Recent Caselaw on Access to Sexual Predator

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Matter of Anndrena 13 Ad3d 1164, 787 NYS2d 766 (4th Dept. 2004)

A Cattaraugus County neglect finding was upheld by the Fourth Department. The respondent neglected his girlfriends's 15 year old daughter. He has prior convictions of sexual abuse of children. This child is at risk of sexual abuse because this respondent is in her home and is "unreconstructed sexual abuser who denies his guilt in the prior incidents" (**citing Kasey C. 1182 AD2d 1117 (4th Dept. 1992)**

Matter of Alan FF., 27AD3d 800, 811 NYS2d 158 (3rd Dept. 2006)

The Third Department reversed Saratoga County Family Court's dismissal of neglect proceeding against two parents. The lower court had dismissed, on motion, a petition, which alleged that the father was living in the home with 3 children and was an untreated sex offender who had sexually abused another child. Without holding a fact-finding, Family Court had found that the allegations in the petition would not demonstrate that the father was a substantial risk to the children. The Third Department disagreed. Upon a motion to dismiss, the court must consider as true all the allegations in the petition. Here if the allegations were true the children were neglected. The petition alleged that the father was a convicted sex offender who had admitted in both Family Court and criminal court to having sexual abused an infant daughter in a prior petition. There had been a Family Court order in 2001 requiring that all contact with his children be supervised. That order had expired in 2003. In the meantime, he failed to complete any offender program and his limited intellect and mental health issues impair his ability to benefit from any program. A 2002 mental health evaluation recommended that his contact with his children be supervised. Now, he denies having sexually abused the other child. The mother is fully aware of his prior admissions, his current denial, his lack of treatment and the recommendation that he have no unsupervised contact with the children. She does not prevent unsupervised contact. Further, the petition alleged that there was domestic violence in front of the children and that the father threw one of the children into a couch. If DSS can prove these allegations, these children are neglected by both of the parents. The court did make a comment in a footnote that the record contained no explanation why the DSS had not sought ongoing orders of supervision of this family after the original dispositional order of 2001 had ended in 2003.

Matter of Ahmad H., 46 AD3d 1357, 849 NYS2d 140 (4th Dept. 2007)

The Fourth Department found a derivative neglect adjudication was appropriate regarding two children even though the original finding on which it was based was from 1989. Although 17 years had passed since the Onondaga County father had been found to have neglected other children in his care, this original finding had been based on sexual abuse of those children. There is no indication that the father's "proclivity for sexually abusing children" has changed. The father is a convicted sex offender and has never been in a treatment program despite much advice that he get treatment. He is on probation with a condition that he have no contact with children under 18 years of age and there is an order of protection that he stay away from another child that is in the custody of the respondent mother. This man has a fundamental defect in his understanding of parenthood and even 17 years between the Art. 10 petitions is not too remote in time.

Matter of Selena J. __AD3d__, 825 NYS2d 749 (2nd Dept. 2006)

The Second Department upheld Queens County Family Court's neglect adjudication against a mother. The mother allowed a cousin access to her home and her children even after a counselor informed her that the younger's child had revealed that the cousin had touched her buttocks. The mother choose not to believe the child. A few months later she learned that the cousin had sexually abused her 14 year old daughter and she still allowed him access to the home. A reasonable prudent parent would have taken steps to protect the children.

Matter of Mary MM 38 AD3d 956, 831 NYS2d 273 (3rd Dept. 2007)

The Third Department affirmed a finding of neglect regarding a Broome County mother. The mother's 8 year old daughter had been the victim of sexual abuse by a 13 year old boy in another state. DSS found a convicted sex offender at the family home on two occasions after specifically advising the mother on the first occasion that the offender, who was about to begin a prison sentence, should not be in the home. The DSS brought both a sexual abuse petition against the convicted offender who appeared to be residing in the home and a neglect petition against the mother. DSS was unable to prove the sex abuse but the lower court did make a finding of neglect against the mother. The Third Department agreed that the

mother was neglectful even though there was no proof that the current paramour had abused the child. The mother had a known history of associating with sex offenders. The child's father had been a convicted sex offender, she had dated a man convicted of indecent exposure and she was aware that this new boyfriend had plead guilty to sexual abuse in the first degree and was about to be incarcerated as a second felony offender. Allowing this man to be in the presence of her child is more than sufficient for find that she neglected the child. Further it was appropriate to place and keep the child in foster care given that the mother "has used what Family Court charitably termed "extremely poor judgment" in associating with known sex offenders". Until the mother and the child receive counseling and services, it is in the child's best interests to remain in foster care.

Matter of Kayla F., 39 AD3d 938, 833 NYS2d 742 (3rd Dept. 2007)

The Third Department reversed a sex abuse and neglect findings against two parents. An Otsego County father had been placed on probation due to a criminal conviction involving photographing girls undressing in the locker room at the high school where he worked. A condition of his probation was that he not be responsible for the care of any child although he was permitted to live at home with his two children. His 7 year old daughter was in special education and was diagnosed with anxiety and selective mutism and it was alleged that she told a school counselor that she had been alone with her father and that he had put his penis between her legs. The child told the caseworker and law enforcement that she had been alone with her father but did not repeat any allegations of sexual abuse. The older brother also alleged that he knew that his sister had been alone with the father and that he had been alone with the father on at least 2 occasions. Otsego County Family Court found that the father had abused the daughter and derivately neglected the son and that the mother had neglected both children by allowing them to be alone with the father. The Third Department found that the out of court statement by the child about sexual abuse was not sufficiently corroborated, There was no medical evidence offered and there was no expert witness called to interpret any behavior on the part of the child. Given the child's problems, there would need to be specific interpretation of any behaviors of the child. The child did not repeat the allegations to the caseworker or to law enforcement - although that in and of itself would not serve as corroboration as repetitious out of court statements by the same child are not enough. The court can take a strong negative inference from the father's lack of testimony but that cannot be used to corroborate the child's out of court statement. Since the child's out of court statements were not corroborated, abuse can not be adjudicated and neither

can the derivative neglect on the son as there was no underlying abuse for the basis. As to the mother, one parent permitting the child to have contact with the other parent in violation of an order of protection may be, but is not automatically, neglect. Here there was no order of protection and no court had ruled that this father was a danger to his own children. The probation terms specifically allowed him to live in the same house as the children. The mother testified that she had no reason to not trust him with his own children as she had never been aware of any sexual contact. She did know that he had been convicted and what the probation conditions were but leaving them alone with the father on a few occasions is not proof that she failed to exercise reasonable care.

Matter of Christian F. 42 AD3d 716, 838 NYS2d 451 (3rd Dept. 2007)

The Third Department affirmed Tompkins County Family Court's dismissal of neglect proceedings against a grandmother and her boyfriend. The boyfriend was a convicted sex offender and the grandmother knew of the conviction. She had custody of her young granddaughter. The petition against the boyfriend was appropriately dismissed as he had never been legally responsible for the child. It was also appropriate to dismiss the petition against the grandmother as she kept the boyfriend away from the child and in fact terminated her relationship with the boyfriend. (Note: the child was in the home for 15 months before she terminated the relationship) While exposure of a child to a known sex offender can constitute neglect, the grandmother's testimony that she did not allow contact between the boyfriend and the child was believed by the lower court.

Matter of Krista LL, 46 AD3d 1209, 849 NYS2d 398 (3rd Dept. 2007)

The Third Department agreed with Columbia County Family court that a mother had neglected her two children based on her response to her oldest child when the child disclosed that the stepfather was sexually abusing her. When the older girl told her mother of the sexual abuse, the mother's initial response was appropriate. She took the child to counseling and called the state police. Thereafter her conduct was neglectful. She refused to believe that the sexual abuse occurred even when her husband confessed that he had done it. She repeatedly accused the child of lying and breaking up the family. She used excessive corporal punishment on the girl when the girl refused to recant. The mother convinced the younger child that her older sister was lying. After the stepfather was released from jail, the mother had the older child go live with friends and then permitted the father to return to

the home where he was in contact with the younger child. This mother failed to provide any assistance to her daughters over this obvious emotional issue. The mother placed the two girls in imminent risk.

Matter of Jessica P., 46 AD3d 1142, 848 NYS2d 412 (3rd Dept. 2007)

A Columbia County mother neglected her three children by living with her mother and her mother's boyfriend when she had reason to be suspicious of the boyfriend's potential for sexual abuse. After the mother had left the grandmother's home, her oldest daughter revealed that the grandmother's boyfriend had been sexually abusing her for a long time. Both the mother and the grandmother were found to have neglected the children and the mother only appealed. The mother knew that another family member had accused the boyfriend of raping her when she was 17 years old. The mother also had been subjected to unwanted sexual advances by the boyfriend and admitted to being scared to be alone with him. "Most notably", on at least two occasions while living in the home with the boyfriend, the mother asked her daughter if "anything bad" was happening with the boyfriend. Given these concerns, it was neglect to continue to live in the home with the boyfriend, to allow him to be alone with the child and to allow him to bathe the child. The mother claimed that the out of court statements of the child were not corroborated. However, the mother was not charged with sexual abuse, only neglect, and she in fact conceded that the child had been sexually abused. The mother's neglect is based on her failure to take action to protect the child based on her own fears and suspicions about the boyfriend and therefore corroboration of the undisputed sexual acts are not required.

Matter of Ian H., 42 AD3d 701, 840 NYS2d 202 (3rd Dept. 2007)

In a case of first impression, the Third Department reviewed evidentiary issues in a neglect matter from Tioga County. The father in this matter lived with his wife and twin sons. The mother operated a day care in the home and although the father was not an employee of the day care, he did assist from time to time in the care of the day care children. The father was criminally charged with sexually touching two female day care children and DSS then filed an Art. 10 petition alleging that this behavior resulted in derivate neglect of his own children. The proof of the sexual abuse included the taped interview of a 7 year old who had attended the day care until she was about 5 and who disclosed sexual penetration as well as the out of court statements of a 3 year old who alleged touching when the father assisted

her in toileting. The out of court statements that the DSS used to establish the allegations were statements by children who themselves were not the subjects of the petition. The Third Department found that the term "child" in FCA 1046 (a)(iv) is not limited by its' definition to only children named in the petition. The father also argued that the out of court statements were not adequately corroborated but the Third Department disagreed. The children's statements cross corroborated each other and the spontaneous circumstances of the out of court statement of the 7 year old also corroborated. The 7 year old former day care child saw the TV report of the father being arrested and was told that he was being arrested for touching little girls and she spontaneously declared "just like he did to me" . The respondent also admitted that he had placed his hands in the vaginal area of the two current day care children under the guise of checking them for wetness and this also supported the older child's statement that he had touched his penis to her vagina while in the bathroom. Lastly, the respondent failed to take the stand and this also added corroboration and allowed the court to draw a strong negative inference. The father argued that his request to have the 7 year old former day care child testify in court should not have been denied. The lower court acknowledged his obligation to balance the rights of the father against the emotional well being of the child and had all the parties brief the issue and concluded that the child's age and emotional well being indicated that she should not be made to testify. The derivative neglect finding regarding his own two children was based in the neglect of the day care children as it showed his impaired level of judgment as to appropriate parenting and it was perpetuated on multiple victims when his own children were in the same home.

Matter of Brian I., 51 AD3d 792, 858 NYS2d 286 (2nd Dept. 2008)

The Second Department affirmed Orange County Family Court's adjudication of neglect against a father and the placement of the children in foster care. The father had been criminally convicted of multiple sexual crimes against other children which demonstrated an impaired level of parental judgment as to create a substantial risk of harm to the children.

Matter of Nassau County DSS v J.P., 21 Misc3d 1126(A) (Family Court, Nassau County 2008)

Nassau County Family Court granted a summary judgment of derivative neglect against a father who had been criminally convicted of sexually abusing the 14 year old "best friend" of his own daughter. His three children were in the home when the acts were committed. The court ruled that it would hold a hearing to determine if the father was a person legally responsible for the victim child to determine if a finding of abuse could be made as to that child.

Matter of Neithan CC., 56 AD3d 1000, 867 NYS2d 758 (3rd Dept. 2008)

The Third Department agreed with Clinton County Family Court that a convicted sex offender neglected his live in girlfriend's 7 year old child. The respondent had been convicted in 1998 of a felony due to his repeatedly subjecting his former girlfriend's child to sexual abuse. He is classified as a level three sex offender. He did participate in sex offender treatment while incarcerated. He admitted that he was instructed not to have unsupervised contact with children and not to drink alcohol. The respondent has been alone with the subject child by his own admission, "numerous times" and he continues to consume alcohol.

Matter of Bethanie AA., 55 AD3d 977, 866 NYS2d 372 (3rd Dept. 2008)

A Columbia County stepfather neglected his 17 year old stepdaughter by having sex with her and by not preventing his father, the child's step grandfather also having sex with her. The child had became pregnant at age 17 and an abuse and neglect petition was filed. The abuse allegation was withdrawn when the evidence indicated that the child was 17 and had "consented" to the sexual contact such that no penal law had been violated and therefore no sexual abuse could be proven. However, the stepfather had lived with the child since she was 4 years old and had treated her as a daughter, therefore his admission that he had, albeit consensual, intercourse with her and may have impregnated her constitutes behavior which is "grossly inappropriate". Further he was aware that his own father had been seen in a sexual situation with the child when she was 15 years old and he had done nothing about it. He failed to satisfy his parental responsibilities to this child and did not provide her with proper supervision and guardianship. His judgment is significantly flawed and his behavior also resulted in a substantial risk of harm to his step son and his own daughter who also live in the house and who are therefore derivately neglected.

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Matter of Kirk V., 60 AD3d 4271, 874 NYS2d445(1st Dept. 2009)

New York County Family Court properly dismissed a neglect petition ruling that the aid of the court was not necessary given that the older brother who had allegedly sexually abused the younger brother had not lived in or visited the family home for over four years before the decision was issued. ACS was unable to articulate what disposition that were seeking as against the parents given that the older brother had long since been out of the home.

Matter of Patricia B., __AD3d__, __NYS2d__ dec'd 4/21/09 (2nd Dept. 2009)

A Nassau County mother neglected her children as she was aware that one of her sons had sexually abused one of her other children but continued to allow that son to live in the home. The dispostional order of supervision with an order of protection that son who had abused a child could not have contact with the children except in therapeutic counseling was appropriate but could only issued for the duration of one year with a possibility of ongoing extensions.

Matter of Kole HH., __AD3d__, 876 NYS2d 199 (3rd Dept. 2009)

A Broome County father was arrested for sexually abusing the mother's cousin's 9 year old daughter who was on occasion in the home. Ultimately the criminal charges were dismissed. The father and mother were alleged in Family Court to have neglected their own two boys. The mother had consented to a neglect order but the father requested a hearing. The lower court found that the 9 year old had been sexually abused in the home but dismissed the petition regarding the two sons as the father had not been a person legally responsible for the 9 year old and therefore this could not form the basis of a derivative finding regarding the sons. The abused child testified in court, albeit unsworn, and her statements were supported by tapes on her interviews with caseworkers in which she provided graphic descriptions of the sexual activity that were clearly inappropriate for her age. The Third Department ruled that the proven abuse of the 9 year old could in fact provide the legal basis for a derivative finding even though the father had not been a person legally for the victimized child. The father's behavior demonstrates

an impaired level of parental judgment to the extent that his own children are at risk. He lacks the capacity to care for and protect his own children.

Matter of Patricia B., 61 Ad3d 861, 877 NYS2d219 (2nd Dept. 2009)
A Nassau County mother neglected her children as she was aware that one of her sons had sexually abused one of her other children but continued to allow him to live in the home. It was approrpaite to grant a dispo order that the abuser child could have no contact with the other children except in therapeutic counseling.

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 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.

Matter of Telsa Z., 81 AD3d 1130 (3rd Dept. 2011)

On its third review of this Clinton County Family, the Third Department found that the mother had neglected the children by failing to protect them from the father's sexual abuse. The Appellate Court had previously remitted this matter after the lower court had removed the children from the non-respondent mother during the dispositional hearing on the father's sexual abuse petition. Since the prior petition had only been against the father, the Appellate Court had found that the lower court did not provide the then non respondent mother with due process. The Appellate Court did stay the placement of the children in foster care and upon the remitter, the lower court ordered a FCA §1034 investigation against the mother which resulted in this neglect petition against her. The Third Department added a detailed foot note to this decision to explain more fully this prior ruling, stating that a Family Court does have authority to place children who have found to be neglected or abused in foster care even as against a non-respondent custodial parent but there must be due process – including a hearing – for the non-respondent parent. The Appellate Court repeated as per its prior ruling that the lower court erred in using FCA §1035 to remove the children from a non-respondent parent, effectively finding her to have neglected the children when there had not been an actual neglect petition filed against her.

When the case was then remanded, the Family Court found that she had neglected the children and the Third Department now affirmed that adjudication. The older sister – who had been 8 years old at the time – disclosed to several adults that her father was sexually abusing her. She also indicated that her mother had "peeked" in the bedroom door and the window on several occasions while the father was actually committing the abuse. The mother's response to seeing what he was doing to her daughter had been to go into her own bedroom and pretend to be asleep. The younger sister corroborated these out of court statements of her older sister by acknowledging that the mother would "peek" when the 8 year old was being abused. The little girl also said her mother would often sleep on a couch between the parents' bedroom and the children's and that she did this to see if the father was going into the girl's bedroom. Also the younger daughter said that her mother had told the girls to sleep with a family dog to protect them from the father. The mother exhibited no surprise when authorities informed her that the this child had disclosed the sexual abuse. The 8 year old also disclosed that her parents told her she was "bad" and that they would go to jail if she told anyone about what the

father was doing. The child was fearful of going to jail herself. The mother had previously been found to have neglected two older daughters when she had allowed another earlier boyfriend to continue to have access to then knowing that he had sexually abused one of them. She had violated a court order regarding those older daughters that had ordered her to keep the boyfriend away from them. She had eventually surrendered her rights to these girls. She had also been found to have neglected yet another daughter who was in foster care at the time of this petition.

Matter of Afton C., 17 NY3d 1 (2011)

The Court of Appeals concurred with the Appellate Division that Dutchess County Family Court erred in finding that a father has neglected his five children, all aged under 14, where he had pled guilty to Rape in the Second Degree for having had sex with a child under the age of 15 and also had pled to Patronizing a Prostitute under the age of 17. Further, the mother did not neglect the children by failing to remove the children from the home or by failing to inquire of the father the circumstances of the criminal convictions. The father had served one year in jail and was now listed as a level three sex offender. He had not been ordered to obtain any sexual abuse counseling. The Court of Appeals ruled that there is no presumption that an untreated sex offender, even where the victim was a child, residing in the home with his own children is neglectful, without other proof of the current risk to his children. Even the fact that the father would not discuss the allegations or exhibit insight into his behavior was not sufficient – nor was his invocation of the Fifth Amendment and his evasive answers in the Family Court proceeding sufficient. The Court did comment that perhaps proof that the father needed treatment, or had been ordered to obtain treatment and had not, might have established the link of risk. Further, they commented that a neglect finding might be appropriate where the conviction stemmed from the sexual abuse of unrelated children who were in the care of the parent. The concurring opinion commented that the petitions may well be proven in such situations if the facts of the conviction or the reasons for his designation as a level three sex offender were more clearly introduced in the Family Court action.

Matter of Zachary T., 85 AD3d 1663 (4th Dept. 2011)

The Fourth Department concurred with Genesee County Family Court that a father neglected his son by failing to protect him from being sexually abused by an older brother and a cousin. The child and the older brother testified that the father knew of the sexual abuse but had done nothing to prevent it. Also the child was

derivately neglected due to the father having sexually abused a nephew when the families shared a home. The father was a person legally responsible for the nephew at that time.

Matter of Jayann B., 85 AD3d 911 (2nd Dept. 2011)

The Second Department reversed Dutchess County Family Court's ruling on a sex abuse matter. The lower court had dismissed the petition without a fact finding hearing, ruling that the petition failed to state a cause of action but on appeal the matter was remanded for a fact-finding. The allegations were that the mother's live in boyfriend had in 2004 been indicated for sexually abusing his 8 year old nephew. The respondent was now living in this mother's home with her child 6 years later. The respondent denied that he had sexually abused the nephew, in fact denied that he even knew that there had been an indicated report of this nature despite evidence that he did in fact know. Further, the respondent acknowledged that he had never attended any treatment program for sexual abuse. The petition was in the nature of a derivative allegation and there were no allegations that he had directly harmed the subject child of this petition. The Second Department ruled that the allegations were sufficient to require the lower court to hold a fact finding hearing.