SELECTED CHILD WELFARE CASE LAW UPDATE

January 2014 – June 2014

By Margaret A. Burt, Esq.
585-385-4252
Mburt5@aol.com

REMOVALS and GENERAL ART. 10 ISSUES

Matter of Devyn B., 114 AD3d 768 (2nd Dept. 2014)

The Second Department upheld a Suffolk County Family Court's denial of a motion to vacate a father's default adjudication on a neglect petition as he failed to provide a reasonable excuse for not appearing on the adjourned date of his fact finding hearing. The father had previously moved for and obtained three mistrials in the matter and had discharged five court appointed attorneys in a row and admitted that he had failed to appear in order to try to stop the matter from going forward. While he claimed he was not being permitted to testify on his own behalf or call witnesses, that was not true, as the court had repeatedly adjourned the hearing to allow him to do just that. He also failed to establish a potentially meritorious defense to the allegations.

Matter of Samantha R., 116 AD3d 867 (2nd Dept. 2014)

In affirming a neglect finding from Suffolk County Family Court, the Second Department commented that all intermediate orders in an abuse or neglect matter are appealable as of right under FCA §1112 (a)

Matter of Brandon WW., 116 AD3d 1108 (3rd Dept. 2014)

The Third Department found the appeal of Delaware Family Court's order to remove two children from a respondent moot where while the appeal was pending the children had been found to have been neglected by respondent. It was immaterial that a dispositional hearing had not yet been held.

Matter of Dean T., Jr. ___AD3d___, dec'd 5/13/14 (1st Dept. 2014)

The First Department ruled that Bronx County Family Court erred when it dismissed the respondent father's motion to subpoena the eldest child's mental health records. The allegations of abuse and neglect relied almost entirely on this child's testimony as there was no physical evidence. The court should have reviewed the records in camera and used a balancing test to weigh the need of the father for discovery versus any potential harm to the child to determine if the records were relevant in any way to issues of the child's credibility as per FCA §1038(d) . There was a significant delay in reporting the abuse, the alleged incidents of abuse were only witnessed by the child and the father argued that the child is angry with him over incidents with the mother and fears the mother is coaching him. The alleged abuse was not reported until after the father had cross petitioned for custody of the child. It is possible that the records may have some bearing on the child's credibility but the court needs to review in camera to make that determination. Respondent's argument that the child has waived the privilege by testifying about the alleged abuse having made him depressed is not accurate. The child's mental status may be relevant to assess credibility but his mental health is not in controversy and FCA §1038(d) balancing by the court is needed.

Matter of William N., __AD3d___ dec'd 6/4/14 (2nd Dept. 2014)

The Second Department reversed a Kings County Family Court decision regarding parental marijuana use and the meaning of a "consent" finding . The mother had consented to a neglect regarding her older children based on the mother's use of marijuana. Three months after the consent, she gave birth to a new son. At the time of his birth, the mother, but not the baby, tested positive for marijuana. ACS filed a neglect petition against the mother regarding the infant and alleged derivative neglect based on the prior finding as well as the mother's positive tox for marijuana at the birth and her failure to follow the disposition from the first adjudication. At the fact finding, the lower court refused to allow ACS to submit evidence of the prior consent and ruled that a "consent" to an adjudication of neglect cannot be admissible as proof of neglect in a derivative action and dismissed the derivative petition. (see **Matter of William N. 40 Misc 3d 602 Kings County Family Court 2013)** The Second Department said the lower court ruling was in error, reversed and ruled that a consent finding to neglect constitutes proof that a child was neglected and that the prior order is admissible with respect

to the issue of the parent derivatively neglected another child under FCA 1046(a)(i) . Further, since the mother had consented to the neglect of her daughter based on the use of marijuana only three months previously, the petition regarding the infant was proximate in time and there can be a reasonable conclusion that the issues still exist. The mother was unable to prove that she had fully complied with the prior dispositional order even thought she had participated in some programs.

Matter of Elijah ZZ., __AD3d __, dec'd 6/12/14 (3rd Dept. 2014)

A Broome County respondent father appeared in court without an attorney in the middle of the caseworker testifying in the FCA§ 1022 hearing. The Judge stopped testimony, greeted the respondent and advised him that DSS was seeking to remove his two children from his care and asked if he consented to this removal. The respondent said he did not consent and the court then permitted the witness to finish the testimony. The court then advised the respondent that he could participate but if he did he might be "giving up certain important rights". The Judge then rendered a decision that the children should be removed and after ascertaining that the respondent was indigent, assigned him an attorney. The appellate division indicated that this failure to advise the respondent of his right to counsel as soon as he appeared at the removal hearing was an error but not one that requires the subsequent adjudication of neglect to be reversed. The fact-finding decision was based totally on the evidence heard at that hearing and not based on anything from the removal hearing. Further although the respondent, after being provided with counsel, repeatedly indicated that he would avail himself of a FCA §1028 regarding the removal decision, he never did so.

Matter of Joseph E.K., __AD3d___, dec'd 6/13/14 (4th Dept. 2014)

A Niagara County mother admitted to neglect but then appealed arguing that the admission was involuntarily entered. She claimed that she told the lower court that she would say or do anything to get her child back. The Fourth Department said the argument was not preserved as she had not made a motion to the lower court to vacate or withdraw her admission. In any event the Family Court had made it clear

to her that she was not to admit to anything that was not true and then the mother did in fact then admit the underlying facts.

Matter of Maria C., ___AD3d___, dec'd 6/18/14 (2nd Dept. 2014)

The Second Department concurred with Suffolk County Family Court that the court had authority to order that a mother submit to a hair follicle drug test.

NEGLECT

General and Mixed Neglect

Matter of Kevin N., 113 AD3d 524 (1st Dept. 2014)

The First Department affirmed Bronx County Family Court that a respondent was a person legally responsible for the subject child under FCA § 1012(g). The respondent had been in a 7 year relationship with the child's mother, described himself to people as the child's stepfather, picked the child up from school and engaged in activities with the child. Although he denied it, there was evidence that he lived in the apartment at least part time and he did admit to staying overnight on three to four occasions. There was evidence that permitted an inference of substantial familiarity between the child and the respondent.

The respondent neglected the child by keeping a loaded semi-automatic weapon in a plastic bin near where the child slept. The respondent denied that the gun was his but that it had been present in the apartment when "they" moved in. Since the child wished to continue his relationship with the respondent, the aid of the court was necessary in order to continue monitoring compliance with the order of protection.

Matter of Anastasia L.D., 113 AD3d 685 (2nd Dept. 2014)

The Second Department concurred with Kings County Family Court's dismissal of a neglect petition against a father. The father had hit his 14 year old daughter a couple of times, causing bruises to her when the teen would not hand over her cell phone. He had told the girl to hand over the phone as punishment for skipping school and she refused and charged at him. The father testified that he did not normally use corporal punishment on either of his children. The court found that although a single incident of corporal punishment could be neglect, this was not. Given her age, the circumstances and the isolated nature of the conduct, this allegation was properly dismissed.

The court also properly dismissed allegations that the father neglected the children due to his drug use. He admitted that he smoked marijuana but the only proof was that this was occasional and there was no evidence that he did this in the children's presence. There was no evidence of the duration, frequency or repetitiveness of the marijuana use such that there was would be any "near or impending" imminent danger of neglect as opposed to "merely possible".

Matter of Daniel X., 114 AD3d 1059 (3rd Dept. 2014)

An Ulster County mother neglected her daughter and son. The mother told a neighbor that she believed her teenage daughter was sleeping the mother's husband, the child's stepfather. The mother called the child disparaging names and said that she planned to go to the store that day and buy a gun and shoot her daughter and her husband. The daughter was not present when this was said but the neighbor thought that the son had heard what the mother said about his father and his half-sister. The husband called the home and the mother screamed obscenities at him and told the son that she was going to put a bullet in the father's brain if the son let his father into the house and that she would put her son's "head through the wall" if he talked back to her. Later that night the mother confronted the daughter, broke down the teen's bedroom door and door frame and hit her with a laptop and threatened to kill her. The daughter called for help and the neighbor arrived to hear the mother call the child vulgar names and make murderous threats. The mother also called the daughter's bio father and told him to come and get her or the child would be "found in a body bag". The teen was crying hysterically,

unable to speak and curled in a fetal positon. The daughter said this had been going on for about 6 months since the stepfather had moved out. The mother would go on midnight tirades, call the daughter vulgar names and accuse her of having sex with the stepfather. The mother had a history of mental illness, prescription drug abuse and would stomp her feet, clench her teeth, yell and threaten abuse toward the children and her husband. These actions frightened and concerned the children.

Matter of Josephine BB., 114 AD3d 1096 (3rd Dept. 2014)

Schenectady parents had filed competing petitions for sole custody of their toddler. The child had been in the sole care of the mother since birth. At first the court ordered temporary joint custody with the mother having primary physical custody while the custody petitions were pending. The Schenectady DSS had an open CPS investigation on the mother regarding a failure to provide for the child's medical and dental needs. Based on a report from DSS, the court changed the temporary order and gave temporary custody to the father with supervised visits to the mother. The court then gave the AFC permission to file a neglect petition against the mother. The parties agreed to allow the neglect petition to go forward with the custody petitions held in abeyance until the dispo or the dismissal of the neglect matter. After a hearing, the Family Court found that the mother had neglected the child and in a combined dispo and custody hearing, awarded custody to the father. The mother appealed the neglect finding.

Significantly, the Third Department affirmed the Family Court's denial of the mother's motion for a FCA § 1028. The appellate court found that the temporary custody order was made under the custody petitions and not under the Art. 10 and in fact the order was made before the AFC filed the Art. 10 petition. Any removal under FCA §1028 would be moot in any event since the court ultimately did adjudicate neglect.

The neglect finding was warranted as the mother did not properly feed the child who was significantly underweight. The child's pediatrician testified that the child was on the verge of being "failure to thrive", that the mother ignored all advice about feeding the child and often failed to bring the child to the pediatrician or the dentist. The fact that the child was not ever ultimately diagnosed with failure to thrive does not preclude a neglect adjudication. The child had low weight and

inadequate nutrition and the mother failed to abide by the medical advice. The mother claimed the child had food allergies but refused testing. The child immediately began gaining weight when custody was transferred to the father. The child had to have major dental surgery due to the pronounced decay in her teeth. The mother had psychological issues that placed the child in imminent danger. She had a personality disorder and believed that others were wrong and to blame and that she was always right. The child was at imminent risk of neglect.

Matter of Karm'ny QQ., 114 AD3d 1101 (3rd Dept. 2014)

The Third Department reversed a summary judgment neglect finding from Washington County Family Court. A newborn was alleged to be derivatively neglected by both the parents but the father only appealed. The father had consented to a neglect of the 3 older children less than 3 months earlier and that is proximate in time. However, testimony at the FCA §1028 hearing demonstrated that there were factual issues and the court should have held a hearing. The father had lost the FCA §1028 hearing and had also appealed that order . That appeal is moot. A neglect finding has consequences so despite the fact that the child in question was freed for adoption by default some 20 months later while this appeal was pending, the issue of the neglect summary judgment adjudication is not moot. The father's testimony at the FCA §1028 raised questions of fact. For example, there was no current proof that the father was using drugs. He claimed to have had a drug evaluation by a DSS employee who he named who told him he did not need treatment. DSS did not provide any proof that this was false. The father acknowledged that he had not enrolled in an anger management program as he had been required to but claimed he had no money to enroll. He also acknowledged that he had missed visits but disagreed that he had missed as many as DSS claimed and also claimed that DSS had canceled a visit and that his work hours interfered with the visit times. He indicated he had a suitable house with a new girlfriend, a good job and that the girlfriend was arranging day care. Lastly, there is no evidence on the record of DSS responding to the court's order that they investigate the new home's suitability.

Matter of Brianna R., 115 AD3d 403 (1st Dept. 2014)

The majority decision in this First Department case reversed the Bronx County Family Court's neglect finding. Two Justices dissented, arguing that the facts did prove maternal neglect. The subject child was a 15 year old girl with mental health and behavioral issues – she was defiant, violent, lied and would threaten to harm herself. She had mood disorders, hallucinations and trouble sleeping. She was hospitalized and medicated to the extent that she was drowsy and disoriented at times. The majority found that while the child missed a lot of school she was not educationally neglected as her missing school was often due to these issues. The mother attempted to get her to attend school by exploring other school options for her and talking to the school many times about the situation. The majority found it quite significant that while the matter was pending and the child was in foster care, ACS could not get the child to go to school either and the school could not get her to stay in the building even if she got there. There was also an allegation that the mother neglected the child in that she allowed the child to have a 15th birthday party that involved beer being served to minors. The majority found that while this was poor judgment on the mother's part, there was no evidence that the child herself had consumed beer.

The dissenting Justices saw the evidence in quite a different light and opined that the lower court's adjudication of neglect should have been affirmed. The child had missed 83 days in the prior school year and, 63 days in the 1st half of the current school year. She had a "abysmal academic performance". The minority felt that the evidence displayed only occasional and feeble attempts by the mother to deal with the school issue, far short of even a minimum degree of care. When the mother did physically take the child to school for a three week period, the child did attend. The mother's claim that thereafter that she could not afford the metro card to take the child to school, lacked credibility. The dissent also thought the birthday party constituted clear neglect. There were some 50 children aged 14- 18 found on the premises by the police at 3:20AM and most of them appeared to be intoxicated. There was a trash container filled with empty beer bottles and one male had been shot in the eye just outside the building. Given the child's problems, the fact that she herself did not appear intoxicated is not the issue. The behavior of the mother in throwing the party, put the child, who was on medication, at serious risk.

Matter of Charisma D., 115 AD3d 441 (1st Dept. 2014)

A New York Family Court's adjudication of neglect was affirmed on appeal to the First Department. The mother left her 8 and 3 year old with the maternal grandmother with no advance notice or provisions for their care. She knew the grandmother to be an inappropriate caretaker. The mother was aware that the grandmother used illegal drugs and had them in her home in the past. She knew the grandmother was to attend a full day methadone program every day but the mother did not determine how the children would be cared for during that time. The mother made no attempt to see to it that the children had food or medical care. Finally, after the mother learned that the grandmother had taken the children to their respective paternal grandmothers, she did not provide these grandmothers with any contact information and failed to communicate with the children.

Matter of Isaiha M., 115 AD3d 575 (1st Dept. 2014)

The Second Department agreed with New York County Family Court that a mother did not provide a reasonable excuse for her default on a medical and education neglect matter. Although the mother claimed to have missed a plane fight in to NYC from South Carolina, she was not clear as to what had occurred. The court could not determine if the travel problems had been beyond her control. Also the mother was in South Carolina in violation of the court's temporary order. The mother had no defense to the allegations. The oldest child had missed 100 of 128 days of school. This child had special needs due to brain injury and those needs were not being met. The mother had refused to allow medical personnel in the apartment to provide medication for and to check on this child's medical condition. The younger child also missed a significant amount of school and there was no explanation for his absences.

Matter of Raven B., 115 AD3d 1276 (4th Dept. 2014)

The Fourth Department reversed Oswego County Family Court's dismissal of a neglect petition. For about one and a half years Oswego DSS was providing substantial services to a mother whose child had been in foster care and then returned home. The three and a half year old child had been home for about five months when while the mother was taking a nap, the toddler left the apartment on her own and wandering a block and a half away. The child was eventually found by a neighbor. The neighbor contacted the police to try to find where the child belonged and the police officer obtained the address of the mother from the supervisor and found an open back door on the mother's porch. The officer loudly knocked and announced himself several times and went through three separate doors until the mother finally woke up and was told that her child had been wandering outside. DSS removed the child but the Family Court ordered the child to be returned after a FCA §1027 hearing and after a fact finding, the lower court dismissed the petition. The Appellate Court reversed.

The three and a half year old child was at imminent danger by wandering the streets unsupervised. The outer door of the porch was not usually locked, the second door to the stairway was not locked or the lock was broken and the door leading into the apartment was not locked or the lock was broken. The mother knew the child could get down the stairs and cross the porch . The caseworker testified that she had seen the child do this in the past and had warned the mother that it was unsafe to allow the child to go down the stairs and out to the porch unsupervised. A reasonably prudent parent would see to it that the door was locked or would otherwise ensure that the child could not get out of the home on her own, particularly when the mother intended to take a nap. The fact that the mother had not known the child to open a door in the past is of little consequence – she did nothing to ensure the child was safe while she herself took a nap. The mother failed to testify or offer any proof in the matter and so the strongest inference can be drawn against her.

Further the home was unsanitary and unsafe. There were full garbage bags on the porch, kitchen and in the living room toys were mounded on the floor and dirty dishes were stacked in the sink and stacked by the toilet. The freezer was full of ice and the refrigerator had moldy fruit and inches of dirty water. The bathroom sink was filled with a moldy gel-like grayish-brown substance. There was cat litter and cat feces strewn where the child had access to it. The child had been exposed to cat feces before and the mother had been warned about that. The child on one visit was observed wearing no pants or underwear and with a disposable razor stuck between her buttocks. On one visit, the caseworker became nauseated due to the foul smell in the home. The police officer found similar conditions when he

attempted to rouse the mother after the child had been found wandering. These conditions had existed for a period of time and not for only a week or so as the lower court had concluded. Both the lack of proper supervision that led to the child wandering in the neighborhood and the unsafe conditions in the home resulted in the child being neglected.

Matter of Jadaquis B., 116 AD3d 448 (1st Dept. 2014)

A Bronx mother neglected two of her children and derivatively neglected two others. She educationally neglected them as they were absent from school excessively and this affected their performance as both children had to repeat a grade. She provided no explanation for not sending them to school and did not establish that there were any safety issues. She also medically neglected the children by failing to respond to numerous referrals for mental health services for the children. Lastly she used excessive corporal punishment on them by hitting them with belts and a plastic bat. The child made out of court statements which described this. The statements were further corroborated by the marks on the children's legs that the caseworker saw and another older brother's statements. There is a substantial risk of neglect for any child in her care.

Matter of China C., 116 AD3d 953 (2nd Dept. 2014)

Westchester County Family Court's determination that a mother had neglected her children was affirmed on appeal. The apartment was in "deplorable and unsanitary" condition. It was infested with flies for several weeks and there weren't permanent beds for the children. The children themselves were unbathed, smelled and were wearing unclean clothes and dirty diapers. The mother refused assistance offered by the caseworker for these issues. The children's health was in imminent danger of impairment.

Matter of Imani W., __AD3d___, dec'd 5/27/14 (1st Dept. 2014)

The First Department concurred that a New York County mother neglected her infant daughter by acting violently toward the father in the child's presence. Further she left the baby alone in her room in a shelter while arguing with another shelter resident.

Matter of Lillian SS., ___AD3d___, dec'd 6/5/14 (3rd Dept. 2014)

The Third Department affirmed Ulster County Family Court's determination that a mother and father had neglected her older boy from a previous relationship as well as neglected their mutual daughter. The father had been determined to be a level III sex offender. He had been convicted in 1996 in North Carolina for placing his penis in the mouth of his two year old daughter. While on probation for that offense, he was charged with raping his girlfriends' 18 month old daughter and ultimately entered an Alford plea regarding that matter. He had never completed the sex offender treatment that was part of his probation requirement for the first offense and had not engaged in any sex offender treatment when he was incarcerated for the second offense. The father consistently denied that he had abused his daughter or that his second conviction was for a sexual act with a child. The father offered no evidence that he had completed any counseling for sexual offenders. The mother testified that she believed her husband and would leave the children alone with him. The court distinguished ***Afton C.,*** given the father's convictions for abusing young children in his care. An expert in sex offender risk assessment interviewed the father and concluded that he should not be allowed to be with the children unsupervised. The expert also opined that the mother was an inappropriate supervisor as she failed to recognize the father's conduct as a risk particularly to their daughter who was the same age and sex as the two children he had previously sexually abused.

Matter of Mateo S., __AD3d___, dec'd 6/18/14 (2nd Dept. 2014)

A Richmond County mother neglected her 5 children by failing to provide proper supervision. The 8 year old made an out of court statement that he and his older brother got into a fight that included the older brother throwing a knife at the younger one. The mother intervened and exchanged punches with the older brother. The 8 year old had marks and bruises that he indicated his older brothers

had inflicted on him. The 5 year old corroborated the 8 years old's version of the violence in the home and indicated that the older children often fought with each other and that the mother would hit the older children back. The two younger children expressed fear of the older children who they say hit, slapped and choked them. The mother denied that the sibling fights were that serious, claimed that the younger children were never left alone with the older children and claimed that the younger child had been coerced or intimidated into lying to the caseworker about the fighting. The younger children's statements cross corroborated each other, the caseworker saw the injuries and some of the events were confirmed by the older sibling and the mother. The mother's defense lacked credibility.

Matter of Airionna C., __AD3d___, dec'd 6/20/14 (4th Dept. 2014)

The Fourth Department affirmed a neglect finding regarding a Monroe County mother of 11 children. One of the children was severely burned by playing with a lighter while the 15 year old had been left babysitting 7 of the younger children, all under the age of 7. The lighter had been in the mother's purse which had been left where the child could reach it and the 15 year old admitted she was sleeping on the couch when the younger child obtained the lighter and burned herself. Even after the incident resulting in the severe burns, the caseworker found the 14 year old alone watching the younger children. It had also been reported that 4 of the children were playing for at least 5 hours unsupervised near a busy city street. Further, the children were educationally neglected. Three of the school aged children had a combined 97 unexcused absences and 86 unexcused tardies in that school year.

Matter of Jesus M., __AD3d__, dec'd 6/20/14 (4th Dept. 2014)

In an Oneida County matter, the parties agreed that instead of holding a fact finding, the Family Court could determine the issue of neglect based on a stipulation that the mother had dysthymic disorder, generalized anxiety disorder, PTSD, and effective psychosis borderline personality disorder and also that the mother was unable to maintain stable housing during a 6 month period. The

Fourth Department agreed that the stipulation that the mother had mental illness did not create a basis to determine she had neglected the child as no information was agreed upon in the stipulation as to how these mental illness impacted the child or placed the child in any imminent danger of neglect. However neglect was established on the basis on the stipulation that she did not have stable housing for a 6 month period. Although the 6 month period was after the filing of the petition, the mother had stipulated to it and the DSS had moved to amend the petition to conform to the stipulation. The child involved in the case had at the time of the appeal been adopted but the court indicated this did not moot the appeal as a neglect finding is a significant stigma.

Matter of Tristyn R., __AD3d___, dec'd 6/20/14 (4th Dept. 2014)

A Cattaraugus County mother derivatively neglected her son based on an incident that had occurred two years earlier in which an older child was abused by the child's father. The record demonstrated that the mother did not understand the duties and obligations of parenthood such that this newborn would be at risk.

Failure to Plan for Child

Matter of Shawntay S., 114 AD3d 502 (1st Dept. 2014)

A Bronx mother neglected her child by refusing to take her child home after he was discharged from a psychiatric hospitalization. The CPS worker and the hospital social worker attempted to discuss the child's future mental health needs but the mother requested that he be placed in foster care and would not make alternative plans for the child. She abdicated her parenting duty to make a suitable plan for the child's care and this placed the child at imminent risk of impairment.

Matter of Evelyn R., __AD3d___, dec'd 5/21/14 (2nd Dept. 2014)

The Second Department affirmed a Westchester Count Family Court's denial of a motion to reopen a default neglect adjudication against a father. The father did not offer a potentially meritorious defense. He had stated to the caseworker that he was "tired" and not willing to seek assistance from Probation to file for help with a PINs matter as his 15 year old son had run away from home. Although the father had sought PINs assistance in the past, he was not willing to do so again. The father failed to exercise a minimum degree of care.

Matter of Ariel R., __AD3d___, dec'd 6/25/14 (2nd Dept. 2014)

A Suffolk County mother neglected her daughter by refusing to pick her up after the child had received psychiatric treatment and subsequent respite treatment. The mother was unwilling to arrange for appropriate care for the child. The mother's defense that she was not offered an opportunity to voluntarily place the child in foster care is without merit.

Parental Drug Use

Matter of Aria L., 113 AD3d 685 (2nd Dept. 2014)

A Suffolk County father neglected his infant daughter given his criminal history of drug possession, including an arrest six months before the child was born. He tested positive for cocaine while the neglect matter was pending.

Matter of Brandon T., 114 AD3d 950 (2nd Dept. 2014)

Kings County Family Court was affirmed on appeal to the Second Department. The father derivatively neglected a newborn infant based on prior adjudications that he had neglected older children due to his drug use. The prior adjudications were proximate in time and it could be reasonably concluded that the neglect conditions still existed. The behavior evinced a fundamental defect in his

understanding of the proper duties of a parent. The father offered no evidence that the circumstances no longer existed.

Matter of Brandon R., 114 AD3d 1028 (3rd Dept. 2014)

The Third Department affirmed neglect findings against two Cortland County parents and the father appealed. The police found drug paraphernalia, marijuana, hydrocodone and oxycontin in the family residence. The father was arrested and Art. 10 proceedings were brought. The fact that the children were not present when the search warrant was executed did not mean they were not neglected. The drugs were located in areas accessible to the children and the father admitted he both used drugs and sold drugs. The father did enter a rehab program but only because he had been arrested. He tested positive while in treatment. The parents had previously been found in another state to have neglected another child. In that case the infant and the mother had tested positive for cocaine, the parents were using drugs and the child went into foster care and ultimately they abandoned the child. There was a substantial basis to find that the two children in this matter were neglected.

Matter of Benicio H., 115 AD3d 857 (2nd Dept. 2014)

Suffolk County Family Court correctly adjudicated a mother to have neglected her child. The mother used cocaine during the pregnancy and tested positive also a few months after his birth.

Matter of Diamonte O., 116 AD3d 866 (2nd Dept. 2014)

A Queens mother neglected her child by allowing drugs to be sold in the home. Heroin was stored at the home and there was marijuana within the child's easy access. This posed an imminent danger of neglect to the child.

Matter of Jamoori L., 116 AD3d 1046 (2nd Dept. 2014)

The Second Department reversed Kings County Family Court's dismissal of a neglect petition and determined that both parents had neglected their child. The mother had been found to have neglected her three older children in 2008. In 2012 she gave birth to this child and the mother tested positive for marijuana both during the pregnancy and at the time of the birth. ACS also alleged that the mother did not comply with the terms of her earlier disposition in that she did not complete drug treatment and was discharged from the program for non compliance. The Second Department found that this use of drugs established a prima facie case of neglect as per FCA 1012 (f)(i) (B) and that ACS was not required to prove that the child was actually impaired or at imminent risk of impairment. Further the mother failed to appear at the fact finding and therefore a strong negative inference can be taken.

The father also neglected the baby as he knew the mother was using marijuana during her pregnancy and failed to do anything to protect the child. He also failed to appear at the fact finding which permitted a strong negative inference against him.

Matter of Brad I., 117 AD3d 1242 (3rd Dept. 2014)

The Third Department reversed a derivative neglect finding against a Broome County father regarding his infant child by ruling that there was not adequate proof of neglect of the target child. The appellate court found that the lack of a specific finding of neglect regarding the target child was not a bar to making a derivative finding on the subsequently born child however the actions of the father regarding the target child did not constitute neglect. The older child had been placed in foster care due to the mother's neglect. The mother stopped at the father's apartment to borrow money and the older child was visiting the father's apartment. Although the parents had been told to stay away from each other due to domestic violence issues, there was no proof that there was any court order that they could not have contact. Even if there was, such a violation would not be neglect per se. While the mother was there, an armed home invasion occurred. An intruder appeared with a gun. The father picked up the crying child and the intruder shot

the father in the arm as he held the child. The mother and the father were indicated for this event but no Art. 10 petition was filed against the father. One month later, the police executed a search warrant at the father's apartment and the father admitted that he used cocaine and marijuana and that he sold "small amounts of both". Following all of this, the mother gave birth to the subject child of this petition (the parties' third child) and the DSS removed the infant and alleged that the mother and the father were derivatively neglectful of this new baby based on these prior events. The lower court found neglect as to the infant and the father appealed.

The appellate court found that although the father admitted he smoked marijuana regularly, there was no evidence he used or sold drugs when any of his children were in his care- he never had custody of any of his children. There was no evidence that he failed to follow through with any court ordered services. There was no evidence that he used the child as a "human shield" during the home invasion or that he grabbed the child believing that the gunman would not shoot him if he was holding a child. The only evidence is that the child was crying and he picked the child up. Since there was no evidence of his neglect of the older child, or any child, there was no ability to adjudicate a derivative neglect of the new baby.

One Justice dissented, finding that the father's admissions to the use of drugs and the sale of drugs posed an imminent risk of neglect to the children. Sale of drugs is a known dangerous activity. The father admitted using both cocaine and marijuana and admitted to growing small amounts of marijuana in his apartment. On the police raid, his apartment contained children's clothes and toys so clearly the children were a regular presence.

Matter of Wyatt YY., __AD3d___, dec'd 6/5/14 (3rd Dept. 2014)

The Third Department agreed with Clinton County Family Court that a custodial grandmother neglected her grandchild. The grandmother had filed for custody alleging that the child's mother was abusing drugs. The parties consented to the grandmother being given custody with the mother only being permitted to be in the child's presence with supervision. Not two months later, the grandmother allowed

the mother to move in and pressured the mother to provide care for the child while the grandmother worked a 40 hour work week. Further, the grandmother turned the child completely over to the mother for a 2 week period when the grandmother lost her apartment. She knew the mother had a very serious drug problem. The grandmother acknowledged to DSS that the mother was continuing to abuse suboxone and that the mother had been about to reenter rehab when the grandmother gave the child to the mother for the 2 week period. The mother was pulled over for speeding with the child in the car (while she was headed to visit her boyfriend in his rehab), her car was towed as she was driving with a suspended license and she had to leave the child with someone that she did not know well. The fact that there was no proof provided that the child was actually harmed is not significant as this created an imminent risk of neglect.

Domestic Violence

Matter of Eugene S., 114 AD3d 691 (2nd Dept. 2014)

The Second Department affirmed a neglect adjudication regarding a Westchester mother who engaged in acts of domestic violence in front of her children that impaired them or put them in imminent danger of impairment.

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

New York County Family Court was affirmed on appeal. The father neglected the child by verbally and physically engaging with the child's mother while the child was in the home. The child was aware of the violence. The child made statements to the caseworker that he heard his parents yelling and fighting. The mother was injured and her injuries, observed by law enforcement and the caseworker, corroborate the child's statements. The father's failure to appear at the dispositional hearing as the failure of his attorney to appear for him means that the dispositional order is not appealable.

Matter of Jeremiah I.W. 115 AD3d 967 (2nd Dept. 2014)

A Queens father consented to a finding that he had neglected his two children by engaging in acts of domestic violence toward the children's mother in the children's presence. He had also pled guilty to attempted assault in the 3rd degree for these acts. Less than 2 weeks after he had consented to the finding, a third child was born and the family court found that infant to be derivatively neglected and the father appealed. The Second Department affirmed. The matter was proximate in time, and demonstrated a fundamental defect in the father's understanding of the duties of proper parenthood. The father offered no evidence to rebut or to establish that the conditions no longer existed.

Excessive Corporal Punishment

Matter of Keith H., 113 AD3d 555 (1st Dept. 2014)

A New York County mother was found to have derivatively neglected a newborn based on the excessive corporal punishment adjudication regarding her older children. The child was born some 4 months after the finding of neglect as to the mother's two older children. The mother had completed a court ordered mental health evaluation, parenting skills and anger management programs and had been visiting regularly but this does not preclude a finding given her continued inability to acknowledge her prior behavior. Further, the mother attempted to hide the fact that she had given birth while the neglect proceedings on the older children were still pending. The mother did appear late during the fact finding when testimony had already begun and the court had been proceeding upon default, the court did allow an adjournment and her attorney was permitted to review the transcript and cross examine the witness who had already testified. The lower court did not err in refusing to grant custody of the child to an aunt given the tumultuous relationship the aunt had with the mother and that the child was doing well in foster care.

Matter of Marelyn Dalys C. G., 113 AD3d 569 (1st Dept. 2014)

Not only did a Bronx respondent sexually abuse a child but he also inflicted excessive corporal punishment. The child testified credibly to the sexual abuse and no physical injury is needed to corroborate. The child also testified to corporal punishment and this was corroborated by the stepbrother's out of court statements that he saw the respondent beat the child and leave bruises on her face and had seen the child be beaten on previous occasions. The caseworker observed a bruise on the child's face. The fact that such a severe beating may have only occurred once does not negate the finding of excessive corporal punishment. The court properly drew a negative inference against the respondent for failing to testify.

Matter of Sylvia G., 113 AD3d 498 (1st Dept. 2014)

A New York County mother neglected her adopted daughter and derivatively neglected her two grandsons. The child testified that her adoptive mother hit her repeatedly in the head with a two foot paddle. The child was allowed to testify via closed circuit video which allowed all the parties to observe the child and her demeanor while testifying and allowed the mother's attorney to cross examine the child after consulting with the mother. This was a proper balance between the child's well being and the respondent's due process rights. The mother claimed that the child's story was not credible as the child had no observed bruises but the child was kept home from school following the incident and the absence of physical injury is not dispositive.

Matter of Kesan W., 114 AD3d 533 (1st Dept. 2014)

A Bronx County Family Court adjudication of neglect was affirmed on appeal. The mother used excessive corporal punishment on her son as there was a history of her hitting the child with a belt causing bruising to his body. The child made out of court statements, and bruises were observed on his arm by the ACS caseworker, the Legal Aid social worker and the child's guidance counselor.

Matter of Julia CC., 115 AD3d 565 (1st Dept. 2014)

The First Department affirmed Bronx County Family Court's determination that a respondent had used corporal punishment on the children. The children made out of court statements that the respondent was violent to them. One child was punched in the face and scratched on the back. The children's statements cross corroborated each other and the caseworker observed scratches on one of the children.

Matter of Nurridin B., 116 AD3d 770 (2nd Dept. 2014)

A Kings County respondent used excessive corporal punishment on one child and also derivatively neglected the other two children in the home. The child made out of court statements that the respondent struck her repeatedly with a belt that resulted in red marks on her arm and legs. The caseworker observed the injuries on the child and the respondent did admit that he had used a belt on the child in the past.

Matter of Jallah J., __AD3d___, dec'd 6/25/14 (2nd Dept. 2014)

The Second Department affirmed Richmond County Family Court's adjudication of neglect. The child made out of court statements that the respondent choked and scratched his neck and the caseworker observed the injuries and provided photographs. One incident of excessive corporal punishment is sufficient for a finding and the evidence also supported derivative findings as to the other two children.

ABUSE

Physical Abuse

Matter of Rachel S.D., 113 AD3d 450 (1st Dept. 2014) and

Matter of Rachel S.D., 113 AD3d 450 (1st Dept. 2014)

The First Department reviewed two appeals from the same matter. The parents were found to have abused and neglected a child and derivatively neglected the child's sister. The 22 month old toddler suffered significant head and body trauma. The older sister told the doctor and the CPS worker that the mother had hit the toddler in the face with a closed fist, had pulled the child's hair and spanked her, after which the child was beaten by the father. The respondent father had picked the 22 month old her up by her legs and swung her into furniture and kicked her on her back into a wooden garbage can. The older child's out of court statements were corroborated by the younger sister's significant injuries. Further the mother knew of the father's violent nature and she herself had been the victim of his violence. The mother did nothing to stop the beating and did not seek medical care for the child. The father's Fifth Amendment rights are not infringed by the court drawing a negative inference upon his failure to testify as these proceedings are civil.

Matter of Jordan T.R., 113 AD3d 861 (2nd Dept. 2014)

The Second Department affirmed Kings County Family Court's finding that a father had abused his 4 month old infant and had derivatively abused the mother's older child and the two children he and the mother had while this abuse petition was pending. The baby was admitted to the hospital with "shaken baby syndrome" and died of her injuries in a couple of weeks. The child had a bulging fontanel, multi-layered retinal hemorrhages, subdural hemorrhages and a subarachnoid hemorrhage. These injuries are not normally accidental. The father was unable to rebut the presumption of his culpability even with expert testimony. His expert acknowledged that the description of accidental events that the father had given at the hospital could not have caused the injuries and further the expert admitted that possibility that the injuries could have been accidental was "very rare" and that he in fact had never seen such a case. The mother's abuse petition was properly dismissed as the mother rebutted the res ipsa injuries of the baby with credible proof that the baby was in the sole care of the father at the time of the injury. She had immediately sought medical help when she returned to the father's apartment and found the baby limp and pale.

Matter of Brayden U.U., 116 AD3d 1179 (3rd Dept. 2014)

The Third Department affirmed Clinton County Family Court's adjudication of abuse and neglect regarding the mother's two children and the mother and father's later born child. The two respondents were dating and spending significant time at the mother's house – ultimately moving in together. About a month before they moved in together, the mother's then youngest child was about 5 month s old. He had serious seizure like symptoms that were life threatening. He was ultimately diagnosed with a skull fracture and intracranial bleeding and had to have surgery to drain fluid from the brain. The parties had a third child together just five months after the Art. 10 petition was filed on the mother's two older children and the lower court ultimately adjudicated the middle child as being abused and neglected and the two other children as being derivatively abused and neglected.

DSS established a prima facie case of abuse against both respondents. The mother was the primary caretaker for the child at the time and the other respondent was physically present in her home about half the time. Although he was not often alone with the baby, he did participate in caring for the children and was a person responsible for the children. The medical testimony was that the baby had suffered two or more episodes of seizure like events which would not normally occur in such a young and non-mobile baby. The damage to the child's skull and brain would have had to be caused by significant force. The respondents did not rebut the prima facie case. First the medical experts said that their explanations – that the child had slipped out of an infant swing inches to the floor or that another child had stuck the baby with a "super soaker" water gun – would not explain the severe injuries. The respondents also argued that other people had cared for the child. The lower court found that both grandmothers who had cared for the child at some points were credible in their denials of injuring or seeing injuries to the baby. A third relative, who was known to behave violently toward his own child had once been alone with the child but only for about 10 minutes and the child did not appear harmed in any way afterwards. The respondent's explanations were inadequate and "extremely suspect" . They did not rebut the res ipsa case.

Matter of Eddie Z.B., __AD3d__ dec'd 5/28/14 (2nd Dept. 2014)

Kings County Family Court affirmed an abuse and neglect finding against a grandmother and the grandmother's boyfriend. The child made an out of court statement that the grandmother's boyfriend hit him repeatedly with an extension cord for staying out late. The child stated that he did this in the presence of the

child's grandmother and that she did nothing to stop the beating. The child was struck on the face and back and the caseworker observed lacerations on the child's forehead, cheek and back and bruising on the ear. Photographs were offered into evidence of the injuries. The child's out of court statements were corroborated by the injuries observed and there is not a requirement that there be a separate corroboration of the specificity of who hit the child. The respondents failed to present any evidence to rebut the child's out of court statements or offer any plausible explanation for the child's injuries.

Matter of Amirah L., __AD3d___ dec'd 6/11/14 (2nd Dept. 2014)

The Second Department affirmed a finding of derivative severe abuse against a Queens mother after her 19 month old toddler died of severe injuries. The child had bruising on the face, chest, abdomen and back and was bleeding from the rectum. She had various fractures and injuries to her internal organs. The mother and her boyfriend were alleged to have severely abused the deceased child and therefore derivatively severely abused the child's sister. The boyfriend submitted to the court's jurisdiction and allowed a finding to be made against him. The mother argued on at her fact finding that she was not home when the child was injured and that she took the child to the hospital when she did return home. The lower court was affirmed in its finding that the mother acted recklessly and intentionally in circumstances evincing a depraved indifference to human life. On two prior and separate occasions in the two weeks before the child died, there would have been significant force intentionally applied to the toddler that resulted in rib fractures and a jaw fracture. The child would have demonstrated significant pain and an inability to chew and the mother sought no medical assistance for the child. On the morning of the child's death, the mother did not summon medical help for the obviously grave injuries her young child was suffering and delayed care for the baby by taking her in a taxi to a hospital in Manhattan, taking over 2 hours, and bypassing other local hospitals. She gave false information to the medical personnel and instructed the baby's older sister to lie about the circumstances of the baby's injuries. Therefore, despite the fact that the mother may not have inflicted the blows to the child, her behavior was clearly and convincingly severe abuse which allows the court to make a finding of derivative severe abuse regarding the sister.

After the fact finding in this matter in Family Court, the legislature amended the SSL 384-b(8)(a)(i) definition of severe abuse to exclude any requirement that

there be proof of diligent efforts at the Art. 10 stage. The Appellate Court retroactively applied the new definition and made a finding of severe abuse as to the deceased child and derivative severe abuse as to her surviving sister.

In a separate decision on the same day, the court affirmed the lower court's decision to grant custody of the surviving child to her father and directed that the mother's contact with that child be supervised.

Matter of Ni'Kia C., ___AD3d___, dec'd 6/12/14 (1st Dept. 2014)

A Bronx father abused his son and derivatively neglected his daughter. The 16 month old son had a transverse fracture of his femur bone which would not occur except by a caretaker's acts. The father was the caretaker at the time. The father could offer no credible or reasonable explanation for the child's fractured leg bone. In fact he failed to testify and therefore a negative inference could be drawn. Further the child also had a burn on his cheek which is likely to result in permanent scarring. The father claimed that the burn occurred when the child feel asleep on a frozen package of meat that the father had put on the child's cheek to treat a bruise. The father had not sought medical treatment for the burn. This is a failure of a minimum degree of care . The child has a younger sister who at the time of the appeal was approximately the age the son was when he was injured. She is derivatively neglected.

Matter of Jaylin C., __AD3d___, dec'd 6/18/14 (2nd Dept. 2014)

The Second Department reversed an abuse finding form Kings County Family Court. A four month old was in the care of the father and the paternal grandmother when she was brought to the hospital with a swelling above her ear. The child was diagnosed with cephalohematoma and a small subdural hematoma. The appellate court found that a prima facie case of abuse was not established, The petitioner's own expert testified that the injury could have been caused by a fall of a couple of feet onto a hard surface. There was no discoloration with the swelling, the child was not in pain and was smiling and happy.

SEX ABUSE

Matter of Jocelyn L., 113 AD3d 484 (1st Dept. 2014)

The First Department affirmed New York County Family Court's adjudication of abuse and neglect. The child testified credibly that she has been sexually abused by the male respondent and that her mother had used excessive corporal punishment. The mother's testimony was discredited by the lower court and there was a negative inference drawn against the male respondent for his failure to testify. The child was allowed to testify via closed circuit TV as the social worker opined that the child's well being could be severely compromised if she was made to testify in their presence.

Matter of Estefania S., 114 AD3d 453 (2nd Dept. 2014)

The Bronx County Family Court was affirmed on appeal to the Second Department. The child's out of court statement that she was sexually abused was corroborated by the testimony of her psychotherapist that the child suffered from PTSD, nightmares and has thoughts of suicide – symptoms consistent with sexual abuse. The child's sister's out of court statements also corroborated the allegations. The children were released to their mother and the respondent was placed under supervision that included an order that he was to stay away from and not communicate with the children.

Matter of Alexis S., 115 AD3d 866 (2nd Dept. 2014)

Westchester County Family Court was affirmed on appeal to the Second Department. The child's prior out of court statements about sexual abuse were corroborated by expert testimony which validated her statements.

Matter of Chaim T., 116 AD3d 704 (2nd Dept. 2014)

A Queens father sexually abused two of his children and derivatively neglected the third. The two children provided out of court statements which cross corroborated each other. There also were adverse changes in the behavior of the son. Further , the father did admit to having examined the daughter's vagina and to having physically "arranged" the son's penis allegedly to make the child feel more "comfortable".

Matter of Jada A., 116 AD3d 769 (2nd Dept. 2014)

The Second Department concurred with Kings County Family Court that a step-grandfather had sexually abused two children. The 10 year old and the 3 year old children made independent and consistent out of court statements to several persons that the maternal step-grandfather had sexually abused them. The children's out of court statements corroborated each other and were also corroborated by the mother's testimony. Although the lower court failed to specify what sexual offenses were committed as is required in FCA 1051(e), the appellate court can make the findings that should have been made.

Matter of Eden S., 117 AD3d 1562 (4th Dept. 2014)

A Cayuga County father sexually abused his one child and derivatively neglected the other two. The father's motion to dismiss the petition due to the DSS delay in proceeding was properly denied as the consequences of dismissal in such actions may not be in the best interests of the children involved. Although the court failed to specify the nature of the sexual abuse as per FCA § 1051 (e) as required, the appellate court can make the findings that should have been made. The court is permitted to infer that the father's deviate touching of the child's genitalia was for sexual gratification based on the circumstances. The child's out of court statements were corroborated and the acts supported a derivative finding regarding the other children.

Matter of Tiffany H., __AD3d__, dec'd 5/1/14 (1st Dept. 2014)

The First Department affirmed a sex abuse finding regarding a Bronx respondent but reversed the lower court's dismissal of the derivative neglect petition on respondent's own daughter. The lower court had found as to the daughter, the aid of the court was not necessary. The targeted child testified and provided competent evidence that was credited by the lower court – any inconsistencies were minor. However, the lower court improperly dismissed the derivative petition on the biological child – that child was derivatively neglected by his actions. Contrary to the lower courts determination, the aid of the court was necessary as his has continued contact with the daughter.

Matter of Adriel R. __AD3d__, dec'd 5/7/14 (2nd Dept. 2014)

The Second Department affirmed a derivative abuse finding upon a motion for summary judgment in Queens County Family Court. The father had previously been criminally convicted of attempted sexual misconduct and endangering the welfare of a child concerning two of his daughters. He had been found by Family Court to have sexually abused one of his daughters, neglected the other and derivatively neglected two of his other children. His impulse control was so defective that he was a substantial risk to any child in his care.

Matter of Katrina CC., __AD3d __, dec'd 6/5/14 (3rd Dept. 2014) (note that this matter is based on a neglect finding but I have included it in this sex abuse section due to the nature of the allegations)

The Third Department reversed a Clinton County Family Court's determination that a respondent had neglected an older child of the mother of his child. When the targeted child was about 5 years old she told her grandmother that the respondent had "pinched" her in the genital area and "went in her hole". She was specific that this had happened when the mother went to the hospital to deliver the second child. Although the child was medically examined and interviewed by a social worker and a detective at that time, no criminal charges were filed and nothing was filed in

Family Court. Two years later the respondent and the mother were in court regarding custody of the younger child and the court ordered a FCA §1034 investigation which resulted in DSS filing neglect against both the mother and the father. The Family Court dismissed the petition against the mother for a failure to establish a prima facie case but made a finding against the respondent and he appealed.

The appellate court found that the child's out of court statements were not properly corroborated. While a relatively low level of corroboration is all that is needed, there must be some level of corroboration. Here there was no expert testimony regarding the child's behaviors. Although the child pointed to her genital area when she made her statement, this action is not a separate corroboration but part of her out of court statement. This is not the same as an expert opinion regarding the significance of that and other behaviors. Also, the fact that the child repeated consistent out of court accounts to multiple persons is well settled as not being sufficient corroboration.

Matter of David L. Jr., __AD3d___, dec'd 6/10/14 (1st Dept. 2014)

A Bronx County respondent sexually abused his daughter and another child he was legally responsible for and also derivatively neglected four other children. The two victim children's out of court statements as to the sexual abuse cross collaborated each other. Further the daughter's statements were corroborated by medical evidence as well as testimony of the child's counselor. The court did properly strike the in court testimony by the child after she failed to return to court to complete it. Also the court properly declined to admit an alleged CD recording by the daughter. The children were each placed in the custody of their respective mothers and the respondent was ordered to attend a sex offender program and an order of protection issued.

Matter of Amparo B.T., __AD3d__, dec'd 6/11/14 (2nd Dept. 2014)

Queens County Family Court's determination that a father had sexually abused his daughter and had used excessive corporal punishment on all of his four children was affirmed on appeal. The daughter testified in court that her father had sexually

abused her when the family lived in Ecuador. The child was allowed to testify outside of the presence of her father but subject to cross examination by the father's counsel. This was proper as the court had determined that there would have been a negative impact on the child's mental and emotional well being if she had to testify in front of her father. The child provided credible testimony and her brother's out of court statements corroborated her testimony. Any inconstancies were insufficient to determine that the whole of her testimony was not worthy of belief. Three of the four children made out of court statements that cross corroborated each other that the father hit them with a belt and an open hand. The daughter testified in court to an instance where the father hit her with a belt on her leg and left a mark. She testified that she had observed the father hit her brother with a belt and cut his head. The children's placement in the care of their grandparents and the conditioning of unsupervised visitation on the father's completion of sex offender treatment was proper. The order of protection that provided for no contact with the daughter was also appropriate given that the child did not want to see her father who continued to deny the sexual abuse and refused to participate in the sex offenders treatment program.

Matter of Daniela R., __AD3d__, dec'd 6/26/14 (1st Dept. 2014)

A New York County father sexually abused his two daughters. The two girls gave sworn credible testimony and the father provided no explanation other than to claim he was never alone with the girls. His own testimony and that of his wife's contradicted the claim that he was never alone with the girls. The father failed to offer any innocent explanation for his inappropriate touching of the girls. That his purpose was sexual gratification can be inferred from the totality of the circumstances.

ART. 10 DISPOS and PERMANENCY HEARINGS

Matter of Diceir D.R.R. 114 AD3d 948 (2nd Dept. 2014)

Kings County Family Court correctly changed three children's goals to adoption given the length of time the children had been in care. The mother failed to complete services for mental health and parenting and was not addressing the reasons the children were in care. There was a preponderance of evidence that the goal of adoption was in the children's best interests as well as limiting the visitation to supervised.

Matter of Luka OO., 114 AD3d 1056 (3rd Dept. 2014)

The Third Department remanded a neglect case back to Clinton County Family Court for a new dispositional hearing. The respondent husband and wife had admitted to the allegations that they neglected 3 children in their care by exposing them to domestic violence that included screaming, loud obscenities and physical violence. While the case had been pending the children had been placed with the wife, the husband had moved to a relatives and there was an order of protection that the husband and wife could not be together if the children were present. The husband and wife then cared for the children alone on alternate days. All the parties agreed to a dispositional plan after the admissions that would have continued the order of protection and provided services but the lower court did not agree. A dispositional hearing was held and the court ordered the children released to the custody of the wife under DSS supervision and that the husband and wife had to accept specified services and that they could not be together in the presence of the children. The husband appealed the dispo order arguing that as the wife now had the children and he could not be there when the children were there, this allowed for no attempts at reuniting with his wife. The appellate court found that as the dispo order did not clarify what visitation he was entitled to have with the children without any finding that there were exceptional circumstances to deny him visitation, the matter needed to be remitted for a new dispo hearing.

Matter of Kenneth S., 115 AD3d 961 (2nd Dept. 2014)

The Second Department reversed Queens County Family Court's "final order of custody" to a non respondent father in an Art. 10 proceeding . The father did not

file an Art. 6 custody petition and the court cannot order "final" custody without such a petition.

Matter of Natalia T., 115 AD3d 966 (2nd Dept. 2014)

Queens County Family Court did not err in denying a father's request for an adjournment of a dispositional hearing. The father had wanted an adjournment to call his therapist as a witness in the dispositional hearing after a sex abuse adjudication.

Matter of Tekiara F., 116 AD3d 852 (2nd Dept. 2014)

The Second Department reversed Kings County Family Court's dismissal of an Art. 10 matter where the children had been provisionally placed with a grandmother in Ohio pursuant to the ICPC. The lower court found that there was no subject matter jurisdiction. The appellate court ruled that this was in error. Even though the children were in Ohio, the ICPC and SSL § 374-a clearly state that the sending state court retains jurisdiction over the children to determine all matters until the child is adopted, reaches majority, becomes self supporting or is discharged with the agreement of the receiving state and none of those things had occurred.

Matter of Dashaun G., 117 AD3d 1526 (4th Dept. 2014)

Shortly after his birth, the Monroe County DSS brought a neglect petition against a mother and placed the child in foster care. Subsequently, the court placed the child with the non respondent father under DSS supervision pursuant to FCA § 1054(a). The placement with the father deteriorated and at the permanency hearing, the father and all parties agreed to conditions that required the father to provide proof of his income, to obtain his own housing, to not allow a specific woman with a criminal past to care for the child, to place the child in day care when he was at work, to allow the DSS caseworker to have access to the home, and to terminate any relationship he had with persons involved in prostitution. Before the

conditions were reduced to a written order, the DSS filed an OTSC that the father was in violation of the conditions and that the child was at imminent risk. The court held a hearing and ordered that the child be removed from the father's care and placed in foster care. The father appealed arguing that his parental and constitutional rights were violated by the court removing the child from his care as he was a nonrespondent father and that any removal should have only occurred had there been an Art. 10 petition filed against him.

The Appellate Court affirmed the lower court's action. The fact that no written order was prepared was not a problem given that the father and his counsel were present when the conditions were agreed to in open court and therefore the conditions were binding on him. The father was subject to the supervision of DSS and the proof was that he had violated the court's order regarding the conditions. Therefore the DSS was entitled to seek removal of the child via an allegation of a violation of the order of supervision without the need to file an Art. 10 petition against him. FCA § 1054, 1072, 1089 (d)(2)(viii) (C). The proof showed with a preponderance of the evidence that he willfully violated the terms he had stipulated to just days before. The court did err in calling this a proceeding under FCA §§ 1061 and 1089 as this was an action allowed pursuant to FCA § 1072 but this was harmless error.

Matter of Gunner T., __Misc3d ___ dec'd 6/5/14 (Clinton County Family Court 2014)

After a child had been in a foster home for approximately five months on a pending Art. 10 petition, Clinton County DSS provided the foster parents with a the required ten day notice that they would be moving the child to a great uncle's home. The uncle had become certified as a foster parent. The AFC filed a motion in Family Court seeking an order that the child could not be moved. The mother's position was not clear as she could not be located. The DSS argued that the court had no authority to direct a specific foster home and that the foster parents could, if they wished, avail themselves of a hearing with OCFS. The Family Court ruled that it did have authority to designate a specific foster home for a child in care under FCA §1017 (2) (b) where the language says that the court can order that the child "reside in a specific certified foster home". The AFC is entitled to choose to file such a motion on the child's behalf, even where a foster parent may have no right to do so, as the child is a separate entity from the foster parents. Although

the court must give preference to a relative, the court need not place with a relative if in the court's decision, this is not in the child's best interests.

Matter of Bernalysa K., __AD3d___, dec'd 6/18/04 (2nd Dept. 2014)

Queens County Family Court was affirmed on appeal for dismissing a father's motion to modify an order of protection that he not have visitation with the children. The father had been ordered to have no contact with the children until he completed a program for sex offenders and therapy. The father had not completed the program but was seeking supervised visitation. The appellate division agreed that there was not "good cause" to modify the prior order given that the father had not complied with the required treatment.

Matter of Roosevelt Mc. ___AD3d___, dec'd 6/25/14 (2nd Dept. 2014)

The Second Department reversed both a Kings County Family Court's granting of a suspended judgment in an Art. 10 matter and the lower court having allowed the parents to relocate out of state. ACS filed abuse and neglect petitions against both parents of six children and removed them. There were allegations that the mother had abused one of the children by beating her with an electrical cord. After the matter had been pending for a year, the children were returned to the father and thereafter both parents entered admissions. The court held a dispositional hearing where the parents indicated that wished to relocate to Virginia due to housing issues. The lower court allowed the children to be released to both parents under the supervision of "a child protective agency" and granted a suspended judgment ruling that the parents had to cooperate with supervision but that they could move to Virginia provided they returned to the NYC area once a month with the children to meet with an ACS caseworker. ACS appealed and the appellate division stayed the order pending the appeal. The Second Department agreed with ACS that it was not in the best interests of the children to allow the family to move to Virginia without an ICPC assessment to ensure that the family would be supervised by a child protection agency in that state. Further the court ruled that a suspended judgment was not in the children best interests. The matter was remitted for a new dispositional hearing.

TERMINATION OF PARENTAL RIGHTS

GENERAL

Matter of Savanna G., __AD3d___, dec'd 6/20/14 (4th Dept. 2014)

The Fourth Department reviewed appeals from Erie County Family Court involving two children. In the first appeal, the court affirmed the termination of the mother's rights to her daughter. The mother did not default as the AFC argued on appeal. The mother appeared and left after the first witness testified. Her lawyer gave an opening statement and cross examined the first witness and thereafter chose not to participate in the hearing as the mother left. This is not a default as the attorney did participate at first. The lower court correctly terminated the mother's rights as the agency provided diligent services and the mother participated in the services but never addressed the problems which had led to the removal. In the second appeal, the mother argued that the court should not have found that she had not complied with the suspended judgment order regarding her son. Here the appellate court concurred with the lower court that the agency had proved by a preponderance of the evidence that she had not complied with the terms of the suspended judgment. She did not attend scheduled visitation with the boy and it was in the child's best interests to be adopted.

Matter of Anastasia I., __AD3d___, dec'd 6/20/14 (4th Dept. 20-14)

A Wayne County mother privately brought a termination petition under SSL §384-b against the father of the child who had severely abused the child. The father moved to dismiss the petition as the child was not in foster care and was not "destitute" or "dependant" as the child resided with and was cared for by the mother. Wayne County DSS then moved to amend the petition and be added as a co-petitioner and DSS also moved for an order under FCA §1039-b not to obligated to offer reasonable efforts to the father. (Counsel advises that the father had essentially "waterboarded" this youngster) The lower court granted the motion on summary judgment grounds and the Fourth Department reversed. SSL §384-b

applies to children who are destitute and without a caretaker or dependent and in foster care and this child is neither. Neither the mother nor DSS can invoke SSL § 384-b to terminate the parental rights of the father while the child is the care of the mother. The Fourth Department pointed out that the father's rights could be ended should an adoption petition be filed under DRL §111(2)(a) as he has abandoned the child.

ABANDONMENT TPRs

Matter of Alliyah C., 113 AD3d 562 (1st Dept. 2014)

The Bronx father in this matter abandoned his children. He never visited the children in the 6 months before the filing of the petition and he never contacted the agency about the children. In fact he failed to respond to attempts by the agency to contact him. However, he did drive the mother to her visits and did not go inside himself. While he claims to have told the mother to give the children his love and claims to have paid for items like candy, juice, toys and shoes that the mother brought the children at the visits, these claims are unsubstantiated . The mother permanently neglected the children as the mother failed to complete the health counseling offered to her and failed to obtain housing although assistance was offered. The mother simply has multiple and inconsistent excuses for not complying with the dispositional order.

Matter of Jerralynn R. Mc. 114 AD3d 793 (2nd Dept. 2014)

A Dutchess County father's incarceration is not a defense to an abandonment where he did in fact not contact the child or the agency for the most recent six months.

Matter of Dustin J.J., 114 AD3d 1050 (3rd Dept. 2014)

A Broome County father abandoned his son. In the relevant 6 months, he saw the child once according to DSS and only twice by his own accounts. He was incarcerated during part of the time but not the whole time and even while incarcerated, his ability to remain in contact is presumed. The foster mother testified that she received one or two calls but no cards, letters, gifts or email. The caseworker testified that in the 6 month time period he called her 3 times but on 2 occasions he asked her for a bus pass. These are sporadic and insubstantial contacts and do not defeat abandonment. There is no evidence that the agency prevented or discouraged him from contact or that he was not able to do so. His claims of having made more contact were not credible. The dispositional hearing in an abandonment is optional and there was not need to hold one here and a suspended judgment is not a permissible option in an abandonment.

Matter of Ruth R., 115 AD3d 531 (1st Dept. 2014)

The First Department concurred with Bronx County Family Court that a mother failed to provide a reasonable excuse for a default on her abandonment default. While she did provide documentation that she was hospitalized, she provided no proof about any inability to contact anyone about her situation. She also did not provide and proof about an inability to visit and communicate with the children during the relevant six month period. Diligent efforts need not be proven in an abandonment termination. The mother is in no position to take these children back.

Matter of Noah G., __AD3d__, dec'd 6/13/14 (4th Dept. 2014)

Wyoming County Family Court was affirmed on appeal. The father of the subject child was to contact the caseworker to set up visitation with the child and visitation was to be supervised by the child's grandfather. Although he did this initially, he then went some 7 months without contracting the worker for a visit. The court did not find credible the father's claim that he though he only had to contact the grandfather.

Matter of Melerina M., ___AD3d__, dec'd 6/20/14 (4th Dept. 2014)

The Fourth Department affirmed Jefferson County Family Court's termination of parental rights of an incarcerated father. The agency proved clearly and convincingly that the father had failed to contact the child or the agency in the 6 months prior to the filing. The fact that the lower court commented that the agency performed due diligence does not mean that the court applied an incorrect standard given that diligent efforts are not required in an abandonment proceedings. Further the father's claims that he supported the child via deductions from his inmate account were not proven. The father claimed that "twenty percent" of his inmate account was automatically deducted and sent to the county for child support but the county presented evidence that it never received any payment from the father or the correctional facility. Even if such funds had been received, under the circumstances, such funds would not constitute communication with the child or the agency sufficient to defeat the abandonment.

Matter of Miranda J., __AD3d___, dec'd 6/20/14 (4th Dept. 2014)

Both the mother and the father of three Wayne County children abandoned them and the family court's termination of their rights was affirmed. Although the parents were prohibited from contacting the children due to an order of protection, there continued to have an obligation to communicate with the agency about the children's welfare and they did not do so. Their only contact with the agency was attendance at one service plan review meeting that had been set up by the caseworker. This one contact is insufficient to defeat abandonment. The parents did not prove that there were any circumstances which rendering it impossible to contact the agency or that the agency discouraged them from contact. Petitions filed earlier on the parents on abandonment grounds were also granted but should not have been as those earlier petitions concerned a time frame where the parents had contacted the agency numerous times.

MENTAL ILLNESS TPRs

Matter of Christina A.N., 113 AD3d 777 (2nd Dept. 2014)

The Second Department affirmed a finding that a Kings County mother was mentally ill to the extent that she could not safely parent her teenage daughter, and there was clear and convincing evidence that the mother was presently and for the foreseeable future not able to care for the child due to the mother's major depressive disorder. Her illness was recurrent, chronic and has psychotic features and the child would be a risk of neglect. However the matter was remitted for a dispositional hearing. Although not required by statute, the court may hold a dispositional hearing in a mental illness termination. This should occur here where the child is now 13 and does not want to be adopted and wants to continue her close relationship with her mother.

Matter of Zachary R., __AD3d___, dec'd 6/20/14 (4th Dept. 2014)

An Erie County father appealed his termination of parental rights matter. The Fourth Department found that the agency had proven clearly and convincingly that he was mentally ill and could not provide proper care for the child for the foreseeable future. The father claimed that the DSS had undermined his relationship with the child by not providing sufficient visitation . The appellate court indicated that diligent efforts by the agency need not be proven in a mental illness termination.

PERMANENT NEGLECT TPRs

Matter of Christina Ann B., 114 AD3d 407 (1st Dept. 2014)

A New York County father's rights were terminated. The agency provided clear and convincing proof that they offered diligent efforts to reunite the father with his daughter. They offered visits twice a week and provided a visit coach. The agency referred the father to parenting classes, provided "extensive efforts" to find housing, and provided referrals for the father to learn about the child's special medical needs. The father failed to obtain housing and did not take advantage of the services to assist him to understand the child's issues. This 7 year old child

has been in foster care since she was 4 months old and the foster mother wishes to adopt her. The foster mother is devoted to the child and sees to it that her medical needs are met whereas the father does not fully comprehend the child's issues and was not committed to keeping the same medical professionals for the child.

Matter of Angelina Jessie Pierre L., 114 AD3d 471 (1st Dept. 2014)

The First Department concurred with Bronx County Family Court that a mother had permanently neglected her daughter and that it was in the child's best interests to be freed for adoption. There was clear and convincing evidence that the agency provided diligent efforts to reunite. Frequent visits were offered and referrals were made for mental health counseling, anger management, parenting skills as it related to children with special needs. A plan was developed for appropriate services for the child. The mother failed to complete the service plan although she did complete many of the services after the TPR petition was filed. However, the mother still had failed to demonstrate insight into the parenting issues and failed to understand or demonstrate ability to care for the child's special needs. The mother did not attend most of the child's medical appointments and did not interact positively with the child during visits. The child has been with the foster parents since she was 5 days old, is bonded to them and they are caring for her many special needs.

Matter of Isis M., 114 AD3d 480 (1st Dept. 2014)

A New York County mother permanently neglected her three children. The First Department concurred with the lower court that there was clear and convincing evidence that the agency offered diligent efforts by providing and encouraging visitation but the mother missed half of the visits, did not provide excuses for her failure to visit and, on at least one observed occasion, did not pay attention to the children at the visit. The mother did not develop a close relationship with her children. The mother did complete a parenting class but did not attend the twins' doctor appointments and did not understand their diagnoses, medications or treatments. There is a preponderance of evidence that the children should be freed for adoption by their respective foster families who have cared for the children for most of their lives and are meeting the children's special needs and with who the children had strong relationships.

Matter of Breanna M.G., 114 AD3d 678 (2nd Dept. 2014)

A Richmond County mother permanently neglected her child. There was clear and convincing evidence that the agency offered diligent efforts with a service plan that included drug treatment, parenting skills, individual counseling, a domestic violence program and visitation. The mother did not complete the parenting program or the drug treatment program and has not maintained regular visitation.

Matter of Alex C. Jr., 114 AD3d 1149 (4th Dept. 2014)

An incarcerated Cattaraugus County father permanently neglected his son. The agency offered diligent efforts by arranging for a psychological evaluation of the father and provided supervised visitation both before and after the father was incarcerated. The agency recommended and encouraged the father to take advantage of various services. The father claimed he took parenting classes while in prison but he told the caseworker that the classes were "stupid" and that he learned nothing. The father did not engage in the recommended mental health counseling, substance abuse treatment or a domestic violence program . The father's only plan for the child was to have him remain on foster care until the father was discharged from prison and this is not an acceptable plan. Given that the father had only made negligible progress, it was in the child's best interests to be freed for adoption.

Matter of Jaylin Elia G., 115 AD3d 452 (1st Dept. 2014)

The First Department affirmed New York County Family Court's termination of a mother's rights. The agency provided diligent efforts by scheduling visitation and by giving the mother funds for transportation between NYS and Rhode Island where she was living to allow for visitation. The agency also advised her that she needed to complete drug treatment, obtain housing and a stable source of income. The mother did not complete a drug program and did not attend all visitation offered. The foster mother provided a positive environment and wanted to adopt.

Matter of Baby Boy P., 115 AD3d 861 (2nd Dept. 2014)

Queens County Family Court correctly found that a mother had permanently neglected her children and that it was in their best interests to be freed for adoption. The agency provided diligent efforts by arranging visitation, developing a service plan, and providing referrals for her to obtain housing and an income. The mother refused the services and did not obtain suitable housing or a stable income. The foster parents each want to adopt the children and the children have lived with them for most of their lives.

Matter of Dutchess County DSS o/b/o Tony R., 115 AD3d 952 (2nd Dept. 2014)

The Second Department affirmed the termination of a father's rights to his son. The agency arranged for visitation with the father who was incarcerated in state prison. They explored the resource that the father identified and repeatedly reminded the father of the need for him to locate a resource for the child. The agency also kept the father informed of the child's progress. The father was unable to provide an adequate plan for the child's future.

Matter of Alyssa Maureen N., 116 AD3d 410 (1st Dept. 2014)

A Bronx mother permanently neglected her child. The agency did offer diligent efforts by providing visitation, meetings, and referrals to a mental health evaluation and therapy as well as drug treatment. The mother failed to remain in contact with the agency for long periods of time and did relapse and use drugs. The child had family wanted to adopt and the child did not want to see the mother.

Matter of Gina Maritza S., 116 AD3d 570 (1st Dept. 2014)

The First Department affirmed a termination of a New York County mother's rights to her children. The agency exerted diligent efforts by creating a service plan and holding numerous service plan reviews, referrals to DV counseling and sex abuse programs and providing visitation. The mother did not make progress, including failing to address the problem of the children's sex abuse. A suspended judgment is not appropriate.

Matter of Ebonee Annastasha F., 116 AD3d 576 (1st Dept. 2014)

Bronx County Family Court correctly adjudicated permanent neglect regarding a mother and her child. The agency offered diligent services including visitation, referrals for parenting skills and anger management services. The mother did complete these programs and attend therapy but she was disruptive and violent during visitation and failed to gain any benefit from the programs. She did not gain insight into why the child was in foster care. The child has been with the current foster mother for over 2 years and the child wishes to be adopted there and does not want to visit with her mother.

Matter of Brandon Michael R., 116 AD3d 620 (1st Dept. 2014)

The Second Department affirmed a finding of permanent neglect regarding a New York County mother but remanded the matter for a new dispositional hearing. The agency did exert diligent efforts by creating a service plan, referring her for parenting skills, anger management, mental health therapy and providing visitation and assistance with housing. The mother was not consistent with visitation, did not obtain housing and did not complete the programs. However, one child is now 15 and does not want to be adopted and wants to return to live with his mother. The other child does want to be adopted but has only recently been placed in a new adoptive home. A new dispositional hearing is needed to determine what is in the youths' best interest at this time.

Matter of Alani G., 116 AD3d 629 (1st Dept. 2014)

New York County Family Court was affirmed on appeal to the First Department. The agency offered diligent efforts to the mother while her children were in care. They referred her to parenting classes as it related to special needs children , mental health services, and set up visitation with a coach. The mother did not attend the special needs children parenting course and did not take advantage of the services of the visitation coach. She did not consistently visit the children. The children's best interests are to be adopted as they have lived most of their lives in foster care and the mother had no realistic plan for them. The AFC presented expert evidence that the children would "regress" if returned.

Matter of Alister UU., 117 AD3d 1137 (3rd Dept. 2014)

A Tompkins County mother permanently neglected her three children. The agency offered diligent efforts. A service plan was created and regularly reviewed. The mother was given weekly visitation, phone contact was set up for the mother with the children and family team meetings were held. The DSS provided transportation assistance and offered help locating housing and referred her to services for sexual abuse and domestic violence. Significantly the caseworkers spoke to the mother on at least a weekly basis reminding her over and over that the children would not be returned to her unless she ended her relationship with "Ray", a known sex offender.

The mother did complete a parenting class and an anger management class and attended therapy and was consistent with her visits but she did not obtain housing and she would not end her relationship with Ray. The mother was aware that there was an order of protection for Ray to stay away from the children until they were 18. The mother married Ray after the children had been removed and after she had been advised that she would not be able to obtain her children back if she was with him. The agency was under no obligation to provide services to Ray as he was not a parent to any of the children. The mother claimed that the agency should have told her more details about Ray's history but she did not ask for details and she chose to believe Ray's version . She lied to the caseworkers about her relationship with Ray and claimed she ended the relationship and was not living with him when there was evidence to the contrary. She first claimed she was obtaining a divorce, which was never true and then said no one could make her divorce Ray. When confronted with the fact that she had posted a photo on Facebook of Ray and the children at an event, she claimed someone had hacked into her computer and created a fake photo of Ray and the children by photo

shopping separate pictures and then posted the faked photo. She failed to plan for the children given her failure to find housing and her total failure to appreciate the risk Ray posed to her children.

Matter of Selvin Adolph F., __AD3d__, dec'd 5/13/14 (1st Dept. 2014)

The First Department reversed the Bronx County Family Court's dismissal of TPRs on both a mother and father. The appellate court found that no one argued that diligent efforts were not offered by the agency but the lower court erred in concluding that the parents hadn't failed to plan for the child. The teenager involved had not lived with his mother since he was an infant. She was found to have neglected him in two different proceedings several years apart and the father was found to have neglected the child as well. Part of the neglect on the mother's part had been her failure to obtain mental health counseling and she still had not obtained that counseling. The mother's nine other living children have been removed from her care and regarding three of those children, she appealed the TPRs - all based on her failure to obtain mental health services. The father's issues were with alcohol and he has been arrested twice for DWI since the neglect adjudication. The teenage boy involved indicated that he did not want to live with his father due to his drinking when the child visited overnight. The father called his drinking " a little problem" and claimed to not know that he was to refrain from drinking and refrain from drinking and driving – he claimed going to a substance abuse program was all he thought he needed to do. He lacked insight into his issues.

Matter of Emily Jane Star R., __AD3d___, dec'd 5/29/14 (1st Dept. 2014)

New York County Family Court was affirmed by the First Department. There was clear and convincing evidence that the agency offered diligent efforts to reunite the children with their parents. Visitation, including a visitation coach, was provided. Referrals were made for drug treatment, parenting skills, anger management, DV counseling and therapy for both parents. The parents failed to complete the services and did not gain any insight as to the reasons the children were in care. The children have been in care over 5 years and have bonded with their respective

foster parents. The younger child has special needs and is autistic and the parents lack understanding about his needs.

Matter of Jessica C., __AD3d___, dec'd 5/28/14 (2nd Dept. 2014)

A Queens County mother permanently neglected her four children and it was in their best interests to be freed for adoption. The agency offered diligent efforts to reunite by setting up visitation, developing a service plan and referring the mother to parenting skills, anger management, mental health evaluations and therapy. The caseworkers encouraged the mother to comply with the service plan and warned her of the consequences of non compliance. The mother however failed to maintain contact with the children, plan for their future or comply with the service plan.

Matter of Travis G., __AD3d___, dec'd 5/28/14 (2nd Dept. 2014)

The Second Department affirmed the termination of a Suffolk County mother's rights. There was clear and convincing proof that the agency offered diligent efforts by creating a service plan, offering mental health evaluation, parenting skills and visitation. The mother did not complete her psychotherapy and did not regularly visit the child.

Matter of Yamilette M.G., __AD3d__, dec'd 6/4/14 (2nd Dept. 2014)

The Second Department reviewed several issues in this termination of parental rights matter from Kings County. The appellate division had already reviewed the matter on a previous appeal and had ruled that the FCA §1039-b "no reasonable efforts" finding against the mother was warranted and that issue cannot be relitigated in this appeal. The father's consent to the adoption is not necessary as he is an out of wedlock father who did not maintain a substantial or continuous contact with the child and did not visit or pay child support. Further, even if his consent was needed, he permanently neglected the child as he was incarcerated and only offered his mother as a resource and she was not in fact a viable custodial resource. The incarcerated mother did not offer any custodial resource either. The

child should be freed for adoption. She has lived her life – except for the first two months – with the foster family who has adopted her older sister and who wants to adopt her. She is bonded to them. Although the mother did attend therapy and a parenting group while she has been incarcerated, it is not in the child's best interests to offer a suspended judgment.

Matter of Jeremy J. M., __AD3d___, dec'd 6/11/14 (2nd Dept. 2014)

Westchester County Family Court's termination of the parental rights of both parents to their two children was affirmed on appeal. The child had been in foster care for seven years. The mother was provided with a service plan, individual therapy, parenting classes and regular visitation. She did not learn the skills in the parenting classes and had trouble interacting with and disciplining the children despite the agency offering visits in a home-like setting with a visit supervisor who provided the mother with recommendations and feedback. The father was also provided with diligent efforts and referring to group therapy, parenting classes and sex offender treatment. A visit supervisor was provided to the father and the supervisor had an educational background in sexual abuse of children and abnormal psychology. The father did not complete the group therapy and was still demonstrating inappropriate sexual proclivities. Both parents contended that their "developmental disabilities" were not taken into account as it would impact services. However, this issue was not raised and preserved at the hearing and in any event, the parents did not complete the services offered.

Matter of Elasia A.D.B., ___AD3d___, dec'd 6/11/14 (2nd Dept. 2014)

A Kings County mother's rights were terminated as to her three children. The agency provided a service plan, met with the mother and stressed the need for compliance, referred her to drug treatment and set up visitation. The mother did not correct the problems and her belated and only partial compliance with the service plan was insufficient.

Matter of Tiara J., __AD3d___, dec'd 6/17/14 (1st Dept. 2014)

The First Department affirmed the termination of both New York County parents' rights to their child. The father's consent was not needed as he was an unwed father who had not support the child. He did have money to do so given that he spent money on drugs for himself. He admitted he was not employed due to his chronic marijuana abuse. Bringing some gifts and food to visits with the child is not the equivalent of support. The agency was not under any obligation to inform the father of his parental obligation to support the child.

The mother was provided with diligent efforts as the agency set up visitation and referred her to programs including services for mental health. The mother failed to comply with services, failed to gain insight into the child's placement and refused to separate from the drug abusing father. The parent's home is disorderly, dirty and unsanitary. The mother did not obtain housing and was often late or missed visits with the child. The child should be freed for adoption as she was placed in foster care shortly after birth and has never lived with either parent. The child is bonded to the foster mother and does well there.

Matter of Jenna Nicole B., ___AD3d__, dec'd 6/24/14 (1st Dept. 2014)

A Bronx mother permanently neglected her child and it was in the child's best interests to be adopted by her foster parent who was also the grandmother. The mother failed to maintain contact with the child as her visitation was inconsistent and there were periods of time with no visits. The mother also did not comply with random drug testing and did not complete substance abuse or mental health evaluations. The mother had recently made some positive strides but overall she has no realistic plan for the child and is now incarcerated. The child has been with the grandmother for 7 years and the grandmother meets the child's needs and wants to adopt .

Matter of Gianni D., __AD3d___, dec'd 6/25/14 (2nd Dept. 2014)

The Second Department affirmed Queens County Family Court's adjudication that both parents had permanently neglected their children. The parents were referred to parenting classes and other counseling and regular visitation was offered. The

mother was offered drug treatment. The mother's brother was explored as a possible resource for the children However, the parents did not resolve their issues and the mother's visitation was suspended at one point due to her continual drug use.

TPR DISPOS

Matter of Jada G., 114 AD3d 1148 (4th Dept. 2014)

A Wyoming County Family Court matter was reviewed by the Fourth Department. The DSS established by a preponderance of the evidence that the father had violated the terms of the suspended judgment and that it was in the children's best interests to be freed for adoption even though the children were not in a pre-adoptive home. The AFC argued that the lower court should have imposed a visitation schedule to "wind down" the relationship between the father and the children but the court has no authority to order visitation after a termination.

Matter of Alisa E., 114 AD3d 1175 (4th Dept. 2014)

The Fourth Department affirmed the Livingston County Family Court's revocation of a mother's suspended judgment. The DSS established by a preponderance of the evidence that the mother failed to obtain suitable housing and would not release information about what programs she attended. She did not provide verification that she completed the programs and the programs were not ones that she had determined DSS would approve. She continued to live at her mother's home where the DSS had not been permitted access to assess the home. It was in the best interests of the child to be freed for adoption.

Matter of Leval B. v Kiona E., 115 AD3d 665 (2nd Dept. 2014) and Matter of Amari S.G.E. 115 AD3d 667 (2nd Dept. 2014)

The Second Department reviewed several appeals in this Westchester matter. The parents of the children consented to a finding that they had permanently neglected

the children. The children had been in foster care at that time over two and a half years. The court issued a suspended judgment and DSS thereafter filed violations of the terms on both parents. Two different relatives then filed custody petitions for the children and a third relative, a grandmother, filed for visitation. While the appellate court agreed that the mother had violated the suspended judgment, the court returned the custody and visitation petitions for a new dispositional hearing. The mother failed to comply with at least one of the conditions of the suspended judgment and the court had a preponderance of the evidence to permit the revocation of the suspended judgment. However, while the case was on appeal, the children had been removed from their foster home as they had been abused there. Since the lower court's decision to deny the custody petitions and free the children for adoption rested on the amount of time the children had been in the foster home that wanted to adopt them, this change in circumstances warranted a new hearing on the children's current best interests.

Matter of Angel R.F., 114 AD3d 781 (2nd Dept. 2014)

The Second Department concurred with Suffolk County Family Court that in was in the children's best interests to be freed for adoption. The father had been incarcerated in the state of Florida. The DSS offered diligent efforts by sending him service plan reviews, forwarding letters and photographs from the children, keeping him apprised of the status of the children who lived in NYS. DSS also explored potential resources from Florida that the father identified. The DSS did not offer visitation but that would not have been in the children's best interests given their young ages, medical and behavioral issues and the travel distance. The father failed to plan as his only suggested resources were non relatives who lived in Florida and this was not a reasonable alternative for these children

Matter of Albert R., 115 AD3d 865 (2nd Dept. 2014)

An Orange County father violated the terms of a suspended judgment and his rights were terminated and the decision was affirmed on appeal. The DSS is not required to prove diligent efforts in a suspended judgment violation hearing – .as having permanently neglected the children.

Matter of Treyvone C., 115 AD3d 126 (4th Dept. 2014)

Oneida County Family Court was affirmed on appeal. The mother violated the terms of the suspended judgment and the lower court correctly determined that there was not only a violation but that it was in the child's best interests to be freed for adoption as required. The DSS request that the appellate court should vacate the lower court's order regarding post termination photographs being provided to the mother is not properly before the court as DSS did not cross appeal.

Matter of Mikel B., 115 AD3d 1348 (4th Dept. 2014)

The Fourth Department reviewed several issues in an Erie County father's appeal of the termination of his parental rights to his five oldest children and a derivative neglect finding as to his youngest child. First the father argued that he was denied adequate appellate review as portions of the transcript of the lower court proceeding are missing as the recording device failed. However, the father should have but did not seek a reconstruction hearing with respect to the missing record and he had stipulated to the accuracy of the record on appeal. In any event, there is a sufficient record on which to reach the issues. The Appellate Court found that the father's argument that the terms of the suspended judgment were too restrictive and unrealistic was not open to appellate review as the father had consented and stipulated to the terms. A preponderance of evidence supported the conclusion that the father violated many of the terms of the suspended judgment and this finding establishes derivative neglect as to the youngest child.

Matter of Bayley W., 116 AD3d 1109 (3rd Dept. 2014)

The Third Department reversed Delaware County Family Court's revocation of a father's suspended judgment, ruling that the court's failure to hold a hearing on the issue was an error. The parents had been both given a suspended judgment but the mother later surrendered the children and the father remained incarcerated. The fathers' "plan" had been that the mother would obtain the children back as he was expected to remain incarcerated for at least 5 more years after the mother had surrendered. The father offered up three other possible resources for the children in his papers but the court said it was "too little, too late" and revoked and freed

the children. The appellate court that a hearing was required to determine his timeliness of the other as it related to the suspended judgment and the surrender by the mother.

Matter of Katie I., 116 AD3d 1309 (3rd Dept. 2014)

Madison County parents admitted to permanent neglect in the middle of the fact finding and the lower court scheduled the dispositional hearing 6 months away making it clear to the parents that this was "one last ditch opportunity" for them to prove they could safely parent the children. When the matter was returned after 6 months, the court held the hearing and freed the children for adoption and the father appealed. The Third Department agreed that it was in the best interests of the children to be freed. The father refused to attend parenting classes and mental health treatment and did not make any contact with the children other than the one hour a week supervised visits although he had been encouraged to do so. He made no efforts to communicate with the foster parents or the children's service providers. The children had various mental health needs and one of the children was hospitalized but the parents made no efforts to seek information about the children's health. The father did not engage with the children during the visits, was inappropriate and once had to be removed. The children were distant, confused and disengaged with the father. The children's therapist opined that the visits had a negative effect on the children. The father did not testify at the hearing and therefor the strongest negative inference can be drawn.

All three of the children are in the same pre-adoptive home and have a strong bond with the family. The pre-adoptive family meets the children's needs and it is in their best interests to be adopted.

Matter of Cornelius L. N., 117 AD3d 1487 (4th Dept. 2014)

The Fourth Department affirmed Monroe County Family Court's refusal to extend a suspended judgment on a father who admittedly had violated the terms of the order. The respondent did not prove any "exceptional circumstances" as required to entitle him to an extension of the suspended judgment. The issue of diligent

efforts is not a proper one for appeal as that issue is resolved when the father admitted to permanent neglect and was granted the suspended judgment.

Matter of Xavier O.V., 117 AD3d 1567 (4th Dept. 2014)

A Monroe County father alleged on appeal that his consent to the entry of a permanent neglect was not voluntary and therefore the subsequent revocation of the suspended judgment he was granted should be reversed. The Fourth Department found that although the farther hesitated and indicated he did not want to admit to having done anything wrong, he relented and consented to the court making a finding of permanent neglect and to the court granting a suspended judgment. There was no evidence of threats or compulsion or fraudulent statements. He was represented by counsel and stated he understood the proceedings which were translated into Spanish for him.

Matter of Male R., __AD3d___, dec'd 5/13/14 (1st Dept. 2014)

While the Bronx County mother's rights to her sons should be terminated as they are bonded to a foster mother who wishes to adopt, the mother properly was granted a suspended judgment as to her daughter who is not in a stable placement.

Matter of Serenity A., ___AD3d___, dec'd 5/22/14 (1st Dept. 2014)

The New York County Family Court properly revoked a suspended judgment and terminated a mother's rights. A preponderance of the evidence demonstrated that the mother failed to visit the child for several months and failed to obtain suitable housing or submit to therapy or drug testing. It was in the child's best interests to be freed and adoption by the foster mother. She has lived there for 2 years and her siblings are there.

Matter of Jason H., __ AD3d ___, dec'd 6/5/14 (3rd Dept. 2014)

Delaware County Family Court was affirmed by the Third Department in a revocation of a suspended judgment and termination of a mother's rights. She missed mental health appointments, did not complete a substance abuse treatment program and did not submit to random drug testing. She admitted using illegal drugs and abusing prescription medication. She did not respond to services offered and she lacked judgment and consistency needed to parent a special needs child. The child has been in foster care since he was 2 months old and has a strong bond with his foster parents who are stable and meet his special needs.

Matter of Jayden T., __AD3d___ , dec'd 6/5/14 (3rd Dept. 2014)

The Third Department affirmed Broome County Family Court's revocation of a suspended judgment on a mother regarding her 5 children. The children went into foster care in 2007 and the mother was ordered to attend parenting and anger management among other services. In 2011, DSS filed to terminate her parental rights and she admitted she had delayed in obtaining the services and the court issued a 6 month suspended judgment ordering that she complete parenting and anger management services. A petition was then filed alleging she had violated the terms of the suspended judgment and the matter was set for a hearing. The mother appeared on the first day of the hearing but not the second and the court proceeded in her absence and found that she had violated the terms of the suspended judgment. There after the court held a dispositional hearing where the mother appeared and the court found it was in the children's best interests to be freed for adoption. The mother appealed.

The appellate court found that proceeding on the second day when the mother did not appear was not an error as notice of the date was mailed to the client's home and the mother failed to exercise due diligence to learn of the adjourned date. The mother did complete the parenting skills class but she had been consistently late to class and she scored lower on the post test for the course than she had on the pretest. She did not enroll in the anger management class – which had been ordered since 2007 - until after the petition had been filed to revoke the suspended judgment. She failed to keep DSS informed of her addresses, she did not sign releases and did not attend the children's medical appointments or parent teacher conferences or meet with service providers for the children and was inconsistent in

her visits with the children. The three older children have resided with maternal grandparents where they are doing well and wish to remain. The grandparents have brought the children the three hour trip to Broome County to visit the mother but the mother has never gone to their home to visit the children and only calls them sporadically. The younger two children reside in a foster home that wishes to adopt and they are dealing with one child's special needs due to fetal alcohol syndrome. Significantly, the mother gave birth to a sixth child during the suspended judgment period and concealed the pregnancy from the DSS and the other children. The children learned of the birth of this child by seeing the mother's post in a social media site.

Matter of Chanel C., ___AD3d____, dec'd 6/11/14 (2nd Dept. 2014)

While the Second Department concurred with Kings County Family Court that a mother had permanently neglected her two children, the appellate court reversed the lower court's order for a suspended judgment. The children had been in foster care with an aunt for about 4 years – most of their lives. The agency provided diligent efforts to the mother by developing a service plan, providing referrals for services and attempting to maintain contact with her. Significantly the mother relocated to Florida while the children were in foster care in NYC. The agency attempted to remain on contact with the mother by phone and letter both before and after the move and provided prepaid transportation for the mother to come to NYC and visit with the children. The mother did complete anger management and parenting skills but she did not submit to random drug testing or participate in a drug treatment program and this was the significant issue which had caused the children's placement. Further she did not maintain regular contact with the children through phone calls or visits. The lower court properly found that this constituted permanent neglect but did order a suspended judgment and the appellate court reversed the disposition and ordered a termination. The mother relocated to Florida which she knew would impede her ability to have regular and meaningful contact with her children, she failed to have insight into her issues and had not completed services even after several years. The mother was unwilling to move back to NY and the court failed to consider if the children would be impacted by a move to Florida, a place they had never even visited, and removed from the aunt who had cared for them for the majority of their lives. The mother had not acknowledged her problems and addressed them and the children may be adversely affected by any move and so a suspended judgment was not appropriate.

One Judge dissented in part and found that the matter should have been returned for a new dispositional hearing. The dissent ing Judge indicated that the circumstances have changed and should be reviewed by the lower court. While the case was on appeal, it was alleged that the mother had been submitting the random drug screening and had visited their children bimonthly via plane tickets purchased by the agency. She alleged that she had been in phone contact with the children and had maintained stable housing and a source of income.

Matter of Jessica Marie C., __AD3d___, dec'd 6/24/14 (1st Dept. 2014)

The First Department affirmed New York County Court's denial of a father's custody petition for a child who was otherwise freed for adoption. The court found extraordinary circumstances in that the father had never assumed a parental role in the child's life and had a persistent criminal pattern. The father had only lived with the child for 3 months after her birth and visited her only once while she was in foster care. He had many arrests, convictions and long periods of incarcerated. The child was over 3 years old when he did file for custody and by then the child has developed a loving, stable relationship with her foster mother who wished to adopt her. The child barely knows her father and is thriving in her foster home.

PATERNITY and UNWED FATHER ISSUES

Matter of Felix M v Leonarda R. C., _AD3d__, dec'd 6/18/14 (2nd Dept. 2014)

The Second Department reversed the Nassau County Family Court's ruling that a man was estopped from denying paternity. The child was born in 2004 and the man signed an acknowledgement of paternity about 5 months later. Two years after that the mother informed him that he was not in fact the child's father and the parties ended their relationship. About 6 years later the man filed a proceeding to vacate the acknowledgement but the lower court dismissed the proceeding on the grounds of equitable estoppel. The Second Department reversed and remanded the matter for a hearing, ruling that equitable estoppel is only appropriate where the child would be harmed with the attempt to deny paternity but here there was no parent child relationship. The child did not recognize the man as his father and had

not seen him in years. Ordering a GMT on DNA testing would not be contrary to the best interests of the child.

SPECIAL IMMIGRANT JUVENILE STATUS

Matter of Maria G.G.U., 114 AD3d 69 (2nd Dept. 2014)
Matter of Maria E.S.G. v Jose C.G.L. 114 AD3d 677 (2nd Dept. 2014)
Matter of Maura A.R.R. 114 AD3d 687 (2nd Dept. 2014)
Matter of Juana A.C.S. v Dagoberto D., 114 AD3d 689 (2nd Dept. 2014)
Matter of Marisol N.H., 115 AD3d 185 (2nd Dept. 2014)
Matter of Maria S. Z. v Maria M. A., 115 AD3d 970 (2nd Dept. 2014)
Matter of Gabriel H. M., 116 AD3d 855 (2nd Dept. 2014)
Matter of Cecilia M.P.S. 116 AD3d 960 (2nd Dept. 2014)
Matter of Cristal W.R.M., ___AD3d___, dec'd 6/18/14 (2nd Dept. 2014)
Matter of Saul A.F. H v Ivan L. M. ___AD3d___, dec'd 6/18/14 (2nd Dept. 2014)

In each of the above ten separate appelas, the Second Department ruled that Nassau County Family Court had erred in dismissing each of these relatives' petitions for guardianship of a child or children and the relatives' motion for SIJS predicate findings to enable the children to apply for SIJS with immigration court. The lower court should have held a hearing on each of the relative's claims that the one of the parents in each case had abandoned the child or children. Only one parent needs to have been found to abandoned, abused or neglected the child and even another parent can seek a guardianship order and can seek predicate SIJS findings of that parent's own children. In the majority of these cases, it was the child or children's mother who was seeking the guardianship order. In one matter it was an older sibling and in another it was a cousin who had petitioned.

Matter of Kamaljit S., 114 AD3d 949 (2nd Dept. 2014)

The Second Department reversed Queens County Family Court's denial of SIJS predicate findings for child from India. The appellate court determined that the

facts did support a finding that the youth's was not able to reunify with his mother due to parental neglect and that it would not be in the youth's best interest to be returned to India. As reunification with at least one of the parents was not viable, the SIJS predicate findings should have been made.

MISCELLANEOUS

Matter of Kenneth H. v Fay F., 113 AD3d 542 (1st Dept. 2014)

The First Department affirmed New York County Family Court's decision to award sole custody of a child to the father given that the child had been placed in the father's care over 6 years ago due to an adjudication of neglect by the mother. Since that time the father has cared for the child without incident and given her a safe, loving and stable home and he has attempted to provide the mother with visits and telephone contact when visits were suspended. The mother has continued to be erratic, inappropriate and unpredictable and acts out which resulted in an order limiting her visitation. The mother has mental health issues and the child's observation of the mother's behavior is detrimental.

Matter of Persaud v NYS OCFS 114 AD3d 492 (1st Dept. 2014)

The First Department upheld a NYS OCFS denial of a request for a group family day care licenses based on the applicants recent federal conviction for conspiracy to commit band and wire fraud in connection with a scheme where she assisted in defrauding banks to obtain mortgages. This crime bears a direct relationship to requirements that she keep accurate records. The fact that the applicant had obtained a certificate of relief for disabilities was a factor that OCFS considered but it did not require them to conclude that she should be given a day care license.

Matter of Washington v Stoker 114 AD3d 1147 (4th Dept. 2014)

The Fourth Department affirmed the dismissal of former foster parents' petition for Art. 6 custody of their former foster child by the Oneida County Family Court. The child was back in the custody of his father and the foster parents lacked standing to file their own petition for custody or to intervene in any other custody proceeding regarding the child. Former foster parents lack any standing to seek an ongoing relationship with a foster child and here the AFC does not support the former foster parents. The fact that the father has been arrested and is incarcerated does not provide extraordinary circumstances to allow former foster parents to seek custody.

Matter of M and J v NYSOCFS __Misc3d__ NYLJ 4/14/14 (Supreme Court Westchester County 2014)

The Supreme Court of Westchester County found that a Family Assessment Response (FAR) cannot be the subject of an administrative review or a request for an expungement of a record. SSL § 427 says that FAR cases are not subject to SCR requirements for review as they are treated as sealed records if the local districts chooses the FAR process. These records cannot be shared, as unfounded records can be, with members of the local child fatality review team, law enforcement or the DA.

Matter of Columbia County Subpoena Duces Tecum __AD3d__ dec'd 6/5/14 (3rd Dept. 2014)

The Third Department reviewed a matter from the County Court of Columbia County. The Columbia County District Attorney served a grand jury subpoena ordering DSS to produce certain documents that related to business relationships between DSS and two contractors. The DSS moved to quash. The County Court limited the breadth of the subpoena and ordered that 3 of the ADAs in the office could not participate in the investigation but the court later changed the order about disqualifying the ADAs. DSS appealed the decision to permit the limited subpoena and to allow the participation in the investigation of several ADAs. The Third Department affirmed the County Court's rulings.

DSS argued that the subpoena identified documents about services provided to specific children and that the current DA, who was the former Family Court Judge and who would have heard some of the matters involving these children – is precluded from issuing the subpoena by Judiciary Law §17 as it is a conflict of interest. The Third Department found that although the children may be children who were the subjects of matters before the DA when he was the Family Court Judge, the subpoena does not appear to directly relate to any court proceedings regarding the children and disqualification is not mandatory unless there is a showing that the subpoena addressed some court proceeding that was before the DA when he was the Judge. DSS also argued that the subpoena may be a vindictive response to a county report that criticized the actions between the court and the DSS when the DA was the Judge and that the DA's involvement in the investigation at least gives the appearance of impropriety. The Third Department found that this was speculative and there is no support in the record of any impropriety. There are no indictments that have been issued, no one has been identified as someone who might suffer prejudice given the DA's involvement in the investigation . There is no showing that any ADAs must be disqualified from participating in the investigation based on the fact that they previously represented DSS or someone named in the subpoena or someone who received services form the providers.

Matter of Morant v Rogers , __AD3d__, dec'd 6/4/14 (2nd Dept. 2014)

The Second Department reversed the denial of a hearing on the issue of the revocability of a surrender by a mother who claimed that when she executed the surrender she was 17 years old, under the influence of drugs and had no attorney. This is a sufficient allegation of duress to require a hearing.