Selected Child Welfare Case Law

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GENERAL ABUSE and NEGLECT ISSUES

Matter of Telsa Z., 71 AD3d 1246 (3rd Dept. 2010)

The Third Department reviewed a sex abuse appeal from Clinton County Family Court. The petition had been filed against the father of two children who also was legally responsible for 3 older children of the mother. The allegations were that he had repeatedly sexually abused his 8 year old natural daughter. The evidence consisted of the child's repeated out of court descriptions to four different adults as well as witnesses' testimony of her behavior – depression, withdrawal, isolation and frequent complaints about her legs, thighs and "private parts" hurting, as well as pictures she had drawn and remarks she had written in a notebook. The child also testified unsworn in camera and corroborated her out of court statements.

At the time of the dispo hearing, the court, on its own initiative, but without objection from any party, called the non respondent mother to the stand and the court questioned the mother in detail about her child protective history - which was extensive. The children's attorney then cross examined the caseworker about statements the child made about the mother seeing an act of abuse and doing nothing. The caseworker also testified on cross that the mother's stated that she had seen her 8 year old go into the bedroom with the father and in fact believed that the father sexually abused the child. The children's attorney then argued that the children should be removed from the non respondent mother and have only supervised visits with her. The father argued that the children should remain in the mother's care and that he have limited visitation. DSS argued that the children should remain with the mother with whom they were bonded and the father should have no visitation. The lower court ruled that the father had sexually abused and neglected the children but also ruled that the mother had failed to protect the children. The court ordered the children were removed from the mother and placed in foster care. The mother's visitation was limited and father was given no visitation.

While affirming the court's finding of sexual abuse and neglect against the father, the Third Department ruled that the court had misused the notice provision of FCA § 1035(d) as it related to the non respondent mother. The court should not have made factual findings against the mother and removed the children from her care when there was no petition against her. She certainly had not received due process notice that evidence would be admitted against her and the children would be removed from her. The lower court could have earlier ordered a FCA §1034

investigation to see if DSS should file a petition against her. The appellate court remitted the matter for a FCA §1034 investigation to allow DSS to file an Art. 10 petition if it deemed that appropriate and the children would remain in foster care while this action occurred.

Matter of Cora J., 72 AD3d 1170 (3rd Dept. 2010)

The Third Department rejected a Schenectady County father's argument that he had been coerced into a neglect plea. The father was alleged to have, in front of the children, pointed a loaded handgun at the mother while threatening to kill her and the children . At the time do this incident he had been under a no contact order of protection. He then pled guilty in criminal court to possession of a weapon relative to this incident and admitted neglect in Family Court. On appeal he argued that he had been forced to enter the criminal plea as the mother had threatened to bring his child in to testify and that this threat prevented him from moving to withdraw his criminal plea such that he had no choice but to enter the neglect plea. The Third Department ruled that he had never made an application to Family Court to withdraw his pleas and further that the Family Court record demonstrated that he was fully informed of the consequences of entering the neglect admission and had an attorney throughout .

Matter of Dakota B., 73 AD3d 763 (2nd Dept. 2010)

Rockland County Family Court did not abuse its discretion in denying a respondent mother's request for an adjournment of the fact finding in a neglect matter. The lower court had previously granted her several adjournments after the mother had requested an adjournment on every one of the 6 days the matter was scheduled for a hearing. The case had already been adjourned from March until August.

Matter of Jesse M., 73 AD3d 780 (2nd Dept. 2010)

In a pending Art. 10 case, Richmond County Family Court released 3 children from foster care into the care of the non-respondent father. This order was made without the court holding a hearing. The children's attorney obtained a stay and brought an appeal. The Second Department reversed, finding that since there were questions raised about the "suitability" of the non-respondent father as a

temporary custodian, the court should have held a hearing on the question of his suitability as per FCA §1017 before releasing the children from foster care into the non-respondent father's care.
NOTE: The stay in this matter lasted 10 months

Matter of Majarae T., __AD3d__ dec'd 6/11/10 (4th Dept. 2010)

A Erie County mother had her parental rights to her older child terminated by reason of mental illness and the DSS then made a motion for summary judgment regarding a neglect petition filed on a new baby. The Fourth Department affirmed the summary judgment on neglect. There are no triable issues of fact in the new neglect when the court had just ruled in the TPR that the mother was incapable of caring safely for a child in the foreseeable future. At the TPR, the testimony was that the mother had a bipolar disorder, ADD, PSTD, RAD, a psychotic disorder, was possibly autistic, had lead poisoning and a thyroid condition and was dependant on marihuana. She had threatened to "blow up" DSS. She does not take prescribed meds, will not follow medical advice and has not completed mental health, substance abuse or anger management programs. At the TPR, the evidence was that she would create a substantial risk of harm to any child in her care.

Matter of BH Children __Misc3d ___ dec'd 6/29/10 (Kings County Family Court 2010)

Kings County Family Court ruled that the court does not have authority to issue an order or protection against a respondent father in an Art. 10 proceeding on behalf of the employees at the foster care agency. FCA § 1056 does not refer to agency employees and agency employees are clearly not the "custodians" of the child that are contemplated by the statute. After an intake Judge had issued such an order of protection, the father had allegedly threatened one of the caseworkers on the phone, saying "You are dead, bitch" . Since the court lacked jurisdiction to issue the order, there is no jurisdiction to find contempt of the order .

Matter of Justin CC., __AD3d___ dec'd 7/1/10 (3rd Dept. 2010)

In a significant decision originating in Chemung County Family Court, the Third Department ruled that sealing the testimony of a child made in a "Lincoln" hearing in an Art. 10 fact finding is inappropriate. The case involved allegations

that the 4 children were subjected to excessive corporal punishment and that the father had also sexually abused the teenage stepdaughter including having sexual intercourse with her on multiple occasions. The stepdaughter's attorney asked the Judge to do what she called a "modified Lincoln" where the Judge would hear the child's testimony with all the attorneys present but without the parties present. It appeared from the lower court's record that no one objected to the procedure. The child was allowed to testify and was fully cross examined by all the attorneys but the respondents were not present. The lower court made a finding of abuse regarding the daughter, derivative abuse regarding the three other children and neglect regarding all the children. A transcript was made of the daughter's "Lincoln" and that transcript was marked confidential by the Family Court and delivered to the Third Department under seal. On appeal, the father's lawyer moved for the transcript to be unsealed and made available for purposes of the appellate process, arguing that a "Lincoln" sealing procedure is only statutorily available in Art. 6 custody cases. The father's attorney indicated that she had been present at the child's testimony but she needed the transcript to prepare her appeal. The appellate court agreed that the transcript should not have been sealed and reopened the transcript.

The Third Department reviewed the history of "Lincoln" hearings and ruled that these are hearings allowed by case law and statute in Art. 6 custody cases. The process consists of the court talking to the child with just the child's attorney present – not the other attorneys. Further what the child says in an Art. 6 Lincoln is not disclosed to the parties and the statute clarifies that the testimony is kept under seal even during the appellate process. In an Art. 10 proceeding, a respondent has due process rights and the position of a child in such a proceeding may be adverse to the respondents. Clearly in an Art. 10 proceeding, the court can determine that the child is going to testify outside of the presence of the respondents but that should only happen after a hearing on the record where the court balances the due process rights of the respondents with the mental and emotional well being of the child. Deciding to hear the child's testimony outside of the hearing of the respondents should only done where the court concludes that the child could suffer emotional harm by being made to testify in front of the respondents. The purpose of the child's testimony in Art. 10 case is quite different then in an Art. 6. In custody cases the "Lincoln" hearing is used to help the court corroborate the evidence heard in open court. In Art. 10 cases the child's testimony may be the key corroboration to the child's out of court statements of abuse. In this particular case, the child's testimony in the "modified Lincoln" became a significant issue as the defense argued that the child's testimony was inconsistent with her out of court statement. All counsel need access to the

transcript in order to properly argue the appeal. The Third Department stated "…where a child provides testimony during a fact finding stage of a Family Ct Act article 10 proceeding" is a situation where the respondent is not present but all "counsel are present and afforded a full opportunity to cross-examine the child, the child's testimony shall not be sealed." The court ruled that the parties would be given the transcript of the child's testimony and be allowed to re-brief the appeal.

NEGLECT

Matter of Briana F., 69 AD3d 718 (2nd Dept. 2010)

A Suffolk County father neglected his son and derivatively neglected his daughter . The father demanded that the son get the father a knife which he then held to the mother's neck in the presence of the son. This action impaired the child or created an imminent danger of impairment to the child's physical, emotional and mental condition. The daughter was derivatively neglected as well. The disposition that the father undergo mental health and substance abuse evaluations was appropriate.

Matter of Jesse XX., 69 AD3d 1240 (3rd Dept. 2010)

Two Chenango County parents neglected their three children. A series of petitions had been filed regarding a variety of allegations against the parents, The Third Department concurred that the proof established neglect of the children. The father frequently used alcohol and was violent to the children and to the mother in front of the children. He hit them, slapped them and spanked them. He overturned a couch when one child was sitting on it, choked another child and threw her across the room. He had sexually abused the oldest on two occasions – one time when the mother was present. The father seemed to have mental health problems, talked to himself, and talked of events that had not happened. He threatened and verbally abused the caseworkers. He took the children's money from them and spent it and other family money on alcohol. The parents lived in a tent at one point with one of the children although neighbors offered housing. They refused other housing for the family as it would mean that they would have to give up their dogs. The mother allowed the father to continue to hurt the children, left the children in

his care when he was drunk and offered to give up her children to be able to stay with the father. The father did not testify at the hearing and the strongest of inferences can be drawn against him. The mother's testimony had many inconsistencies and contradictions .

The court did conduct an in camera hearing with the children after the DSS made a written motion to do so. The respondents did not object nor did they request the alternative of the children being subpoenaed for testimony. The parents did not ask to be present. The court advised the parties how it would conduct the in camera and accepted questions submitted by the father. After the in camera, the court met with the parties and summarized what the children had said and indicated that the parties could have transcripts. The parents did not ask for transcripts nor did they ask to cross examine the children. When they argued on appeal that their due process rights were violated by the in camera with the children, the Third Department found that due to their actions, they had failed to preserve the issue.

Matter of Jayvien E., 70 AD3d 430 (1st Dept. 2010)

The First Department reversed a New York County Family Court neglect adjudication in a lengthy decision that reviewed the evidence in detail. The allegations concerned a 19 year old mother's behavior at the hospital as it related to her newborn child. The Appellate Court found that the behavior alleged simply did not prove that the mother had a mental illness such that her son would be at imminent danger of being impaired. The mother had allegedly "yelled" at a nurse who pushed on her stomach after the birth, allegedly referred to her child as "greedy" when the child appeared to want to eat frequently, asked to have security remove the child's father from her hospital room and had some prior history of depression and hospitalization. Although the hospital did seek a mental health consult, the mother was not diagnosed with a mental illness that raised concerns that she would place her infant at imminent risk of neglect. The mother did have prior issues involving domestic altercations both with her mother and the child's father, the proof regarding these issues was vague, far removed and was not linked to the mother being unable to care for the child. Even though the court was permitted to draw the strong negative inference from the mother's failure to testify, there was not enough evidence to make a neglect finding.

Matter of Stephanie S., 70 AD3d 519 (1st Dept. 2010)

New York County Family Court found that a father had neglected his daughter and an older sister to the child. The father exposed the children to harm by failing to ensure that the girl's mother attend a court ordered drug treatment program and remain drug free. He allowed the mother unsupervised access to the children – who were 4 years old and 10 months old – even when he had been repeatedly told not to leave them with her. The father claimed that since ACS was supervising the family, it was their job to deal with the mother. The First Department agreed with the lower court that since the children lived with him, he was responsible to deal with their safety and he had in fact exposed them to harm. The adjudication was affirmed as was the dispositional order that left the 10 month old in his care but under ACS supervision and placed the 4 year old with her non respondent biological father, also under supervision.

Matter of Lindsey BB., 70 AD3d 1205 (3rd Dept. 2010)

The Third Department affirmed a neglect adjudication regarding two Columbia County parents that had resulted in the placement of the children. The children had made out of court statements some of which were corroborated by their in court testimony. (some statements were not but the court was aware that the children may have recanted some due to pressure by the father) Other witnesses also supported the allegations. The parents engaged in constant arguments, slapping, shoving and pushing each other. Once one threw a computer monitor at the other. In another incident one child called 911 after the mother had been hit by the father. The father was emotionally abusive in that he would threaten to take all the child's possessions to punish her. The child would hide her things at school to try to keep them from her father. The parents used marijuana and cocaine in front of the children and allowed their friends to also use drugs in front of the children. There was drug paraphernalia in the home. The parents refused to cooperate with a substance abuse evaluation. The Third Department ruled that although the parents were not present when the court held a hearing with the children, the parents had no absolute right to be present at every stage of the proceedings. The parent's attorneys were permitted to cross examine the children and Family Court had balanced the due process rights of the parents with the desire to protect the children emotionally.

Matter of Janice G., 70 AD3d 1210 (3rd Dept. 2010)

A Chemung County mother had placed her child with relatives but the child ran away and was placed in foster care on a PINS. Thereafter DSS filed a neglect petition against the mother and the Third Department affirmed the lower court's adjudication. The mother simply wanted no contact or involvement with her child. The mother would not cooperate with DSS, would not visit the child or participate in her schooling or mental health counseling. The mother stated that she did not care what happened to the child and wanted the state to take care of her daughter. The child was depressed, suicidal and had to be placed in a treatment center. This was at least partially due to her mother's behavior.

Matter of Cunntrel A., 70 AD3d 1308 (4th Dept. 2010)

Onondaga County Family Court was affirmed in a educational neglect case. The father neglected the two children. They had a significant unexcused absentee rate that had effected their education. The father provided no proof to justify their absences or to show that they were being educated elsewhere.

Matter of Cory S., 70 AD3d 1321 (4th Dept. 2010)

The Fourth Department affirmed Onondaga County Family Court's adjudication of neglect. The lower court did not err in admitting evidence of an out of court statement of a child who was not a subject of the proceeding. (citing ***Ian H. 42 AD3d 701)*** The mother knew or should have known that her daughter was in danger of being physically and sexually abused by the mother's adult son. A reasonable prudent parent would have acted to protect the child. Her other son was derivatively neglected.

Matter of Niyah E., 71 AD3d 532 (1st Dept. 2010)

A Bronx father neglected his daughter by engaging in domestic violence against the child's mother in the girl's presence. No expert or medical evidence needed to be presented to prove the risk to the child in these circumstances. The child was appropriately released to her mother under agency supervision.

Matter of Paige WW., 71 AD3d 1200 (3rd Dept. 2010)

The Third Department concurred with Columbia County Family Court that a father was derivatively neglectful of his 6 month old child based on a 2005 adjudication of Dutchess County Family Court regarding older children. Although it was unclear from the 2005 adjudication if that court had in fact found that he had sexually abused the older children, at the very least it had found that he had not protected the children from being sexually abused by others. He had not engaged in the court ordered sexual perpetrators counseling. He was in denial regarding the prior abuse of the older children. Although the acts had taken place 6 years earlier, this was sufficiently proximate in time to conclude that the problems still existed particularly given his failure to obtain treatment . However, the lower court erred in ordering that the father have no contact with the child until she turned 18. It did appear that he was the child's father even though he had not legally been declared the father and such an order cannot be made against a parent. The matter was remanded for a new dispositional hearing.

Matter of Dana T., 71 AD3d 1376 (4th Dept. 2010)

The Fourth Department reversed a derivative neglect finding from Onondaga County Family Court. The mother argued that her rights were abridged when the lower court failed to schedule a requested FCA §1028 hearing within 3 court days and the appellate court agreed with her. Since no "good cause" was shown, the removal hearing should have been held within 3 days. Further the Fourth Department reversed the neglect finding itself. The mother had been found to have neglected two children five years earlier due to the condition of her home and the lack of proper medical treatment for the children. This is too remote in time to serve as a basis for a derivative on the newborn baby particularly as there was no evidence that the conditions were still the same. The agency had only had limited contact with the family in the last two and a half years and could not testify as to the mother's current situation.

Matter of Dustin B., 71 AD3d 1426 (4th Dept. 2010)

The Fourth Department affirmed an Oswego County Family Court's neglect adjudication. The father engaged in acts of domestic violence against the mother and at least one of the children. The children's out of court statements on this were corroborated by a school nurse and the caseworker.

Matter of Nyjaiah M., 72 AD3d 567 (1st Dept. 2010)

The First Department reversed the Bronx County Family Court's dismissal of a derivative neglect petition regarding a father's three daughters. On appeal the court determined that there was derivative neglect and that it warranted the removal of the three children from his care. The father had been found to have sexually abused an older daughter in 2004. He had admitted in 2004 that he had improperly touched the older daughter's genitals. The sexual abuse of this child took place continually over a four year period and there was no evidence that the respondent had changed his proclivity for sexually abusing children. In fact he had " blown on" the exposed genitals of his 6 month old and placed the head of his 3 year old daughter under his shirt near his crotch mimicking oral sex. The fact that the prior abuse was five years old was not relevant.

Matter of Alexander J.S., 72 AD3d 829 (2nd Dept. 2010)

The Second Department reversed Suffolk County Family Court 's adjudication that a father's discipline was excessive and therefore constituted neglect. When the child disobeyed him, the father pulled on his daughter's shirt and she fell on the floor, injuring her wrist. He spanked her on the buttocks and hit her on her arm with his open hand. There was no evidence that he intended to injure her or that he had used corporal punishment as a pattern. A single act can constitute neglect but this act was not sufficient to adjudicate neglect.

Natter of Tylasia B., 72 AD3d 1074 (2nd Dept. 2010)

The Second Department agreed with Suffolk County Family Court that a father had neglected his 8 year old daughter when he did nothing to prevent the child from getting into a car driven by the child's mother who he knew to be intoxicated. The father also admitted that he had an ongoing substance abuse problem. This behavior shows an impaired level of parental judgment such that the son was derivatively neglected.

Matter of Richard S., 72 AD3d 1133 (3rd Dept. 2010)

A Delaware County father was convicted in criminal court of secretly photographing high school girls undressing in the locker room at the school where he was employed. Two years later he violated the terms of his probation by being alone with his children and was then told that he could not live with his children. Two years after that he was found to have violated the terms of his probation for not completing a sex offender evaluation and he was sentenced to prison. He had also violated his probation by possessing pornography involving very young women, he took photos of women he saw at stores focusing on their genitalia and would watch girls walking around the local state university campus. At that time DSS filed a neglect proceeding alleging that the father had frequently visited his children's home, sometimes staying overnight which violated his criminal probation and he continued to refuse to cooperate with any sex offender treatment. The children had been told to lie about his being in the home, his daughter had been acting out sexually and his son had violent outbursts which resulted in his expulsion from school. Delaware County Family Court adjudicated neglect and on appeal the Third Department affirmed. The father's failure to obtain a sex offender evaluation is very significant given the sexual nature of his probation violations. He was in the home with his children when he had been specially told not to be there. The daughter had made statements of his touching her (although no sexual abuse could be proven, see *Matter of Kayla F.*, 39 AD3d 983

Matter of Anthony Y., 72 AD3d 1419 (3rd Dept. 2010)

A Broome County mother and her parents were found to have neglected the mother's four children. The mother had medical problems and arranged for the children to primarily reside with her parents. The grandparents had a long child protective history. In 1991 the grandfather had been convicted of raping his then 14 year old daughter – this mother's sister. He had also forced his son to have sex with the sister as well. He also had been convicted of assault on the grandmother and served prisons sentences for these actions. When he was released from prison, he was not allowed contact with children – including his own -- while he was on parole. He is a level two sex offender. The parental rights of these grandparents to their own children – including this mother – had been terminated. When Broome County DSS learned that these grandparents were now caring for the four grandchildren, they brought neglect proceedings. Broome County Family Court determined that all three were neglectful in exposing the children to the grandfather. The grandparents appealed the findings as to them, supported by the

children's attorney. Their argument was that the grandmother protected the children from the grandfather and that the lower court ruled that neglect existed solely based on the fact that the grandfather was a level two sex offender. In fact the lower court had found ample evidence beyond the classification. The grandfather did participate in sex abuse counseling in prison but was not accepted into treatment when he was released and had had no treatment since then. The grandparents were often with the children, including overnight. The grandmother denied that there was any reason that her parental rights should have been terminated in the past. She did not know the details of the grandfather's sexual abuse of their own children and had never spoken to him about getting further treatment. She was willing to leave the grandchildren alone with him and "if something happened, turn it in". These grandparents fail to understand the dynamics of sexual abuse and the grandchildren are at imminent risk of substantial harm.

Matter of Donell S., 72 AD3d 1611 (4th Dept. 2010)

A Onondaga County respondent neglected his child and another child of the co-respondent mother. On appeal, he argued that he was not a proper respondent relative to the mother's other child. The Fourth Department agreed with the lower court that the proof showed that he was living with the mother and the two children as a family and acted as the functional equivalent of a parent. The father did neglect both children in that he was aware of the mother's substance abuse problem and did not protect the children , including allowing the mother to care for the children overnight. He knew that the mother and his infant child had tested positive for cocaine at the child's birth and knew that the mother's explanation for that was not believable. He also was present when someone tried to deliver marihuana to the mother's home.

Matter of Jerrod G., 73 AD3d 503 (1st Dept. 2010)

The First Department reversed a neglect adjudication against a Bronx father. The father may have had mental health and substance abuse problems but there was no link or causal connection between that the any impairment or imminent impairment to the children.

Matter of Aria E., 73 AD3d 489 (1st Dept. 2010)

A Bronx mother's testimony that the father engaged in ongoing criminal activity in the home where the child lived was sufficient to establish that the child's condition was in imminent danger of becoming impaired and the father had neglected the child.

Matter of Takia B., 73 AD3d 575 (1st Dept. 2010)

New York County Family Court granted a summary judgment motion and found that a new baby was derivatively neglected. The adjudication was affirmed on appeal. A few months earlier both parents had been found to have neglected and abused their older children. Their five month old son had unexplained injuries - four broken ribs and a fractured clavicle. The father had admitted to beating a five year old. These events were very proximate in time and the parents failed to offer any evidence that the conditions that led to the finding a few months earlier had been resolved.

Matter of Sasha B., 73 AD3d 587 (1st Dept. 2010)

An 11 year old Bronx child was on the subway with her mother who was escorting the child back from school in Queens to the Bronx Shelter where they lived. The child dozed off while they sat on the train. When the child awoke, she was still on the train but her mother was gone. The child, not knowing how to get to the Bronx Shelter, took the subway back to school. When the school could not locate the mother, the child's grandmother came and got her. Upon being asked, the child said that her mother had left her on the train two other times in the past. The Bronx County Family Court adjudicated the mother neglectful and the First Department concurred.

One Judge dissented saying that the mother testified that she had nudged the child when they had reached the right stop and had exited the train believing the child to be behind her. It was only when the train pulled out that she realized that the child was still on the train. Not knowing what to do, the mother had returned to the Shelter and called the police. The police informed her that the child had returned to school. The mother then phoned the grandmother to go get the child. The dissent found that this did not put the child at any risk and further that there were

no details presented about the allegations that the mother had done this two times before. The dissent found that the mother was in fact making extraordinary efforts in traveling with her child to and from school and the child was not upset at all about what had happened.

Matter of Jaquanna H., 73 AD3d 776 (2nd Dept. 2010)

In an Art. 10 matter which alleged that a Suffolk County mother neglected her children as a result of illegal drug use, the mother was asked to consent to a drug test. After consulting her attorney , she did consent to the test and in doing so waived any right to object to being ordered to undergo drug treatment based on the test then showing that she had used illegal drugs.

Matter of Andrew B., 73 AD3d 1036 (2nd Dept. 2010)

A Suffolk County mother appealed her neglect adjudication arguing that the question of her mental condition was res judicata and collateral estoppels applied based on the Suffolk County Supreme Court having previously ruled under MHL § 9.39 that mental health hospitalization was not required. The Second Department found that the mother had failed to perfect an appeal on these grounds to an order made by Family Court to deny her motion to dismiss the petition. The evidence supported that the mother's mental health condition put her daughter at risk of neglect. The child's testimony was credible and also supported a derivative finding regarding the son.

Matter of Christopher C., 73 AD3d 1349 (3rd Dept. 2010)

The Saratoga County father of young child had a history of sexual abuse of children. He had been convicted of sexual abuse of his niece and served time in jail and was a level three sex offender. He also admitted sexually abusing another niece over the course of a three year period, including engaging in sexual intercourse. These events occurred when he lived in the home with the nieces. Further he had sexually abused an unrelated 8 year old boy. He had not completed sex offender treatment. When he fathered this baby, DSS became involved and still he was unable to complete any sex offender treatment as the program discharged him due to his untruthfulness . They recommended that he have no contact with any child at all due to his high risk of reoffending. The Saratoga County Family

Court dismissed the petition. DSS appealed and the Third Department reversed. The father not only had a lengthy history of sexually abusing children but this history included male and female children, related and unrelated and had gone on for years. He failed to stay in treatment even at the risk of having a neglect petition field regarding his own child. He did not act as a reasonably prudent parent to prevent imminent danger to his son.

Matter of Crystal S., __AD3d__, dec'd 6/1/10 (2nd Dept. 2010)

The Second Department reversed a neglect finding against a Kings County mother. ACS alleged neglect by the mother and her boyfriend as to the mother's 16 year old daughter. The daughter left home after being told she could not leave and an altercation occurred when she returned after midnight. The boyfriend and the 16 year old engaged in a screaming match. The mother testified that she saw the 16 year old reach for a knife and that she came between the two of them and held the child's arms "very hard" to stop her from obtaining the knife. The caseworker observed a mark, a bruise and a small swelling the size of a quarter on the child's arm. The Family Court called the child "out of control" but still ruled that the mother's use of physical force on the child was neglect and the court suspended judgment with an order of supervision. At the end of the supervision period, the court dismissed the neglect petition with prejudice. The mother appealed and the child's attorney argued that the appeal was academic since the petition in effect had been dismissed. But the Second Department found that although the proceeding was dismissed, the court had not actually vacated the neglect finding and that the mother should still be able to appeal the neglect finding. The appellate court found that mother's actions were not neglect as she used physical force to justifiably stop the child from obtaining and possibly using a knife on the boyfriend.

Matter of Mitchell WW., __AD3d___, dec'd 6/3/10 (3rd Dept. 2010)

A Columbia County father neglected his son. The Third Department agreed with the lower court. The father permitted a friend with an alcohol addiction to stay in the family home, sometimes overnight, while the father helped the friend to "detox" by deciding how much beer he was allowed to ingest. The child was present for this. Also the father abused his own and the mother's prescription medications – particularly to Oxycontin. The child's laundry contained an

envelope with approximately 30 Oxycontin pills in it that the mother had given to the child to take to the father at the father's insistence. He had threatened the mother that if she did not give the child the pills for the father's use, he would not let her see the child again. No reasonable parent would put a child at such risk as to give him that quantity of drugs to carry. Further the father's argument that the lower court should not have let him appear pro se at the removal hearing was rejected by the appellate division. The court had questioned the father extensively about his education and advised him that he would be bound by the rules of evidence and procedure. The court explained the nature of the petition and the legal ramifications and told him that the other attorneys would not be representing his interests. The father understood the consequences and perils of self representation.

Matter of Clydeane C., __AD3d__, dec'd 6/8/10 (1st Dept. 2010)

The First Department reversed New York County Family court's finding of neglect in a "dirty house" case. The mother and her 11 year old daughter lived with an elderly man and took care of him- bringing him to medical appointments and cooking for him. The man died at age 96 after they had lived there and cared for him for 3 years. The man's son then attempted to have them evicted. At the suggestion of the police, the mother went over to the housing court to attempt to stop the eviction and the son then called CPS to report a child had been left alone. The apartment was cluttered but many of the things were legal files that belonged to the old man. The kitchen was dirty and the caseworker said there was a mild smell of urine. However a musty or urine smell in the apartment of an elderly sick man is not unusual. The cat feces found in one room is not unexpected in a home with a pet cat. The home may have been far from ideal but none of these conditions seemed to have impacted the child. The 11 year old had adequate sleeping conditions and was observed as well taken care of, verbal, very smart and was attending school and passing. The child sometimes had body order and dirty clothing but she was not at imminent risk of neglect. Further either leaving an 11 year old alone or with a known adult in an apartment for 2 hours is not neglect.

Matter of Susan XX., __AD3d__, dec'd 6/10/10 (3rd Dept. 2010)

The Third Department refused to overturn a fair hearing decision and determined that the behavior of a Tioga County mother constituted an indicated report. The

fair hearing decision had ruled that the indication was not "reasonable related" to the care of children and so it would not be disseminated but continued it as an indicated report. The mother had left her two children in a locked car at 9pm at night while she went into a store. A passerby called law enforcement who waited by the car for 20 minutes before the mother arrived back with shopping bags. The children were asleep and in car seats and the car had been left running . The mother claimed that she did not want to wake the children and had left the motor running so the air conditioning would be on. She thought it was safe as she could see the car from the store. It did not seem that the mother could in fact see the car as the deputy was by the car for 20 minutes and the mother did not exit the store. Leaving children for a such a period of time in a locked running car is so inherently dangerous that it carried a very high risk the child children could be harmed.

Matter of Serenity P., __AD3d___ dec'd 6/11/10 (4th Dept. 2010)

The Fourth Department affirmed Erie County Family Court that a mother neglected her children by leaving a one and a three year old alone in a car for at least 15 minutes while she was grocery shopping.

Matter of Elizabeth W., __AD3d__, dec'd 6/11/10 (4th Dept. 2010)

The Fourth Department affirmed an Erie County Family Court finding that two parents neglected their children. The mother "repeatedly subjected" them to "unnecessary and demeaning physical examinations" and made them take a "herbal remedy that she knew to be toxic". The father knew or should have known what she was doing and a reasonable parent would have protected their children from this behavior.

Matter of Christy C., __AD3d__ dec'd 6/15/10 (1st Dept. 2010)

The First Department reversed a neglect adjudication from the Bronx County Family Court. Citing ***Nicholson,*** the appellate court found that one incident of domestic violence outside or the presence of the children was not sufficient to prove that they were impaired or in imminent danger of being impaired. The lower court had found that there were repeated acts of domestic violence but this was based on inadmissible hearsay from police reports that contained comments

from non police officers who were under no business duty to report. Further the proof was insufficient that there had been excessive corporal punishment of the children. The father admitted he "popped" or "tapped" the child but this was not proof that the discipline was excessive. The child had no injury and was laughing and in good spirits after being hit.

Matter of Shiree G., __AD3d__, dec'd 6/21/10 (2nd Dept. 2010)

The Second Department agreed that a respondent had neglected children when he grabbed the pregnant mother, threw her into a wall. The mother grabbed a knife and held it to the respondent's throat. The children were present and were terrified, screaming and crying, hysterical and trying to get to the mother.

Matter of Melanie S. __Misc 3d ___ dec'd 6/23/10 (Family Court Kings County 2010)

Two Brooklyn parents derivatively neglected their children based on the circumstances of the death of their two month old. They took the baby out at night in January while the child had been suffering from a cold and brought the child to an abandoned building with no heat or electricity. They left the baby in a stroller for six hours with no supervision and with a bottle tied into its mouth. The baby died. They may not have intended the child's death but they disregarded a substantial probability that harm would result to the baby. The neglect allegation as to the deceased infant is dismissed as the Court of Appeals has recognized the need to make abuse findings regarding deceased children but not neglect findings. The mother also did not provide the other children with adequate food. Even though given help, the children were not provided enough food and the home was infested with roaches and mice. There were also bags of garbage and dirty dishes and clothing.

Matter of Jalesa P., __AD3d___, dec'd 7/1/10 (3rd Dept. 2010)

A Schenectady County child's attorney received permission to file an Art. 10 petition regarding a child who he had represented in a custody petition. DSS had decided there were no grounds to file a petition. After a hearing, the lower court dismissed the petition against the mother and on appeal, the Third Department

agreed that there was not a preponderance of evidence of neglect. The allegation of excessive corporal punishment was not proven. The child did have a bruise but the witnesses testified that it was not as the result of corporal punishment and there was no evidence of ongoing activity of this kind. The child was late for school frequently and did have a large number of unexcused absences and was having to repeat a year. However, the proof was that this issue had greatly improved and that the child was doing much better in the current school year. The child had gotten head lice and ringworm but the evidence showed that the mother dealt with each appropriately. While the mother had become aware that the child needed glasses, it was not unreasonable for her to wait to purchase them when her insurance would cover the cost. There was no proof presented that any lack of hygiene or suitable clothing had resulted in any harm to the child. Although the mother had been involved in an acrimonious relationship with the father and also with her current boyfriend, again there was no proof that anything occurred in the presence of the child or that it impacted her in any way. Allegations of the mother's abuse of alcohol and marijuana and unsupervised play outside were also not proven.

Matter of Bianca QQ., __AD3d___, dec'd 7/1/10 (3rd Dept. 2010)

The Third Department affirmed a neglect finding against a Clinton County mother. The children made numerous out of court statements about excessive corporal punishment and being left unsupervised. The out of court statements were corroborated by other witnesses. The children who were 7 and 5 years old were observed on one occasion standing outside in the winter and waiting for at least an hour for their parents to come and let them into the home after they returned from school. On another occasion, no one came to school to get the children and upon being reached the mother indicated that the children should be sent home alone where there would be a babysitter waiting for them. Instead a school employee drove them home where there was no babysitter and the children had to be brought back to school to await the mother leaving work to come for them. The older child made multiple out of court statements that she was often left alone to supervise the younger child and that she would make toasted cheese sandwiches for them to eat. The children also complained about being "whooped" and they did have observable bruises and scars on their fingers, feet , knees and their backs. They were hit by a belt and often the buckle struck them. They had been told not to discuss what happened at home at school and they expressed fear of being hit after disclosing the problems at home. Even when they were removed and taken to the DSS building, they expressed fear that they would be "whooped" because the parents knew the building.

Matter of Isaac J., __AD3d___, dec'd 7/6/10 (2nd Dept. 2010)

The Second Department concurred with Kings County Family Court that a mother had neglected her child. The home was deplorable and unsanitary. The child was not provided with adequate medical care. The child was in imminent danger of being neglected. The court also properly granted ACS' motion to have the child immunized under PHL § 2164 since the mother failed to prove that her opposition to any immunization was based on genuinely held religious beliefs.

Matter of Dylan TT., __AD3d__ dec'd 7/8/10 (3rd Dept. 2010)

A Madison County respondent neglected his stepson and derivatively neglected his own daughters. The respondent used excessive corporal punishment on the child. The mother testified that the respondent struck the child in the face after a toilet training accident. She also testified that the child was afraid of the respondent and would cower or hide from him. The respondent himself admitted that the child would "flinch". In another incident the child made out of court statements that the stepfather got mad at him for walking slowly, picked him up and threw him down the hallway. These out of court statements were corroborated by witnesses who saw bruises, redness and marks on the child's face and neck and by photos showing abrasions on the child's nose and cheek. The respondent not only injured the child but also left the child in a state of fear.

ABUSE

Matter of Abraham P., 69 AD3d 492 (1st Dept. 2010)

The Bronx County Family Court issued a derivative abuse adjudication against a mother, which resulted in her children being placed in foster care. The adjudication was affirmed on appeal. The mother's 4 month old son had died of asphyxiation due to a coin being lodged in his throat. The child was not developmentally mature enough to have picked up the coin himself and there had been a previous choking incident. The baby had been in her exclusive care. The mother's other children were therefore derivatively abused. At the very least there was proof that she took no action to assist the baby when he was unable to breathe on two occasions. The strongest inference can be drawn against the mother for her failure to testify.

Matter of Alanie H., 69 AD3d 722 (2nd Dept. 2010)

A Kings County matter was reviewed in detail by the Second Department. ACS had filed an Art. 10 abuse and neglect petition against the mother, father and paternal grandmother regarding a four month old boy. The ACS allegation was that the child had suffered a non accidental head trauma while in their custody. The Family Court had held a combined FCA §1028 and fact-finding and had dismissed allegations against the grandmother finding she was not a person legally responsible for the child. The lower court also found that the parents had not been abusive but had medically neglected the child and returned the child to the parents under supervision. The child's attorney supported the parent's position. ACS obtained a stay of the return of the child and on appeal , the Second Department modified the disposition such that the child should remain in foster care.

The Second Department concurred that there was no proof that the grandmother was a person legally responsible for the child's care and so the dismissal of allegations against her was appropriate. The appellate court also agreed that ACS did not prove abuse. While a prima facie case was established that the child suffered injuries while in the parent's care, the parents expert witnesses did offer an explanation. The child had just been in the hospital for meningitis and the symptoms were not evidence of a trauma to the head but were sequelae to the meningitis and the treatment the child had received during his 10 day stay in the hospital. However a medical neglect finding was warranted as the parents did not seek immediate medical treatment for the 4 month old when he was vomiting and crying given that he had just been released from a 10 day hospital stay. The parents had properly attended to the child's medical needs in the past but this failure supported the ACS position that the child would be at imminent risk if returned to the parents . At the dispositional hearing, the court could consider again the possibly of a release to the parents under appropriate supervision NOTE: The stay of the child in foster care ended up being 8 months long .

Matter of Brooke KK., 69 AD3d 1059 (3rd Dept. 2010)

The Third Department affirmed a sex abuse adjudication regarding a father and his 3 year old daughter. The testimony indicated that at the emergency room, the child told the nurse that her vagina hurt and when asked why said said , "Daddy. Daddy's big finger." She made similar statements to the caseworker but then

would say no more. The child did have redness and soreness in the vaginal area but the doctor could not say this was due to sexual abuse as the child had other conditions that could have caused these symptoms and in fact continued to have the symptoms long after contact with her father was ended. The child's out of court statements were sufficiently corroborated, though, by statements the father made to a State Police investigation. He admitted he had touched the child's vaginal area on two occasions and told two investigators that he "needed help". The father produced expert testimony that he was easily manipulated and had been pressured into making the statement but the court found the father's testimony that he had not touched the child weak and unconvincing.

Matter of Elizabeth S., 70 AD3d 453 (1st Dept. 2010)

The First Department reversed the New York County Family Court's dismissal of an abuse and neglect petition on a prima facie motion. The petition alleged that the mother should have known of the stepfather's sexual abuse of her daughter and should have taken appropriate action to protect the child. In their direct case, ACS had offered the child's in court testimony that she had told her mother twice that she was being sexually harassed by the stepfather. The child also testified that the mother knew of and in fact arranged for the stepfather to come to her bedroom at night, allegedly to "improve" their relationship. The child testified that the mother allowed the stepfather to give her "massages" and that her mother ridiculed her and called her a liar when she complained to her mother about the stepfather's actions. ACS also provided emails that the mother had sent to the child's biological father that tended to support the claim that she did in fact know of the child's complaints.

The respondent mother then took the stand in her defense and began to testify but before she had testified about the allegations, the lower court granted a prima facie motion and dismissed the case. Apparently the lower court assumed that the mother was going to testify that she believed that the child's testimony of the stepfather's behavior was false. On appeal, the First Department ruled that the direct case made out a prima facie claim of abuse and neglect on the mother's part and that the "burden then shifted" to the mother to explain her conduct and rebut the evidence against her. The lower court apparently concluded that the mother would deny the allegations but did not in fact hear such testimony and instead relied on out of court statements that the mother had made in the past. The court's

ruling on the motion denied ACS and the child's attorney an opportunity to cross exam the mother. The matter was remained for a continued fact finding.

Matter of Sonia C., 70 AD3d 468 (1st Dept 2010)

The First Department refused to reinstate an abuse and neglect petition that had been dismissed by New York County Family Court. The child's testimony regarding sexual abuse was vague, inconsistent and not detailed. There were no other witnesses that confirmed the child's allegations independently. The mother's testimony however was consistent and supported by witnesses. The lower court was in a position to judge the credibility of the witnesses.

Matter of Arlenya B. 70 AD3d 598 (1st Dept. 2010)

The First Department approved of the process Family Court used regarding a child's testimony in a sex abuse matter. The father was alleged to have sexually abused his 13 year old sister in law and therefore derivatively neglected his own daughter. At the hearing, the 13 year old was called to provide testimony but her live in court testimony was interrupted when her voice was inaudible. The child's psychologist indicated that the child had been intimated by the respondent watching her in open court and that this had led to the child having sleeping difficulties and an increase in her thoughts about the abuse. The court then ruled that the child could testify via live two way video. The two way live video allowed all the parties to hear the testimony and observe the child's demeanor and allowed for cross examination. The court also then had a full record of the child's testimony. This approach was an appropriate balance between the due process rights of the respondent and the mental and emotional well being of the child. Criminal evidence rules do not apply. The court properly found that the respondent had sexually abused the 13 year old sister in law and therefore also derivatively neglected his own daughter. The 13 year old was placed with her biological mother who was not a respondent and the respondent's child was placed with her mother who also was not a respondent.

Matter of Daniel R., 70 AD3d 839 (2nd Dept. 2010)

The Second Department reviewed a sex abuse matter from Kings County Family Court on an appeal by the mother. The mother had seven children - six of the children had the same father and the youngest child had a different father who was also a respondent. The lower court found that the youngest child's father had sexually abused two of the older girls and that the mother had failed to protect them. After the adjudication, the mother had consented for two older boys to be placed in the custody of their biological father. The two oldest girls who alleged the abuse tuned 18 years old before the case was appealed. The mother objected to the last two of her oldest six being placed with their father.

The Second Department concurred that abuse had been proven, The older girls had testified that the mother's boyfriend had touched their buttocks and legs repeatedly over a five year period. One of the girls claimed that on one occasion she woke up at night to find him on top of her with his hands going up her legs and that he had put a knife to her throat and told her he did not want her or her siblings in the house. The boyfriend's claim was that these touching were accidental but the fact that this was a repeated occurrence makes that claim unlikely. The mother argued that there was no proof that this touching was sexual in nature and as an example claimed that the incident with the knife showed that the boyfriends' intent was not sexual but was intended to be a threat to make the children want to leave the home. The intent to gain sexual gratification can be inferred from the repetitious acts he committed. The mother further claimed that she was unaware of the touching but she admitted that the girls' father had complained to her that the girls were being touched. Placing the children with their own father on his Art. 6 petition in the context of this Art. 10 was appropriate given the adjudication against the mother.

Matter of Afton C., 71 AD3d 887 (2nd Dept. 2010)

The Second Department reversed neglect findings against a Dutchess County mother and father as to their 4 children. The lower court had found the parents to have neglected the children. The father had been released from prison and was classified as a level three sex offender and the father had moved back into the home with the mother and the children. DSS had alleged that as an untreated sex offender he posed a risk to the children and that he and the mother were aware of and ignored that risk. The Second Department reversed, ruling that DSS had not proven how the father's presence in the home had posed a threat to the children

and that the parent's evasiveness and the father's invocation of the Fifth Amendment during testimony was not sufficient to establish any imminent danger of neglect.
NOTE: Since other cases, particularly in the Third and Fourth Department have ruled otherwise, it would have been helpful for the Second Department to have distinguished this case from the others.

Matter of Leon K., 69 AD3d 856 (2nd Dept. 2010)

The Queens parents of three children pled guilty in criminal court to felony assault charges regarding the injuries to one of the children. The Second Department concurred with ACS and the children's attorney that these convictions warranted summary judgment of abuse regarding that child and derivative abuse regarding the other two. However, as to severe abuse, the Second Department , found that diligent efforts had not been proven as required by SSL § 384-b(8) (a) (iii) (C) and therefore severe abuse and derivative severe abuse findings were inappropriate. ACS "conceded" this on appeal. The Second Department noted that ACS was free to establish the diligent efforts issue in further proceedings. NOTE: Both the First and the Second Departments continue to incorrectly read the diligent efforts requirement of a severe abuse TPR into the Art. 10 severe abuse definition. The severe abuse finding in an Art. 10 allows for a motion that no diligent efforts are needed as a disposition which then sets up the severe abuse termination. It is completely illogical and an incorrect reading of the statue to require diligent efforts to be proven in order to find severe abuse in an Art. 10.

Matter of Keyarei M., 71 AD3d 1510 (4th Dept. 2010)

An Erie County father admitted that his child died due to his serious abuse of her but argued that this act was insufficient evidence that he had derivatively abused his other three children. The Fourth Department disagreed.

Matter of Destiny UU., 72 AD3d 1407 (3rd Dept. 2010)

Schenectady County Family Court correctly ruled that a five year old had been sexually abused by her father. The child gave detailed out of court disclosures that were corroborated by her age inappropriate knowledge. She gave graphic descriptions of sexual acts. An expert witness testified that the child demonstrated

the behaviors of a sexually abused child and that it was likely that the father had been the abuser. The child also provided unsworn testimony in camera. The father provided improbable testimony that he had never been alone with the child.

Matter of Aaron H., 72 AD3d 1602 (4th Dept. 2010)

The Fourth Department affirmed Oneida County Family Court's vacating and order that had dismissed a severe abuse petition. After the court had dismissed the petition based on mother's testimony that she did not abuse the child, the mother entered an Alford plea in criminal court with respect to sexually abusing her child. Family Court had authority to vacate the prior order in the interest of justice. Even though she made no admissions, her Alford plea is a criminal conviction for sexual abuse which constitutes conclusive proof of the abuse allegations in Family Court.

Matter of Dashawn W., 73 AD3d 574 (1st Dept. 2010)

The First Department reversed New York County Family Court's dismissal of the severe abuse cause of action in a physical abuse case. Applying the criminal case law standards regarding the "depraved indifference to human life" requirement, the lower court had ruled that severe abuse was not proven. The First Department however found that the father's actions on separate occasions that resulted in his five month old baby sustaining a fractured clavicle and some four to seven broken ribs did evince a depraved in difference either intentional or reckless as per SSL § 384-b (8)(a). The First Department then remanded the matter for the lower court to reach the issue of diligent efforts which the Appellate Court interpreted to be a requirement in the determination of Art. 10 the severe abuse.
NOTE: Unfortunately, yet again the Appellate Division seems to have misread the definition of Art. 10 severe abuse. There is no "diligent efforts" finding needed to adjudicate severe abuse in an Art. 10 action. That finding is only needed for a termination on the severe abuse grounds . The severe abuse Art. 10 adjudication allows motion to make a finding that no reasonable or diligent efforts are needed – it is nonsensical to require a finding of diligent efforts to make a finding that diligent efforts are not needed.

Matter of Peter B., 73 AD3d 764 (2nd Dept. 2010)

In this Dutchess County severe abuse matter, the county filed both a severe abuse Art. 10 petition and a termination of parental rights petition against a father who had killed the child's mother. The father had been convicted of manslaughter in the first degree and was serving 18 years. At the conclusion of the combined hearing, the DSS orally moved for and the lower court granted an order that the agency need not offer the father any diligent efforts toward reunification. On appeal, the father argued that the motion should have been made in writing. The Second Department ruled that the motion itself was "superfluous" since in determining that the child had been severely abused as per Art. 10, the court had already ruled that diligent efforts had been offered or were not necessary.

Matter of Yamillette G., ___AD3d___, dec'd 6/15/10 (2nd Dept. 2010)

A Kings County mother and her boyfriend were responsible for the death of the mother's 20 month old child. Both parents plead guilty to manslaughter in the death of the child due to massive head trauma. ACS moved for summary judgment on petitions of severe abuse of the deceased child and derivative severe abuse of another child they had in common. ACS also requested a finding that reasonable efforts to return the child surviving sibling be excused as it would not be in her best interests. The child's attorney supported ACS' motion. The parent's criminal pleas specifically admitted that they had abused the child and caused her death and that was sufficient for a summary judgment motion in Family Court for severe abuse. This also establishes clear and convincing evidence that efforts should not be made to return the surviving child to the home.

Matter of Melissa O., 73 AD3d 783 (2nd Dept. 2010)

Suffolk County Family Court found that a father had neglected his daughter due to his sexual abuse of his daughter's friend. The Second Department reversed finding that the lower court's credibility determination regarding the testimony of the victim was not support by the record

Matter of Taylor T., 73 AD3d 1075 (2nd Dept. 2010)

The child's attorney appealed a Suffolk County Family Court dismissal of an abuse and neglect petition. The Second Department agreed with the dismissal finding that the child's testimony was incredible, inconstant and vague. The child did not give details and her time frames were directly contradicted by other evidence. Her testimony was not corroborated by any other witness, medical evidence or expert evidence.

Matter of Lauryn H., 73 AD3d 1175 (2nd Dept. 2010)

Kings County Family Court adjudicated sexual abuse and the Second Department affirmed. The 10 year old girl testified that some 3 years earlier, the respondent who was a person legal responsible, had sexually abused her. Her testimony was credible in that she was able to give details such as lighting conditions, the fact that she was seated and clothed while he was standing and that she told someone at school the next day. Although she was unable to testify at to the date of the event and some other details, her testimony was not shaken on cross examination. Further the lower court was proper in considering the report filed by the mandated reporter in the matter as per FCA § 1046 (a)(v). The respondent claimed that there was no proof of his intent of sexual gratification but that can be inferred here from the nature of the acts and the circumstances. This abuse of the one child is sufficient to support a finding of derivative neglect of the other child in the home.

Matter of Devre S., __AD3d___, dec'd 6/11/10 (4th Dept. 2010)

An Erie County mother appealed findings against her of abuse and neglect of her infant and toddler. The second respondent did not appeal. The medical testimony was that the 2 week old infant sustained a fracture of the left leg and a laceration of the liver that the respondents did not adequately explain. The 18 month old child was derivatively abused and neglected due to this level of impaired judgment.

Matter of Kayla J., __AD3d __, dec'd 6/24/10 (3rd Dept. 2010)

The Third Department expressed its concern about the difficulty in determining the truth about the allegations in this matter but ultimately upheld the Albany County Family Court's dismissal of sex abuse allegations against a father. The appellate

court agreed that the mother's animosity toward the father which included multiple and prolonged custody and visitation litigation had distorted and tainted her testimony as well as the out of court statements the child did make. The child's statements included things that appeared to be adult viewpoints or included legal information. The child had age inappropriate sexual knowledge but she had also been exposed to sexual information unrelated to the father. The court did take judicial notice of the prior litigation but that was upon notice to the parties and the court did not overly rely on those records. DSS had offered "validation" testimony . The Third Department said that it was error for the lower court to find that testimony unacceptable however the proof was of limited value since the experts were providing therapy for the child and were not performing forensic evaluations. Both therapists proceeded from the assumption that the child had been sexually abused and the history provided to them was all from the mother. One therapist never met the father and the other only communicated with him once but the session ended when the father became upset. The appellate court did comment that they were "concerned" about the court discussing its views on proper protocols for sexual abuse interviews, particularly it's apparent endorsement of Yuille's protocols given that these protocols were not offered into evidence at trial.

Art. 10 Dispositions and Permanency Hearings

Matter of Imiya P., 69 AD3d 480 (1st Dept. 2010)

While ruling that the appeal of an expired New York County dispo order was moot, the First Department did comment that had it considered the merits, the requirement that a respondent father had to complete a drug rehab program before the child was released to his care under ACS supervision was appropriate. The father had admitted that he neglected the child due to his drug use and his failure to seek treatment.

Matter of Louis M v ACS 69 AD3d 633 (2nd Dept. 2010)

The father filed for Art. 6 custody in this Queens County Family Court matter, Since there was no prior custody order between the mother and the father, the correct standard to apply was best interests and the father was not required to show

any change in circumstances. The child's wishes, given her age, were entitled to be given substantial weight.

Matter of Kasja YY., 69 AD3d 1258 (3rd Dept. 2010)

A Schuyler County permanency hearing was reviewed by the Third Department. The lower court had issued an order that continued the child in foster care and this was appropriate. The mother had been found to have neglected the child and the child was placed with an aunt in Tennessee. The mother moved there to work on reunification however she then left Tennessee without notifying anyone and eventfully resurfaced in New York State when she applied for public assistance. She refused mental health services that had been ordered and moved three times after returning to NY. She refused to return to Tennessee even though she was advised that it would be very difficult to effectuate a return of the child with such distances. Since she could not show that she had made progress toward overcoming the problems that had led to placement, the child's placement needed to be extended. The mother's parental rights were terminated on mental illness grounds while this appeal was pending but the Third Department did ruled that it did not make the issue of the permanency hearing moot.

Matter of Michael D., 71 AD3d 1017 (2nd Dept. 2010)

Queens County Family Court changed a child's goal to adoption in a permanency hearing and the mother appealed. The goal change was appropriate. The child was placed in care due to the mother having allowed the father access to the child in violation of an order of protection. The child is 3 years old and has been in care since she was 6 months old.

Matter of Zachary EE., 71 AD3d 1239 (3rd Dept. 2010)

The Third Department reviewed contempt findings against a Clinton County mother. One month into the Art. 10 case, the mother admitted she had violated the temporary order of protection and the court sentenced her to 6 months in jail but suspended the sentence. Five months later, DSS filed a petition alleging that the mother had now violated the terms of the suspended sentence and the dispo order by leaving her inpatient drug treatment program and by not telling the caseworker that she had moved. The mother admitted these violations as well. Clinton

County Family Court then ordered an 18 day jail sentence for failing to inform the caseworker of her new address and revoked the original 6 month sentence and imposed that as well, requiring that the two sentences be served consecutively. The mother had been in jail for 49 days awaiting this sentence and the lower court ruled that the 49 days could be used as time served on the 18 days but could not on the 6 months. A month later and from the jail, the mother surrendered her rights to the child. The mother's lawyer then sought a stay which was granted from the Third Department and the mother was released from the jail pending the appeal of the contempt sentencing. Family Court then vacated it's order of 18 days and 6 months and ordered an evidentiary hearing on the suspended sentence. The mothers' lawyer sought and obtained from the Appellate Division a stay of that hearing.

The Third Department ruled that while the Clinton County Family Court had authority to lift the suspension on the original jail sentence based on the mother's admission of the second set of violations, the court lacked any jurisdiction to vacate its own order and schedule a hearing while the Appellate Court had issued a stay. During an appeal, the trial court can correct ministerial errors but cannot sua sponte vacate an order while the appeal is pending as this in effect insulated the lower court from an appropriate appellate review that the mother has a clear right to have. The Appellate Court then credited the mother with the remaining 31 days of jail time that she had served of the 6 month sentence and vacated the rest of the sentence.

Matter of Otsego County DSS v Mathis 71 AD3d 1298 (3rd Dept. 2010)

Otsego County Family Court had ordered DSS to supervise the visitation that a father, who was a registered sex offender had with his child who was in the Art. 6 custody of the mother. DSS learned that all three of the parties had moved out of the county and brought a motion to Family Court to be relived of the order to supervise. The lower court did so and among other issues on appeal, the Third Department affirmed.
NOTE: There was no discussion of the lower court's authority to order DSS supervision in an Art. 6 matter.

Matter of Heaven C., 71 AD3d 1301 (3rd Dept. 2010)

In a much discussed case, the Third Department ruled that 22 NYCRR 130-1.1a (a) requires that all permanency hearing reports must be signed by an attorney for the social services agency responsible for the report as it is a "paper" that is "submitted to the court" . A report pursuant to FCA Art. 10-A is not listed in the regulation as being one of the exceptions to the attorney certification rule. The Third Department did say that an unsigned report "need not be stricken" if the omission is "corrected promptly after being called to the attention of the attorney" NOTE: The current mandated forms for permanency reports do not carry this certification language and most attorneys have not been reviewing every one of the permanency hearing reports in their county and without a change in the law, this will be a very daunting process for some of our larger counties and could delay the timely filing of reports.

Matter of Brendan N., 72 AD3d 1138 (3rd Dept. 2010)

A Columbia County infant was placed in foster care after neglect allegations that the parents had a violent relationship and that the father used cocaine and marihuana while taking care to of the child. The child's paternal grandmother filed 3 separate guardianship petitions as well as sought to become a kinship foster parent for the child but was denied each time. After the child had been in foster care about a year, the mother was murdered and the father was charged with her murder and incarcerated. (He was later convicted and that was currently on appeal) DSS then requested and the court did in fact change the child's to adoption. The paternal grandparents then filed for visitation which the lower court denied. The Third Department found father's appeal of the changed goal to be moot as his parental rights had by then been terminated. (and that too was currently on appeal) As to the grandparents' appeal, the Third Department found that the denial of the guardianship petitions and the kinship foster care application had not been appealed at the time so those issues were not preserved for appeal. As to the denial of the visitation petition, the lower court was correct. The child was now 2 years old and had spent all of his life except for a few first months in foster care. The grandparents had no meaningful relationship with the child. The grandmother did not believe her son had murdered the mother and did not believe that there had been domestic violence in the home. Even when faced with medical records of the child's mother's injuries, she denied that there had been domestic violence and claimed the mother was prone to accidents. The grandmother had paid for a motel room for her son and the mother after the son had been released from jail earlier

for violating the orders of protection that he stay away from the mother. She and the grandfather both knew that the son abused drugs while caring for the baby but had done nothing. They simply do not appreciate the serious circumstances that led to the child being placed and they used poor judgment with respect to the safety of the child.

Matter of Lindsey BB., 72 AD3d 1162 (3rd Dept. 2010)

Columbia County parents appealed a permanency hearing order that found them in violation of the terms of the dispositional order and changed the children's goal to adoption, ordering that DSS file a TPR. DSS did prove by clear and convincing proof that the parents had violated the order. They refused to undergo substance abuse evaluations, refused to attend counseling and would not execute releases. Apparently they choose not to obey the court's order as the underlying Art. 10 was on appeal at the time. However, the parties are obligated to follow the lower court's order while a case is on appeal, unless there is a stay. Family Court also correctly changed the children's goal to adoption given the parent's refusal to engage in any services . However, the lower court erred in issuing a "no reasonable efforts" order at the permanency hearing as the motion for that relief should be made on papers and the DSS did not prove that the respondents in fact swore that they would refuse to engage in any services dispute being warned that this could result in an order that reunification services need not be provided.

Matter of Melody v Clinton County DSS 72 AD3d 1359 (3rd Dept. 2010)

A Clinton County mother was found to have neglected her son and the child was placed in a FCA §1017 placement with an aunt and uncle. At the first permanency hearing, the court changed the goal to permanent placement with a relative and urged the relatives to file for Art. 6 custody, which they did. The Third Department concurred with Family Court that extraordinary circumstances warranted the granting of the relatives' Art. 6 petition. The primary evidence in the Art. 6 came from the caseworkers who had worked with the mother before the removal, the circumstances of the removal and her lack of progress after the removal.

Matter of Iceniar R., 73 AD3d 784 (2nd Dept. 2010)

Kings County Family Court found a father in contempt for willfully violating an order of protection on multiple occasions and sentenced him to four consecutive terms of jail of six months each. On appeal, the Second Department reduced the sentence to one term of imprisonment of 6 months. The father had not been given notice prior to the hearing of three of the dates where he was alleged to have violated the order. Also the imprisonment for violating the order on those dates was double jeopardy as he had already pled guilty in criminal court to violating the order of protection on two of those dates. (Citing the Court of Appeals finding of ***People v Wood*** **95 NY2d 509 (2000)**

Matter of Blaize F., __AD3d__ dec'd 6/3/10 (3rd Dept. 2010)

The Third Department reviewed an extension of supervision petition for Clinton County stepfather as to two stepchildren and an older son. The extension of supervision for the two stepchildren did not appear to be the issue but the parties all indicated that they agreed that visitation with the, now 6 foot, 17 year old son, could be unsupervised. The DSS even stated that they should not have included the son in the extension of supervision petition as they did not think any supervision of that relationship was needed any longer. The Family Court however produced and admitted into evidence its own exhibit, a Canadian report on treatment for sex offenders. The lower court's decision included a lengthy quote from the report and ruled that the visitation with the son would remain supervised. The Third Department reversed ruling that all the witnesses and parties supported unsupervised visitation. The DSS wanted the court to dismiss as to the older child and that the court disregarded all the witnesses and instead produced and relied on its own exhibit. The lower court called the witnesses unreliable and yet of the witnesses had been described as "credible and highly reliable" in an earlier hearing on this matter. The teenage son expressed terrible frustration at not being able to spend meaningful time with his father and there is no basis in the record to continue the supervision of this older child's visits.

Matter of Brandon DD., __AD3d___ dec'd 6/3/10 (3rd Dept. 2010)

A Clinton County mother was appropriately found to have violated the court's orders of protection and placed the child at risk such that the child needed to be

placed in care. After a neglect finding and an order of supervision, the child's attorney became aware that the mother had married a level 2 sex offender whose conditions of parole included that he could not have contact with minors. The court then modified the mother's supervision order to include a provision that the mother could not let her husband within 1,000 feet of the child. The caseworker received information that the husband was in the home with the child and went to the home with a state trooper. The mother and the husband denied that the child was present but a search of the house found the child fully dressed and hiding in the shower. The mother then swore this was a nephew and not her child and told the child to say he was the nephew. She also solicited another person in the home to sign a sworn document that the child in the home was not her child but was the nephew. The lower court found the mother in violation of the order, imposed a jail sentence of three days and placed the child in foster care with only supervised visitation with the mother. The Third Department found the action to be justified given what the mother had done – willfully placing the child in the same home with the husband after being ordered not to do so and then engaging in an elaborate plot to deny it that included having the child lie and encouraging perjury.

Matter of Brandon DD., __AD3d___ dec'd 7/8/10 (3rd Dept. 2010)

In a continuation of the above Clinton County case, the Third Department reviewed the extension of the child's placement and the extension of supervised visitation. The mother appealed the court's most recent permanency hearing, arguing that the court should have released the child to her care or at least allowed her unsupervised visits. The appellate court agreed with the lower court's decision to keep the child in care and keep visits supervised. The mother did in fact participate in mental health counseling, cooperated with drug testing, parenting classes and some educational programming. She had attended family counseling and had come to visitation. However she also had quite recently tested positive on two occasions for THC. She continued to live with her husband – a level 2 sex offender who had been ordered to stay away from the child - including that she admitted to having him in the home overnight just prior to the hearing. She also did not always act appropriately during even supervised visitation. This was adequate evidence to keep the child in care and to keep the visitation supervised.

Matter of Todd NN., __AD3d___, dec'd 7/8/10 (3rd Dept. 2010)

The Third Department reviewed a permanency hearing from Clinton County and reversed one of the conditions that the lower court ordered the respondent father to obey. The two children had been in care since 2009 based primarily due to the father's drug abuse. In early 2010 the father had refused to take court ordered drug testing and the court imposed a 90 day jail sentence. In the most recent permanency hearing the lower court continued the children's placement in care and that various ordered services be continued but the court added that the father would have to wear a SCRAM device and have it installed in his home. A SCRAM device measures the use of alcohol. It is this condition that the respondent objected to and appealed this order. The DSS did not join in the appeal as they had not asked for this provision and took no position on it. The original order had contained a generic provision that he not "purchase, possess or consume alcohol" but there was no allegation that he had violated that portion of the order. While the father admitted using marihuana, oxycodone, oxymorphone and cocaine, this device does not test for these drugs. There was never any evidence offered that the respondent abused alcohol or was an alcoholic. It was an abuse of discretion to order the SCRAM device under these facts.

Matter of Telsa Z., __AD3d___, dec'd 7/8/10 (3rd Dept. 2010)

A Clinton County father was found to have violated the terms of the dispositonal order in an Art. 10 abuse and neglect case. He had been ordered to stay away at least 1,000 feet from the children and their home. The testimony was that he drove by the trailer home in which the children lived on two occasions and the road was 100 feet from the trailer. The father admitted he did drive by but argued that the road was 150 feet from the trailer and that he had just been looking for a junkyard to drop off some tires. The father also admitted that he had gone to the trailer next door but claimed that was before he was told to stay more than 1, 000 feet away and that the trailer was 200-300 feet away. The caseworker testified that he visited the next door trailer during the time period of the order and that the trailer was more like 150 feet away. The lower court imposed a 6 month jail sentence which had been served by the time the appeal was heard. The Appellate Court concurred that the respondent had violated the order. The father argued that the burden of proof in a violation hearing should be beyond a reasonable doubt since the punishment can be (and was in this case) incarceration but the Third Department ruled that the issue had not been preserved.

General TPR

Matter of Nikeerah S. 69 AD3d 421 (1st Dept. 2010)

In affirming a New York County permanent neglect TPR of a mother, the First Department found no error in the lower court having not appointed an attorney for the mother at the fact finding since the mother was not present for the proceedings despite having actual knowledge of every court date. When the mother did appear for the disposition, she was appointed counsel. It was not ineffective assistance of counsel for that attorney to not move to vacate the default fact finding as the mother did not have a reasonable excuse for her failure to appear nor did she have a meritorious defense.

Matter of Kathleen K., 71 AD3d 1146 (2nd Dept. 2010)

A Suffolk County father appealed the termination of his parental rights alleging that the lower court erred in not granting his motion to proceed pro se. The Second Department affirmed the denial of the motion finding that the father's request to represent himself was "not unequivocal" and that the father did not understand the consequences of proceeding without counsel and was not knowingly and intelligently waiving his rights

Matter of Alicia EE., 72 AD3d 1155 (3rd Dept. 2010)

An Albany County father was criminally convicted of felony assault regarding his 5 year old daughter. On a summary judgment motion, the Family Court found that he had severely abused the child and issued a no diligent efforts motion. DSS then moved to terminate his rights on severe abuse. While that motion was pending, his lawyer wrote the court asking to be relived as the father had not responded to her request that he tell her if he wanted her to oppose the motion. The lower court relived the lawyer and at the dispositional hearing, the father appeared and indicated that he did not know that his lawyer had been relived nor that the court had issued the summary judgment TPR order. The court gave him another attorney who moved to vacate the order but was denied. On appeal, the

Third Department ruled that there was no proof that the original attorney had notified the father that the attorney was seeking to be relived and therefore his right to counsel was not fully protected. It was not relevant whether he had a viable defense to the motion or not, he was entitled to counsel . So the Third Department reversed without prejudice to DSS to seek similar relief after that the father has counsel.

Matter of Amirah Nicole A., 73 AD3d 428 (1st Dept. 2010)

The Bronx County Family Court refused to vacate a permanent neglect termination that had been granted on default and the First Department concurred. Although the mother did provide proof that she had medical problems around the time of the trial, she did not specifically prove that these problems stopped her from attending court on the specific date and further she advised no one, including her own attorney that she was ill and unable to make court. She also did not provide any proof of a meritorious defense. One judge dissented finding that the court should not be as rigorous in the application of the rules on opening defaults when in concerns issues regarding children. The dissent argued that she had proven a medical condition and had proven difficulties with her telephone and further she had consistently appeared for court and the agency had been given many adjournments at its request.

Abandonment TPR

Matter of Bibianamiet L.M., 71 AD3d 402 (1st Dept. 2010)

The First Department concurred with the Bronx County Family Court that the parents' motion to reopen a default termination against them was properly dismissed. The parents did not provide a reasonable excuse for failing to appear and claimed they had confused the date with another date on a matter concerning a young child but they had used such an excuse before and had clearly been in court on two dates when the fact finding date for the TPR was decided. Further they had no meritorious defense to the abandonment. The fact that the mother claimed that the caseworker did not respect her and was rude does not substantiate a claim that the mother was prevented or discouraged from contacting the children. Also her claim that the agency did not offer her appropriate referrals is also insufficient as

diligent efforts is not an issue in abandonment proceedings. The father's allegations also did not merit reopening the default. He merely claimed that visits were not scheduled and were required to be supervised.

Matter of Mahogany Z., 72 AD3d 1171 (3rd Dept. 2010)

The Third Department reviewed an abandonment termination from Albany County Family Court. The child's attorney argued that the appeal was moot as the child had been adopted. The Third Department ruled that an adjudication of abandonment carries a serious stigma and should be reviewed regardless of the adoption having already occurred. The Third Department then found that the proof of the father's abandonment was clear and convincing. He was aware of the child and visited her once at the birth. He did not interact with the child or DSS during the 6 months preceding the TPR filing. The father claims that DSS did not make enough effort to involve him – but the appellate court found that diligent efforts on the part of the agency are not required in an abandonment TPR. In fact the DSS did make diligent efforts to seek him out and made multiple efforts to contact him at the location where he lived with no response. The court need not hold a dispositional hearing in an abandonment.
NOTE: The court did not comment on what they would have ruled regarding the adoption had they in fact overturned the TPR. Regulations require that local DSS not consent to the adoption of any foster child while an appeal is pending and DRL requires the consent of the agency before the court can finalize an adoption.

Matter of Michaela PP., 72 AD3d 1430 (3rd Dept. 2010)

A Broome County father's parental rights to his two children were terminated. He had been offered weekly visitation but only attempted to see the children twice in the 6 month period. Once he showed up during a visitation for the mother and was told that he had to have his own visitation and once he asked to see his son in the hospital who was there due to a broken hand. He claimed a bad relationship with the worker kept him away but these attempted contacts were too sporadic and infrequent to defeat the abandonment

Matter of Maddison B., __AD3d__, 6/11/10 (4th Dept. 2010)

An Erie County mother abandoned her daughter when the only contact in the relevant 6 months was one visit and one phone call.

Matter of Kaitlyn E., ___AD3d___, dec'd 7/1/10 (3rd Dept. 2010)

The Third Department affirmed Warren County Family Court's termination of a mother's rights. The child had gone into care when the mother was arrested at 4AM when she was found by law enforcement with the baby in a car. The baby was naked, screaming and not in a car seat. There was a man in the car whose pants were unzipped and there was cocaine in the car. Ultimately two terminations petitions were filed on permanent neglect as well as abandonment. The lower court terminated on abandonment . The mother did not visit or communicate with the child for the 6 months preceding the filing of the petition. The mother claimed DSS discouraged visitation. But DSS proved that the caseworker made many attempts to reach her by phone, sent letters and provided her with a visitation schedule. When the mother stopped visiting, the caseworker urged her to contact the caseworker to set up a new schedule.

Matter of Jackie B., __AD3d__ dec'd 7/1/10 (3rd Dept. 2010)

An Albany County father abandoned his child and had his parental rights terminated. The father had no contact with the child in the relevant 6 months but he claimed that he was incarcerated and thought he could not contact the child while in prison. He offered no explanation for why he thought he could not make contact and in fact he received a letter from the caseworker during that time telling him of his obligation to visit the child. The father also claimed he attempted to call collect from prison and the caseworker would not take the call but the worker testified that it is the policy of their county to take collect calls from parents in prison and there was no record of any call from the father. The father appeared in court during this time period and did not ask the caseworker about this problem contacting her about visits. The court did hold a dispositional hearing and determined that it was in the child's best interests to be freed for adoption. The father had a long history of criminal behavior, he did not complete a DV program or a substance abuse program. His history of visitation before the abandonment was erratic. The foster parents are loving and devoted and the child has been there for over 2 years and is bonded to them. They want to adopt him.

Mental Illness/ Mental Retardation TPRs

Matter of Mercedes W.R., 69 AD3d 638 (2nd Dept. 2010

A Queens mother's rights to her two children were terminated upon the testimony of a psychologist that the mother had significantly impaired adaptive functions, sub average intellectual functioning, limited understanding of how to care for a child and would require supervision. Due to her mental retardation, the children would be at risk of neglect if returned to her.

Matter of Genesis S. 70 AD3d 570 (1st Dept. 2010)

The First Department affirmed the termination of a New York County mother's rights on the grounds of mental illness. A psychiatrist testified that the mother had a long mental health history, including a diagnoses of schizoaffective disorder that was also reflected in her medical records. She is unable to act in response to her children's needs for the foreseeable future. Since the agency did not proceed on the alternative grounds of mental retardation, it was not relevant whether they proved the elements of that ground.

Matter of Darren HH., 72 AD3d 1147 (3rd Dept. 2010)

The Third Department affirmed terminations of parental rights on mental illness grounds to two Clinton County parents. The children were in care due to sexual abuse and the father had a history of sexually abusing children. The licensed psychologist who interviewed the parents also administered tests and reviewed prior mental health evaluations, court findings, school reports from the mother's childhood and DSS records. The psychologist testified that the mother suffered from a personality disorder, with anti social narcissistic features, an anxiety disorder, a post traumatic stress disorder, borderline intellectual functioning and a learning disorder. She continued to deny that the father had sexually abused

children even though he had admitted to it. She was unable to multi task, had no empathy for her children and could not follow recommendations from caseworkers or court orders all due to her mental illnesses. The psychologist testified that the father had pedophilia, a personality disorder, anti social features and borderline intellectual functioning. He is impulsive, places his needs above his children's, is unable to consider the welfare of other people, does not understand consequences and has a lack of conscience. He adamantly denies any wrongdoing which make it virtually impossible to treat the pedophilia.

Matter of Karen GG., 72 AD3d 1156 (3rd Dept. 2010)

A Clinton County mother's rights were terminated when the licensed clinical psychologist testified that the mother suffered from a personality disorder with dependant antisocial features, borderline intellectual functioning and a longstanding chronic low to moderate level of depression. She was not able to problem solve and protect the children. The children had special needs and she could not meet their proper medical care. Her mental health problems led to interpersonal issues – such as her repeated decision to become involved with various sex offenders. She was unable to improve her parenting skills due to her mental illness and she could not understand how to feed her son who had a swallowing disorder. She would not discipline her daughter as she did not want the daughter to not like her. She could not safely care for her children for the foreseeable future. The expert had reviewed the mother's background information, court orders, prior petitions , case notes, mental health records, interviewed the caseworkers, homemakers as well at the respondent herself. Although some of his findings differed from some prior evaluations, the psychologist explained that the other evaluations were in different contexts and his were more comprehensive on the issue of parenting ability.

Matter of Roberto A., 73 AD3d 501 (1st Dept. 2010)

A Bronx mother's rights were terminated on mental illness grounds when clear and convincing evidence was provided that she suffered from paranoid schizophrenia and was unable to care for her special needs child and would be unable to care for him for the foreseeable future. The agency need not prove diligent efforts in a mental illness termination.

Permanent Neglect

Matter of Megan R.W., 69 AD3d 737 (2nd Dept. 2010)

Two Kings County parents' rights were terminated and this was affirmed on appeal. The mother had continued to use drugs for three years after the child was removed and she did not cooperate with any rehab. Although recently she had made an effort to comply, there was no reason to offer a suspended judgment. The father was offered diligent efforts including referrals for alcohol treatment and domestic violence counseling as well as other treatment programs. He was provided visitation. He did not visit regularly and did not cooperate with the rehab programs. The child has lived almost half her life with the foster family and has a close bond with them.

Matter of John G. Jr., 70 AD3d 419 (1st Dept. 2010)

The First Department affirmed a Bronx County termination of a father's rights to his son. The agency provided diligent efforts but the father failed to plan for the child in that the father refused to admit, even years after the adjudication, that he had failed to protect his son from the mother's alcoholism. The father repeatedly described the placement of the child in foster care as "kidnapping" The fact that the father had complied with the agency's plan including drug testing , does not change the fact that the father remains in denial of the issues involved in the placement. There is no reason to do a suspended judgment where the child has been in care for years, there is substantial question as to the father's ability to safely care for the child and the child's psychologist opined that the child needed to remain in a stable environment.

Matter of Precious W., 70 AD3d 486 (1st Dept. 2010)

A Bronx County TPR of a mother's rights was affirmed on appeal. The agency made diligent efforts by formulating a service plan, attempting frequent case work contacts, offering visitation, referring the mother to mental health treatment and assisting with locating housing. The mother however failed to plan in that she did

not obtain psychiatric treatment or housing and visited only sporadically. The child should be adopted by the paternal grandmother who had cared for the child most of her life.

Matter of Alexander B., 70 AD3d 524 (1st Dept. 2010)

The First Department upheld the TPR of a Bronx mother's rights to her child. The agency offered diligent efforts by encouraging compliance with a meaningful service plan, held frequent service plan reviews and conferences and made referrals for mental health services. The mother failed to complete a mental health evaluation or treatment and failed to gain any insight into the reasons for the child's placement in foster care. Child is thriving in foster home where he is placed with a biological sister.

Matter of Malen Sansa V., 70 AD3d 707 (2nd Dept. 2010)

The Second Department reviewed two parents' terminations from Suffolk County Family Court. For 16 months after placement in foster care, the mother and the father failed to complete substance abuse treatment and psychotherapy that the agency had referred. The children had lived in the same foster home for four years and the older two children - 15 and 14 years old - want to be adopted and the foster family wants to adopt all four of the children.

Matter of Rachael N., 70 AD3d 1374 (4th Dept. 2010)

The Fourth Department affirmed an Ontario County Family Court termination of two parent's rights. The agency had provided diligent efforts but the mother was unable to correct the problems that had led to the placement. The father had made some progress but he was still abusing drugs, drinking, still had issues with anger control and would not visit the child as a protest to the visitation rules. The parents had gained no insight into their problems.

Matter of Raquel N., 71 AD3d 418 (1st Dept. 2010)

New York County Family Court's termination of both parents' rights was upheld on appeal. The mother permanently neglected the children. She did attend all the programs recommended but she failed to correct the problems that had led to the placement. She remained in an abusive relationship with the father and lied to the agency about the relationship. She made no progress in handling her own mental problems or in assessing her children's needs particularly the mental health needs of her daughter. During visits with the children , she remained passive. The father also abandoned the children by making no attempt to see them at all. He was aware that they were living with the maternal grandmother and although he had an order of protection, he did not maintain contact and made no attempt to regain contact after the order expired. The children have lived with the grandmother of over 6 years. They want to remain with her and she wishes to adopt them.

Matter of Juan A., 72 AD3d 542(1st Dept. 2010)

A Bronx mother's parental rights were appropriately terminated. The agency offered diligent efforts in that it prepared a service plan, offered drug treatment, parenting skills and anger management programs. When the mother claimed that she could not complete her drug treatment program as her public assistance was terminated, the caseworker referred her to agency experts to assist with reapplying. The parenting program offered was designed for teenage parents as the mother was young. The mother failed to complete these programs within the relevant time frame and only visited sporadically. She had an "unsettled history" as a parent and did not resolve her drug problem. The children should be adopted by their foster mother with whom they had lived for years. The foster mother
was loving and supportive as was her husband and the children were thriving in their home. Even the mother acknowledged that she was not yet ready to provide a stable home. A suspended judgment is not warranted as the children should not have to wait any longer for the mother to obtain the needed abilities to care for them.

Matter of Jazmin Marva B., 72 AD3d 569 (1st Dept. 2010)

The First Department affirmed New York County Family Court's termination of a both parent's rights to two children. The agency made diligent efforts with the mother by encouraging her parental relationship and working with the mother to establish a service plane, maintaining frequent contact with her, setting up visitation and referring her to therapy and housing resources. The mother however failed to plan as she did not obtain appropriate housing and did not obtain treatment. The father also failed to obtain suitable housing and did not file for paternity until his child had been in care for some time. The children have lived with the foster parents for most of their lives and the home is loving and supportive. There is no reason to offer a suspended judgment

Matter of Christopher V., 72 AD3d 980 (2nd Dept. 2010)

A Westchester County mother's rights were terminated. The mother had failed to plan for the return of the child and to maintain contact with the child despite the agency's diligent efforts. It was not error for the court to consider the time she was in a drug treatment facility as part of the one year required time frame. Except for the initial 30 days of the treatment, she was not prevented from visitation with the child or working with the agency to plan for the child and therefore she was not "institutionalized" as per the meaning of SSL § 384-b (7)(d) (ii). The Second Department did remand the matter as the lower court had not held the required dispositional hearing .

Matter of Keegan JJ., 72 AD3d 1159 (3rd Dept. 2010)

Cortland County Family Court properly terminated the parental rights of a mother. The agency offered her diligent efforts but she failed to plan for the child's return. She continued to have relationships with men who physically abused her and this was one of the reasons for the placement. She did not complete mental health treatment of domestic violence counseling. She refused to submit to court ordered urine testing and did not complete substance abuse counseling. She is homeless. She did not cooperate in efforts to find employment and was unable to take the GED exam to improve her chances of providing her child with basic necessities. She had been on criminal probation and served 60 days in jail for a series of petit

larcenies. There was no reason to offer a suspended judgment. The child was thriving in the home of an aunt and a licensed clinical psychologist had testified that the mother was not likely to benefit from services.

Matter of Lawrence KK., 72 AD3d 1233 (3rd Dept. 2010)

An Albany County child was placed in foster care as a destitute child when his mother died while his father was incarcerated. The child has Down syndrome and other special needs and was placed with a foster parent who cares for special needs children. After 15 months, the DSS brought a termination petition against the incarcerated father. Diligent efforts were offered. The agency told the father that he had to make a plan for the child to be cared for since his sentence still had four to six more years when the child entered care. The worker investigated every relative that the father identified. The worker also kept the father informed of the child's health and progress. Since the child was very young and had acute special needs, visitation was not offered however some telephone contact was provided although the child was non verbal. The father did not develop a realistic plan for the child as every relative he identified was unable, unwilling or unacceptable. While the father had shown a good faith efforts to indentify relatives, that is not sufficient – he simply had no plan but for the child to remain in care until he finished his prison sentence and this would only mean prolonged foster care for this special needs child.

Matter of Mary MM., 72 AD3d 1427 (3rd Dept. 2010)

The Third Department agreed with Broome County Family Court that the parental rights of a mother to her daughter should be terminated. The child had been placed due to the mother's exposure of the child to a sex offender and it was later determined that the mother in fact had seen the boyfriend sexually abuse the child and had not protected her. The mother had a long history of contact with men who were sexual abusers. The home also was very unsanitary. The agency offered diligent efforts for over three years. The agency set up mental health and literacy services, arranged an IQ test, parenting classes and sexual abuse counseling. The caseworker visited the home on numerous occasions and had office appointments with the mother. The caseworker advised the mother of the need to keep the home sanitary, to keep sharp objects and medicines away from the child and to keep her outside doors locked. The mother was advised to talk to the landlord about

necessary repairs and offered assistance in locating a new residence. Visits were provided and bus passes to attend the visits as well. The caseworker even purchased gifts for the mother to give to the child.

The mother was completely unable to make the changes needed for the child to return home safely. She was unable to keep the home in a safe condition and even visitation could not occur in the home. The home was filthy with overflowing garbage and spoiled food. The bathroom was unclean and there were feces in the sink, on the toilet paper roll , and on underwear and towels that were left on the floor. Nude photos of the mother were on the coffee table. The doors were left unlocked and people could and did just wander into the home. An older cousin was allowed to have access to the child and the cousin was physically aggressive and sexually inappropriate. The mother continued to try to get the child to recant the sexual abuse claims. Although the mother's intellect was limited, she was still required to plan for her child's return and she did not. The foster family wishes to adopt the child and that would be in her best interests.

Matter of Shawntashia Michelle B., 73 AD3d 615 (1st Dept. 2010)

While upholding a New York County Family Court's termination of a mother's rights the First Department agreed that the agency was not required to prove they had engaged in diligent efforts given that the mother's rights had been terminated to her other children in the past. However, the court did find that the agency offered diligent efforts in any event. The mother failed to plan for the children by failed to obtain employment and appropriate housing as well as failing to gain insight into the conditions that led to the placement. The children should be adopted by the foster parents with whom they have lived for most of their lives. The home is loving and supportive.

Matter of Ana M.G., __AD3d___, dec'd 6/1/10 (1st Dept. 2010)

A New York County Family Court adjudication of permanent neglect was affirmed on appeal. The mother argued on appeal that the petition was jurisdictionally defective as it did not describe the alleged diligent efforts of the agency. The matter was not preserved . However the First Department indicated that if it did rule on the merits that petition was sufficient as it did describe efforts. At the

hearing the agency proved diligent efforts had been offered in that it had formulated a service plan for the mother, referred her to drug treatment programs and arranged visitation. The mother was uncooperative and indifferent and missed most of her scheduled visits. She failed to complete a drug treatment program.

Matter of Jasmine F., __AD3d__-, dec'd 6/3/10 (3rd Dept. 2010)

The Third Department reversed a permanent neglect finding against two Ulster County parents. The children had been in care since 2007 and the parents were not complying with the court orders to be involved in drug rehab and to refrain from drug use. DSS filed violation petitions against the parents. The lower court did find the parents in violation of the dispo orders and in fact found clearly and convincingly that they had failed to address the shortcomings that led to the removal of the children and had failed to plan for the children's future. DSS then filed termination petitions and moved for a partial summary judgment arguing that the only needed proof was of the DSS' diligent efforts since the court had already ruled on the parent's failure to plan. The lower court granted the motion and after hearing diligent efforts testimony, terminated the parent's rights. The Third Department found this to be error and reversed. The first element of permanent neglect is diligent efforts by the agency and the second is the parental failure to plan or maintain contact. The court must first hear of the diligent efforts and in that context decide if the parent has fulfilled the duties to maintain contact and plan for the future. The parent's planning and contact cannot be fairly assessed until DSS establishes the efforts it made to permit and facilitate such contacts and planning.

Matter of Sierra C., __AD3d___, dec'd 6/3/10 (3rd Dept. 2010)

A Cortland County mother's rights were terminated to her daughter. The DSS offered diligent efforts in that they attempted to assist the mother with her drug problem which was the major issue in the placement. The mother continued her chaotic lifestyle with illegal drugs. She did not complete drug treatment. She did not attend meetings with her drug counselor and tested positive. While she cares for the child and visits with the child, she has no insight into her problems and has not benefitted from any treatment offered. A suspended judgment is not warranted

as the child has a close bond with the foster parents and is thriving and the mother has simply refused to recognize how her addiction had affected her child.

Matter of Lanise Moena R., __AD3d__, dec'd 6/8/10 (1st Dept. 2010)

The First Department upheld the termination of a New York County mother's rights to her child. The agency offered her diligent efforts by referring the mother to drug treatment and mental health treatment and arranged visits. The agency kept her informed of the child's progress and provided caseworker counseling. The mother did not complete either the drug treatment or the mental health treatment, continued to use marijuana and failed to take prescribed medications. The fact that the mother had a mental health problem did not excuse her from being responsible to cooperate with treatment.

Matter of Angelica G., __AD3d__, dec'd 6/8/10 (1st Dept. 2010)

Bronx County Family Court properly terminated the parental rights of a father to his child. The agency made diligent efforts by referring the father to drug treatment and arranging visitation. The father continued to use drugs and continued to live with the mother who also used drugs. He admitted relapsing four or five times and never completed a drug program. The child should be adopted by her loving foster mother with whom she has lived since she was a baby. The father's failure to remain drug free and to separate from the mother mitigate against any suspended judgment.

Matter of Carol Anne Marie L., __AD3d___ dec'd 6/22/10 (1st Dept. 2010)

Both parents rights were terminated in this Bronx County Family Court matter. The father was provided with diligent efforts as referrals were made to drug treatment programs, parenting skills classes and visitation was scheduled. The father failed to remain drug free and failed to complete a drug program. He missed one quarter of the visits. He may have made steps toward addressing his drug problem but they were not sufficient. The mother was offered drug treatment, anger management and parenting skills and failed to complete any of them. She

also did not visit the children on a regular basis. The foster mother wanted to adopt the children and has a loving relationship in which to addresses their special needs.

TPR Dispos

Matter of Samantha Stephanie R., 71 AD3d 484 (1st Dept. 2010)

A suspended judgment was not in the best interest of two children where although the New York County mother had made "laudable" progress in correcting the issues that resulted in her children being placed, she has a long history of drug abuse and relapses. She does not have permanent housing or a steady income and is a "work in progress" in becoming a "reliable parent". The children need a permanent and stable home and should be adopted by the foster parents who have cared for them for 6 years since one child was two years old and one was 2 months old.

Matter of Vincent P., 71 AD3d 497 (1st Dept. 2010)

The First Department concurred with New York County Family Court's ruling that a mother has not violated her suspended judgment but in fact had satisfied it. The mother substantially complied with the terms and conditions. She attended both individual and couples counseling, submitted to random drug testing and did not test positive, she cooperated with home visits and all reasonable referrals. The mother addressed the problems that had led to her son's removal. The agency did not meet its burden of proving noncompliance by the preponderance of the evidence and the matter is restored to the docket for further permanency hearing regarding the disposition of the matter.

Matter of Teshana Tracey T., 71 AD3d 1032 (2nd Dept. 2010)

A Queens County mother's rights were properly terminated. The agency offered diligent efforts by scheduling visitation, reminding the mother of the need for visitation and therapy and referring her for housing assistance . The mother failed

to do what was required. The lower court correctly freed the children for adoption despite the fact that one of the children, a boy over the age of 14, did not want at that point to be adopted. The fact that an older child does not yet want to be adopted is a factor but not a determining factor in freeing the child for adoption. It may still be in the child's best interests to terminate the parent's rights. The children here had been placed in care due to violent abuse and the mother has made clear that she will not exclude the violent father from her life. Even if the child does not want to be adopted, the court can consider that the best interest of the child may mean that termination of the mother's rights is appropriate. The child does not want to be involved with the father and has indicated that he is willing to work with the foster parents and attend adoption counseling.

Matter of Elias QQ., 72 AD3d 1165 (3rd Dept. 2010)

In an abandonment TPR matter before Chemung County Family Court, the parties agreed to a suspended judgment. Thereafter, DSS alleged a violation of the suspended judgment. The lower court found a violation and terminated parental rights and on appeal, the Third Department concurred. The mother had failed to complete two different substance abuse treatment programs , abused cocaine, did not advise the caseworker of her arrest for drugs, moved without telling the caseworker and failed to maintain suitable housing. She also failed to appear for the hearing and was the hearing was held in default over the objection of the mother's attorney who sought an adjournment. The Third Department found that the mother did not provide good cause to reopen the default. The Appellate Court also commented that the violation need only be proven by a preponderance of the evidence and that hearsay is admissible le as it is a dispo hearing.
NOTE: There is no statutory authority to order or agree to a suspended judgment of an abandonment TPR.

Matter of Janasia H., 71 AD3d 1524 (4th Dept. 2010)

The suspended judgment of an Erie County mother was appropriately revoked. She only attended one third of the scheduled visits with the children. She did not attend their appointments and did not find suitable housing. In a revocation of a suspended judgment, the agency need not prove diligent efforts and hearsay is admissible.

Matter of Roystar T., 72 AD3d 1569 (4th Dept. 2010)

In a Wayne County TPR, the mother claimed that the court was biased against her and cited certain comments the court made. However, the comments were about her residence and her finances and therefore were relevant to the issue of her ability to plan for the child's future. The other comment was related to another proceeding for her other children. The Fourth Department also rejected the mother's argument that the court should have offered a suspended judgment. The child was 4 years old and had been placed in foster care on 3 different occasions due to the mother's substance abuse. At various times the mother would make progress, the child would be returned and the mother would then relapse. This is perpetual limbo for the child who deserves a sense of stability

Matter of Kyle K., 72 AD3d 1592 (4th Dept. 2010)

The Fourth Department reviewed a TPR from Erie County Family Court and agreed that the court erred in not allowing the father's counsel to cross examine on the issue of the stability of the foster home in the dispositional hearing. This was a relevant issue that he should have been allowed to inquire about but the error was harmless given the evidence before the court that was extensive and in support of the court's decision. Further, the father did not merit a suspended judgment where the children had been with the foster family for four years, were now teenagers and wanted to be adopted. The father had not made enough progress to warrant the continuation of the children's lack of permanency.
NOTE: The termination process for these children had taken years as this ruling and appeal resulted from a prior termination which had been appealed and remanded in 2008.

Matter of Geneva B., 73 AD3d 406 (1st Dept 2010)

A Bronx County dismissal of a grandmother's petition for custody of her freed grandchildren was affirmed on appeal. A grandparent has no preemptive right to custody surpassing those persons selected by the agency to adopt. The children had lived with the foster mother for 8 years and the foster mother wishes to adopt them. The foster mother has indicated she will allow contact with the bio family . The children should not be disrupted after all these years. They are bonded and wish to remain there.

Matter of Elijah D., __AD3d __, dec'd 6/11/10 (4th Dept. 2010)

An Erie County mother's argument for a suspended judgment in a TPR was denied. She had made progress in completing the plan and had stopped using pain medications that had been one of the significant reasons for the placement but she had only done this after the TPR petition had been filed and some 10 months after the TPR petition had been filed, she had still not completed the dispositional requirements. The child should be adopted by the foster parents who have cared for him his whole life.

Matter of Malashia B., 71 AD3d 1493 (4th Dept. 2010)

The Fourth Department agreed with Onondaga County Family Court that a mother had violated the suspended judgment and that her rights should be terminated. The mother was not even at a point where she could have unsupervised visits with the child. She had not learned anything in her parenting classes and was not consistent in her parenting when she saw the child. She could not set boundaries for the child and would become frustrated with her daughter. She had been unemployed since the child's birth – three years – and had recently been arrested for shoplifting. She was then a resident in an inpatient treatment facility for substance abuse where the child was not allowed to live. Not one of her service providers recommended that she was ready to have the child returned and her own therapist said she was not even ready for unsupervised visits. The child had been with the same foster parents since her birth three years ago and they wanted to adopt her.

The court also correctly denied post termination ***Kahlil S.*** visitation. The child had never lived with the mother and there had only been supervised visitation two times per week. The child did have a bond with the mother but there was a strong bond with the foster parents who wanted to adopt her. The foster parents testified that the child acted out and had temper tantrums after extended visitation with the mother. The mother failed to prove that post termination contact was in the child's best interests.

Matter of Andrea E., 72 AD3d 1617 (4th Dept. 2010)

The Steuben County Family Court did not err in failing to order a suspended judgment for a mother as she had not make sufficient progress. Also no post termination ***Kahlil S.*** visitation was warranted as the mother did not ask the court for it, she not ask for a hearing and failed to establish that any contact would be in the child's best interest.

Matter of Sean H., __AD3d__, dec'd 6/11/10 (4th Dept. 2010)

In upholding an Oneida County Family Court who revoked a mother's suspended judgment and terminated her parental rights, the Fourth Department concurred that the lower court had not erred in not ordering post termination ***Kahlil S.*** visitation. The mother failed to prove that it was in the children's best interests to have visits with her. The mother had only visited the children twice in the 8 months before the hearing. The lower court did not err in failing to take the testimony of the children about possible post termination visits. The court was well aware from evidence provided that the children loved their mother, missed her and wanted to visit her and the court did consider that in the decision to deny the visitation.

Matter of Micah H., __AD3d__, dec'd 6/11/10 (4th Dept. 2010)

In affirming the Onondaga County Family Court's termination of a mother's rights to her child, the Fourth Department also concurred in the denial of any post termination ***Kahlil S.*** visitation. The mother did not establish that the contact would be in the child's best interest.

Matter of Clifton ZZ., __AD3d___, dec'd 7/1/10 (3rd Dept. 2010)

The Third Department affirmed Schenectady County Family Court's revocation of a mother's suspended judgment and the termination of her parental rights. The mother violated the terms of the suspended judgment. The mother was to maintain a suitable residence but she cancelled overnight visits with the children so she could shop, pack and make arrangements to move. She was to attend appointments for one child who was autistic but she missed a mental health appointment for him and was late for three required meetings regarding the children and missed another one totally. On one overnight, she failed to give the children their medications,

Significantly, even when the court gave the mother an extension of the suspended judgment , she continued to not comply – moving five times, failed to notify the caseworker of her new address on numerous occasions. She allowed one of the fathers to move in with her despite a history of domestic violence. She canceled many visits with the children and missed at least 10 medical and therapy appointments for the children. She missed appointments with the service providers. It was in the children's best interests to be freed for adoption. The mother is unlikely to become a fit parent who could meet the children's needs even if given more time.

Matter of Terrance M., __AD3d__, dec'd 7/9/10 (4th Dept. 2010)

A Monroe County father violated the terms of his suspended judgment and his rights were terminated. The Fourth Department affirmed. He only attended 5 out of 34 possible visits at the time of the violation hearing and only 9 out of a possible 65 visits by the time of the dispositional hearing. He had not completed a mental health evaluation, had been denied public assistance and had no verifiable employment. He was not likely to change his behavior. Although a relative had filed an Art. 6 petition that was dismissed, the father has no standing to appeal that dismissal which must be appealed by the relative. The children were attached to and considered the foster parents to be their parents and wanted to stay with them. The foster parents wanted to adopt.

Rights of Unwed Fathers

Matter of Dustin G, v Melissa I. 69 AD3d 1019 (3rd Dept. 2010)

The Third Department reversed Schenectady County Family Court's refusal to grant a motion to dismiss a paternity petition filed relative to an 8 year old girl. The apparent bio father filed a paternity petition after 8 years of not being involved although he had known that he was likely the child's bio father. Since the child's birth another man had acted as the child's father, including being named on the birth certificate and in all ways treating the child as his daughter for 8 years. This man moved to dismiss the paternity petition on equitable estoppels grounds but the

lower court denied the motion. On appeal, the Third Department found that although the man acting as father knew from the beginning that he was not the bio father, he had formed a relationship that the child had come to depend on and that it was not in the child's best interest to disrupt that relationship after 8 years.

Matter of Mathew Niko M., 71 AD3d 440 (1st Dept. 2010)

In a TPR matter against the mother, New York County Family Court determined that an unwed father was not a consent father under DRL§ 111 and on appeal the First Department agreed. The father claimed he visited and paid support in that his mother provided some monies and contacted and communicated with the child. These actions cannot be imputed to him. He claimed that he was unable to contact the child as the maternal grandmother was difficult however this contradicted the father's other testimony that he did not want to stress his son by contacting him while the father was incarcerated. At no point did the father attempt to seek assistance from the foster care agency to obtain help in contacting his son.

Matter of Fidel A., 71 AD3d 437 (1st Dept. 2010)

Although DNA testing established that the petitioning man was the biological father of the child, the Bronx County Family Court properly dismissed the paternity petition on the basis of equitable estoppel as it would be detrimental to the child who believed that another man was her father. The child has a close parental relationship with the man she thinks is her father and the court will not disrupt that.

Matter of Nicole J., 71 AD3d 1581 (4th Dept. 2010)

In a private adoption in Monroe County, the out of state birth father did not personally appear on the first appearance but counsel did appear for him and asked for an adjournment. The lower court denied the request and proceeded with the hearing, ultimately ruling that he had abandoned the child. On appeal, the Fourth Department found the refusal to adjourn the matter an abuse of discretion particularly as the birth mother's consent issue had not yet been resolved, and remanded the matter for an opportunity for the birth father to appear.

Matter of Tiara G., 73 AD3d 920 (2nd Dept. 2010)

Suffolk County Family Court found that the father's consent was not necessary to the child's adoption by the maternal grandmother and the Second Department affirmed. The father had not visited or communicated with the child in any way for more than 2 years before the petition was filed. The father claimed that his substance abuse problems interfered with his ability to communicate with the child but he admitted that he had been in rehab and in fact was not using substances for some time before the petition was filed. Although he claimed he gave some $50 to $150 during a two month period to the mother for the child, the mother did not have custody of the child and this was insufficient. Particularly in the light of the mother's denial that he had ever given her anything but two stuffed animals for the child.

Matter of Asia Sonia J., ___AD3d___dec'd 6/1/10 (1st Dept. 2010)

New York County Family Court ruled that the father was not a consent father in a TPR case against the mother. If he was a notice father, he had been properly served and failed to appear and would not reopen the default finding. The father appealed but the First Department affirmed. The process server's testimony was credible and the father offered no creditable reason or his failure to appear. Further he has not meritorious defense. The father admits he is not a consent father but claims that as a notice father he wanted to offer best interest testimony in which he would claim that he had appeared at the termination proceedings of the child's older siblings. Adoption by the foster parent is in the child's best interests. The child has lived her whole life with the paternal grandmother who also cares for her older siblings.

Matter of Gekia Hafeesah Amore M., __ AD3d___ dec'd 6/22/10 (1st Dept. 2010)

A New York County father was not a consent father in a TPR case regarding the mother. On appeal the father complained that the lower court had not allowed him to explain his failure to pay child support and that he could not visit as the court had denied him visitation. However, the father could have communicated with the foster care agency about the child and failed to do that. His only attempts were

half hearted ones to reach the agency by phone –mostly through his mother's efforts and these effort fall far short of the regular efforts the statue describes.

Matter of Marc Jaleel G., __AD3d___, dec'd 6/29/10 (1st Dept. 2010)

The First Department agreed that a New York County father was not a consent father. Neither his repeated incarceration nor the agency "not instructing" him to pay child support excuse his failure to support the child or attempt contact. For the first 8 years of the child's life, the father was mostly in jail and had virtually no contact with the child. He did contact him when he was released from jail but this was intermittent and were not the regular contacts the statue requires. Although the agency did offer some diligent efforts and services toward him, that does not make him a "consent father".

Matter of Mia II., __AD3d___, dec'd 7/1/10 (3rd Dept. 2010)

The Third Department affirmed a Washington County Family Court's decision that an unwed father did not have to consent to a stepparent adoption. The lower court found the mother and petitioning stepfather to be more credible than the father as to his contacts with the child. They had testified that the father had not seen the child in over 6 years and had only tried to see the child in that period on two occasions – both of which he appeared at their home at inappropriate times and intoxicated. He had never paid any support for the child. Although the father claimed he had tried many more times to see the child, the lower court did not find his testimony credible. Even though there were periods of time when there was an order of protection that prevented him from having access, he did not try to modify the order of protection. He did not pursue legal action to obtain the visitation he claimed he was being denied.

Surrenders and Adoption

Matter of Tia G., 70 AD3d 692 (2nd Dept. 2010)

Adoption petitions were filed in Suffolk County Family Court by a man who was engaged to the mother of three children. The petitions alleged that the biological father's consent was not needed. Two weeks after the petitions were filed, the petitioner died. The court went forward anyway with the hearing regarding the need for the biological father's consent and determined that his consent was not needed. The biological father appealed. The Appellate Court ruled that at the time the petitioner died the adoption abated and the court should not have proceeded. An adoption order nunc pro tunc is not recognized. The order is a nullity. Of course the mother is free to establish in any probate proceeding that the finance has in effect equitable adopted the child for any estate purposes.
NOTE: The appellate decision did not refer to and differentiate DRL §113-a which does allow the adoption to proceed where one of two petitioners dies after the petition is filed and allows for the deceased parent to be considered as one of the legal parents to the child.

MF v KG NYLJ 4/27/10 at 43 (Family Court, Nassau County 2010)

An adoptive parent sought an order of protection against the birth mother of three of her adoptive children. She alleged that the birth mother was stalking the family and that she sent the adoptive mother letters, left a note in the mailbox, was following the children's school bus and photographing the children. The adoptive mother feared the birth mother would try to kidnap the children. The birth mother moved to dismiss. The Nassau County Family Court ruled that the parties had an "intimate relationship" and that the allegations were also filed on behalf of the children who also had an "intimate relationship" with the birth mother.

Matter of Ernestine L v ACS., 71 AD3d 510 (1st Dept. 2010)

The First Department concurred that New York County Family Court correctly dismissed a custody petition filed for a freed child. The petitioner was not related to the child and was not the current caretaker. The child was with a foster mother

who had provided a loving and stable home for the child for the majority of the child's life and wishes to adopt the child. The child's lawyer supports the adoption.

Matter of Keenan R. v Julie L., 72 AD3d 542 (1st Dept 2010)

New York County Family Court denied a visitation petition filed by a biological brother to visit with his adopted twin sisters. On appeal, the denial of visitation was affirmed. The adoptive parents of the twins strongly objected to any visitation with the brother and provided evidence from an expert that the prospect of visitation was causing great anxiety for the twins. The possibility of post traumatic stress disorder existed and visitation would therefore not be in the twin's best interests. There were no real familial bonds with the brother and the adoptive parents were the only family that the girls had ever known. The adoptive parents were fit parents making the decision they thought was best for their daughters and forced visitation would only exacerbate the girls' anxiety.

Matter of Timothy AA., 72 AD3d 1390 (3rd Dept. 2010)

The Third Department affirmed Saratoga County Surrogate's Court's denial of a motion to reopen an adult adoptee's adoption records. The adoptee wanted to review the medical records in the file. He had already reviewed those available in the Adoption Information Registry. As per DRL §114(2) the adoptee had provided a certification from his physician who indicated that the records would be helpful and would assist in the adoptees' medical care. However, the statue requires that the certification state that the records are required to address a serious physical or mental illness and that is not the case here. The statute provides birth parents with confidentiality which can only be pierced if there is a serious medical condition.

Matter of Christina RR., __AD3d__, dec'd 6/3/10 (3rd Dept. 2010)

A Broome County father appealed the Family Court's approval of his surrender of one of his children claiming he had been coerced into signing the surrender. The Third Department rejected his argument. The surrender had occurred after the

father had been given a suspended judgment on a termination and was now facing an application to terminate the suspended judgment. When the lower court denied his motion to dismiss the petition to terminate the suspended judgment, he felt "coerced" into a surrender. The Third Department ruled that the lower court had correctly not dismissed the petition to revoke . It was not "defective" as the father alleged because it was accompanied by a verified petition and not an affidavit – the person signing the petition had actual knowledge. Service was properly made and the father had timely and clear notice. At the time of the surrender, he was represented by counsel, he indicated that he understood the finality of what he was doing and that he understood what the alternatives were and that he had enough time to consult with his attorney. There was no fraud, duress or coercion.

Matter of Franchesca LS., __AD3d__, dec'd 6/11/10 (4th Dept. 2010)

The Fourth Department affirmed a finding by Oneida County Family Court that DSS had not made reasonable efforts to effectuate a permanency plan of adoption for 2 children.

Matter of MT v ET NYLJ 6/11/10 at 27 (Family Court, Suffolk County 2010)

A foster mother who intended to adopt freed children moved to vacate the surrender terms of the birth father. The foster mother alleged that the father had continued to abuse drugs and that the contact was no longer in the children's best interests. The Suffolk County Court ruled that the foster mother had standing to bring the proceeding given that the children had lived with her for more than a year and that she was a party to the permanency hearings. The court agreed that the contact should cease, it would be perhaps a year of services before the father could be in a position to safely have contact with the children who have been in care for 3 years. The surrender will not be vacated as that would likely simply result in a successful termination in any event.

Misc. Cases Relevant to Child Welfare Issues

Matter of Trudy-Ann W., 73 AD3d 793 (2nd Dept. 2010)

The Second Department reversed Kings County Family Court's dismissal of a guardianship petition filed regarding a 20 year old youth. The young woman was a native of Jamaica and her maternal aunt wished to be granted guardianship and for the court to make the appropriate findings so that the young lady could apply for special immigrant juvenile status. She had been in the United States, albeit illegally, since 2007. Her father's whereabouts were unknown and her mother had abused and neglected her. She needed a legal guardian and it was not in her best interests to return to Jamaica.

Matter of Emma M., __AD3d__, dec'd 6/8/10 (2nd Dept. 2010)

The Second Department reversed King's County Family Court's dismissal of a motion to have the court make the legal findings that would allow an 18 year old to apply for special immigrant juvenile status in the context of an adoption petition. The young woman is a native of Grenada and her mother is deceased and her father has neglected and ignored her for her whole life and consented to a Brooklyn couple adopting her. Although the lower court approved the adoption, it would not issue the rulings that would allow her to seek SIJS. The child has lived in the USA since she was 13 years old and has no birth mother or birth father with whom she can safely reside and it is not in her best interests to return to Grenanda.

Matter of Jisun L., __AD3d___, dec'd 6/6/10 (2nd Dept. 2010)

Kings County Family Court was reversed by the Second Department on the dismissal of a motion to make the legal findings that would allow a South Korean youth to seek special immigrant juvenile status in the context of a guardianship proceeding. The young man is under 21 and resides with an aunt and uncle and has been in the country for a couple of years. His parents abused and neglected him and it would not be in his best interests to return the South Korea.

McCabe v Dutchess County 72 AD3d 145 (2nd Dept. 2010)

The Second Department dismissed a civil lawsuit against foster parents and the County for damages a child suffered in a foster home. Given the responsibilities asked of foster parents, it would not be reasonable to hold them to such a high level of responsibility that they virtually must have their eyes on the child at all times to prevent accidents. The county also cannot be held liable as the although the caseworker was aware of the child's attempts to climb out of his playpen, this did not put her on notice of that any dangerous conduct was occurring.

Matter of Natiello v Carrion 73 AD3d 1070 (2nd Dept. 2010)

The Second Department unfounded two indicated matters at the request of a Putnam County mother. A 13 year old autistic child did receive some minor bruises and scratches when she left the child with a grandmother who allowed him to play roughly but the child had a history of self inflicted injury even when closely supervised. Her 16 year old son and absences from school but since he also lived at some points with his father, there was no evidence as to what absences were attributable to the mother and no evidence which absences were properly excused. Further, although the child did stop attending school at all in May, he completed a GED program that summer and had started to attend college so there was no evidence that his absences affected his education.

V S vs Muhammad 595 F3d 426 (2nd Cir. 2010)

The Second Circuit dismissed a §1983 action against a doctor and ACS that had alleged that the doctor had a history of giving misleading diagnoses of shaken baby syndrome and ACS relied on the doctor, knowing of this history. The federal court found that the Rooker-Feldman doctrine applied given that ACS had withdrawn its petitions against VS and the child had been released to VS. The caseworker cannot be expected to second guess a doctor who is the head of a child protection team at a hospital. Two other doctors also supported the diagnoses made in this case

Matter of Dustin O., 27 Misc 3d 623 (Clinton County Family Court 2010)

Clinton County Family Court refused to approve a voluntary placement in foster care ruling that the standard form did not appropriately describe in detail what efforts were made to locate relatives.

DB G-D v Bedford Central School District , NYLJ 3/30/10 (Supreme Court, Westchester County 2010)

In an action where a child alleges that she was sexually abused in her home and school officials failed to report the abuse, the Supreme Court quashed subpoenas served on DSS to produce and testify about unfounded reports. Unfounded reports can only be revealed to certain agencies but not to courts. While the unfounded report can be revealed to a subject of a report – the child is not a subject of the report.

City of NY v Maul 14 NY3d 499 (2010)

The Court of Appeals upheld a class action certification to a group of developmentally disabled children who are or were in foster care in NYC and who allege that ACS and the state OMRDD do not provide timely services and allow young adults to age out without appropriate services.

People v Texidor 71 AD3d 1190 (3rd Dept. 2010)

In reviewing sexual abuse criminal convictions, the Third Department ruled that a Clinton County CPS worker was not an agent for law enforcement such that testimony regarding statements made to her were admissible. The caseworker interviewed the defendant about a month after his arrest in connection with her CPS investigation of the same issues. There was no one from law enforcement with her and the defendant did not ask for his lawyer to be present.

Matter of Isidro A.M., __AD3d___, dec'd 6/24/10 (1st Dept. 2010)

In a private custody matter from New York Count y Family Court a father requested he be provided with a copy of the forensic report. The court permitted him to look at the report under court supervision and take notes but allowed the attorney for the mother to have a copy. The First Department ruled that this was not an abuse of discretion since he was not denied access to the information that he needed but that the better practice would be to provide equivalent access under the same conditions for prose litigants as well as counsel.

Matter of Faison v Nassau County DSS __AD3d__, dec'd 6/29/10 (2nd Dept. 2010)

Nassau County Family Court correctly dismissed an Art. 6 petition for custody or visitation with a child without a hearing. The petitioner was not actually a grandmother by blood or adoption and therefore has no stranding to file under DRL §72 for custody or visitation.

Matter of Maude V., __AD3d___, dec'd 7/1/10 (3rd Dept. 2010)

The Third Department reviewed a fair hearing decision regarding a Clinton County mother who refused to let her 17 year old son return to live in their apartment. The court ruled that it was not a violation of due process that the decision denying her request to unfound was written by someone other then the ALJ who heard the case. However, the court remanded the matter for a new hearing as large portions of the testimony was missing or inaudible and the court could not review the issues.

Matter of Christine Y., __AD3d___, dec'd 7/8/10 (3rd Dept. 2010)

A Saratoga County mother was indicated in a CPS report and the Third Department agreed that the report should not be unfounded. The mother took her 3 year old to a party and when the child was disruptive, she left the party with the toddler. It was after midnight and after she had been drinking. She was pulled over by the State Troopers for swerving and her BAC was .09%. She pled guilty to driving while ability impaired. She failed to properly care for her child and

placed him at imminent risk of physical injury when she drove with him in the car when her ability to drive safely was impaired by alcohol.