New York County father's rights were properly terminated. The agency offered diligent efforts by setting up visitation and offered a service plan and programs. The father did not keep in contact with the agency, didn't visit the child or send him any letters, cards, gifts or pay any child support. The record demonstrated that the father continued to use drugs and failed to seek treatment. It was harmless error that the court admitted lab reports without the proper foundation. The father had no resources to provide for the child and offered no proof at the dispositional hearing. The agency need not offer proof of the best interests of the child where the court indicated that it has sufficient evidence in that regard. The foster parents

have cared for the child since he was three months old and can meet his extensive medical needs.

Matter of Aliyah Julia N. 81 AD3d 519 (1st Dept. 2011)

The First Department affirmed New York County Family Court's termination of parental rights of a mother. The agency engaged in diligent efforts by working with the mother to create a service plan, staying in contact with her, setting up visitation, referring her to parenting and DV counseling. However, the mother did not complete the programs or maintain a meaningful relationship with the child. The mother defaulted on the disposition but a suspended judgment was not in the child's best interests in any event.

Matter of Kenneth Frederick G., 81 AD3d 645 (2nd Dept. 2011)

On appeal from Dutchess County Family Court, the Second Department affirmed the termination of a father's rights. The agency had made diligent efforts for the incarcerated father by advising him of the child's progress, asking him to participate in planning for the child and reviewing the alternative resources that the father identified for the child. The father was not able to provide a realistic alternative to foster care and everyone he suggested as a caretaker – including his mother – was not appropriate. The child was bonded to the foster family and they want to adopt him.

Matter of Victorious LL., 81 AD3d 1088 (3rd Dept. 2011)

The Third Department affirmed the termination of an Ulster County father's rights. He had been frequently incarcerated while the child had been in foster care – there were only 15 days in the relevant period where he was either not in jail or in an inpatient facility. Despite this, the agency offered diligent efforts by advising him repeatedly of the need to get substance abuse treatment, by providing numerous visitations and by transporting the child to visits at the father's residential treatment. The caseworker arranged for the father to be present at 2 service plan reviews, provided him with photographs of the child and let him know how the child was doing. The caseworker located temporary housing for the father when he was not in a facility. The father did not complete a substance abuse program,

he was re-incarcerated due to ongoing confrontations with the child's mother. The father did not understand the child's special needs due to the mother's substance abuse during the pregnancy and accused the foster parents of trying to get more money for the child by saying the child had special needs. After the fact finding, the father was discharged from another drug treatment program and tested positive for drugs. A suspended judgment was not warranted.

Matter of Lindsey BB., 81 AD3d 1099 (3rd Dept. 2011)

The Third Department reversed a termination from Columbia County Family Court. The lower court had previously issued a "no reasonable efforts order" and that was appealed. While that appeal was pending, the DSS let the children move to a kinship foster home in Florida, without telling the parents. DSS also stopped offering reunification efforts for the parents due to the order. DSS then brought TPR proceedings. The parents objected to the children's move and argued that the agency was not offering diligent efforts. The lower court terminated parental rights and denied the motion to return the child from Florida, citing the court's earlier order that the agency need not offer efforts toward reunification. The lower court did order a suspended judgment for the parents. The Third Department then reversed the lower court finding of "no reasonable efforts" therefore the DSS was in fact obligated to offer efforts and since they admitted that had stopped doing so, the TPR was not proven and the Third Department reversed and remanded the matter. This had been this case's third trip to the Appellate Division – and stay tuned on the remitter.

Matter of Juliette JJ., 81 AD3d 1112 (3rd Dept. 2011)

A Schenectady County Family Court termination was affirmed on appeal. There was no dispute that the agency had offered diligent efforts. The father did participate in services such as parenting and mental health counseling but he did not benefit from those services or gain any insight into his responsibility for the child's placement. He continued to refuse to see that the child needed to be protected from the effects of his wife's severe mental illness. He refused to medicate his wife or help her comply with treatment. He would not intervene at visitation when the mother would make rambling, violent comments that frightened the child. The father also suffered from obsessive compulsive disorder

and severe anxiety and did not supervise the child, who had developmental delays, properly. The father failed to recognize that the child's issues had been the result of living in the parents' home. The father claimed that the child was doing better in the foster home only because she was getting older. He did not come to the child's special education meetings. He claimed that if the child came home, his plan would be to just make sure the child was not alone with the mother. The father does love the child but he has not resolved the problems that led to her placement. He never was able to progress beyond supervised visitation and needed assistance to simply manage the child during visits. The child was reluctant to visit with him, was clingy and anxious. The foster mother wanted to adopt and the child had become part of the family.

Matter of Kaiden AA., 81 AD3d 1209 (3rd Dept. 2011)

Cortland County Family Court terminated a father's rights to his son and this ruling was affirmed by the Third Department. The mother and her boyfriend abused the child and the mother ultimately surrendered her rights. The father was incarcerated soon after the child went into care and had been incarcerated when the child was younger as well. DSS did provide him with diligent efforts. The caseworker learned he was incarcerated and informed him of the child's placement in care and thereafter informed him of the child's health and progress and provided copies of all permanency hearing reports. The caseworker responded to the father's letters and phone calls and sent photos of the child. When the father suggested his sister as a resource for the child, the caseworker investigated that possibility and determined it would not be appropriate given the sister's child protective history. Although the agency did not provide visitation, given the child's young age (toddler and preschool during the period in question) and the long distance the child would have had to travel to see the father in prison, visitation was not in the child's best interests. Also the caseworker did not provide rehabilitative services but that is not required when a parent is incarcerated. The father had had no contact with the child since the child was 16 months old and the father never consistently followed up on a petition for visitation. In a 21 month period, the father contacted the caseworker only four times and never sent the child any cards, letters or gifts. The father's only plan for the child was to wait in foster care for years until the father served his sentence. This is not in the child's best interests and will not mean permanency.

Matter of Holden W., 81 AD3d 1390 (4th Dept. 2011)

The Fourth Department affirmed a Cattaraugus County termination of a mother's rights. Diligent efforts were offered by referring the mother to substance abuse and mental health treatment programs and provided transportation. The caseworker also assisted the mother when her Medicaid benefits were threatened. The mother, however, failed to complete the recommended programs, continued her relationship with the abusive father and appeared for two supervised visits under the influence of alcohol – in one instance with a BAC of .10%. The child has been in care for 18 months with supportive and loving foster parents who wish to adopt.

Matter of John M., 82 AD3d 1100 (2nd Dept. 2011)

Suffolk County Family Court properly terminated the parental rights of a father to his son. The agency offered referrals for substance abuse treatment and set up visitation. The father missed half of the visits, did not participate in drug treatment and continued to use drugs.

Matter of Nicholas R., 82 AD3d 1526 (3rd Dept. 2011)

A St. Lawrence County child had been placed in foster care due to the domestic violence between his parents. The Family Court ultimately terminated parental rights and the Third Department affirmed. The agency offered diligent efforts by devising separate service plans for the two parents. The caseworker met with each of them and reviewed the plans, kept them apprised of the child's situation and made referrals for services and offered help in obtaining the services. The father indicated he would only go to services because they were court ordered. In response to being questioned, the caseworker told this to the serviced provider. This was simply relaying honest information and did not "sabotage" him and delay him on the service waiting list. There was an order of protection in effect that the father was to have no contact with the child so the caseworker was not obligated to provide visitation. The caseworker did encourage the mother to obtain mental health services, it was the mother's unwillingness to engage in appropriate services that caused delay.

While the mother did engage in many of the services offered, she did not gain any insight. She continued to have contact with the father when it was his violence that had caused the removal of the child. She made no plan to protect the child from the father that would permit a safe return. She did not engage in mental health counseling and did not complete the anger management program. She continued to express anger toward the caseworkers and had a physical fight with a neighbor that resulted in the police being called. The father continued his violent behavior including breaking into the mother's apartment and slashing her furniture with a knife while she hid in the closet. There was no reason to offer a suspended judgment to either parent.

Matter of Trestin T., 82 AD3d 1535 (3rd Dept. 2011)

A Cortland County father's parental rights were properly terminated. He was incarcerated for attempted rape when the child was born. The child was placed into care at birth. The agency caseworkers offered diligent efforts to the incarcerated father by developing a service plan and keeping him informed of the child's progress. The caseworker met with the father at prison as well as spoke with him by telephone and as well as with the father's counselor at prison regarding the father's progress in various programs. The father had agreed that he would not have any visitation with the baby until the father had completed a sexual abuse program in the prison which he never completed. The caseworker also investigated relatives that the father suggested as placement options for the child but none were suitable. The father did maintain contact with the caseworker regarding the child but he made no realistic plan for the care of the child. He was not eligible for release for at least another year and the child had already been in care for several years. The father had no alternative for the child but foster care. The child had no real relationship with the father but was bonded to the foster family who had cared for him since his birth.

Matter of Jasmine Courtney C., 83 AD3d 450 (1st Dept. 2011)

A New York County mother permanently neglected her child. The agency offered diligent efforts by meeting with the mother and preparing a service plan and encouraging her compliance. Visitation was arranged at times to accommodate the mother's schedule. However, the mother attended only 5 of the 52 scheduled

visitations. It was conceded that the mother had been victimized by the father and details about those incidents were not relevant.

Matter of Skyler S.M., 83 AD3d 549 (1st Dept. 2011)

On appeal to the First Department, the New York County Family Court was affirmed in its termination of a mother's rights. Although there is no proper appeal of the fact finding since it was on default, the grounds of permanent neglect were proven by clear and convincing evidence. The mother tested positive for cocaine, did not complete drug treatment or anger management programs and did not obtain suitable housing. It would be in the child's best interests to be adopted by the foster mother who meets the child's medical and psychological needs.

Matter of Amilya Jayla S., 83 AD3d 582(1st Dept. 2011)

New York County Court terminated the parental rights of a mother and it was affirmed on appeal. The agency offered diligent efforts by making referrals for required services and setting up visitation. The mother did not maintain contact with the child and did not complete the required programs. It would be in the child's best interests to be freed for adoption by the foster mother with whom she has lived for more than four years. The lower court did not abuse its discretion by refusing the mother's request for further adjournments given her history of non-appearance. Further, the court properly struck the mother's direct testimony in the fact finding and the dispositional hearing given her failure to appear for cross examination.

Matter of Nicholas B., 83 AD3d 1596 (4th Dept. 2011)

The Fourth Department affirmed an Erie County termination of a mother's rights. DSS provided diligent efforts by offering referrals for mental health treatment and encouraging her to maintain a clean home but the mother did not follow up with mental health services and was not able to keep her home in appropriate condition. The children's best interests were served by termination. They had been in foster care for 6 years. The mother made no more progress after the fact-finding and did not have a realistic feasible plan for the children's care.

Matter of Megan Victoria C.S., ___AD3d__, dec'd 5/5/2011 (1st Dept. 2011)

The First Department affirmed Bronx County Family Court's termination of a mother's parental rights. The agency provided diligent efforts by developing a service plan, setting up visitation and providing referrals for the services in the plan. The mother did not complete drug treatment, stopped mental health therapy and did not avail herself of the services offered.

Matter of Tyler LL., __AD3d__, dec'd 5/5/11 (3rd Dept. 20110

The Otsego County Family Court's termination of a mother's rights was upheld on appeal. The agency offered diligent efforts by offering appropriate services, setting up supervised visitation and keeping the mother informed of the child's progress. The caseworker offered her mental health counseling as well as couples counseling to deal with the domestic violence issues that had been a major factor in the child's being placed. There were also mental health referrals, substance abuse referrals and parenting offered. The caseworker also had regular contact with the mother advising her of the problems that needed to be resolved. She missed many visits with the child – the birth of her sixth child and her heart surgery were issues – but the majority of her missed visits were not for these reasons. She failed to keep the caseworker aware of her location and did not answer telephone calls about missed visits. She never called the child or wrote him. She missed 3 appointments for her mental health evaluation and did not keep her home in an appropriate and safe condition. The mother failed to recognize her role as an instigator of domestic violence and did not engage in services nor did she maintain contact with the child.

Matter of Colinia D., __AD3d__, dec'd 5/6/11 (4th Dept. 2011)

An Erie County AFC appealed the Family Court's dismissal of a permanent neglect petition against the child's father. The Fourth Department agreed with the lower court that DSS had not offered the father diligent efforts that were tailored to the situation. The decision did note that the mother of the child is deceased and the father of the child's custody petition for the child was dismissed. The child, who is now 18 years old and has severe Down syndrome remains in foster care with the family who had hoped to adopt.

Matter of Chelsea C., __AD3d__, dec'd 5/10/11 (1st Dept. 2011)

A New York County mother's rights to her children were terminated appropriately. The agency provided diligent efforts by offering parenting classes and therapy in her native language. The mother was a non-offender whose child had been sexually abused but the mother chose not to work with a therapist who was skilled with sexual abuse issues. She also choose not to go to a Spanish parenting class but attended one in English even though she needed a Spanish interpreter to participate at court proceedings. The mother did not take steps to correct the issues that had led to the placement and it was more than a year into the placement before she even began therapy. The children are all doing well in their respective foster homes where they have been living for years. Three of the four wish to be adopted and do not wish contact with the mother. The fourth child is 17 years old and wishes to remain in foster care although she has reestablished contact with members of her biological family. A suspended judgment is not in their best interests.

Matter of Anthony P., __AD3d___, dec'd 5/10/11 (1st Dept. 2011)

New York County Family Court was affirmed on appeal to the First Department regarding the termination of a mother's rights. The agency provided diligent efforts by offering a service plan that included anger management training, parenting skills training and therapy as well as other services. Regular supervised visitation was offered. The mother's criminal and violent tendencies that led to the placement were not resolved, however. Although the mother did attend two anger management programs, she was convicted of attempted murder and also arrested for assaulting the children's father during the time period. She was also arrested for prostitution. Her visitation with the child was very irregular – she missed visits, would cancel at the last minute or not call at all, was late, left early and would not confirm in advance. The visits themselves were not of good quality. The child had been in the same safe foster home since 2008 and has a stronger bond with the foster mother than the birth mother. A suspended judgment is not warranted.

Matter of Zechariah J., __AD3d__, dec'd 5/17/11 (2nd Dept. 2011)

The Second Department agreed with Orange County Family Court that a father had permanently neglected his son. The agency offered diligent efforts by setting up

regular visitation and providing referrals for substance abuse and domestic violence programs. The father did visit regularly and did complete many of the services. He also obtained suitable housing. However, he failed to gain insight and make necessary changes in his behavior. He remained hostile, uncooperative and reluctant. He missed treatment appointments and on several occasions attended substance abuse treatment with beer on his breath. He never acknowledged his responsibility for the child's removal including his violence toward the child's mother. He claimed the mother was violent and a drug user but he continued his contact with her. He was arrested for another violent incident toward her almost a year after the child had been removed. Given the father's lack of acknowledgement and insight, it would not be in the child's best interests to offer a suspended judgment.

Matter of Jonathan B., __AD3d__, dec'd 5/17/11 (2nd Dept. 2011)

The Second Department concurred with Suffolk County Family Court that a mother had permanently neglected her son. The child had been placed in care at birth due to a positive tox screen for opiates. The mother had been ordered to have a mental health evaluation, attend drug treatment and parenting training and participate in therapy. She did complete parenting, but never participated in mental health treatment on a regular basis and failed to complete any substance abuse program. She admitted using heroin even after the TPR had been filed. It was in the child's best interests to be freed and adopted by the foster family with whom he has lived his whole life.

Matter of Khalil A., ___AD3d___, dec'd 5/24/11 (1st Dept. 2011)

The First Department affirmed that a New York County mother had permanently neglected her children. The agency offered diligent efforts by meeting with the mother regularly, preparing a service plan, arranging visitation, and assisting with housing. The mother failed to attend therapy or deal with her mental health issues that had led to the placement. The children have lived in the same loving foster home for five years.

Matter of Crystal JJ., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

A Tompkins County mother lost her parental rights to four children. Diligent efforts were offered by DSS. She was offered substance abuse services for her abuse of alcohol, marijuana and cocaine as well as housing assistance. She was referred for a psychosocial evaluation and provided regular visitation as well as transportation. The mother did complete two inpatient substance abuse programs but failed to complete two outpatient programs. She tested positive for cocaine four times between her two admissions to inpatient programs. She did not obtain adequate housing and had been sanctioned and not permitted to remain in subsidized housing or a local shelter. She continued to have a relationship with a man who abused alcohol, knowing that this was a factor in the children not being returned to her. She did not make a realistic plan for the children's return. She had made some recent progress at the time of the dispositional hearing but given her history of relapse and lack of any real progress, a suspended judgment was not appropriate.

Matter of Hailey ZZ., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

The Third Department affirmed the termination of an incarcerated father's rights to his child. DSS offered diligent efforts by arranging for visitation, keeping in contact with him about the child's status, providing service plans and investigating relatives as placement resources. None of the resources offered were appropriate. A sister suggested had been hot-lined and a girlfriend was only offered as a resource after the TPR had been pending three months. Other relatives the father suggested at the dispositional hearing had never had any relationship with the child. The father could not be released for at least two years after the hearing at a minimum and the child had already been in care for 20 months. It is in the child's best interests not to remain in long term foster care awaiting the father's release but to be adopted in the foster home with her half sister. The father's request for post-termination contact with the child was "properly denied as unavailable in a contested termination proceedings."

Matter of Nazelle RR., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

The Third Department affirmed a Tompkins County termination that freed four children for adoption. The children had been in care 18 months and the DSS offered diligent efforts toward reunification. The mother was offered casework

counseling as well as referrals to therapy and visitation. Family team meetings were held, a service plan devised and transportation was offered. The caseworker kept the mother informed of the children's schooling and appointments. The mother failed to plan for the children who had been removed due to domestic violence and lack of supervision. The mother continued to deny that there had been any domestic violence in the home or that her use of the 10 year old as a parent substitute for the younger children was inappropriate. She continued seeing her boyfriend with whom there had been a violent relationship and she lied about the relationship continuing. The mother had significant medical and mental health issues and was unable to maintain a safe home. She did complete some programs but was failed to complete mental health therapy and derived no benefit from it. She did not follow through on needed care for "methicillin-resistant staphylococcus aureus" and did not follow instructions about the disease such as keeping her apartment clean and taking precautions with the children. This resulted in her spreading the disease to two of the children. It was not abuse of discretion to fail to offer her a suspended judgment as there was no hope that she would make the changes she has not made in the two years before the dispositional hearing. The children had been in the same foster home for 2 years and were thriving and the foster mother wanted to adopt.

Matter of Nicole K., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

The termination of the parental rights of two Delaware County parents was affirmed on appeal. The three children had been in care since 2007 after the children were found to have been neglected. DSS offered diligent efforts in that a parent aide was assigned to help the parents with finances and other issues and parent education courses were offered. Referrals were made to a mental health counselor who specialized in working with parents who were cognitively impaired. Visitation was arranged and supervised by DSS and the children were transported for the visits. Appointments were scheduled around the father's employment and the mother's "propensity to sleep late". The parents failed to take advantage of the services offered and were resentful of the DSS interference with their lives. They failed to attend many service appointments, completely discontinued the mental health counseling and violated rules in place regarding the use of computers and web cameras during the visitation. The mental health counselor indicated that the parents did understand the caseworker and service providers but did not want to take their advice. The counselor testified that the parents had made some progress initially but that they were resistant to change and the children could not return safely. One of the children had reached 18 and chose to return to live with the

parents and so dispositional issues as to him were moot as were the issues as to the second child for whom the lower court had awarded a suspended judgment as she too at aged out by the time of the appeal. However, the freeing of the youngest child to be adopted by his foster parents – supported by the AFC – was appropriate and in his best interests. He has spent a long time in the foster home, is still young and his parents have failed to plan for him. He was happy in his placement and was continuing to see the parents.

Matter of Sharon V., __AD3d__, dec'd 6/9/11 (3rd Dept. 2011)

The Third Department affirmed Chemung County Family Court's termination of a mother's rights to her son as well as the denial of the grandmother's request for custody. This mother's two children had been in the care of the grandmother but she had voluntarily returned the children to the mother and shortly thereafter the younger child – just 7 months old – died while the mother was sleeping and the children were unattended. The subject child of this petition witnessed his little brother climb into an open oven that then fell on top of him, asphyxiating and burning him to death. The children were both found encrusted with feces and the apartment was unsafe and unsanitary, The mother had previously lost her parental rights to two other children due to domestic violence and substance abuse. This surviving child had been in foster care for 2 and half years when the grandmother petitioned for custody and the DSS filed to terminate parental rights of the mother.

The agency offered diligent efforts tailored to the mother's needs including parenting classes, a substance abuse assessment, a domestic abuse program and counseling. Visitation was offered twice a week as was transportation. Although the mother argued that she did not get assistance with housing, that would not have remedied the safety issues that really was not what prevented the return of this child. The mother failed however to make the service plan work. She did not come to appointments with the caseworker to provide her feedback. She failed to acknowledge her role in the baby's death and did not complete grief counseling. Her participation in services was inconsistent, delayed and often incompliant. The mother choose to live with and then marry a felon with a history of substance abuse and domestic violence. He had been court ordered to have no contact with the child. The grandmother's petition for custody was considered at the dispositional hearing. She has no legal preference over the prospective adoptive parents and indeed waited 2 and a half years after the child's placement in foster care to bring the petition. The grandmother has had appropriate contact with the

child throughout his life. However, the child is bonded to the family he has lived with since his removal who wish to adopt him. The child's therapist believed that the child needed the ongoing stability of this family to deal with his special needs as well as the trauma of having witnessed his brother's terrible death. Family Court did not improperly delegate its authority regarding post-termination contact for the grandmother. The court ruled that the grandmother was entitled to ongoing contact with the child as agreed upon by the parties and "in likely consultation" with the child's therapist.

Matter of La'Derrick J.W., ___AD3d__, dec'd 6/10/11 (4th Dept. 2011)

After a prior reversal, the Jefferson County Family Court termination of a mother's rights was affirmed this time by the Fourth Department, The mother moved to Louisiana shortly after the children were placed in care as a result of another child have been killed by the mother's boyfriend. DSS offered her diligent efforts by keeping her apprised of the children's situation, providing methods to maintain contact with the children, including setting up regularly scheduled phone contact, urging her to return to the geographic area to receive services at the expense of the county and referring her for grief counseling in Louisiana. The mother failed to keep in contact with the children or to plan for the children. The foster mother had cared for the children for several years and wanted to adopt them. The mother did not appear for the dispositional hearing but there was no error in proceeding without her. She had previously obtained an adjournment when she provided documentation from a doctor that another child had suffered a brain aneurism and several weeks later she indicated that she felt she still could not appear due to the child's condition but provided no documentation. Her attorney did vigorously represent her interests.

Matter of Calvario Chase Norall W., __AD3d__, dec'd 6/21/11 (1st Dept. 2011)

Bronx County Family Court was upheld on appeal regarding the termination of a mother's rights to her son. The agency offered help with housing, counseling and regular visitation. The mother was in the same circumstances as she had been in when the child had been removed three years earlier. She also failed to maintain regular visitation with the child. She had no real relationship with the child and no

plan for his care. The child was in a kinship foster home where his needs had been met since birth. A suspended judgment was not appropriate.

Matter of Beyonce H., __AD3d__, dec'd 6/28/11 (2nd Dept. 2011)

The Second Department affirmed a termination of a mother's rights to her child on appeal from Kings County Family Court. The agency offered visitation, drug treatment programs and mental health evaluations. The caseworkers advised her of the importance of attending and completing the programs and of obtaining appropriate housing. The mother did not complete the programs nor did she obtain adequate housing.

Matter of Fernando Alexander B., __AD3d__, dec'd 6/28/11 (1st Dept. 2011)

A Bronx mother's parental rights were terminated and the First Department affirmed. The agency provided diligent efforts by meeting with the mother, providing a service plan, discussing compliance with the plan and providing services including parenting, mental health therapy, housing assistance and regular visits. The mother failed to attend therapy, did not obtain suitable housing and did not visit regularly. The child is thriving in a foster family where he has lived for most of his life. His special needs are met in the foster home.

Matter of Tailer Q., __AD3d__, dec'd 7/7/11 (3rd Dept. 2011)

The Third Department affirmed Tompkins County Family Court's termination of a mother's rights to her son. The agency offered diligent efforts by providing ongoing contact and services, offering visitation and family team meetings. DSS reviewed the case with the mother and service providers and repeatedly sought services for the mother. Specifically services were directed at the mother's mental health issues. The mother did maintain contact with the child by she refused to meaningfully participate in mental health treatment. She also failed to see the significance of the child's mental health problems. She exhibited a pattern of

anger and hostility and would refuse to cooperate with her own evaluations and blamed others for the child's serious mental health issues.

TPR DISPO'S

Matter of Carolyn S., 80 AD3d 1087 (3rd Dept. 2011)

A Tompkins County grandmother appealed the denial of her custody/visitation petition that had been heard in the TPR dispositions of the children's parents. Her petitions had been consolidated and heard at the same time as the TPR dispos and the lower court had freed the children for adoption by their foster parents. The Third Department concurred with the procedure, finding that the Art. 6 petition should be consolidated with the TPR dispo where, as here, it had been filed at the time of the TPR. Also, the lower court properly provided the mother with a full evidentiary hearing. Her due process was not violated and the lower standard of proof at a dispositional hearing did not prejudice the court's assessment of the children's best interests. Although the terminations provided the threshold extraordinary circumstances for a non-parent custody petition, it was not in the children's best interests to be placed in the custody of this grandmother.

The grandmother had a long relationship with the children and they had periodically lived with her, her other teenage daughters and her boyfriend due to the mother's drug problems. However, when the mother had neglected the children and the children had been placed with the grandmother, she had violated court orders and let the children reside with the mother. The children were in the mother's home for possibly a month before this was discovered and at a time when the mother had recently failed to complete drug treatment. The caseworker expressed "grave concerns" that the grandmother would allow the children to be with the mother in unsafe situations again. Further the evidence showed that the grandmother had been inappropriate in front of the children in disagreements with the caseworker and the foster parents. The caseworker testified that she felt threatened by the grandmother and an incident with the foster parents had resulted in the police being called. The children have bonded with the foster parents and are happy and thriving in school. One foster parent has a graduate degree in psychology whereas the grandmother has an 8th grade education. Even visitation is not in the children's best interests given the grandmother's open hostility with the foster parents and her vocal opposition to the adoption. The court did not abuse its discretion in declining to hold a Lincoln hearing with the children, which

their lawyer opposed. The children had gone through much emotional turmoil and there could be harmful affects to them. The court was well aware that the children did love and felt attached to the grandmother. The children's attorney had a long standing relationship with the children and actively represented them and her position will not be second guessed.

Matter of Shirley A.S., 81 AD3d 1471 (4th Dept. 2011)

Erie County Family Court was affirmed in its decision to terminate a mother's rights and not provide a suspended judgment. The mother was incarcerated for stealing money for her drug habit at the time of the dispositional hearing although she was released by the last day of the hearing. However at that time she was living in a homeless shelter and had no income. The mother had been addicted to drugs for many years and she had not seen this child in over 2 and half years. The foster parents, who wanted to adopt, had been caring for the child since birth and she was doing well with them.

Matter of Kathleen Shaquana G., 82 AD3d 610 (1st Dept. 2011)

The First Department reversed the disposition in a termination of a father's parental rights to his daughter. The father appealed the disposition that had freed the child to be adopted by the foster mother. The father had argued for the child to be placed in the home of the father's cousin. The Appellate Division concurred that at the time of the disposition in New York County Family Court, the child best interests were to be freed for adoption by the foster mother , but the circumstances had changed. The child had now been hospitalized for having hallucinations and the child was violent. The foster mother no longer wishes to adopt the child. She believes that she cannot provide the level of support needed for the child's mental and emotional issues. The court remanded the matter for a new dispositional hearing. (Note: The appeal time – that is from original disposition until the appeal decision - was 1 year and 9 months)

Matter of Shania D., 82 AD3d 1513 (3rd Dept. 2011)

Tompkins County Family Court correctly terminated parental rights and did not issue a suspended judgment as it related to a mother and her two children.

Although the mother participated in the programs offered by the agency, and had appropriate housing and was employed, she refused to recognize that her relationship with an abusive boyfriend was a bar to the children's safe return. The children had been in care for 2 years and she continued the relationship, trying to hide it from the caseworkers. She placed "more importance on this relationship than on her children's well-being". She also made questionable parenting decision during visits. The children were thriving in a kinship placement where the family wanted to adopt.

Matter of Antoinne T., 83 AD3d 721 (2nd Dept. 2011)

Suffolk County Family Court revoked the suspended judgment disposition of a mother's termination proceeding given that the mother had violated the terms of the order. On appeal the Second Department concurred finding that only one hearing was necessary to make both the violation finding and that termination was in the child's best interests.
(**Note:** The decision says this was a suspended judgment from an abandonment termination but there is no statutory authority to do a suspended judgment on an abandonment termination)

Matter of Tumario B., 83 AD3d 1412 (4th Dept. 2011)

Although the Fourth Department agreed that Onondaga County Family Court did not err in failing to enter a suspended judgment for this mother in this matter, the court did remand the case for a hearing on post termination contact. The mother did not request this in the lower court and only argued for it for the first time on appeal but the Fourth Department found that in the interest of justice the matter should be remitted for a hearing on that issue. The evidence suggested that the adoptive parents might support such visitation and the AFC also supports it. Currently the adoptive parents do visitation already with the birth mother regarding a sibling that they have already adopted.

Matter of Michael C., 83 AD3d 1651 (4th Dept. 2011)

Steuben County Family Court did not abuse its discretion in denying a suspended judgment to the father in a TPR. The father had completed a 28 day inpatient

substance abuse program but he has since failed drug tests and has been noncompliant with the court's orders. His progress was not sufficient.

Matter of Hassan E., 83 AD3d 1653 (4th Dept. 2011)

An Erie County mother violated numerous terms of her suspended judgment and a preponderance of evidence supported that termination was in the best interests of the children. The mother did not ask the court to consider post-termination contact and did not prove that any contact would be in the child's best interests.

Matter of Mya B., __AD3d___, dec'd 5/6/11 (4th Dept. 2011)

In affirming a termination of an Onondaga County father's rights, the Fourth Department indicated that she the father did not ask for post-termination contact rights, he did not preserve the issue and in any event he failed to establish that it would be in the child's best interests.

Matter of Ronnie P., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

The Third Department affirmed the Cortland County Family Court's finding that a mother had violated a suspended judgment and terminated her rights. The evidence demonstrated that the violation was proven by a preponderance of the evidence. One of the terms of the suspended judgment was that the mother have no contact of any kind with a former boyfriend who had abused the children. The mother had been seen by the foster father in the company of the boyfriend. The mother did admit in the hearing that she had not always been truthful about her relationship with the boyfriend. The mother also had not consistently attended ordered counseling and did not always cooperate or communicate with the caseworker. The mother had violated the terms of the suspended judgment but as required the court also found that is was in the best interests of the children to be freed for adoption. The children have been in the foster home for over three years and the family wishes to adopt. The children have special needs which are being met by the family and progress is being made in their behavior. The children's counselor testified that the mother attended only one of the children's counseling sessions but this resulted in both children becoming highly stressed and anxious and regressed in behavior.

Matter of Kellcie NN., __AD3d__, dec'd 6/2/11 (3rd Dept. 2011)

Tompkins County Family Court appropriately terminated the parental rights of a mother to her children as a suspended judgment was not warranted. The mother had been incarcerated for much of the time that the children were in placement and even after being released, was arrested three more times. She blames everyone else for the children's placement and is argumentative with and distrustful of the caseworkers and service providers. She threatened and harassed the foster parents to the point of an order of protection being issued. She has not been allowed to see the older child for more than a year due to actions during visits. The mother has continued to have inappropriate relationships with men, including one with a man who had been convicted for breaking his child's arm. Her psychological evaluation indicated that she has poor and impulsive judgment and a tendency to unlawful actions as well as deficiencies in her parenting. The children have been with the same foster family for 20 months and their behaviors have substantially improved. They have a bond with the family and are thriving and the family wishes to adopt. Termination is in their best interests.

Matter of Jane H., __AD3d___, dec'd 6/10/11 (4th Dept. 2011)

The Fourth Department agreed with Onondaga County Family Court that there was no reason to issue a suspended judgment as the mother was unlikely to change her behavior. The mother failed to ask for post-termination contact and in any event there was no proof that such contact was in the best interests of the child.

Matter of Keyon M., __AD3d___, dec'd 6/10/11 (4th Dept. 2011)

A Monroe County mother's rights were terminated after she violated the order of suspended judgment. The hearing was proper in that the court determined the violation and also heard testimony of the children's best interests as both are required. The burden of proof is preponderance.

Matter of Thomas X., __AD3d__, dec'd 7/7/11 (3rd Dept. 2011)

A Broome County mother admitted to neglect and then eventually surrendered her three children after violating the terms of an order of protection that required her to keep her children away from her boyfriend who was a sex offender and had a history of exposing himself to the children. The boyfriend not only had unsupervised contact with the children, but slept in the same bed as the 8 year old son and showered with the 12 year old son. The boyfriend then filed for Article 6 custody and appealed the Family Court's denial of the custody petition without a hearing. The Third Department agreed that it would be "antithetical" to grant the boyfriend – a legal "stranger" to the children - standing to file for custody even though it was arguable that there may be extraordinary circumstances here in that the mother had surrender and there were no biological fathers or other relatives in the children's lives.

RIGHTS OF UNWED FATHERS

Matter of Wanda M., 80 AD3d 765 (2nd Dept. 2011)

A Westchester County man's motion for a genetic marker test was denied on equitable estoppels grounds. The child and all the parties have always believed he is the child's father and the mother testified that there could be no other man who is the father and gave the child the man's last name when the child was born. The man has always identified himself to the child as her father, petitioned soon after she was born for visitation and the child calls him "dad". The child wants to continue her relationship with him and he acknowledged that the child would be upset if any testing showed he was not her biological father. Under these circumstances, the court will not order a test.

Matter of Jaleel E.F., 81 AD3d 1302 (4th Dept. 2011)

Erie County Family Court was affirmed in its determination that a father of a child in foster care was not a consent father but only a notice father. The child's mother was deceased and the father had not had any contact with the child for over 3

years. The father's only proof of any attempt at contact was a single card sent to the child more than 2 years after the father learned that the mother had died.

Matter of Jayden C., 82 AD3d 674 (1st Dept. 2011)

New York County Family Court correctly ruled an unwed father as a notice father. He did not maintain a substantial and continuing relationship with the child that would have made him a consent father under the *Raquel Marie X* test. Further he raised no objection to his notice status when he did appear and therefore did not preserve any issue. The child's best interests are served by being adopted. The mother is not capable of caring for the child financially or emotionally. The child lives with a foster mother and his biological sibling and has strong bonds there. The court is not obligated to consult with a three year old regarding the disposition. It is not in the child's best interests to wait any longer for the mother to "gain the ability to fulfill her parental obligations" and therefore a suspended judgment is not warranted.

Matter of Derrick H., 82 AD3d 1236 (2nd Dept. 2011)

The Second Department reversed Queens County Family Court and allowed a "father" to reopen is acknowledgement of paternity after more than 60 days based on "material mistake of fact." The "father" alleged that the mother had told him at the time that he was the child's father and he believed her as they had another child in common. The father had now been told by her family members that in fact there was another man who was likely the father. The lower court also incorrectly ruled that he was estopped from denying paternity as in this matter then "father" had not had a relationship with the child even thought the child was now 3 years old. Therefore a genetic marker test will be allowed.

Matter of Leonardo Antonio V., 82 AD3d 1253 (2nd Dept. 2011)

A Nassau County father was properly stopped from seeking a genetic marker test regarding a 6 year old boy. The father had been criminally convicted of murdering the child's mother and now sought to determine if he was the child's biological father. The deceased mother has always identified him as the father and the child

had a relationship with the father. It was not in the child's best interests to allow the test and the lower court need not have held a hearing to so determine.

Matter of Nassau County DSS v Alford 82 AD3d 1242 (2nd Dept. 2011)

Nassau County Family Court did not abuse its discretion in ordering an out of state mother to bring her child to New York for a Lincoln hearing on the question of the child's relationship to the "father" who was seeking a genetic marker test and where the issue of estoppel had been raised.

Matter of Brianna L., 83 AD3d 501 (1st Dept. 2011)

A New York County unwed father was not a consent father. He was in a work release program but he was unemployed and did not want to work and therefore did not provide any financial assistance for the child. His claim that he had personally provided for the child was not credible and providing occasional gifts from himself and his family is not sufficient.

Matter of Washington v Erie County CS., 83 AD3d 1433 (4th Dept. 2011)

While an Erie County child was in foster care, a father was noticed, after a series of delays. that he may be the child's father. He came forward and was adjudicated. Thereafter he filed an Art. 6 petition for custody of the child and the court combined that petition with a permanent neglect petition against the mother, hearing it with the dispositional . The lower court dismissed the father's petition saying he was a notice father and it was not in the child's best interests to be placed with him as he had had very little contact with the child. On appeal, the Fourth Department reversed and remanded the matter to be heard before a different judge. The father's custody petition was not simply a part of the mother's TPR and he was entitled to a hearing regarding if there were extraordinary circumstances as against custody with DSS and then a review of best interests. The father may well have been a notice father as it related to the mother's TPR but that did not mean he was not entitled to a full custody determination as an adjudicated father.

Matter of Ethan S., __AD3d___, dec'd 6/10/11 (4th Dept. 2011)

A Monroe County Family Court correctly determined that the father was not a man who needed to give consent in this private stepparent adoption. He had not paid any child support or seen the child for over three years. He had not communicated with the mother in a year and a half but then sent the mother two letters and had his counselor call the mother about 9 months before the adoption was filed. These contacts were all insubstantial. Although the father claimed his substance abuse problems were overwhelming, this does not explain his lack of contact. Even when he was in treatment, he always had a cell phone, access to post office services and the Internet and he used none of these methods to reach out to the child or the mother.

ADOPTION

Matter of Carrie B., 81 AD3d 1009 (3rd Dept. 2011)

A Tompkins County mother's parental rights were terminated in 2005 and the children were adopted by the birth mother's adopted mother. Three years after the termination, the birth mother filed a visitation petition which was dismissed without a hearing by the Family Court for lack of standing. The Third Department affirmed. The mother argued that she was the adopted sister of the children and that as such she had a right to seek visitation. Of course she had no right to seek visitation as the children's mother as her rights were terminated which ends any standing she would have had as the mother. Under DRL § 71 siblings can sue for visitation but only if they can allege equitable circumstances. The statue speaks of siblings of the "whole or half blood" and not adoptive siblings but even if the statute contemplates sibling relationships that were created in such a way, there are no equitable circumstances. She had permanently neglected these children and had an opportunity to be heard on that issue. The mother also argued on appeal that the statute was unconstitutional in that a parent who surrenders can seek to negotiate post adoption contact terms but a parent who contests the termination and asserts their rights is denied that option. (Note: Of course, not in the 4th Dept.!) However, there was no evidence that the mother was denied a surrender or penalized in some way for wanting to contest the permanent neglect which she in fact defaulted on.

SPECIAL IMMIGRANT JUVENILE STATUS

Matter of Daniel T. H., 81 AD3d 966 (2nd Dept. 2011)

The Second Department affirmed Westchester County Family Court's FCA §1027 placement of an immigrant child in "foster care" with DSS. The decision does not recite the facts but the undocumented Mexican youth was at Children's Village and the Family Court Judge placed the child in the care of DSS to allow the youth, to pursue Special Immigrant Juvenile Status based on the alleged abuse and abandonment by his Mexican family. The DSS position was that the child did not need to be placed in care with DSS in order to pursue SIJS as the child at that point was not being neglected or abused.

Matter of Alamgir A., 81 AD3d 937 (2nd Dept. 2011)

The Second Department reversed Queens County Family Court's dismissal of a guardianship petition that requested that the court make the findings necessary for a 20 year old young man from Bangladesh to petition for special immigrant juvenile status (SIJS) . The lower court did not consider the child's best interests. He had been in this country since he was 12 years old and his parents had neglected him and had no contact with him in over 7 years. A non-relative who had appropriately cared for him since March of 2009 petitioned for guardianship and the lower court should have granted the guardianship and made the SIJS findings.

Matter of Sing W.C., 83 AD3d 84 (2nd Dept. 2011)

In a case of first impression, the Second Department ruled that Family Court had authority to order ACS to do an investigation or home study where a private person sought guardianship of a "child" who was over 18 but under 21 years of age. The youth was a young man originally from Hong Kong who alleged that he had been abandoned by his parents in the United States and his older brother had filed for guardianship status and sought the court to make the findings necessary to provide the youth with an ability to seek special immigrant juvenile status. (SIJS). ACS argued that since the youth was over the age of 18, it had no authority to perform any investigation and would have no authority to provide assistance should there be a need. The Second Department reviewed FCA § 255 and concluded that

Family Court did have authority as FCA §661(a) has been expressly extended to allow guardianship until 21 with the youth's permission and that therefore the word "child" in Social Services law includes youth between 18-21 for whom SIJS is sought as those youth are alleging that they have been abused or neglected and are in need of protection. Further FCR 205.56 states that the court can order any "authorized agency" to interview people and provide information to the court to aid in a FCA 661 petition. The court distinguished *Matter of Amrhein v Signorelli 153 AD2d 28 (2nd Dept. 1989)* where they had ruled that the Surrogate's Court lacked authority to order DSS to conduct investigations and home studies of persons who sought guardianship of orphaned children. Although the appellate court recognized that the lower court might also have used other resources – notable the probation department – to perform such investigations, the lower court was not obligated to choose one service over the other.

Matter of Mohamed B., 83 AD3d 829 (2nd Dept. 2011)

The Second Department reversed a Kings County Family Court's denial of a motion for special immigrant juvenile status findings. A former teacher of a 19 year old Sierra Leone national sought guardianship of the youth and that was granted but the lower court refused to make the SIJS findings along with it, focusing on how 4 year earlier the young man had "become separated" from a church group that he was visiting NYC after winning a scholarship for a visit. The Appellate Court found that those circumstances were not relevant given that there was uncontroverted proof that the youth had been neglected by his parents when he lived in Sierra Leone and that his father was not deceased and his mother had not been supporting him. Given his current circumstances, the youth was in need of the court's supervision and was entitled to the court making the SIJS findings what would enable him to apply to the Immigration Court for SIJS.

Matter of Ashley W., __AD3d__, dec'd 6/7/11 (2nd Dept. 2011)

Nassau County Family Court dismissed, without a hearing, the petition of an aunt and uncle to become guardians of two Haitian children whose parents remained in Haiti and had no means of support and were homeless due to the earthquake. The lower court was concerned that the uncle had a criminal conviction for endangering the welfare of a child from 1997. The lower court did advise that it would consider a guardianship petition from another individual or from the aunt only if the uncle no longer resided with her. The dismissal of the petition meant

that the request for SIJS predicate findings was also dismissed. The Second Department reversed, finding that the lower court had to hold a hearing regarding the best interests of the children. The criminal record is not an automatic bar to the guardianship petition. The uncle had only been given a one year CD and had obtained a certificate of relief from civil disabilities. A home study by a licensed social worker and a licensed family therapist supported the petition. The court cannot dismiss such a petition without a hearing the examines the best interests of the children to have these guardians appointed and to obtain the SIJS findings.

MISC

Matter of Rosalind R., 80 AD3d 1109 (3rd Dept. 2011)

A CPLR Art. 78 proceeding was brought by a Tompkins County adoptive mother regarding the level of the subsidy payments she was receiving for four children. She had sought to receive retroactive upgrades of the subsidy payments from the "basic" level to the "exceptional" level and had been denied. The Third Department agreed with the denial. First of all, the two older children were both over 21 years old when the mother sought the retroactive upgrade and therefore she had no legal basis to even seek an upgrade on those youngsters. In any case, no evidence as provided in any psychological or medical documentation that the two older children had the learning disabilities, and PTSD that she claimed they had. As to the two younger children, the adoptive mother did not prove that they had the "severe behavior problems" that would require "high levels of supervision" to protect them from hurting themselves or others as required in the regulations to obtain the exceptional rate. The medical documentation did not support the mother's argument that the behaviors were that severe and the documentation was not current.

People v Spicola 16 NY3d 441 (2011)

The Court of Appeals affirmed the criminal convictions of a defendant for sodomy, sexual abuse and endangering the welfare of a minor in regard to behavior that the 13 year old victim claimed had happened some six years earlier. The Court found that testimony from a nurse practioner and a clinical social worker relating to the Child Sexual Abuse Accommodation Syndrome and its relationship to the child's delayed reporting and other behaviors was admissible. For child

welfare purposes, there is a good discussion of the CSAAS including a discussion of (and implicit continued endorsement of) *Nicole V* 71 AY2d 112 (1987)

Rivera v County of Westchester reported in NYLJ 4/8/11 (Westchester County Supreme Court 4/1/11)

The aunt of two deceased children sued Westchester County alleging that they had performed an improper CPS investigation and that the children may have not died if they performed the investigation properly. The court dismissed the action, ruling that there is no private right for money damages. SSL §419 provides immunity for a person who reports or provide services upon the report of maltreatment and §SSL 420 only allows a private cause of action for money damages for the failure to report child abuse or neglect.

Matter of Corrigan v Orosco __AD3d__ dec'd 5/10/11 (2nd Dept. 2011)

The Second Department reversed Suffolk County Family Court's order of a FCA §1034(1) investigation in a private custody case. The Appellate Court found that "… there was absolutely no indication of abuse, neglect or maltreatment" raised in the pleading or the proceedings and therefore Family Court "improvidently exercised its discretion" in ordering DSS to do a CPS investigation. The court found unpreserved the question of unlawful discrimination. The couple were a married same sex couple where one partner was the biological mother of the children and one was the adoptive mother.

Matter of Jolynn W. __AD3d___, dec'd 6/2/11 (3rd Dept. 2011)

In a private custody case from Sullivan County, there had been some indicated and some unfounded CPS reports. The Third Department commented that the unfounded reports were properly inadmissible under FCA §651-a as was any testimony as to the source of the reports under SSL § 422 (5) (a). The lower court had taken steps to properly preclude the portions of DSS records that were inadmissible.

Matter of Anne FF., __AD3d___, dec'd 6/2/11 (3rd Dept. 2011)

The Third Department unfounded and expunged a SCR report against a day care employee for allegedly leaving a 3 year old alone. The employee had take a small group of three year olds to an outside play are that was at the rear of the day care building and was totally fenced in on all sides and accessible only by locked gates that enter into the building and is not visible from the street. When one of the children had a bathroom emergency, the employee and another employee took all the children back into the building where another child saw his mother and ran to her resulting in the employee chasing after that child. Upon a return to the classroom, she discovered one of the three year olds unaccounted for and located the child still out on the playground. The child had not been harmed in anyway, had only been on the playground for about 6 minutes and there had been other day care staff on the play ground at the time. There was no evidence that the child was ever in fact unsupervised. However, after reporting to the parent and the day care what had happened, the day care reported the employee to the hotline and the fair hearing had upheld the indication. The Third Department concluded that there was insufficient evidence that the employee's actions fell below minimal standards of behavior and unfounded the report.

Southerland v City of New York reported NYLJ 6/14/11 (2d Cir. 5/10/11)

The 2nd Circuit reversed the District Court's a determination that an ACS caseworker had qualified immunity for his part in seeking an access order and doing a removal. The claim is that the CPS worker made erroneous statements in his affidavit for the access order and the removal request- both misrepresenting the facts and by leaving out important information. The 2nd Circuit found that it may be possible for a jury to determine that the caseworker recklessly or knowingly misrepresented the facts of the situation in order to obtain the orders. Further a jury may find that the caseworker had access to appropriate legal counsel to provide legal guidance to discern if his actions were lawful. The Kings County Family Court did remove the children and did ultimately rule that the children were in fact neglected and abused but the fact that the CPS worker's suspicions about the children were true, does not impact that the caseworker may have misrepresented the evidence in the initial papers.