

Can the Court Order Post Termination Contact?
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The FOURTH Dept.'s Position:

Matter of Kahlil S., 35 AD3d 1164, 830 NYS3d 625 (4th Dept. 2006)

The Fourth Department rejected its own long standing precedent as well as rulings of the three other Appellate Divisions in this unexpected decision regarding a mother's termination on mental illness grounds. The court affirmed that the lower court properly found that the mother was unable to care for the children for the foreseeable future due to her mental illness. However, the Appellate Court then remanded the matter for an admittedly non mandated dispositional hearing on the issues of "posttermination contact". The Appellate Court ruled specifically that "Family Court, may in those cases in which the court deems it appropriate, exercise its discretion in determining whether some form of post- termination contact with the biological parent is in the best interests of the child". The Appellate Court found that this was appropriate to consider in cases where the termination was on the grounds of mental illness, mental retardation and permanent neglect. The court acknowledged that it was reversing its own precedents which had clearly held that the court had no such discretion. The court did not cite any statutory authority for its decision. The court also did not define "posttermination" contact in the sense of whether it meant only before an adoption or after an adoption as well. The lower court is to review the best interests of the children by considering their ages, the bond they have with the mother and the likelihood of adoption.

Matter of Thomas 35 AD3d 1289, 825 NYS3d 416 (4th Dept. 2006)

In a similar case to the **Kahlil** matter above, the Fourth Department remanded a mental illness termination matter back to Chautauqua County for a dispositional hearing on the question of "posttermination contact".

Matter of Bert M., 50 AD3d 1509, 856 NYS2d 758 (4th Dept. 2008)

The Fourth Department reviewed an appeal from Jefferson County Family Court regarding the revocation of a suspended judgment and the freeing of two children for adoption. The parents maintained on appeal that the DSS had not engaged in diligent efforts to assist them. The Appellate Court refused to consider of what diligent efforts had been made for the time period prior to the parents having consented to the adjudication of permanent neglect. They did review the actions of the DSS subsequent to the adjudication and during the term of the suspended

judgment. (Note: Although the court reviewed the actions of the DSS during the suspended judgment period, the court made no comment that “diligent efforts” are required to be proven in a violation of a suspended judgment and it is well settled that such proof is not necessary) The DSs had provided the parents with a “coparent” who assisted them with the care of their home and arranged supervised visits. Services to assist with personal hygiene, employment, budgeting, parenting as well as counseling were offered to the parents. The parents did not address or overcome the problems that had caused the placement of the children. Mere attendance at the required programs, without progress is not sufficient to fulfill a suspended judgment.

However, the Fourth Department did remand the matter for a new dispositional hearing on the question of the court ordering “post termination contact” with the parents. The Appellate Court commented that the hearing had been held prior to the **Kahlil S.** decision. The lower court must consider in a permanent neglect termination if the children’s best interests warrant ongoing contact with the birth parents whose parental rights are terminated.

Matter of Diana M.T., 57 AD3d 1492, 870 NYS2d 656 (4th Dept. 2008)

The Fourth Department reviewed an Allegany County Family Court’s termination of a father’s rights to his two daughters on mental illness grounds given that the expert testimony was that the father had a personality disorder, alcohol dependency and posttraumatic stress disorder that prevented him from safely caring for the children. The father’s treating psychologist did opine that he could provide proper care if he were gradually given responsibility with a system in place to provide him support and treatment. Since he had been unable to do that very thing with petitioner’s help, the mere possibility that he might be able to in the future did not defeat the termination. The father had requested post termination visitation but the lower court properly denied the request as the father failed to establish that the visitation would be in the girl’s best interests.

Matter of Kahlil S., 60 AD3d 1450, 876 NYS2d 310 (4th Dept. 2009) and Matter of Terrell Z., 60 AD3d 1451, 879 NYS2d 353 (4th Dept. 2009)

In 2006, the Fourth Department reversed all precedent and ruled that Family Court had authority to order post termination contact in terminations based on permanent neglect, mental illness and mental retardation in **Matter of Kahlil S. 35 AD3d 1164**. That matter was remanded for a best interest hearing in Erie County Family Court. At the remanded hearing, the court ordered that there should be no post

termination contact with one of the children and that “reasonable” post termination contact should occur with the second child. The mother then appealed both determinations. Both findings were affirmed by the Fourth Department as appropriate based on the evidence regarding each child’s best interests.

Matter of Josh M., 61 AD3d 1366, 877 NYS2d 784 (4th Dept. 2009)

While upholding a mental retardation termination of a father’s rights, the Fourth Department remanded the disposition back to Ontario County Family Court for failing to hold a *Kahlil* inquiry about post adoption visitation. The lower court had urged the parties to consider having the father surrender with some agreement for visitation after the child’s attorney and the court expressed the opinion that post termination visitation might be appropriate but the father refused to surrender when the parties could not reach agreement on the terms. The lower court then ordered a termination without holding a hearing to determine if post termination should be ordered as being in the child’s best interests.

Matter of Christopher J., 60 AD3d 1402, ___ NYS2d ___ (4th Dept. 2009) and Matter of Christopher J., ___ AD3d __. ___ NYS2d ___ dec’d 6/5/09 (4th Dept. 2009)

In reviewing a Oswego County Family Court’s revocation of a suspended judgment in a permanent neglect termination, the Fourth Department ruled that the mother did not ask the court to consider post termination contact or to hold a hearing on that issue and that in any event, she failed to establish that the contact would be in the children’s best interests. The court exactly the same as the the father in the second matter.

Matter of Samantha K., 59 AD3d 1012, ___ NYS2d ___ (4th Dept. 2009)

Oneida County DSS was not required to prove diligent efforts in a permanent neglect case where the father was incarcerated and filed on more than one occasion to cooperate with the agency. Further, since the father had no feasible plan for the child other than foster care while he was incarcerated, he failed to plan and therefore had permanently neglected the child. The Fourth Department found that the terminating the fathers rights , while allowing the father to still have “visitation rights” was in the child’s best interests.

Matter of Tryston M., __AD3d__, 885 NYS2d 824 (4th Dept. 2009)

While affirming the Jefferson County Family Court's termination of a mother's rights, the Fourth Department continued its position that Family Court has jurisdiction to order post termination contact and remanded the case for a **Kahlil** hearing.

CONTRAST TO THE OTHER DEPT'S :

Matter of Valentino G., 36 AD3d 439, 827 NYS3d 54 (1st Dept. 2007)

New York County Family Court was affirmed on appeal to the First Department. The father had failed to comply with the terms of a suspended judgment. He relapsed in his drug treatment and he could not care for the child. Freeing the child for adoption would be appropriate even though this child's chances of being adopted were not high. But termination would mean that the child could be photo listed and this would enhance the ability to locate a pre-adoptive home for the child. There has been an agreement with the agency, the foster mother and the law guardians to continue to visit the child and so the court will not "grant respondent's alternative request for an order" for visitation post termination. (Note: court cited caselaw that open adoption cannot be ordered in any event)

Matter of James X. 37 AD3d 1003, 830 NYS2d 608 (3rd Dept. 2007)

The Third Department affirmed a Cortland County Family Court termination of a father's rights to his 7 year old son. The father had lived with the child at earlier points but when the child came into foster care, the child had been in the mother's home. The mother ultimately surrendered her parental rights. The agency worked with the father after the child was removed from the mother on issues regarding sexual abuse. Although he had not been found to have abused this child, he had plead guilty to sexually abusing a 9 year old niece and had been found by Family Court to have sexually abused a different son. In both cases, he was ordered to obtain sexual abuse treatment and he did not do so. He had an extensive history of indicated child protective reports and had also sexually abused yet another unrelated child. Due to this history, DSS required that he obtain sexual abuse counseling for any potential return of this child. They offered diligent efforts involving weekly supervised visitation and anger management programs. The caseworkers repeatedly indicated that he would have to complete sexual abuse treatment and he repeatedly refused to do so saying that he did not have a problem

with sexual abuse. He lived in a home with several adults who also had extensive child protective histories. He offered “myriad invalid excuses” for not becoming involved in sexual abuse treatment. His basic failure to accept responsibility for his repeated sexual abuse of children is a failure to plan for this child’s return and necessitates a termination of parental rights. There is no reason to offer a suspended judgment in this situation. Lastly, in response to the respondent’s request that the court consider allowing him visitation with the child even if his rights were terminated, the Third Department stated that “... It is axiomatic that when parental rights are terminated pursuant to an adversarial proceeding that results in a finding of permanent neglect, the court lacks the authority to permit visitation to a respondent”. (Note: No mention was made of the 4th Department’s **Kahlil S.** ruling just 2 months earlier that allowed court to consider ordering post termination visitation on a mental illness TPR)

Matter of Charles FF., 44 AD3d 1137, 844 NYS2d 455 (3rd Dept. 2007)

A Columbia County mother voluntarily placed her two sons in foster care and 18 months later, the county filed to terminate her rights on both mental illness and mental retardation grounds. The Third Department affirmed the Family Court’s termination. The expert testified that the mother had a borderline range of intellectual functioning as well as a panic disorder, agoraphobia and a borderline personality. He did opine that medication might help the panic disorder but this would only be a partial solution at best. Her personality disorder is largely untreatable and her IQ will not increase such that she can care safely for the children. The mother argued that termination was not in her children’s best interests. Given the fact that mother’s problems are not resolvable, there is no reason to prolong the matter. The law does not provide for a suspended judgment, as the Law Guardian argued for, in mental illness or mental retardation terminations. Although there is no current adoptive resource for the children, parental rights can still be terminated when it is in the children’s best interests to do such that a permanent home can be found for them, despite the bond with the mother.

Matter of Tiffany T., __AD3d__, 845 NYS 2d 255 (1st Dept. 2007)

The First Department affirmed New York County Family Court’s termination of a mother’s rights due to her mental limitations. She was mentally retarded, had poor adaptive functioning and was depressed. She would not be able to care for her special needs child for the foreseeable future. There was evidence of a strong bond

between the mother and the child but termination and adoption is in the best interests of the child.

Matter of Melissa DD., 45 AD3d 1219, 846 NYS2d 475 (3rd Dept. 2007)

The Third Department reviewed a termination proceeding brought against a mother and one of the fathers of four of her children and affirmed Broome County's termination. The children had been in foster care since the fall of 2003. The agency provided diligent efforts to the parents. A parent aide was assigned. Biweekly visits were set up and the parents were given a bus pass. Arrangements were made such that they could call the foster home twice a week to talk to the children. The mother was provided with referrals to parenting and codependency classes and the father was provided with parenting classes, anger management and domestic violence counseling. While the parents did attend most of the visits with the children, cleaned up their apartment and completed parenting classes, they failed to resolve other issues. They missed half of the children's medical appointments, several special education meetings and only called the children about twice a month. The mother did not complete her codependency counseling and the father has not completed his anger management or domestic violence counseling. A suspended judgment was not appropriate. Although the mother had completed the codependency counseling by the time of the dispositional hearing, she did not follow up with their recommendation of mental health counseling even though the counseling services suspected that she had an undiagnosed bipolar condition that needed medication. The father had completed anger management counseling by the dispositional hearing but had not even arranged for domestic violence counseling. The parents had separated twice in the six month between the fact finding and the disposition with the police being called on two occasions due to their domestic violence. The parents had four different addresses in the last year. These parents had been under various court orders to improve parenting since 2001 and have never resolved their problems. A suspended judgment would only delay permanency for these special needs children. The Third Department ruled that given the parental rights were being terminated instead of surrendered, the Family Court "had no authority to permit post termination visitation" between the mother and the children. (Note: no comment re the 4th Departments ruling in **Kahlil S**)

Matter of Jasmine Pauline M., ___AD3d___, ___NYS2d___ (1st Dept. 2009)

The First Department affirmed New York County Family Court's termination of a mother's rights based on mental illness and mental retardation. The expert

testimony by the court appointed psychologist was that her mental condition made her unable to care for her child for the foreseeable future. The expert had interviewed the mother and reviewed all her medical records. The mother's adaptive skills had improved but not to the point that she could ensure the safety of the child. The court was not required to issue any order regarding post termination visitation. (note: no reference made to the 4th Dept's **Kahlil S.** ruling)