

SELECTED CHILD WELFARE CASE LAW

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REMOVALS and GENERAL ABUSE and NEGLECT ISSUES

Matter of Alexi R.C., 109 AD3d 819 (2nd Dept. 2013)

The Second Department reversed Kings County Family Court's ruling on a FCA §1028 hearing where the lower court had returned a baby to its mother. A neglect petition had been filed against the mother in 2010 regarding a second child. While that proceeding was pending she had a third child and ACS filed a derivative petition on the third child. In 2012, the Family Court found that she had neglected those children and the mother appealed that decision. While the appeal was pending, she had a fourth child and within days, ACS removed that child and filed a neglect petition regarding that child. After holding a FCA § 1028 hearing, Kings County Family Court returned the fourth child to the mother. ACS obtained a stay of that order of return from the Second Department but 4 months later while that appeal was pending, the Second Department reversed the neglect finding on the first two children. Despite the reversal of the first adjudication, the Second Department ruled that the lower court's return of the fourth child on the §1028 petition was in error. The fourth child was at imminent risk and that child should remain in foster care while the petition regarding that child is pending.

Matter of Brandie B., 109 AD3d 987 (2nd Dept. 2013)

ACS moved for summary judgment on a neglect matter in Kings County Family Court based on evidence in the FCA § 1028 hearing in which the father had testified and submitted evidence. The lower court granted the motion but it was reversed by the Second Department. There were questions of fact on the issue of neglect. There was not a prima facie evidence that warranted a summary judgment.

Matter of Trey C., 110 AD3d 575 (1st Dept. 2013)

While Bronx County Family Court correctly adjudicated the respondent as abusive, it erred in entering the order on default. It is not a default matter where although the respondent does not appear, counsel does and counsel states that she has authorization to proceed and is willing to do so.

Matter of Gemiyah T., 111 AD3d 644 (2nd Dept. 2013)

The Second Department reversed Kings County Family Court's denial of a mother's motion to reopen a FCA § 1028 hearing some 6 months after the court had removed her 3 children. The Appellate Court indicated the mother should be allowed to provide the court with newly discovered evidence. The children had been removed after the mother hit the 16 year old in the face, about the eye and with a belt, once while the younger children were present and the other times within hearing distance of them. The teenager was bruised and the mother kept her home from school so that no one would see the injuries. The mother had put makeup on the teen's face to hide bruise when they went to a dentist appointment. She also told one of the younger children to lie about the incident. It was alleged that the mother had mental illness problems which resulted in her using excessive corporal punishment on the children. The mother indicated that she would not cooperate with supervision if the children were returned to her care. Lastly, at the time of the FCA §1028 hearing, the mother submitted to a drug test and it resulted in a positive screen for opiates. The mother claimed that she had recently had surgery on her hand and had been taking Tylenol with codeine for pain. The lower court removed the children on all this evidence. Six months later, the mother indicated that she had a note which corroborated that she had been taking legally prescribed pain medication which would have accounted for the positive opiate test but the lower court denied her motion to reopen the proof. The Appellate Division indicated that since the Art. 10 petition had not alleged any substance abuse problem, the mother had not presented any information about the recent surgery and she should now be allowed to present this evidence at a new hearing.

Matter of Skylar H., 111 AD3d 1285 (4th Dept. 2013)

Jefferson County Family Court did not violate the constitutional rights of the father in this matter when it granted a summary judgment motion that he abused the children at a time when he was not physically present in the court room. The issue was not preserved and the reason he was not present was that he had been incarcerated after being convicted of sexually abusing one of his daughters. This criminal conviction had been the basis for the Art. 10 proceeding. His presence would not have made any difference in the granting of the motion and he was not prejudiced. Further it was not ineffective assistance of counsel for his attorney to not have argued for his physical appearance. Counsel also informed the court that he had permission of the client to go forward in his absence at the dispositional hearing.

Matter of Jennifer R., __ Misc 3rd __, dec'd 11/25/13 (Kings County Family Court 2013)

Kings County Family Court determined that it did not have authority to issue a warrant of arrest for a 16 year old and/or her mother in an Art. 10 matter where the child had left her court ordered foster care and was believed to be living with the mother.

Matter of Arthur G., __ AD3d __ dec'd 12/26/13 (2nd Dept. 2013)

Kings County Family Court ordered a child released to his parents under ACS supervision after a FCA § 1027 hearing. ACS then obtained a stay and the Second Department reversed. The Appellate Court found that due to the child's age and the parents documented history of drug abuse, the child would be at imminent risk if released to the parents while the Art. 10 petition was pending. There were no reasonable efforts that could mitigate this risk.

Matter of Evan E., __ AD3d __, dec'd 12/26/13 (3rd Dept. 2013)

The Third Department reviewed an Ulster County Family Court order which detailed what records and information DSS had to provide to CASA in an Art. 10 matter where the court had assigned CASA. CASA had brought a motion seeking the order claiming that the DSS would not provide records or allow CASA to be in on meetings and had advised foster parents and others not to talk to CASA. The Appellate Division ruled that a Family Court has no authority to order a local DSS to permit CASA to review foster care and CPS records, nor to order that DSS must allow CASA to attend service plan meetings, nor that DSS can be ordered to provide information on the identities of service providers. Under SSL §372 and SSL §422 (4)(A) the lower court had no authority to order DSS to provide its foster care and CPS records to CASA. The Third Department stated that the lower court's order that DSS had to do these things, in effect ordered the DSS to violate the statutory law on confidentiality and would open the local DSS to liability for the violation of such laws. CASA is not a service provider under SSL §422 (4)(a) and cannot obtain records under that section. CASA is not listed as an entity who can receive CPS info under SSL §422 (4)(a) and no foster care information can be revealed without a hearing upon notice to all parties and with the court specifically

ruling that such information is necessary and ruling what specific information is to be revealed.

The Third Department did find that the court had the authority to order that DSS cannot advise foster parents not to talk to CASA however, foster parents will have to follow the legal requirements of confidentiality regarding their foster children should the foster parents choose to talk to CASA.

The Third Department also held that CASA is not a party to Family Court actions and has no authority to appeal any decisions. In this matter, due to the issues involved the Third Department treated CASA's arguments as amicus briefs to the DSS appeal of the Judge's order. In Family Court actions, even where they have been appointed, CASA cannot appear in a case as of right or by permission and cannot file motions. The court had no authority to order that the names of other service providers be revealed to CASA or that other service providers had to provide information to CASA. Service providers have their own confidentiality laws that they must follow. The court had no authority to order that CASA be allowed into service plan review meetings where confidential information will be discussed without the express request of the respondents and without a hearing on the need for CASA to be present. The Appellate Court reversed the lower court's order to DSS to produce records, to allow CASA into the service plan review and to disclosure of service providers and remanded the matter back to Ulster County Family Court for proceedings in compliance with the decision.

NEGLECT

General Neglect

Matter of Janiyah T., 110 AD3d 416 (1st Dept. 2013)

New York County Family Court found that a mother had neglected her daughter by not protecting her from seeing sexually explicit materials and by not obtaining an evaluation of the child after the child exhibited extremely sexualized behavior. The child told CPS that she watched porn videos with the mother on multiple occasions. The child's psychologist testified that the child's extreme sexualized behavior would not occur unless she either learned this, had seen it or had experienced it. The Appellate Court refused to rule on the dismissed count of

excessive corporal punishment as neither ACS nor the AFC separately appealed that dismissal.

Matter of Nassau County DSS __ Misc3d __, NYLJ 9/9/2013 (Nassau County Family Court)

Nassau County Family Court found that two parents neglected their children by exposing them to high levels of lead in the home while the parents were doing home repairs themselves. They ignored numerous warnings that the children had high levels of lead in their blood. The court considered making an abuse finding as it related to the 6 year old given the risk of serious medical consequences for the lead levels in a child of that age, but the petition did not allege abuse and the court choose not to make a finding of abuse based on the due process rights of the parents.

Matter of Jayline R., 110 AD3d 419 (1st Dept. 2013)

The First Department found that a man was a person legally responsible under FCA § 1012 (g) . He lived in the home with the mother and the children for about 9 months and picked the children up from school and baby sat them when the mother worked. He described himself as a father figure to the children and told people he was the children's babysitter when they were all living at a shelter. He neglected the children by being violent to the mother in the children's presence. The children saw them fighting and saw him hit her in the head and choke her which caused the children to be frightened and upset. He forced one of the children to watch a porn movie with him and then threatened the child with a "fake" gun if he told his mother. He was violent to and inappropriate with the children. He refused to accept that his relationship with the mother had ended and was obsessive and violent toward her. The court was correct in issuing orders of protection that he stay away from the children until each of their 18th birthdays.

Matter of Joel S., 110 AD3d 442 (1st Dept. 2013)

The First Department concurred that a Bronx man had neglected his children. He sold drugs out of the home and refused to participate in a drug treatment program. He threw the mother and the children out of the home on several occasions. He admitted to at least one act of domestic violence in that he choked the mother and

even if, as he claimed the children were not in the home when that event occurred, he did admit to other neglectful behaviors.

Matter of Destiny M., 110 AD3d 438 (1st Dept. 2013)

The First Department reversed a neglect adjudication from New York County Family Court. The mother was unaware she was pregnant when she gave birth. The baby was healthy and the mother when to the hospital immediately to obtain treatment for the baby. Although her judgment was impaired immediately after the unexpected birth which resulted in the police being called to the hospital, she provided a reasonable explanation based on her medical conditions and her weight as to why she did not know she was pregnant. There was not sufficient proof that the child would be at substantial risk of neglect if released to the mother.

Matter of Niya Kaylee S., 110 AD3d 460 (1st Dept. 2013)

New York County Family Court correctly determined that a mother had derivately neglected a newborn child based on prior neglect findings regarding her 2 and 4 year old children. These findings had been entered less than a year earlier. Although the mother was no longer in an abusive relationship, she still had no income source, no medical care and unstable housing. She was currently residing in her grandmother's home. Her grandmother's agreement to house and support the child for "a while" until the mother could obtain public assistance and move to a shelter was not sufficient proof that the neglectful conditions didn't still exist.

Matter of Cevon W., 110 AD3d 542 (1st Dept. 2013)

The First Department affirmed a New York County Family Court's adjudication of neglect. The mother neglected her special needs son by using excessive corporal punishment, failing to exercise a minimum degree of care and engaging in inappropriate actions at a parent teacher conference. One incident of neglect where the parent's judgment was strongly impaired and exposed a child to a substantial risk of harm can support a neglect finding. The daughter was derivately neglected.

Matter of Nicolette L., 110 AD3d 1250 (3rd Dept. 2013)

Schuyler County Family Court found that a mother and father had neglected their daughter and gave physical custody of the child to an aunt. The father appealed the neglect finding against him as well as the placement with the aunt and the mother appealed the placement with the aunt. The Third Department affirmed the adjudications and the custody order but modified the visitation. There had been prior court proceedings regarding this child and the parents had obtained legal custody of the child after the child lived with a grandmother for some time. The order of custody, however, required “strict compliance” with terms particularly as it related to the father’s mental health and substance abuse. DSS brought neglect proceedings against the father and mother and the aunt filed for Art. 6 custody. The father argued that the lower court erred in refusing to sever the hearings on the neglect matters. He argued that the mother’s admissions prejudiced the court in his case. But the lower court had ruled that it would not consider mother’s admissions in the case against the father and “scrupulously abided” by that.

The child had made out of court statements that she found her father asleep on the kitchen floor and could not wake him. The next day, the caseworker arrived unannounced and found the father erratic, belligerent and smelling of alcohol. He admitted he had been drinking. The father’s testimony was inconsistent and contradictory but he did admit using alcohol on at least two occasions when the child was in his care as well as marijuana. Other witnesses said he used alcohol and drugs in their presence. A court ordered evaluation by a psychologist found that the father was bipolar with psychotic features and narcissistic elements. He was delusional and alcohol dependant. Although the father attended mental health sessions, he did so only because he was court ordered to do so and made little or no progress. He appeared to be intoxicated at one session. He would not follow through with a psychiatric evaluation and would not take any medications. His behavior neglected the child.

The placement of the child in the Art. 6 custody of the aunt (physical custody, as the court awarded joint legal custody to the mother, father and aunt) was proper. The standard is best interests and such an order is not a de facto termination of parental rights. The child and the aunt had a close bond and this placement would allow the child to reside near the area where she had previously lived with her grandmother. However, the court erred in giving the aunt the authority to determine visitation. Although flexibility in visitation is appropriate in some instances a set schedule is needed where the parties do not cooperate well. The

court cannot delegate its authority to determine visitation to the aunt who has a strained relationship with the parents. The case was remitted to determine a visitation schedule.

Matter of Hannah U., 110 AD3d 1258 (3rd Dept. 2013)

The Third Department reversed a neglect finding on a Clinton County mother who was alleged to have neglected her children by allowing the father, a known sex offender, to reside in the home. Previously the Third Department had reversed the finding against the respondent father based on *Afton C* grounds. (**Matter of Hannah U. 97 AD3d 908 (3rd Dept. 2012)**) Simply being a registered sex offender and living in a home with children is not sufficient to demonstrate that they children are being neglected. The court ruled it was illogical to conclude that the children were neglected by the mother for letting the father live there when the court had already ruled that it was not neglect on the father's part to live with the children.

Matter of Dante W., 110 AD3d 1400 (3rd Dept. 2013)

A Delaware County father was incarcerated after an incident where he punched the back window of the mother's car causing glass to shatter onto the child. He pled guilty to aggravated harassment in the 2nd degree and criminal contempt in the 2nd degree and was serving a 1 to 3 prison term. There had been prior domestic violence incidents and an order of protection. DSS then filed an Art. 10 petition and the father appeared by telephone from prison and was represented by an attorney. The father consented to a resolution of the Art. 10 petition and the court entered a dispo order. The father then appealed. There is no appeal on an order that was consented to and the father had not moved to vacate the order or withdraw his consent in Family Court.

Matter of Arianna S., 111 AD3d 461 (1st Dept. 2013)

The First Department reversed a neglect finding from New York County Family Court. Since the lower court had indicated that it could not determine if the mother had used excessive corporal punishment or not and this was the only allegation in the petition, the court cannot adjudicate neglect. The court cannot base a neglect adjudication on incidents not alleged in the petition unless the respondent is given

reasonable opportunity to prepare an answer. In any event, there was not enough evidence that the children were impaired or at risk of impairment due to the mother's financial and emotional stress.

Matter of Alexander C., 110 AD3d 1067 (2nd Dept. 2013)

Suffolk County DSS moved for summary judgment where a mother had pled guilty to reckless endangerment in the second degree based on the acts alleged in the Art. 10 petition. The lower court adjudicated neglect and the Second Department concurred. The other children were derivatively neglected.

Matter of Liarah H., 111 AD3d 514 (1st Dept. 2013)

New York County Family Court was affirmed on appeal. An 18 year old mother neglected her daughter by smoking marijuana in the child's presence and drinking to the point of blacking out on one occasion. The mother had become so intoxicated that she was psychiatrically hospitalized for an alcohol induced mental disorder. The mother refused services for substance abuse or mental health although she admitted that she had been diagnosed with bipolar disorder several years earlier and that she did not take her meds. She claimed that when she used drugs or alcohol, she left her child under proper supervision by others. However, the child was present on some occasions when the mother abused substances. One of the caretakers was the mother's grandmother who had psychiatric hospitalizations due to a failure to take her meds.

Matter of Justus G., __ Misc3d __, dec'd 11/18/13 (Suffolk County Family Court 2013)

A Suffolk County mother had conceived a child while the mother worked as a federal corrections officer after having sex with a prisoner who had been convicted of murder and sentenced to death. She knew that he would not be able to care for the child due to his pending execution. She also knew that she would not be able to care for the child due to her own likely incarceration for her behavior. She knew that the child would suffer emotionally and be stigmatized regarding the circumstances of his conception. She used cocaine during her pregnancy, drove

with intoxicated with the child in the car and brought the child to the prison to visit the father. The mother was facing federal charges for her behavior. These actions constituted neglect of the infant.

Matter of Arique D., 111 AD3d 625 (2nd Dept. 2013)

A Richmond County mother neglected her 6 children although since two of them were now over 18 years old, they are no longer subject to the order appealed from. The mother and the father struck two of the children on more than one occasion. Out of court statements were made by the victim children as well as confirming statements by children who witnessed the events. There were personal observations of injury by the caseworker. The mother also failed to provide adequate food to two of the children and failed to supervise one of them. It was proper to take judicial notice of prior excessive corporal punishment neglect adjudications against both the mother and the father. The father lacked credibility when he denied the acts.

Matter of Lebraun H., 111 AD3d 1439 (4th Dept. 2013)

The Fourth Department reversed an Erie County neglect adjudication and remanded the relevant companion custody matter. The child was in the joint custody of the paternal and maternal grandmothers. DSS filed a neglect petition against the paternal grandmother. The maternal grandmother then filed an Art. 6 modification petition seeking sole custody. The lower court granted both petitions and the appellate court reversed. DSS failed to prove by a preponderance of the evidence that the paternal grandmother had neglected the child. The allegation was that the respondent grandmother had been “dismissive” when the subject child told her that an 8 year old cousin had sexually abused her. There was no proof provided that in fact there had been any sexual abuse. The court cannot find neglect on the possibility of theoretical future harm in that somehow the child would in the future be reluctant to report an concerns of abuse. Since there was no neglect, there was no basis to modify custody. However, it is now not in the child’s best interests to continue joint custody where the two grandmothers have an acrimonious relationship. The child basically lived with the maternal grandmother and not the respondent grandmother and the relationship with the respondent grandmother is now strained and so sole custody to the maternal grandmother is

appropriate. It was not necessary for the court to require visitation with the respondent paternal grandmother to be supervised.

Matter of Hannah L., __ AD3d __, dec'd 1/3/14 (4th Dept. 2014)

Erie County parents neglected their 7 children. The children's out of court statements cross corroborated each other that the parents would engage in acts of domestic violence in front of the children. The parents did not testify on their own behalf. The parents routinely left the 10 year old child – the oldest – in charge to supervise and discipline the younger 6 children. The parents coerced the children into lying to the CPS investigators. The children were in distress due to their home environment and the condition of all the children was in imminent danger of becoming impaired due to the parents' pattern of inattention to safety.

Substance Abuse

Matter of Sarah A., 109 AD3d 467 (2nd Dept. 2013)

The Second Department affirmed a Queens County Family Court determination that a father neglected his children by selling drugs from the home. He also possessed prescription drugs, cocaine and marijuana in multiple quantities and kept them in places accessible to the children.

Matter of Jamie V., 110 AD3d 481 (1st Dept. 2013)

A New York County father neglected his child by dealing drugs out of the family apartment. The father had admitted to this behavior outside of court and his failure to take the stand allowed the court to draw the strongest inference against him. The fact that the child was not present in the home for a week before the search warrant was executed is not a defense.

Matter of Darrell W., 110 AD3d 1088 (2nd Dept. 2013)

The Second Department affirmed Westchester County Family Court's adjudication of neglect by a mother. The mother had one positive drug test and there was evidence of repeated misuse of drugs and no participation on a regular basis in a treatment program. This established a FCA §1046 prima facie case of neglect and the children's specific risk of impairment need not be proven.

Matter of Michael T., 111 AD3d 750 (2nd Dept. 2013)

A Queens County mother neglected her 5 year old when she used morphine, for which she did not have a prescription, along with alcohol and then fell asleep for over 17 hours. She failed to pick up the child at day care and left him at the day care overnight - some 18 hours beyond her pick up time - with no notice to the day care providers. She failed to respond to the day care's repeated attempts to contact her.

Matter of Angela M., 111 AD3d 940 (2nd Dept. 2013)

The Second Department determined that the Suffolk County Family Court properly found that a mother had neglected her children. The DSS proved that the mother repeatedly used cocaine and this established a prima facie case of neglect as per FCA §1046 (a)(iii). There does not need to be proof of a specific parental conduct toward the child or evidence of actual impairment. The mother in fact admitted to using cocaine on more than one occasion when she was caring for the children. She did not rebut the presumption.

Matter of Stevie R., 111 AD3d 1078 (3rd Dept. 2013)

A Cortland County father neglected his two children due to his and the mother's drug abuse. The first child was born positive for opiates and amphetamines and was placed in foster care and the father and the mother were ordered to obtain substance abuse evaluations and treatment. The Third Department had affirmed that first finding. The mother then gave birth to a second child who also tested positive for opiates and amphetamines. In the same month the father was found driving a vehicle with drug paraphernalia in it. The father neglected the second child and violated the dispo order on the first child. The father was aware that the

mother had tested positive in the first child's birth, he lived with her during the second pregnancy and was her sole source of support. He and the mother were with a known drug dealer when they were arrested for possession of a controlled substance. He was not ignorant of mother's long standing drug problems and therefore he neglected the second child. He further willfully violated the dispo order for the first child. He had not completed the drug treatment recommended.

Matter of James D.D., 111 AD3d 1337 (4th Dept. 2013)

Yates County Family Court was affirmed on appeal regarding a finding that a mother had neglected her children. She did not acknowledge, confront or adequately address her husband's repeated misuse of alcohol to the point of intoxication and his aggressive behaviors. The mother failed to preserve her argument that the AFC should not have been requested to offer an oral "report" to the court and in any event, that was harmless error.

Matter of Tyler J. 111 AD3d 1361 (4th Dept. 2013)

The Fourth Department reversed Steuben County Family Court's dismissal of a neglect petition at the close of the DSS case. The petition had been against both the mother and the stepfather but the DSS only appealed the dismissal as it related to the allegations that the mother misused alcohol. The Appellate Court found that the DSS had proven a prima facie case of neglect and that the matter should be remitted. The 16 year old child testified that his mother drank beer every day, often all day and all evening. The younger child told the caseworker that the mother started drinking when he went to school in the morning and would still be drinking when he went to bed. Under FCA §1046 (a)(iii) this behavior established a prima facie case of neglect. The mother is ingesting alcohol to the extent that it would ordinarily have the effect of a substantial state of intoxication. The lower court did not abuse its discretion to preclude the testimony of a witness that DSS had not indentified in response to the respondents demand for a list of witnesses.

Matter of Denis F., Jr., __AD3d__, dec'd 12/4/13 (2nd Dept. 2013)

A Suffolk County father neglected his children. The mother testified that while the children were visiting the father, his speech was slurred, his eyes were bloodshot, he was unsteady and he smelled of alcohol. The father had had multiple alcohol related arrests and in the past had misused alcohol when the children were present. The court ordered that the father attend a parenting program and undergo a substance abuse evaluation.

Matter of Orlando R., __AD3d __, dec'd 12/19/13 (1st Dept. 2013)

A New York County father knew or should have known that the mother was abusing drugs and not properly caring for the children and therefore he also was neglectful. He did not use drugs himself but knew of the mother's drug abuse. He had the pregnant mother reside in a home where he knew there was drug use going on. The couple was otherwise homeless. This environment contributed to her relapse during the pregnancy. The father was incarcerated intermittently and that also contributed to his failure to exercise minimum care to ensure that the mother was not using drugs during the pregnancy.

Domestic Violence

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

The First Department affirmed a Bronx County adjudication that a mother neglected her child. There was an extensive history of domestic violence between the parents. In one incident the child saw the father break down a door and hit the mother and the child told the father to "stop". The mother repeatedly exposed the child to the risk of seeing violence as she allowed the father to reside with them or visit them although there was an order of protection in place. The child gave out of court statements about what had been witnessed and the mother also made admissions. The mother did not preserve arguments about the admission of a domestic incident report.

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

An Erie County mother neglected her children where they were exposed to domestic violence. The children were 8 and 9 years old and the police had been

called to the home on “numerous occasion” for domestic violence. Most recently, the police arrived to find a “trail” of wet blood from the hallway into the apartment where they observed a “huge puddle” of blood as well as mother’s boyfriend with a bloody arm and observed a hunting knife with fresh blood on it. The mother was unharmed. The police testified that both the mother and the boyfriend were intoxicated. The children were in the bedroom with the door open and were awake and watching TV. Although the children said they has slept through the incident, they described being traumatized by all the blood and by being forced to clean up the blood. The children described seeing other prior acts of violence. The mother did not testify and the strongest possible inference can be taken against her. The children were placed in the custody of their half sister over the objection of the mother but that was not an issue in contention given that the mother later consented to the children remaining with the half sister.

The court did err in admitting the police records as the certification attached to the records did not have the required photocopy of the delegation of authority signed by the head of the agency and by the employee who was certifying the records as to the delegation of authority to certify. This is specifically required under FCA §1046 (a)(iv) .

Matter of Lydia DD., 110 AD3d 1399 (3rd Dept. 2013)

Broome County Family Court dismissed an Art. 10 petition regarding a father alleged to have used domestic violence against the mother. The AFC appealed the dismissal but the Appellate Division concurred that DSS had not proven neglect against the father. The only proof provided was the testimony of the caseworker about what he had been told by the mother. The caseworker had no personal knowledge of what had happened and no other evidence was offered. This is not sufficient evidence to make a finding against the father. DSS had not filed a notice of appeal but filed a letter to the court and the Third Department declined to consider the letter given that no appeal had been filed by DSS.

Matter of Angie G., 111 AD3d 404 (1st Dept. 2013)

The First Department affirmed a Bronx County Family Court’s adjudication of neglect regarding a father. The father had a pattern of violence toward the mother. The children’s bedroom was near the kitchen of the shelter where the family lived

and this is where the physical and verbal fighting occurred, placing the children at imminent risk of emotional and physical impairment. There was a prior adjudication of neglect and he had also pled guilty in criminal court to threatening the mother with a fire extinguisher. The children were placed with the mother under the supervision of ACS and the father was ordered to receive services.

Matter of Shakil G., 110 AD3d 572 (1st Dept. 2013)

A New York County father neglected his two children by engaging in domestic violence with one child's mother and that child's older sister as well as one of the subject children. This occurred in the youngest child's presence. The oldest child became so frightened that he hyperventilated and had to be taken to the emergency room. The older child gave out of court statements and testified in court as did the sister. The emergency room records also corroborated what the children indicated. The youngest child was derivatively neglected based on the father's impaired parental judgment creating a substantial risk of harm to any child in his care.

Matter of Amodea D., ___ AD3d ___, dec'd 12/27/13 (4th Dept. 2013)

A Genesee County father neglected his children when he kicked the mother in the face and choked her in the presence of one child and with the other child nearby. The child who witnesses the incident told the caseworker that he was "very sad and scared" when she saw her mother's bloody face. Both children told the caseworker that they were afraid of their father.

Parental Mental Health

Matter of Christy S. v Phonesavanh S. 108 AD3d 1207 (4th Dept. 2013)

Oneida County Family Court was affirmed by the Fourth Department. The father neglected the child's emotional condition in that the father exhibited "bizarre and paranoid behavior" which led to the child being frightened and depressed. The child's out of court statements were corroborated by admissions the father made to

the caseworker. The court properly awarded sole Art. 6 custody to the mother as the adjudication of neglect constituted a change in circumstances since the prior joint custody order. Sole custody to the mother was in the child's best interests.

Matter of Lakshmi G., 110 AD3d 640 (1st Dept. 2013)

A Bronx father neglected his 6 week old infant when he left the baby in the care of her mother given what the father knew of the mother's mental state. The mother had told the father that she had been having hallucinations and hearing voices for more than a year. No reasonable prudent parent would leave an infant with another parent who was in such a conditions. After the father left the baby with the mother, she threw the infant to the pavement as she claimed to have seen a light in the sky with a figure in a chariot which she took to be signs from God that the child was possessed.

Excessive Corporal Punishment

Matter of Matthew M., 109 AD3d 472 (2nd Dept. 2013)

Kings County Family Court was affirmed on appeal regarding a mother's excessive corporal punishment of her 8 year old daughter. The mother struck the child with a belt numerous times and there were bruises on the child's back and arms. The lower court did not abuse discretion by denying a motion to dismiss under FCA §1051(c) on the grounds that the aid of the court is not necessary. Although the mother had completed parenting skills and anger management programs, supervision was still needed and the incident was not an isolated one and the mother was still in individual counseling.

Matter of Alisia M., 110 AD3d 1186 (3rd Dept. 2013)

The Third Department affirmed the Columbia County Family Court's finding that the child's father had neglected her but remitted on the issue of the details of the order of protection. The child visited with her father and informed the caseworker that the father hit her approximately four times a month. On one occasion he hit her in the face with the back of his hand with enough force to cause her lip to bleed and swell. She also reported that her father smoked marihuana in her presence.

The father was put under supervision for a year and required to take anger management services, parenting courses and substance abuse counseling. The court also issued an order of protection that prohibited contact except as therapeutically recommended after a review by family court. The visitation would not be reviewed by the court unless it was triggered by a therapist saying it was okay. While the child was neglected, the lower court erred in delegating the visitation issue to therapist.

Matter of Benjamin D., 111 AD3d 434 (1st Dept. 2013)

The First Department affirmed Bronx County Family Court. A mother neglected her children by inflicting excessive corporal punishment. The caseworker testified that one of the children had been hit in the face. After the caseworker had visited, the mother hit the child with metal bed poles. The caseworker not only heard the children's descriptions of the events but saw a scratch on the child's jaw. The child's medical records provided corroboration.

Matter of Jahani K., 111 AD3d 832 (2nd Dept. 2013)

A Queens' mother neglected her child based on excessive corporal punishment. The caseworker testified that she observed welts and scars on the child that were consistent with being hit with a belt or cord. The mother admitted hitting her son with a belt for discipline and the child also reported being hit on a regular basis with a cord or belt. The court properly admitted photos of the child's bruises and certified medical records of the child's examination.

Matter of Ameilla RR., __AD3d__, dec'd 12/12/13 (3rd Dept. 2013)

The Third Department reviewed a matter from St. Lawrence County Family Court and affirmed the lower court. A mother and her live in boyfriend were not able to satisfactorily explain the numerous bruises on the mother's daughter. She had bruises on her hands, feet, ears, eye, forehead and back and a cut to her lip. The doctor who examined her indicated that given the number, size, locations and varying stages of healing, the injuries were more likely the result of abuse rather

than by accidental means. Some of the bruises could have been accidental but others, such as the ones on her ears and fingertips were likely to be non-accidental. The child had told the emergency room nurse that the mother boyfriend had hurt her lip when he pushed her off a chair. The mother and boyfriend gave various and vague explanations for some of the bruises – such as the dog stepping on the child’s feet – and for other bruises they offered no explanation for at all.

The child was placed with her non respondent father and the mother served him with a notice of deposition and a subpoena duces tecum. The lower court properly issued a protective order as the father was a nonparty and there were no special circumstances that would demonstrate that any information the mother wanted from the father could not be obtained from other sources.

Lastly the lower court correctly denied the mother’s motion for the child to have a physical examination, ostensibly to determine there was a medical reason that she would bruise more easily than the rest of the population. There were other ways the mother could have obtained this information regarding the child. She did not provide the child’s medical records to her own expert and the experts who testified for the DSS did not see any reason to think the child had a bruising problem.

Matter of Harrhae Y., __AD3d__, dec’d 12/17/13 (1st Dept. 2013)

The Bronx County Family Court was affirmed that a mother had used excessive corporal punishment on her children. She hit her older son in the mouth with her fist and caused a cut to his lip and swelling to his face. She hit her younger son on the forehead with a wooden candlestick, leaving a gash like injury. The two injuries demonstrated a pattern in which the mother would get angry and lash out at the children. The children made out of court statements. The older child’s teacher and the caseworker testified about the observed injuries visible two days later and took photos. The children did later recant their statements but they did so because they wanted to prevent the adjudication against their mother – her second such adjudication. The AFC argued that the teacher and the caseworker “grilled” the children until they said that the mother hit them. However the teacher testified that she saw the older child’s “fat lip” and thought he was being bullied at school and asked him about the injuries. The caseworker’s testimony did not demonstrate that the younger child was “grilled”.

Matter of Fawaz A., __ AD3d __, dec'd 12/31/13 (1st Dept. 2013)

A maternal uncle in the Bronx inflicted excessive corporal punishment on a child and allowed a baby sitter to do so as well. The child was observed to have bruises on his body which he indicated had been caused by the uncle and the babysitter. The child was placed in foster care and the uncle was ordered to refrain from corporal punishment and attend family and individual counseling.

ABUSE

SEXUAL ABUSE

Matter of Amber A., 108 AD3d 664 (2nd Dept. 2013)

After Suffolk County DSS brought a sex abuse petition against a stepfather, they advised the court that they were withdrawing the petition. The court asked the AFC to inquire about the 15 year old stepdaughter's position and to see if she would want the AFC to file a petition. Thereafter, the AFC did file a petition and the court held a fact-finding and a dispositional hearing on the AFC's petition. The teen testified and the court determined her testimony to be credible and made a finding against the stepfather. The stepfather argued on appeal that the AFC had no authority to file the petition. FCA § 1032 allows the court to direct another person, other than DSS, to file an Art. 10 petition and the court in fact did authorize the AFC to do so. The fact that DSS had withdrawn the petition did not preclude the Family Court from directly the AFC to inquire if the child wanted the AFC to file.

Matter of Dezarae T., 110 AD3d 1396 (3rd Dept. 2013)

Schoharie County Family Court dismissed a sex abuse petition filed against a mother's boyfriend and the AFC appealed the matter but the Third Department agreed that DSS had not proven the case. The 4 year old child alleged that the respondent had touched her under her clothing and told this information repeatedly to several individuals including law enforcement. However, repeated out of court

statements from the child are not corroboration. There was no medical evidence, no testimony from a mental health expert that the child exhibited behaviors of a sexually abused child. While the police investigator testified that he did a “truth versus lie” inquiry of the child, he did not explain any methodology for this and did not discuss if the child’s behaviors fit any profile for abused children. The child may have had an upset demeanor but no expert testimony was provided that linked her demeanor to the sex abuse as opposed to any other trauma the child may have been dealing with as her parents had broken up. The DSS did not file a notice of appeal but submitted a brief and the court will not consider that brief as no notice of appeal was filed.

Matter of Nyrie W., 111 AD3d 402 (1st Dept. 2013)

The First Department affirmed a sexual abuse adjudication from Bronx County Family Court. The child made out of court statements that her father would enter the bathroom while she was showering and tell her she had to wash her private parts only. She said that her father had raped her on 5 occasions. The child’s medical records, which were properly certified and contained the required delegation of authority, corroborated her out of court statements. The child’s siblings also corroborated her out of court statements. The impaired level of judgment as well as the fact that some of the children were in the father’s apartment when he raped the target child, support a derivative finding.

Matter of Alyanna C., 110 AD3d 458 (1st Dept. 2013)

ACS appealed the New York County Family Court’s dismissal of a sex abuse petition but the First Department affirmed the dismissal. The child’s testimony was inconsistent, vague and not specifically detailed when she alleged that her stepfather had sexually abused her. It was not reliable testimony and it did not corroborate her previous out of court statements. The respondents also did not neglect the child. They may not have been appropriate at all times but there was no proof that they failed to provide a minimum degree of care.

Matter of Michael U., 110 AD3d 821 (2nd Dept. 2013)

A Queen's man sexually abused one female child and derivatively abused three other children in the home. The Second Department ruled that the respondent's claim that the court erred in not letting him present evidence that the victim child received certain bank checks is without merit. Documentary evidence cannot be used to contradict a witness on collateral matters solely for the purpose of impeaching credibility. The evidence regarding these checks was remote and speculative. Further, the respondent's argument that the court should draw a negative inference from the fact that the target child exercised her privilege against self incrimination is without merit. The fact that she, as a witness, did not testify on certain matters does not permit the trier of fact to speculate what she would have testified nor does it require an adverse inference. Lastly the Second Department found that the Family Court had not erred in excluding the respondent from the court room when the target child testified. The lower court had reasonable concluded that the child would be emotionally traumatized if she had to testify in front of him. A two way closed circuit television process was used and the respondents attorney was present and cross examined the child.

Matter of Alesha P., 110 AD3d 1461 (4th Dept. 2013)

The Oswego County Family Court correctly determined that the respondent sexually abused his two stepdaughters. The lower court properly determined that the respondent would not be present when the children testified after balancing the interests of the parties and determining that the children would suffer substantial emotional trauma to testify in front of him. Further, the children would be compromised in their ability to give clear and accurate testimony if he was present.

PHYSICAL ABUSE

Matter of Robert A., 109 AD3d 611 (2nd Dept. 2013)

A Suffolk County mother and father appealed abuse findings to the Second Department. The mother's sole argument was that since the abused child was

deceased and he was her only child, the court lacked subject matter jurisdiction. The First Department cited the *Alijah C.* 1 NY3d 375 (2004) decision and dismissed the mother's appeal. The father's adjudication was also upheld. The medical proof was that the child's rib fractures had been inflicted intentionally and that the child was in the care of the parents when he suffered the fractures. The burden shifted to the father to rebut the prima facie case of abuse and he could provide no reasonable explanation for the injuries. This properly resulted in a derivative finding regarding the father's other two children as well

Matter of Jonathan Kevin M., 110 AD3d 606 (1st Dept. 2013)

A Bronx stepfather abused his 2 year old stepson. The child had contusions, lacerations, scratches, 13 bite marks, rib fractures and internal injuries. The marks were fresh – no more than 2 weeks old - and the stepfather admitted to the police that he and the mother had both struck and bitten the child. The examining doctor testified that the injuries could not have been self inflicted. The stepfather provided no evidence to rebut the showing of abuse. The mother did admit to having caused some of the injuries but the stepfather did not offer any explanation for the other injuries. His failure to testify allows for the strongest inference against him and although he had already pled guilty to felony assault in connection with the abuse, his failure to testify would be held against him even if the criminal case had still been pending. The fact that the stepfather had only lived with the child for 8 days when the abuse was discovered, does not preclude the finding that he was a person legally responsible given that he was married to the child's mother and living with the mother and the child. The court had authority under FCA § 1056(4) to issue an order of protection until the child was 18 given that by then he and the mother had been divorced. Further it was proper to order that he would have to have a mental health evaluation before he could petition for any future contact with the child.

Matter of David T.C., 110 AD3d 1084 (2nd Dept. 2013)

The Second Department concurred with Richmond County Family Court that ACS did not prove that a mother was responsible for the death of her 2 month old and therefore did not derivatively abuse of her twin 15 month old sons. The ACS medical expert was board certified in pediatrics and child abuse pediatrics and he

reviewed the autopsy results and the ACS file. He testified that the child suffered a brain contusion within 24 hours before her death when she was in the sole care of her mother. The ACS expert testified that it would have required a “tremendous” amount of force to inflict the infant’s injury and that it was a recent one given the “fresh, new blood” noted in the autopsy report. The mother’s expert was the forensic pathologist who performed the autopsy and she testified that the child sustained the brain injury a few days to one week before her death. No evidence was offered that the mother was the sole caretaker in the period that this expert said the injury occurred. The mother’s expert also testified that she was not able to determine if the child died from blunt force trauma to the head or from accidental asphyxiation due to being placed on her side on the mother’s futon and wrapped in blankets. The mother did not appeal the lower court’s finding that she had neglected the deceased child and her brothers.

Matter of Radames S., __AD3d__, dec’d 12/5/13 (1st Dept. 2013)

The First Department affirmed an abuse adjudication of a Bronx mother. Her 8 month old baby had three separate injuries – two skull fractures and a fractured leg that would not have occurred ordinarily. The mother and the maternal grandmother were the only caretakers. The mother offered no reasonable explanation for the injuries and claimed the child fell in the crib about a month earlier and hit her head on a toy. This explanation was not sufficient to have caused the recent skull fracture or the leg fracture and did not explain the older skull fracture on the back of the head. The two other children were derivately neglected.

Matter of Francini C., __AD3d__, dec’d 12/24/13 (1st Dept. 2013)

A New York County mother abused her daughter by hitting and choking her with a belt. The child’s out of court statements were corroborated by medical records and the testimony of the expert in pediatrics who examined the child. The caseworker also saw the marks on the child. The mother’s claims were inconsistent with the medical findings.

Matter of Joseph P., __ AD3d __, dec'd 12/31/13 (1st Dept. 2013)

New York County Family Court correctly adjudicated a mother to have derivatively abused and neglected her two children based on the severe and repeated abuse of an older sibling that had occurred 5 years earlier. The mother was incarcerated for having physically abused the older boy which left that child brain damaged. While incarcerated, the mother took anger management and parenting classes. However, given the nature and severity of the abuse and the mother's lack of acknowledgement of her responsibility, the younger children, who had not been born when the incident happened, were at substantial risk. It does not matter that 5 years had elapsed since the original finding or that the mother had been caring for one of the children for 9 months without incident. Her parental judgment is still defective. The mother was given an opportunity to testify at the fact findings and she could have acknowledged her crimes against the older brother but choose not to leading to the inference that she still did not accept responsibility.

ART. 10 DISPO ISSUES and PERMANENCY HEARINGS

Matter of Alazaya I.B., 109 AD3d 1147 (4th Dept. 2013)

In affirming an abuse finding from Jefferson County Family Court, the Fourth Department noted that the lower court erred in providing that the visitation with the children that could be modified upon the agreement of the DSS, the children's counselors and the AFCs. Modification regarding visitation should not be delegated but should be the court's determination.

Matter of Monique M., 110 AD3d 814 (2nd Dept. 2013)

Although the Kings County Family Court correctly determined that the mother had abused her daughter and derivatively abused her other children, the matter was remitted as the lower court had failed to hold a dispositional hearing when it had placed the children with the father. The mother's boyfriend had shot the mother in 2008 and an order of protection was issued that ordered the boyfriend to stay away from the mother and the children. The mother admitted that she allowed the boyfriend back in the home while the order of protection was still in effect. After the mother let him back in, the boyfriend sexually abused the 8 year old girl. The

child told her mother that the boyfriend had committed a variety of sexual acts on her but the mother did nothing to stop the abuse. The child's out of court statements to the CPS worker about the sex abuse were corroborated by the boyfriend's guilty plea in criminal court to endangering the welfare of a child. The mother was abusive by not protecting this child and she was derivatively abusive to her other children. However, the lower court did err in issuing a dispo order without holding a hearing. The mother was not permitted to testify, no evidence was adduced and two of the children were released to the father with no evidence provided about alternative dispos. Given that the court refused to let the mother testify at the dispo by demanding an offer of proof, there was the appearance of a lack of impartiality and the matter is remitted before a different Judge.

Matter of Eric W., 110 AD3d 1000 (2nd Dept. 2013)

A Kings County infant was placed in the custody of his aunt after a neglect petition had been brought against the child's mother. The neglect petition was dismissed upon the mother's consent to the custody order to the aunt. The aunt was thereafter the respondent in a second neglect action and the infant was placed in foster care. The aunt defaulted on her neglect petition and the mother filed for Art. 6 custody of the child. The lower court allowed the mother to intervene in the dispositional phase of the aunt's neglect matter and then determined that the child should remain in foster care. The mother appealed. The mother is entitled to appeal as she was granted intervenor status and her requested relief was denied. The mother argued on appeal that ACS should have to prove extraordinary circumstances in the disposition in order to place the child in foster care over the mother's objection. However, the Second Department found that only best interests was the proper test in the dispo given that the maternal aunt had custody of the child at the time of the neglect proceeding. The Art. 6 proceeding that the mother has filed was pending at the time of the appeal.

Matter of Dashawn N., 111 AD3d 640 (2nd Dept. 2013)

The Second Department had reversed a 2012 decision in a permanency hearing in Westchester County, ruling that the mother had been denied her right to counsel in the hearing and remanded the matter for a new hearing in front of a different referee. While that appeal was pending, however, another permanency hearing

was held before the same referee and mother then appealed the second hearing. The Appellate Division ruled that since they had removed the referee , the second order must be reversed and remitted back for a new determination (if necessary as it appeared as though the child may have been freed for adoption in the meantime) before a new referee.

Matter of V. P., 41 Misc 3d 926 (Kings County Family Court 2013)

A foster care agency in Kings County filed an OTSC in Family Court. The agency was seeking an order that the child, who had been placed in foster care with their agency by ACS due to parental neglect, be placed out of state with maternal grandparents and ordering ACS to file an expedited ICPC placement. The mother opposed the child's placement with her parent. The court found that the foster care agency had no independent identity in a neglect proceeding or any right to seek a court order to compel ACS to do anything. They are in fact a "nonparty."

Matter of Angelina L.C., 110 AD3d 793 (2nd Dept. 2013)

A Nassau County mother had been found to have neglected her children in 2007 and then again in 2010. The father had also been found to have neglected the children in the 2010 action. However the court granted the father Art. 6 custody of the children and ordered the mother to stay away except for supervised visitation for a year. On mother's appeal, the Second Department affirmed. The mother had been diagnosed with schizoaffective disorder , bipolar type. She experienced delusions and has disorganized speech. Her mental condition affected her parenting ability. The mother had a lack of insight about her mental health condition. The court appointed forensic psychologist and the AFCs supported that the custody order be modified to provide the father with sole custody. The older children – 12- 17 years old – also stated to the court in camera that they wanted to live with the father.

Matter of Baby Girl Dominique A.E., ___ Misc3d ___ dec'd 11/29/13 (Family Court, Kings County 2013)

Family Court Kings County granted a FCA §1039(b) motion where the mother had a previous termination of her parental rights. The court ruled that a no reasonable efforts motion “shall” be granted where one of the enumerated circumstances is proven. Here there was no triable issue as there was a prior court order of termination of parental right as to this child’s 2 siblings. Once ACS proved the prior TPR, the burden shifted to the mother to proof that providing reasonable efforts would be in the best interest of the child, not contrary to the health and safety of the child and would likely result in reunification and she was unable to proof that.

Matter of Thomas J., ___ AD3d ___ dec'd 12/11/13 (2nd Dept. 2013)

A Queens County mother did not preserve her argument that she did not have a full dispo hearing in her Art. 10 as she did not object when the court said it would immediately proceed to the dispo hearing. She did not request a full hearing and she participated without objection in a informal dispositional proceeding.

TERMINATION OF PARENTAL RIGHTS

ABANDONMENT

Matter of Mariah A., 109 AD3d 751 (1st Dept. 2013)

The First Department concurred with Bronx County Family Court that a father had abandoned his children. His claim that he visited with them “when he was in the neighborhood” and called on birthdays and holidays was nothing more than a sporadic and minimal attempt at a parental relationship.

Matter of Erving BB., 111 AD3d 1102 (3rd Dept. 2013)

The Third Department affirmed an abandonment termination from Madison County Family Court. The mother had placed her son in care on a voluntary

placement agreement when she found herself homeless. She visited him only once about a month after the placement and the DSS filed an abandonment petition after the child had been in care for about 9 months. Even though the mother struggled with housing, transportation, lack of both finances and phone service, there were some points in time when she had housing and employment and it would not have been impossible or unfeasible for her to contact DSS or the child at some point. The DSS did not prevent or discourage her from contacting them or the boy. Diligent efforts need not be proven and a suspended judgment is not an option in an abandonment termination.

Matter of Jazmyne OO., 111 AD3d 1085 (3rd Dept. 2013)

An out of state father abandoned his child. The child was in foster care in Cortland County and the father was determined by order of filiation. He visited the child once about 5 months after being adjudicated. He did not visit again and not at all in the most recent 6 months before the filing of the petition. The one visit he did have was upsetting to the child who did not know him. Another visit was scheduled but he did not show for it. The father filed a custody petition but that was dismissed when he did not appear. He also did not appear at the abandonment hearing although counsel did appear for him. He claimed he sent gifts and cards in the holiday season but the court questioned if this was actually him or his mother who had done so. Since he was not there to testify that he had done it, the court could not determine that he had. Even if he had, this sporadic and limited contact would not defeat the abandonment. Further the father claimed he had been told to await the ICPC process but in fact he had been told at the prior proceeding that he needed to request an ICPC evaluation in his home state. No evidence was presented that he in fact did this.

Matter of Carter A., 111 AD3d 1181 (3rd Dept. 2013)

Cortland County Family Court's termination of a father's rights on abandonment grounds was affirmed. The father had visited twice in the first month of the six month period but did not visit thereafter even though he was offered weekly visits. The two visits were sporadic, infrequent and insubstantial and do not preclude a finding of abandonment. The caseworker tried on multiple occasions to reach out to the father by going to his home and sending messages. The caseworker saw the father at court, on another matter, and urged him to visit and offered to work

around his schedule. He did not send any letters, cards or gifts. The father was incarcerated on occasion but when he was not, the caseworker would often be unable to find him as he did not let the caseworker know where he was living. Although diligent efforts need not be proven in an abandonment, efforts on the part of the worker demonstrate that the father's argument that he was prevented or discouraged from visiting are incorrect. It was not unreasonable for the caseworker to require at one point that the father ask for visits in writing and in any event, that rule was put in place after the 6 month time period. The respondent did not even ask for visitation after the petition had been filed. There was no reason to offer a suspended judgment.

MENTAL ILLNESS and MENTAL RETARDATION TPRs

Matter of Jeremiah M., 109 AD3d 736 (1st Dept. 2013)

Bronx County Family Court was affirmed on appeal in the termination of a mother's rights on mental illness grounds. The psychologist conducted an interview and read the mother's medical records. He concluded that the mother had schizophrenia and that her prognosis was very poor and that she was incapable for caring for the child now and for the foreseeable future. The court was permitted to draw a negative inference from the mother's failure to testify. A separate dispositional hearing is not required in a mental illness termination.

Matter of Kristian-Isaiah William M., 109 AD3d 759 (1st Dept. 2013)

Clear and convincing evidence supported a finding that a Bronx mother's mental illness prevented her from caring for two of her children safely for the foreseeable future. The court appointed psychologist examined the mother for several hours and reviewed her extensive history. The mother suffered with schizoaffective disorder and had been hospitalized numerous times. She was violent, abused alcohol and marijuana and had no insight about her condition. The mother did have two younger children in her care but that was under court supervision and had only occurred for a limited period of time. The addition of more children to the household might cause her to decompensate. The mother's mental illness was chronic and there were periods of relative stability but then periods of instability. The court also found permanent neglect as the agency provided diligent efforts but

the mother would not consent to the disclosure of her records to service providers and refused all services. The children have lived with their foster mother for most of their lives and she wanted to adopt them. That home was loving, supportive and stable.

Matter of Savannah Love Joy F., 110 AD3d 529 (1st Dept. 2013)

The First Department affirmed a mental illness termination regarding a New York County mother. The court appointed psychologist examined the mother and testified that due to her bipolar disorder the mother was unable to safely care for her child for the foreseeable future. The child would be at risk of neglect as the mother lacked insight into the extent of her mental illness. The court properly drew a negative inference against her for failing to call to the witness stand her own treating physician and other counselors after she expressed her intention to do so. A suspended judgment is not a dispositional alternative in a mental illness termination and it is in the child best interests to be freed for adoption. The mother has made no significant progress and the child is bonded with the foster mother that she has lived with for most of her life. The father was not a consent father under DRL § 111(1)(d) as he failed to provide child support or maintain any regular communication with the child or the agency. He is not excused from his failure to provide support because the agency did not ask him to do so.

Matter of Khadijah Destiny H., 110 AD3d 601 (1st Dept. 2013)

Bronx County Family Court's decision to terminate a mother's rights on the grounds of mental retardation was affirmed on appeal to the First Department. The mother's IQ scores were testified to by two court appointed psychologists who indicated that her mental limitation, deficits in academic skills and self-direction resulted in an inability to safely care for the child.

Matter of Dakota F., 110 AD3d 1151 (3rd Dept. 2013)

The Third Department reversed a termination of a mother's rights to her two children ruling that DSS had not proven that she had a mental illness. At first DSS brought a permanent neglect termination and after several witnesses had been called, the court, in a recess, questioned the DSS about the issue of the hearing in view of testimony about the mother's mental health. DSS then withdrew the

permanent neglect petition and filed a mental illness termination. The court then appointed a psychologist to evaluate the mother who opined that the mother did not have a mental condition which prevented her from parenting the children. DSS then relied on the testimony and the report of another psychologist who had evaluated the mother earlier in the case after an order in a permanency hearing. However, the Third Department found that the court erred in allowing the testimony of this psychologist. He had conducted numerous interviews of various caseworkers, counselors and others. Although some of these people also testified as witnesses themselves, others did not and the DSS did not elicit the testimony of the psychologist that the information he obtained, that would otherwise be hearsay, was of a kind accepted in the profession as reliable in forming a professional opinion. Given that and respondent's objection to the testimony as well as the expert's report on hearsay grounds, the court erred in allowing the testimony and the report into evidence. Since this was the only evidence of the mother's mental illness and it was not admissible, the TPR was reversed.

Matter of Christopher B., __AD3d ___, dec'd 12/19/13 (1st Dept. 2013)

A Bronx father had his parental rights terminated on mental illness grounds. The expert testimony from the court appointed psychologist was that he had examined the father twice and reviewed all his records and that he was not able presently or for the foreseeable future to safely care for the child. Although the father did have periods of compliance with his medication, he did not always take his medication and he exhibited symptoms regularly even if he was compliant with treatment.

PERMANENT NEGLECT

Matter of Larice N., 108 AD3d 675 (2nd Dept. 2013)

The Second Department affirmed Queens County Family Court's termination of a father's rights. He permanently neglected the child by continuing to engage in dangerous criminal activity even when the child was in his care. He was not consistent in keeping contact with the child and he was ultimately incarcerated and

deported for his criminal activities. He failed to plan for the child's return despite diligent efforts on the part of the agency.

Matter of Tramel T. V., 108 AD3d 726 (2nd Dept. 2013)

An incarcerated Kings County mother permanently neglected her child. The agency made diligent efforts by meeting with her, keeping her advised about the child's progress and asking her to help plan for the child. The mother failed to provide a realistic living situation for the child outside of foster care and made no plans for the child's care. It was in the child's best interests to be freed for adoption.

Matter of Cayden L.R., 108 AD3d 1154 (4th Dept. 2013)

The Fourth Department affirmed a termination of a Jefferson County mother's rights. They concurred with the lower court that diligent efforts had been offered to the mother including a psychological assessment, therapy sessions for the mother, parenting, budgeting and nutrition education as well as services for the child. The DSS even provided for an in home child psychologist to offer help to her on parenting issues. Supervised and unsupervised visitation was provided. The mother failed to repair the conditions that caused the child to be placed and she was unable to provide an adequate and stable home for the child. She could be patient and caring for short periods of time but was unable to handle him for longer periods. Several experts testified as to the "marked negative change" in the child's behavior when there was increased unsupervised visits. DSS argued that the Appellate Court should also vacate the court's order of post-termination contact but the issue is not before the court as the DSS did not properly cross appeal.

One Judge dissented finding that the DSS had not in fact proven that they offered diligent efforts nor that the parent failed to make needed changes. The dissent noted that DSS never really understood the source of the mother's problems. The DSS treated mother as though she was mentally retarded and believed that the child had mild autism and yet in fact neither of those things really were the issues. Five months after the TPR had been filed, the mother was determined to be bipolar and the expert admitted at trial that the child was not in fact autistic. Since the DSS did not offer services that went to root of the issues with this mother and

son, the services they did offer were not diligent. It was the mother herself who had sought the mental health services which uncovered the true issue – her bipolar condition.

Matter of Jessey Andrews S., 110 AD3d 489 (1st Dept. 2013)

The First Department affirmed Bronx County Family Court's alternative findings that a respondent was not a consent father and that in any event he had permanently neglected the child. He had not lived with the mother, had not supported the children and only provided some small gifts and occasional meals. Alternatively, he had permanently neglected the children. The agency provided him with diligent efforts in that they made numerous referrals for services and he refused them claiming he had already engaged in services in the past which two other children who had been the subjects of termination proceedings. Respondent admitted he had failed to complete the service plans. The foster family wants to adopt the children and have been meeting their special needs in a living and supportive home.

Matter of Nasir Levon L., 110 AD3d 565 (1st Dept. 2013)

A respondent mother did not demonstrate a reasonable excuse or a meritorious defense of a permanent neglect petition to justify reopening a default. She had not completed a mental health treatment program within the one year period in question and did not obtain a discharge report for the program until the day she had to appear in court. The summary stated that she was inconsistent and noncompliant with her treatment and was not interested in obtaining treatment. She had in fact terminated the treatment herself.

Matter of Micah Zyair F.W., 110 AD3d 579 (1st Dept. 2013)

The First Department concurred with Bronx County Family Court that a mother permanently neglected her child. The agency made diligent efforts by referring her to drug treatment and anger management session as well as parenting skills. The

mother did not complete any of the programs and did not visit regularly. She also failed to obtain a safe home for the child.

Matter of Precious D.A., 110 AD3d 789 (2nd Dept. 2013)

The Second Department affirmed Kings County Family Court's termination of a mother's rights on permanent neglect grounds. The agency made diligent efforts by setting up visitation and providing transportation, developing a service plan and referring her to parenting skills, anger management, mental health evaluations and encouraging her to comply and warning her of the consequences if she did not. The mother did not comply with the service plan and failed to visit consistently.

Matter of Joannis P., 110 AD3d 1188 (3rd Dept. 2013)

A Schenectady father's parental rights were terminated and this was affirmed on appeal to the Third Department. The agency offered diligent efforts by meeting with the father, arranging for visits and providing him with updates on the children. The father lost contact with the caseworker for extended periods of time as he was in violation of his probation and not making himself available. The caseworker during this time attempted to send letters, visited his home and called him on the phone. Due to his violation of probation, he was then incarcerated. At that point the caseworker met with him several times to discuss plans for the children and brought the children to the prison for visits. The caseworker also sent him photos, report cards and status updates and explored his sister as a possible custodial option. The sister chose not to go forward. The father failed to make changes in his life by refusing to enter into a treatment facility, resulting in his violation of probation and incarceration. For four months he failed to maintain contact with the caseworker and his only plan for the children was that he would seek their return after he had served his 2-6 year sentence. There was no reason to offer a suspended judgment as the children were thriving with foster parents who wanted to adopt them. Although the father was in fact out of prison by the dispositional phase, he had a long history of relapse and the children had been in foster care prior to this episode.

Matter of Arianna BB., 110 AD3d 1194 (3rd Dept. 2013)

The Third Department concurred with Tompkins County Family Court that both parents' rights should be terminated to their daughter. The child had come into care when she was 11 months old based primarily on parental substance abuse. Diligent efforts were made toward the mother by providing her with numerous substance abuse treatment programs, various forms of mental health evaluations and counseling, domestic violence services and supervised visitation with the child. DSS also provided transportation help and assistance with housing, met with the mother regularly and worked with her in the Family Treatment Court. The mother did visit the child and did attend programs but she frequently relapsed and engaged in criminal behavior. She was unable to remain sober for any appreciable period of time, testing positive for cocaine and marihuana. She violated her probation and served time in jail. She had multiple documented suicide attempts

The father was also provided with diligent efforts, in fact he did not argue that he wasn't. However, he also continued to have issues with substance abuse, criminal activity and domestic violence. He used cocaine and heroin, testing positive right before the filing of the TPR petition. He did not complete mental health treatment nor did he complete programs for domestic violence or anger management. He continued to use violence against the mother, lost his housing and had no stable legal income. He did not testify on his own behalf. Keeping the child in foster care while he continues to attempt rehabilitation is "contrary to the child's best interests and antithetical to her need for permanency"

Lastly the lower court did not err in continuing the hearing on a day when the father did not appear. Defense counsel indicated that the father was ill and could not appear but did not ask for an adjournment and continued to participate in the hearing. When the father appeared on a later date, he did not testify nor did he object to the matter having gone forward.

Matter of Julian Raul S., 111 AD3d 456 (1st Dept. 2013)

The First Department affirmed New York County Family Court's termination of a father's rights to two children. The agency offered diligent efforts by offering drug treatment programs, parenting skills, anger management and domestic violence programs. They set up visitation and therapy and monitored the children's care and

provided for trial discharges. The father did attend and even complete numerous programs but he failed to show that he had overcome his issues with domestic violence and that he could meet the children's special needs. There was a long history of failed attempts to return the children to his home and so a suspended judgment was not proper. The children's therapist indicated that the foster parents provided the children with stability to meet their special needs.

Matter of Jaileen X.M., 111 AD3d 502 (1st Dept. 2013)

A Bronx mother and father's rights were terminated and the termination was affirmed by the First Department. There was clear and convincing evidence of diligent efforts by the agency who had provided referrals for parenting skills, drug testing, mental health evaluations, anger management programs and visitation. The parents failed to submit to drug testing, tested positive for narcotics, failed to complete mental health evaluations and did not address anger management issues. They did not improve their insight into their children's special needs. The children were bruised and scratched when unsupervised visitation did occur. The children were returned to the foster home with stained clothing, reeking of urine and one child had severe diaper rash. The fact that the parents routinely visited the children is not sufficient to preclude permanent neglect. The children should be freed for adoption as the foster mother is equipped to deal with their special needs and they are thriving with her while the parents have no realistic plans to provide a safe and stable home. The children have been in foster care for 6 years and they should not be denied permanency so that the parents can have more time with a suspended judgment.

Matter of Cory N., 111 AD3d 1079 (3rd Dept. 2013)

A Rensselaer County Family Court termination of a mother's rights to three children was affirmed on appeal. The mother's underlying issues were drug abuse and mental health. The DSS offered a "vast array" of services to the mother. These services included: supervised visitation, referrals for substance abuse and mental health evaluations and counseling and treatment. There also were referrals for housing, referrals for drug court and drug treatment, transportation, scheduling assistance, referrals of a cognitive evaluation, a parenting program, employment

referrals and an intensive aftercare and preventive program. The caseworkers regular apprised her of the children's progress, of their special needs and continued to advise her of the need to address and correct her problems so that the children could return to her. The children were in care for over 2 years and the mother failed to obtain adequate housing. She lived in a YWCA apartment and had no plans to locate an apartment suitable for the child to return. She refused caseworker assistance to obtain housing. She was discharged from the intensive preventive program due to missing appointments. She did remain sober and completed many programs that the drug treatment court required but she was in no position to parent the children. There was no real change in her ability to care for the children.

Matter of Kayden E., 111 AD3d 1094 (3rd Dept. 2013)

Otsego County Family Court was affirmed in its termination of the parental rights of the father as well as a derivative abuse finding on a new child. The three older children had been placed in care due to one of them, at two months of age, suffering life threatening injuries which left him a virtual infant for the rest of his life. The Third Department had previously upheld the abuse finding on the father on this matter. The father continued to deny any responsibility for the child's severe injuries. Although the father attended counseling, he continued to refuse to acknowledge that the child had been abused and continued to provide implausible explanations for the child's horrific injuries. This behavior supports the derivate abuse finding on the newest child as well as demonstrates that he had not planned for the three older children's return. Keeping in contact with the caseworker and participating in services is not sufficient given that he refuses to acknowledge the issue that led to the placement of his children. A suspended judgment was not in the children's best interest. He missed visits with the younger child. He had been homeless and unemployed at times and he and the mother accused each other of domestic violence.

Matter of Deime Zechariah Luke M., __AD3d ___, dec'd 12/24/13 (1st Dept. 2013)

The First Department affirmed a termination of a Bronx mother's rights to her children. The mother was incarcerated for assaulting the children and was

precluded by the criminal court order from having any contact with the children. However, the agency did provide diligent efforts by regularly updating the mother on the children's progress and advising her of the service plan requirements. The mother failed to request a required mental health evaluation while incarcerated as the service plan required. She also failed to document services she may have completed in the prison and did not offer alternative resources for the care of the children while she was incarcerated. The mother lacked insight into her behavior and did not accept responsibility for the severe physical abuse of one of the children that resulted in her incarceration. Although the mother has now been released from prison and has recently tried to avail herself of services, she did not make progress toward gaining insight or accepting responsibility. The children had not lived with the mother for four years and have bonded with their respective foster families and want to remain with them. The children's special needs are met in the foster homes. Termination was in the children's best interests.

Matter of Allison Y., __AD3d __, dec'd 12/3/13 (1st Dept. 2013)

The First Department concurred that a New York County Family Court's termination order was correct. The agency offered diligent efforts by arranging for visitation and referring the mother to drug treatment and money management programs and for housing assistance. The mother did not keep appointments and failed to find a clean and suitable home for the child. She was still in single room housing where children were not allowed and was unemployed. She had no school plan or medical care for the child. The child should be freed for adoption by the foster parents with whom the child had been living for most of her life. The casework notes were properly admitted into evidence as they were business records with the proper certification and delegation of authority. The case notes had been admitted without objection and the mother cited no inconsistencies in the case record on the appeal.

Matter of Corey S., __AD3d __, dec'd 12/4/13 (2nd Dept. 2013)

A Richmond County father permanently neglected his son. Diligent efforts were offered by the foster care agency. They provided visitation, referrals for drug treatment and mental health and counseling and advised the father on that he needed to complete the programs and submit to drug screens. The father failed to

cooperate with the drug screenings and then tested positive for cocaine when a hair follicle test was ordered. He failed to complete a mental health evaluation.

Matter of Jalaya A.C., __AD3d__, dec'd 12/4/13 (2nd Dept. 2013)

The Second Department affirmed Queens County Family Court's finding that a mother's rights should be terminated. The mother failed to appear at the fact finding for cross examination and therefore her direct examination was struck. Even though she appeared at the dispositional hearing, the lower court correctly refused to reopen the default fact finding as she did not have a potentially meritorious defense. Even if her direct had not been stricken, the court did not err in finding permanent neglect. The agency had offered diligent efforts by setting up meetings with the mother, reviewing the service plan with her, referring her to substance abuse treatment, assisting her with housing paperwork and setting up visitation. The mother failed to plan. A suspended judgment was not appropriate given the mother's lack of insight into her problems and her failure to acknowledge and address the problems that led to the placement. Since the father did not file a notice of appeal, his brief regarding his termination were not considered.

Matter of Jah'Meir G., __AD3d__, dec'd 12/5/13 (3rd Dept. 2013)

A Tompkins County mother's termination on permanent neglect grounds was reviewed and affirmed by the Third Department. The DSS offered diligent efforts. The caseworker remained in contact with the mother, set up a service plan, arranged for visitation, held family team meetings, visited the mother in her home, set up transportation and referred the mother to programs for mental health services, substance abuse evaluations and housing help. The mother did attend the scheduled visitation regularly but she never obtained safe and stable housing. She lived a volatile lifestyle with difficult people that resulted in unsafe situations in her home and numerous emergency interactions with law enforcement. The mother admitted that she was using marijuana, sometimes daily, and the caseworker smelled marijuana on her but she refused to take a drug test. She failed a drug test on another occasion and would not engage in treatment. She would miss appointments, saying she had forgotten them or saying she had no transportation when she had been given bus passes and calendars with appointments. She did not follow through with mental health treatment and lied to

the caseworker that she had done so. She did not complete parenting classes after being accommodated with individual classes. She was unable to regulate her emotions and would yell and threaten the caseworker staff, sometimes in front of the child. There was no evidence to support offering a suspended judgment even though she had begun mental health treatment as that had occurred only very shortly before the dispositional hearing. She had tested positive for marijuana and cocaine before the dispositional hearing and had given birth to another child who had been removed. She had been charged with several crimes and had a domestic dispute with the father just before the dispositional hearing. She was not complying with the family treatment court rules. The child had been with a pre-adoptive family for almost a year and it was in the child best interest to be freed for adoption even though a great-grandmother had filed for custody. The child was bonded with the foster family and had only seen the great grandmother a few times. The great grandmother had a history of alcohol abuse even though she had been sober for 4 years, and had a prior neglect adjudication regarding the mother and the mother's sister. She had difficulty caring for a child that was still in her home and she did not acknowledge that her drinking had played a part in her caretaking abilities. The Third Department stated "while a family placement with the great-grandmother would have been permissible" under the statute "it was not in the child's best interests".

Matter of Amonte M., __AD3d__, dec'd 12/26/13 (2nd Dept. 2013)

Suffolk County Family Court's termination of a mother's rights was affirmed on appeal. The DSS provided diligent efforts by referring the mother on multiple occasions for substance abuse and mental health programs, providing transportation to those programs and consistently remaining in contact with her via phone and letter. The mother failed to plan by not completing her substance abuse or mental health programs. She tested positive for drugs on one occasion and did not obtain suitable housing. The court can draw the strongest possible negative inference against the mother for failing to testify at the termination fact finding.

Matter of Kelsey R.K., __AD3d__, dec'd 1/3/14 (4th Dept. 2014)

Jefferson County Family Court's termination of both a father and a mother's rights to their two children was affirmed on appeal. Diligent efforts were offered by DSS

in that they helped with housing, set up counseling and visitation. The parents choose other housing and would not allow the caseworker to visit the home after just one visit. They did not make progress in counseling as they continued to deny any responsibility for the sex abuse that had resulted in the placement. Visitation did not go well and the children were stressed by the visits. The father did not preserve his argument that he was limited in his cross but in any event there was no abuse of discretion where the court merely rephrased an overly broad question that was repetitive. Mother's claim that she was not provided with effective assistance of counsel was rejected by the appellate division. It is not ineffective assistance of counsel to fail to make a motion or an argument that has little or no chance of success.

Matter of Jaelyn Hennesy F., __AD3d__, dec'd 1/7/14 (1st Dept. 2014)

The First Department affirmed the Bronx County Family Court's termination of a father's rights. The agency offered diligent efforts by helping the father fill out forms for housing, reminding him of document she needed for housing applications, referring him for parenting skills and anger management and scheduling visitation. The father failed to obtain suitable housing, tested positive for drugs and was arrested for selling drugs at a point in time when the child was with him on a trial discharge. The child had been in foster care nearly her whole life and was well cared for by the foster family.

Termination Dispositions

Matter of Dayjore Isaiah M., 109 AD3d 745 (1st Dept. 2013)

A Bronx mother violated the terms of her suspended judgment. She failed to consistently visit the children, did not participate in therapy and did not obtain suitable housing or a legal source of income. The children had been in the same foster home for three years and the foster mother met their special needs and wanted to adopt them. It was in their best interests to be freed for adoption.

Matter of Ender M. Z. P., 109 AD3d 834 (2nd Dept. 2013)

The Second Department reversed the dispo of two children after the parent's were found to have permanent neglected them. The lower court had granted Art. 6 custody of the children to an uncle. However the Appellate Court found that this was error. The one child had lived with foster parents who wished to adopt and there is no presumption in a termination matter favoring biological relatives over a foster family. Although the law favors keeping siblings together, here the lower court erred in concluding that this consideration outweighed the benefit of the child remaining with the foster family she has resided with since infancy. The child is happy there, bonded and well provided for and it was not in her best interests to move her to the custody of her uncle. The other child also should not have been placed with the uncle without a more substantial basis in evidence. The court did not obtain a full forensic evaluation of the uncle's home for fitness and suitability. The uncle did testify but his wife did not file for custody and was not a party and he resides with his wife. The wife's cooperation with a forensic evaluation of the home would assist the court in determining if the uncle should be given custody of the second child.

Matter of Jesse D., 109 AD3d 990 (2nd Dept. 2013)

The Second Department reversed a Suffolk County Family Court order for a suspended judgment upon an appeal by DSS. The two children, 17 and 14 years old, had been in foster care over 6 years. The father was in and out of prison. In 2010, the Family Court has issued a suspended judgment after a hearing on a permanent neglect petition. The order stated that the suspended judgment would be in effect "for one year from the date" that the father left prison. Two years later, DSS brought a motion to vacate the order claiming that it was illegal. FCA § 633 (b) says that a suspended judgment can only have a year one duration . The father remained incarcerated and the lower court granted that motion and issued a new order after a brief hearing. However, the new order while suspended judgment for only one year, did not contain any terms or conditions and FCA § 633 (c) as well as 22 NYCRR 205.50(b) require that the suspended judgment contain terms. This is so that Family Court can ultimately determine if a parent has cooperated with or violated an order. The matter was remitted for a new dispositional hearing and the Appellate Court commented that a new suspended judgment should not be entered, as opposed to a termination, if it was no longer in the best interest of the children "for whom uncertainty has existed for far too long".

Matter of Anthony Wayne S., 110 AD3d 464 (1st Dept. 2013)

The First Department concurred that a Bronx mother violated the terms of her suspended judgment. She did not stay away from the children's father as was ordered. The father had a history of domestic violence. She also abused alcohol. The children have been in the same foster homes for most of their lives and the foster parents, who met their special needs, want to adopt them. There were no special circumstances that would warrant an extension of the suspended judgment.

Matter of Julien Javier F., 110 AD3d 562 (1st Dept. 2013)

The First Department affirmed Bronx County Family Court's determination that a mother had violated the terms of her suspended judgment. She did comply with some of the terms but she missed some planning conferences and her apartment was unsafe due to mold and gnat infestation. She relapsed in her drug use 6 months into the suspended judgment period. She did not make sure her paramour obtained clearance as she feared it would "hurt her case" and also allowed other friends into her apartment without obtaining clearance. A suspended judgment can be violated even though only some of the terms are disobeyed.

Matter of Azmara N.G. v Jessica Stepahnie S. 110 AD3d 617 (1st Dept. 2013)

A Bronx petitioner sought custody of children who had been freed for adoption. She had failed to appear for a hearing on her custody petition and had sought to reopen the default against her but she did not have a meritorious position. The children needed special medical care and the foster family who wanted to adopt were meeting their needs and providing proper care. The children had lived with the foster family for most of their lives. The petitioner had no real plan to meet the children's needs and she lived with the father of the children's half siblings whose parental rights to those children had been terminated. This man had mental health and anger management problems.

Matter of Victoria XX., 110 AD3d 1168 (3rd Dept. 2013)

The Third Department reviewed a fact pattern that involved proceedings in both Schuyler and Tompkins County Family Court and determined that one freed child had been neglected by his adoptive resources. The court had authority to remove freed children in any event. The Art. 10 proceeding was brought regarding two respondents who had three of their own children and a niece and nephew in their Schuyler County home. One of the children disclosed at school that there was physical abuse occurring. The niece and the nephew were in the home as they had been freed for adoption by Tompkins County Family Court and the respondents, who were their aunt and uncle, had planned to adopt them. Although the children had been freed for some time, there was no petition to adopt filed due to a pending appeal.

The Third Department concurred that there was no requirement to hold a FCA §1027 removal hearing to remove the niece and nephew as those children were still under the jurisdiction of Tompkins County Family Court. Pursuant to SSL § 384-b the court continues to have jurisdiction over children who are freed and have been placed with relatives for adoption and the court can modify its order if not adoption petition has been filed within 6 months. The Appellate Court also agreed that the nephew had been neglected. The child had many issues and was emotionally fragile. The respondents used inappropriate punishments such as restraining him for extended periods of time, slapping him, spanking him, forcing him to take cold showers, and binding his hands and mouth with duct tape. These punishments exacerbated the trauma the child had already suffered. They failed to understand the child's special needs. They would not agree to a higher level of services as recommended by the child's psychotherapist and would not transfer him to a recommended educational program. Their lack of insight into how troubled the nephew was put him at imminent danger to his emotional and mental health. The child was hospitalized shortly after being returned to foster care and still resides in a psychiatric center.

The niece was also placed into foster care. There was no adoption petition and therefore there is authority under SSL §384-b for the court to order the child into care without the need for a neglect action (she had recanted her claims of neglect). The aunt and uncle had not appealed that order. She has now been adopted by a foster family and her issues are therefore moot in any event.

Matter of Sjuqwan Anthony Zion Perry M., 111 AD3d 473 (1st Dept. 2013)

A New York County mother violated the terms of her suspended judgment. She did not obtain suitable housing during the suspended judgment period. She located an apartment after the term of the suspended judgment but intended to live there with the father who abused drugs and refused treatment. There are no exceptional circumstances to extend the suspended judgment. The father was not a consent father as he did not support the child . Adoption by the child's kinship foster mother who he has lived with since birth along with three half siblings is in his best interests.

Matter of Timmia S., 111 AD3d 838 (2nd Dept. 2013)

The Second Department reversed a finding that two Suffolk County parents violated their suspended judgments and remanded the matter for a new hearing. After about 6 months of a suspended judgment and during a court hearing, the Family Court ordered both parents to have drug testing. The father tested positive for marijuana and the mother refused the test. The lower court then revoked the suspended judgments and freed the children for adoption. The Second Department reversed finding that there was no petition alleging a violation and no court hearing on the issue of a violation of the condition that the parents were to be in drug treatment and no hearing on the best interests of the children . The Appellate Division remitted the matter for a new hearing but pointed out that 18 months had gone by while the matter was pending appeal and the suspended judgments had now expired. The parent's present circumstances as well as the children's best interests should be reviewed and a new suspended judgment should not be entered if it is not in the children's best interests.

Matter of Madalynn L., 111 AD3d 1205 (3rd Dept. 2013)

The Third Department reviewed a TPR from Tompkins County Family Court where the mother argued that she should have been given a suspended judgment. The Appellate Division agreed with the lower court that although she had made some progress, a suspended judgment was not in the child's best interests. The mother had just completed a long term in-patient drug re-hab program and was

living in a supportive living program. She had been sober for 7 months and had ended the “volatile” relationship with the child’s father. Visits with the child were going well. However, the mother even described herself as being in “early recovery” and had a history of relapse. She had not yet had her sobriety “challenged” by living outside of the structured living programs. She had pled guilty to a felony larceny charge and was in a diversion program for that. As her visits had been supervised, it was not clear how she would handle the day to day stress of parenting this child. The child has lived with her foster parents since she was 7 months old and has a strong bond with them. The child’s sister has already been adopted by them (the child’s sister was born after this child was already in foster care and the mother had surrendered that child for adoption by the foster parents) The child is thriving in the loving, stable foster home. Despite the progress the mother has made, the lower court’s determination that it was in the child’s best interests to be freed for adoption is supported by the evidence.

Matter of Madelyn D., __AD3d__, dec’d 12/19/13 (3rd Dept. 2013)

The Broome County father in this matter appealed the finding that he had violated the suspended judgment for 5 of his 7 children. He did not contest that he had violated the terms of the suspended judgment but he did contest if it was in the best interests of the children to be freed for adoption. The Third Department agreed with the lower court that termination was in the children’s best interest. The father had a no contact order and was ordered to undergo substance abuse screening and maintain employment and stable housing in his suspended judgment. He did not complete the substance abuse evaluation and he had no identified source of income or stable home. The children had been in care a long time – since 2008 – and the father had been unwilling to do what needed to be done in order to get any of the children home.

Matter of Jada G., __AD3d__, dec’d 1/3/14 (4th Dept. 2014)

The Fourth Department denied a Wyoming County mother’s argument that she had been denied effective assistance of counsel at the hearing which determined that she had violated the terms of her suspended judgment. She did not demonstrate

that there was any actual prejudice. She is only speculating that there could have been favorable evidence offered. The mother did not object to an alleged prior relationship between her attorney and a witness and the witness' testimony was trivial in nature. The court has no authority to remand the matter for an order "winding down" the visitation and there is no authority to order any post termination visitation.

UNWED FATHERS' RIGHTS

Matter of Lynik Jomae E., __AD3d __, dec'd 12/17/13 (1st Dept. 2013)

A New York County father was not a "consent" father. He had not provided a fair and reasonable sum toward the child's support and he did not communicate with the child on a regular basis. He is not excused from this responsibility due to his incarceration. His testimony about prior child support demonstrated that it was in fact inconsistent.

SURRENDER and ADOPTION ISSUES

Matter of Benzin v Kutty 109 AD3d 1175 (4th Dept. 2013)

An Erie County mother filed a petition seeking a modification of her visitation rights in Family Court, while the matter was pending, the father and his wife obtained an adoption order for the stepmother in Surrogate Court. The Family Court dismissed the visitation petition without a hearing. The Fourth Department affirmed the dismissal as the mother has no rights to the child now that the child has been adopted. It appeared from the record that the mother was not noticed in the adoption proceeding in Surrogate Court but Family Court cannot serve as an appellate court to Surrogate Court and the mother would need to seek relief in the court that rendered the order.

Matter of Kaylee O. 111 AD3d 1273 (4th Dept. 2013)

A birth mother sought to enforce the post adoption contact (PACA) provisions in her surrender. The Erie County Family Court ruled that it was not longer in the child's best interests to require visitation. On appeal, the Fourth Department found that the PACA was in fact not enforceable. SSL § 383-c(2)(b) clearly states that the PACA is not enforceable if the court did not approve of the terms and thereafter incorporate the terms in the adoption order. There was no proof that the adoption court had ever incorporated the PACA terms in the adoption order. The Appellate Court also commented that the lower court correctly determined that it was no longer in the child's best interests to have visitation in any event.

Matter of Chasity O., __AD3d __, dec'd 1/9/14 (3rd Dept. 2014)

A Rensselaer father was incarcerated for having stabbed the mother of the subject child when she was 8 months pregnant. The child was in foster care and DSS brought a termination petition against the father. On the day of the fact finding, he signed a judicial surrender. He then appealed, alleging the the surrender occurred under duress and coercion. The Third Department found that the father had counsel, the family court reviewed the terms with the father and informed him of his rights and the consequences of signing the surrender. He stated to the court that he understood his rights and that he had been given ample time to meet with and talk to his attorney. He was specifically asked if he was under the influence of any substance or if anyone was forcing him or coercing him to sign and he said no. He knew what he was doing and the seriousness of it and the irrevocability of it.

SPECIAL IMMIGRANT JUVENILE STATUS

Matter of Hei Ting C. 109 AD3d 100 (2nd Dept. 2013)

The Second Department affirmed Queens County Family Court's dismissal of motion for SIJS findings in a child support case. The child cannot be seen as a child who is "dependent on a juvenile court". The children were siblings in the custody of their father and they alleged that their mother, who also lived in Queens but not with the father and the children, was verbally and physically abusive to

them and that in the past, refused to support the children. The Appellate Court ruled that SIJS requires that there be a showing of the need for “dependency on the court” or that the child was “committed to the care of an individual appointed by state or juvenile court” to ensure that SIJS is not used where children have sufficient family support and stability to seek permanent residence through other procedures; notwithstanding that SIJS may be a shorter route for documentation. Child support cases focus on the parent’s financial obligations to the child and are therefore must more limited in their scope than guardianship, adoption and custody cases where the courts typically make SIJS determinations.

Matter of Maria P. E.A. ., 111 AD3d 619 (2nd Dept. 2013)

The Second Department reversed Westchester Family Court for denying SIJS predicate findings for a 16 year old girl from El Salvador. The child’s mother had petitioned for custody and for SIJS findings and alleged that the child’s father’s whereabouts were unknown, he had abandoned them over 10 years earlier . The lower court had granted the mother custody but refused the SIJS findings as the child was being cared for by her mother. The Second Department found that the abandonment by the father entitled the child to SIJS predicate findings - only one parent needs to be found to have neglected or abandoned the child.

Matter of Karen C., 111 AD3d 622 (2nd Dept. 2013)

Nassau County Family Court was reversed in denying a motion for SIJS predicate findings. The child’s father has abandoned her and reunification with him is not a viable option. The mother did not neglect, abuse or abandon but the SIJS findings only require proof that one parent has done so.

Matter of Marcelina M.G., __Ad3d __, dec’d 10/23/13 (2nd Dept. 2013)

The Second Department reversed Westchester County Family Court and held that a SIJS findings only require proof that reunification is not viable with one parent. This child’s Honduran father had abandoned her. She never lived with him and had no knowledge that he ever provided support for her although she spoke with him by phone sometimes. Her mother confirmed that the father had never been

involved in the child's life, that he abused drugs and alcohol and was violent and never offered to provide any support. The fact that the child's mother was in the USA and was a fit mother did not mean that the court was prevented from making the SIJS predicate findings. The father has abandoned the child. Reunification with only one parent not being viable is all that the law requires. Here the child should not have to face deportation to Honduras, where her father lives, as he has abandoned her and her only relatives there had been neglectful and abusive. She has friends and relatives in the USA that will care for her.

MISCELLANEOUS

Ellis v Burke 108 AD3d 764 (2nd Dept. 2013)

Westchester County Family Court was reversed on appeal in a matter where a father sought Art. 6 custody after obtaining temporary custody under Art. 10. Suffolk County DSS had filed an Art. 10 petition against a mother and the court placed the child in the temporary custody of the father while the Art. 10 was pending. However, while the Art. 10 was pending, OCFS held a fair hearing and "unfounded" the allegations. This resulted in Suffolk County DSS withdrawing the Art. 10 petition. The father then filed an Art. 6 petition alleging a change in circumstances. The Family Court dismissed the father's petition but the Second Department reversed and remitted for a hearing. While living with the father in Westchester County, the child thrived at home and at school. The child has special needs and it would be disruptive to now move him back the mother's home. The father assists in continuing the child's strong relationship with the mother and the AFC supports custody to the father.

Matter of Rasheeda K v Tawana M. and Taarik K., __ Misc 3d __ dec'd 11/25/2013 (Bronx County Family Court 2013)

Bronx County Family Court adjudicated a mother to have neglected one child but dismissed the neglect as to her younger child. The father of that younger child was found to have neglected him and the father was placed under supervision. The younger child had been placed with a paternal grandmother during the Art. 10

proceeding so that the grandmother had been caring for the child from the time he was 16 months old until he was 3 years old. She then brought a custody petition and the Family Court dismissed the petition for a failure to state a cause of action. Although the mother had been found to have neglected the older child and was in violation of the dispo order regarding that child, this did not establish extraordinary circumstances as a basis for the grandmother to seek custody of the younger child. The court found it “perverse” that the mother who had successfully defended herself against the county on the allegations that she had not neglected her younger child would now have to defend herself again in the private custody matter.

Puma-Grippe v City of New York NYLJ 8/29/13 dec’d 8/13/13 (EDNY 2013)

A mother sued NYC and ACS and ACS employees alleging a wrongful removal of her child. Summary judgment motions by the defendants were granted by the federal court. ACS is an agency of the City and cannot be sued independently and there was no proof that NYC or ACS had any policy, practice or custom that resulted in harm to the mother. The claim that the caseworker was not sufficiently trained to identify mental illness did not rise to the level of “deliberate indifference”. ACS did not fail in its determination about the child’s health and safety.

Matter of Nathan F.T., 110 AD3d 820 (2nd Dept. 2013)

The Second Department reversed a Westchester County Family Court’s determination that a father’s attorney had filed a frivolous motion and banned her from submitted a voucher for payment of her work on the motion. The attorney had been assigned to represent a man on a paternity petition. The man was alleged to be the father of a child in foster care due to neglect by the mother. The man admitted to being the father and consented to an order of support. A few weeks later, the man, on his own, filed for custody of the child. He appeared in court unrepresented and then waived his right to an attorney and withdrew the custody petition. His visitation with the child was suspended and two days after that court appearance, DSS filed to terminate his parental rights and the attorney from the paternity matter was then assigned to represent the father. That attorney brought a motion for the Judge to recuse herself. The lawyer argued that the Judge was biased against the father given that she had suspended visitation, obtained an

uncounseled waiver of his right to an attorney and obtained a withdrawal of the custody petition at the same time that the attorney had been representing the father on the paternity petition. The Judge held a hearing and sanctioned the attorney under 22 NYCRR 130-1.1 for making a frivolous motion and ordered that the attorney could not seek payment for her services to the client on the motion. The Second Department found that the lower court did not comply with 22 NYCRR 130-1.2 requirement that the court set forth the reasons why the motion was frivolous and why the sanction was appropriate. The sanction imposed was not authorized by law and the lawyer's conduct was not frivolous.

Matter of Williamson v NYS OCFS __AD3d__, dec'd 12/11/13 (2nd Dept. 2013)

The subject of an unfounded report sought to have his report expunged under SSL § 422 (5)(c) and brought an Art. 78 proceeding after OCFS refused to expunge the matter. The Second Department ruled that the Supreme Court erred when it ruled that the subject had to seek an administrative fair hearing as the law does not allow for a fair hearing. The Appellate Court however ruled that the denial of the petition to expunge was correct as the subject did not present clear and convincing written evidence to affirmatively refute the allegations.

Matter of Omari M v Amanda M. __AD3d__ dec'd 12/12/13 (1st Dept. 2013)

New York County Family Court was affirmed in denying annual visits for an incarcerated father in Washington State. The children were only 4 and 5 years old and the trip would be very lengthy. There was no one suitable to bring them. The paternal grandmother was proffered but she had not spent any time with the children recently. Written correspondence and photos were ordered and the court acknowledged being open to ordering visits in the future if a suitable person could be located to bring the children.

Matter of Dashawn Q., __AD3d__, dec'd 12/26/13 (3rd Dept. 2013)

In a JD case, Sullivan County Family Court made a finding that the reports regarding the respondent child, which would otherwise be sealed by law, were ‘absolutely imperative’ to an appropriate disposition in a pending neglect petition against the child’s mother. The JD had been alleged to have been sexually abusing his younger siblings and the mother was a respondent in an Art. 10 petition alleging that she had not protected the other children from this sibling and another one. Among other issues on review to the Third Department, the Appellate Court indicated that allowing the JD reports to be accessed as part of the mother’s Art. 10 dispo was appropriate.