SELECTED CHILD WELFARE CASE LAW UPDATE

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ART. 10 REMOVALS and GENERAL EVIDENTIARY TOPICS

Matter of Grayson J., 119 AD3d 575 (2nd Dept. 2014)

The Second Department reversed and remanded a neglect adjudication on a Kings County mother; finding that the lower court made several errors. The lower court refused to allow certain case progress notes into evidence. The notes stated that the police told the caseworker that the child had bruises on her right arm but that the bruises were "not serious" and that there had not been "other visible bruises/marks observed". These case records were business records and should have been accepted. The police had a business duty to tell the caseworker what they saw and the caseworker had a business duty to document what was said. Further, the lower court erred in not allowing the defense to call 4 different witnesses who were prepared to give testimony as to why the child might be lying about the alleged excessive corporal punishment. Evidence on a possible motive for lying is never collateral and may not be excluded on that ground. The court erred in not allowing into evidence other case progress notes containing statements that the foster parents made to the caseworker about the child's motive to lie. Foster parents are under a business duty to report such matters to the caseworker. Lastly, in the remanded hearing, the appellate court instructed the lower court to not summarily deny the defense's application to have the subject child subpoenaed for testimony. The court should balance the respective interests in making that decision. These errors resulted in the mother being denied her right to present her defense and to have a fair fact finding hearing.

Matter of Isis U., __AD3d__ dec'd 7/3/14 (1st Dept. 2014)

ACS appealed an order from New York County Family Court regarding a FCA§ 1028 hearing. The lower court ordered the children released to the respondent parents and the First Department affirmed. The parents demonstrated that they had complied with conditions the court set related to appropriate care of the home and provision of educational and medical care for the children. The court had ordered that the agency be allowed access to the home, that the children be enrolled in school or properly home schooled and that the parents show that the children were being given medical care. This decision to return the children was in the best interests of the children as it minimized any imminent risk and ended the harm inflicted on the children by the removal. The appellate court also commented that the lower court had allowed unsupervised visitation in the interim before the § 1028 hearing and this was appropriate as none of the allegations being made would pose a risk during an unsupervised visit.

Matter of Vivien V., 119 AD3d 596 (2nd Dept. 2014)

A Suffolk County father was criminally convicted of sexual abuse third degree and endangering the welfare of a child relative to one of the subject children. The father is collaterally estopped from relitigating that issue and this conviction is sufficient to demonstrate that he sexually abused the child and also derivately neglected the second child. There was no triable issue of fact and the defense attorney's affirmation in opposition is not sufficient to create a triable cause of action.

Matter of Lucinda A., 120 AD3d 492 (2nd Dept. 2014)

In a neglect matter, the Second Department affirmed a finding of emotional neglect and medical neglect. The appellate court also found that it was not error to deny the defense attorney's request for an adjournment when the mother failed to show for her dispositional hearing. The attorney failed to offer any explanation for the non appearance. The appellate court refused to rule on the issue of the lower's court's denial of the subsequent motion to vacate her default as the mother did not specifically appeal the order denying her motion. Lastly the mother did not preserve her argument that the court was too active in its participation in the fact finding hearing by not objecting at the time. The Second Department did comment that in any event the court's participation in the fact finding was proper as the questions were confined to clarification of confusing issues and testimony.

Matter of Connor S., 122 AD3d 1096 (3rd Dept. 2014)

The Third Department denied an appeal from a Schoharie County respondent who had consented to a finding of neglect. He had not moved the lower court to vacate the order. He claimed that his consent was made under stress and that his attorney the court did not advise him of the consequences of the consent but he cannot now raise those issues on appeal. The court did comment that if the matter had been appealable, the appellate court would find that the respondent knowingly and voluntarily agreed to the consent order and that he had been informed of its implications.

Matter of Joslyn U., ___AD3d___, dec'd 10/3/14 (4th Dept. 2104)

The Fourth Department reversed and remanded a neglect adjudication regarding an Oswego County mother. The mother did not appear for the fact finding and her counsel told the court that she had mailed a letter to the mother 6 days earlier advising the mother that the attorney might withdraw from her representation if the mother did not appear for the hearing. The defense attorney did not make a written motion to withdraw. The court allowed the defense attorney to withdraw and then went forward with the hearing and adjudicated neglect in the mother's absence. The Appellate Division found this to be in error and reversed, even though they commented that the record supported the neglect finding. The mother was denied due process in that the defense attorney did not provide reasonable notice the mother that the attorney planned to withdraw. (NOTE: Although the decision does not say so, apparently the respondent had been given Parker warnings by the court on more than one occasion and had been advised on the record that she needed to assist her attorney or her attorney might ask to be relived.)

Matter of Jackson F., __AD3d__, dec'd 10/29/14 (2nd Dept. 2014)

Suffolk County Family Court correctly took a negative inference against a father who did not testify on his own behalf at a neglect fact finding. The lower court did err in admitting into evidence a CPS intake report with the reporter's identity redacted. (Presumably because only a

mandated reporter's report comes into evidence and the identity cannot be redacted in order to determine if it was a mandated reporter) But the lower court did not rely on this report in its determination so it was not prejudicial and does not require reversal.

Matter of Kayla S., __Misc3rd___, dec'd 11/3/14 (Family Court, Bronx County 2014)

In a sex abuse proceeding, the child's medical and mental health records were made available to all the parties in pre-trial discovery. The respondent also has criminal charges based on the same allegations. The respondent's counsel in the criminal court matter had been in family court watching the proceedings there. The two defense attorneys worked for the same not for profit organization. The family court ruled that the criminal defense attorney cannot use the child's records for the criminal court proceeding and instead must use the appropriate methods available in criminal court proceedings to obtain and/or use the child's records. Under HIPAA, lawfully obtained records cannot be redisclosed and the child never consented to the release of the records. The FCA does not give the respondent or his attorney the right to use the records released to them in connection with this proceeding in another proceeding.

Matter of Rafael M., __AD3d__, dec'd 12/3/14 (2nd Dept. 2014)

Suffolk County Family Court was reversed on appeal for ordering FAR records to be provided to the AFC. The DSS had brought an Art. 10 petition against the parents and at the AFC's request, the court ordered that DSS was to provide any SSL § 427-a FAR (called FAST in the decision) records to the court if there were any. The DSS appealed and the Second Department ruled the lower court erred as the statute requires that all parties must be noticed and the mother and her counsel were not provided with notice

NEGLECT

General and Mixed Neglect

Matter of Isaiah L., 119 AD3d 797 (2nd Dept. 2014)

A mother moved from California to NYC with her young son after meeting a Kings County man online. She moved into his apartment and although they had only lived there a month, a neglect petition was brought against the man. He was a "person legally responsible" He was the functional equivalent of a parent as he purchased food for them all, fed the child and slept in the same bed as the mother and the child. He even told the initial CPS workers that he was the

child's father. The respondent neglected the child. The child lost a dramatic amount of weight while in the apartment and had to be hospitalized. Further the respondent took no action to protect the child when he saw the mother angrily shake the child on two occasions. The respondent's biological child was born 11 months after the mother and her son had moved into the apartment and during the pendency of the neglect proceeding. This new baby was found to be derivately neglected by the respondent. The second child's birth was proximate in time and the respondent did not show that he had been receiving services such that the conditions had improved.

Matter of Jamakie B., 119 AD3d 939 (2nd Dept. 2014)

Queens County Family Court was reversed and the matter remanded for a hearing after an appeal by the respondent mother. The Second Department agreed with the respondent that the lower court should not have granted a summary judgment motion for derivative neglect when the older findings had been adjudicated more than 10 years ago . This is remote in time and the court should hold a hearing on the issue of derivative neglect regarding these children.

Matter of Cheryl Z v Carrion 119 AD3d 1109 (3rd Dept. 2014)

The Third Department concurred that an indicated report on a grandmother should not be unfounded. The Saratoga County grandmother had called the police when her two year old grandchild wandered away from the front yard. The child was in the front yard and the home faced a four lane highway with a speed limit of 45-55 miles an hour. There was no fence. The child had wandered away before resulting in a prior call to the police. The police office reported that the grandmother said the child had wandered away when the grandmother had briefly gone inside the home. At the fair hearing the grandmother denied both that she had said that or had done that. There is no reason to reject the ALJ's determination of credibility. Hearsay is admissible in an administrative hearing and the hearsay admitted was relevant and probative. The ALJ appropriately did not allow in a police report that post dated the incident. The admission of a map that may have inaccurately represented the 200 yards that the child had wandered away when found was not so egregious as to be unfair given that ample cross examination that occurred on this point. Lastly the ALJ's questioning of the grandmother when she testified does not support an argument that the ALJ was biased as the questions were simply clarifying ones or instructions.

Matter of Heyden Y., 119 AD3d 1012 (3rd Dept. 2014)

An Otsego County mother neglected her child even though the child's grandmother actually had legal custody of the child. Both the mother and the father were alleged to be neglectful of the child based on incidents that occurred when the child would visit them on the weekends. The father accepted an ACD with an admission that there had been domestic violence in front of the

child. The mother lost a fact finding hearing and appealed the adjudication. The Third Department ruled that the mother was a proper respondent even though the grandmother had custody and was the child's primary caretaker. A biological parent is always a proper respondent under the statute. The mother's home was a "mess" and unsafe. There were cluttered piles of clothes, cigarette butts and animal feces near the child's toys and multiple spoons in the bathroom covered in a "chalky, powdery type substance". The father had an admitted long standing problem with drug and alcohol abuse and was essentially residing with the mother and there was ongoing domestic violence. Two physical altercations occurred in the child's presence and the father had been arrested on several occasions for harming the mother. In one altercation of mutual violence, the mother's spleen was ruptured and she had to have surgery. The mother told the grandmother that there was ongoing domestic violence virtually monthly. The mother would not leave the father despite the grandmother's urging. The mother said she was not just a victim but was "giving it back" to the father. The mother's decision to have the child stay with her on weekends when she knew the father to be abusing drugs and that there were mutual acts of violence was neglect on her part.

Matter of Kordasiewicz v Erie County DSS 119 AD3d 1425 (4th Dept. 2014)

An indicated report against a mother for driving while intoxicated with her two children in her car should remain indicated. The children were 6 and 7 years old and the mother drove an hour and a half from Cuba NY to Elma NY. The police had stopped her in her driveway after a citizen reported that her car was swerving all over the road. She tested as having a BAC of .18%. Her driver's license was revoked. The mother testified at the fair hearing that she had only 3 glasses of wine in a 4 hour period and that she believed that the BAC testing equipment was faulty. The mother proved that all the criminal charges against her had been dismissed. However, the report should remain indicated based on the sufficient evidence produced. This included the hearsay in the SCR report of the car swerving, her admission to drinking at least 3 glasses of wine and the fact that the mother admitted the test showed a BAC of .18%.

Matter of Arbogast v NYS OCFS 119 AD3d 1454 (4th Dept. 2014)

The Third Department agreed that an indicated report against an Erie County grandmother should not be unfounded. The 4 year old granddaughter told a nurse and a CPS worker that her grandmother had ripped her right earlobe. There was conflicting testimony from the grandmother and her sister but the finder of fact determined the credibility and the court should not substitute its judgment to weigh conflicting testimony.

Matter of Jamel T., 120 AD3d 504 (2nd Dept. 2014)

Kings County Family Court was affirmed in determining that a respondent had derivatively neglected two children based primarily on the abuse he had perpetrated on a child who was not the subject of the proceedings. The non subject child testified credibly that the respondent had

inappropriate sexual contact with her. This behavior was sufficiently proximate in time to the birth of the two children who are the subjects of this petition so as to find them derivately neglected. The respondent also abused drugs on a regular basis.

Matter of Jaquan F., 120 AD3d 1113 (1st Dept. 2014)

The First Department affirmed Bronx County Family Court's determination that a mother neglected her special needs son. She failed to attend various medical appointments for him and failed to properly supervise him. In a 5 month period, he missed 52 days of school. The mother did not obtain a required protective helmet for the child which caused him to miss more than 2 months of school. Her claims that the child could not go to school because of medical appointments and bad weather were not credible.

Matter of Jasmine A., 120 AD3d 1125 (1st Dept. 2014)

New York County Family Court's determination that a father neglected his children was affirmed on appeal. He had repeatedly allowed the mother to return to the home even though he was aware of the mother's history of drug use and domestic violence. The father had allowed the mother back in the home in violation of an order of protection. The children made out of court statements which cross corroborated by each other and were also corroborated by the father's admissions.

Matter of Stephanie M., 122 Ad3d 508 (1st Dept. 2014)

A New York County father neglected his 17 year old daughter. He refused to allow the teen to return to the home to live when she was unable to stay in her current living situation. The father said he wanted to give up responsibility for the child and was not willing to engage in any family services. He had also inflicted excessive corporal punishment on the girl in several past incidents. The father argued that the aid of the court was no longer necessary since the teen and her baby had been placed in foster care together. But they were in a mother and child program and needed agency assistance to learn independent living skills for herself and to learn to care for her baby. The teen had an APPLA goal and agency supervision was needed to assist her in that goal.

Matter of Tyler W., __AD3d__, dec'd 10/3/14 (4th Dept. 2014)

The Fourth Department affirmed the determination of neglect by Chautauqua County Family Court but remanded the matter for a new dispo hearing. The court properly found that the mother had neglected the child by frequently exposing him to domestic violence, drug use, the mother's mental instability and other unsafe situations. The court should not have admitted any out of court statements made by the mother's boyfriend in the case against the mother as those statements were hearsay, however the admission was harmless given that the resulting

determination would have been the same. The trial court also erred in not granting the defense attorney's request for an adjournment of the dispo hearing. The proceedings had not been protracted. The mother had not requested an adjournment before and the mother was unable to attend.

Matter of Josee Louise L.H., __AD3d___, dec'd 10/14/14 (1st Dept. 2014)

New York Family Court was affirmed on appeal to the First Department. A mother neglected her child given that the home was unsanitary and the conditions deplorable. There was dog feces on the floor, an odor of dead vermin, and bed bugs in the beds and sofa. The home was not merely cluttered nor were the odors attributable to someone else. The aid of the court was still needed since the mother refused to provide her new address to the court, ACS or even her own lawyer. There was no way to assess if her new apartment was safe and clean as she claimed.

Matter of Krystopher D'A., __AD3d__, dec'd 10/14/14 (1st Dept. 2014)

A New York County father neglected his child by using excessive corporal punishment and by inflicting domestic violence on the mother. The child gave out of court statements to both the CAC caseworker and the ACS caseworker. There were photographs of the child's injuries and the mother corroborated the child in her testimony. The father himself admitted that he had hit the child with a wooden spoon at least 20 times. Even if the injuries resulted from a single episode, they still constituted excessive corporal punishment. The father failed to acknowledge the severity of the bruising he had inflicted. The father had also pushed the mother into the bath tub and choked her in front of the boy and this was also corroborated by the mother's testimony. The child made out of court statements that this incident frightened him which put him at risk for both emotional and physical impairment. The court's granting of the mother's custody petition in the dispositional hearing is not appealable as the father defaulted at that hearing.

Matter of Robert K.S., __AD3d__ dec'd 10/15/14 (2nd Dept. 2014)

The Second Department affirmed a neglect adjudication from Queens County Family Court. The father had a pattern of verbal abuse and intimidation of the mother in the presence of the children This included an act of domestic violence against her. The father also gave one of the children a marijuana cigarette and told the child to bring it to school and say it was from the mother's boyfriend. The children were impaired or at imminent risk of impairment. The father was also sentenced to 6 months of incarceration as he violated the court's temporary order of protection.

Matter of Jovitha M., __AD3d__, dec'd 10/15/14 (2nd Dept. 2014)

Queens County Family Court adjudicated a mother to have neglected her children and this was affirmed on appeal. The home was in a deplorable and unsanitary condition. The children also had excessive school absences and the mother offered no reasonable explanation. She claimed to be home schooling the children but admitted she had not gotten permission from the school officials to do so. She did not provide any evidence of the schooling she claimed to be providing. The lower court did not abuse discretion in refusing to allow the mother to offer post petition evidence.

Matter of Ishaq B., __AD3d__, dec'd 10/15/14 (2nd Dept. 2014)

The Second Department reversed Westchester County Family Court's dismissal of neglect petitions regarding both parents and 5 children. The DSS proved that the parents regularly used marijuana. This established a prima facie case of neglect under FCA §§1012 (f) and 1046. DSS does not need to establish actual impairment of the children nor even specific risk of impairment. The mother also neglected one of the children by striking him in the face and hitting him with a belt. The caseworker observed the marks on the child. Another child described seeing it happen. The father knew or should have known of the excessive corporal punishment and did not take steps to protect the child. This not only neglected the target child but resulted in derivative neglect of the sibs.

Matter of Heaven H., __AD3d___, dec'd 10/16/14 (3rd Dept. 2014)

An Ulster County mother neglected her three children by getting into a physical altercation with a neighbor. The mother had been drinking at a friend's house with the three children present. The police had been called twice in response to neighborhood disturbances and the police had advised the mother to return to her home and backyard and remain there for the evening but the mother stayed in the front of the home. A neighbor across the street then made a vulgar hand gesture toward the mother. The mother crossed the street and punched the neighbor in the face resulting in a fight that several other people joined. The oldest child, apparently to protect her mother, joined the fight and was punched in the stomach which resulted in the child having difficulty breathing and being taken to the hospital in an ambulance. The mother was arrested and criminally charged. The other two children were witnesses and were frightened by what they had seen. The child were at imminent risk of harm given that one was actually hurt and they all were in the immediate proximity of a violent fight. The mother also failed to testify and a strong negative inference can be drawn.

Matter of Darren Desmond W., __AD3d__, dec'd 10/23/14 (1st Dept. 2014)

Even though the New York County Family Court's judgment of neglect was entered on default, and therefore not technically appealable, the First Department commented that there was both derivative and direct neglect of the child by his mother. The mother had lost her parental rights to 2 older children a year and a half earlier after a suspended judgment. She had not completed the service plan for those children – she did not obtain legal income, did not obtain adequate housing or medical care for the older siblings. The lower court properly conformed the pleadings to the proof that there was now also direct neglect in that she had abandoned this child.

Matter of Troy B., __AD3d__, dec'd 10/23/14 (1st Dept. 2014)

A New York County father neglected his son. He allowed unsupervised contact with the child's mother even though he was fully aware of her "long term, chronic and acute drug use". There was an order of protection in place that he himself had sought. The father denied the contact but the mother testified that she in fact had unsupervised visits. The caseworker testified that she had watched a video on the mother's cell phone of the child playing in the park with the mother's voice, while with the child, clearly audible.

Matter of Kiana M., __AD3d__, dec'd 12/3/14 (2nd Dept. 2104)

A Suffolk County AFC filed an Art. 10 petition against a father at the family court's direction. The lower court found the father neglected the child but the Second Department reversed. The mother testified that the father shoved her out of a second floor bedroom window to the ground below as she tried to video tape him while he was angrily searching for his missing eyeglasses. However no proof was provided that the children, who were on the first floor of the home at the time, saw this or were in danger of impairment by it. Further, proof that the father put a diaper on the 4 year old instead of taking her to the bathroom when he was parked near the home did not demonstrate neglect. The child soiled herself in the diaper. The father believed that a temporary order of protection had been issued and was waiting with the child outside of the home in the car for the police to arrive to supervise his drop off of the child. Undesirable parental behavior is not neglect if there is no proof of actual or imminent danger of impairment to the child.

Matter of Theresa WW., v NYS OCFS __AD3d___, dec'd 12/4/14 (3rd Dept. 2014)

Albany County foster parents were indicated for several incidents of neglect as it related to the foster children in their home. At the fair hearing, some of the indications were retained. The foster mother was accused on pulling the arm of a 6 year old foster child who was reluctant to exit a car. In another incident the foster father slapped a 9 year old boy on more than one

occasion. The foster parents appealed the fair hearing decision to the Third Department who ordered the reports to be unfounded. The only proof offered by the county were the case records, the caseworker did not testify. The foster parents testified and denied the incidents and provided medical records that the children were not injured in anyway and that the 6 year old had specifically told the doctor that the foster mother had not in fact hurt her. Although hearsay is admissible and an indicated report can be retained solely on hearsay, the appellate court found that the investigation summary and progress notes alone were not sufficiently reliable to constitute substantial evidence of maltreatment, particularly since the 6 year old gave contradictory statements.

There was a dissent. The dissenting Judge pointed out that the caseworker who called in the report on the foster parents was not the caseworker who investigated the report and that therefore the foster parents' claim that the worker was "vindictive" was inaccurate. When this was pointed out to the foster parents, they claimed that the other worker had fabricated the stories. Also the dissent pointed out that when the children were interviewed during the investigation, the 6 year old and 4 other siblings separately corroborated that the foster mother had pulled on the child's arm and the 9 year old and 3 siblings corroborated that the foster father having slapped the child on the head. The fact that the 6 year old denied it the next day to a doctor that the foster mother took her to does not change the fact that there were other children who corroborated the incident. The dissent commented that the court should not substitute its judgment for the finder of fact when there are two conflicting accounts of event. The dissent found that the caseworker's "detailed investigation" should be the more reasoned basis to determine credibility than the foster mother's "accusatory explanation"

Matter of Gianna O., __AD3d__, dec'd 12/4/14 (3rd Dept. 2014)

Otsego County Family Court correctly determined that the respondent neglected his son and the older two children of his son's mother. While the mother was pregnant with his son and in the presence of the older children, the respondent, who was intoxicated, became enraged when the mother refused to allow him to drive the car. The respondent and the mother had a fight in front of the children that included the respondent forcing the pregnant mother to her hands and knees to pick up the car keys that she had thrown. One of the children attempted to intervene and the respondent shoved him forcibly. In the hospital, after the mother had given birth to the respondent's child, the respondent had a verbal argument with the older child to the extent that hospital staff had to intervene. The children admitted that they did not feel secure when the respondent was in the home and in fact they left to go live with their father. The mother testified in court that she and the respondent had a troubled relationship. The mother had even requested supervision when she brought their child to visit the respondent in jail. (the mother had also been charged with neglect but had stipulated to a settlement of her matter) Further the respondent was a registered level II sex offender – which had been the original hot line allegation – based on the second degree rape of a 15 year old girl. The respondent adamantly refused to acknowledge the crime and insisted that he was wrongfully convicted and did not need any treatment. While it is correct that a untreated sex offender does not alone create a presumption of neglect here the respondent's conduct poses a substantial and imminent risk of harm to the children.

Matter of Alicia P., __AD3d___, dec'd 12/31/14 (2nd Dept. 2014)

A Queens father derivately neglected his newborn daughter. He had failed to complete drug treatment and domestic violence counseling as required by prior neglect dispositions. The most recent neglect adjudication was proximate in time such that it can be reasonably assumed that the conditions still exist and so the lower court correctly granted summary judgment. The father raised no triable issues of fact and did not provide evidence that he was complying with services.

Domestic Violence

Matter of Celeste O., 119 AD3d 586 (2nd Dept. 2014)

A Queens' father neglected his children when he and the mother engaged in acts of domestic violence against each other while the children were nearby. The children were frightened by the fighting.

Matter of Kaleb B., 119 AD3d 780 (2nd Dept. 2014)

Kings County Family Court was affirmed on appeal. The father neglected two children when he beat their stepmother with a stick in their presence. The stepmother sustained bruises to her abdomen, arm, thighs and buttocks. The children's out of court statements about witnessing this act were corroborated by the stepmother's injuries. This supported a derivative finding regarding the child who had not witnessed the beating.

Matter of David M., 119 AD3d 800 (2nd Dept. 2014)

The Second Department affirmed a Westchester County Family Court adjudication that a mother and a stepfather neglected her child. The proof demonstrated that the child was exposed to the domestic violence in the home. The mother testified that there was a pattern of domestic violence in that the stepfather would physically abuse her and on several occasions this happened in front of the child. The child told the caseworker that he had seen the stepfather hit his mother on multiple occasions and that he was scared and that he was afraid for his mother. The child's therapist also testified that the child told her he was scared and that he had symptoms of fear and trauma. The mother continued to reside with the father, knowing he was violent and ignoring the impact on her son. She refused services, including a shelter and this established that she also neglected her son.

Matter of Autumn P., __AD3d__, dec'd 10/9/14 (1st Dept. 2014)

A New York County father derivatively neglected his child. In 2010 he had been found to have neglected this child's older sister by committing an act of domestic violence on the mother in front of that child. Then in January and March of 2012 he committed additional acts of domestic violence against the mother. That resulted in his plea in criminal court to menacing. This pattern demonstrated that his impaired level of parental judgment would result in a substantial risk of harm to any child in his care. The fact that this child was not present for any incident does not preclude a finding. While it is true that there was a prior petition regarding this child that was dismissed, that petition was filed before the last two domestic violence incidents and the criminal conviction. Since those incidents were not in the prior petition, they were not litigated and neither res judicata nor collateral estoppel applies. While it is true that that ACS could have amended that petition as opposed to the filing of this new petition, amended the petition was not a requirement.

Matter of Dean J.K., __AD3d___, dec'd 10/15/14 (2nd Dept. 2014)

A Suffolk father neglected his children by engaging in acts of domestic violence toward the mother in the children's presence. The mother credibly testified about the violence and the children made out of court statements that were corroborated by the mother's testimony. The father failed to appear on the last day of the fact finding and failed subsequently to file a motion claiming that his non- appearance was not willful and that he had a meritorious defense. Therefore the lower court did not err in drawing a negative inference against him for failing to testify.

Matter of Sumaria D., __AD3d___, dec'd 10/16/14 (3rd Dept. 2014)

The Third Department affirmed a summary judgment motion for derivative neglect as to the respondents' 7th child. The Broome County DSS brought the neglect petition as soon as the child was born in 2012. The 5 oldest children had been found to have been neglected in 2008 and then were found to be permanently neglected ultimately they were freed for adoption in 2011. The 6th child had been found to be derivatively neglected at her birth in 2010 and at the time of this petition, had been surrendered by the mother. All of the past actions were based on the long standing mutual acts of domestic violence committed in the children's presence. The prior determinations were sufficiently proximate and had been based on the respondents' admissions to the mutual domestic violence that had occurred in front of the children. One incident resulted in the mother having to obtain hospital treatment and the father had sustained physical injuries at the hands of the mother as well. There were violations of prior orders of protection, the father's parental rights were terminated to the 5 older children after a failed suspended judgment. Two weeks after the neglect findings on the first 5 children, the father wielded a screwdriver against the mother. After the neglect finding on the first 5 children, there were incidents of domestic violence between them that resulted in the father being arrested on two occasions. This 7th child would have been conceived while there was a no contact order in place between them. The

parents simply have not been able to appreciate the severity of their domestic violence and its impact on their children. The motion for summary judgment also included information that the parents had not completed all the prior court ordered services even though they may have completed some.

The court did comment that it appeared that the DSS had offered the mother's medical records in its motion for summary judgment and that they had been obtained without a subpoena. These records should have been obtained via subpoena as the record does not reflect that the hospital was the mandated reporter entity that made the report on this newest child. However, the records were offered to prove the fact that the parties were living together and that information was also available to the court in other provided evidence and so error was not a basis for reversal.

Matter of Mohammed J., __AD3d__, dec'd 10/22/14 (2nd Dept. 2014)

A Queens father neglected his child by hitting the mother in the child's presence. He hit the mother on her head with an object that caused a bloody cut and required stitches. This action in front of the child put the child at imminent risk. The child made out of court statements about the incident that were corroborated by the medical records and the testimony of the caseworker.

Matter of Madison M., ___AD3d___, dec'd 12/23/14 (1st Dept. 2014)

The First Department affirmed New York County Family Court's determination that a father neglected his children. The children gave of court statements that corroborated each other. The children indicated that the father was violent to the mother in their presence. Both the caseworker and the police corroborated the children's statements by observing the injuries on the mother. They also observed the children crying about the incident. The father claimed that the violence was an isolated event. Even though an isolated event is enough to determine neglect, here the father had in fact a history of violence against the mother as he had plead guilty to threatening her with physical violence in a prior incident. He was at the home on this incident in violation of an order of protection.

Parental Mental Health

Matter of Trevor McK., 120 AD3d 416 (1st Dept. 2014)

The First Department concurred that there was not sufficient proof that a Bronx mother had neglected her child. Although the mother had some problems and may have been in denial of her child's "misdeeds"*; there was not enough proof that the mother's mental health put her child at imminent risk of neglect. The AFC moved for a mental health evaluation of the mother but the lower court correctly denied the motion since it was made during the fact finding and there was

no proof as to why the AFC and ACS had not sought an evaluation sooner. Also on appeal, ACS did not request that the case be remanded for such an evaluation now.
* The Appellate Court noted that at the time of the appeal, the child had been placed in care on a JD petition.

Matter of Devin M., 119 AD3d 435 (1st Dept. 2014)

The First Department affirmed the New York County Family Court's determination that a mother had neglected her son. Several experts indicated that the mother had mental health issues but gave a variety of differing diagnoses. A definitive diagnosis is not needed to determine that the mother's mental health issues placed the child at risk of neglect. The mother had an extensive history of psychiatric hospitalizations including after the child was removed. Among other things the mother had pushed the child down a fire escape to try to get away from a maternal grandmother, left bizarre phone messages for the father, as well as the caseworker and the child's school, and made unfounded allegations against the father and the school. The mother did not have stable finances. She was irrational. The court was appropriate in consolidating the Art. 10 dispo hearing with the father's custody petition. It was in the child's best interests to grant custody to the father. He had provided a loving and stable home for the child who is thriving and happy there. The mother claimed ICWA applied to the matter but was not able to provide any information as to how she or the child qualified. Her attorney provided effective assistance of counsel and presented evidence and witnesses, cross examined witnesses, and made appropriate objections and arguments.

Matter of Karma C., 122 AD3d 415 (1st Dept. 2014)

A New York County child was neglected by her mother who had a history of bipolar disorder, anxiety and depression. She would not take medication or maintain regular treatment. In Boston the mother had lived in homeless shelters and the paternal grandmother had often been the child's caretaker. Now in NYC, the mother lived in various homeless shelters and had gotten into altercations, including physical ones with staff and other residents in the child's presence. She has been hospitalized on several occasions. The mother suffers from panic attacks and had threatened to kill the child if ACF took the child away. She said she heard voices telling her to kill someone. It was in the child's best interest to be released into the temporary custody of the non- respondent father .

Matter of Yu F., 122 AD3d 761 (2nd Dept. 2014)

A Queens' mother neglected her child as the mother had an untreated mental illness and she could not provide adequate supervision for the child. A psychiatrist testified that the mother suffered from a psychosis disorder which had resulted in an involuntary hospitalization and opined that the child would be at risk if in the care of the mother. The mother would not make a

plan for the child while the mother was hospitalized. She told staff that it was in fact the 9 year old child who cared for the mother herself. The hospital could not safely discharge the mother as there was no safety plan for the child. This risk of harm is sufficient.

Matter of Delybe C., __AD3d__, dec'd 10/9/14 (1st Dept. 2014)

A New York County mother defaulted on her neglect matter regarding her children and grandchildren. She did not claim a meritorious defense if allowed to reopen the default and so her motion to do so was properly denied. However, the appellate court did comment that in any event the mother neglected the children due to her long standing and untreated mental illness. She refused treatment even though she had attempted suicide just a month before the petition was filed. She was involuntarily hospitalized when she continued to have suicidal thoughts. The respondent also left her young grandson without proper supervision and did not provide appropriate guardianship of her older teenage daughter.

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

The First Department affirmed New York County Family Court's determination that a mother with untreated mental health problems had neglected her child. Hospital records and expert testimony established that the mother had bipolar disorder, paranoia and psychosis among other mental conditions. She believed that she was a famous actress whose computer has been hacked. The mother herself testified to multiple extended hospitalizations for mental illness but has a lack of insight into her condition. She repeatedly relapsed as she will not comply with her medication or treatment. ACS need not prove that the child has been harmed, only that he was at risk of harm.

Excessive Corporal Punishment

Matter of Laequise P., 119 AD3d 801 (2nd Dept. 2014)

Suffolk County Family Court's determination that a father had used excessive corporal punishment on his son was reversed. The 8 year old child cursed an adult while at a party at a friend's home and the father spanked the child with an open hand at the party. The father did admit doing this. However open handed spanking for this behavior was a reasonable use of force for discipline and was not excessive. There was a further allegation that after returning home from the party, the father repeatedly struck the boy with a belt on the buttocks, legs and arms. The father denied that he had done this and there was not enough evidence provided at the hearing to prove at a preponderance that this second event had happened.

Matter of Jerome S., 120 AD3d 1421 (2nd Dept. 2014)

A Kings County mother used excessive corporal punishment on her son by striking the child repeatedly with a belt. This supported a derivative finding regarding the child's brother as well.

Matter of Adam Christopher S., 120 AD3d 1110 (1st Dept. 2014)

The First Department affirmed New York County Family Court regarding the excessive corporal punishment a mother inflicted on her 8 year old son. She slapped the child in the face leaving red marks. Just 9 days later, she beat him with a belt on his legs, over the course of 10 hours and tried to pry his mouth open to force him to eat. The fact that the injuries inflicted on the child did not require medical attention did not preclude the adjudication of neglect. The mother also showed no remorse or insight. This behavior justified the derivative findings as to the other 3 children.

Matter of Reina R., 122 AD3d 746 (2nd Dept. 2014)

A Queens' County adjudication that a mother had neglected her 12 year old daughter was reversed on appeal. There was not sufficient proof of excessive corporal punishment. An EMT report stated that the child had bruises and swelling but the EMT did not testify. The caseworker who saw the child that day indicated that she did not observe any bruises or swelling. The 4 year old sibling made out of court statements but this without corroboration these statements did not establish a pattern of excessive corporal punishment. Further there was no proof to the allegations that the mother failed to take the child to the hospital as claimed after a supposed attempt by the child to commit suicide by drinking cough medicine.

Matter of Jermaine J., __AD3d___, dec'd 10/2/14 (1st Dept. 2014)

The First Department affirmed New York County Family Court's determination that a father inflicted excessive corporal punishment on his son. He hit the child with a belt, punched him in the stomach and face and kicked him in the leg. The child made out of court statements that were corroborated by several others. There were photographs of the bruises. The father admitted hitting the child but only with an open hand and only on the arms, legs and buttocks and claimed it was reasonable discipline. However, what had occurred was in fact excessive.

Matter of Genesis F., __AD3d__, dec'd 10/16/14 (1st Dept. 2014)

A New York County mother used excessive corporal punishment on her three children. The children independently gave out of court statements that the mother would grab them and rip

their clothing, throw them on the bed and scratch and punch them. She bit the eldest child on the back. The children's statements cross corroborated each other and the caseworker observed a cut on the eldest child's lips and a bite mark on her back. There were also scratches on the middle child's hand and old belt marks on the youngest child. The mother admitted to grabbing the children, ripping their clothing and hitting and biting the older child but claimed this was a single isolated incident. This was discredited by the children's claims that there were prior incidents. A single incident of excessive corporal is sufficient in any event.

Matter of Cheryale B., __ AD3d__, dec'd 10/22/14 (2nd Dept. 2014)

The Second Department affirmed Kings County Family Court that a Brooklyn mother used excessive corporal punishment on her daughter. The child made out of court statements that the mother hit the child in her face with both an open hand and a fist. These statements were corroborated by the caseworker's observations of the child's injuries, photographs of the injuries and the mother's own testimony in court that she had hit the child in the past with a belt. The lower court found the mother not credible when she denied that she had hit the child this time. This incident supports derivative findings as to the mother's three other children.

ABUSE

Sex Abuse

Matter of Sinclair P., 119 AD3d 587 (2nd Dept. 2014)

Kings County Family Court was affirmed in ruling that a father had sexually abused his daughter. The child's out of court statements about the sexual abuse where corroborated by the out of court statements of another child that the father had previously sexually abused. This, along with the negative inference taken due to the father's failure to testify, was sufficient proof.

Matter of Anthony M.C., 119 AD3d 781 (2nd Dept. 2014)

A Rockland County father sexually abused his son. The DSS presented an expert in the field of child sexual abuse who corroborated the out of court statements of the boy. There is no merit to the argument that the expert did not take into account the boy's developmental disability. Further the father did not testify and the court properly drew a negative inference. This sexual abuse of his son warranted derivative neglect findings regarding the other two children.

Matter of Linda F., 119 AD3d 944 (2nd Dept. 2014)

The Second Department affirmed a sex abuse adjudication regarding an adoptive father. The Appellate Court found no reason to disturb the credibility determinations that the lower court made in determining the conflicting evidence. The father's abuse of his adopted daughter supports a derivative abuse finding regarding the other children,

Matter of IIonni I., 119 AD3d 997 (3rd Dept. 2014)

The Third Department affirmed a summary judgment finding of derivative neglect, abuse and severe abuse of a newborn. The St. Lawrence County father had been found to have neglected, abused and severely abused a daughter of his girlfriend in 2010 after having had repeated sexual intercourse with the child in 2008. This had also resulted in derivative findings of neglect, abuse and severe abuse regarding his 6 biological children (from three mothers) and a stepchild. When this child was then born in 2012, the DSS brought a derivative proceeding and the lower court granted it upon summary judgment. The prior acts showed a fundamental defect in his understanding of parental duties, the prior actions had occurred only a few years earlier and the father had never completed services – including sex offender treatment. It was not a violation of the father's due process rights to rule on the summary judgment motion when he and his lawyer were not present in the courtroom. The date was known to all and the court did not hear argument on that date but merely read the decision on the record.

Matter of Melody H., ___AD3d___, dec'd 10/1/14 (2nd Dept. 2014)

The Second Department affirmed sexual abuse findings regarding a Kings County father. The 10 year old girl made out of court statements to CPS, a police detective, and her mother that the father had sexually abused her in multiple incidents when she was 9 years old. Her statements were consistent, detailed and explicit. These statements were corroborated - among other ways - by the fact that the respondent had previously sexually abused another of his children. The child had recanted and this created a credibility issue. The trial court did not err in light of the proof that the child had recanted to keep peace in the family. This abuse of his daughter supports the court finding derivative abuse on the three other children as well. The father's impulse control is so defective that there is a substantial risk of harm to any child in his care.

Matter of Lylly M.G. ___AD3d___, dec'd 10/3/14 (4th Dept. 2014)

An Onondaga County stepfather sexually abused his step daughter and derivately neglected the other step children. The lower court correctly balanced the respective interests of the parties and determined that the stepdaughter would suffer emotional trauma if required to testify in front of the stepfather. She was allowed her to testify in chambers but with cross examination by the step father's attorney. Although the court did not have an affidavit regarding the potential harm to the child, the court was aware of and did consider: the child's age, the serious nature of the allegations, that the child had been permitted to testify in camera at the criminal trial, that the

child was in therapy, and the fact that the father's rights would still be protected by the cross examination that would be permitted. The child's sworn, in camera and cross examined testimony about the sexual abuse was corroborated by her out of court statements which were consistent. The lower court determined that the step father's denial of the sex abuse was not credible. This sexual abuse of the one step child demonstrates such a fundamental flaw in his understanding of parenthood that warrants a derivative finding regarding the child's siblings.

Matter of Milagros C., __AD3d___, dec'd 10/14/14 (1st Dept. 2014)

The First Department affirmed a Bronx County Family Court sex abuse adjudication. The mother walked in on the child being forced to engage in sexual activity with her brother and did not protect the child. The brother did plead guilty to criminal sexual act in the 3rd degree. The child's out of court statements were corroborated by the brother's criminal plea. The child also provided detail, consistency and specificity in her multiple statements to various people.

Matter of Victoria P., __AD3d__, dec'd 10/22/14 (2nd Dept. 2014)

A Queens father sexually abused one child and derivatively neglected the other three siblings. The target child gave out of court statements regarding the abuse and these statements were corroborated by the child sexual abuse expert who treated the child. The expert opined that the child displayed the behaviors constituent with children who have been sexually abused. There is no basis to change the lower court's assessment of credibility. These acts on the father's part demonstrated a fundamental defect in his understanding of parental duties which warranted a derivative finding for the siblings. The court properly ordered the father to complete sex offender treatment. The children were reluctant to see the father, he had no insight into his issues and the agencies involved did not recommend unsupervised visits; so the lower court did not err in ordering that there would only be supervised visitation at the discretion of the agency.

Matter of I-Conscious R., __AD3d__, dec'd 10/23/14 (1st Dept. 2014)

The First Department concurred with New York County Family Court that a father had sexually abused and neglected his daughter and derivatively abused and neglected his son. The 6 year old girl had genital herpes which is highly indicative of sexual abuse. The father was her primary caretaker. The child's initial disclosure was to her pediatrician. The child's doctor asked questions very appropriately. The child gave similar disclosures to the caseworker. When the caseworker asked about her "snuggling" with her stuffed animals, the child reacted very strongly and said this was the word her father used to describe what he did to her. The father also medically neglected the child. She complained for days of itching and pain during urination and she had visible lesions. The father took her to several doctors but was turned away when he did not have medical insurance. He did not respond to this lack of medical care by taking her to an emergency room. The father offered expert t a witness who did not seem to be neutral. This expert claimed the genital herpes could have been transmitted by a washcloth but then admitted

he had actually never seen this occur. The respondent's expert claimed that the pediatrician's interview must have been unduly suggestive; which it wasn't. The respondent's expert also was unaware that the child had made disclosures to multiple therapists. Lastly, the father's counsel was not ineffective in choosing not to object to the admissions of the child's medical records given that they were certainly admissible.

Matter of David R., __AD3d__, dec'd 12/9/14 (1st Dept. 2014)

Bronx County Family Court's abuse and neglect adjudications were affirmed on appeal. The respondent sexually abused a 5 year old girl. The child told her grandmother and CPS that the respondent had touched her private parts and kissed her inappropriately. The statements were consistent which while it does not provide full corroboration, does enhance credibility. The child's out of court statements were corroborated by the child's uncle who credibly testified that he saw the respondent place the 5 year olds' head near his crotch. Further, the respondent did not testify which resulted in a negative inference. The respondent also inflicted excessive corporal punishment on both this 5 year old girl and a 4 year old boy. He hit the girl in the head and struck the 4 year old with a hanger. Both children made out of court statements as to these incidents and the grandmother had seen the girl rubbing her head and crying and a red mark on the boy. These behaviors were derivatively neglectful of the other children. The mother was also neglectful as she knew of the excessive corporal punishment and did not protect the children and she also was dismissive of the allegations of sexual abuse. She chose to remain loyal to the other respondent and did not show the proper concern for the children.

Physical Abuse

Matter of Stephen Daniel A. 122 AD3d 834 (2nd Dept. 2014)

The Second Department concurred that a Queens mother had abused her child. ACS proved a prima facie case of abuse. The one month old baby's injuries could not be explained by the mother's claim that an older sibling had dropped the baby. The mother failed to offer any reasonable and adequate explanation for the child's injuries. The lower is supported by the record.

Matter of Harmony M.E., __AD3d__ dec'd 10/1/14 (2nd Dept. 2014)

In September of 2003, a 3 month old Queens baby died while in the care of the father – the child had been smothered to death. The father was arrested and ultimately pled guilty to a misdemeanor. The parents had 2 older children and ACS brought a derivative abuse petition against the father based on the baby's death. It also alleged that he had plead guilty 10 years earlier to assault in the second degree for attempting the strangle a 3 month old baby - the child

of another relationship. The family court found that the father had derivatively abused the two older children. While the matter of those children was still pending, the parents had a fourth child and ACS filed a derivative petition on that child and also filed against the mother regarding the newest baby and the older children, alleging that she was not enforcing protective orders against the father and allowing contact. The 3 children were then placed in foster care and the parties then had 2 more children while the matters were still pending and each of those children were placed in foster care at birth on derivative petitions.

The Second Department concurred that all of the children were derivately abused by the father based on his criminal convictions regarding the deceased child and the prior felony assault on the child from another relationship. Given the criminal convictions in those two matters, the father was collaterally estopped from being able to litigate his culpability. Since the court had provided him with a fact finding hearing on his derivative abuse of the two older children who had been alive when the 3 month old sibling was killed, the lower court was then justified in finding derivative abuse on the 3 afterborn children on summary judgment grounds. The death of his son was not too remote in time as to the afterborn children and given the seriousness of the two prior criminal actions, was justified. The mother was also found to have derivately abused the two oldest children and the first of the afterborn children as she allowed the father access to the children in violation of the court's order. This finding was properly based on the out of court statements of the older children when they were between 4 and 6 years old. These out of court statements cross corroborated each other. The two children born thereafter were derivately abused by the mother as she continued to refuse to entertain even a possibility that the father was responsible for the 3 month olds death even thought she had been provided with "ample evidence" that he was responsible. She was unwilling to see the father as a risk to the children

ART. 10 DISPOS and PERMANENCY HEARINGS

Matter of Paige G., 119 AD3d 683 (2nd Dept. 2014)

The Second Department reversed Suffolk County Family Court's refusal to place a child in the care of an out of state grandmother. The child had been removed due to neglect by her mother and was placed with the maternal grandmother who resided in Florida but was temporarily in New York State when the child was removed. However, the grandmother then had to return to Florida for her job and she was not permitted to leave the state with the child. She left in January of 2013 and the child was placed in non kin foster care at that time. The court ordered an ICPC home study of the grandmother which came back as favorable. The grandmother was employed, had a stable home environment and could provide for the child's needs. DSS filed a modification petition to move the child to Florida and to return to the grandmother's care. The grandmother was willing to be a long term resource and the mother was in agreement with this plan. Although the child had only been separated from the grandmother for 6 months, the lower court ruled that the child should stay in the NYS foster home for stability purposes. The trial court cited that the grandmother chose to return to Florida and left the child behind in foster care. The Second Department reserved and ordered that the child be placed with the grandmother in Florida under FCA §1017.

Matter of Tamara D., 120 AD3d 813 (2nd Dept. 2014)

A Kings County father failed to admit responsibility for his neglect toward the subject child and did not participate in services offered to him prior to the disposition. It was not inappropriate to deny his application at disposition for a suspended judgment.

Matter of Allison C., 44 Misc3rd 1219 (A) (Family Court, Kings County 2014)

A mother had been found to have severely abused her 5 year old daughter and the father had been found to be abusive as he stood by and did nothing and also did not seek medical attention for the injured little girl. They were both criminally convicted – she was serving a 10 year prison term and he served 3 and a half years. ACS had obtained FCA § 1039-b orders that they need not provide reasonable efforts toward reunification with either parent and they had both been denied visitation in prison. The father, now out on parole, petitioned for visitation. The lower court ruled that given the FCA §1039-b order and the circumstances, there was no good cause to allow visitation.

Matter of North v Christine Y., 122 AD3d 864 (2nd Dept. 2014)

A Orange County grandmother petitioned for Art. 6 custody of a grandchild who had been in foster care for over 21 months. The parents' parental rights to the child were terminated 3 months after the grandmother had filed the Art. 6 custody petition and so the lower court dismissed the petition without a hearing. The Second Department affirmed the dismissal as the only option for the grandmother was an adoption petition, not a custody petition.

Matter of Maria S., 45 Misc3rd 1213 (A) (Family Court, Kings County 2014)

The parents of a 6 month old were found to have abused the child when the child suffered unexplained injuries. The infant sustained a fractured femur, followed just 2 weeks later by a skull fracture, followed later by unexplained bruising on the child's face and legs and a torn frenulum. Neither parent could explain any of the injuries. There was a full dispositional hearing when the children were then 2 and 3 years old and had been returned to the parents' care under ACS supervision five months earlier. The parents are complying with the supervision and there are announced and unannounced home visits. They are engaged in parenting classes and therapy. ACS had not asked for the children to be returned to care. At the dispositional hearing, the parents requested a suspended judgment on the abuse adjudication indicating that they wanted to be able to move in the future for a vacatur of the adjudication. The parents continue to offer no explanation for the child's injuries. The court denied the application.

Matter of Agam B., __AD3d___, dec'd 10/29/14 (2nd Dept. 2014)

An Queens County AFC's motion to appoint a GAL for a foster care youth after he had turned 18 and remained in care was granted by the family court and the mother appealed. The Second Department dismissed the appeal ruling the mother was not aggrieved by the order. The mother lost her rights to make decisions on behalf of the youth when he turns 18, especially as that relates to medical issues, unless she obtains court ordered adult guardianship which she did not do.

Matter of Jasiah T., __AD3d__, dec'd 12/3/14 (2nd Dept. 2014)

The Second Department reversed Kings County Family Court for ordering that a father have expanded visitation with his child in foster care. The father had filed for custody and argued that he should have at least expanded visitation with the child. He was having one two hour visit a week – the first hour supervised and the second hour unsupervised. The foster care agency and the AFC opposed the expansion of visitation based partially on a recommendation of a psychologist whose report was not admitted into evidence. The AFC argued that the report recommended that all visitations be supervised. The lower court granted the expanded visitation and the foster care agency appealed. The lower court erred in ordering the expansion as the court did not possess adequate relevant information as to the best interests of the child. The court should conduct a more complete evidentiary hearing on remand.

TERMINATIONS

General

Matter of Raphanello J.N.L.L. 119 AD3d 580 (2nd Dept. 2014)

Both Kings County parents appealed the termination of their parental rights. They had failed to appear for both fact-finding and disposition. The Second Department concurred that the default should not be vacated where the claim that the father was in the hospital was not supported by any documents that showed he was actually in the hospital on the day in question. Also they failed to provide any argument that they had a meritorious defense.

Matter of Ca'leb R.D., __AD3d__, dec'd 10/15/14 (2nd Dept. 2014)

After the mother failed to appear in Kings County Family Court, the lower court terminated the mother's rights and the mother appealed. The lower court was justified in denying the defense attorney's requests for adjournments given the mother's history of missing court dates, the length of the pendency of the case and the merits of the proceeding.

Severe Abuse TPRs

Matter of Rodney J.R., __AD3d___, dec'd 12/3/14 (2nd Dept. 2014)

The Second Department affirmed Kings County Family Court's severe abuse termination of a father's rights. The father had been criminally convicted for the murder of the child's mother was incarcerated. The child was therefore severely abused and reasonable efforts toward reunification are excused as detrimental to the child as per SSL §384-b(8)(a)(iii) and (iv). The lower court correctly rejected the father's request for the matter to be adjourned until he appealed the criminal conviction.

Abandonment TPR

Matter of Zayvion Jamel Lewis S., 122 AD3d 546 (1st Dept. 2014)

A Bronx father abandoned his child. Although the father was incarcerated, this is not a defense. The agency need not prove any diligent efforts in an abandonment termination and does not have to prove that any assistance was offered to the father to establish contact with the child. There is no evidence that the agency discouraged the father from contact.

Matter of Nadir J.B., __Misc3d ___, dec'd 9/22/14 (Family Court, Monroe County 2014)

Monroe County Family Court dismissed an abandonment petition against a father where the evidence indicated that the father believed that there was a plan going forward for his mother to become the child's foster parent. The grandmother did have three of the child's siblings in her care and had asked for this child.

Mental Illness and Mental Retardation TPRs

Matter of Logan Q., 119 AD3d 1010 (3rd Dept. 2014)

The Clinton County Family Court found that a father's rights should be terminated on both mental illness and mental retardation grounds and the Third Department concurred. The court appointed expert interviewed the father, administered testing and reviewed the history. He opined that the father was mentally retarded based on the IQ testing. The expert also testified that the father was mentally ill, suffering from an impulse control disorder and an antisocial personality disorder. Both the mental illness and the mental retardation rendered the father unable to safely parent the child for the foreseeable future. The foster care worker testified that she worked with the father for 20 months on various parenting skills and supervised his

visitations with the child and that the father simply did not improve his parenting ability. He could not or would not follow suggestions, had anger management problems; losing his temper in front of the child. No evidence contradicted this testimony.

Matter of Julius H., 120 AD3d 1346 (2nd Dept. 2014)

The Second Department affirmed the termination of the rights of an Orange County mother to her child. A forensic psychiatrist reviewed the medical and other records and interviewed the mother. The expert's opinion was that the mother had a paranoid personality disorder as well as a borderline personality disorder and a long history of psychiatric problems. Her mental health put the child as risk of neglect if the child was returned to her care for the foreseeable future.

Matter of Stephen Daniel A., 122 AD3d 837 (2nd Dept. 2014)

The Second Department affirmed Queens County Family Court's termination of a mother's rights. In 2011 the mother's rights had been terminated and the mother had appealed. The appellate court had reversed the mother's termination ruling that the lower court had permitted her to appear pro se but had not engaged in the "searching inquiry" required to allow her to appear pro se. The matter was remanded back to family court and the court again allowed her to proceed pro se but this time with a "legal representative" to assist her. For the remanded hearing, the mother failed to appear for the fact finding but the "legal representative" appeared and participated to the extent possible. At the close of proofs, the lower court found that the mother could not parent the child for the foreseeable future due to her mental illness. The mother then moved to vacate her default and the court denied the motion and terminated parental rights. The mother appealed for the second time.

Family court properly denied the motion to vacate. The mother failed to present a reasonable excuse claiming that the court room door was locked – which it apparently may have inadvertently been. However, when this had occurred, the legal representative called the mother's cell phone and told her that the door was unlocked and that she could come into the court, a brief recess was called but the mother did not appear at any subsequent point in the hearing and failed to provide any reasonable excuse. There is no need to discuss if she offered a meritorious defense she did not provide a reasonable excuse for the default.

Matter of Kaitlyn X., 122 AD3d 1170 (3rd Dept. 2014)

The Third Department concurred with Clinton County Family Court that a father's rights to his daughter should be terminated based on his inability to care safely for the child due to his mental illness. The court appointed expert was a licensed psychologist who reviewed the father's background. The collateral source information the expert reviewed is the type reasonably relied upon in his profession. Contrary to the father's arguments on appeal, the expert had clarified the

impact this collateral evidence had on his opinion. Before the expert testified, all the parties stipulated to the admission of his report into evidence. The first 41 pages of the report included background information and the rest included the opinions and conclusions the expert had reached. The father raised no objection to the foundation provided for the report and so he waived any objection to the report and the testimony. The expert testified that the background information and the information from the personal interview with the father were equally important in determining his opinion. The father's behavior in the interview made sense to the psychologist given the history.

The expert testified that the father was mentally ill with a long standing personality disorder, a delusional disorder and a disruptive impulse control conduct disorder. The father had a lack of anger control which presented a risk to the child. The father had delusions and extreme behavior which included poor judgment – such as continuing to live with his wife despite the fact that she had fractured the child's wrist. The father would not be able to care for the child without risk of abuse for the foreseeable future. Medication generally does not alleviate a personality disorder and the father was not motivated to pursue treatment. His condition was not likely to improve. There was no competing expert evidence.

Matter of Joseph E.K. 122 AD3d 1373 (4th Dept. 2014)

Niagara County Family Court was affirmed in its termination of a mother's rights on mental illness grounds. The court appointed psychologist testified that the mother suffered from paranoid schizophrenia and is delusional. The child, who has special needs, would be in even greater danger if returned to the care of the mother. The mother did call an expert who had seen her once and testified that she saw no evidence of a major psychiatric illness. However, even her own expert admitted that the child should not be returned to the mother at this time as there were "issues". The mere possibility that the mother may improve is not sufficient.

The court did reverse the family court's other order terminating the mother's rights on permanent neglect grounds ruling that ".. given the court's finding that the mother was incapable of caring for the child based on her mental illness, the court erred in terminating her parental rights on the additional ground of permanent neglect. She cannot be both too mentally ill to safely parent a child as the same time to have failed to plan for a child although physically able to do so." (NOTE: The Fourth Department has repeatedly ruled that a parent cannot have their rights terminated both on mental illness and permanent neglect grounds – only one or the other if proven clear and convincingly. Other Appellate Divisions have affirmed TPRs on both grounds)

Matter of Delia S., 122 AD3d 1449 (4th Dept. 2014)

The Fourth Department affirmed the termination of an Erie County mother's rights to her younger child while dismissing the appeal as to the older child. The older child's appeal was moot as she is now 18 years old. As to the younger child, the DSS proved by clear and

convincing evidence that the mother was unable due to her mental illness to safely care for the child for the foreseeable future. The mother's behavior, thinking, feeling and judgment were so disturbed that a child in her custody would be in danger of becoming neglected.

Matter of Star C., ___AD3d___, dec'd 10/3/14 (4th Dept. 2014)

Onondaga County Family Court was affirmed by the Fourth Department regarding a termination of a father's rights on the grounds of mental illness. The court appointed psychologist testified that the father had schizophrenia and auditory hallucinations. He is grossly disorganized, combative and agitated and cannot concentrate to properly care for the child. He will not take medication. The caseworker and counselor who supervised the father's visits with the child testified of his inability to concentrate and his failure to use skills explained to him in parenting classes and by the visit supervisors.

Matter of Skylar F., __AD3d___, dec'd 10/30/14 (1st Dept. 2014)

A Bronx father's rights to his child were terminated on mental illness grounds. There was uncontroverted expert evidence that the father had schizophrenia and could not care safely for the child now and for the foreseeable future. The medical records were admissible as business records and the records contained his diagnoses and were relevant to his treatment.

Matter of Donovan Jermaine R., __AD3d__, dec'd 12/16/14 (1st Dept. 2014)

The First Department affirmed a termination of a New York County father's rights on mental illness grounds. The father had an "almost life-long battle with mental illness" according to the expert testimony and extensive medical records. He had spent the last several years confined to a psychiatric facility. He could not control his anger and had no insight into his problems. He cannot safely parent this child now or in the foreseeable future. He had not seen the child since his birth. The court appointed expert was not required to observe the father interact with the child to enable him to render this opinion. Even if it were possible that the father may someday be able to parent, this does not defeat the termination.

Permanent Neglect TPRs

Matter of Melisha M.H., 119 AD3d 788 (2nd Dept. 2014)

A Queens mother had her parental rights terminated to her two children on permanent neglect grounds. The agency offered diligent efforts toward reunification by providing visitation, referrals to drug treatment and counseling and encouraging her to complete the programs. The mother failed to plan. The progress notes offered into evidence were properly admitted as

business records and even if some of them were not properly admitted, the mother's own testimony supported the finding of permanent neglect.

Matter of Devon M., 119 AD3d 864 (2nd Dept. 2014)

The Second Department concurred with the termination of a Richmond County mother's rights to her 5 children. She had been offered visitation and numerous referrals for services and was repeatedly included in meetings to review the service plan. The mother did not complete the service plan, did not allow the caseworkers access to her home and would not consent to needed special education evaluations for 2 of the children. Freeing them for adoption was in their best interests and a suspended judgment was not warranted.

Matter of Marissa O., 119 AD3d 1097 (3rd Dept. 2014)

Saratoga County Family Court's dismissal of a permanent neglect petition was appealed by the AFC. The Third Department affirmed the dismissal finding that DSS had not proven that the mother had failed to plan for her 5 children. The mother failed to protect 2 girls from sexual abuse by an older male sibling. Even after a neglect finding and being ordered to not allow contact, the children were abused again by the male sibling which resulted in the children being placed in foster care. DSS offered diligent efforts by providing referrals to counseling, sexual victimization treatment, domestic violence treatment, mental health evaluations, anger management and parenting classes. The mother did have some issues at first adjusting to the supervision but she attended all visits with the children, all her service plan and permanency planning meetings and did participate in all of the recommended treatment and counseling. She maintained employment and found housing without help from DSS. The mother's treatment providers and the children's treatment providers testified that over time the mother had been able to acknowledge her responsibility regarding the sexual abuse. The mother, although imperfect and lacking in advantages, did make meaningful steps and used resources to correct conditions. She did not fail to plan for the children's future. The AFC also argued that the lower court improperly relied on a court ordered evaluation that had been ordered. The evaluation had been ordered as DSS had also filed a mental illness and mental retardation TPR petition had later been withdrawn. This was not an error however as the trial court specifically ruled that the expert's opinion was not "useful" on the issues of permanent neglect.

Matter of Asianna NN., 119 AD3d 1243 (3rd Dept. 2014)

The Third Department affirmed the termination of parental rights as to the younger child of an Albany County mother but remanded the older child's matter for a new dispositional hearing. The children had been placed in foster care due to a horrific act of abuse when the youngest child was 11 months old. The mother's boyfriend was ultimately criminally convicted of reckless assault of the child. The child suffered serious injury which ultimately resulted in traumatic brain injury, one sided paralysis, and cognitive delays. The mother told various different versions

of events. The mother was ultimately convicted of endangering the welfare of a child and served a one year jail term for failing to seek medical attention for the badly injured baby. After the criminal conviction, the mother consented to an abuse finding on both children without an admission. The baby, after hospitalization and rehabilitation, was placed in a foster home and the older child was placed with the maternal grandmother. While the mother was in jail, DSS brought a permanent neglect petition against the mother regarding both the injured child and the older child.

The DSS did engage in diligent efforts and the mother failed to follow through. The DSS referred the mother to several programs including preventive services, domestic violence counseling, and set up visitation. DSS repeatedly offered psychological evaluations and family assessments to try to identify the mother's specific mental health issues that contributed to her failure to seek immediate medical care for the child. Also these assessments were needed to determine what was behind the mother's failure to recognize the severity of the child's injuries and her role in the event. Despite repeated recommendations that she be evaluated, the mother would not do so, saying that her criminal attorney told her not to consent to an evaluation until the criminal prosecution was resolved. She did obtain the evaluation after her criminal conviction but she then almost immediately entered jail so that needed services could not be offered.

The mother argued that her delay in undergoing the assessment should not have counted against her as she was exercising her constitutional right against self incrimination. Although the mother remained affectionate and visited the children whenever it was permitted, she simply failed to avail herself of services and would not take responsibility for what had happened. While it was true that she was facing criminal charges and her comments to the evaluator would not have been privileged, her participation would not necessarily have required prejudicial admissions. The psychologist who was to do the assessment said he would have assessed for services, not determined culpability or involved himself in "legal issues'. He did not challenge a parent's presentation of events or press the parent for factual details. In any event, in these proceedings the parents' rights are subordinate to the protection of children. This mother refused to participate in an assessment for more than a year and although she may have a right to choose to do that, there are consequences to putting her needs above the needs of her children. Her choice to protect herself resulted in a failure to expeditiously plan for the children's future. She did complete some services and did consistently visit the children. But she failed to acknowledge that she knew her boyfriend had serious anger management issues but allowed him contact with the child when she was not present. Even though she had delayed medical attention when the child was in such distress that she was near death; she continued to deny that she had failed to seek medical attention and continued to provide varying stories of what had happened that day. For months after the severe injuries, she persisted in claiming that the child was far less injured than she was – for example, claiming the child could sit up and eat solid foods when the child could not walk or crawl. Even though the child could no longer swallow or suck and had to be fed through a tube, she tried to feed the child a cookie and chips. She could not understand why this was a problem even though the doctors had explained the extent of the child's injuries.

There was no reason to offer a suspended judgment regarding the younger, injured child. The child was with an excellent foster mother who spent hours receiving training to care for the medically fragile child. The foster mother dealt with the child's complicated schedule of

medical providers and services – even acting as an advocate seeking special help for the child such as orthopedic treatment from the Shriner's Hospital out of state. The child was bonded to the foster mother and to the other children in the foster home. The family strongly wished to adopt her. It was in the best interests of the younger child to be freed to be adopted. However, the appellate court remanded the older child's – who was a kindergartener at the time of the dispo hearing --- matter for a new dispo hearing. The court ruled that little evidence was presented about this child's needs at the time of the original hearing. The older child was with the maternal grandparents who were willing to adopt. The family was close knit and the child had almost daily contact with the mother who parented the child in a close and loving relationship. Although the court expressed "reluctance" to add more delay given the amont of time this child had been without permanency, they remanded for a new dispo hearing on the older child. The Third Department ruled that a suspended judgment may be appropriate as it relates to this child and there is not enough evidence in the current record to determine this.

The Appellate Court commented in a footnote that the TPR fact-finding hearing took almost a year, then a decision was not rendered by the trial court for over another year (problems with obtaining transcripts) and then finally there was a dispositional hearing – the termination procedures ultimately taking 3 and a half years in the family court to resolve. (The appeal decision came yet another 18 months later) The appellate court expressed "considerable concern" that DSS appeared to have a "blanket prohibition against unsupervised visitation during the course of termination proceedings". This mother had gone years with only supervised visitation leaving her unable to show if she was capable of parenting either child. At the same time the children's bonds weakened with the mother and relationships with their respective caregivers deepened. The court opined that this visitation policy could have contributed to the result in this matter.

Matter of Mandju S.K., 120 AD3d 1133 (1st Dept. 2014)

The First Department affirmed the termination of a Bronx mother's rights to her child. The agency made diligent efforts toward reunification by offering referrals to drug treatment programs as well as other programs. They also set up meetings with her regarding the service plan, offered visitation and tried to remain in contact with her. The mother did not complete the drug treatment or anger management programs and she continued to use drugs. She claimed she had obtained a mental health examination but could not produce any proof of an examination. The 10 year old subject child had been in kinship foster care for 3 years and had a stable, positive bond with the foster mother who wished to adopt him. A suspended judgment is not warranted given how long the mother has had to resolve her issues and her continued failure to do so – particularly her failure still to complete drug treatment.

Matter of Natina F., 122 AD3d 437 (1st Dept. 2014)

A New York County mother permanently neglected her children. The termination of her parental rights was affirmed by the First Department. Although the mother had completely a number of programs including mental health therapy, she did not empathize with the children or understand their needs. She exposed her 3 year old to the home birth of a sibling even though the agency had directed her to bring the 3 year old back to the foster home prior to the birth. It was in the children's best interests to be freed for adoption. One child had been in foster care for 7 years (!!), since she had been a toddler. The other child had been placed there more recently and the foster mother wanted to adopt both. There was no need to offer a suspended judgment given the mother's failure to resolve her issues in the 7 year period the matter had been pending.

Matter of Leroy Simpson M., 122 AD3d 480 (1st Dept. 2014)

The Bronx children in this matter had been placed in foster care after they ran away from their home to a relative's home. The children said that they were afraid of one the children's fathers due to his violence toward them and the mother. The mother used excessive corporal punishment on the children. She also did not protect the children from the father's violence or from witnessing the violence he inflicted on her. Although the mother was provided with many services over the next 8 years (!!) that the children were in care and although she completed many of those services, she refused to acknowledge the issues and gained no real insight. She may have consistently visited the children but she did not plan for their future. It is in the best interests of the siblings who have not yet aged out of care to be freed for adoption. Two of the children have lived virtually their whole lives with a foster mother who meets their special needs and they have improved in her care. Although the third child's placement is uncertain, there is no need to offer the mother a suspended judgment as to that child as she has made no progress in learning how to care for him and his needs.

Matter of Jemel M.A., 122 AD3d 622 (2nd Dept. 2014)

The Second Department concurred that a Queens mother permanently neglected her 6 children. The agency offered the mother referrals to various drug treatment programs, a parenting program, and for housing assistance. The mother did not complete drug treatment or parenting. It was in the children's best interests to be freed for adoption.

Matter of Kaydance H.G., 122 AD3d 630 (2nd Dept. 2014)

A Suffolk County mother's rights were properly terminated. DSS offered diligent efforts toward reunification but at the time of the filing of the petition, the mother had not found suitable housing and had not planned for the child's return.

Matter of Clair E.F., 122 AD3d 847 (2nd Dept. 2014)

The Second Department affirmed the termination of two Orange County parents' rights to their child. DSS offered diligent efforts for reunification. They provided visits, referrals for mental health counseling and repeatedly advised the parents of the need to attend and complete the counseling. The parents failed to consistently attend the programs and it was in the child's best interests to terminate parental rights.

Matter of Sean P.H., 122 AD3d 850 (2nd Dept. 2014)

A Richmond County mother's rights were terminated to her son and the Second Department affirmed the trial court's order. On appeal, the mother first argued that the family court deprived her of her right to be present as the court denied her attorney's request to delay the proceedings when the mother did not appear at the start of the fact finding. The attorney had no information as to why the mother was not there. The mother's attorney and the mother's GAL were present when the first witness testified on direct. The mother then appeared; and at that time the trial court allowed the defense attorney to cross examine the first witness. This was not an error.

The agency did offer the mother diligent efforts towards reunification by creating a service plan and attempting to assist her to comply with it. The agency made referrals for a mental health evaluation, recurrent mental health services, parenting skills classes and provided regular supervised visitation until the visits were later terminated. At the time that the TPR petition was filed, the mother still had not participated in mental health services. The visitation had been ended some 2 years earlier after the mother had a physical altercation with the foster mother and the case worker in the child's presence. There was no proof that the foster mother had thwarted reunification efforts and no reason to offer a suspended judgment given the complete failure of the mother to complete the programs. Termination was in the child's best interests. The mother's attorney did move at summation to withdraw as counsel at the client's request but there was no showing sufficient to warrant any withdrawal and there was no ineffective assistance.

Matter of Davyana M., 122 AD3d 854 (2nd Dept. 2014)

Orange County Family Court was affirmed on appeal. The mother permanently neglected her child. The DSS offered diligent efforts by setting up visitation, referring the mother to parenting classes and monitoring her mental health treatments. The DSS met with the mother to review the service plan and encouraged her to cooperate with the plan. The mother argued that DSS has not set up the mental health treatment. But the caseworker testified that the mother told her that she did not want the worker to set up the treatment and wanted her own attorney to set it up. The mother did in fact obtain her own mental health evaluation but she did not thereafter keep her appointments for treatment. The mother claimed that treatment was not needed. She also failed

to attend parenting classes and to maintain regular visitation with the child. It was in the child's best interest to be freed for adoption.

Matter of Shapphire A.J., 122 AD3d 1296 (4th Dept. 2014)

Monroe County Family Court was affirmed on appeal regarding the termination of a mother's rights to her child. The mother was a foster child as she had been placed on a PINs petition. However the DSS offered her diligent efforts to enable her to parent her child. The mother was referred to parenting classes and placed in structured environments to assist her. She did not comply with any mental health counseling or parenting classes and ran away from her placement on numerous occasions. Her running away resulted in missing visits with the baby. There was no need to offer a suspended judgment as she had only made negligible progress.

Matter of Tatiana E., __AD3d__, dec'd 10/1/14 (2nd Dept. 2014)

The Second Department agreed that a Westchester County child should be freed for adoption from her mother as the child had been permanently neglected. The DSS offered diligent efforts toward reunification by setting up visitation, referring the mother to counseling and domestic violence services, by providing her with a Russian interpreter and by assisting the mother with housing. The mother failed to establish a residence and failed to complete the domestic violence counseling and other counseling. Although the mother consistently visited the child, she failed to gain insight into the reasons for the child's placement and thereby plan for the child's future. It was in the child's best interests to be freed for adoption.

Matter of Edgardo Yadiel N., __AD3d__, dec'd 10/2/14 (1st Dept. 2014)

The First Department affirmed the termination of a Bronx father's rights to his children. The agency referred him to parenting skills, domestic violence counseling and anger management. They attempted to assist him with housing and arranged visitation. Diligent efforts towards reunification were provided. However the father failed to plan for the future of the children as he refused to undergo a mental health evaluation and would not submit to drug and alcohol testing. He provided no proof that he had stable employment or suitable housing. He frequently failed to visit the children.

Matter of Anastasia S., __AD3d___, dec'd 10/3/14 (4th Dept. 2014)

The Fourth Department affirmed the termination of a Cattaraugus County father's rights. The DSS provided diligent efforts by referring the father for mental health counseling, parenting classes and substance abuse evaluation. He did not followed up on any of the referrals. The DSS also provided help on housing and finances and provided the father with weekly visitation

when he was not in jail and a visit when he was in jail. At one point, DSS paid the father's rent for a year. This was done even though he had income from employment and one of the children in his home was getting SS disability benefits. The Appellate Court noted that the caseworker did contemplate adoption as a possible permanency option for the children just shortly after they were removed from the father. However, this did not diminish the diligent efforts offer as DSS is permitted to consider alternative permanency options where reunification is unlikely. Simultaneously considering adoption while still working toward reunification is not necessarily inappropriate.

Matter of Tarik G. McS., Jr., ___AD3d__, dec'd 10/7/14 (1st Dept. 2014)

The Bronx County Family Court properly terminated the parental rights of two parents to their child. The agency offered diligent efforts for rehabilitation services. They made multiple referrals for services including drug treatment and visitation was scheduled. The parents did not comply with the services, did not complete the programs and used drugs. They did not visit on a regular basis. The child has many special needs – sever developmental delays, cerebral palsy and ADHD. The foster mother has provided constant supervision and has assisted the child with his extensive array of services. The parents have no ability to do the same and in fact have no consistent relationship with the child whose needs they do not understand.

Matter of Dianelys T.W., __AD3d__ ,dec'd 10/8/14 (2nd Dept. 2014)

A Suffolk County Family Court's termination of a father's rights to his children was affirmed on appeal. The DSS offered diligent efforts to attempt reunification. The agency supported the father by preparing a service plan, referring him to a mental health evaluation and a course of psychotherapy. They referred him to parenting skills training, and a domestic violence program and set up visitation. At the time of the petition, the father still had not had a mental health evaluation and had not completed the psychotherapy. It was in the children's best interests to free them for adoption.

Matter of MHP., __Misc3rd__, dec'd 10/8/14 (Family Court, Kings County 2014)

Kings County Family Court dismissed TPR petitions against both parents ruling that the agency had not provided diligent efforts toward reunification. The parents' history included the death of 2 separate infants who had been in the father's care as well as injuries to a 4 year old girl's buttocks and hymen while in the parents' care. The court denied the request for a FCA § 1039-b motion to not provide reasonable efforts toward reunification ruling that such a finding can only be made in conjunction with the filing of an Art 10 petition. (NOTE: The Court of Appeals has ruled just the opposite more than 10 years ago in **Matter of Marino S., 100 NY2d 361(2003)** which concerned a FCA §1039-b motion properly brought in the middle of a TPR) The trial court found that the agency caseworkers had a "barely concealed antipathy" toward the parents

and changed the goal for the children to adoption without a consultation with the parents. There was never any intention of working toward reunification. The children were in care nearly 3 years and the petitioning agency had supervised the placement for the last 20 months and but never offered unsupervised visitation. The agency had not however identified any risks with unsupervised visitation. The agency canceled visits with the father, often without notice to him and rescheduled visits without regard to the father's schedule. The caseworker would interfere with the visits bringing agency toys and games when the father had brought things himself for the children.

Matter of Javon D.B., __AD3d__dec'd 10/8/14 (2nd Dept. 2014)

The Second Department concurred that a Queens County mother permanently neglected her child. The agency made diligent efforts by developing a service plan, recommending psychiatric treatment and therapy, parenting skills courses, offering regular visits and monitoring her progress. The mother failed to consistently attend mental health services and did not follow through with repeated referrals for parenting programs. The mother also failed to consistently visit the child.

Matter of Male G., __AD3d___, dec'd 10/8/14 (2nd Dept. 2014)

A Queens father permanently neglected his son. The agency offered him diligent efforts in that they set up visitation, referred the father to drug treatment and a parenting skills program. The father failed to plan for the child's future.

Matter of Brian T., __AD3d __, dec'd 10/14/14 (1st Dept. 2014)

Both Bronx parent's rights were terminated and the order was affirmed on appeal. The case notes were properly admitted into evidence as business records and they showed that diligent efforts had been offered. Regular visits were scheduled. Both parents were referred to multiple parenting programs and anger management programs. The father was referred to sexual abuse therapy as he had sexually abused one of the mother's children. The parents did complete some of their programs but not all of them. They did not visit the children consistently and they failed to gain insight into the reasons for the children's placement. The children have been in care for over 9 years (!!) with the same foster mother who provided them with a stable home. The children said they wanted to be adopted. A suspended judgment is not appropriate as it would prolong the children's uncertain situation in foster care.

Matter of Anthony R.G.-W., __AD3d__, dec'd 10/15/14 (2nd Dept. 2014)

Queens County Family Court was affirmed on appeal regarding the termination of both a mother and a father's rights to their children. The agency offered diligent efforts toward the mother – setting up visitation and developing an appropriate service plan. She did not avail herself of the services and she did not visit consistently. The father abandoned the children and as that ground was proven clearly and convincingly, the Second Department found it unnecessary to review the father's termination on the second grounds of permanent neglect grounds.

Matter of Justice AA., __AD3d__, dec'd 10/15/14 (2nd Dept. 2014)

The Second Department concurred with Queens County Family Court that a mother's rights to her two children should be terminated. Diligent efforts were made in that the agency met with the mother and reviewed her service plan and referred her to counseling. The agency set up visitation, modifying it at the mother's request and provided her a Metro card for transportation to the visits. Although the children were in foster care for several years, the mother did not comply with the services and did not visit regularly. Her belated and partial attempts at compliance after the TPRs had been filed was not sufficient. The children had been in foster care for a prolonged period of time and were bonded to the foster parent and it was not in their best interests to offer a suspended judgment.

Matter of Carter A., __AD3d__ dec'd 10/16/14 (3rd Dept. 2014)

A Cortland County mother was 15 years old when she gave birth to a child. The baby was removed from her care within 2 months after birth and then entered foster care when the placement with the maternal grandmother failed 3 months after that. The Third Department concurred that the teen mother permanently neglected the child and that the boy should be freed for adoption. The agency provided the young mother with diligent efforts including referrals for parenting classes, preventive services, substance abuse evaluations and treatment, domestic violence education, family counseling, and mental health evaluations. The DSS caseworkers encouraged the mother to end her relationship with the child's father who had been violent with the mother and others. The DSS kept her informed of the child's progress by meeting with her and giving her reports on the child. Visitation was provided several times a week and a parenting educator provided guidance for the visits. When there was a billing issue with a counseling service, the mother was referred to another program and given bus passes to get there. The worker even offered to drive the young mother to her appointments.

The mother argued that she should have been placed in foster care along with the baby but of course the mother was not the subject of a neglect petition so there was no legal method to place her in care (Later there was a PINs petition against her but that did not result in the mother being placed in foster care.) The mother's home was unsuitable - due mainly due to the mother's behavior. She abused substances, she was truant from school, she engaged in criminal conduct and would not obey the household rules. She continued her relationship with the violent father

despite mutual orders of protection. Placing the mother in foster care with the baby, even if that had been legally permitted, would not have changed the mother's behavior given the ongoing nature and severity of her acting out. Having the mother in care with the baby was not in the baby's best interests. The mother also argued that the DSS should have tried to obtain a court order that she be sent for inpatient for drug treatment. However, the mother's drug counselor never asked DSS to obtain such an order because the mother had told the counselor that she would never consider such treatment.

The mother also did not plan for the child. She made very few efforts to avail herself of services and completed almost none of them. She continued to have a relationship with the violent father. She move out of her mother's home and did not have stable housing, living with various other people such as the violent father and members of his family. She did not attend school regularly and was suspended for being in possession of another students prescription medication which led to criminal charges. She violated her PINs probation. She also had other criminal charges for shoplifting. She was discharged from outpatient treatment for substance abuse due to repeatedly testing positive for marijuana and then claimed that she did not need in patient treatment. She delayed engaging in mental health services only finally going to an evaluation shortly before the TPR was brought. She did visit the child regularly but would fail to bring a stocked diaper bag as requested and she was never able to progress beyond supervised visits.

Lastly there was no reason to provide a suspended judgment even though by the time of the dispositional hearing, the mother had made some laudable progress. She had apparently been frightened by a psychiatric hospitalization that occurred due to her having been found in possession of drug paraphernalia at school. She admitted to using and selling synthetic marijuana in an effort to avoid detection in drug testing. At this late juncture she did complete a drug evaluation, engaged in some sessions of outpatient drug treatment and tested clean for 2 months just before the conclusion of the dispositional hearing. She completed her parenting program, a nutrition program, a DV program and had finished her GED program with good grades and was to take the GED exam. She had a job and was making regular visits to the child. All of this was commendable and showed steps to maturity however she did not have stable housing or stable relationships. Instead she had married a 20 year old after knowing him only briefly. That marriage failed within a few months. The mother argued that the child should remain in foster care for another year while she continued to work on her issues. However the child was 2 years old, had been in care for all but the first few months of his life and was bonded with foster parents who wanted to adopt him. It was not in his best interests to remain in care despite the mother's recent improvements which were belated, incomplete and followed a long and troubled history.

Matter of Ariana N.T., __AD3d___ dec'd 10/22/14 (2nd Dept. 2014)

Suffolk County Family Court's termination of a mother's rights to her children was affirmed on appeal. DSS offered repeated referrals for mental health and drug treatment and set up visitation. DSS repeatedly advised the mother that she must complete the programs and her

belated and partial attempts at the programs were not enough to defeat a permanent neglect petition. It was in the best interests of the children to be freed for adoption.

Matter of Joshua E.R., ___AD3d___, dec'd 12/3/14 (2nd Dept. 2014)

Queens County Family Court was affirmed on appeal regarding the termination of both parents' rights to their 3 children. The parents were offered diligent efforts. The agency provided them with a service plan, parenting classes, domestic violence programs, anger management programs and visitation. The mother was also referred for mental health services including therapy and medication and urged to obtain stable housing. The father was referred for substance abuse treatment. The mother testified on direct but then failed to appear at the next appearance for cross examination and so her testimony was struck and a negative inference for failure to testify was drawn. She appeared thereafter and moved to vacate her default claiming that she had been late as her train had been delayed. The lower court properly denied the motion as she provided no evidence of the alleged transportation issue and no reason why she had not contacted her attorney about the problem. Further she provided no evidence that she had a potentially meritorious defense to offer. The mother failed to consistently visit the children, did not comply with mental health treatment and was not taking medication. She was repeatedly hospitalized. The father did not complete his drug rehabilitation program and his visitation was also inconsistent. It was in the best interests of the children to be freed for adoption. The 3 children were in 2 separate foster homes and siblings should generally be kept together but the children had special needs and they had become strongly bonded to the respective foster mothers. The children had only known their foster homes since infancy. The mother did not even request a suspended judgment. It is not in the children's best interests to prolong foster care.

Matter of Winstoniya D., __AD3d__, dec'd 12/3/14 (2nd Dept. 2014)

The Second Department reversed a termination of an Orange County mother's rights. The appellate court concurred that the DSS had proven clearly and convincingly that diligent efforts were offered. However, the lower court erred in ruling that DSS had proven that the mother had failed to plan for their future. The DSS provided visitation when the children were placed in foster care. They monitored the mother's progress when she was in residential drug treatment and the children resided in the program with her. The DSS urged the mother to remain in treatment. She was given referrals for housing and mental health treatment for when she would return to the community along with referrals for subsequent outpatient drug treatment. Within a month of the children coming into foster care, the mother entered an inpatient rehab center. Less than 2 months later, the children were discharged to the mother's care at the rehab center. Approximately 7 months after that the mother and children returned to the community only to have the children placed back into care within a short time as there were allegations that the mother had used drugs. It was true that the mother relapsed on this occasion and she also that she did not achieve a 90% attendance at her outpatient program as the court has ordered. She also was not consistent with her mental health appointments. However, the trial court erred in ruling that she was failing to plan. There was a strong loving bond between the mother and the

children and she maintained consistent contact with them. She had completed her parenting classes and was substantially complying with the drug treatment. The DSS had not proven clearly and convincingly that she had failed to plan.

Matter of Angelo AA., __AD3d___, dec'd 12/11/14 (3rd Dept. 2014)

The Third Department agreed with Tompkins County Family Court that a mother's rights to her child should be terminated on permanent neglect grounds. The DSS offered diligent efforts. They provided regular supervised visitation included both supervised and unsupervised portions. They referred the mother to parenting and anger management classes, domestic violence awareness classes and a women's empowerment group. She involved herself in these services. However, her behavior did not change. She yelled at the child during visits, engaged in anger related behavior towards adults and continued to involve herself with men who had a history of domestic violence. She was removed from Family Treatment Court for repeatedly testing positive for marijuana. She did complete an inpatient program for substance abuse but then failed to complete the outpatient portion. She did not participate in the group sessions and had poor attendance. She did enroll in another outpatient program but had not completed it when the TPR was filed. She never finished her mental health counseling.

The mother argued that she should have been provided counseling for her past sexual abuse. However the outpatient program, that she did not complete, was one designed for persons with a dual diagnosis of substance abuse and emotional trauma. The mother also argued that she should have had a psychological evaluation with IQ testing as was discussed in an initial service plan. However the caseworker's testified that the IQ testing was not needed as the mother understood what she was told, she just did not agree with it or follow through. The mother's evaluations had recommended the dual diagnosis program that she did not complete. Lastly, the mother claimed that she was denied due process as the court precluded an expert witness she wanted to call. However the offer of proof was that the expert would testify that there may be a more current method of dual diagnosis treatment. This is not relevant on the issue of diligent efforts as the question is if appropriate services were offered and not if there were some better services that might be available.

Matter of Destiny EE., __AD3d__, dec'd 12/4/14 (3rd Dept. 2014)

The Third Department concurred with Ulster County Family Court that a mother had permanently neglected 2 of her 3 children. (the eldest child's matter was not appealed as the parties had agreed to a suspended judgment as to him and at the time of the appeal, that child had been returned to the mother's care) The DSS did provide diligent efforts for the mother. The workers advised her at in person weekly meetings what she needed to do to obtain the return of the children, provided monthly letters to her on the children's progress and held interactive service plan review meetings. She was referred to mental health services, housing and employment services. The mother was offered 150 visits where she was coached before the

visits on planning, counseled during the visits and was given tips after the visits. There were some inconsistent communications from the service providers about the use of an aunt as a placement option for the children however these were isolated instances as compared to how long the children were in care. There were a myriad of issues the caseworkers needed to deal with and there was worker turnover.

This was not a case of a lack of diligent efforts but there was a failure on the part of the respondent mother to adequately plan for the children's future. She did regularly exercise her visitation and did attend some counseling and parenting classes. However, she did not complete those programs and did not pursue other services offered. She was inconsistent in her recognition of the sexual abuse of the oldest child, she did not enroll in therapy and she only made minimal efforts to seek employment. She was unable to progress to unsupervised visits with the children. The children made considerable improvement in foster care and are bonded with the foster family who wish to adopt them.

Matter of Samuel DD., __AD3d__, dec'd 12/4/14 (3rd Dept. 2014)

The Albany County Family Court was affirmed on appeal to the Third Department. A mother had permanently neglected her special needs child and it was in his best interests to be freed for adoption. The DSS offered diligent efforts by providing weekly visitation and financial assistance to the mother to attend the visits. The child was given a 45 day evaluation and meetings were held with the education officials to determine a specific plan for the child's education. The mother was to attend and participate in the evaluations and services for the child and to have a psychological evaluation herself. The child was given weekly counseling and the DSS provided the mother with notices of the meetings with the school and the service plan reviews. The mother continuously refused to acknowledge the reasons for the child's placement. She attended most of the visits with the child and was appropriate. However, after the initial evaluations for herself and her son, she would not discuss the recommendations or participate in the counseling services recommended, including family therapy. She missed several permanency planning meetings and service plan reviews. She failed to cooperate with DSS and make any meaningful effort to address the issues that had caused the placement. She told caseworkers she simply would not comply with some aspects of the court's dispositional order.

The mother argued that she should have been provided "religious based" therapy. However she has refused to provide a release to the DSS to obtain information from her church as to the availability of services. There was no need to offer a suspended judgment. It may be true that the court should not have adopted inconsistent permanency planning goals of both adoption and reunification but that was in the permanency order which was not appealed. Also such an error is not a basis to disturb the permanent neglect finding. There was no error in the court choosing not to talk to the child in camera at the time of the disposition. No one requested that the lower court do this and it is not statutorily required. The AFC had conveyed to the court that the child was ambivalent and uncertain. The mother and son did have a loving relationship but the mother did not take the necessary steps to ameliorate the problems in the home, did not maintain stable

housing and would not even provide her current address. The child had been in care for 4 years at the time of the disposition and was in a therapeutic foster home where his needs were being met.

Matter of William Z., __AD3d___, dec'd 12/17/14 (2nd Dept. 2014)

Rockland County Family Court's termination of two parents' rights to their child was affirmed on appeal. The agency proved clearly and convincingly that it had offered diligent efforts toward reunification. This included offering both the mother and the father drug treatment programs as well as mental health treatment and parenting programs for the mother. Visits with the child were offered. The parents failed to plan and it was in the child's best interests to be adopted by his foster family with whom he had lived his whole life.

Matter if Davina R.M.R.L., ___AD3d___, dec'd 12/31/14 (2nd Dept. 2014)

The Second Department affirmed the termination of a Queens County mother's rights to her child. Clear and convincing evidence demonstrated that the foster care agency had offered diligent efforts toward reunification. This included facilitating visitation with the child, developing a service plan, referring the mother for a mental health evaluation and for treatment programs as well as parenting skills programs and anger management classes. The caseworkers advised the mother on obtaining housing and maintaining a source of income and warned her about failing to comply. The mother failed to complete the programs, did not secure housing or a source of income. She attended parenting and anger management classes but never gained any insight. The child's best interests would be served by being adopted by the foster family she has lived with since her birth as a suspended judgment would not be warranted.

TPR Dispos

Matter of Jesus Michael P., 122 AD3d 520 (1st Dept. 2014)

The First Department affirmed a dispositional order terminating the parental rights of a New York County mother to her children. It was in the children's best interests to be freed for adoption. They have been placed with kinship foster parents who are certified to deal with their special medical needs. There is no reason to offer a suspended judgment since the mother delayed dealing with the issues that had caused the placement of the children. She had no realistic or feasible plan to create a stable home for the children. She never even sought to modify the lower court's order that had suspended visitation.

Matter of Adams v ACS 122 AD3d 840 (2nd Dept. 2014)

Queens County Family Court properly dismissed a paternal great aunt's petition for custody of the children following a dispositional hearing on a permanent neglect matter. A relative takes no precedence over the foster parents that the agency has selected to adopt the children.

Matter of Darlenea T., 122 AD3d 1416 (4th Dept. 2014)

Erie County Family Court's determination that DSS had proven by a preponderance that the birth mother failed to comply with the terms of a suspended judgment was affirmed. However the Fourth Department remanded the matter for a new dispo hearing as at the time of the appeal "new facts and allegations" raised questions concerning if termination of parental rights was in the best interests of the children.

Matter of Justin S., __AD3d__, dec'd 10/2/14 (1st Dept. 2014)

New York County Family Court correctly terminated the parental rights of a mother who violated the terms of a suspended judgment. She tested positive for drugs and failed to demonstrate that she made significant progress in her drug treatment. There were no "exceptional circumstances" to support an extension of the suspended judgment. The children should be freed to be adopted by the foster mother who has cared for them for over 5 years.

Matter of Taleeya M., __AD3d__, dec'd 10/3/14 (4th Dept. 2014)

A Cayuga County mother consented to a finding of permanent neglect but appealed the dispositional decision to terminate her rights. She is entitled to appeal the dispositional decision even though she stipulated to the permanent neglect adjudication. However, her short term progress with the service plan was not sufficient to justify keeping the child in an unsettled status.

Matter of Nyasia E.R., __AD3d__, dec'd 10/8/14 (2nd Dept. 2014)

A Queens father admitted to permanent neglect and then argued that the children should be placed in his sister's custody as opposed to being freed for adoption. The lower court freed the children to be adopted by their foster parents. Both the father and the aunt appealed. On appeal, the father argued that his admission on the permanent neglect was not knowing, voluntary and intelligently given. However, since he did not move to vacate his admission in the lower court, he cannot now raise that issue on appeal. In any event, there was no evidence that the admission was not knowing, voluntary and intelligently given. Further both the father and the aunt argued that the children should have been placed in the custody of the aunt. There is no presumption in

favor of a family member at the point in time of a dispo hearing on a permanent neglect. In fact it would not be in these children's best interests to be placed in the custody of the aunt as opposed to being freed for adoption. The aunt did not preserve for review her current argument that the court should have ordered an updated forensic evaluation.

Matter of Phoenix D.A., __AD3d___, dec'd 12/10/14 (2nd Dept. 2014)

The Second Department reversed Suffolk County Family Court's termination of a mother's rights. The mother had violated the terms of the suspended judgment order that required that she was to remain drug free as she tested positive for drugs. However, there was not sufficient proof that it was in the child's best interests to be freed for adoption. The child had been in foster care several years. He was not in a pre-adoptive home and there was no proof that freeing the child would increase the possibility he would be adopted. There was a strong and loving bond between the mother and the child and the mother came to all the visits that were offered. The visits were positive and enjoyed by the child. While the mother is not yet ready to assume custody, she has tried to deal with her drug issues and wants to continue to try. Termination is not in the child's best interests at this time and the matter was remanded for a new dispo hearing.

SURRENDERS and ADOPTIONS

Matter of Naquan L.G., 119 AD3d 567 (2nd Dept. 2014)

A Queens mother argued that her judicial surrenders were invalid claiming that the court had not complied with the requirements of SSL §383-c(3)(b) regarding the recitation of the rights that the mother was giving up by her surrender. However, the appellate court remanded the matter for a reconstruction hearing as the tapes of the proceedings were inaudible at significant points.

Matter of R. Children 119 AD3d 947 (2nd Dept. 2014)

Kings County Family Court was affirmed in its determination that neither a father nor a mother's consents were needed for the children to be adopted pursuant to an adoption petition filed by potential adoptive couple. The unwed father's consent was not needed under DRL §11 (1)(d) as he had never provided any financial support for the children. The fact that the adoptive parents did not ask for any support does not excuse him. The biological mother's consent was not required because she had abandoned the children for a period of more than 6 months before the adoption petition was filed. Her only contact was an occasional phone call which was not substantial or frequent enough.

Matter of Shapphire W., 120 AD3d 1584 (4th Dept. 2014)

A Cattaraugus County birth mother judicially surrendered her child with a condition for biannual visits. The agreement was for 2 visits a year, once each in July and December, for 2 hours each. The birth mother was to contact the adoptive parent by the first Monday in July and December respectively to arrange the visits. The child was adopted. The parties then agreed orally to a visit to occur after Thanksgiving instead of the one in December. The birth mother did not contact the adoptive parent in July for a visit at all and then did not contact the adoptive parent until mid November, instead of the first week of November for the next visit. The adoptive parent would not permit the November visitation. The birth mother filed a petition to enforce the agreement. The family court found that the birth mother's cell phone had been destroyed and she had lost the adoptive parent's phone number. However, she did not make sufficient efforts to obtain the phone number from others and therefore the birth mother was in violation of the agreement. Further the lower court found that it was no longer in the child's best interests for the visits to continue. At the visits that had occurred before the alleged violation, the birth mother would not always pay attention to the child, who had special needs. The Fourth Department found no reason to disturb these findings.

However the Appellate Division did modify the trials court's decision. The agreement stated that if visitation was ever terminated then the birth mother could notify the adoptive parent every year by November 1st of the birth mother's current address and the adoptive parent was to supply a progress report and photographs the child. This term was specifically was to go into effect if the visits were terminated. Therefore the lower court erred in failing to grant the birth mother's petition to this extent and the order was ordered modified to reflect the birth mother's right to the photos and report.

Matter of Bentley XX., 121 AD3d 209 (3rd Dept. 2014)

A St. Lawrence County Family Court decision on a conditional surrender was reversed by the Third Department. The father had surrendered the child after the child had been in foster care from his birth until about 2 years of age. The surrender was conditioned on specific foster parents adopting the child. Before the adoption occurred, the foster parents separated and thereafter the adoptive father sought to adopt separately. The DSS notified the father and the AFC about the fact that the two adoptive parents would not be adopting and asked the court to modify the surrender terms to allow for the one adoptive parent (who was the child's maternal grandfather) to adopt as a single parent. The birth father did not want to agree to the modification of the terms. The family court held a hearing and ruled that the modification of the terms was in the child's best interests. The Third Department found that the statue, although quite detailed about procedures for substantial failures of material conditions of a conditional prior to adoptions did not give the court authority to modify the terms of the surrender. This would in effect "force" surrender terms on a parent. The statute does not give the court authority to modify the terms of a surrender without the parties consent and the parent can revoke the surrender in such a situation as prior case law has dictated. Also the statue did not abrogate or replace the prior case law that deemed that the birth parent could revoke the surrender when the

substantial failure occurs prior to any adoption. Of course, the court noted, there is nothing that prevents the DSS from now going forward with TPR proceedings if there are grounds. (NOTE: The court made no comment relative to simply having conditions that anticipate such an issue, as is commonly done, by having terms that say that "either one or both" adoptive parents will adopt or even a term that says that the parties agree that no revocation can occur if the adoptive parents cannot adopt.)

Matter of Child A., __Misc2d ___, dec'd 10/2/14 (Surrogates Court, Nassau County 2014)

Nassau County Surrogates Court refused to close the courtroom and instead allowed public access in a matter where there were allegations of fraud concerning the adoption of 2 Russian children. The adoptive family sought a decree denying recognition of the adoption order or an order vacating the adoption. The court found that actions regarding Russian adoptions were of great concern to those who have adopted or are considering adoption and the court will allow access to the courtroom. However, if the press publish any names of family members involved, the court will reconsider the order.

Matter of Rashi-Malik Olatunji G., __AD3d___, dec'd 10/21/14 (1st Dept. 2014)

The First Department concurred that a father was only a notice father to a New York County mother's surrender of a foster child for adoption. The father's notice of appeal was untimely. In any event, the appellate division indicated that since the father's attorney admitted that the father had never supported the child, he was statutorily precluded from being a consent father. He did not ask for a hearing on the issue of consent at the lower court, but only a best interest hearing as a notice father. The father's own testimony revealed that he was incarcerated, unemployed and with no employment plans for the future. He had relied on his mother for 5 years. He had virtually never seen the child. It was in the child's best interests to be adopted by the foster parent that he had lived with for almost all of his 4 years. The foster parent is in a position to support and care for the child.

Matter of Jayden A., ___AD3d___, dec'd 12/10/14 (2nd Dept. 2014)

The Second Department reversed and remanded for a hearing the Queens County Family Court dismissal of a birth mother's petition to enforce the terms of the PACA after her child had been adopted. The mother had surrendered the child when the child was almost 3years old and agreed to the child being adopted by his foster parents. The agreement also indicated that the mother would have a visit once every 6 months with the child. Almost 4 years later, the mother filed to enforce the visits claiming she had been denied visits for the last 3 years. She said the adoptive family would not let her visit as the birth father had threatened the adoptive parents. The birth mother argued that the visits with her would be in the child's best interests so that the child

would not feel abandoned or hate her, his biological mother. When the parties appeared, the Judge dismissed the petition without a hearing noting that the visitation would not be in the child's best interests. The court stated that it had presided over the child's "lengthy neglect case" and that the mother had never complied with services. The court said that the "visits were going badly" and that the child was "well situated and happy". The AFC advised the court that the adoptive parents provided very good care for the child who had special needs. The lower court did not allow the birth mother's attorney to even speak until after the court had already dismissed the petition. When the mother's attorney objected to the failure to hold a hearing, the court stated that it was very familiar with the mother's history and that waiting so long to bring an enforcement proceeding was not in the child's best interests.

Although the statue does not mandate a hearing, the lower court erred in not holding one. While the lower court alluded to other proceedings with the birth mother, the court did not state the specific facts it based its decision on. The appellate division could not properly review the matter. Also information the lower court has that would have been relevant at the time of a termination, may not be relevant years later as it relates to the current visitation question. The fact that the child is special needs or is currently well cared for does not necessarily determine if it may be in his best interests for visits with the birth mother to resume.

There was a dissent. The dissenting Judge indicated that the trial court should not be required to hold a hearing when it had so much information about the child and the parent. A PACA does not confer on the parent an absolute right to visitation after an adoption and it is up to the court to determine if contact is in the child's best interests. The lower court had presided over 5 prior neglect proceedings regarding this mother and had terminated her rights to 2 other children. At the time this petition was pending, the same court has before it a permanency hearing regarding another child who had recently been freed for adoption and a neglect proceeding regarding the mother's newest child. The lower court was very familiar with this mother, this child and the circumstances of the surrender. There was no controversy that the mother had not seen the subject child, who was now 7 years old, since he was 4 years old. The court can take judicial notice of all of its prior proceedings and orders. The AFC supported the dismissal and the court knew of the disruptive history the mother had as it related to visitation issues.

Matter of Kimberly J.G., __AD3d___, dec'd 12/17/14 (2nd Dept. 2014)

Westchester County Family Court dismissed a birth mother's petition to reinstate her parental rights to her two children under FCA §635. The Second Department affirmed. The older child was over the age of 21 and therefore no longer under the jurisdiction of family court and the younger child had been adopted – the statutory conditions for reinstatement were not met.

SPECIAL IMMIGRANT JUVENILE STATUS

Matter of Miquel C.N., 119 AD3d 562 (2nd Dept. 2014)

Nassau County Family Court was reversed on appeal to the Second Department. The court erred in dismissing a petition for SIJS predicate findings for a child from Honduras. The child has been neglected and abandoned by his father and therefore reunification with the father is not a viable option. The fact that the mother did not neglect or abandon the child is not relevant as the law only requires that one parent be not viable. All other requirements of predicate SIJS findings were met.

Matter of Jorge A.V.G., 119 AD3d 566 (2nd Dept. 2014)

The Second Department reversed Nassau County Family Court for dismissing a petition by a mother and a great aunt to be made co-guardians of the mother's child without a hearing. A mother can be made a guardian of her own child. A hearing is needed to determine if that would be in this child's best interests.

Matter of Gabriela Y.U.M., 119 AD3d 581 (2nd Dept. 2014)

Nassau County Family Court's refusal to grant SIJS predicate findings to a child from El Salvador was reversed. Her mother was deceased. Her father had not supported her nor did her father's wife want her in the home, resulting in her being moved around to various relatives where she was abused by multiple caretakers. The child cannot be reunified with either parent and all other requirements are present.

Matter of Luis R v Maria Elena G., 120 AD3d 581 (2nd Dept. 2014)

The Second Department reversed Nassau County Family Court's refusal to make SIJS predicate findings on a young man from El Salvador. The child's father is deceased and therefore the child cannot be reunified with his father and all the other requirements are present. Since the law only requires that reunification with one parent is not possible, it is not relevant if the child might be able to be reunified with the mother.

Matter of Marvin E.M. de P., __AD3d__, dec'd 10/15/14 (2nd Dept. 2014)

The Second Department affirmed Nassau County Family Court's dismissal of a motion for special predicate findings for SIJS status of a youth from El Salvador. The petitioner, the child's aunt did not prove that reunification of the child with his parents was not viable.

RELEVANT MISCELLANEOUS MATTERS

Matter of William O v Michele A., 119 AD3d 990 (3rd Dept. 2014)

The Third Department reversed and remanded a private visitation case from Chemung County Family Court. A father sought custody of his youngest child who, with two older siblings had been placed in the custody of the maternal grandparents. The father had been incarcerated for failing to register as a sex offender in NY after having been convicted of endangering the welfare of a child in NJ in 1994. He had engaged in sexual intercourse with two teenage girls when he was 20 years old. The court denied the request for custody and awarded supervised visitation but without a hearing. The court also conditioned any future custody modification petitions on the father completing sex abuse offender treatment.

The father was denied effective assistance of counsel. He was represented by an institutional provider but 5 different lawyers from that provider appeared for him at the 9 different court appearances. The attorneys were not always familiar with his case nor were they always prepared. The father would speak extensively on the record and his counsel would say little. The court's ruling was based on its belief that the father was an untreated sex offender but that information came from comments by the AFC. There was no evidence presented on this issue and the father claimed that the information was inaccurate. There was also no evidence presented that any lack of treatment was detrimental to his contact with the children. The lower court should not be relying on the AFC as an investigative arm or as an advisor. Here the court referred to the AFC as the court's "quarterback" and regularly deferred to the AFC's recommendations. The father's attorney failed to object to this improper use of the AFC and failed to object to the court's failure to hold a fact finding. The father's attorney never requested a hearing to determine the issues of the father's alleged failure to obtain sex offender treatment or its impact on the best interests of these children. The AFC also sought a review of the lower court's order on other issues but since the AFC had not filed a separate notice of appeal, those matters were not before the appellate court.

Matter of Samantha I v Luis J. 122 AD3d 1090 (3rd Dept. 2014)

The Clinton County mother of a 13 year old girl brought an Art. 8 petition on the young teen's behalf against a 13 year old boy. The mother alleged that the boy had committed acts of forcible touching and sexual misconduct on the girl. The lower court issued an order of protection for 2 years. The respondent appealed. The Third Department found that the mother had standing to bring an Art. 8 proceeding on behalf of her child. Further the appellate court concurred that the young teens' relationship was an "intimate relationship" within the meaning of FCA §812(1)(e). The 13 year old girl testified that she and the boy had a "boyfriend-girlfriend" relationship since 5th grade that continued on and off through 8th grade that consisted of holding hands, kissing, texting and phone calls. However the young girl testified that he became jealous and controlling by 6th grade when the relationship started to include some sexual touching. She testified that this touching was without her consent. In 8th grade, there was an incident of oral sex which she had reluctantly agreed to, hoping he would leave her alone - and then an incident of sexual

intercourse where she asked him to stop but he did not. The boy did not dispute that these events occurred but argued that the statute was not meant to apply to young persons' relationships. He argued that he was too young to be held criminally responsible for anything that may have occurred between them. The Third Department found that the age of the two persons involved in the relationship did not matter, nor did it matter that they each lived with their respective families and had never lived with each other.

Advisory Committee on Judical Ethics Opinion 13-157

When a "high ranking" county attorney becomes a Judge, he or she should not preside over matters involving the county, its departments and agencies which were pending at the time the Judge was employed at the county. The Judge must also disqualify him or herself from any case that he or she was personally involved in or that lists him or her as the attorney of record.

NYS Citizens Coalition for Children v Carrion __FSupp2d __dec'd 7/17/14 (EDNY 2014)

The NYS CCC sought federal court orders to modify the setting of foster care rates in NYS. The Eastern District of NY granted OCFS' motion to dismiss holding that federal law does not provide a right to a §1983 action. Congress did not intend §1983 plaintiffs to interfere in the statutory scheme for how federal matching funds for foster care payments are monitored under the Adoption Assistance and Child Welfare Act of 1980

Bibbins v Sayegh __AD3d__, NYLJ 8/5/14 (Supreme Court, Westchester County 2014)

In a medical malpractice case concerning the death of a child, the defendant sought a judicial subpoena for the DSS records about the child's death. The Supreme Court denied the request for a subpoena for the records. SSL § 422 (4) does not permit disclosure of CPS records to the defendant who is a Visiting Home Service. While it is true that SSL §422 (4)(A)(e) allows disclosure to a court, this is for the court's own use and the statute does not allow the court to provide the records to someone else. Although the plaintiff father of the deceased child has joined in the motion for the records, his entitlement to the records under SSL § 422 (4)(A)(d) does not then entitle him to redisclose the records to anyone else. The defendant is not entitled to the records under SSL § 422-a as this is a section designed to make a request of a commissioner, not to seek a judicial subpoena.

Jackson v Conway __ F 3rd __dec'd 8/14/14 (2nd Cir 2014)

A Monroe County man was charged with raping his wife, his ex-wife and his 14 year old daughter all in the home they resided in together. He invoked his Miranda right to remain silent once he was brought to the police station. The police contacted Monroe County CPS as it

related to the alleged rape of the teen and the CPS worker came to the police station and participated in interviews of the teen and the ex-wife. The CPS worker then asked to speak to the defendant who was still in a holding cell at the police station. The defendant was taken to a table in the hallway where the CPS worker was sitting. The police officer who escorted him sat around the corner where he was not visible but was within earshot of the conversation. The CPS worker knew that there were criminal charges and knew that the defendant had asked for an attorney. She advised him who she was and the defendant agreed to talk with her. The CPS worker made no statement about his right to an attorney nor did she give him any other warnings. The defendant then gave the CPS worker a very detailed account of his sexual relationship with his wife and his ex-wife and described his version of the events that had occurred that night much of which he had forgotten due to his drinking and use of cocaine that night. As to the allegation he had raped the teen, he denied it but when the CPS worker asked him if it was a "possibility" that he may have been so drunk that he wouldn't have remembered if he raped her, he agreed that this was possible.

The CPS worker was allowed her to testify at his trial to his statements that his rape of his daughter was "possible". This was referenced in the DA's summation as proof that the defendant had raped his daughter that night. The defendant was convicted of 47 various counts of rape in the 1st degree and 3rd degree, sodomy in the 1st and 3rd degree, and other charges and this included the alleged sexual acts with the daughter. The Fourth Department affirmed the convictions disregarding multiple claims by the defense including that the CPS worker's testimony should not have been heard by the jury as it had violated the defendant's Miranda rights. The defendant was ultimately sentenced to 50 years in prison. The defendant then brought a federal habeas corpus proceeding again arguing multiple points but also that the CPS worker was an agent of the police. The Western District Court agreed to that argument as well as others and ordered a retrial. The DA appealed to the Second Circuit.

The Second Circuit affirmed the District Court's decision on several points – including that the defendant's Miranda rights were violated by the CPS worker's interview and her subsequent testimony. The CPS worker knew that the defendant was facing criminal charges and she knew she was going to be required to tell the police anything the defendant said to her. She knew her questions to the defendant could very well elicit an incriminating response. The defendant's rights were violated as he was not informed that anything he said to the CPS worker could be used against him at his criminal trial and the DA should not have been permitted to use the statements made to the CPS worker to secure a conviction. The defendant was granted habeas relief as it related to his conviction for the crimes that related to the child.

Matter of Diane T v Lydia Tamelka T., __AD3d___, dec'd 10/9/14 (1st Dept. 2014)

A Bronx grandmother's Article 6 visitation petition was properly dismissed. She was not eligible for assigned counsel under FCA § 262. The grandmother had only seen the children twice - not enough for the grandmother to have the proper standing required – that of a sufficient existing relationship. It was not in the children's best interests to order contact when she had no meaningful relationship with them.

People v George Smith __AD3d___, dec'd 11/13/14 (1st Dept. 2014)

In a criminal matter, the First Department ruled that it was not error to exclude foster care records of the victim as it related to things that foster parents had said to caseworkers about the victim's untruthfulness. The foster care records were exceptions to the hearsay rule as they are business records given that foster parents are required to report to the caseworker. However, the records themselves were properly excluded as they contained only opinions, conclusions and anecdotal information.

Walker v NYC __F Supp 3rd___NYLJ 12/15/14 (EDNY 2014)

Two parents sued ACS and NYC in federal court for damages in connection with the removal of their children in a 2009 incident. They alleged that their due process rights were violated, that the children were unlawfully seized and that there was malicious prosecution and an abuse of process in the family court proceedings. The District Court granted the defendants' motion for summary judgment. There was no evidence of a municipal policy or custom. The caseworkers involved were entitled to qualified immunity as reasonable caseworkers could have disagreed about the need for family court proceedings and the adjudication of neglect in fact established that there was reasonable disagreement. That that the caseworkers' testimony was not always consistent with the notes taken is not unconstitutional or unreasonable as a caseworker might continue to evaluate prior evidence as new evidence comes to light.

Nolette v Berkshire Farms ___AD3d___, dec'd 12/18/14 (3rd Dept. 2014)

The Third Department affirmed a ruling on a claim allowing a lawsuit to go forward against Berkshire Farms for not properly training and supervising a 27 year old male employee who raped a 14 year old female resident. The employee has pled guilty to rape 3rd degree and was serving a prison sentence of 18 months. Berkshire Farms had received complaints before about the inappropriate contact that the employee had with residents and had failed to act on them. The director at Berkshire disregarded staff concerns of improper conduct and employees were reluctant to report policy violations. The director assigned male counselors to work alone overnight when she knew that there were young female residents who were "highly sexually active".

People v Bailey __Misc3rd___, NYLJ 12/22/14 (County Court, Monroe County 2014)

A Monroe County Court Judge granted a CPL § 440.10 motion and vacated the criminal conviction of a day care provider for murdering a toddler. The defendant had already served 13 years on prison. The medical experts at the initial trial had testified that the child had shaken

baby syndrome. The defendant always maintained that she had not hurt the child but that the child had fallen from a high chair while the defendant was using the bathroom. The court cited a significant shift in medical expert opinion, particularly due to improved medical imaging, that now might well support an argument that the toddler may not have been killed by a shaking incident. Many experts now agree that a fall from a relatively low height where the child hits his or her head can, under the right circumstances, cause death. Further, retinal hemorrhages may occur in other situations and not just with a shaken baby incident as previously thought. The defendant was released from prison and the DA will have to decide if they will appeal the decision or seek to retry the defendant.

Matter of Kwame M v Jennifer A., __AD3d__ , dec'd 12/31/14 (2nd Dept. 2014)

A Queens mother had no standing to appeal a dismissal of a putative father's motion for genetic testing for paternity when the mother's parental rights had subsequently been terminated.