BABIES CAN'T WAIT ~ TEENS WON'T WAIT:
INTERSECTION BETWEEN CHILD WELFARE & DV:
BALANCING SAFETY & REUNIFICATION – PARENT ATTORNEY PERSPECTIVE
May 20, 2015
12:30 – 2:00 P.M.

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I. DOMESTIC VIOLENCE – DO WE AGREE ON THE DEFINITION?

A. US Dep't of Justice definition of domestic violence:

A pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.

1. Physical abuse: Hitting, slapping, shoving, grabbing, pinching, biting, hair pulling, etc. are types of physical abuse. Also includes denying a partner medical care or forcing alcohol and/or drug use upon him or her.

2. Sexual abuse: Coercing or attempting to coerce any sexual contact or behavior without consent. Sexual abuse includes, but is not limited to, marital rape, attacks on sexual parts of the body, forcing sex after physical violence has occurred, or treating one in a sexually demeaning manner.

3. Emotional abuse: Undermining an individual's sense of self-worth and/or self-esteem is abusive. This may include, but is not limited to constant criticism, diminishing one's abilities, name-calling, or damaging one's relationship with his or her children.

4. Economic abuse: Defined as making or attempting to make an individual financially dependent by maintaining total control over financial resources, withholding one's access to money, or forbidding one's attendance at school or employment.

5. Psychological abuse: Elements of psychological abuse include – but are not limited to-causing fear by intimidation; threatening physical harm to self, partner, children, or partner's family or friends; destruction of pets and property; and forcing isolation from family friends, or school and/or work.

Domestic violence can happen to anyone regardless of race, age, sexual orientation, religion, or gender. Domestic violence affects people of all socioeconomic backgrounds and education levels. Domestic violence occurs in both opposite-sex and same-sex relationships and can happen to intimate partners who are married, living together, or dating.

II. THE PROBLEM – CHILD WELFARE RESPONSE TO DOMESTIC VIOLENCE

A. In an ideal world, CPS would respond to the problem of domestic violence within a family by partnering with the DV victim and those she trusts to create an individualized response that acknowledges the complicated family dynamics, and builds on the DV victim's strengths as a parent.

1. CPS risk assessment should include:

a. Nature and extent of domestic violence

b. Observable impact of DV on adults and children in household

c. Level of risk to and protective factors of victim and children

d. Victim's ability to seek help; clarity of her survival strategies

e. Level of perpetrator's dangerous behaviors

f. Family's service needs as a whole

g. Availability of family and community resources to support family

2. CPS should make an effort to identify those factors that may prevent the DV victim from taking the steps necessary to extricate herself and her children from the situation and assist her with "reasonable efforts" to overcome them:

a. Negative response to prior efforts to seek help from community resources

b. Increased fear and anxiety that the presence of CPS in her life jeopardizes her children remaining in her care

c. She may not be aware of the services and community supports available to assist her

d. Financial dependence on the perpetrator to support the family

e. Feelings of shame and/or guilt about the situation

f. Ambivalence or fearfulness that she may not be able to adequately care for her children's needs on her own

g. Depression

h. Emotional investment in her partner that makes her hopeful the situation could change

i. DV victim's own substance abuse issues

j. DV victim's physical or mental disabilities

k. Denial, minimization or lack of education that the problem actually is one of domestic violence

l. Unwillingness to break up an intact family, or to lose child care

m. CPS intrusion into victim's family may invite custody litigation from noncustodial fathers worried about their children's safety, lead to breakup of sibling groups

n. Fear that leaving family home with children will make her and children less safe

3. The typical CPS response most often is NOT one founded upon an in-depth assessment of the DV victim's individual situation and her parenting strengths, but rather a formulaic response premised upon a demand that the DV victim immediately leave the situation as a "safety plan" to protect the children

a. DV victim shoulders the burden of protecting the children from domestic violence. If she "fails to protect" her children by removing herself and the children from the perceived DV danger, she is then viewed as having "chosen" the perpetrator over her children

b. Erroneous presumption that all children will always be severely emotionally harmed by witnessing domestic violence

c. Demands made to take certain actions under threat of removal of children from her care if she fails to follow through:

i. Demands to get an order of protection

ii. Demands to leave home and enter a shelter with children

iii. Demands to get a custody order

iv. Demands that the children go live "temporarily" with third party relatives or friends

v. Demands to call perpetrator's parole or probation officer, police, etc. to make complaint to put perpetrator in jail

vi. Demands to place children in fulltime day care or after school programs

d. No consideration given to the impact on the children of the breakup of the family and/or separation from their mother

e. No mercy if the DV victim permits the children to visit their father outside the limits of visitation "approved" by CPS

f. The resources from whom the DV victim is mandated to seek help sometime undermine her ability to maintain her children in her care:

i. Shelters or safe haven employees may make reports to CPS if DV victim violates rules or is argumentative

ii. Children may advise court through custody proceedings that they wish to live with perpetrator – stable job and home, near school and friends, DV victim appears meek and unable to meet children's needs, victim has other problems which are more pronounced than the perpetrator's

iii. Orders of protection may be denied if level of conduct does not rise to the level of criminal conduct, or the victim's presentation at court is inadequate

iv. Perpetrator has access to victim's medical, mental health, substance abuse records through court proceedings

v. Court proceedings may prove the DV victim's mental health issues, substance abuse, etc.

vi. Victim may become homeless, financially destitute, have no transportation, no child care, no access to services

g. No consideration given to less disruptive alternative preventive services – anger management, other therapy for the perpetrator, no offensive contact order of protection, marriage or partner counseling

4. The ultimate CPS response is to remove the DV victim's children from her care, and often from each other's company, via a neglect or abuse proceeding under Article 10 of the Family Court Act.

<u>The ultimate revictimization of the victim</u>

III. *NICHOLSON V. SCOPPETTA* – A UNIQUE OPPORTUNITY FOR THE COURT OF APPEALS TO AT LONG LAST ADDRESS CHILD REMOVAL PROCEDURES GENERALLY, AND DOMESTIC VIOLENCE SPECIFICALLY

A. The Story of Sharwline Nicholson (I got her autograph. She is my hero.)

1. A young, single mother of 2 children, living in NYC in 1999. Worked full-time, no substance abuse or mental health issues. Took good care of her children.

2. Boyfriend lived out of state, typically visited her and children one time per month. On one such visit she told him she wanted to break up with him, whereupon he brutally beat her. Children were home. No proof of prior domestic violence.

3. Police were called. Boyfriend arrested. Ms. Nicholson was taken by ambulance to the hospital. She arranged for her neighbor to watch the children until her cousin arrived to take the children until she was discharged from the hospital.

4. While at the hospital, her children were removed from her cousin by ACS and placed in foster care. ACS then filed a neglect petition against her in Family Court alleging she "failed to protect" her children by "allowing" them to be exposed to domestic violence.

5. During the course of the federal lawsuit filed later, it was disclosed that ACS had an official policy of removing children from their mothers solely on the basis that the mothers were victims of domestic violence.

B. The Federal Lawsuit

1. In 2000 Landsner & Kubitschek filed a federal lawsuit against ACS on behalf of Ms. Nicholson and her children under 42 USC § 1983, challenging as unconstitutional ACS's policy of removing children from DV victims solely because the mothers were victims of domestic violence. Working with 2 other organizations and plaintiffs, a class of plaintiff DV victims was eventually certified.

2. In 2001 the federal district court issued a preliminary injunction prohibiting ACS from executing its policy of removing the children of DV victims from them solely because the victims somehow "failed to protect" the children by "allowing them to be exposed to domestic violence." In Re Nicholson, 181 F.Supp.2d 182 (EDNY 2002), *opinion supplemented by* Nicholson v. Williams, 203 F.Supp.2d 153 (EDNY 2002).

3. The district court found specifically that:

a. ACS regularly indicated neglect against battered women

b. ACS rarely held abusers accountable for their violence

c. ACS failed to offer adequate preventive services to mothers before prosecuting them or removing their children

d. ACS regularly and unnecessarily separated mothers and children solely because the children witnessed their mothers being abused

e. ACS failed to train its employees regarding domestic violence

f. ACS's written policies provided insufficient and inappropriate guidance and training to employees

4. The district court found these policies violated the following constitutional provisions:

a. They infringed the mothers' right to familial integrity under the Fourteenth Amendment without substantive or procedural due process

b. They infringed the children's Fourth Amendment right against unreasonable search and seizure

c. They infringed the mothers' rights under the Ninth Amendment, Thirteenth Amendment and the Nineteenth Amendment

5. On appeal to the Second Circuit, the appellate court was generally favorable to the district court decision but found that assistance from the New York Court of Appeals was necessary to interpret New York law, specifically Article 10 of the Family Court Act dealing with child removal procedures. Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003)

a. Three questions were certified:

i. Does the definition of "neglected child" under FCA § 1012(f) and (h) include instances in which the sole allegation of neglect is that the caretaker or parent allowed the child to witness domestic abuse against the caretaker?

ii. Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or caretaker constitute "danger" or "risk" to the child's "life or "health" as those terms are defined in FCA §§ 1022, 1024, 1026-1028?

iii. Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary" in FCA §§ 1022, 1024, 1027 or that "removal was in the child's best interests" in FCA §§ 1028, 1052(b)(i)(A) or must the child protective agency offer additional particularized evidence to justify removal?

C. The Court of Appeals decision in Nicholson v. Scoppetta, 3 NY3d 357 (2004)

1. Decision is seminal to child welfare law practice, regardless of the basis upon which the neglect allegations rest.

2. Manner in which the case arrived at Court of Appeals gave the Court a unique opportunity to give a full advisory opinion about what the Article 10 statute means, both generally and when dealing with the issue of whether a victim of domestic violence could ever be charged with neglect of her child.

3. Quick primer on neglect

a. A neglected child is one whose physical, mental or emotional health is impaired or is in imminent risk of becoming impaired as a result of the failure of the parent or caretaker to exercise a minimum degree of care for the child. FCA § 1012(h)(i)

b. 3 elements: 1) proof that a child's physical, mental or emotional health has been impaired, 2) a parent who failed to exercise a minimum degree of care, and 3) a nexus or causal connection between 1) and 2)

c. Removal procedures – a continuum based on exigencies then and there existing, taking into account the harm to child caused by parenting failures balanced against the harm of removing the child from the parent

i. Get the parents' consent to the removal of their children. FCA § 1021.

ii. If parent won't consent, file a petition, ask the Court to decide the removal issue. FCA § 1027.

iii. No time to file a petition, get an ex parte order from the Court authorizing removal. FCA § 1022.

iv. No time to get an ex parte order, simply remove the children and ask the Court for its stamp of approval after the fact. FCA § 1024

4. COA explains the plain meaning of these words in Nicholson:

a. The State's focus must be on "serious harm or potential harm" to the child, "not just on what might be deemed undesirable parental behavior."

b. "Imminent risk" means "near or impending, not merely possible"

c. "Minimum degree of care" is the "baseline of proper care for children that all parents, regardless of lifestyle or social or economic position, must meet." It is "not maximum, not best, not ideal."

d. Parents' failure must be "actual, not threatened"

e. Parents' behavior must be evaluated objectively – "would a reasonable and prudent parent" have done what this parent did or did not do under similar circumstances

5. In the context of domestic violence, the reasonableness of the victim's actions must be evaluated by considering a number of factors:

a. Risks to victim if she leaves

b. Whether abuser has threatened to kill her if she leaves

c. Risk of further abuse if she stays

d. Risks attendant to seeking gov't assistance

e. Risk attendant to seeking criminal prosecution

f. Risks attendant to relocation

g. Severity and frequency of abuse

h. Resources and options available to victim

6. COA's answers to certified questions:

a. If the only 2 facts in the case are that the mother is a victim of domestic violence, and the child was exposed to domestic violence, that is insufficient to establish neglect.

b. There is no presumption that a child being exposed to domestic violence harms the child's emotional health, or places the child's emotional health in imminent risk of impairment.

c. Except in the rarest circumstances, emergency removal of children exposed to domestic violence without prior order is unjustified.

7. BUT THERE'S ALWAYS A "BUT"!

a. The following language in Nicholson has undercut the benefits of its holdings to future domestic violence victims accused of neglecting their children:

> "This does not mean, however, that a child can never be 'neglected' when living in a household plagued by domestic violence. Conceivably, neglect might be found where a record establishes that, for example, the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet nonetheless allowed him several times to return to her home, and lacked awareness of any impact of the violence on the children, [citations omitted] or where the children were exposed to regular and continuous extremely violent conduct between the parents, several times requiring official intervention, and where caseworkers testified to the fear and distress the children were experiencing as a result of their long exposure to the violence." Nicholson, 3 NY3d at 371.

IV. JUDICIAL RESPONSE TO DOMESTIC VIOLENCE POST-NICHOLSON

A. Has Nicholson helped domestic violence victims accused of neglect?

1. It's made some difference, but victims still bear the responsibility for ending it, and if they do not end it to CPS's satisfaction, they risk losing their children, sometimes permanently.

B. ACS changed its policy – part of the settlement in the Nicholson case after it made its way back to the federal district court

C. No neglect where the proof shows the domestic violence was no more than an isolated incident, that the proof as to actual or imminent emotional harm to the children was slim, and where there is no other proof of neglectful parenting.

1. Case examples:

Matter of Harper F.-L., 125 AD3d 652 (2d Dept. 2015) – neglect finding reversed where the evidence established two incidents of physical altercations between the parents, one when the child was 5 weeks old and one when the child was 7 months old, but no nexus between the incidents and impairment of child's condition. Incidents occurred either outside child's presence or in such a way that child's condition not impaired, as supported by caseworker testimony that she examined infant on 4 occasions and noted no physical markings or other signs that the child was harmed.

Matter of Javan W., 124 AD3d 1091 (3d Dept. 2015) – neglect finding reversed where evidence consisted of the mother having a verbal argument with her then 13-year-old daughter and, afterward, loudly explaining the situation to neighbors and cursing in the street. When police arrived, she resisted and cursed at the police, in front of 2 of the 4 children. While her conduct was inappropriate, no evidence in the record that the 2 children who were present were actually harmed or in any danger of impairment due to witnessing their mother's behavior.

Matter of Kiana M.-M., 123 A.D.3d 720 (2d Dep't 2014) – citing Nicholson language that "exposing a child to domestic violence is not presumptively neglectful. Not every child exposed to domestic violence is at risk of impairment" [Nicholson, 3 NY3d at 375], the appellate court reversed a finding of neglect against a father who shoved the mother out of a second floor bedroom causing her to land on the floor in the hallway near the stairs. The mother was videotaping him as he "angrily" searched for his missing eyeglasses, and the children were on the first floor. No evidence that the children suffered any impairment as a result of the father's action. Petition was filed by the AFC on behalf of the children.

Matter of Addis C., 43 Misc.3d 1234(A)(Kings Co. Fam. Ct 2014) – Family Court granted father's motion to dismiss neglect petition against him. The agency alleged father had physically abused mother on 2 occasions. ACS presented proof domestic violence took place but did not prove there was imminent danger to a child or even a risk to the child because of domestic violence.

Matter of Ilona H., 93 AD3d 1165 (4th Dept. 2012) – no neglect where evidence showed father struck the child's mother one time when the child was 8 months old. Incident occurred outside presence of the child. No proof of any emotional or other harm to the child.

Matter of Eustace B., 76 AD3d 428 (4th Dept. 2010) – no neglect where child well-cared for by mother, and the only evidence against mother was that the child felt "scared and nervous" during one isolated incident of domestic violence against mother.

Matter of Casey N., 44 AD3d 861 (2d Dept. 2007) – the mother's admission as part of ACD plea that there were "incidents of domestic violence" in her home in the presence of the children was insufficient to constitute neglect. No evidence as to nature and extent of DV, no proof of actual or imminent impairment to the children.

Matter of Imani B., 27 AD3d 645 (2d Dept. 2006) – no neglect against father where the only evidence of domestic violence was loud verbal disputes in front of a 4-month old child.

Matter of Daniel GG., 17 AD3d 722 (3d Dept. 2005) – no neglect against father where the only incident of domestic violence was mild pushing of his mother while his teen son was in another room playing video games or watching television.

Matter of Larry O., 13 AD3d 633 (2d Dept. 2004) – no neglect where only proof was of one isolated incident of an altercation in the kitchen while the child was asleep

D. Findings of neglect against mothers still occur regularly, either because the mother is deemed the aggressor, or because she is a victim but "refuses" to avail herself of available resources to extricate herself and her children from the, and therefore fails to understand the impact of DV on her children

1. Mother as aggressor

Matter of Tayleese M. C. 2015 N.Y. App. Div. LEXIS 3321 (2d Dep't Apr. 22, 2015) – neglect finding against mother affirmed upon credible evidence from father and daughter that mother used excessive corporal punishment on child and committed acts of domestic violence against the father in the child's presence.

Matter of Heaven H., 121 A.D.3d 1199 (3d Dep't 2014) – Neglect finding against mother as to her 3 children affirmed where, after dispute with neighbor earlier in the day while consuming alcoholic beverages, police had been called and told mother to go home. After police left, neighbor made a rude gesture to mother from across the street, causing mother to "inexplicably" return to neighbor's house and initiate a "melee" by punching neighbor in the face. Children were present, and one of children, in an attempt to protect mother, got punched in her mid-section and went to the hospital. This fact, plus mother's failure to testify at trial, was sufficient for finding of neglect as to all 3 children.

Matter of Heyden Y., 119 A.D.3d 1012 (3d Dep't 2014) – Neglect finding against the mother affirmed based on the deplorable condition of her home, her decision to let the child stay with her and father on weekends even though she knew about father's ongoing drug use, and "her participation in mutual incidents of domestic violence." Also, she did not testify at trial.

Matter of Hannah I., 113 AD3d 1137 (4th Dept. 2014) – parents "engaged" in acts of domestic violence in front of the children, allowed 10 year old to babysit six younger

siblings and encouraged the children to lie to CPS. Oldest child suffered from "extreme distress" the source of which was her home environment. Both parents neglectful.

Matter of Eugene S., 114 AD3d 691 (2d Dept. 2014) – Mother neglected children by "engaging in certain acts of domestic violence in the children's presence". These acts impaired or created imminent risk of impairment to children's health. *Opinion gives no details as to exactly what the mother did or the specific impairments the children suffered.*

Matter of Kadyn J., 109 AD3d 1158 (4th Dept. 2013) – Mother neglected children as a result of repeated acts of domestic violence. Two children in very small apartment were present for many of the incidents. Significant police intervention in the past. On the most recent occasion police saw a large pool of blood in the apartment, a bloody knife, an injured boyfriend, empty beer cans, and a mother with no injuries. Concluded both were drunk and violent. Mother arrested. She deemed the "instigator" of the incident. The kids were found in their room with their eyes open, watching television. Caseworker testified that the children said they slept through the incident but were traumatized by having to clean up the blood the next day. *Opinion doesn't say who made them do that, but if mother arrested the night before, probably not her.*

Matter of Anthony FF, 105 AD3d 1273 (3d Dept. 2013) – Mother neglected children where, although her boyfriend instigated the incident and was violent towards her, she was observed chasing him with a baseball bat. He claimed she hit him with it. Mother also minimized boyfriend's conduct and attempted to have charges against him dropped, allowed him around at least one of the children in violation of court order and told the child to keep it a secret. Also educational neglect.

Matter of Jada F., 97 AD3d 575 (2d Dept. 2012) – mother neglected children by engaging in acts of domestic violence against her adult daughter in her child's presence.

Matter of Clarissa SP, 91 AD3d 785 (2d Dept. 2012) – mother engaged in acts of domestic violence against the children's great-grandmother "without concern" for the children's presence. Both children under age 2 and were "visibly upset and were caused to cry as a result of her belligerent conduct." Mother also repeatedly left the children with others without provisions for their care and without leaving info as to her whereabouts or contact information.

Matter of Ariel B., 85 AD3d 1224 (3d Dept. 2011) – mentally ill mother neglected her children when she stopped taking her meds and her violent behavior escalated. Mother in anger bit one child, bit the father in the children's presence, threw a table downstairs where the children were located and placed her hand around older child's throat, which scared the child. Repeated incidents of domestic violence "perpetuated" by the mother, in the children's presence.

Matter of Armani KK, 81 AD3d 1001 (3d Dept. 2011) – mother neglected children when she and boyfriend engaged in domestic violence while children were home.

Mother knocked a window out of the residence, while drinking alcohol, smashed a car window, left children unattended with broken glass on floor while she drove off in car intoxicated. Numerous arguments where mother and boyfriend yelled, cursed, smacked, kicked and pushed each other. Mother continued to live with boyfriend despite pattern of alcohol abuse and DV. She admitted it sometimes happened in front of children and that she sometimes initiated it.

Matter of Kaleb U., 77 AD3d 1097 (3d Dept. 2010) – Child had leukemia. Mother neglected child when she got drunk and engaged in bizarre behavior sticking her body out a car window and smacking her fiancé really hard when he tried to get her back in the car. Child in back seat and was upset. Later that night mother punched fiancé during an argument. Child did not see it happen but was aware and was frightened. On another occasion mother and partner choked each other; child had intervened telling fiancé to "let my mommy go." Mother's aggressive behavior, coupled with her consumption of alcohol and tumultuous relationship with fiancé in front of a special needs child constituted neglect.

Matter of Richard T., 12 AD3d 986 (3d Dept. 2004) – Mother instigated a physical altercation with her mother in the presence of the children. The older child tried to intervene. The younger child was visibly crying and shaking. Younger child called father to "separate the two protagonists." Even though it was an isolated incident, mother was the aggressor and children suffered emotional harm.

2. Mother as hapless victim who lacks awareness

Matter of David M., 119 A.D.3d 800 (2d Dep't 2014) – Finding of neglect against father affirmed where evidence from mother established a pattern of domestic violence against her. Child told caseworker he had witnessed the stepfather abuse his mother on several occasions which made him afraid for his mother, and child's therapist confirmed child expressed fear with stepfather in the home. But! Court also affirmed finding of neglect against the mother because she continued to reside with the stepfather despite the recurring pattern of his violence against her in the child's presence and "without regard" for the impact of the violence on the child, and had rejected shelter and domestic violence services made available to her. (*Thanks for testifying against the batterer Mom!)*

Matter of Joseph RR., 86 AD3d 723 (3d Dept. 2011) – mother neglected children (children were separated and placed with respective fathers) where evidence showed mother and boyfriend fought frequently, especially when he drunk. He threatened mother with a handgun that he kept on top of refrigerator and discharged it numerous times. He grabbed 3-year old girl's wrist and, displaying a pocket knife, threatened to cut off hand if she didn't stop picking her nose. Left 3-year old outside in pajamas as punishment for crying. Mother refused to participate in preventive services. When asked who she would pick, she responded "My children, I guess."

Matter of Celine O., 68 AD3d 1373 (3d Dept. 2009) – mother neglected children upon evidence that boyfriend beat her regularly shortly after he moved into her home.

Children did not see violence, but heard it, saw her injuries and were afraid for her safety. Mother had to seek medical care on one occasion due to beating. She promised an officer she would take kids to a shelter, she returned home whereupon she was beat again. A few days later, while the children at school, she left with the boyfriend and drove him out of state without notifying the children or arranging for their care. She left a note for her son that he found under his pillow which stated "call 911." Mother minimized the incidents, which showed she "lacked insight" into the effect her actions had on the kids. *Sounds to me like she was trying to protect them in the only way she could.*

Matter of Shalyse WW, 63 A.D.3d 1193 (3d Dep't 2009) – mother was abused by the father who strangled her while holding a knife to her head, punched her in children's presence and made threats to her while holding a weapon. Children were scared of the father. Mother received order of protection but she and children were later spotted with the father in a hardware store. Mother also recanted her family offense allegations. One of the children received injuries after attempting to intervene to protect his mother. Mother found neglectful because the evidence strongly suggested she did not appreciate or recognize the imminent threat that the father posed to the children.

Matter of Chelsea M., 61 AD3d 1030 (3d Dept. 2009) – mother neglected children when she started advocating for the father shortly after receiving an order of protection because he had threatened to kill her. Older children testified they had been physically and sexually abused by their father, particularly when he was drunk. He was physically violent to their mother. But she wanted him home, and actively concealed his continued alcohol use to facilitate his return home.

Matter of Xavier II, 58 AD3d 898 (3d Dept. 2009) – mother neglected children because she was unable to recognize the imminent threat her boyfriend posed to the children. He was 6 feet tall, 280 pounds, and on one occasion in a parking lot grabbed mother by her neck, pulled her hair and covered her mouth while she was holding the oldest child. He asserted the mother had tried to stab him/burn him in the past. Mother obtained OP but she had it modified to a NOC order. Children went to live with grandparents while parents were supposed to go through DV counseling. But then the mother punched the father in the face and started living with him again. He was arrested for DV against her again, but she signed a statement recanting her allegations.

Matter of Xavier J., 47 AD3d 815 (2d Dept. 2008) – Family Court decision to return children to mother upon hearing reversed and children placed in care. Mother had previously shaken a baby who then died, and did not appreciate the risk the father's domestic violence behavior posed to her subsequent born child.

Matter of Christopher B., 26 AD3d 431 (2d Dept. 2006) – mother neglected child because child was regularly exposed to domestic violence and drug use by the father, and mother lacked awareness of any impact the DV or drug use had on the child.

V. THE FEW RAYS OF SUNSHINE

A. Very few cases discuss the quality of the agency's efforts to hold the batterers accountable and/or to offer the victim meaningful services that account for the complicated factors at play in a domestic violence situation, but there are a few:

Matter of Baby Boy D., 2015 N.Y. App. Div. LEXIS 3316 (2d Dep't Apr. 22, 2015) – Order of Family Court remanding newborn to agency care after § 1027 hearing reversed, child returned to mother's care. Mother's older 3 children in care after finding of abuse. Mother had engaged in all services, exercised all visits and demonstrated loving relationship with children. She no longer lived with abusive father, which was confirmed by ACS caseworkers. She had obtained an order of protection against him. Agency's claim that infant was at risk of imminent harm in mother's care was mere speculation. Agency should have developed a plan to allow newborn to remain in mother's care under agency supervision.

Matter of David G., 29 Misc.3d 1178 (Family Ct., Kings County 2010) – After a combined § 1027 and 1028 hearing regarding mother's 3 children, Family Court returned all children to mother. Triggering event for agency's 1027 removal was mother's departure from a shelter after abusive father tracked her there in violation of order of protection against him. Court held that agency's removal of baby without court order improper where the agency only speculated that mother would reunite with abusive father. Agency offered the mother no reasonable efforts by giving her referral to a different shelter, and did nothing to hold the father accountable for violating the order of protection the mother had against him. "…[T]he decision to conduct … a removal … from a non-abusive parent, herself a victim of domestic violence, repeatedly rendered homeless by the actions of the alleged perpetrator, raises disturbing questions."