SELECTED CHILD WELFARE CASELAW

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Margaret A. Burt, Esq.

585-385-4252

Mburt5@aol.com

REMOVALS and GENERAL ABUSE AND NEGLECT

Matter of Martha A., 75 AD3d 476 (1st Dept. 2010)

The First Department reversed New York County Family Court's FCA§ 1028 ruling that three of the mother's five children be returned to her pending an Art. 10 fact finding. The proof proffered at a second § 1028 hearing on an amended petition, filed after the court ordered the children home the first time, was that the mother had a history of not protecting her children from sexual abuse. The 12 year old girl had been sexually abused by a man in his late 20's that the mother had allowed to sleep overnight in the child's room. The 14 year old girl had been sexually abused by her stepfather. The 12 year old and the 10 year old girls had been sexually abused by a family friend. The 12 year old had been sexually active since she was 9 and had been videotaped performing a sexual act on a 14 year old boy. The man who was alleged to have had sex with the 12 year old, had also had sex with the oldest girl – now 19 – and had impregnated her on two occasions when she was 14. The 14 year old indicated that this same man had also touched her and asked for sex. The 14 year old told the mother that her 12 year old sister admitted the man had had sex with her when she was questioned about a "hickey" on her neck. The mother herself had also slept with this man although she knew that he had previously raped and impregnated her eldest daughter at age 14.

This man, who had sexual contact with the mother, two of the girls and attempted contact with a third, also allegedly had a sexually transmitted disease and the mother did not seek medical treatment for any of the children or report the incidents to the police. It was the 14 year old who disclosed what was going on to the police and ultimately caseworkers. The mother indicated she did not want the child's head to be "messed up" by reporting the incidents and that she did not want the children growing up to "hate men". The mother claimed and that she had a good relationship with and trusted this young man who had had sex with 2 of her underage daughter, impregnating one of them twice. The mother's behavior and impaired judgment places the children at imminent risk of harm and then should remain in care until a resolution of the Art. 10 petition.

Matter of Eustace B., 76 AD3d 428 (1st Dept. 2010)

The First Department reversed New York County Family Court's denial of a motion to reopen a neglect matter and the Appellate Court dismissed the neglect

petition. The mother was alleged to have neglected her son due to an incident of domestic violence that the child witnessed. The matter was on for fact finding at 4pm to accommodate the mother's work schedule but at 4 , the mother had not yet appeared. Mother's counsel was present and indicated that the mother was "on her way" from work and asked that the case be called again later. The court denied the request and went forward, made a finding of neglect and thereafter refused a motion to reopen the default. On appeal, the First Department found that under the circumstances the default should have been reopened and further dismissed the petition under FCA§ 1051 c, ruling that the aid of the court was not needed. The lower court had released the child to the mother's custody. The child was a "being raised as a model person and student" and wanted to remain with his mother. The domestic violence incident was isolated and the relationship with the boyfriend had ended. Further the Appellate Court commented that the evidence did not establish neglect in any event since the child being "scared and nervous" during an isolated incident of domestic violence is not sufficient to show that the child's condition was impaired or in imminent danger of being impaired.

Matter of Cristella B., 77 AD3d 654 (2nd Dept. 2010)

A Suffolk County AFC appealed the lower court's denial of her motion for an order that the DSS caseworkers not interview her child client on issues other than safety ones without 48 hours notice to her. Legal Aid in New York City filed an amicus brief. The attorney for the child argued that the county had taken an opposing position in a contested permanency hearing for the child and that letting the caseworker talk to the child in such a situation amounted to a denial of the child's right to counsel. The lower court disagreed as did the Second Department. Rules of Professional conduct only prevent attorneys – not caseworkers – from communicating with represented parties. The agency is entrusted with the child's care and this request by the child's attorney would be a significant restriction on the caseworker. DSS has a constitutional and statutory obligation to a foster child which is significantly different that an attorney or another party in a civil action. The DSS must conduct family assessments and service plans and include children in these discussions. The caseworker is required to have face to face contact with the child within time constraints to assess safety but also well being, permanency needs and to help the child with social, emotional and developmental needs. There is a mandate for the DSS to do more than simply assess immediate safety of a child in foster care and that requires communication with the child.

Matter of Zoe W., 29 Misc3d 1224 (A) (Clinton County Family Court 2010)

In an Art. 10 matter where DSS sought the removal of a baby from her parents after a twin sibling died a few weeks earlier from asphyxia after that infant had been left in a overstuffed chair with a propped bottle of water, Clinton County Family Court found that the DSS had not engaged in reasonable efforts to prevent the surviving child's placement. The court was critical of the agency who a few weeks before the twin's death, responded to an initial CPS report and offered preventive services but did not seek court intervention. The court ruled that the agency did not provide evidence as to why specific types of services were offered at that time and also why specific services were offered later when the twin died.

Matter of Erica B., __AD3d___, dec'd 12/2/10 (1st Dept. 2010)

A Bronx father was appropriately a respondent in an Art. 10 case even though he did not have custody of the children and in fact there was an order prohibiting his contact with the children. A parent does not have to have custody of a child to be neglectful. Here the father knew the mother was not properly caring for the children.

Matter of Sean S., __AD3d___, dec'd 12/7/10 (2nd Dept. 2010)

A Kings County AFC moved to have a specified psychologist examine the child in an Art. 10 proceeding and the court denied his motion. The Second Department concurred that pursuant to County Law § 722-c , there must be proof that the services are "necessary".

Matter of Natalie L., ___AD3d___, dec'd 12/9/10 (1st Dept. 2010)

Bronx County Family Court granted a mother's FCA§ 1028 motion for the return of her child and ACS appealed and the First Department affirmed. ACS did not prove that the child would have been at risk to her life or health if she was returned to the mother. Any risk was eliminated by the lower court's temporary order that the mother and child live in a domestic violence shelter away from the father while being provided services and with ACS making weekly visits. The harm that would

be inflicted on the child by any removal from her mother was appropriately weighed in the lower court's decision.

Matter of Jermaine H., __AD3d___, dec'd 12/30/10 (4th Dept. 2010)

The Fourth Department reversed a Monroe County Family Court's order that DHHS certify a caregiver as an emergency foster home. The child had been removed from the parent and DHHS supported the child being placed in the home of a family friend who was also caring for half siblings of the child. The AFC moved for and the court ordered that DHHS certify the caregiver as an emergency foster home so that she would receive an immediate foster care subsidy for the child. The lower court ruled that FCA § 1017 (2)(a)(iii) gave the court the power to order DHHS to make an eligible person an emergency foster home. The Fourth Department reversed, ruling that 1017, when read in totality, did not give the court authority to order DHHS to make someone an emergency foster home. Neither the statute nor 18 NYCRR 443.7(a) require that DHHS must certify a home on an emergency basis but only require that DHHS certify a foster home in the person is qualified. The court "impermissibly encroached upon the powers granted by section 398 of the Social Services Law" to local districts. Family Court does not have the power to issue an order directing executive agencies to take specific action which is discretionary to them. The child's attorney supported the lower court decision and Legal Aid of Buffalo had also filed an amicus brief.

NEGLECT

Matter of Kevin M.H., 76 AD3d 1015 (2nd Dept. 2010)

A Suffolk County father neglected his children by verbally abusing the mother in front of the children and making unfounded reports about her and her boyfriend to the hotline. He engaged in "obstreperous behavior" which impaired the children or placed them in imminent danger of impairment.

Matter of Gianna C.E., 77 AD3d 408 (1st Dept. 2010)

The First Department affirmed New York County Family Court's adjudication of a father as having neglected his 2 month old child. The father punched the child's

mother repeatedly in the head and face while she was three feet from the baby. The baby had been released from the hospital just days earlier, was lying on a bed and was both on a heart monitor and receiving oxygen.

Matter of Ja'Mes G., 77 AD3d 484 (1st Dept. 2010)

A New York County father neglected his child by engaging in acts of domestic violence against the mother in the child's presence. The child was placed with the mother under ACS supervision.

Matter of Joshua Hezekiah B., 77 AD3d 441 (1st Dept. 2010)

Even though the New York County Family Court had subsequently vacated the order of disposition in a neglect matter, the First Department did not find the issue of the neglect adjudication moot. The custodian of the child was a maternal grandfather who neglected the child by failing to feed him properly such that the child was diagnosed failure to thrive. The grandfather also failed to obtain medical treatment for the infant's condition. Although the lower court had erred by failing to qualify the respondent's pediatrician witness as an expert, this was harmless error as the witness was not competent given that he had only examined the child after the filing of the petition.

Matter of Erica D., 77 AD3d 505 (1st Dept. 2010)

The First Department affirmed Bronx County Family Court's neglect adjudication. The educational neglect allegations were not proved but inadequate guardianship and supervision was established. The mother has an IQ of 50 and the daughter had Down Syndrome with autistic features and needs constant care. The mother's limitations mean she cannot meet the special high needs of her child.

Matter of Christy C., 77 AD3d 563 (1st Dept. 2010)

A Bronx father neglected his daughter by failing to protect the child from the mother who was mentally ill with substance abuse problems that caused her to behave erratically. The agency's argument that the appeal should be dismissed as it is not a final order since the court's order is ongoing through permanency

hearings is not correct as FCA§ 1112(a) allows an appeal as of right from any intermediate or final order in an Art. 10 matter.

Matter of Elijah J., 77 AD3d 835 (2nd Dept. 2010)

The Queens father in this matter neglected his children due to a pattern of domestic violence against the mother.

Matter of Amelia W., 77 AD3d 841 (2nd Dept. 2010)

Richmond County Family Court was affirmed in its adjudication that a mother had neglected her three children. The mother knew that her boyfriend had inflicted excessive corporal punishment on two of the children in the presence of the third and knew that he had been ordered to stay away from the children in an order of protection. The mother had also been ordered to move the children out of the boyfriend's home. However, three weeks after the order, the mother moved back into the home with the boyfriend. The appeal in this matter was not moot even though the court had issued a suspended judgment in the disposition of this matter as the order was silent as to the legal consequences of the expiration of the period of suspension and so that judgment of neglect did not expire.

Matter of Kaleb U., 77 AD3d 1097 (3rd Dept. 2010)

Columbia County Family Court was affirmed by the Third Department in its decision that a mother and her fiancé had neglected her son. The child, who has leukemia, was placed in the care of his father and visitation for the mother was supervised. The finding was based on an evening where the mother was intoxicated and engaged in bizarre behavior in a moving car. With the child in the back seat watching, the mother hung out of the car window, singing and yelling and she hit her fiancé in the face when he tried to restrain her. The child was upset by this. Later the mother punched the fiancé and gave him a black eye and a bloody nose and although the child did not witness this, he was aware of it and frightened by his mother's behavior. On another occasion the child was present when the mother and the fiancé were arguing and began to choke each other in the child's presence. The child attempted to intervene and told the fiancé to "let go of my mommy". The child made out of court statements that indicated that the

mother had aggressive behaviors, often after drinking. She had a tumultuous relationship with the fiancé. Given the child's special vulnerability, the mother did not provide a minimum degree of care.

Matter of Tomasa Z., 77 AD3d 1102 (3rd Dept. 2010)

The Third Department affirmed that two Clinton County parents neglected their newborn baby . The mother is mildly mentally retarded and has a seizure disorder which causes her to become unaware of her surroundings if she has a seizure. She has difficulty meeting her own basic needs including personal hygiene, taking meds, preparing food and basic housekeeping. There have been arguments and domestic violence between her and the child's father. Although the mother has been cooperative in parenting programs, she herself admitted that she was not ready to take care of an infant and did not know what to do to care for her. Her own testimony revealed the severely limited understanding she had of basic parenting concepts. The father admitted to domestic violence and did not seem to appreciate the limitations the seizure disorder of the mother's may have – for example he said he would "catch" the baby if the mother had a seizure. He intended to work out of the home and leave the baby with the mother, believing that the mother was capable to care for the child alone. He did not think the child needed to be in a day care arrangement and showed a lack of insight into the limitations of the mother.

Matter of Nikita W., 77 AD3d 1209 (3rd Dept. 2010)

A Columbia County father neglected his two daughters based on his sexual fondling of one of their friends during a sleep over. The 10 year old girl was sleeping in the bed with one of the daughters and the child testified in open court that the father had untied her top and fondled her breasts and attempted to put his hands in her pants. The child's school counselor, a CPS worker and a validation expert all testified to out of court statements that the girl made as well. Although the Third Department pointed out that the credible testimony of the child was enough to have made the finding that she had been fondled and that therefore the respondent's own daughters were neglected, the appeal focused on the testimony of the validator.

The validator in this matter gave an opinion that the child's "spontaneous, coherent, logical, detailed and contextually embedded" disclosure was "consistent

with accounts of known sexual abuse victims". The validator used the Yuille Step Wise Protocol to interview the child. The child gave detailed descriptions of what she was wearing, body positions, how the touching occurred and provided gestures to describe the incident – all indicative of the child having actually experienced the abuse. Further the child testified that she pretended she was asleep while it happened which is a "typical dynamic" for sex abuse victims. Although the validator used the term "credibility" she explained that her method was not a credibility determination but that she used that term loosely in talking about the child's statements.

Matter of Alexandra J., 77 AD3d 1299 (4th Dept. 2010)

An Erie County Family Court finding of neglect regarding a mother was affirmed on appeal. The mother attempted suicide by taking an overdose of prescription medication while her children were on a weekend visit to their father's. The mother was unconscious when the children returned from the visit and they could not wake her the next morning when they needed to be taken to school. When the mother did awake later that morning, she was unable to drive them to school and school officials came to the home to get the children. The mother was admitted to a psychiatric ward for five days. The mother's "voluntarily-induced drug stupor" resulted in the children not being properly supervised and neglected.

Matter of Justyce M., 77 AD3d 1407 (4th Dept. 2010)

The Fourth Department reversed Monroe County Family Court's dismissal of a excessive corporal punishment case. The lower court had found that the mother struck the six year old girl on the buttocks and accidently hit her in the face. The Fourth Department found that the evidence showed that the mother told the police that she hit the child in the face with a belt when the child failed to watch her little brother. The child told the caseworker that her mother had hit her in the face with a belt and that the mother had also thrown a toy at her that struck her face. The child's cheek had a small cut and was red and the child had a cut above her lip. The mother also told the caseworker that she had "whooped" the child with a belt for failing to pick up clothes. The mother would not agree to stop any "whooping" of the child. The mother also told the caseworker that she had removed the child from school that day as the child had lost the mother's car keys but that the mother

had not "whooped" her since the mother knew the caseworker was coming over. This evidence was sufficient to find that the mother had used excessive corporal punishment on the child and that the child was neglected.

Matter of Alfonzo H., 77 AD3d 1410 (4th Dept. 2010)

Onondaga County Family Court dismissed a neglect petition on the close of petitioner's proof for failure to establish a prima facie case. On appeal, the Fourth Department restored one of the causes of action and remanded but concurred with the dismissal of the other. As to the allegation that the father had neglected the child due to exposure to domestic violence, the Appellate Court agreed that there was no proof offered that the child's condition was impaired or in imminent danger of being impaired due to the father's violence against the mother. However, the court restored and remanded the allegation that the father abused alcohol to the extent that he was not able to safely care for the child. Proof had been offered that the police had intervened at the home on several occasions when the father was intoxicated and violent toward the mother.

Matter of Isaiah D., 29 Misc3d 1215 (A) (Bronx County Family Court)

Bronx County Family Court dismissed a petition for failure to prove a prima facie cases of neglect. A mother and father were arrested when police located 7 zip lock type bags of marijuana under the bath room sink of their home. The marijuana was in a glass container with a lid and in a lower cabinet with a simple pull knob. The parents had a two your old in the home that was walking and able to manipulate with his hands. However, there was no proof that the marijuana was owned by the parents, or that they even knew it was there or that it posed an imminent risk to the child.

Matter of Annalize P., __AD3d___, 11/4/10 (1st Dept. 2010)

A New York County mother educationally neglected her child. The child had 5 excused and 24 unexcused absences during the school year and these absences adversely affected her academic performance

Matter of Brianna R., ___AD3d___, 11/9/10 (1st Dept. 2010)

Bronx County Family Court ruled that a mother had derivatively neglected her baby based on a neglect finding from 2007 where the mother had left a 9 month old unsupervised in a bathtub with running water and that infant had drowned. The First Department agreed that the prior neglect was not too remote in time as it had been adjudicated less than 2 years before this petition was filed. The mother's lack of judgment that had resulted in the death of her 9 month old created a substantial risk of harm to this new baby and the mother did not prove that her judgment had improved . Although the court also admitted evidence about two prior neglect findings from 2005 and 2006, this was not error; or if so was harmless as the court specifically based the derivative finding on the 2007 drowning. The new baby was placed in foster care.

The mother had completed parenting skills and bereavement counseling and submitted to random drug testing but would not exclude the father from the home who refused to participate in a parenting course. The fact that she now claimed to be willing to separate from the father was properly excluded in the fact finding as she took this position after the filing of the petition. Further, any error in the lower court refusing into evidence a letter regarding a mental health evaluation that mother's lawyer offered, was harmless as the mother had not been ordered to seek such an evaluation and her having had such an evaluation or not was not considered by the court in its fact finding.

Matter of Dave D., __AD3d__, dec'd 11/9/10 (2nd Dept. 2010)

The Second Department affirmed Kings County Family Court's determination that a mother had neglected her son. She should have known that her son was in imminent danger of being sexually abused and did not act to protect the child. The child made out of court statements that his mother was aware of the abuse and these statements were corroborated by the mother's own admissions.

Matter of Syira W., __AD3d__, dec'd 11/12/10 (4th Dept. 2010)

An Erie County mother neglected her children in that they were present when an incident of domestic violence occurred .

Matter of Annastasia C. ___AD3d___ ,dec'd 11/12/10 (4th Dept. 2010)

The Fourth Department modified a neglect finding on a Cattaraugus County mother as to her three children. The Appellate Court concurred that there was adequate proof that the mother had failed to protect the children from the father. The child's out of court statements that she was sexually abused by her father were corroborated by the testimony of the doctor who said the child's physical symptoms were consistent with sexual abuse. Further a psychologist testified that the statements the child had made in the interview with the caseworker, which were videotaped, were credible. The videotape was appropriately admitted into evidence based on the testimony of the interviewing caseworker. The mother neglected the children based on her failure to take any action regarding the abuse by the father.

The Fourth Department did find that the other cause of action in neglect was not proven. These other allegations were that the children were attending school in dirty and inappropriate clothing and that the older boy was not being given medication as prescribed. The Appellate Court found that there was no evidence offered concerning the financial status of the mother and her ability to provide adequate clothing and there was insufficient evidence of the older child's need for medication and the appropriate dosage of any medication.

Matter of Jared S., ___AD3d___, dec'd 11/18/10 (1st Dept. 2010)

The First Department agreed with Bronx County Family Court that a father had neglected his children. He engaged in acts of domestic violence against the children's mother and threatened to kill one of the children by placing two knives at the child's throat. Even though this was a single act of domestic abuse it was sufficient given how strongly impaired his judgment was in exposing the child to substantial harm. The children were placed in the custody of the mother under the supervision of ACS and the father was ordered to attend parenting and batter's programs.

Matter of Lah De W., __AD3d___, dec'd 11/18/10 (1st Dept. 2010)

A New York County mother appealed the finding of neglect made against her but the First Department affirmed the adjudication. The mother had five children aged 1 to 14. The 14 year old boy was speech impaired and developmentally

disabled. She and the children lived in a homeless shelter where she left the children unattended on several occasions. She also allowed the children to ride the subway at night without adult supervision, failed to bring them to several medical appointments and continued to use marijuana, even after the petition had been filed. There was a dissent by one of the Justices who agreed with the AFC that the oldest child should not have been adjudicated as neglected. The mother having allowed him and the 11 year old to ride the subway alone at night was poor judgment but not neglect. The 14 year old was in his grade level at school, was well cared for and healthy and had ridden the subway alone on prior occasions. He was able to communicate with adults and there were only brief periods in which the younger children were left in his care.

Matter of Dakota CC., __AD3d__, dec'd 11/24/10 (3rd Dept. 2010)

A Chemung County Family Court finding of neglect regarding a father and his son was affirmed on appeal. The father abused alcohol and failed to provide the child with adequate supervision. The child had complete freedom to sneak out of the house and use drugs himself and he tested positive for marijuana at 12 years of age. The child's mother and the caseworker both testified to the father's ongoing alcohol abuse and prior indicated reports for neglect. When the caseworker went to the home in response to the child's positive drug screen, the child was alone and unsupervised and the father appeared from a neighbor's home in a visibly intoxicated state. The father claimed the child's test results were "bogus" and that he was unaware that the child was using drugs. The child had 38 unexcused absences from school and 5 suspensions. The lower court should not have taken judicial notice of the father's prior criminal record without providing him with an opportunity to challenge the relevancy nor should the court have included allegations in the decision that were not in fact proved but these were harmless errors.

Matter of Christopher R., __AD3d__, dec'd 11/30/10 (1st Dept. 2010)

New York County Family Court was affirmed on a neglect adjudication by the First Department. The mother had a long history of mental illness and would not seek treatment. She had been hospitalized on multiple occasions and testified that she would not take medication or treatment even if that meant that the children could not be returned to her. She had kept one child out of school for a month

before she received approval to do homeschooling. The lower court consolidated the dispositional hearing with a custody petition filed by the non respondent father and properly gave the father custody. The mother had not addressed her mental health conditions and the children were doing well in the care of the father and were properly attending school.

Matter of Michael N., __AD3d__, dec'd 12/2/10 (3rd Dept. 2010)

The Third Department agreed with Tioga County Family Court that a father had derivatively neglected his son. There were allegations that the father had engaged in domestic violence with the child's mother in front of the child on two occasions. Without objection from the defense, DSS asked the court to take judicial notice of numerous certified records of Chemung and Tioga Counties that showed several prior determinations of abuse and neglect of other children that had been in the father's care. These included the prior sex abuse of a girlfriend's child and the prior termination of his parental rights to two of his biological children. There were also records of his extensive history of domestic violence involving women in previous relationships. The father did not take the stand to defend or explain himself. His lawyer simply waived any further hearing and agreed to "move straight to a dispositional" hearing. The court properly made a finding against the father given that the "extensive documentation of the respondent's past abuse and neglect of several children, both unrelated and biological, all emanating from successive turbulent relationships with different women, sufficiently demonstrates a consistent pattern of neglect…." The adjudications were proximate in time in that they all occurred within the 4 years before the birth of this child and within 8 years of this proceeding.

Matter of Regina HH., __AD3d___, dec'd 12/2/10 (3rd Dept. 2010)

A 14 year old Sullivan County girl was neglected by her mother and placed in foster care. The Third Department agreed with Family Court that the mother had educationally neglected the child. The child had missed 50 out of 88 days of school and was late on 5 other days. The mother claimed that the child had medical and anxiety issues which made it difficult to get her out of bed in the morning. The mother did not have medical documentation of the absences and no one but the mother had witnessed the alleged anxiety attacks. The child had told some people that she stayed home to take care of her mother and that she did not

want to leave her mother. The child was failing all her classes. The mother testified that she had been told that the child would have to attend every day for the rest of the year and all summer long in order to be promoted to the next grade. The mother minimized the situation and did not call the caseworker as recommended when the child would not get up in the mornings. Further, the mother had mental health problems, was paranoid and would not accept any help. The child was not allowed to socialize with children of her age and was unusually meshed with the mother. Both the teen and her mother each thought the other would not be able to function and would need therapy to cope with any separation. The mother did not have gas to cook with for one month and had let all the light bulbs burn out in the home. There was no hot water for a month and the child was unable to shower.

Matter of Jonathan S., __AD3d__, dec'd 12/14/10 (1st Dept. 2010)

The First Department agreed that a New York County mother had neglected her children based on her mental illness. The mother had a recurrent major depressive disorder and had increasing and frequent thoughts of killing herself and of drowning the children in a bathtub. There was also a history of numerous incidents domestic violence in the presence of the children. Expert testimony was not needed to show that her mental illness had affected her ability to care for the children.

Matter of Eric C., ___AD3d__, dec'd 12/21/10 (2nd Dept. 2010)

Suffolk County DSS proved educational neglect where the submitted and unrebutted evidence showed that the child had excessive absences from school and the mother offered no reasonable justification for those absences.

Matter of Noah Jeremiah J., __AD3d__, dec'd 12/21/10 (1st Dept. 2010)

In a lengthy opinion with a dissent, the First Department reviewed a New York County Family Court neglect finding regarding a newborn. The majority affirmed the finding agreeing that the premature HIV positive infant was at imminent risk of neglect if placed into the mother's care. The mother had a history of mental illness which had resulted in a finding of neglect a year earlier and the placement of her two older children in foster care. The mother has bipolar mood disorder and has

on occasion missed medication. The majority opinion focused on the mother's greater need for medication since the delivery of the baby and that even one missed dose could leave her less capable of caring for a baby, particularly a premature baby who needs medication for his HIV status. The dissent noted that the mother was very cooperative with her mental health treatment, had not tested positive for illegal drugs, was polite and used proper hygiene. She kept appointments and informed her therapists if there are issues with her medications. The dissent opined that there was no real proof that the mother could not care for the infant with services and assistance in place.

Matter of Alfonzo T., __AD3d__, dec'd 12/30/10 (4th Dept. 2010)

The Fourth Department reviewed again a petition regarding this father and mother in a domestic violence situation in Onondaga County (see case above). After the Fourth Department had upheld the lower court's dismissal of the portion of the neglect allegations involving domestic violence, DSS filed a new petition alleging that this young child was exposed to a series of domestic violence incidents between the parents. However, all but one of these allegations could have been raised in the prior dismissed action and therefore they are barred on res judicata grounds. If DSS had exercised due diligence, they would have discovered these prior incidents and included them in the prior petition. DSS cannot continue to bring successive petitions alleging the same theory of neglect until they obtain the result they want with the child's statues remaining undetermined. The lower court did err is dismissed one allegation that occurred after the prior petition. The father pushed the mother onto the bed while he was wielding a knife and while the child, then six months old, was lying on the bed. This incident could be neglect on the part of the father and that part of the petition is restored and remanded.

Matter of Jack P., __AD3d___, dec'd 1/6/11 (3rd Dept. 2011)

An Ulster County mother used excessive corporal punishment on her two sons. She hit and punched them when she was angry, screamed obscenities at them and humiliated them. The children were afraid of her. The older child, who is blind on one eye, testified to one incident where she slapped and pushed him and his head hit the wall. She then pushed him to the ground and pounded him with her fists. The younger child saw this and testified that it scared him and caused his stomach to hurt. The court did not abuse its discretion regarding the mother's request for the older child's probation records to be subpoenaed. The court reviewed the records

in chambers and determined that there was nothing in them that related to the mother's claim that the child had told Probation that the allegations were not true. Further the court did not err in proceeding with the third day of testimony in this matter when the mother claimed she could not attend due to back pain. Parties do not have an absolute right to be present at all stages of a civil proceeding, even an Art. 10 petition. Here the mother had failed to appear before and had disobeyed prior directives of the court. The court did reopen the proof and allowed the mother to testify.

Matter of Shannen AA., __AD3d___, dec'd 1/13/11 (3rd Dept. 2011)

An Ulster County mother was found to have neglected her daughter after a series of Art. 10 matters. Originally given an ACD on two occasions, the mother violated the ACDs and also was adjudicated to have neglected the girl again in a second petition. The original acts occurred when the child was 14 and the mother had difficulty with her and sent her to live with a paternal uncle and aunt. The mother did not check out the home of the relatives. In fact the aunt took the child and her own children to a hotel within a week of the child arriving, apparently due to safety concerns with the uncle. The mother did not know where the child was and did not attempt to find her or call the police, taking the position that it was the child's responsibility to contact her. After finding out that the child was at the motel, the mother let her remain there for five weeks even though she knew that the child's father, a registered sex offender, was there and having contact with the child. The mother was also aware that the child was not going to school. When the child returned home, the mother learned she had been raped at the hotel and yet obtained no medical care for the child for several days and then only when the police insisted. These actions were neglectful.

The second petition was also appropriately adjudicated as neglect. The mother failed to ensure the child was attending school even though she was 14 years old. The mother gave various reasons for the child not attending including that the child had been threatened and that she had a medical condition. The mother ignored the plans and directions of the DSS caseworkers regarding these issues. The child did not meet with an assigned tutor as the mother allowed the teen to move to her boyfriend's family's home which was out of the school district. The child failed all her classes as she did not take her final exams. This educational neglect was in addition to a lack of guardianship and supervision in that the mother allowed the girl to spend unsupervised overnights with her boyfriend which resulted in the

child becoming pregnant. She then permitted the child to move in with her boyfriend after the baby was born and live in unsanitary and inappropriate conditions. Regardless of the mother's claim that the teen refused to return home, the mother had an obligation to provide a minimum degree of care and supervision to her. The younger child in the home is derivatively neglected.

Matter of Anthony TT., ___AD3d___, dec'd 1/13/11 (3rd Dept. 2011)

A St. Lawrence County father neglected his two sons due to the father's mental illness resulting in the children being placed with the mother and the father being limited to one hour supervised visitation a week. The father's mental illness resulted in him believing that the mother and the government were conspiring to track him and had implanted devices in his body such as infrared in his eyes. He engaged in an "extensive tirade" about this in the court room. He had convinced the children of these hallucinations and the children were showing signs of mental illness and hostility toward the mother for her supposed actions. The father had threatened to kill the mother in front of the children and the police. He told the caseworker that he would go after the mother and that he wanted her off the face of the earth. He told the caseworker that he lied to his doctors and did not take his medications.

ABUSE

Matter of Jacob B., 77 AD3d 936 (2nd Dept. 2010)

The Second Department affirmed Suffolk County Family Court's abuse adjudication. DSS' medical expert testified that the child's multiple fractures were intentionally inflicted and that the child did not suffer from any bone disease. The child was in the mother's care when the fractures occurred and therefore the "burden shifted" to the mother to rebut the prima facie case of abuse. The mother was unable to explain her son's injuries.

Matter of Justin CC., 77 AD3d 1056 (3rd Dept. 2010)

A Chemung County mother and father were found to have abused and neglected the mother's daughter and their three sons. The 14 year old girl disclosed at school that she was regularly slapped, whipped with a belt and had her hair pulled. She described being whipped with her pants and underwear pulled down and with her brothers being made to watch. She was also made to "pick cherries" in which she was required to stand with her arms outstretched and to simulate picking cherries off a wall – a version of a painful military exercise. The child indicated that both her mother and the father had punished her in this way. The mother did admit to the use of a belt and to the "cherry picking" as well as to not intervening when the father used these punishments. Two of the brothers gave out of court statements which cross corroborated each other that all three of the brothers were hit with belts by both parents as well as that they had been made to watch the discipline of the sister. The teenage girl was placed in foster care and a neglect petition filed. The mother surrendered the child for adoption 5months later.

A few months after her placement, the girl revealed to her foster mother that the father of her brothers had been sexually abusing her for several months before she was placed in foster care. The neglect petition was amended to add the sexual abuse allegations. The child provided sworn in court testimony outside of the presence of the parents but with full cross examination. (the transcript of that testimony was provided to the respondents' counsel for purposes of this appeal as per a prior appeal) The child's testimony was deemed credible and the father's "string of denials" not worthy of belief. The Appellate Court concurred that the mother had neglected all of the children and that the father had abused the girl and neglected and derivatively abused all of the children. The father could not appeal the court's order that he was prohibited from contact with the boys since he had consented to that order.

Matter of Zanna E., 77 AD3d 1364 (4th Dept. 2010)

The Fourth Department dismissed an appeal by the AFC on a sexual abuse case from Steuben County. The Appellate Court found that since the child had testified that she was sexually abused by her stepfather, she was not "aggrieved" by the determination of the court that the abuse had occurred. The stepfather's appeal was denied as the proof was sufficient that he had sexually abused the child given

that the DNA evidence was that his sperm and seminal material were found on the child's shorts.

Matter of Shardanae T.L., ___AD3d___, dec'd 11/12/10 (4th Dept. 2010)

A Wayne County father sexually abused his daughter. The out of court statements of the girl were corroborated by the testimony of a "sexual abuse validator" as well as by the child's "age-inappropriate knowledge of sexual conduct."

Matter of DM., 29 Misc3d 1220 (A) (Bronx County Family Court 2010)

Bronx County Family court dismissed a sex abuse petition ruling that the "validation" did not corroborate the out of court statements of the four year old child. The court was critical of the ACS expert validator. Although he stated that he "borrowed" from various protocols that that the APSAC and APA have developed, he did not actually describe his protocol. For an opinion in a sex abuse case to be accepted by the court s corroboration, validators must strictly follow accepted protocols. The court also criticized the validator for making references to outside reports that he had looked at but not clarifying what those were, as well as by failing to take into account the child's therapeutic issues, the ongoing custody litigation between the parties and the family history. Lastly the expert used leading questions and he repeated questions when he was unsatisfied with the answers and he called the mother into the room at a certain point in the interview.

Matter of Jezekiah R.A., __AD3d__, dec'd 11/12/10 (4th Dept. 2010)

The Fourth Department modified a severe abuse finding from Erie County Family court and reduced it to an abuse finding. The father had been found to have severely abused a baby girl of the mother's but raised no issues concerning that child so that portion of the appeal was dismissed. He had also been found to have severely abused his son and derivatively abused his other son. The son had shaken baby syndrome and had a fracture of his femur, bilateral subdural hematomas and retinal hemorrhages. The injuries would have been inflicted at different times. The father would not testify at the fact finding. This is sufficient proof by a preponderance that the father abused the child or allowed someone else to do so. However, since the child was also in the care of the mother and the grandparents

and no proof was deduced as to how the child actually was injured, there was not clear and convincing proof that the father severely abused the child. Severe abuse requires proof of serious physical injury but also proof that the child was abused by reckless or intentional acts under circumstances evincing a depraved indifference to human life and there was not such evidence offered.

Matter of Alston C., __AD3d___, dec'd 11/19/2010 (4th Dept. 2010)

Cattaraugus County Family Court was affirmed by the Fourth Department regarding a father's sexual abuse of his child. The child's unsworn out of court statements were corroborated by statements the father made to the State Police as well as the testimony of a psychologist who "determined that the contextual details of the child's statements were consistent with a description of actual events".

Matter of Miranda HH., __AD3d___ dec'd 1/13/11 (3rd Dept. 2011)

The Third Department affirmed a sex abuse case from Albany County in a detailed review of the proof. There were 3 daughters but the allegations focused on the middle child who was about 8 years old at the time of the petition. The parents were living together but their relationship was deteriorating. The mother noticed that the child was excessively masturbating and continued to question the child repeatedly about inappropriate touching. The child had been abused many years earlier by a baby sitter. The child did finally disclose that her father had touched in her the shower. The mother waited 5 days to tell law enforcement and then, significantly, brought the child to the police on the day that the father had filed for custody. The child signed a written statement at the police station that her father had touched her on two occasions – once when she was "2 or 3 or 4" when she was in the bathtub and once when she was 7 in the living room. The child's third grade teacher testified that the child engaged in inappropriate masturbation in the class room and seemed unaware she was doing so. The child told a licensed clinical social worker that her father touched her and the clinical social worker also testified that the child's frequent and public masturbation activity was behavior similar to other patients she has counseled regarding sexual abuse.

The child and two year older sister both testified in camera, unsworn but cross examined. There the child testified that the father had touched her 3 times – once when she was 2 or 3 years old in his bedroom, once when she was older in her bath

and once in her bedroom. When the child was asked how this made her feel, she said “unhappy” and then added “relaxing too at the same time”. The older sister testified that she had seen the father touching the middle sister “in a bad way” years earlier when the older sister had looked into a partially opened bedroom door. The Appellate Court also reviewed the father’s evidence. He called John Yuille, a forensic psychologist, to the stand (Yuille is a well known sex abuse expert and the Third Department has repeatedly indicated its support of the John Yuille “Step Wise” protocol for interviewing child sexual abuse victims) and Yuille criticized the interviews of the child for not having been videotaped. He indicated that the inconsistencies in the child’s statements meant either that the child was not telling the truth or that it did happen and the child is unwilling or unable to provide details. Yuille indicated that in some cases a child may blend common features of multiple acts of sexual abuse and in doing so drop minor differences. Yuille also indicated that the child having spontaneously referred to the “relaxed” feeling during the incident tends to indicate a real experience. He further claimed that her masturbating could be explained by sex abuse but also by anxiety, substance abuse or brain damage. The father also called a sex abuse consultant who testified that she interviewed the child who told her in two different interviews that the father had touched her twice and then changed it to three times. The father testified that he never touched the child sexually and that that he had heard the mother tell the child repeatedly to say that he had touched her. The mother testified that she had left the children alone with the father after the child had supposedly told her that she was being touched and that she waited and only after he had filed for custody, did she bring the children to the police. Also she admitted that she told the oldest child that if they did not go to the police that the father would get custody. The mother had been untruthful in some other respects and had also attempted to manipulate a drug test.

Lastly the court reviewed the witnesses that the child’s attorney called including psychologist Eileen Treacy. (a well known sex abuse expert). Tracey testified that it was not unusual for child victims to both love and hate the abuser similar to how this child behaved. Also she said that where children were coached they tended to only claim to hate the abuser. Treacy claimed that the child’s desire to visit the father and her unhappiness with her mother for claiming that she did not want to visit him was evidence that this was not a coached case. The excessive public masturbation indicates that she is “over-sexualized”. Further, her spontaneous description of the touch being “relaxing” indicated that the touching did have positive aspects for the child which can also enhance the child’s conflict about disclosing.

The Appellate Court found that the child's out of court statements were corroborated by the in court testimony of the child and the other witnesses despite the inconsistencies of the child regarding the number of incidents, the timing of the incidents and the locations as well as the mother's possible ulterior motives. The lower court observed that the inconsistencies suggested not that the child was not telling the truth but that the child had been sexually abused many times by the father. The testimony of both Yuille and Treacy supported that the spontaneity and sensory detail the child gave in chambers gave credence that the child was recalling incidents that had actually happened. Further the court found the father's testimony to be not credible.

ART. 10 DISPOSITIONS and PERMANENCY HEARINGS

Matter of Kyle S., 75 AD3d 859 (3rd Dept. 2010)

A Delaware County father appealed the Family Court's approval of a voluntary instrument to place his in son in care as well as the Art. 10- A permanency order that continued the child in care. The court ruled the appeal moot since the youth had since obtained the age of 18 and was consenting to his own placement.

Matter of Arlene Y., 76 AD3d 720 (3rd Dept. 2010)

The Third Department concurred with Warren County Family Court that a grandmother had not proven extraordinary circumstances such that the court should have granted her Art. 6 custody petition at the disposition of the mother's Art. 10 neglect petition. The mother had consented to a neglect finding but opposed the grandmother's Art. 6 petition. Therefore grandmother was required to prove "extraordinary circumstances" and a finding of neglect is not per se extraordinary circumstances. The grandmother did not prove that the mother was "unfit" or that she intended to surrender or " abandon" her children. The mother had not failed to plan for the children such that there was "persistent neglect". The children had not resided with the grandmother for any length of time in the past such that there was an "extended disruption of the mother's custody". Further the grandmother's husband and son were prevented from contact with the children due to allegations of sexual abuse but the grandmother expressed a lack of knowledge about the sex abuse. She had also moved multiple times, had not looked into

health insurance or schooling for the children. She was not prepared nor did she have the ability to care for the children full time.

Matter of Hayley PP., 77 AD3d 1133 (3rd Dept. 2010)

The Third Department agreed with Broome County Family Court that two children should be returned to their mother's custody. The placement resource's Art. 6 petition for custody of the children was appropriately denied. When the mother's two very young children were to be removed, a family friend had stepped forward as a resource and the children were placed with her in Art. 10 custody. Over 2 years later, in a permanency hearing, DSS took the position that the children could safely be returned but the resource opposed the return and sought custody or in the alternative, visitation. After a hearing, the court did return the children temporarily to the mother and two months later, returned the children permanently. The resource's custody as well as her request for visitation were denied and she appealed. The evidence from the caseworker, the parent aide and the CASA worker was that the mother had made tremendous progress and had completed recommended classes, had attended mental health counseling and resolved the safety issues. She had cooperated with the parent aide and the casework, interacted and disciplined the children well and had matured and improved her attitude. Although the resource has a close and loving relationship with the children, she does not have standing as a nonparent to seek visitation with a child when the fit biological parent opposes that visitation. The mother is fit to make that decision in that the court found her fit to return the children.

Matter of Keith B., 29 Misc 3d 969 (Clinton County Family Court 2010)

Clinton County Family Court ruled that it had authority to place a child, who had been found to be neglected by his mother, in foster care as opposed to releasing the child to the non respondent father. There had never been a custody order between the two parents although the child had been living with the mother when the removal occurred. The court found that the child's best interests warranted the foster care placement and since there had been no prior custody order and the child was not removed from the father's care, the court was not obligated to place the child with the father.

Matter of Kenneth QQ., 77 AD3d 1223 (3rd Dept. 2010)

A Delaware County Family Court modification of a neglect disposition was affirmed by the Third Department. The mother had previously consented to a neglect finding without an admission and her three sons remained in her care under the supervision of DSS. The DSS then alleged that the mother was failing to follow through with the mental health needs of her youngest son and the lower court concurred and placed the child in foster care. The mother appealed. The appeal was not moot even thought the mother had consented to the extension of the child in care at the most recent permanency hearing. The youngest child who was 14 at the time of the violation had been diagnosed with bipolar disorder, oppositional defiant disorder and attention deficient disorder.

The mother had failed to attend meetings with DSS and failed to contact DSS to reschedule meetings. The child in question had become involved in a serious incident at a neighborhood pool where he threatened to assault an 11 year old girl and swore at the child's father. The child motioned to strike the 11 year old girl and was restrained by the father. The child then obtained a golf club, a baseball bat and then a knife, in succession, each time being disarmed by adults present. The child threw a rock at the father's car and threatened to kill the 11 year old and rape her sister. The child refused to cooperate with a safety plan when the caseworker arrived. The mother, who was on the telephone, told the caseworker to tell her 14 year son to "shut the fuck up" . The child became verbally abusive to the caseworker, came at the worker and had to be restrained. In a subsequent meeting the child swore at the worker and he and the mother stormed out of the room. The mother's failure to cooperate in resolving the child's situation requires a modification of the prior order such that the child must be placed in care.

Matter of Tasha R., 29 Misc3d 1091 (Family Court, Clinton County 2010)

Clinton County Family Court ruled that an 18 year old freed child with severe intellectual limitations was not consenting to remaining in foster care as she was unable to understand what foster care was and therefore could not give her consent. (The young woman had indicated to the court that she wanted to continue to live with her foster mother). The court was not willing to issue a permanency hearing order to continue the youth in placement with no specific knowing, intelligent and voluntary consent on the part of the 18 year old and the statute offers no other alternative than a consent. Anticipating this position of the court, DSS had

petitioned the Surrogate Court to have someone appointed as the guardian of the child's person. The Surrogate's Court issued that order and DSS therefore took the position in Family Court that the appointed guardian was empowered to consent on behalf of this mentally limited youth to remain in care and the guardian testified as to her consent. Family Court rejected this argument finding that the appointment by Surrogate Court was made technically after the child's 18th birthday and that as of the 18th birthday the child's placement had legally ended as she was not competent to consent to it continuing.

Matter of Michael D., __Misc3d___ dec'd 10/4/10 (Bronx County Family Court 2010)

Bronx County Family Court found ACS and a foster agency in contempt and fined them $250 for filing to obtain services for a foster child who had been moved to Schenectady County. The court had ordered that arrangements be made through a request to the "intrastate compact" for the child to receive specialized and needed services for Early Intervention including neurological and audiological evaluations as well as monthly face to face contacts with the foster family. The arrangements were apparently not made because the request was inadvertently made to Albany County. The court found that good faith is not a defense to contempt and the motive for the disobedience is not relevant.

Matter of Arden A., __AD3d___, dec'd 11/9/10 (2nd Dept. 2010)

The Second Department reversed Kings County Family Court's order that granted a mother and grandmother's motion for visitation. The mother and her mother had made a motion to be allowed to have visitation supervised by the foster mother instead of the agency and the court had granted the motion over the agency's objection and without a hearing. This was an abuse of discretion in that the court should have held a hearing on the best interests of the children. Under the facts of this matter, the agency should be the supervisor of the visits.

Matter of Michael A., ___AD3d___, dec'd 12/2/10 (3rd Dept. 2010)

A Cortland County attorney representing a child who had been placed in a relative's home after a finding of neglect appealed the Family Court's granting of an ex parte order to move the child from a relative to a foster home. The DSS had

sought the ex parte order to move the child when the relatives had indicated that they could not longer handle the child's behaviors. The court had granted the order to move the child and had scheduled a hearing five days later. Subsequently the AFC did consent to the child's movement but he appealed arguing that the issue was the process and that the issue was likely to reoccur and therefore was an exception to the mootness doctrine. The AFC argued that the ex parte removal order was obtained in a situation that was not an emergency and that the person who requested the order had not personal knowledge of the situation. The Third Department found that the issue was not substantial enough to warrant an exception to the mootness doctrine.

People ex rel. Karen FF., __AD3d___, dec'd 12/2/10 (3rd Dept. 2010)

The Third Department agreed that a mother's writ of habeas corpus should be dismissed without a hearing where the children had been placed in care a year earlier on a neglect adjudication. The proper procedure is a direct appeal of the last order or a motion to modify or vacate the prior order.

Matter of ACS v Sonia R., __Misc 3d ___, dec'd 12/6/10 (Bronx County Family Court 2010)

Bronx County Family Court reviewed the 10 year CPS and legal history of this family, including the 5 successive Art. 10 petitions that resulted in adjudications of neglect. Some of the children originally involved were now more than 18. The court detailed the repeated placements in foster care of the children and how the children's behaviors became increasingly more problematic and violent. Also the court detailed the parents' extensive problems, which after periods of improvement, would worsen yet again. The court ordered ACS to file termination petitions regarding the 5 children then currently in care.

Matter of O,N,W and H., 29 Misc 3d 1233(A) (Queens County Family Court 2010)

In 2007 a mother admitted to neglect and over the span of the next 3 years she dealt with the issues of her drug problems which resulted in periods of sobriety but also multiple relapses, violations of court orders and drug use which resulted

ultimately in the children having to enter care. During this period of time ACS and Family Court remained involved with the family. The mother eventually made progress and in June of 2010 all the children had been returned and the court's orders were ended. One month later, the mother filed a FCA § 1061 motion to vacate the 2007 finding of neglect claiming that the findings were inhibiting her ability to find work in the field of geriatric care. The Queens County Family Court ruled that while it did have jurisdiction to vacate a prior finding at any time, to do so in this case would be amount to pretending that the mother's long history of drug abuse and neglect had not happened and therefore the court denied the motion. The court also pointed out that the mother had other ways of obtaining employment and the indicated reports would remain on the SCR in any event.

Matter of Bianca QQ., __AD3d___, dec'd 1/6/11 (3rd Dept. 2011)

While ruling that the mother's appeals of a permanency order that continued her children in care were moot as the mother had agreed to custody to relatives; the Third Department did reverse the Clinton County Family Court's ruling that the DSS had not engaged in "reasonable efforts to reunite" the children. The Appellate Court indicated that while the DSS permanency report could have been more detailed in regard to dates services were offered, nonetheless the DSS had offered reasonable efforts to reunite. The efforts consisted of arranging individual counseling for the mother, placing her on a waiting list for an anger management therapy, referring her to a parenting class and providing her with financial assistance to attend her appointments. Also, the mother was out of state and unavailable for services for a month and a half during the time period.

Matter of Taylor EE., ___AD3d___, dec'd 1/6/11 (3rd Dept. 2011)

In this Clinton County Family Court appeal of a permanency hearing on a 15 year old freed child, the Third Department did agree with the lower court that the agency had not engaged in reasonable efforts to achieve the child's goal of APPLA. The child had developmental delays and he was in a residential facility. He will not be able to function in a traditional home environment. DSS had not been able to locate any relatives willing to adopt the youth. The child's goal was placement in an adult residential facility with a significant connection to an adult resource. The agency had not been able to find an adult resource for the youth.

They had asked if someone at the residential facility would be the resource but the facility said no, that would violate their policies on boundaries with staff. On the day of the permanency hearing, the caseworker asked the woman who had adopted the child's siblings if she would be a resource and she said she would think about it. This was not sufficient effort. There was no record of when DSS had asked the facility and how long the facility to respond and there was no record of DSS asking the relatives who had not wanted to adopt, if they would want to be resources. The youth had lived in the community for 13 years before going into placement and DSS made no record of attempting to locate any adults he may have had a prior relationship with to see if they would be his resource. DSS had a negative view of the youth based on the comments made in the permanency report and this may have "infected" the process and led to the lack of efforts to find him a resource.

Matter of Katie II., ___AD3d___ dec'd 1/6/11 (3rd Dept. 2011)

A Clinton County father violated the court's dispositional order of protection in an Art. 10 neglect proceeding and the court did not abuse its discretion by sentencing the father to 30 days in jail. Among other things, the father had been ordered to not engage in reckless endangerment or threats against the children or to act in a manner that created an unreasonable risk to the child's health or welfare. He was not to subject the children to name calling or to make disparaging remarks and was not to possess any medications that were not prescribed to him. The court found that the father tried to stop the mother and one of the children from going to a mental health appointment by jumping on to the running board of the moving car and hanging on the side view mirror while arguing with the wife. He then got into the driver's seat, and continued the argument while driving on the driveway and the open road and with the child in the backseat with her door ajar. The wife also testified that the father had a prescription for hydrocodone that was someone else's and he admitted this fact to a caseworker as well. The wife further testified that he had threatened to hurt the children and called them names such as "whore, slut and bitch".

Matter of Araynnah B., ___AD3d___, dec'd 1/11/11 (2nd Dept. 2011)

The Second Department reversed the Kings County Family Court's dismissal of a FCA § 1061 motion brought by the mother. The mother sought to have her order of disposition modified to an order suspending judgment . Without ruling on the

merits, the Appellate Court found that the lower court should not have dimissed without holding a hearing. .

TERMINATION of PARENTAL RIGHTS

GENERAL

Matter of Cain Keel L., __AD3d___, dec'd 11/18/10 (1st Dept. 2010)

New York County Family Court denied a mother's motion to vacate an abandonment default and the First Department affirmed this on appeal. The mother had failed to appear on two prior dates and the court had told her attorney that the proceeding would go forward even if she did not appear, so a default was not inappropriate. On appeal, the mother also claimed that the Cherokee Indian tribe should have been given an opportunity to appear pursuant to ICWA. This argument is without merit as the mother did not provide enough information to put the court or the agency on notice that the child could in fact be an Indian child under ICWA.

Matter of Eileen R., __AD3d__ dec'd 12/23/10 (3rd Dept. 2010)

The Third Department concluded that Broome County Family Court had violated a father's rights and reversed an abandonment termination as to his four children. The father was incarcerated in Pennsylvania and the court allowed him to "appear" by telephone for the first appearance at which time the court told him that the court would not "allow testimony by telephone" and that the case would proceed in the father's absence and that the court would make its decision based on the DSS' evidence. This statement by the court made it clear that the court was not intending to allow the father to provide evidence on the issue. The court then appointed counsel for the father. Father's counsel did not object to the court's decision and did not request that the father be able to present evidence or testimony by telephone, deposition or any other means. The attorney did not request adjournments to enable him to review transcripts with the father prior to cross

examining the DSS witnesses. It was apparent that the defense attorney's attempts at cross examination were not comprehensive as they lacked input from the father. The court did adjourn on the first day of the hearing as defense counsel did not know the father was still in prison and had expected him to be there and another adjournment was also granted as DSS had not produced certain records. These were not adjournments that allowed the defense counsel to consult with the father about his testimony. Also on the first day, the court admitted that there had been an inadvertent order issued that the father be allowed to appear by telephone. The court made no record as to why this order was issued, why the court was not going to comply with it and the father's attorney made no objections.

The father was simply not allowed to present any defense. His unsworn comments at the first appearance suggested he had intended to argue that he had made contact with the children. The court's blanket policy of not allowing testimony by phone, even though it is not required, instead of considering the available options meant that the father was denied his due process right to present his case. Further his lawyer's failures amounted to ineffective assistance of counsel.

Matter of Charity W., __ AD3d___, dec'd 12/30/10 (4th Dept. 2010)

An appeal from Onondaga County Family Court was denied by the Fourth Department. The respondent mother appeared on the first day of fact finding but failed to appear on the second day. The court continued the hearing on the second day, made a default finding of permanent neglect and then held a dispositional hearing on the same day and terminated parental rights. The mother moved to vacate the default, claiming that she did not understand the court's information about the second day of the hearing. The lower court denied the motion but did "reopen" the dispositional hearing to allow the mother to testify on her behalf. The court did not issue the termination disposition until after hearing the mother testify. The Fourth Department found this was not error and pointed out that the record demonstrated that the mother and her lawyer were told the date of the second day for the hearing.

Matter of Serenity KK., __AD3d__, dec'd 1/6/11 (3rd Dept. 2011)

The mother on a Broome County termination does not have standing to appeal the court's dismissal of the aunt's petition for custody of the child.

ABANDONMENT

Matter of Jayquan J., 77 AD3d 947 (2nd Dept. 2010)

The Second Department reversed the Kings' County Family Court's dismissal of a TPR petition and ruled that a father had in fact abandoned his child. The father had not been noticed by the agency to the original removal or the subsequent permanency hearings and this was an "inexcusable dereliction" on the part of the agency. However, this error did not change the fact that the father had abandoned the child. He was not prevented or discouraged from contacting the agency or the child. Any efforts he did make to determine his child's status were minimal, sporadic and insubstantial. He did not maintain regular communication or provide financial support. His incarceration did not absolve him of his responsibility to maintain regular contact and attempt to provide support within his means.

Matter of Dior H., 77 AD3d 1066 (3rd Dept. 2010)

An Ulster County father abandoned his child. During the 6 month period in question, the foster mother and the DSS caseworker both testified that the father had no contact with the girl. The caseworker indicated that in the relevant time period, the father contacted her once, the day before the TPR was filed in response to a request from her that he give her his phone number. The father and some relatives testified that there was some contact in the relevant time period but they were not consistent with each other and displayed significant confusion about the dates of the contact. The father also claimed that he did not know the child was in foster care and thought the child was with relatives. DSS conceded that it sent some letters to the wrong address for the father even after they had been provided with his correct address but there was evidence that the father had received the

correspondence or had had it read to him. The father may have had some insubstantial contact with the child during the time period but not sufficient to defeat abandonment. He was like a "friendly but irresponsible uncle" who dropped in and out of her life when it was convenient for him.

Matter of Spencer Isaiah R., __AD3d___, dec'd 11/23/10 (1st Dept. 2010)

The New York Family Court determined that a father was not a parent whose consent was required to free the child for adoption under DRL §111(1)(d) and also that he had abandoned his child and terminated parental rights. The father appealed the abandonment termination to the First Department. The Appellate Court held that since the lower court had ruled that the father was not a man whose consent was needed, then he had no rights to terminate and the Appellate Court had no need to examine that unnecessary ruling. Since the father had not appealed the ruling that he was not a consent father, that ruling remained intact.

Matter of Le'Airra CC., __AD3d___, dec'd 12/2/10 (3rd Dept. 2010)

The Third Department concurred that an Albany County father who was incarcerated during the child's foster care stay had abandoned the child. During the six months relevant to the issue, he did not contact the child or the DSS worker. The father claimed that he had requested information about the child himself or through his attorney when he was in court on various matters and that he read letters and permanency reports that the caseworker had sent him. The court concluded that this was minimal and insubstantial contact that could not defeat an abandonment. Although there were some restrictions on the father's ability to use the phone while in prison, he made no attempt to call the caseworker whose name he knew. The caseworker indicated that she would have accepted a collect call if he had called. The father admitted that he could have written to the caseworker but did not do so until he had been served with the TPR petition. Further the Appellate Court concurred with the Family Court that it was appropriate to sustain objections to the father's attorney's questions about diligent efforts as diligent efforts need not be proven in an abandonment case.

Matter of Gabriella I., __AD3d___ dec'd 12/9/10 (3rd Dept. 2010)

A 16 year old PINS girl gave birth to a baby while in placement and shortly thereafter ran away and the baby was placed in foster care in Broome County. The child remained in foster care. Almost three years later, DSS brought an abandonment TPR against the mother. In the relevant 6 months, the mother had made no visits to the child and in fact moved to Louisiana. Her PINS caseworker indicated that before she left the state, the mother never spoke to the worker about the toddler or about visiting; although when asked, said the mother claimed she wanted to visit. Instead she took no steps to see the little girl and moved all the way to Louisiana without notifying the child's caseworkers. Once there , the mother did nothing to let the DSS know where she was, how she could be reached nor did she remain in contact. The mother did not ask how the child was doing nor request visitation with the child. The caseworkers did nothing to discourage the mother's contact.

Matter of Omar Saheem Ali J., __AD3d__, dec'd 1/11/11 (1st Dept. 2011)

A Bronx father abandoned his child as he did not contact the agency or the child in any way for the 6 months prior to the fling. The father had been ordered to have no contact with the child until he completed a mental health evaluation. However, he was still obligated to maintain contact with the agency about the child and should have taken steps to see the child again after he finished the evaluation. A suspended judgment would not have been appropriate as the child was in a loving foster home where his special needs were being met and they wished to adopt him NOTE: There is no statutory authority for the court to grant a suspended judgment in an abandonment termination.

MENTAL ILLNESS/RETARDATION TPRs

Matter of Kasja YY., 77 AD3d 1100 (3rd Dept. 2010)

A Schuyler County mother's parental rights to her child, who was in placement with a relative out of state, were terminated and the child was freed for adoption. The mother has a borderline personality disorder, a factitious disorder, a depressive disorder, a posttraumatic stress disorder and borderline intellectual functioning

among other things. The court appointed psychologist is a board certified forensic examiner who did an extensive clinical examination of the mother in 2007 and updated it in 2009 and did an "exhaustive review" of her records. He concluded that she would not be able to adequately care for her child for the foreseeable future based on her mental health issues. She was unable to differentiate herself from others and to distinguish reality from fantasy and her behavior was erratic. The borderline personality is a lifelong condition and she has not previously accepted and or followed through with treatment. She is uncooperative and unwilling to accept her condition or try to address it. The fact that the mother had recently claimed to be willing to engage in the intensive therapy that had been recommended for the last two years and that she had begun therapy with a new counselor is not sufficient to rebut the overwhelming evidence. Lastly, the court did not err in failing to consider post termination visitation. (citing old 3rd Dept. cases that the court does not have authority to order post termination contact)and not mentioning the 4th Dept's ***Kahlil S***. decision)

Matter of Deondre M., 77 AD3d 1362 (4th Dept. 2010)

The Fourth Department affirmed Erie County Family Court on the mental illness termination of a mother's rights. Although some of the mother's records were six years old, the court appointed psychologist appropriately based his opinion on all of the mother's most recent records, including DSS records and treatment program records. The psychologist's opinion was not inadequate despite the fact that he indicated he could not provide an exact diagnosis. He had not been able to do a full in person examination of the mother. Even if the mother might become capable of caring for the child at some point in the indefinite future, that possibility is not sufficient to deny the petition.

Matter of Niya X., __AD3d__, dec'd 12/2/10 (3rd Dept. 2010)

A Schenectady County mother's rights were terminated and this was affirmed on appeal. The child had been in foster care since birth and at one point the mother had been having as much as three consecutive unsupervised overnight visits. However, the mother was diagnosed with a bipolar disorder that had psychotic features and she could not safely parent the child for the foreseeable future. A psychologist reviewed the mother's records, talked to collateral contacts,

interviewed the mother and conducted testing as well as observed a home visit between the mother and the child. There were examples of lack of judgment, poor decision making, limited functioning and lethargy. The mother had not been hospitalized in some years and was generally compliant with her medications but the medications also produced side effects that affected her ability to safely care for the child. A second psychologist who had reviewed records, interviewed and tested the mother reached the same conclusion. The mother did offer the opinion of a third psychologist who reviewed the other two expert's reports and interviewed the mother and took the position that her mental illness did not make her incapable of parenting. The court found the opinion of the petitioner's first expert as more credible.

Matter of Alyssa Genevieve C., ___AD3d___, dec'd 12/9/10 (1st Dept. 2010)

The First Department affirmed New York County Family Court's termination of a mother's rights on mental illness grounds. The mother has multiple mental health diagnoses of long standing duration. She has schizoaffective disorder, bipolar type, a borderline personality disorder and is paranoid and combative. The child has special needs in that she has a serious development disorder, is autistic and has spinal dysplasia. The court appointed psychologist testified that given the mother's issues and the child's special needs, the child would be at risk of neglect. Even the mother testified that she knew that she would need support and would not be able to care for the child on her own. The mother was very motivated, committed and showed a great effort attempting to deal with her mental condition but sadly this was not enough to be able to handle the extraordinary needs of this particular child. While it may be possible that at some time in the future, the mother might be able to safely parent, this possibility is not sufficient.

Matter of Devonte M.T., __AD3d ___, dec'd 12/30/10 (4th Dept. 2010)

A Niagara County father's parental rights were terminated on mental illness grounds. The expert witness opined that he suffered from schizophrenia and had borderline intellectual functioning. This diagnoses, along with the caseworker observations at visitations, demonstrate that he is presently and for the foreseeable future, unable to safely parent the children.

Matter of Erica D., ___AD3d___, dec'd 1/4/11 (1st Dept. 2010)

The First Department affirmed the Bronx County Family Court's adjudication of the termination of a mother's rights on mental retardation grounds. The mother had an IQ of 48 which the expert described as "extremely low". Her daughter child has Down Syndrome. The mother is unable to meet the child's needs. The issue of the lower court's limitation on the mother's proffered testimony of her abilities as it related to another child was unpreserved. In any event the testimony would have been from lay witnesses and based on general anecdotal information.

SEVERE ABUSE TERMINATIONS

Matter of Brendan N., __AD3d__, 12/2/2010 (3rd Dept. 2010)

The Third Department affirmed a father's termination of his parental rights on severe abuse grounds after he was convicted of murdering the child's mother. A Columbia County boy was placed in foster care after a finding of neglect against his parents. At the time, the paternal grandmother sought to become the child's foster parent or in the alternative to have visitation and both were denied. The child had been in care just over a year when the father was arrested and charged with murdering the mother. DSS then brought terminations against the father on both permanent neglect grounds as well as severe abuse grounds. The paternal grandparents filed a custody petition. Before the TPR hearing, the father was convicted of murder in the second degree and sentenced to 25 years to life. The grounds of severe abuse were proven by the father's conviction for murdering the mother and by proof that the DSS had offered diligent efforts toward the father. Before the murder, he was given supervised visitation, referred to various treatment programs and was provided transportation for both. He was included in service plan review meetings. After the murder and his incarceration, DSS kept him updated with the child's status and progress and offered to help him engage in services in the prison. The child has been with the same foster family for most of his life. The foster family wishes to adopt the child and it is in his best interests to be adopted. It was not error for the court to dismiss the custody petition of the grandparents as the grandparents continued to plainly and repeatedly state that they

did not believe that their son had murdered the child's mother. Even after being informed that this belief was hindering any ability for them to visit the child, never mind gain custody, their professed belief in their son's innocence did not change. The grandparents further filed a private adoption petition after the child was freed and that too was appropriately dismissed as a private adoption petition can not be filed when the child is in the care of an agency.

Matter of Kailynn WW., __AD3d___, dec'd 1/6/11 (3rd Dept. 2011)

A Chemung County termination of a father's rights on severe abuse grounds was affirmed on appeal to the Third Department. The father pled guilty to second degree assault based on his having repeatedly struck this baby girl on her head and body. The lower court then properly granted the DSS' motion for summary judgment of Art. 10 severe abuse based on the criminal conviction and ordered DSS relived from engaging in reasonable efforts to reunite the child with the father. The mother surrendered the child. The DSS then brought a TPR on severe abuse grounds and the court held a "fact finding" hearing which the Appellate Court claimed was, in reality, a dispositional hearing since the court had already made the Art. 10 finding of severe abuse. The DSS was not required to show diligent efforts given the prior order of no efforts and such an order can retrospectively excuse diligent efforts where such efforts would have been detrimental to the best interest of the child as here. The hearing demonstrated that the child had special needs and was making progress in her foster home. The court also allowed the father to present any evidence as to the child's best interests and reviewed the father's capacity to care for the child and the availability of any relatives for placement. The lower court correctly concluded that it was in the child's best interests to be freed for adoption.

PERMANENT NEGLECT

Matter of Elijah P., 76 AD3d 631 (2nd Dept. 2010)

The Second Department affirmed Queens County Family Court's termination of a mother's rights to her son. The agency offered diligent efforts by providing visitation and holding many meetings with the mother to develop and review the

plan for the child's return. The agency offered substance abuse treatment, individual counseling and advised the mother about the dates of the child's medical and therapy appointments and encouraged her attendance at them. The child had special needs that the mother failed to understand.

Matter of Toyie Fannie J., 77 AD3d 449 (1st Dept. 2010)

A Bronx County mother's termination of parental rights to her children was affirmed on appeal. Diligent efforts were made as the agency provided referrals for a mental health evaluation, set up visitation and met with the mother to discuss the service plan and the importance of her compliance. The mother made only sporadic visits to the children and did not complete the mental health evaluation on a timely basis. Even though she did ultimately provide a copy of the evaluation results, there was no need to offer a suspended judgment as there was no evidence that she had a realistic plan to care for the children.

Matter of Prince McM., 77 AD3d 582 (1st Dept. 2010)

The First Department agreed with Bronx County Family Court that a mother's rights to her children should be terminated. The mother had attended programs that the agency had set up for her but she did not make the changes needed for the children to be able to return home. She continued to live with the father and denied that he had sexually abused her children despite the fact that three children had disclosed abuse over a long period of time as well as the fact that the father had been adjudicated – twice – for child abuse. The mother claimed she would separate from the father but had never obtained her own housing. All of the children are in stable foster homes and two of them are in pre-adoptive homes. The children deserve a "realistic opportunity to free themselves from a troubled past."

Matter of Aniya Evelyn R., 77 AD3d 593 (1st Dept. 2010)

The First Department concurred with the Bronx County Family Court that a mother had permanently neglected her children. The agency did make diligent efforts by creating a service plan, providing referrals for the services in the plan, scheduling visitation and ongoing service plan reviews and repeated encouraging

the mother to comply with services. The mother did not complete a drug treatment program, tested positive and also refused drug screens. She did not complete a parenting skills program and missed most of the visits with the children. She did not appear for the dispositional hearing.

Matter of Austin C., 77AD3d 938 (2nd Dept. 2010)

The Second Department reversed an Orange County Family Court permanent neglect termination of a mother's rights. Diligent efforts were proven in that DSS provided visits, transportation to visits and made referrals for mental health, parenting and substance abuse evaluations and treatment. The caseworker made home visits, scheduled office visits, encouraged the mother to take advantage of the services offered and warned her of the consequences of failing to do so. However, the Appellate Court reversed the lower court's decision that there was proof that the mother failed to plan or remain in contact with the children. The mother visited the children, completed a parenting class, signed all release forms, for the most part kept the worker apprised of her changes in address and phone number. She also completed her mental health evaluation and was participating in treatment. She was at that time undergoing the required substance abuse evaluation. She had obtained a new apartment and had gotten employment. She attended the children's counseling sessions and talked to their doctors. She had helped her brother to become a certified therapeutic foster parent so he could care for the children. Although she did not meet monthly with the caseworker and had not continued in counseling after being discharged, this is not enough to say that she was failing to plan given that there was no proof offered that she needed to continue the counseling.

Matter of Ronnie P., 77 AD3d 1094 (3rd Dept. 2010)

A Cortland County mother lost her parental rights to her two sons. Clear and convincing evidence was offered of diligent efforts. DSS developed a case plan and offered various programs and counseling services to the mother and provided weekly visitation. She was encouraged to establish a safe and suitable home and to end her relationship with her boyfriend who was drug addicted and had physically abused and mentally traumatized the children. DSS also provided the children with counseling. The mother claimed on appeal that DSS was not diligent in that they did not set up the joint counseling sessions with the children that her therapist

recommended. However, the therapist only recommended the joint counseling because the mother told her that she had ended her relationship with the abusive boyfriend, which was not true. The therapist would not have recommended the counseling change if she had known the truth. Also the fact that the DSS sought to suspend visitation did not mean that had not offered diligent efforts as the mother had pressured the children during the visits to recant their statements about the abuse and neglect and told them to tell the caseworkers that they wanted to go home.

The mother failed to plan even though she participated in many of the recommended programs. She failed to benefit from the programs. In particular, she failed to end her relationship with her drug addicted paramour and continued to lie about it. She failed to realize the seriousness of the situation and would minimize or deny the injuries to the children as well as her role in their placement in foster care.

Matter of Adaliz Marie R., __AD3d__dec'd 11/4/10 (1st Dept. 2010)

The First Department concurred with Bronx County Family Court that a mother had permanently neglected her children. The agency offered the mother numerous referrals stressing the importance of dealing with the major issues of domestic violence and mental health. They tailored the programs offered to her changing needs and continued to follow up with her on the goals. The agency also offered help with obtaining suitable housing and income. The mother refused to complete the important portions of the service plan and did not cooperate with the agency on the issues of housing or income.

Matter of Hannan Nicholas G., __AD3d__, dec'd 11/9/10 (2nd Dept. 2010)
Matter of Daniel A.G., __AD3d__, dec'd 11/9/10 (2nd Dept. 2010)

The Second Department reviewed a permanent neglect determination from Kings County and affirmed the adjudication. The agency had offered diligent services in that they scheduled weekly visits with the children and his father and referred the father to parenting and anger management programs. The father never attended the programs and gained no insight into why the programs were needed. It was in the

children's best interests to be adopted by the foster parent that they had lived with for many years.

Matter of Ayodeji W., __AD3d__, dec'd 11/12/10 (4th Dept. 2010)

A Steuben County mother's parental rights were appropriately terminated. DSS provided mental health, parenting and family counseling for the mother. They also provided supervision and transportation for visitation. While termination was in the child's best interests, the lower court did properly provide for post termination contact between the mother and her son.

Matter of Ganesha B., __AD3d___, dec'd 11/16/10 (1st Dept. 2010)

New York County Family Court was affirmed on appeal to the First Department in regard to a mother's permanent neglect of her child. Clear and convincing evidence of diligent efforts was proffered in that the agency made referrals to parenting and substance abuse programs as well as for a mental health evaluation. Visitation was set up. The mother did not complete the programs or get the evaluation and she was not consistent with the visitation. She did not find appropriate housing and was involved in an incident where the police had to respond. The girl had spent her whole life in foster care with a stable kinship home. The mother's current statements that she will comply with the services comes too late to warrant a suspended judgment.

Matter of Paul Antoine Devontae R., ___AD3d___, dec'd 11/30/10 (1st Dept. 2010)

The Bronx County Family Court found that a father had permanently neglected his son and the First Department agreed. The father had failed to maintain consistent contact with the child. He did not visit the child at all for five months. After that the father was incarcerated. He did call the agency another 5 months after his incarceration and set up a visit but the visit never occurred. The father did not locate any appropriate placement for the child while he served his prison sentence. It was not error for the lower court to deny the father's request to adjourn the dispositional hearing until he could appear in person instead of by telephone. The father had appeared for the fact finding by telephone and there was no reason to

delay the matter further. The child has been with the foster mother since he was two years old. She meets his needs and is his best chance for a stable family life.

Matter of Tatianna K., __AD3d__, dec'd 12/2/2010 (3rd Dept. 2010)

The Third Department reversed an Otsego County Family Court's termination of the parental rights of a father to his daughter. The Appellate Court agreed that diligent efforts had been offered to the father. There was a service plan developed that offered appropriate services to the father to address the problems that had led to the child's removal and this plan was updated and reviewed in a timely manner. The DSS also facilitated visitation.

However, the DSS did not establish clearly and convincingly that the father failed to plan for the child's future. Soon after the child went into foster care, the father separated from the mother and her inappropriate lifestyle and "entered into a stable, committed relationship with a female companion and established suitable housing." There was no proof of any incidents of domestic violence with this new companion. Further, the father had resolved his substance abuse problems and had records from a chemical dependency clinic that he had not used alcohol for the entire year before the filing of the TPR. Although the father had not completed anger management or parenting education and had in fact not even started those programs until the child had been in care for over a year, the father was at the time of the TPR, fully engaged in those programs and making significant progress. The parenting educator testified that the father was almost 70% of the way thought he program, involved actively and was showing that he understood the things he was being taught by implementing them with the child. The lower court also erred in failing to consider the progress the father made after the one year period and before the commencement of the TPR.

Matter of James U., ___AD3d__, dec'd 12/2/10 (3rd Dept. 2010)

The Third Department affirmed the termination of a mother and father's rights to their son in a "no reasonable efforts toward reunification" matter. The parents' rights to two other children had previously been terminated and those terminations were affirmed on appeal. Another child had been voluntarily surrendered by both of them. This child had been in the care of the mother under DSS supervision but was placed in foster care when she violated the court's order that the father – who

had sexually abused another daughter at two years of age - have no contact with the child. After this child came into foster care, the lower court ordered that DSS need not make any reasonable efforts toward reunification with the mother based on the mother having had her parental rights to other children terminated in the past. The mother appealed that order and both parents appealed the subsequent termination of their parental rights on permanent neglect grounds.

The Family Court did not err in ordering that "no reasonable efforts" needed to made toward the mother given that the siblings had been freed via a termination order. As the mother was unwilling to acknowledge the risk of the father and failed to protect the child from that risk, the court's order was not inappropriate. Since there was such an order, the agency did not need to prove "diligent efforts" but did need to prove that the mother had failed to plan for the child's return.

The mother continued to suffer from periodic mental instability. She abused alcohol and did not stay on her medication. She admitted allowing the father to repeatedly violate the order that he stay away from this child. She had resumed living with the father after the child was removed, refusing all services. The father had never completed sex abuse counseling even though he had been engaged in such counseling for 10 years. Neither parent had any insight into the reasons for the child's placement in foster care and they were not meaningfully benefitting from any services. The mother's claim that she will now move away from the father is not credible. The child has a long and stable relationship with the foster parent who meets his needs and wants to adopt him. The paternal aunt and uncle did file a custody petition which was denied by the court and the parents have no standing to raise that issue.

Matter of Alexa L., __AD3d___, dec'd 12/9/10 (3rd Dept. 2010)

The Third Department upheld a termination of a Columbia County mother's rights to her twin daughters based on both abandonment and permanent neglect. The children had spent a good deal of their lives being raised by a maternal aunt but when she could no longer care for them , the twins were placed in foster care based on the mother's default neglect finding. It was undisputed that the mother had no contact with the two girls during the relevant 6 months. For the one twin, the mother claimed she did have some limited contact with the caseworker but in fact multiple certified letters from the caseworker sent to the mother were returned unclaimed. This twin had medical conditions and the mother also had no contact

with any medical providers about the child's status. As to the second twin, the mother had been prevented from seeing her by court order. The second twin has serious emotional issues – including reactive attachment disorder - based on the mother's erratic relationship with the child. The mother claimed that DSS had required that she had to first meet with the child's therapists, submit to drug and alcohol evaluations and mental health assessments and become involved in needed programs before she would be allowed to see the child. The mother claimed she was willing to do that but was involved in an abusive relationship that made it impossible for her to attend. That may partially account for her difficulties, but it does not explain why she did not even come to court in reference to the child. The mother also permanently neglected the second twin. The agency had offered her diligent efforts, including parenting and anger management, but the mother did not make real efforts to participate in any programs.

The court correctly terminated parental rights as to the second twin and did not offer a suspended judgment. The child had serious vulnerability stemming from her relationship with the mother and it was difficult for the child to form attachments as she harbored hopes of a return to her mother. The child had just begun to adjust to her foster home and spoke of an interest in adoption, as she had her own concerns about her mother's ability to care for her. It was in her best interests to be freed for adoption. The attorney for this second twin argued that the court should have ordered post termination visitation for this child and the mother but the Third Department (without citing ***Kahlil S.***) ruled "……there is no statutory authorization for allowing those visits once respondent's parental rights were terminated…."

Matter of Elijah Jose S., ___AD3d____, dec'd 12/14/10 (1st Dept. 2010)

Although entered on default and therefore not appealable, the First Department did decide to comment on the Bronx County Family Court's fact-finding decision in a permanent neglect termination against a father. The agency did offer diligent efforts but the father only visited sporadically. He failed to complete a psychological evaluation, a substance abuse program or a parenting program and would not comply with random drug screenings. He had no plan for the children's future. The children had been in the same foster home for years and the foster mother wished to adopt. She has attended to their special needs and provides loving care.

Matter of Joaquin Enrique C. ___AD3d___, dec'd 12/16/10 (1st Dept. 2010)

A New York County Family Court termination of a mother's rights was affirmed on appeal. There was clear and convincing evidence of diligent efforts. The agency offered parenting classes specially designed for parenting special needs children, a CPR course and provided regular visitation. The mother was also given individual therapy and the caseworkers monitored the mother's progress in all the services. The mother did not plan for the future as she continued to assert that the child's injuries had occurred when someone else was caring for him. The child had been placed in care after a diagnoses of shaken baby syndrome and had suffered broken ribs, retinal hemorrhages and a subdural hematoma and these injuries had been inflicted on more than one occasion. The child was medically fragile. The mother had no insight into her role in the cause of the injuries, continued to fail to show real awareness of the severity of his injuries and failed to actively work with his various therapies. The child has been in the same foster home since he was 3 months old and the foster mother wishes to adopt. The foster mother provided extraordinary efforts into meeting his extensive medical and therapeutic needs and he has made remarkable progress. The mother, in contrast, loves the child but is not equipped to handle his needs as exemplified by her failure to perform any therapy with him, by ignoring his dietary restrictions and in removing a required eye patch. It is in the best interests of the child to be adopted.

Matter of Yasiel P., ___AD3d___ ,dec'd 12/20/10 (4th Dept. 2010)

In this Erie County appeal, the Fourth Department rejected the argument that the modifications to SSL § 384-b regarding permanent neglect grounds and parents who are incarcerated or in patient for substance abuse should have a retroactive application to terminations that occurred before the effective date. Further the court found that the DSS had offered diligent efforts and the mother failed to complete her service plan. The mother had no viable plan for the child, made only minimal efforts to see the child and seemed indifferent toward the child.

Matter of Destiny S., __AD3d__, dec'd 12/28/10 (1st Dept. 2010)

The majority opinion in this First Department appeal of a New York County termination of a mother's rights affirmed the lower court. The agency had offered

a realistic service plan and the mother failed to adhere to it in that she would not submit to drug testing and in fact tested positive and was using during the one year statutory period. The child should be adopted by her paternal aunt foster mother who the child had lived with for three years and where she is doing well. The dissent however stressed the lack of clarity in the phrase "…failed for a period of more than one year" …to have "… substantially and continuously or repeatedly…" failed to plan for the future of the child in SSL §384-b. Since the mother had maintained compliance and sobriety for at least a five month period at the beginning of the relevant period, the dissent opined that the proof did not establish that the mother had failed to plan for the required time frame.

Matter of Ja'Heen W., __AD3d___, dec'd 1/13/11 (3rd Dept. 2011)

The Third Department affirmed a termination of a Columbia County mother's rights to her son. The child had been removed at birth and had remained in foster care. The DSS offered diligent efforts in that caseworkers met with the mother many times and created a service plan for her. The offered mental health and drug treatment programs, parenting and anger management. They provided supervised visitation and keep the mother informed of the child's status. The caseworker also helped the mother obtain financial support, help with budgeting, transportation, food and prepaid cell phones. The caseworkers repeatedly told her how important it was to complete the drug program in particular.

The mother failed to plan for the child's future as she repeatedly indicated that she did not need and did not complete a drug treatment program. She indicated that she only used marijuana which she did not consider a drug. She did not routinely attend any of the other programs set up and did not come to the service plan review although repeatedly notified to do so. She would not submit to drug screenings before visitation and therefore was not allowed visitation. (The mother did raise on appeal the requirement that she have drug testing before each visitation but the court did not rule on that as it had been ordered in a permanency hearing order and that order was not appealed) Her apartment was unclean and she had little food. There were people living in the apartment who had marijuana and drug paraphernalia out in plain sight. There was no reason to offer a suspended judgment as it was in the best interests of the child to be freed for adoption. The prospects for reunification were dim given that the mother would not acknowledge

needing drug treatment even at the dispositional hearing. The child has been with the same foster family since birth and they want to adopt him.
NOTE: The court did comment that the child had been adopted while the appeal was pending but that this did not moot the appeal. 18 NYCRR 421.19 (I) (5) (I) indicates that a DSS cannot consent to the adoption of a foster child while an appeal is pending and DRL § 111 requires the DSS to consent to any adoption of a foster child.

TERMINATION DISPOSITIONS

Matter of Selena C., 77 AD3d 659 (2nd Dept. 2010)

In a short but significant decision, the Second Department joined the Fourth Department in ruling that Family Court has authority to order post termination visitation. In this Kings County mental illness termination, the mother requested that the court consider ordering that she be allowed visitation with the child after the termination. The Second Department agreed that while there was "… no statutory authorization…" for such visitation the courts "…have inherent authority to provide for visitation between and adopted child and a member of his or her birth family where such visitation is in the best interests of the child and does not unduly interfere with the adoptive relationship.." The Second Department then cited the Fourth Department's 2006 ***Kahlil S.*** decision
NOTE: As of this point the Fourth Department and the Second Department are specifically in direct conflict with the Third Department on this critical issue.

Matter of Krystal B., 77 AD3d 1110 (3rd Dept. 2010)

A Schenectady County matter was reversed and remanded by the Third Department. The parents of three children had admitted to permanent neglect and consented to a suspended judgment that involved them cooperating with substance abuse treatment programs, submitting to random drug testing, attending every visitation or providing a documented excuse if they missed a visit. Four months after the suspended judgment had been issued, DSS moved to revoke alleging non compliance. The parents admitted to the non compliance and the lower court freed

the children for adoption after a hearing and the parents appealed. The violation of a suspended judgment does not require the court to terminate parental rights and the court must consider the best interests of the child. Here the Third Department found that the lower court had not reviewed the children's best interests and had in fact refused to allow testimony on the children's status and progress in their foster care placements, finding that such testimony was not relevant. The court did not hear evidence on the children's relationship with the parents or how termination would affect the children.

The parents expressed a desire to still work toward the children's return and offered mitigating testimony about their admitted non compliance with the suspended judgment. The parents claimed that they refused the random drug screenings on advice of an attorney who was representing them in a personal injury action they had brought against DSS for serious injuries one of the children had received while in foster care. The parents called the caseworker when they had to miss visits but the caseworker never asked them for any written documentation. The parents claimed that the caseworker did nothing to help them obtain appropriate counseling programs when they had trouble locating programs. The DSS caseworker and the two foster care agency caseworkers agreed that DSS had stopped providing any services to the parents once the TPR had begun. The matter was remanded for a new dispositional hearing.

Matter of Sierra C. 77 AD3d 1132 (3rd Dept. 2010)

The Third Department ruled that a Cortland County mother cannot appeal the post termination permanency order that continued the freed child in care pending adoption. The mother had previously appealed and lost the termination. After a termination, she has no standing regarding further hearings regarding the child.

Matter of Eleydie R., 77 AD3d 1423 (4th Dept. 2010)

An Erie County mother admitted to permanent neglect but appealed the disposition that the child be freed for adoption. The Fourth Department found that the child's best interests warranted being freed. The DSS was not required to prove diligent efforts toward reunification in a dispositional hearing where the mother had already admitted to permanent neglect.

Matter of Christian Anthony YT., ___AD3d___, dec'd 11/4/10 (1st Dept. 2010)

The Second Department agreed with Bronx County Family Court that a mother had violated the terms of the suspended judgment and that her parental rights to her three children should be terminated. Three months after granting the suspended judgment, a violation was filed. Although the mother was making efforts to technically comply with the terms of the suspended judgment, she had emotional and intellectual limitations which interfered with her being able to accomplish what was necessary. She did not have the skills needed to support and advocate for her three special needs children. She was unable to cooperate with agency caseworkers and would often become angry without appropriate restraint, storming out of meetings and threatening agency personnel. Although the agent may have lapsed in its efforts to assist the mother, the burden is on the parent in a suspended judgment to show progress at all times during the suspended judgment period.

Matter of Nicholas S., __AD3d__, dec'd 11/9/10 (2nd Dept. 2010)

The Second Department affirmed a Westchester County Family Court's decision that a mother had violated the terms of her suspended judgment. The parties had agreed to a suspended judgment on the permanent neglect petition and mother was ordered to complete a parenting program, undergo psychiatric evaluations and to attend weekly supervised visits with her son. Four months later at the violation hearing, the proof was that the mother had not completed the parenting program, had only gone to 2 of 6 psychiatric appointments and had missed 3 visits with the boy. She violated all three terms of the suspended judgment and in was in the best interests of the child to be freed for adoption.

Matter of Imani Xiomara M., ___AD3d___, dec'd 11/9/10 (2nd Dept. 2010)

A Dutchess County father appealed the dispositional finding in his permanent neglect matter. The Second Department concurred that the child's best interests were in being adopted. The child was bonded to the foster mother and she wanted to adopt her. The father was still incarcerated and would not be able himself to care for the child and had no plan for the child's care.

Matter of Mikia H., __AD3d__, dec'd 11/12/10 (4th Dept. 2010)

The Fourth Department concurred with Erie County Family Court that a mother's rights to her two daughters should be terminated. She had consented to a finding of permanent neglect and it was in the children's best interests that they be freed for adoption. The mother had not completed substance abuse or domestic violence counseling and had continued to use drugs even after her admission to permanent neglect. A suspended judgment was not warranted. Further the mother defaulted on the petition as it related to her son, when she failed to appeal on his fact finding. She failed to establish a reasonable excuse for her failure to appear or a meritorious defense and therefore she was not entitled to a vacteur of that order.

Matter of Xionia VV., ___AD3d__, dec'd 11/24/10 (3rd Dept. 2010)

The Third Department finally specifically addressed the Fourth Department's 2006 ***Kahlil S.*** ruling on the authority of the Family Court to order post termination visitation. The father in this Chemung County case appealed his termination solely on the grounds that he should have been granted post termination contact with the child and cited the Fourth Department's ongoing rulings in this regard. The Third Department, citing its own cases specifically stated that …. "Family Court had no authority to grant it (post termination contact) in this adversarial proceeding…" Even though the Appellate Court made this clear statement, they also added that the father had not raised and preserved the issue at trial and that he had "at best" an "attenuated" relationship with the child with somewhat limited contact over the years the girl had been in foster care and the father had been in prison.

Matter of Lauren L., ___AD3d___, dec'd 12/2/10 (3rd Dept. 2010)

In an appeal of a suspended judgment, the Third Department concurred with Clinton County Family Court that the court had authority to order as a condition of the children's return to the mother, that the mother move from out of state to Clinton County. A 9 year and her 11 year old sister had been in foster care in Clinton County for over 2 years after their father had neglected them. The father surrendered his parental rights. When the children went into foster care, the mother was living out of state and she continued to live out of state in three different states and in at least 4 different residences. A permanent neglect petition

was filed against the mother and a suspended judgment was ordered. The mother made progress under the suspended judgment but the court ordered the children to continue in care because the mother refused to relocate to Clinton County . Ultimately the court ruled that the children would not be returned to the mother unless she relocated to the County and the mother appealed that order.

While the matter was on appeal, the mother did relocate and the children were returned to her. However the Third Department ruled that the matter was not moot as the terms of the current supervision order required that the mother remain in Clinton County with the children. Under the factual circumstances, this order was not an abuse of discretion. The children were well supported in the community. The caseworkers had long term relationships with the children and the mother and knew their respective needs. The children were in counseling relationships that were going well and should not be interrupted. The county was paying for the counseling. The children were supported in their current schooling where there had been exceptional attention to the children's unique situation. They were in the middle of an academic year. The sisters other sibling was in Clinton County and they had a meaningful relationship with that sibling. The children had lived all of their lives – except for two years some years earlier – in Clinton County and moving them was not in their best interest. The mother on the other hand resided in Vermont although she had lived also in Florida and Connecticut during the time that the children had been in foster care. The mother did not have a job in Vermont and her husband was in the military and deployed overseas. Her children, by her current husband, were preschoolers and would not have any interruption of schooling to relocate to Clinton County. The requirement to relocate is not unconstitutional as the state has a compelling interests in seeking the best interests for children who have been neglected and surrendered by one parent and have remained in foster care for years. There was no requirement that this order involve the ICPC as the court had determined that it was not in the children's best interests to be moved.

Matter of Amber D.C., ___AD3d___, dec'd 12/14/10 (2nd Dept. 2010)

A Kings County couple appealed the disposition of the permanent neglect petition which had freed their children for adoption. The Second Department agreed that it was in the children's best interests to be freed. The three younger children should have the opportunity to have a permanent adoptive family and although the older child may not end up being adopted, it was in her best interests to be freed. A suspended judgment was not appropriate here where the parents had continued to

not acknowledge the seriousness of the problems and failed to address the issues that caused the children to come into care.

Matter of Sean S., __AD3d___, dec'd 12/30/10 (4th Dept. 2010)

The Fourth Department affirmed an Oneida County mother's termination on mental illness grounds finding that the lower court did not err in denying the mother's request for post-termination visitation given that the evidence demonstrated that any contact would have been contrary to the child's best interests.

FATHER'S RIGHTS

Matter of Seasia D., 75 AD3d 548 (2nd Dept 2010)

After a 2007 reversal by the Court of Appeals that ruled that an unwed father had notice rights in a private agency adoption, the matter was remitted to Family Court and yet again appealed to the Third Department. On the remand, the father as well as his mother sought custody and/or visitation with the child. The Third Department found that it was in the child's best interests to be adopted by the adoptive parents with whom she had lived all her life and where she had a stable home in which she was thriving. The father had not seen the child since 2007 when the court stopped paying for supervised visitation. Even when the court was paying, the father had missed at least half of the visits. The grandmother had only visited the child three times and had never sought her own visitation and the child did not know her. The father was focused on his own frustration and sense of unfairness of the legal proceedings and anger at the adoptive parent. He feels essentially entitled to the child who he thinks "belongs" to him. He does not address himself to the child's best interests and has nothing more than a biological relationship to the child. The father has been provided the notice that the Court of Appeals ruled he had which entitles him to providence evidence regarding the child's best interests and he has been unable to show how it would be in the child's best interests to be in his custody. Given this, he had no parental rights and therefore cannot maintain a custody or a visitation petition regarding the child. The grandmother has no standing to seek visitation as she has no relationship with

the child and had made no efforts to seek one. The grandmother has no preferential rights of custody over the adoptive couple selected by the agency.

Matter of Vanessa B., 76 AD3d 912 (1st Dept. 2010)

The First Department affirmed a Bronx County Family Court decision on the rights of an unwed father. The father was not a consent father as he had not supported the child other than some modest gifts and clothing. He visited the girl inconsistently when she was both in and out of foster care - 2 times in one year, five in another. He also does not fit any of the categories of a notice father.

Matter of Shane Chayann Orion S., __AD3d___, dec'd 12/2/10 (1st Dept. 2010)

A New York County father's consent was not needed to free his child in foster care for adoption. Although he had paid child support for about a year, the father had then brought a successful action to cease payment. After that he only provided some modest gifts and clothing. No proper foundations was established to allow the proffered admission of the father's list of child support payments he claimed to have made or the photos of the father with the boy.

Matter of Timothy M., __AD3d___, dec'd 12/21/10 (1st Dept. 2010)

The First Department agreed that a New York County father's consent was not needed to free his children for adoption. He had been incarcerated for most of the children's lives and had not paid child support or maintained regular contact. The children's paternal grandmother wished to adopt them and had been their foster mother for years. They were receiving excellent loving care from her which the father acknowledged. The father has no stable home.

Matter of Adreona C., __AD3d___, dec'd 12/30/10 (4th Dept. 2010)

Jefferson County Family Court's decision on the rights of a biological father to object to an adoption by the maternal grandparents was reversed on appeal to the Fourth Department. While the lower court found that the father had abandoned the child by not supporting, visiting or communicating for a 6 month period, the

Appellate Court found that the court had not reviewed the most recent 6 month period of time as required. An abandonment allegation must be viewed by a review of the most recent 6 months and the test is if the parent "maintained substantial and continuous or repeated contact with the child as manifested by paying child support for the child and either visiting the child at least monthly or regularly communicating with the child or the caretakers."

SURRENDERS and ADOPTIONS

Matter of Dustin K.R., 76 AD3d 794 (4th Dept. 2010)

In a private adoption with an agreement for post adoption visitation, the Fourth Department was called upon to interpret the clauses of the agreement on an appeal from Genesee County Family Court. The birth mother and the adoptive parents had entered into an agreement that the mother would be allowed monthly visits with the child for a six hour period and that the transportation costs for such visits would be the birth mother's to pay. The agreement further stated that if the adoptive parents relocated over 250 miles away then the visits would be six times a year, consisting of two six hour visits over a two day period with the adoptive parents paying for the mother's transportation and housing expenses. The adoptive couple did in fact move and the question before the court was if the move was over or under the 250 mile mark. The mother argued that the move was more than 250 miles as she would have to travel by bus and the bus route was over 250 miles and further that the adoptive parents had known her only option was public transportation. She moved for summary judgment that the adoptive parents had to pay for her transportation and give her the alternative visit schedule. The adoptive parents argued that the trip was less than 250 miles if you drove a car and that the birth mother had known that this was the area that they had contemplated moving to when the terms were arranged.

The lower court found that it was possible, but with practical difficulty, to use public transportation to reach the new location under 250 miles but ruled that the alternative visit schedule would be placed into effect in any event. The adoptive parents appealed. The Fourth Department ruled that the lower court erred in its interpretation of the agreement. The agreement was ambiguous as to how the 250 miles would be calculated and the court should not have relied on extrinsic

evidence based on its own research to reach the conclusion that it was possible to use public transportation to reach the new residence in less than 250 miles. Further, the court erred in concluding that the alternative visitation schedule would be in effect after concluding that the travel distance was less than 250 miles. The matter was reversed and remitted for a full hearing.

Matter of S.D., 29 Misc 3d 623 (Queens County Family Court 2010)

A Queens County father surrendered his daughter with the specific condition that the foster parents adopt her. When the foster parents were no longer an adoptive resource, the matter was returned to court and with all the parties in agreement, the condition was changed to one where the biological older sister of the child would adopt. The sister then was no longer an option and the child had turned 17 years old and was refusing to be adopted by anyone. The subject youth expressed a desire to return to live only with her father and would agree to no other plan. No parties objected to that and the court found that it had the jurisdiction to revoke the surrender given that the condition could not be honored and as well to reinstate the parental rights of the father. The parties should be returned to their legal positions at the time of the original surrender.

Matter of Zachary N., 77 AD3d 1116 (3rd Dept. 2010)

In a private adoption by paternal grandparents, the Third Department affirmed the Montgomery County Family Court's ruling that the mother had abandoned the child. The 10 year old boy had lived most of his life with the grandparents after a joint custody order between them and the mother. The court found that the mother had not supported the child, visited him or inquired after him for years and discounted the mother's testimony that the grandparents had discouraged and thwarted contact. The court commented that the mother made no attempt to bring court action to have access to the child. Further the court remarked that the child's position on the matter was not relevant to the determination of the abandonment which was to be judged on the parent's behaviors only.

Matter of Michelle N., __AD3d__, dec'd 12/7/10 (2nd Dept. 2010)

Rockland County Family Court had determined that a birth mother's consent to her children's adoption was not required under DRL § 111 (2)(a) and the children's adoption was proceeding when the mother filed a petition for visitation. The Second Department affirmed the lower court's ruling that the mother has no standing to seek visitation after a ruling that her consent was not necessary for the adoptions.

Matter of Mya V.P., __AD3d__, dec'd 12/30/10 (4th Dept. 2010)

The Fourth Department reversed and remanded a Niagara County Family Court's ruling on the enforcement of a post surrender contact agreement. The biological mother had surrendered the child with an agreement that she would have visitation but that if she missed any two visits in a 12 month period, then the agreement could be voided by the adoptive parents. The adoption was finalized. In June of 2008 the mother missed a visit as she had been incarcerated. In August of 2008, the adoptive parents ended the visitation. The lower court properly applied the principles of contract law. Since the mother was also going to miss her December 2008 visit as she would still be incarcerated at that point, the mother was not ready, willing and able to perform her obligation to visit and therefore the adoptive parents were entitled to void the visitation agreement. However, the Fourth Department found that DRL §112-b requires that the court also must determine that enforcement of an order must be in the child's best interests and the lower court did not make such a finding. Since the lower court did in fact "enforce" the order by dismissing the petition from the birth mother as per the terms agreed upon, there should have been findings on the child's best interests. The court remanded the matter for those findings.

Matter of Thomas X., ___AD3d___, dec'd 1/6/11 (3rd Dept. 2011)

A Broome County mother had no basis to seek a revocation of the surrenders she signed as to her three children. She was represented by counsel who had spoken to her before the day of the surrenders and who asked for a brief recess during the surrenders to talk to the mother. The mother indicated on the record that she understood the consequences of what she was signing.

MISCELLANEOUS

Matter of Michael X v NY SCR 77 AD3d 1026 (3rd Dept. 2010)

An indicated sex abuse matter from Washington County remained indicated after a fair hearing and an Art. 78 was filed and sent to the Third Department who affirmed. The administrative decision was supported by substantial evidence. The child's accounts of the abuse and her identification of the abuser were consistent when interviewed by the police and the caseworker, with only minor variations, that the ALJ resolved with credibility determinations.

Allen v Ciannamea 77 AD3d 1162 (3rd Dept. 2010)

A Rensselaer County mother brought a personal injury action in Supreme County against a landlord on behalf of her children alleging damages due to exposure to lead based hazards. In her EBT, the mother admitted that the children had been in foster care for 14 months during the relevant period of time due to abuse but was unable to provide any more detail. She also refused to sign any releases to allow the defendants to obtain Rensselaer County DSS records. The Supreme Court signed a subpoena duces tecum for the records to be produced for an incamera examination. DSS sent the records to court with a certification that they were records as they related to the CPS investigation. The records contained Family Court orders and reports from some involved agencies. The Supreme Court then determined that the records could not be produced for the defendants as per SSL §422 and the defendants appealed.

The Third Department reversed. The Appellate Court found that SSL §372 may allow disclosure of information. SSL §422 applies only to CPS investigation information and not all information that might relate to rehabilitative and preventative services provided to the children as a result of a CPS investigation. That information may be disclosable under SSL §372 in that information about foster care services is disclosable if a Supreme Court Justice orders a disclosure after notice and hearing to all interested parties. The matter was returned to Supreme Court for a determination if the information in the records is about the children's stay in foster care and what if any information should be disclosed under SSL § 372 procedures.

Matter of Michael TT., __AD3d___ dec'd 11/24/10 (3rd Dept. 2010)

A 17 year old freed foster child placed with Cortland County DSS was arrested for stealing his foster family's car. He pled guilty and was in jail and then was transferred to a substance abuse treatment program with the understanding that he remain there as a condition to not being sentenced to prison. The DSS then brought an OTSC seeking to terminate the placement of the child based on the fact that he would either be in a long term treatment facility or prison and either way, the DSS could not supervise him or provide him with services. Family Court granted the order finding that the youth had "forfeited his right to be in the guardianship and custody" of DSS by committing a crime. The Third Department reversed. The teen was a freed child and although parents have procedures to revoke surrenders, DSS has no procedure to "revoke" it's guardianship of a child under SSL §384. Also SSL § 398 requires DSS to supervise children until they are 21, are discharged to parents or relatives or are adopted and none of those things has occurred. There is no exception for criminal behavior and the agency's argument that it might be liable for the youth's criminal behavior or that it will keep the child on a 'aftercare" caseload are not sufficient.

Matter of Brenda P., 30 Misc3d 1203(A) (Clinton County Family Court 2010)

A great aunt filed for custody of a child alleging that her parents were not meeting her medical needs. Clinton County Family Court ordered a FCA § 1034 investigation by DSS who responded with a 7 page report. Although the report indicated that there was no credible evidence of current neglect, it did reference a two year old indicated report for domestic violence. The AFC then sought a subpoena for the fuller CPS records of the 2 year old report and DSS opposed. The AFC provided additional information as to why she believed this information was related to the current issues. The parents did not oppose the subpoena. Although the court indicated that the 1034 report was full and completed, the court found that the AFC had a legitimate reason to review in more detail the records of the prior indicated report to determine if it was relevant in her advocacy for the child.

Matter of Parker v Carrion __AD3d___, dec'd 1/11/11 (1st Dept. 2011)

The First Department reviewed a New York County fair hearing determination that a report should remain indicated and determined that the report should be unfounded and sealed. The only witness who testified was the mother who stated that her daughter had been asked to get her materials to do her homework and the child slammed the door of her room and began to throw things around and cry. The mother found a "child's belt" and while attempting to use it to hit the child on her bottom, the child was accidently hit in the face with the buckle. The mother had grabbed for the child and the child tried to run away. The mother claimed she never intended to hit the child in the face and there was a scratch on the face which was gone in a day or two after some over the counter medicine had been put on. The ALJ never specifically ruled that the mother had intended to hit her child in the face but did find that the mother had acted in anger and struck the child. The Appellate Division found it was not neglect where the mother had not intended to hit the child in the face, the child had not needed medical treatment, and there was no proof the mother had ever used excessive corporal punishment in the past