CHILD WELFARE CASELAW/LEGISLATIVE UPDATE

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Current through: January 11, 2021

I. Legislation, Regulations and Policies

Visiting By Incarcerated Parents

Chapter 355 of the Laws of 2020, which takes effect on December 23, 2021, adds a new Corrections Law § 72-C that requires the Commissioner to place persons in correctional institutions or facilities located in closest proximity to where the inmate's minor child or children reside, provided such placement is appropriate and is in the best interest of the child, and the incarcerated parent gives their consent to such placement.

DOCCS, in consultation with the Office of Probation and Correctional Alternatives and the Office of Children and Family Services, must develop assessment procedures and criteria, and submit an annual report regarding the implementation of the statute to various government officials.

The legislative memo states: "Over 100,000 children in New York State have at least one parent in state prison. At present, a majority of individual s are being housed in facilities that are hours away from their children and families. Experts in the field of criminal justice, child development, and child welfare agree that in the vast majority of cases, a child who has a parent in prison benefits from being able to have personal contact and communication with them. Consistent, ongoing contact in the form of in-person visiting reduces the strain of separation, lowers recidivism, and is the single most important factor in determining whether a family will reunite after a prison term. The criteria for deciding where individuals are housed, including decisions about transfers should include proximity to a child security, mental health, and medical needs. It is important that a child maintain a relationship with their parent and increase their access and contact to their parent in prison. Furthermore, proximity offers many benefits for corrections, the incarcerated parent, and successful reentry. Research demonstrates visits with family and children improve institutional adjustment, decrease disciplinary infractions, and promotes lower recidivism rates."

Foster Care: Report Of Change Of Placement

Regarding an agency's obligation to report a change of placement, Chapter 732 of the Laws of 2019 added a new subdivision (5) to FCA § 1017, a new subdivision (j) to FCA § 1055, a new clause (H) to FCA § 1089(d)(2)(vii), and a new paragraph (g) to Social Services Law § 358-a(3).

Chapter 55 of the Laws of 2020, Subpart L, which took effect April 21, 2020, removes from the above-cited statutes a requirement that the agency include certain indicated reports of child abuse or maltreatment, and otherwise amends the placement change reporting requirement, as follows:

In any case in which an order has been issued remanding or placing a child in the custody of the local social services district, the social services official or authorized agency charged with custody or care of the child shall report any anticipated change in placement to the court and the

attorneys for the parties, including the attorney for the child, forthwith, but not later than one business day following either the decision to change the placement or the actual date the placement change occurred, whichever is sooner. Such notice shall indicate the date that the placement change is anticipated to occur or the date the placement change occurred, as applicable. Provided, however, if such notice lists an anticipated date for the placement change, the local social services district or authorized agency shall subsequently notify the court and attorneys for the parties, including the attorney for the child, of the date the placement change occurred; such notice shall occur no later than one business day following the placement change.

Foster Care Re-Entry During COVID-19 Emergency

Chapter 346 of the Laws of 2020, which took effect on December 15, 2020, amends Family Court Act §§ 1055(e) and 1091 to allow a former foster care youth to re-enter the foster care system without having to file a motion with the family court during the state of emergency declared pursuant to Executive Order 202 of 2020 in response to the novel coronavirus (COVID-19) pandemic.

FCA § 1055(e) is amended to state that the former foster care youth "may request to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion pursuant to [FCA § 1091] and any requirement to enroll in and attend a vocational or educational program shall be waived for the duration of the state of emergency; provided further, however, that during a state of emergency, the local commissioner of social services or other officer, board or department authorized to receive children as public charges shall be authorized to place such former foster care youth requesting to return to foster care placement; and provided further, however, that the local commissioner of social services or other officer, board or department authorized to receive children as public charges shall, when determining whether to return such former foster care youth to foster care placement, take into consideration the factors the court would take into consideration upon making such a determination to return a child to foster care placement pursuant to [FCA § 1091]. To the extent a former foster care youth is denied the request to return to the custody of the local commissioner of social services, or other board or department authorized to receive children as public charges pursuant to this paragraph, the youth shall still have the opportunity to file a motion as authorized pursuant to [FCA § 1091].

Family Court Act § 1091 is amended in a complementary manner, and also now states that nothing shall prohibit the local social services district from filing a motion for requisite findings needed to claim reimbursement under Title IV-E of the federal Social Security act to support the youth's care, and the family court shall hear and determine such motions.

From legislative memo:

PURPOSE:

To allow a former foster care youth who has been discharged from the foster care system the ability to re-enter without submitting a motion to the family court during a certain state of emergency.

SUMMARY OF PROVISIONS:

Section 1 amends section 1055(e) of the Family Court Act to allow a former foster care youth to re-enter the foster care system without having to file a motion with the family court during the state of emergency declared pursuant to executive order 202 of 2020 in response to the novel coronavirus (COVID-19) pandemic. The commissioner of the local social services department would be required to consider the same factors that the court is required to consider when

determining the appropriateness of the former foster care youth reentering the foster care system. Any requirement to enroll in vocational or education program when a former foster care youth reenters the system would be required to be waived during the time of the state of emergency. This
section would also clarify that to the extent a former foster care youth is denied the request to return to the custody of the local commissioner of social services, or other board or department authorized to receive children as public charges, that the youth would still have the opportunity to file a motion as authorized pursuant to section 1091 of the family court act.
Section 2 amends section 1091 of the Family Court Act to require that during the state of emergency declared pursuant to executive order 202 of 2020 in response to the novel coronavirus (COVID-19) pandemic that former foster care youth can re-enter the foster care system without making a motion to the court, and that any requirement to enroll and attend an educational or vocational program will be waived for the duration of the state of emergency. This section would also clarify, subsequent to former foster youth's return to placement without making a motion, as authorized under this section during the COVID-19 state of emergency, that nothing in this section would prohibit a local social service district from filing a motion for requisite findings needed to claim reimbursement under Title IV-E of the Federal Social Security Act to support the youth's care, and the family court shall hear and determine such motions.
JUSTIFICATION:
Under existing law, young adults can return to foster care when they have no alternative and agree to participate in a vocational or educational program, upon the approval of the Family Court. Because access to court can be severely restricted in the event of a state of emergency, requests for assistance by youth between ages 18 and 21 should be automatically granted by the local social services districts. Requirements for participation in vocational and educational programs should be temporarily waived so as not to serve as a barrier to re-entry during the crisis.

Judicial Recusal

Chapter 376 of the Laws of 2020, which took effect on December 23, 2020, adds a new Judiciary Law § 9 (Recusal; reason) which states: "Any judge who recuses himself or herself from sitting in or taking any part in the decision of an action, claim, matter, motion or proceeding shall provide the reason for such recusal in writing or on the record; provided, however, that no judge shall be required to provide a reason for such recusal when the reason may result in embarrassment, or is of a personal nature, affecting the judge or a person related to the judge within the sixth degree by consanguinity or affinity."
The legislative memo states: "Judicial recusal is an important mechanism to safeguard the perception of judicial integrity. A judge must currently disqualify themselves from presiding over a matter when they doubt their ability to preside. impartially. Currently, judges also have total discretion to recuse themselves without giving a reason. Yet without written order specifically justifying the recusal, it is difficult to tell whether the disqualification was really necessary."

Courthouse Civil Arrests

Chapter 322 of the Laws of 2020, which took effect on December 15, 2020, adds a new Civil

Rights Law § 28 that protects certain persons from civil arrest when going to, remaining at, or returning from a court appearance or proceeding unless a specific judicial warrant or judicial order authorizing such arrest has been issued. A civil court action may be brought by the individual or the Attorney General to address an alleged violation of this provision.

Chapter 322 adds a new Judiciary Law § 4-A that allows courts to issue orders designed to protect the prohibition on such civil arrests.

Judiciary Law § 212 is amended to provide that non-local law enforcement officials seeking to enter a courthouse with respect to an alleged violation or violations of federal immigration law are required to identify themselves and such purpose. Counsel for the Unified Court System is required to review any judicial warrant or judicial order presented to assure its authenticity before allowing entry of the officer intending to effect such an immigration-related arrest.

From legislative memo:

JUSTIFICATION:

Article Three of the Civil Rights Law, "Privilege From Arrest," dates back to the early part of the last century. Most of these provisions of the Civil Rights Law were enacted in 1909 (e.g., § 22 ("Privileges of officers and prisoners from arrest while passing through another county"); § 23 ("No person to be arrested in civil proceedings without a statutory provision); § 25 ("Witness exempt from arrest")). While such provisions have been effective to protect the integrity and needs of the court system in certain circumstances, certain modern practices make an updated, supplementary statute necessary. Changes by federal agencies regarding the enforcement of federal immigration law have instilled significant fear in immigrant communities across New York State. In particular, the use of court calendars and courthouses as a means of locating allegedly undocumented individuals has soared, leaving many immigrants, documented and undocumented, afraid to access the justice system or respond to court summonses for fear of potentially life-changing immigration-related repercussions. This trend has a potentially damaging impact on all New Yorkers, not just immigrant communities, as the operation of our judicial system and public safety are undermined.

Domestic violence victims - whether documented individuals or not – need access to our civil justice system, for orders of protection and similar relief. An entire family may be gravely impacted if a tenant is afraid to enter the courthouse and respond to a landlord's court petition. Justice to other persons is denied when an immigrant - documented or not - refuses to come to court to testify as a victim or witness. It serves neither justice nor public safety when fear of a civil arrest deters a defendant charged with a traffic infraction, or a more serious crime, from attending a scheduled court appearance in the case.

According to the Immigrant Defense Project, from 2016 to 2017, arrests by federal Immigration and Customs Enforcement ("ICE") agents at courthouses in New York State increased by 1200%. Fear of being targeted, either due to a lack of legal immigration status or concern about the uncertain status of a family member, have dissuaded many individuals from contacting law enforcement or following through with court proceedings. District attorneys and legal representatives, in New York and elsewhere, have expressed frustration and concern regarding their ability to prosecute cases, as victims and witnesses are sometimes too afraid to attend the proceedings. This inability of law enforcement and the legal community to work effectively with immigrant communities and individuals has potentially severe consequences for public safety, as the justice system is handicapped by the unwillingness of victims, witnesses, tenants and others to come forward and enter the courthouse.

As fewer individuals feel safe interacting with the justice system, fearing potential implications

for themselves, friends or family, it becomes all the more challenging to promote public safety. It is imperative that we ensure that all members of our community feel safe accessing New York's court system.
This bill would make a modest change to clarify and update New York's century-old prohibition on certain courthouse arrests (Civil Rights Law Art. 3). The bill would allow arrest for an immigration offense based on a judicial arrest warrant or judicial order, signed by a judge of another jurisdiction who is authorized to order such arrest. However, an immigration- related courthouse arrest based on an administrative warrant, or without a warrant, would not be permitted.

ABUSE/NEGLECT: CENTRAL REGISTER REPORTS AND RECORDS/FAIR PREPONDERANCE OF EVIDENCE STANDARD

Chapter 56 of the Laws of 2020, Part R, amends certain provisions of the Social Services Law governing reports of abuse or maltreatment, and the records thereof, to, inter alia, apply a "fair preponderance of the evidence" standard, rather than a "some credible evidence" standard, to investigations and challenges to indicated reports. **The legislation does not become effective until January 1, 2022.**

Fair Preponderance Standard

SSL § 412(6) is amended to state that an "unfounded report" results when an investigation commenced on or after January 1, 2022 does not determine that a fair preponderance of the evidence of the alleged abuse or maltreatment exists.
SSL § 412(7) is amended to state that an "indicated report" results when an investigation commenced on or after January 1, 2022 determines that a fair preponderance of the evidence of the alleged abuse or maltreatment exists.
SSL § 422(5)(a), which addresses sealing of unfounded reports, and SSL § 422(5)(c), which addresses expungement, are amended to incorporate the fair preponderance standard.
SSL § 422(8)(a) and (c), which address requests to amend indicated reports and fair hearings, are amended to incorporate the fair preponderance standard.
FCA § 651-a, which governs the admissibility of central resister reports in custody/visitation proceedings, is amended to incorporate the fair preponderance standard.

Interplay With Article Ten Proceedings, And Fair Hearings

SSL § 422(8)(a)(ii) is amended to state that where a FCA Article Ten proceeding based on the same allegations that were indicated is pending, a request to amend the report shall be stayed until the disposition of the family court proceeding. In the documents sent by the child protective service (CPS) to OCFS, the CPS must include a copy of any petition or court order based on the allegations that were indicated.
SSL § 422(8)(b)(ii) is amended to state that in a fair hearing, where a Family Court Act Article Ten petition alleges that a respondent in that proceeding committed abuse or neglect against the subject child in regard to an allegation contained in an indicated report: (A) a finding by the court that such respondent did commit abuse or neglect shall create an irrebuttable presumption in the fair hearing that the allegation is substantiated by a fair preponderance of the evidence as to that respondent on that allegation; and (B) where the CPS withdraws the petition with

prejudice, or the family court dismisses the petition, or the family court finds on the merits in favor of the respondent, there shall be an irrebuttable presumption in the fair hearing that the allegation as to that respondent has not been proven by a fair preponderance of the evidence.

Inquiries By Child Care Providers And Licensing Agencies

There are a number of amendments to SSL § 424-a(1)(e).

OCFS shall inform a provider or licensing agency, or child care resource and referral program, whether or not a person is the subject of an indicated child abuse and maltreatment report only if the person is the subject of an indicated report of child abuse; or if the person is the subject of a report of child maltreatment (but not abuse) where the indication occurred within less than eight years from the date of the inquiry. An indication for child maltreatment that occurred more than eight years prior to the date of the inquiry shall be deemed to be not relevant and reasonably related to employment.

When OCFS sends documents regarding an indicated report, it shall include a copy of any petition or court order based on the allegations that were indicated, and if there is such a FCA Article Ten proceeding pending, OCFS shall stay determination of whether there is a fair preponderance of the evidence to support the indication until the disposition of such proceeding.

If OCFS makes a fair preponderance of the evidence finding, OCFS shall notify the subject of the determination and of the right to request a fair hearing. If the subject requests a hearing, OCFS shall schedule the hearing and provide notice of the hearing date to the subject, to the statewide central register and, as appropriate, to the CPS which investigated the report.

The burden of proof in the fair hearing shall be on the CPS which investigated the report. Where a FCA Article Ten petition alleges that a respondent in that proceeding committed abuse or neglect against the subject child in regard to an allegation contained in an indicated report: (A) a finding by the court that such respondent did commit abuse or neglect shall create an irrebuttable presumption in the fair hearing that the allegation is substantiated by a fair preponderance of the evidence as to that respondent on that allegation; and (B) where the CPS withdraws the petition with prejudice, or the family court dismisses the petition, or the family court finds on the merits in favor of the respondent, there shall be an irrebuttable presumption in the fair hearing that said allegation as to that respondent has not been proven by a fair preponderance of the evidence.

If it is determined at the fair hearing that there is no fair preponderance of the evidence, OCFS shall amend the record as to that respondent on that allegation to reflect that such a finding was made at the administrative hearing, order any CPS which investigated the report as to that respondent to similarly amend its records of the report, notify the subject of the determination, and notify the inquiring party that the person about whom the inquiry was made is not the subject of an indicated report on that allegation.

Upon a determination at the fair hearing that there is a fair preponderance of the evidence, the hearing officer shall determine, based on guidelines developed by OCFS, whether such act or acts are relevant and reasonably related to the subject being allowed to have regular and substantial contact with children who are cared for by a provider agency, or relevant and reasonably related to the approval or disapproval of an application submitted by the subject to a licensing agency. The failure to determine that the act or acts are relevant and reasonably related shall preclude OCFS from informing a provider agency or licensing agency that such person is the subject of an indicated report on that allegation.

Upon a determination that the act or acts of abuse or maltreatment are relevant and reasonably related, OCFS shall notify the subject and inform the inquiring party that the person about whom

such inquiry was made is the subject of an indicated report.

Custody: Medical, Educational, And Other Decisions By Custodian

Chapter 623 of the Laws of 2019 amends Family Court Act § 657(c) and Public Health Law § 2504(4) to provide to persons who possess a lawful order of custody the same authority to make medical, educational, and other decisions that may be made by persons who possess a lawful order of guardianship.

Chapter 623 took effect on December 12, 2019.

Adoption: Adoptees' Right To Birth Certificate

Chapter 491 of the Laws of 2019 amends the Public Health Law to provide for adoptees' right to gain access to their original birth certificate.

Chapter 491 took effect January 15, 2020.

Information from legislative memo:

Section 1 adds a new Public Health Law § 4138-e. It is premised on an acknowledgment that the truth of one's origins should be a birthright. Accordingly, § 4138-e affirms, supports and encourages the life-long health and well-being needs of adoptees, and those who will be adopted in the future, by restoring the right of all adult adopted persons born or adopted in New York to unrestricted access to their original birth certificates. The denial of access to accurate and complete self-identifying and medical information of any adopted person is a violation of that person's human rights and is contrary to the tenets of governance.

Section 1 provides that an adopted person eighteen years of age, or if the adopted person is deceased, the adopted person's direct line descendants, or the lawful representatives of such adopted person, or lawful representatives of such deceased adopted person's direct line descendants can obtain a certified copy of the adopted person's original long form birth certificate, from the commissioner or a local registrar, in the same manner as such certificates are available to persons born in the state of New York who were not adopted. The amendment also requires the commissioner to provide the adopted person or other authorized person with the background information about the adopted child and the adopted child's birth parents sent to the commissioner pursuant to Domestic Relations Law § 114(1).

In addition, in the event that the commissioner does not have the original birth certificate of an adopted person, section 1 requires courts and other agencies that have records containing the information that would have appeared on the adopted person's original long form birth certificate to provide such information, including all identifying information about the adopted person's birth parents, to the adult adopted person or other authorized person upon a simple written request therefor that includes proof of identity.

Section 2 amends PHL § 4138(4) to authorize the commissioner to make microfilm or other suitable copies of an original certificate of birth in accordance with PHL § 4138-e, and to provide a certified copy of the original long form certificate of birth to an adult adopted person in accordance with § 4138-e.

Section 3 amends PHL § 4138(5) to state that a certified copy of the original long form certificate of birth of such a person shall be issued to an adult adopted person in accordance with § 4138-e.

Section 4 amends paragraph PHL § 4138(3)(a) to authorize a local registrar to provide a certified copy of the original long form certificate of birth to an adult adopted person in accordance with § 4138-e.
Section 5 amends PHL § 4138(3)(b) to authorize a local registrar to provide a certified copy of the original long form certificate of birth to an adult adopted person in accordance with § 4138-e.
Section 6 adds a new PHL § 4138(8) to authorize adopted persons eighteen years of age or older, or the birth parent(s), to submit a change of name and/or address to be attached to the original birth certificate of the adopted person.
Section 7 amends PHL § 4138-d to remove the provision that allows an adoption agency to restrict access to non-identifying information that is not in the best interest of the adoptee, the biological sibling or the birth parent(s).
Section 8 amends PHL § 4104 to include additional provisions under vital statistics that would be applicable to the city of New York.
Section 9 amends Domestic Relations Law § 114(1) to require that any order of adoption direct that the information to be provided to the adoptive parents about the child and the child's birth parents shall include the child's and birthparents' information at the time of surrender and, in addition, that the information provided to the adoptive parents also be provided to the commissioner of health.

The bill will restore adult adoptees' right to access information that non-adopted persons, including those who "age-out" of foster care, have a legal right to obtain. In New York, an adopted person cannot access his or her original birth certificate unless the adopted person goes through a judicial proceeding and, even then, the outcome does not guarantee that access will be granted. This bill will allow adult adoptees, or if the adopted person is deceased, the adopted person's direct line descendants, or the lawful representatives of such adopted person (living) or lawful representatives of such deceased adopted person's direct line descendants, to obtain a certified copy of the adopted person's original long form birth certificate. Adoptees will continue, under existing law, to be able to secure "non-identifying" information which may include, but not be limited to, their religious and ethnic heritage and medical history information that may be necessary for preventive health care and the treatment of illnesses linked to family history and genetics. To whatever extent "non-identifying" information may be unavailable, the restoration of the civil right to one's own original birth certificate will restore equal opportunity for seeking such information.

CPLR Statute of Limitations: Child Sexual Abuse
Chapter 130 of the Laws of 2020 amends CPLR § 214-g to extend for another year the one-year "revival window" created by the Child Victims Act, which allowed adult survivors of child sexual abuse to file civil actions even if the statute of limitations had already expired or, in the case of civil actions against public institutions, if a notice of claim requirement had gone unmet.
The original revival window opened on August 14, 2019, and thus now runs until August 14, 2021.

Orders of Protection: Smart Devices
Chapter 261 of the Laws of 2020, which took effect on November 11, 2020, amends Family

Court Act §§ 352(1), 446, 551, 656, 759, 842, and 1056, Criminal Procedure Law §§ 530.12 and 530.13, and Domestic Relations Law §§ 240 and 252, to provide that an order of protection may be issued that requires that the respondent refrain from controlling any connected devices affecting the home, vehicle or property of the person protected by the order.

"Connected device" shall mean any device, or other physical object that is capable of connecting to the internet, directly or indirectly, and that is assigned an internet protocol address or bluetooth address.

The legislative memo notes that "[t]hese devices include security systems that can lock or unlock doors and windows, cameras, thermostats, sprinklers, voice-activated assistants and speakers, lights and more." "These devices can often be used by domestic abusers as tools for surveillance, harassment, and stalking. Protective orders currently do not protect against those who control accounts for smart devices, providing a unique way of harassing victims through smartphone apps connected to the internet-enabled devices."

II. ABUSE/NEGLECT

Removal/Central Register/Investigation Of Abuse And Neglect

ABUSE/NEGLECT - Removal After Post-Dispositional Trial Discharge

After a finding of neglect against the father based on acts of domestic violence, the children were released to the mother, but were later removed and placed in non-kinship foster care. Subsequently, the children were trial discharged to the father. However, a few months later, the children were removed and placed back in non-kinship foster care because of an allegation of excessive corporal punishment that was later determined "unfounded." In February 2017, there was a court-ordered trial discharge to the father. Again, in January 2018, ACS removed the children because of an allegation of corporal punishment. The father sought the return of the children via an Order to Show Cause, and asked for an "expedited hearing." The hearing commenced two weeks later, on February 14, 2018, and took six months to complete, with the father's counsel repeatedly asking for earlier dates. On August 7, 2018, the Family Court found that the allegations against the father were not credible, and directed a conditional trial discharge. In a September 24, 2018 written decision, the court explained its denial of an expedited hearing. The children were finally discharged to the father on March 25, 2019.

After noting that the issues fall into an exception to the mootness doctrine, the First Department concludes that the lack of a prompt hearing violated the father's and the children's Due Process rights. While an erroneous failure to place the children in foster care may have disastrous consequences, this concern must be weighed against, a parent's interest in having custody, the children's interest in residing with their parent, and the significant emotional harm inflicted upon children by temporarily separating them from their parents, are factors that merit equal consideration.

ACS has failed to establish that the lengthy delay was related to its interest in protecting the children. The hearing was prolonged because of the court's and attorneys' scheduling conflicts. There is no indication that the completion of the hearing was caused by difficult legal issues, or by the need to obtain elusive evidence, or by some other factor related to an accurate assessment of the best interest of the children.

The Court rejects ACS's assertion that, in light of the prior finding of neglect, the government has a greater interest in ensuring a correct adjudication, even if that may lengthen the proceeding. Post-disposition, parents are entitled to the strict due process safeguards afforded in neglect proceedings. Parents' fundamental liberty interest in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.

The Court, noting that the Family Court Act is silent as to the procedural time frames applicable when a child is removed post-fact-finding, declines to specify what is "prompt" or "expedited" judicial review. However, a post-deprivation hearing should be measured in hours and days, not weeks and months, according to the facts and circumstances of the matter. In a footnote the Court adds: "We recognize that Family Court has a large caseload with competing deadlines

which may cause slight delays. We do not hold that in every instance a hearing that takes 'weeks and months' is inappropriate, especially when there is a sound basis for delay. Rather, there should be a case-by-case evaluation, but the court should value promptness whenever possible."

In re F. W.
(1st Dept., 4/23/20)

Practice Note: In a footnote, the Court declined to recognize a right to a hearing within thirty days. "Any imposition of a defined time frame is a matter to be addressed by the legislature within the constraints of due process." But practitioners should keep in mind that the return of a child after a failed trial discharge could be sought via a request for a permanency hearing pursuant to FCA § 1088. If such a hearing is held, it must be completed within thirty days. FCA § 1089(a)(2), (3).

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ABUSE/NEGLECT - Removal/Imminent Risk
- Adjournment In Contemplation Of Dismissal
- Medical Neglect

The Second Department affirms orders granting petitioner DSS's application pursuant to FCA § 1027 to temporarily remove the child; finding that the mother and father had failed substantially to observe the terms and conditions of a FCA § 1039 adjournment in contemplation of dismissal order; and granting DSS's application to restore the proceedings to the calendar for a fact-finding hearing on the underlying abuse petitions.

At the § 1027 hearing, DSS proved that the standard treatment protocol for a child with leukemia included chemotherapy even after the child went into clinical remission; that this treatment was necessary because even in remission there remained a substantial number of malignant cells in the body; that leukemia cells start multiplying as soon as you stop the chemotherapy; and that if the bone marrow was filling with abnormal cells, the likelihood of getting the child back into remission and a cure dramatically dropped and it was much more likely he would die.

The mother testified as to alternative treatments the child could receive through Utopia Wellness Center, where she had brought him following issuance of the ACD order. But the medical doctor there specialized in anesthesiology and holistic treatment and was not a pediatric oncologist, and the mother submitted no testimony contradicting DSS's evidence that chemotherapy was the only effective treatment for leukemia and that vitamin and other alternative therapies did not effectively treat cancer or prevent its recurrence.

The family court also properly determined that the mother and father failed substantially to comply with the requirement in the ACD order that they ensure that the child receive appropriate continued care for his leukemia.

The court did not err in holding the § 1027 hearing before holding the hearing on the issue of whether to restore the proceedings to the calendar. The court may decide an application pursuant

to § 1027 at any time prior to dismissal of a petition under FCA § 1039.

Matter of Nicholas G.
(2d Dept., 7/8/20)

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ABUSE/NEGLECT - Removal/Imminent Risk
- Medical Neglect

The Second Department upholds the family court's determination under FCA § 1027 that the return of the children to the maternal grandmother's care presented an imminent risk where the grandmother failed to fully comply with court orders directing that, except in an emergency, the children receive all of their medical care at Maimonides hospital; the child Ethan appeared at the emergency department at Maimonides in critical condition; another child was brought by ambulance to the emergency department at Long Island Jewish Medical Center with pneumonia after being brought to school with a fever of more than 103 degrees Fahrenheit; and an expert in pediatric medicine and child abuse opined that the grandmother had a pattern of taking the children to the emergency room for non-urgent issues, and yet failed to take Ethan to the emergency room in a timely manner when he was critically ill.

Matter of Ethan D.
(2d Dept., 10/14/20)

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ABUSE/NEGLECT - Removal/Imminent Risk

The Second Department reverses an order that, after a hearing, granted the mother's FCA § 1028 application for return of two of the children.

The evidence at the hearing demonstrated that, after one of the children reported to the mother that her older brother had been sexually abusing her since she was ten years old, the mother did not address the sexual abuse or provide increased supervision for the children. The mother also left one of the children in the older brother's care for a period of time, in violation of a court order, while she gave birth to the third child.

Matter of Carter R.
(2d Dept., 6/2/20)

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ABUSE/NEGLECT - Court-Ordered Child Protective Investigation

In this dependency proceeding, the trial court issued orders directing the parents to permit the agency into their home to assess the living conditions of the children, and directing the parents to

cooperate with the agency. The court also ordered the father to submit observed urine samples for purposes of drug and alcohol assessments. The orders noted that the parents' failure to comply would subject them to sanctions.

The parents appealed, and an appeals panel reversed. The panel noted that while there were three separate reports of the father's intoxication, there was no specificity as to the type of impairment or if such impairment caused the children to be abused or neglected; that nothing in the agency's investigation, including its interviews with the children, led to further suspicion of abuse or neglect; that the agency did not allege a link between any alleged abuse/neglect and the condition or circumstances in the parents' home; that because the record did not provide a sufficient foundation for a finding of child abuse or neglect, the trial court erred by ordering the parents to submit to a home inspection; and that there is no statutory authority for the agency to petition for a drug test prior to a dependency adjudication.

The Pennsylvania Supreme Court affirms, concluding that the agency's authority to investigate does not include the authority to obtain an involuntary urine sample from the subject of the investigation. The nature of a custody case, where the parties initiate the action before the domestic relations division of the court to determine the best interest of the child, differs fundamentally from the instant motion to compel in which an arm of the State seeks to intrude into a family's private sphere based on a third party report. Moreover, the agency has not explained how any results obtained from the proposed testing would further its determination of whether or not child abuse occurred or to identify a perpetrator.

In re D.R.
2020 WL 3240581 (Pa., 6/16/20)

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ABUSE/NEGLECT - Imminent Risk

The Second Department reverses an order denying ACS's FCA § 1027 application for removal where the newborn child is the mother's fifth child; in 2006 the mother's first child died, at the age of two months, after sustaining multiple head fractures as a result of blunt force trauma; in 2008 the mother's second child, at the age of four months, sustained seven rib fractures among other injuries, the mother was incarcerated as a result, and it was determined in a child protective proceeding that the mother abused that child; and in 2012 and 2013, the mother gave birth to a third and fourth child, who were removed from her care based on a finding of derivative abuse, and a finding of neglect resulting from her failure to provide adequate food, housing, and clothing, and, although those children were returned on a trial discharge, ACS ended the trial discharge when the mother failed to ensure that the children attended school regularly and that they received their mental health treatment.

The evidence failed to establish that the mother adequately addressed and acknowledged the circumstances that led to the death of her first child and the removal of her other children.

Matter of Nasir C.

(2d Dept., 3/25/20)

* * *

ABUSE/NEGLECT - Child Welfare Safety Plans/Constitutional Issues

Defendant social workers employed by the Kentucky Cabinet for Health and Family Services appeal the district court's order denying their motion for summary judgment on qualified immunity grounds.

Plaintiffs assert that defendants violated their Fourth Amendment rights by subjecting four of the family's children to warrantless in-school interrogations without reasonable suspicion of child abuse. Plaintiffs also assert that defendants violated their Fourteenth Amendment rights by requiring them to adhere to a "Prevention Plan," which constrained the mother's ability to be alone with her children for approximately two months without any question as to her parental fitness and without any procedural protections.

The Sixth Circuit U.S. Court of Appeals reverses the order denying qualified immunity on plaintiffs' Fourth Amendment claims. The Fourth Amendment does in fact govern a social worker's in-school interview of a child pursuant to a child abuse investigation, and, at a minimum, a social worker must have a reasonable suspicion of child abuse before conducting an in-school interview when no other exception to the Fourth Amendment's warrant requirement applies. However, the law governing in-school interviews by social workers was not yet clearly established at the time of defendants' conduct.

The Court affirms the order denying qualified immunity on plaintiffs' Fourteenth Amendment procedural and substantive due process claims. As alleged by plaintiffs, defendants imposed the Prevention Plan's supervision restrictions on the mother for approximately two months after there was no longer any question as to her parental fitness without any procedural protections. In so doing, they abridged the parents' clearly established right to the companionship and care of their children without arbitrary government interference in violation of the Due Process Clause of the Fourteenth Amendment.

Schulkers v. Kammer
2020 WL 1502446 (6th Cir., 3/30/20)

* * *

SEARCH AND SEIZURE - Emergency/Exigent Circumstances
ABUSE/NEGLECT - Court-Ordered ACS Entry

The Family Court's FCA § 1034 order directed that the parent or other responsible person "must permit ACS to enter the home" to determine whether abused or neglected children are present, and that the "NYPD is to assist with entering the home if needed." After arriving at defendant's home at the request of an ACS case worker and knocking on the door for approximately five minutes while announcing their presence, the police received no response and heard no noise

coming from inside the house.

The First Department agrees with the hearing court's determination that "the narrow and circumspect authorization" given to the police did not permit them to "unilaterally" walk down a 70-100 foot alleyway adjacent to defendant's house and enter his enclosed backyard, which required the officer to "blade his shoulder" to avoid a fence. The order did not authorize unfettered access to defendant's property and provide permission to enter the curtilage, and there were no emergency or exigent circumstances.

People v. Kenrick Daye
(App. Term, 1st Dept., 1/6/20)

* * *

ABUSE/NEGLECT - Removal/Imminent Risk

The Second Department reverses an order that, after a hearing, granted the parents' FCA § 1028 application for the return of the child to their custody.

The Court notes that the child's sibling, Michael, has special needs that require him to be under constant supervision, and, on a prior occasion, the parents' inability to control Michael resulted in serious physical injuries to one of his siblings; that, notwithstanding the parents' willingness to comply with court-ordered services, they and Michael had not yet completed those services at the time of the hearing; and that the parents' inability to adequately control Michael would present an imminent risk to the subject child.

Matter of Nicholas O.
(2d Dept., 7/1/20)

Respondent/Person Legally Responsible

ABUSE/NEGLECT - Respondent/Person Legally Responsible
- Domestic Violence

The First Department reverses an order that granted respondent's prima facie motion to dismiss the neglect petitions, concluding that the evidence in the record is sufficient to establish that respondent was a person legally responsible for the children, and that he committed acts of violence against the mother.

An ACS child protective supervisor testified that respondent exercised power over the children's environment by controlling the family's spending and exerting command over the mother's food stamps and social security cards, leaving the family unable to purchase necessities such as food and clothes. The children reported that often they would not eat and would have to ask respondent if and when they could eat.

The children reported that they heard the mother and respondent yelling and screaming with

items being thrown around in the bedroom, and that the mother would emerge from the bedroom crying and with marks on her. The children feared respondent and reported that he made sexual comments to them.

In re Angel L.
(1st Dept., 4/2/20)

* * *

ABUSE/NEGLECT - Respondent/Person Legally Responsible
- Presumption Of Abuse

The First Department finds sufficient evidence that respondent was a person legally responsible for the child under FCA § 1012(g) where he resided with the mother and child for a number of months; the child referred to him as "daddy," and he treated the child like his son; and he fed the child, cleaned him, taught him how to speak, and took care of him on at least two occasions for multiple hours.

The Court upholds findings of abuse, concluding that respondents failed to rebut the statutory presumption with a credible and reasonable explanation of how the child suffered injuries to his internal organs, or otherwise demonstrate that they were not guilty of abuse. Respondents' attempts to blame each other or the child's father were insufficient.

Matter of Amir A.
(1st Dept., 12/1/20)

Right To Counsel

ABUSE/NEGLECT - Educational Neglect
- Right To Counsel

The First Department upholds a finding of educational neglect, noting that the child turned five years old in January 2016, resided in New York City, and was enrolled in kindergarten for the 2016-2017 school year, and thus was required to attend school (see Education Law § 3205[2][c]; and that, during the 2016-2017 school year, the child missed 47 out of 176 days of school and was late 68 out of 176 days.

The mother's contention that her right to counsel was violated is foreclosed by the Court's holding in *Matter of X. McC.* (140 A.D.3d 662, 663) (right to counsel did not attach at child safety conference).

In re Amberlina V.
(1st Dept., 10/27/20)

Discovery

ABUSE/NEGLECT - Credibility Of Child/Impeachment With Sexual History
- Discovery/Oral Depositions

In this civil action in which plaintiff's 15-year-old daughter attended a sleep over at a friend's home and was allegedly raped by an adult male relative of defendants (the friend's parents), during depositions the court precluded defendants from examining plaintiff's daughter regarding her prior sexual history, but permitted defendants to examine her regarding her purported drug use. The court determined that the Rape Shield Law applies to civil cases.

The Third Department affirms. The Court need not determine whether CPL § 60.42 applies to civil cases since the court below had authority pursuant to CPLR 3103(a) to issue a protective order to protect a party from harassment. The court was required to balance plaintiff's concern that the child's sexual history is irrelevant, and that questions of this nature are nothing more than a form of intimidation and embarrassment, against defendants' argument that the child had a motive to fabricate the allegations because of a purported pregnancy.

Plaintiff met her burden of showing annoyance and embarrassment. The child's sexual history, sexual conduct and pregnancies are not relevant or material to the elements of the causes of action for negligence, battery, intentional infliction of emotional distress or loss of services. Moreover, there is limited value to testimony concerning the sexual past of a victim of a sexual assault; instead, it often serves only to harass the victim and confuse the jurors. Defendants' claim that the child may have had a motive to fabricate the allegations of the incident to cover up a purported pregnancy is undermined by the child's medical records, which include a negative pregnancy report six weeks prior to the incident.

Lisa I. v. Manikas
(3d Dept., 5/14/20)

* * *

ABUSE/NEGLECT - Discovery/Mental Health Records

In this case involving sexual abuse charges made by one of the children against her former stepfather, respondent made motions seeking production for his use of certain records of nonparties Heartland Psychological Services, P.C., Brooklyn Heights Behavioral Associates, and Alan J. Ravitz, M.D. Upon reviewing the records in camera, the family court denied the motions, finding that the records were not relevant to the allegations.

The Second Department, citing FCA § 1038(d) and CPLR 3101(a), concludes that the records from Heartland and Dr. Ravitz should have been disclosed. The crux of respondent's defense is that the child's mother "has a history of fabricating allegations against him, including that he tried to murder or harm her and the children," and he contends that the mother influenced the child to make false allegations against him. These records are material to his defense, as they bear on the truth or falsity of the allegations and the mother's interactions with the children. In weighing respondent's need for discovery against the potential harm to the children from disclosure, the Court notes that the children do not have an ongoing therapeutic relationship with

Dr. Ravitz, a court-appointed forensic evaluator in previous custody litigation, and the Heartland records do not contain information from therapy sessions with the children.

However, disclosure of the treatment records from BHBA is denied. Mental Hygiene Law § 33.13(c)(1) prohibits the release of such records and information except pursuant to a court order finding that the interests of justice significantly outweigh the need for confidentiality. Here, respondent's need did not outweigh the potential harm to the child given that she has an ongoing therapeutic relationship with BHBA therapists which requires confidentiality.

Matter of Elliot P.N.G.
(2d Dept., 3/25/20)

* * *

DISCOVERY - Oral Depositions
PHYSICIAN-PATIENT PRIVILEGE

Plaintiff, a nurse, was seriously injured when he was assaulted by a patient at a psychiatric facility. Plaintiff commenced this consolidated action to recover damages for personal injuries against, among others, the patient's treating psychiatrists. After defendants indicated at a compliance conference that they would not answer any questions at their depositions regarding the patient, plaintiff moved pursuant to CPLR 3124 to compel them to appear for depositions and to answer questions seeking non-privileged information. Defendants cross-moved pursuant to CPLR 3103(a) for a protective order. The court ruled for defendants.

The First Department reverses. Plaintiff is entitled to inquire into any non-privileged information regarding the patient. The "prospect that a witness may be asked questions at a deposition as to which an objection based on privilege may be asserted is not a proper reason for declining to appear for a deposition. Rather, the proper procedure is for the witness to appear and for counsel to interpose objections to particular questions which call for the disclosure of privileged information (see 22 NYCRR 221.2)."

Jayne v. Smith
(2d Dept., 6/3/20)

Notice To/Investigation Of/Intervention By/Release By Agency To Custody Of Parent Or Other Relative/Visitation/ICPC

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The Maryland Court of Appeals upholds a determination holding that the ICPC does not apply to an out-of-state, non-custodial parent, and invalidating a conflicting Maryland regulation.

The statutory language and legislative history confirm that the ICPC applies only to pre-adoptive or foster care placements. Any regulation purporting to expand the application of the ICPC to out-of-state placements with a non-custodial parent is impermissible and will not be given the

force of law.

Any application of the ICPC to placements with biological parents who have not been deemed unfit would conflict with state and federal constitutional law. Subjecting a biological parent to the procedural hurdles and delays associated with an ICPC investigation unnecessarily deprives the individual of the fundamental right to parent.

The ICPC process effectively allows an out-of-state social services agency to deprive a presumably fit, biological parent of custody with virtually no judicial oversight. Maryland has the option of requesting a courtesy check of an out-of-state, noncustodial parent's home.

In re R.S.
2020 WL 4744912 (Md., 8/17/20)

* * *

ABUSE/NEGLECT - Notice To And Intervention By Noncustodial Parent/Custody Orders

Upon allegations that the mother had endangered her six-year-old child, the Nebraska Department of Health and Human Services was given temporary legal and physical custody of the child and his half siblings. No allegations were made against the father, who did not have notice of the hearing on temporary custody. He had lived with and helped support the child and his mother for approximately five years until developing Guillain-Barre syndrome about seven months before the petition was filed. After the father became aware that his child was in foster care, he moved for temporary physical placement, which the juvenile court denied.

The Nebraska Supreme Court agrees with the father that because he was not given notice that his fitness, forfeiture, or exceptional circumstances would be adjudicated at the hearing on his motion for placement, the juvenile court could not properly deprive him of his right to custody. Without a proper adjudication that the State had rebutted his parental preference, the law required temporary placement with the father.

Although there were questions about how the father, wheelchair bound, would be able to address hypothetical scenarios, and the court appeared to presume that he was unfit unless he could provide a detailed response to all of the scenarios, he had adequate answers as to how he would handle them. The father also described disability services, family, and members of the community he could reach out to as needed when difficult situations arise.

However, the juvenile court has the power to require cooperation with orders of visitation with the mother and its reunification plan. Temporary physical custody with a noncustodial parent ought not create a substantial and unnecessary hindrance to efforts of reunification with the custodial parent.

In re A.A.
2020 WL 6814034 (Neb., 11/20/20)

* * *

CUSTODY
INTERSTATE COMPACT

The Second Department adheres to its previous holdings that where a child is in the custody of a child protective agency pursuant to Family Court Act Article Ten, and a parent living outside of New York petitions for custody, the provisions of the ICPC apply.

Since the court could not grant the father's petitions for custody absent approval from the relevant North Carolina authority, and that approval was denied, the court properly dismissed the petitions.

Matter of Laland v. Bookhart
(2d Dept., 5/6/20)

* * *

ABUSE/NEGLECT - Visitation/Court-Ordered Payment Of Transportation Costs

In this Article Ten proceeding, the Second Department upholds an order that directed DSS to pay for transportation for the mother to have parental access with the child, where DSS petitioned for the out-of-state placement of the child and agreed to monthly parental access if the mother was clean of drugs and in a treatment program.

Social Services Law § 384-b(7)(f)(2) provides that "diligent efforts" includes making suitable arrangements for the parents to visit the child. Regulations provide that DSS must plan for and make efforts to facilitate parental access, and those efforts must include the provision of financial assistance, transportation, or other assistance necessary to enable parental access to occur (see 18 NYCRR § 430.12[d][1][i][a]).

DSS's contentions that the Family Court's authority is limited to the services included in the comprehensive annual services plan is not properly before the Court on this appeal.

Matter of Amaray B.
(2d Dept., 1/29/20)

* * *

ORDERS OF PROTECTION

The Third Department rejects the father's contention that the family court's failure to vacate an order of protection issued in a criminal proceeding effectively deprived him of due process and precluded him from having any contact with his daughter, leading to termination of his parental rights.

Although the same judge presided over the family court and county court proceedings, any challenge to the validity of the order of protection should have been raised before the county court. Also, the father agreed to the order of protection through 2040.

Matter of Robert B.
(3d Dept., 2/27/20)

Hearing Requirement: Right To Be Present and To Participate/Defaults/Adjournments

ABUSE/NEGLECT - Defaults

The First Department finds no error in the denial of respondent's motion to vacate her default where respondent claims that she missed the fact-finding hearing because her counsel failed to inform her of the hearing date, but she was present in court when the conference was scheduled, knew that the purpose of the conference was to schedule the fact-finding hearing, failed to appear at the conference, and then failed to maintain contact with her counsel, the court, or the agency, which shows an overall lack of attention to the proceeding.

Matter of Meajay B.
(1st Dept., 11/10/20)

*** * ***

ABUSE/NEGLECT - Defaults

The First Department concludes that the order of fact-finding was, in fact, issued on respondent's default where, by the time she appeared at the April 28, 2017 proceedings, records from her treatment and evaluation upon which the fact-finding order was heavily based had already been admitted into evidence; respondent's counsel was not authorized to participate in her absence and stated that he would not participate until she arrived; respondent was present at certain times, but not when most of the evidence of her neglect was submitted; and, when she was present, she did not seek to introduce any evidence to rebut the evidence of neglect.

In re Daniel P.
(1st Dept., 1/7/20)

*** * ***

TERMINATION OF PARENTAL RIGHTS - Defaults

In this termination of parental rights proceeding, the First Department upholds the denial of respondent mother's motion to vacate an order of disposition terminating her parental rights and freeing the child for adoption where, on each of the two successive days of the fact-finding and dispositional hearings, the mother arrived at family court, checked in, but

then left before her case was called; respondent argued that she was ill, but, on the first day, she left without telling her counsel she was leaving, her explanation for not appearing was unsupported by any evidence, and she did not seek medical treatment for any illness that day; and, on the second day, she did not go to the hospital until approximately four hours after she was required to appear in court, and was diagnosed with only mild symptoms.

In re Jayden J.
(1st Dept., 6/25/20)

*** * ***

ABUSE/NEGLECT - Adjournments
- Defaults

The Second Department finds no error where the father, who had been deported to Poland prior to the combined Article Ten dispositional hearing and hearing to address the mother's custody petition, was denied an adjournment of the hearing. The father was present on the telephone and represented by an attorney who was in the courtroom. His request for an adjournment could have been made earlier, and he did not substantiate either his assertion that he would be returning to New York in the near future or his assertions of dissatisfaction with assigned counsel. The court did not err in viewing the application as a tactic to obtain delay.

The court also properly found that the father's persistent interruptions during his telephonic participation warranted termination of the call and constituted a default. Thus, the determinations made after the default are not subject to direct appellate review.

Matter of Bartosz B.
(2d Dept., 10/14/20)

*** * ***

CUSTODY - Timeliness Of Proceeding/Hearing Delays

The Second Department upholds an order awarding sole physical custody of the child to the mother, and joint legal custody with final decision-making authority to the mother, but, "[a]s a final note, we express concern regarding the lengthy period of time that elapsed between the commencement of the custody hearing, which was held on 9 nonconsecutive days beginning in October 2016, and its conclusion nearly 1¾ years later in July 2018, and the additional 2 months that elapsed before the Family Court reached its determination in September 2018."

Matter of Lopez v. Noreiga
(2d Dept., 4/9/20)

* * *

ABUSE/NEGLECT - Adjournments/Right To Present Evidence

The family court conducted a fact-finding hearing over the course of several days, during which the mother was present. On the fifth day of the hearing, the mother was late in arriving to court because she allegedly was traveling by bus from Georgia to New York, and the bus was delayed. The mother's counsel notified the court of the transportation issue, and of the mother's intention to testify, and requested an adjournment. The court denied the adjournment request and directed that the hearing proceed as scheduled. The mother arrived shortly after summations, but the court did not reopen the hearing to afford the mother the opportunity to testify.

The Second Department reverses the neglect finding, concluding that the court should have exercised its discretion to reopen the hearing. The case is remitted for a continued hearing so the mother can present her case and for a new determination as to DSS's petition.

Matter of Katie P. H.
(2d Dept., 4/9/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Right To Present Evidence

The Second Department finds reversible error in this termination of parental rights proceeding where, when the mother failed to appear on a hearing date, her counsel stated that she would be participating in the proceeding on the mother's behalf but the family court denied counsel's request to place into evidence certain documentary evidence. This was not a default, and there was no showing that the mother waived her right to be heard.

The Court remits the matter to give the mother an opportunity to renew her proffer of the documents at a reopened fact-finding hearing and, if warranted, for new findings of fact and a new disposition.

Matter of Amira W. H.
(2d Dept., 4/9/20)

* * *

ABUSE/NEGLECT - Right To Be Present/ADA Issues
- Excessive Corporal Punishment/Violent Conduct

The First Department finds no error in the denial of the father's request to appear by phone for the final day of hearings. The court previously made efforts to accommodate the father's needs - for instance, ensuring that hearings did not take place in the morning, per his request. The father does not explain why he waited until two days before the hearing to

request a delay that did not arise from an emergency - he claimed to have become homebound due to mobility and related issues he had been experiencing since at least the month before. He had appeared in person on numerous prior court dates and it was unclear when or if his health had worsened.

Even were the Court to consider the father's unpreserved Americans with Disabilities Act-related arguments, the Court would reject them. Any physical and psychiatric issues did not affect the father's ability to appear in court previously, and he did not show that his health issues constituted a disability for ADA purposes or that the court actually denied him an opportunity to participate, given that his counsel was present and actively participated.

The Court upholds the finding of neglect, noting, inter alia, that the father's violence towards the family dog terrified the children; that when one child reacted to his having thrown the dog to the floor, he viciously hit the child repeatedly on her back, shoulder, and head, producing red welts and causing her to start sobbing; and that there was other evidence of his sudden eruptions of rage, such as ripping apart a keyboard on which his son was playing, flipping over a dining room table, and slapping one child's buttocks and legs after trapping her by stepping on her bathrobe's ties, and wrenching the door off of her bedroom.

In re Ian G.
(1st Dept., 2/11/20)

Abandonment

TERMINATION OF PARENTAL RIGHTS - Abandonment

In this termination of parental rights proceeding, the Fourth Department upholds a finding of abandonment, concluding that the father failed to prove circumstances that prevented contact with the child or agency or that the agency discouraged such contact.

Although the mother removed the child from the father's care and took the child to an undisclosed location in violation of their custody arrangement, the father did not report that violation, make any attempt to locate the child, or attempt to file a modification petition after his unsuccessful filing in Pennsylvania about six years after the mother left with the child.

Even assuming, arguendo, that the agency was required to do more than serve the father by publication with the neglect petition that resulted in the child's placement in foster care, the father's lack of awareness of that petition was not the reason the father failed to communicate with the child. even after the father was served with the termination petition, he failed to contact the child even though the agency told him he could write letters to the child.

Matter of Najuan W.
(4th Dept., 6/12/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Abandonment/Insubstantial Contacts

The First Department upholds a finding of abandonment where the incarcerated father alleged that he mailed the agency seven letters he wanted forwarded to the child during the six months.

In re Messiah C.T.
(1st Dept., 2/20/20)

* * *

ADOPTION - Abandonment

The Third Department affirms an order which dismissed petitioners' application for a determination that the father's consent to adoption was not required.

The Court notes that the father wrote letters addressed both to the child and to petitioners and asked if petitioners could take the child to see him, but the aunt did not respond to these letters or take the child to visit the father; that when asked whether she encouraged the child to respond to the letters, the aunt stated that she "asked if he wanted to" and provided him with paper; and that although the aunt stated that the father never called, the father explained that he could not remember petitioners' phone number, and that he asked for the phone number from his family members but they were unable to provide it.

Petitioners failed to establish by clear and convincing evidence that the father evinced an intent to forgo his parental rights. Petitioners bore some responsibility in hampering the father's ability to visit or have contact with the child.

Matter of Khrystopher EE.
(3d Dept., 4/2/20)

* * *

ABUSE/NEGLECT - Failure To Plan For Newborn
- Abandonment

Respondent Shirley P. had been remanded to foster care after her mother abruptly moved to Florida and left respondent, who was pregnant, in New York City. Less than two months later, seventeen year-old Shirley gave birth to Joziah, and ACS filed a neglect case three days later. "This precipitous decision to file when Joziah was still in the hospital was unnecessary given that Shirley herself was already under ACS's jurisdiction and could have been supervised and provided services." "Like the proverbial ball picking up speed as it rolls down the hill, this dynamic became exacerbated over time to the point where the mutual lack of trust between Shirley and both ACS and the foster care agency sabotaged any chance of a working relationship." ACS was never able to find a foster home that could accommodate both Shirley

and Joziah. The "failure of the system to provide a home where both a teenager and infant could be parented according to her/his needs and where Shirley could learn how to be a mother undermined her abilities both to succeed as a parent and to bond with her baby. This failure would prove devastating for both mother and child and ultimately be a major factor in their continued separation from each other."

Upon a fact-finding hearing, the Court dismisses the petition with prejudice. The evidence does not establish that Shirley failed to plan for Joziah. A visiting caseworker observed the absence of a crib or formula when Joziah was still in the hospital. As long as Shirley had a reasonable plan to obtain what she needed before Joziah was released, a finding cannot be made on that basis.
With respect to the abandonment charge, the Court notes, inter alia, that Shirley e-mailed the agency or spoke with ACS by phone on at least a monthly basis, and often more than once each month, to try to obtain information about Joziah or arrange a visit or some other contact; that Shirley temporarily relocated to Florida in order to care for her terminally ill mother and spend her mother's last months with her, and lacked identification so she could take a bus, train, or plane to New York even though that was something the agency should have obtained when she was still in foster care (court cites 18 NYCRR 430.12[1]); that Shirley asked that Joziah visit until she moved back to New York to fight for his return after ICPC approval was denied; that the agency discouraged Shirley's efforts to maintain contact via delays in complying with an order to obtain the ID she needed and unreasonably conditioning a visit with Joziah upon participation in a goal change conference before the visit; and that although the Court wishes Shirley had been able to better manage her emotions during interactions with caseworkers, the agency is obligated to behave professionally and not discourage the efforts of a parent.

Given the health risks, the Court was left with no options for a transition period involving in-person visits that were acceptable to all the involved parties. Since the Court believes that Joziah's emotional health and well-being is best promoted by his immediate return to his mother, the Court stays its decision for two days and orders that Joziah be returned to his mother no later than the following day.

Matter of Joziah P.
(Fam. Ct., Kings Co., 5/26/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50645.htm

Educational Neglect

ABUSE/NEGLECT - Derivative Educational Neglect

The Second Department upholds an educational neglect finding as to the older child, but finds that the mother did not derivatively neglect the younger child. There is no likelihood that the educational neglect of the older child, who was eight years old at the time of the proceeding, had any detrimental impact on the younger child, who was four months old at the time of the events in issue and thus was not even close to being of school age.

Matter of Nevetia M.
(2d Dept., 6/24/20)

Criminal Activity Involving Child

ABUSE/NEGLECT - Criminal Activity In Presence Of Children

The First Department upholds an OCFS determination finding maltreatment where petitioner, in the presence of the children, stole a credit card and identification out of someone's purse, attempted to use it and was caught, used her two-year-old child to shield herself from the victim and gave another one of her children stolen items to hide, and was arrested at the scene. There was also undisputed evidence of petitioner's substantial criminal history of stealing in front of the children and evidence that this incident impacted the children.

In re Solvin M. v. New York State OCFS
(1st Dept., 3/3/20)

Excessive Corporal Punishment/Physical Force/Evidence Of Injury

ABUSE/NEGLECT - Excessive Corporal Punishment
- Leaving Child Alone

After her ten-year-old daughter fled the apartment because she wanted to play at the park and was bored at home, the mother ran after her and shouted at her to come back. The child continued running. When the mother caught up with her, she refused to go home. In an attempt to immediately return home to her five-year-old son, who had been left alone in the apartment, the mother pulled her daughter by the arms, attempted to drag her home, and pulled her hair.

The First Department reverses a finding of neglect. Under the circumstances, the mother's use of force did not constitute excessive corporal punishment. The medical records and the caseworker's observations show that the child's injuries were minor.

The mother did not neglect her son by leaving him unsupervised in the apartment when she made the less-than-ideal choice to run after her daughter.

In re Avrie P.
(1st Dept., 7/9/20)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment

The Second Department upholds a finding of neglect where the maternal grandmother hit the child repeatedly with a silver cooking spoon, and one of the blows caused a mark on his shoulder that remained visible two days after the incident.

Matter of Emmanuel E.
(2d Dept., 10/21/20)

Domestic Violence/Conflict

ABUSE/NEGLECT - Domestic Violence
- Inference From Failure To Testify/Present Evidence

The First Department, reversing a dismissal order, finds sufficient evidence of neglect where respondent, while in proximity to the children, grabbed the mother by the hair and dragged her into the apartment after she returned, with the children, from the hospital, and all three were standing together outside the apartment while the mother tried to persuade respondent to allow them inside.

The court erred in failing to draw a negative inference against respondent for failing to testify or present evidence at the hearing.

In re Janiya P.
(1st Dept., 1/30/20)

* * *

ABUSE/NEGLECT - Domestic Violence

The Second Department upholds a finding of neglect against the father where the children observed the aftermath of the father's acts of domestic violence, which included seeing the mother bleeding from her head and crying, as well accompanying her in an ambulance to the hospital.

Matter of Noah N.
(2d Dept., 6/17/20)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department upholds a finding of neglect where, during an altercation, the father struck the mother in her arm with her cell phone while he was holding the child. The mother testified that during the incident the child was paralyzed and appeared afraid, and that the child later refused to eat dinner.

In re Mateo M.S.J.
(1st Dept., 6/4/20)

* * *

ABUSE/NEGLECT - Verbal Attacks Against Child

The Second Department reverses a finding of neglect where the family court found that the

mother neglected the child by her "continuous, relentless belittling and degrading of the child and by striking the child."

The Court notes, inter alia, that the mother and the child have a difficult relationship caused, in significant part, by the mother's disapproval of the child's behavior and the child's unwillingness to abide by her mother's rules, and the child's disciplinary problems at home and at school; and that the mother's insults and name-calling, while counterproductive and inappropriate, did not establish neglect.

Matter of Alexandra R.-M.
(2d Dept., 1/15/20)

Mental Health Issues

ABUSE/NEGLECT - Mental Illness
- Derivative Neglect

In these appeals brought by respondent mother and by the child Samuel, the Second Department upholds findings of neglect as to Hannah and derivative neglect as to Samuel, based on the mother's untreated mental illness, where the mother threw things at Hannah and instructed her brothers to hit her when the mother became frustrated with her; after these proceedings were commenced the mother told Hannah that Hannah would be placed in a mental institution and raped in petitioner's custody and that she would pretend Hannah was dead and burn Hannah's clothes, and threatened to kill Hannah once the case was over; and the mother's conduct caused Hannah to fear the mother and her brothers.

Neither a diagnosis of a specific mental illness nor expert testimony was required where the testimony of petitioner's caseworker and Hannah's school psychologist, as well as the mother's testimony and behavior during the hearing, supported the family court's conclusion that the mother suffered from an untreated mental illness.

Matter of Hannah T. R.
(2d Dept., 1/8/20)
Matter of Samuel A.R.
(2d Dept., 1/8/20)

Leaving Child Alone Or Unsupervised Or With Harmful Individual

ABUSE/NEGLECT - Leaving Children Alone
- Disposition/Order Of Protection

The First Department finds sufficient evidence of neglect where the mother left the children, who were then five and three years old, alone in her apartment for about fifteen minutes. Although there was some evidence that the mother's neighbor had agreed to watch the children through her apartment door peephole, those arrangements did not adequately provide for the children's safety while the mother was away from the home.

The family court did not err in issuing a dispositional order of protection excluding the mother from the home where she had left the children unattended in the apartment and was denying that she required services.

Matter of Jesiel C.V.
(1st Dept., 12/15/20)

* * *

ABUSE/NEGLECT - Leaving Children Alone/Unsupervised

The Third Department upholds neglect findings where police officers observed the two-year-old daughter crying and crawling on the floor, and the three-year-old son, who has cerebral palsy caused by a traumatic brain injury and is not able to care for himself, pulling DVDs or something like that near the television; the mother did not immediately respond to the officers and, when she exited her bedroom a few minutes later, appeared disoriented, stepped over the crying daughter without picking her up and told the officers that she was or could have fallen asleep; the mother admitted that she knew the children were unsupervised and that there was a fan and a television that prevented her from hearing noises; and, during a second incident, the caseworker observed the son without supervision in a highchair at the house while the mother reportedly was sleeping.

Although these two events were isolated, in light of the circumstances, including the son's disability, leaving the children unsupervised even for a brief amount of time constituted neglect.

Matter of Jarrett SS.
(3d Dept., 5/14/20)

* * *

ABUSE/NEGLECT - Leaving Child Alone On Street/Derivative Neglect

The mother, while driving the children to their Manhattan school from Queens, became angry with her eleven-year-old son, threw his cell phone out the window, stopped the car one block from an entrance ramp to the Queensboro Bridge, and ordered her son out of the car. After he exited, the mother drove away and brought the other two children to school. Her son took medication for ADHD, and had never taken the subway by himself and was not familiar with that area of Queens. He did not know his address, his mother's phone number, or the address or phone number of his school. He wandered for several blocks before two bystanders became concerned and called the police. The mother returned to the area, but could not find her son, and returned home without contacting the police or taking further steps to ensure the child's safety. Four hours after the initial incident, the police contacted the mother and told her that the child was in their care.

The Second Department upholds findings of neglect and derivative neglect.

Matter of Leo A. G.-H. B.
(2d Dept., 3/4/20)

* * *

ABUSE/NEGLECT - Allowing Neglect/Leaving Child Alone With Substance Abuser

The First Department reverses a finding of neglect where petitioner failed to prove that respondent grandmother knew or should have known that her boyfriend had a serious substance abuse problem. She was aware that he used alcohol frequently, and overdosed on drugs one time, but the record does not establish the frequency or duration of his drug use prior to the charged incident.

(Facts not stated in First Department's opinion) This case involved allegations that the grandmother, inter alia, left the child alone with the boyfriend, during which time he collapsed on the floor, unconscious from a heroin overdose, and traumatized the crying child.

In re Zaire S.
(1st Dept., 2/13/20)

* * *

ABUSE/NEGLECT - Leaving Children Alone

The First Department upholds a finding of neglect where, after the children's mother failed to appear for a scheduled visitation exchange, the father brought the children to the mother's home, pushed the children into the apartment, and fled as the children followed him outside the building, at which point he left the children on the sidewalk, alone and crying.

In re A'Keria A.H.
(1st Dept., 1/14/20)

* * *

ABUSE/NEGLECT - Leaving Children Alone
- Failure To Supply Adequate Shelter

The First Department upholds findings of neglect where the mother left the three older children - then five years old, two years old, and eleven months old - in a locked car, with marijuana within their reach, for approximately thirty minutes, to go shoe shopping. The mother failed to realize that young children should not be left alone in a car for any period of time. In addition, the father left the one-year-old and the five-year-old unattended in a bathtub half-filled with water for an appreciable period of time. Such behavior was intrinsically dangerous and manifests an "appalling" lack of judgment.

The only evidence that respondents failed to maintain the home in a sanitary condition was the

caseworker's testimony about her observations during a single visit, which is insufficient to support that finding of neglect.

In re Dream F.
(1st Dept., 10/15/20)

Derivative Abuse/Neglect

ABUSE/NEGLECT - Derivative Abuse

The First Department upholds a determination that respondent sexually abused his 15-year-old granddaughter, but overturns a finding that he derivatively abused his son, who is situated so differently from the granddaughter that the sex abuse is insufficient to demonstrate that he is at risk of harm. There is no evidence that he was aware of the abuse.

In re Ayanna P.
(1st Dept., 6/25/20)

* * *

ABUSE/NEGLECT - Mental Illness
- Derivative Neglect

The mother lost the youngest child, who was ten years old, non-verbal, and diagnosed with autism, neglected to contact the police until more than one hour after she was separated from that child, was uncooperative with the police when they arrived, and was subsequently admitted for psychiatric treatment at a hospital. The family court made findings of neglect and derivative neglect.

The Second Department affirms. The single incident provided sufficient evidence that the child was at imminent risk of harm due to the mother's untreated mental illness. The mother's failure to recognize that her child was in danger and that she needed assistance, coupled with her admission that she was no longer taking medication for her mental illness, supports the conclusion that the condition impairing her parental judgment still exists. When her youngest child was missing, she had to be persuaded by one of her other children to call the police. There was evidence that voices she heard in her head caused her to ignore her parenting duties.

Matter of Hadeem D.
(2d Dept., 12/30/20)

* * *

ABUSE/NEGLECT - Derivative Neglect/Summary Judgment

In 2012, DSS filed petitions alleging that the father neglected his children by, inter alia,

engaging in acts of domestic violence. Subsequent petitions were filed against the father in 2014 and 2015, shortly after the birth of two additional children. After the subject child was born in December 2016, DSS commenced this proceeding alleging that the father derivatively neglected that child. In July 2018, the Family Court, after a fact-finding hearing, found that the father had permanently neglected the oldest children, and terminated his parental rights in an order of disposition dated June 19, 2019.

In September 2019, DSS moved for summary judgment determining that the father derivatively neglected the subject child. The Family Court granted the motion.

The Second Department affirms. The father failed to complete drug treatment and domestic violence counseling programs, as required in connection with the neglect proceedings with respect to the oldest children. The conduct that formed the basis of the permanent neglect finding was sufficiently proximate in time to this derivative neglect proceeding.

Matter of Jamie A. C.-A.
(2d Dept., 11/25/20)

*** * ***

ABUSE/NEGLECT - Derivative Neglect

The Second Department upholds findings of derivative neglect where the mother knew of and failed to protect two of her now adult daughters from years of sexual abuse at the hands of their stepfather beginning when they were in their early teens and lasting until their adulthood.

Matter of Khadijah S.
(2d Dept., 9/2/20)

*** * ***

ABUSE/NEGLECT - Derivative Neglect

The Second Department upholds a finding of derivative neglect where the child's older sibling was adjudged neglected after an incident of domestic violence between the parents, and the father failed to complete a mental health assessment with an anger management component and follow through with any and all recommendations from the treatment provider, as required by the order of fact-finding and disposition issued in the older sibling's case.

Matter of Sebastian Y.
(2d Dept., 7/1/20)

*** * ***

ABUSE/NEGLECT - Derivative Abuse

The petitions filed in January 2017 alleged that respondent derivatively abused and/or neglected the children when, in December 2016, under the guise of helping his tenants' seven-year-old child with her homework in the kitchen area of the shared apartment, respondent pulled the child's pants down and touched her vagina. In connection with that incident, respondent pleaded guilty to forcible touching - admitting that he touched the girl's vagina in the kitchen of the family home under the guise of helping the child with her homework - and was sentenced to 60 days' imprisonment and three years' probation. In March 2018, ACS moved for summary judgment based upon the conviction and respondent's admissions. The Family Court granted the motion and found that the children were derivatively abused.

The Second Department affirms. The forcible touching incident established, prima facie, a fundamental defect in respondent's understanding of his parental duties relating to the care of children and demonstrated that his impulse control was so defective as to create a substantial risk of harm to any child in his care.

Matter of Lluvia G.
(2d Dept., 5/6/20)

*** * ***

ABUSE/NEGLECT - Derivative Neglect/Summary Judgment

The Second Department upholds the family court's findings via summary judgment, based on a 2012 neglect proceeding and subsequent events, that the mother and the father derivatively neglected the two youngest children. In support of its motion, ACS submitted prior orders finding that the mother and the father neglected the three oldest children, and suffered from mental health issues and continually failed to comply with recommended mental health services; and the orders demonstrated that the none of the three oldest children were returned to the care of the mother and the father, and that the conditions that resulted in the removal of those children continued to exist.

Matter of Elijah G.
(2d Dept., 6/24/20)

*** * ***

ABUSE/NEGLECT - Derivative Abuse
- Visitation/Parental Contact

The First Department affirms a finding of derivative abuse where, although there was evidence that respondent had provided daily care for the subject children, the finding that respondent sexually abused his stepdaughter, the children's half-sibling, demonstrated a

fundamental defect in his understanding of the responsibilities of parenthood and placed his biological children at imminent risk of abuse. There was evidence of long-standing, extensive sexual abuse and excessive punishment of the stepdaughter

The court did not err in placing restrictions on respondent's contact with the children that included their mother's monitoring of communications to ensure that respondent was complying with the court's order not to discuss his court cases with the children.

In re Xzandria B.
(1st Dept., 5/7/20)

* * *

ABUSE/NEGLECT - Derivative Severe Abuse

The Third Department upholds a finding of derivative severe abuse made via summary judgment and based on respondent's conviction, rejecting respondent's contention that the finding was unjustified due to the absence of evidence that the children, who were present in the house, were present at or aware of the abuse of the other child.

Matter of Chevy II.
(3d Dept., 2/20/20)

* * *

ABUSE/NEGLECT - Derivative Neglect

The Second Department upholds findings, made via summary judgment, that respondent derivatively neglected his stepdaughter, stepsons, and biological son and daughter, where respondent pleaded guilty in criminal court to endangering the welfare of a child and admitted that between January 1, 2013, and January 31, 2013, he touched the intimate parts of his other stepdaughter (as to whom a finding of abuse was made).

Matter of Isabelle C.
(2d Dept., 1/8/20)

Sexual Abuse Or Related Misconduct

ABUSE/NEGLECT - Sexual Abuse/Specification Of Penal Law Offense

The Fourth Department concludes that although the court failed to comply with FCA § 1051(e) by specifying the sex offense, the error is technical in nature and harmless. Because the child was seven years old at the time of the contact, the offense could only be sexual abuse in the first degree.

Matter of Skyler D.

(4th Dept., 7/24/20)

* * *

ABUSE/NEGLECT - Sexually Inappropriate Behavior

The First Department upholds a finding of neglect where respondent behaved in a sexually inappropriate manner in the presence of the then one-year-old child.

Matter of Jacyah V.
(1st Dept., 11/19/20)

Severe Abuse

ABUSE/NEGLECT - Severe Abuse
- Presumption Of Abuse
- Appeal/Fact-Finding Authority Of Appellate Division

The Fourth Department, citing the presumption in FCA § 1046(a)(ii), upholds findings that the older child was severely abused and the younger child was derivatively neglected by the parents.

The Court notes that there were two incidents in which the father found the older child at the bottom of the basement stairs in the morning; that the older child suffered severe injuries, including cuts to her throat that required a significant amount of medical attention, and serious bruising; that the act of cutting the child's throat twice demonstrates that the actor did so because he or she simply did not care whether grievous harm would result; that, despite the fact that the father was aware of the injuries sustained by the older child after the first incident, he took no additional precautions with respect to the child's care, and failed to seek immediate medical care after observing two severe lacerations on the child's neck at the time of the second incident; and that, after the mother testified, petitioner presented in rebuttal the testimony of a victim witness coordinator, who testified that the older child informed her that the mother had cut the child's throat with a knife.

Although the family court erred in failing to set forth the clear and convincing evidence forming the basis for its determination, this Court has the authority to independently review the record and make such a finding.

One judge dissents.

Matter of Mya N.
(4th Dept., 7/24/20)

Drug/Alcohol Abuse/Possession/Sale

ABUSE/NEGLECT - Alcohol Misuse

The Second Department finds sufficient evidence of neglect where the father regularly misused alcohol to the point of intoxication in the presence of the child; the father admitted to the caseworker that he was a "functioning alcoholic" and consumed alcohol daily; the caseworker observed the father intoxicated and drinking alcohol during a home visit, and further observed that the father became increasingly agitated with members of his extended family and yelled loudly and cursed at them, and one episode spanned fifteen minutes and caused the child to cry; and the caseworker's observations corroborated the child's statements to the caseworker that the more the father drank, the more he yelled and cursed at his extended family members.

This evidence triggered a presumption of neglect, and also established actual harm.

Matter of Ava A.
(2d Dept., 1/8/20)

* * *

ABUSE/NEGLECT - Drug Misuse

The Supreme Court of Vermont upholds a determination that there was insufficient evidence of the parents' drug use, noting, inter alia, that the child stated that she saw "her Mommy and Daddy smoke something" and that they "smoke it with fire," but the caseworker "couldn't really gather … couldn't really clarify what they were smoking" and agreed that the child could be referring to tobacco; that the father's cousin, a registered nurse, testified that she noticed that the mother had swollen hands, which can be a sign of opiate use, that the mother and father were disoriented and were nodding off during conversation, and that the father and mother had lost weight and seemed "checked out" and wore long sleeves regardless of the weather, but the cousin admitted that she had only seen the mother on one occasion and had very limited interactions with the father; that the cousin testified that she went into the family's room and observed "drug paraphernalia" including "pipes and bowls" and a bowl filled with white baggies, but did not investigate what was in the bags; and that the case worker observed that the mother's pupils were small and she seemed shaky and there were vape cartridges containing "a very small amount of oil" in the family's room, and the mother said the cartridges contained THC but had not been used since before the child was born.

Although the parents' behaviors can be associated with drug use, there are many other reasonable explanations.

In re M.E.
2019 WL 7245558 (Vt., 12/27/19)

Failure To Supply Shelter, Supervision Or Care

ABUSE/NEGLECT - Failure To Supply Shelter
- Evidence/Negative Inference

The First Departments reverses a finding of neglect made against the father. The evidence of the

condition of the family's apartment consisted only of the child's statement that the apartment was messy and untidy and that its condition had deteriorated over the prior three months. This statement was corroborated by the building superintendent's testimony that, during one visit to the apartment, he observed that the hallway, kitchen, and bathroom were dirty and smelled like garbage and there was broken glass and various items strewn about.

There is no evidence that the child, age thirteen, was in danger or imminent danger of impairment due to the deteriorated condition of the apartment. The caseworker testified that the child appeared to be healthy and appropriately groomed. The child was at the appropriate grade level, and denied any concerns about the father.

The strong inference drawn by the court against the father for failing to testify is insufficient by itself to provide the necessary link between the conditions in the apartment and any imminent harm
to the child.

In re Angelica M.
(1st Dept., 10/13/20)

* * *

ABUSE/NEGLECT - Failure To Provide Care
- Derivative Neglect

The Second Department upholds findings of neglect and derivative neglect where the mother failed to notify the authorities or express any concern when she did not know her sixteen-year-old daughter's whereabouts, and failed to ensure that the child was attending school and receiving appropriate mental health treatment.

Matter of Jordan G.
(2d Dept., 11/4/20)

* * *

ABUSE/NEGLECT - Leaving Children With Inappropriate Caretaker/Failure To Supply Care
- Failure To Comply With Services

The First Department upholds a finding of neglect where the mother left her infant children with an ex-girlfriend for several weeks without adequate provisions. The children slept in car seats since there were no cribs in the home. In addition, the ex-girlfriend was an inappropriate caregiver because she had obtained a full stay-away order of protection against the mother after a domestic violence incident, thus rendering it impossible for the mother to visit the children without violating the order.

The mother also refused to comply with her mental health services or seek adequate treatment for her anger management issues.

In re Aniya M.
(1st Dept., 10/13/20)

Summary Judgment/Collateral Estoppel/Res Judicata

ABUSE/NEGLECT - Collateral Estoppel

The First Department holds that respondent was collaterally estopped from rebutting the allegations of sexual abuse in the petition where, prior to the conclusion of the fact-finding hearing, respondent was convicted after a jury trial of crimes involving acts that fell squarely within the allegations in the petition.

In re Katherine U.
(1st Dept., 1/7/20)

Practice Note: Notably, although it has been held that the "valid and final judgment" element of collateral estoppel presupposes an opportunity to prosecute an appeal [*see People v. Sanders*, 71 N.Y.2d 946 (1988) (predicate felony determination improperly given collateral estoppel effect where sentence had not been imposed and People had not had opportunity to challenge ruling on appeal)], collateral estoppel may be applied in an Article Ten proceeding before any appeal from a criminal conviction has been decided. *See Matter of Philomena V.*, 165 A.D.3d 1384 (3d Dept. 2018) (conviction properly given collateral estoppel effect prior to resolution of pending appeal since determinative issue was whether respondent had full and fair opportunity to litigate during course of criminal trial; court did not err in refusing to stay proceeding pending resolution of appeal, but respondent could seek relief if he won appeal).

* * *

ABUSE/NEGLECT - Res Judicata/Claim Preclusion

In *Matter of Eq.W.* (124 N.E.3d 1201), the Indiana Supreme Court determined that the doctrine of claim preclusion applies to child in need of services proceedings. The Court now holds that the Department of Child Services should have been barred from filing a successive CHINS action after the first petition was dismissed with prejudice.

The second petition largely duplicated allegations or relied on matters that could have been determined in the first proceeding, and enunciated three new, weakly supported allegations. Although the family case manager was aware the petition had been dismissed, the FCM did not share this information with the mother or indicate that the child could have been returned to her care. The mother refused to allow the FCM to inspect her home, and that refusal became part and parcel of the second filing.

The tactics employed by DCS in this case undermine the confidence parents have in Indiana's child welfare system. *Matter of Eq.W.* sought to prevent the type of piecemeal litigation that occurred in this case.

Matter of R.L.
2020 WL 2124756 (Ind., 5/5/20)

Post-Filing Evidence

ABUSE/NEGLECT - Presumption Of Abuse
- Evidence/Post-Petition Events

The First Department upholds findings that respondent abused and neglected the child Y.S.T. and derivatively abused and neglected the other children.

The findings were based on medical records from June through August 2017, which, although they post-date the petition, document the wrongdoing alleged in the petition, i.e., sexual abuse of Y.S.T. Respondent was aware of these records when petitioner moved them into evidence, and was aware of the court's theory of the case when his motion to dismiss was denied. Fact-finding was then adjourned for more than six months before respondent presented his case.

A presumption of abuse was supported by proof that Y.S.T. had chlamydia, and the testimony of the child's mother that respondent lived in their home for twelve years. Respondent's contention that since Y.S.T. reached the age of puberty, and attended an inner city public school, she must have engaged in sexual activity with peers is rank speculation.

In re Yumara T.
(1st Dept., 7/2/20)

Out-of-Court Statements Of Children/Corroboration, And Other Hearsay/Right Of Confrontation

ABUSE/NEGLECT - Corroboration
- Hearsay Evidence - Agency Records/Central Register Reports
- Appeal

The First Department first concludes that although respondent failed to file a timely notice of appeal from a prior order of disposition with respect to the child B.P., he timely appealed from the order of disposition regarding A.P. and M.P., which brings up for review the fact-finding determination as to all three children since the questions of whether respondent derivatively abused A.P. and M.P. and whether he sexually abused B.P. are inextricably intertwined.

The court correctly determined that petitioner agency's progress notes on a prior unfounded case against respondent with respect to B.P.'s eighteen-year-old half-sister were not admissible.

B.P.'s out-of-court statements regarding sexual abuse were corroborated by testimony by respondent and his girlfriend that established that B.P. had regular overnight visits with respondent, and further corroboration was provided by the testimony of the half-sister about respondent's sexual abuse of her in a similar manner several years earlier.

In re A.P.
(1st Dept., 5/28/20)

* * *

ABUSE/NEGLECT - Corroboration

The Second Department reverses a neglect finding based on allegations of excessive corporal punishment, concluding that the child's out-of-court statements that respondent disciplined him by punching him in the stomach were not sufficiently corroborated.

The child did say "ow, ow it hurt" when a case worker touched his stomach, but this was after the caseworker told the child that she did not see bruises. The child made a fist to demonstrate to the caseworker what respondent allegedly did when he punched him, but this was at the same time the child alleged that respondent punched him. The child's reaction to the caseworker's touch and his gesture in making a fist were simply a repetition of his verbal accusation.

Matter of Treyvone A.
(2d Dept., 11/25/20)

* * *

ABUSE/NEGLECT - In Camera Interview Of Child

In this neglect proceeding, the Fourth Department concludes that any error committed when the family court conducted an in camera interview with two of the children outside the presence of the mother's attorney is harmless since there is no indication that the court considered, credited, or relied upon the in camera interview in reaching its fact-finding determination.

Matter of Janae R.
(4th Dept., 11/20/20)

* * *

ABUSE/NEGLECT - Corroboration Of Out-of-Court Statements
TERMINATION OF PARENTAL RIGHTS - Jurisdiction

The Fourth Department upholds a finding of severe abuse, concluding that the child's out-of-court statements were sufficiently corroborated by, inter alia, the consistency of the child's account; witness testimony that the child engaged in behaviors identical to those she had attributed to the father, and engaged in age-inappropriate sexual behavior with other children; testimony by a CPS caseworker that she found the child's account credible because the child could give specific details of the abuse and where it occurred, and because the child's sexual and aggressive behaviors were consistent with behaviors seen in sexually abused children; and testimony by the mother that the child reacted vocally and negatively when a physician sought to touch her genitals when examining the child for a urinary tract infection.

However, DSS had no standing to bring a petition to terminate the father's parental rights, and the court had no jurisdiction to entertain it. The child is neither a destitute nor a dependent child, and there is no indication in the record that an adoption was planned. Indeed, the court granted temporary full custody to the mother with the consent of DSS and did not thereafter make any other custody order.

Matter of Bryleigh E.N.
(4th Dept., 10/9/20)

* * *

FAMILY OFFENSES - Hearsay/Out-of-Court Statements Of Child

In this family offense proceeding, the Second Department notes that although the hearsay exception in FCA § 1046(a)(vi) has been applied in the context of custody proceedings where the proceeding is founded on neglect or abuse issues that are inextricably interwoven with the custody issues, § 1046(a)(vi) is inapplicable in a family offense proceeding under FCA Article Eight.

Matter of Godfrey v. Bahadeur
(2d Dept., 10/14/20)

* * *

ABUSE/NEGLECT - Sexual Behavior/Derivative Neglect
- Corroboration

The First Department upholds findings of neglect and derivative neglect where respondent asked the eldest child to send him photos of her exposed breasts, which she did.

The child's out-of-court statements were sufficiently corroborated by the testimony of her mother, who saw the photo on the child's phone and recognized respondent's phone number as its recipient.

In re Matthew C.
(1st Dept., 5/14/20)

* * *

ABUSE/NEGLECT - Burden Of Proof/Hearsay Evidence
- Petitioner/AFC Authorized To Proceed

The Third Department finds no error where petitioner asked to withdraw the neglect petitions, but the family court declined to dismiss the petitions and allowed the attorney for the children to adopt the petitions and proceed on them.

However, the attorney for the children failed to prove educational neglect with competent, non-hearsay evidence, and also failed to prove medical neglect. "Although respondent's counsel should have raised objections to the hearsay evidence offered by the attorney for the children, [the Court] cannot uphold a finding of neglect that is supported solely by inadmissible evidence."

Matter of Abel XX.
(3d Dept., 4/2/20)

* * *

ABUSE/NEGLECT - Corroboration Of Child's Out-of-Court Statement

The First Department reverses a finding of neglect, concluding that the child's out-of-court statement that respondent bit him on the right shoulder was not sufficiently corroborated.

Although medical findings confirmed that the child sustained injuries that were consistent with a bite mark, those findings in no way connected those marks to respondent. Further, the child told respondent he would make false allegations against her to the Administration for Children's Services while the fact-finding hearing was pending, rendering his overall credibility "quite impaired."

In re Jaylin S.
(1st Dept., 10/8/20)

* * *

ABUSE/NEGLECT - Out-of-Court Statements Of Child
- Evidence/Cellphone Video

The First Department holds that the child's out-of-court statements formed a proper foundation for admission of a cellphone video where the foundational statements were corroborated by respondent, who acknowledged the video and did not dispute its contents.

In re A.M.A.
(1st Dept., 10/8/20)

* * *

ABUSE/NEGLECT - Corroboration/Recantation

The Fourth Department upholds a finding of sexual abuse, noting that the out-of-court statements of the child were sufficiently corroborated by, inter alia, the opinions of the child's play and trauma therapists that the statements were credible and consistent in describing the sexual conduct, and that the consistency of the child's multiple statements enhances their reliability.

The child's recantations do not render the initial statements incredible as a matter of law, particularly in view of evidence that the child recanted as a result of prompting by the father.

Matter of James L.H.
(4th Dept., 4/24/20)

* * *

ABUSE/NEGLECT - Corroboration Of Out-of-Court Statements

The Third Department finds sufficient corroboration of the child's out-of-court statements.

A social worker at a sexual abuse program, who was declared an expert, testified that in order to validate, five evaluation criteria must be met; that the child's statements did not fully meet two criteria, "sufficient detail" and "contextual embedding," because the child was unable to give sufficient detail regarding the actual sexual interaction and place the sexual abuse in time; that, given the amount of time that had elapsed between the initial allegations and the interviews, the child's ability to give details may have been impacted; that the child's low IQ and difficulty with oral comprehension could have impacted the interview; and that, during the two interviews, there were no inconsistencies in the child's disclosures. In the expert's report, which was admitted into evidence, she discussed the child's affect, concluding that "some aspects of [the child's] presentation could be consistent with children who are known to have been sexually victimized."

Multiple witnesses talked about the child's demeanor while reporting the abuse, as well as changes in her behavior before and after her disclosures. The mother testified regarding marked changes in the child's behavior in the months prior to her initial disclosure. The court drew a negative inference from the failure of the father to appear for DNA testing, which he had requested so that his DNA could be compared to that found in the child's underwear.

Matter of Isabella I.
(3d Dept., 2/27/20)

* * *

ABUSE/NEGLECT - Hearsay Evidence
- Domestic Violence

The First Department upholds a neglect finding where the mother's statements that the father stabbed her, took the child from the home and was driving a grey car were admissible under the present sense impression and excited utterance exceptions to the hearsay rule. The statements were made to a 911 operator moments after the mother was stabbed in her neck, face and upper extremities.

Impairment or an imminent danger of impairment to the child's physical, mental, or emotional condition could be inferred from the child's close proximity to extreme violence directed against the mother, even absent evidence that the child was aware of or emotionally impacted by it.

In re Rebecca V.
(1st Dept., 2/4/20)

* * *

EVIDENCE - Prior Testimony

Petitioner mother moves pursuant to CPLR § 4517 for admission of the criminal trial transcript pertaining to respondent father in this custody and family offense proceeding. In the criminal proceeding, the father was found guilty by a jury of endangering the welfare of a child, attempted assault in the third degree and harassment in the second degree. The mother argues pursuant to CPLR § 4517(a)(3)(v) that there are "exceptional circumstances." She cites the fact that domestic violence is at issue in both proceedings, that the current COVID-19 pandemic weighs against in-person proceedings, and that replicating her testimony from the criminal trial would delay the conclusion of this proceeding, present cumulative evidence and be wasteful of court time.

The Court grants the mother's application, subject to the father's right to cross-examine and object to specific portions of the testimony. The Court notes, inter alia, that admission of the testimony would not violate the father's right to due process given that he had ample opportunity to cross-examine the mother and will have the opportunity to do so again during the virtual hearing; that the Court has had ample opportunity to observe the mother's demeanor and will be able to do so during her cross-examination; and, with respect to the father's request for admission of the trial testimony of other witnesses, that, absent a stipulation to the contrary, that testimony shall not be admitted unless the witness is available for cross-examination, in which case counsel also would be afforded the opportunity to object to specific portions of the prior testimony.

D.M. v. E.C.
(Sup. Ct., N.Y. Co., 12/1/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20319.htm

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ABUSE/NEGLECT - Right Of Confrontation
- Hearsay Evidence - Oral Transmittal Report/Child's Out-of-Court Statements
- Domestic Violence
- Derivative Neglect

In Ariana M., a sex abuse case, the Second Department finds no error where the family court permitted the child Ariana to testify via Skype. The father was present in the courtroom during the testimony, and the father's attorney cross-examined the child.

The Court also finds no error in the admission of four Oral Transmittal Reports for the limited purpose of establishing the child's out-of-court statements.

In *Serina M.*, the Court upholds derivative neglect findings based on the sexual abuse of Ariana. However, the Court reverses a finding of neglect based on the father's alleged threat to use domestic violence against the children where the mother testified that during a phone call she had with the father while the children were with him, he father threatened to snap the children's necks if the mother did not answer certain questions, and that the father then sent her photos of the children, with text messages she believed to be threatening. The father denied making any threat, and the photographs, which depict the children sleeping, and the accompanying text messages, supported the father's testimony that he was merely informing the mother that he was able to get the children down for their naps.

Matter of Ariana M.
(2d Dept., 1/22/20)
Matter of Serina M.
(2d Dept., 1/22/20)

Sealed Records

ABUSE/NEGLECT - Evidence/Sealed Criminal Records
- Oral Report Transmittal

In this Article Ten proceeding, respondent father moves for preclusion of all New York Police Department records, including Domestic Incident Reports, follow up reports and a 911 tape, since the criminal case against the father was dismissed and sealed.

The Court precludes the NYPD records since they are sealed pursuant to CPL § 160.50, but the 911 tape (and Sprint report) are not precluded since they are not sealed pursuant to § 160.50. The Court notes that 911 recordings were not designed for the purpose of criminal prosecution and law enforcement; and that the Sprint report is inadmissible under the best evidence rule, but if it contains evidence which is not duplicative of the 911 recording, the Court will entertain further applications concerning its admissibility.

The Court also concludes that because the source of the Oral Report Transmittal is an assistant district attorney, a mandated reporter, the narrative and other sections of the report are admissible pursuant to FCA § 1046(v).

Matter of MR v. JR
(Fam. Ct., Bronx Co., 1/27/20)
https://www.law.com/newyorklawjournal/almID/1583926763NYNN187491/

Expert Testimony

ABUSE/NEGLECT - Drug Misuse
- Sexual Abuse/Medical And Mental Health Evidence

The First Department upholds a finding of neglect where respondent admitted to smoking marijuana daily, and the child testified that she regularly observed respondent going into the

bathroom to smoke and observed marijuana in the home.

The family court also properly found neglect where respondent gave the child unprescribed medication that made her feel drowsy and unable to walk. The child gave credible and detailed testimony about the appearance, taste, and effects of the medication, and this testimony did not require any scientific or expert corroboration to establish injury from ingestion.

However, given the child's lack of certainty about whether respondent engaged in sexual contact with her, neither the medical evidence nor the testimony by her therapist, which was inconclusive as to whether her physical symptoms and PTSD were caused by sexual abuse, established sexual abuse.

In re Jennifer V.
(1st Dept., 3/12/20)

Presumption Of Abuse/Neglect

ABUSE/NEGLECT - Presumption Of Medical Abuse
- Derivative Abuse

The First Department upholds a finding that the mother medically abused one child and derivatively abused his two younger siblings where the abused child's general condition was improving at the time of each instance of acute liver failure; he was on the verge of discharge from the hospital when he suffered a drastic decline which occurred when the mother had greater access to him than she had when he was under closer hospital supervision; on at least one occasion, a nurse saw the mother handling the child's gastric tube; it was at the mother's suggestion that the doctors investigated the child's liver function; no injuries occurred after the child was placed on twenty-four-hour supervision; and many test results ruled out non-abuse causes of the liver failure.

The family court reasonably found the mother responsible for administering the toxic doses of acetaminophen that caused the liver failure. Because the injuries occurred when the mother had greater access to the child and not when he was under close supervision, the court reasonably deemed the child, although hospitalized, to have been in the mother's care at the time of the injuries.

One of the siblings argues that there is no evidence that the mother interfered with his medical treatment, but given his vulnerable medical condition, and the manner in which the mother apparently mishandled and exacerbated the abused child's medical condition, there is proof of severe risks to the siblings' physical well-being.

Matter of Prince G.
(1st Dept., 11/10/20)

* * *

ABUSE/NEGLECT - Allowing Abuse
- Presumption Of Abuse

Noting that the requisite standard of proof is clear and convincing evidence, the Pennsylvania Supreme Court finds no abuse where there is no evidence that, prior to being contacted by a nurse practitioner and asked to return to the hospital with the child for additional testing, the mother was aware that the child had a sexually transmitted disease or had been a victim of sexual abuse. There was no evidence that the mother was or should have been aware that one of her stepsons posed a risk to the child. The Court also notes that the mother divorced her husband and no longer has any contact with him, or her stepson, the perpetrator of the abuse.

The Court is troubled by the mother's initial false statements regarding the male residents of her household, but those statements in and of themselves are insufficient under a clear and convincing evidence standard. "To conclude otherwise would be mere conjecture."

And, while the agency and the child's GAL have focused on the mother's "relaxed" demeanor, and the fact that she asked a nurse about a good place to order a pizza rather than how she could "find the person who did this to my child," the mother's inquiry could reasonably be viewed as an effort to keep the child happy and comfortable, and her "relaxed" demeanor an attempt not to alarm the child.

The trial court erred in applying the statutory presumption of abuse flowing from evidence that a child has suffered abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts of omissions of the parent or other person responsible for the welfare of the child. Under these circumstances, the Court cannot find that the abuse was of a type that would ordinarily not occur except for the acts or omissions of the child's caretaker. The presumption is not applicable where there is no evidence that the parent or other person responsible for the welfare of the child knew or should have known of the abuse or the risk of abuse and disregarded it. Otherwise, a parent could be deemed a perpetrator by omission in every case where a child is abused, placing the burden on the parent to prove that they had no reason to believe that their child was at risk..

In re N.B.-A.
2020 WL 354978 (Pa., 1/22/20)

* * *

SELF INCRIMINATION

The New Jersey Supreme Court holds that a defendant's answer to a civil forfeiture complaint cannot be introduced against him in a related criminal trial. To defend against a forfeiture complaint, those who are also criminal defendants must file an answer that states their interest in the property. In other words, to assert their constitutional right not to be deprived of property without due process, they have to link themselves to alleged contraband and give up their constitutional right against self-incrimination. Alternatively, they can refuse to answer and lose their property. A defendant's choice to file an answer under those circumstances is not freely

made, and the statements in an answer cannot be considered voluntary.

The Court rejects the State's argument that defendant's civil forfeiture answer was admissible as a statement by a party-opponent. A statement obtained in violation of a constitutionally protected right is inadmissible in the State's case in chief even if it satisfies a rule of evidence.

State v. Melendez
2020 WL 86613 (N.J., 1/8/20)

Practice Note: Self-incrimination concerns arise in Article Ten proceedings when a related criminal prosecution is pending. Since Article Ten proceedings are civil in nature, the court may draw an adverse inference from the respondent's failure to testify, or refusal to answer questions on self-incrimination grounds. *In re Jani Faith B.*, 104 A.D.3d 508 (1st Dept. 2013); *Matter of Keara MM.*, 84 A.D.3d 1442 (3d Dept. 2011); *Matter of Cantina B.*, 26 A.D.3d 327 (2d Dept. 2006). Respondents, faced with the difficult choice between mounting no meaningful defense and suffering an adverse inference, and testifying despite the risk that the testimony will be used in the criminal proceeding, have argued that the Fifth Amendment is violated if the family court proceeds to trial before the criminal court. Thus far, these arguments have been rejected. *Matter of Emily I.*, 50 A.D.3d 1181 (3rd Dept. 2008), *lv denied*, 10 N.Y.3d 712; *Matter of Derra G.*, 232 A.D.2d 211 (1st Dept. 1996); *Matter of New York City Commissioner of Social Services v. Elminia E.*, 134 A.D.2d 501 (2d Dept. 1987), *appeal withdrawn* 72 N.Y.2d 1042.
But what if the reasoning in *Melendez* is applied, and the family court testimony is deemed to have been coerced and thus is inadmissible in the criminal proceeding, at least when the Article Ten respondent had no way to mount a meaningful defense without testifying?

* * *

ABUSE/NEGLECT - Removal/Imminent Risk
- Presumption Of Abuse

The remote FCA § 1028 hearing in this res ipsa abuse/derivative abuse case involving allegations that the injured child presented to Montefiore Medical Center with seizures, and that medical findings revealed retinal hemorrhages and a subdural hematoma consistent with a diagnosis of abusive head trauma.

The Court releases the children. Respondents offered persuasive evidence that the medical findings were not indicative of trauma. Although ACS's expert opined that the only possible explanation was abusive head trauma, she did not explain why the medical findings support that conclusion. In contrast, respondents' expert connected his findings to the specific nature of the injuries, and concluded that inflammation and/or dehydration could logically fit with the medical findings, that the retinal hemorrhages are not associated with trauma because they were only in one eye, and that none of the possible mechanisms of abuse fit the findings. When questioned regarding dehydration or the possible consequences of an infection, ACS's expert appeared resistant to acknowledging that medical information about COVID-19 and how it affects the human body remains unknown, adamantly denied that the child may have been dehydrated even though he was drinking approximately one quarter of his normal milk intake for almost two

days, and was not able to explain how the medical findings could not have resulted from a combination of dehydration and inflammation.

The parents testified clearly, were never evasive, looked at the camera throughout their testimony, and were calm except when the mother became understandably emotional discussing her initial shock when her children were removed from her care and when she was worried about the injured child's health at the time she brought him to the hospital. The Court cannot exclude the possibility that one of the respondents intentionally injured the child, but that is highly unlikely. By all accounts, the child was well cared for prior to the instant hospitalization. Although the parents, despite engaging in services, have not shown insight into their supposed actions, "this is simply due to the fact that the parents likely did not commit the very act they are being accused of."

Matter of Caleb S.
(Fam. Ct., Bronx Co., 9/2/20)
https://www.law.com/newyorklawjournal/almID/1599713173NYredacted/

* * *

ABUSE/NEGLECT - Removal/Imminent Risk
- Presumption Of Abuse

In this "res ipsa" abuse case against respondent parents, ACS alleged that the child B., who was five-months-old at the time of filing, presented with a subconjunctival hemorrhage in her left eye, bruising to her upper and lower eyelids, a parietal skull fracture, and healing rib fractures. The father asserted that B.'s injuries resulted from her falling off the bed.

Upon a FCA § 1028 hearing, the Court grants respondents' application for return of the child.

ACS's expert opined that the injuries were not the result of an accident; she described the injuries as "patterned," and asserted that injuries to the cheek in a 4.5-month-old baby are inherently suspicious, as such injuries would generally be protected by the child's bones. ACS offered published articles detailing how its expert's findings are in line with current medical literature.

However, the Court credits the testimony of experts presented by the mother and the attorney for the child, who opined that B.'s injuries were consistent with the explanation given by the father, and, specifically, that the father's claim that B. fell off the bed could logically fit with the child's head injuries. ACS's expert also testified to a "possible" skull fracture that was visible via a very fine CT scan of B.'s skull, but the other two experts rejected that possibility.

B. also had fractured ribs that were in the process of healing when B. was first taken to the hospital. However, all three experts agreed that broken ribs can be a result of accidental and non-accidental causes. The attorney for the child's expert explained that the rib fractures were lateral, which is far less suspicious than posterior fractures because lateral fractures are related to compression, and that the father's "double swaddling method" places a great deal of pressure on

the baby's ribs and could have accidentally caused the fracture. If B. had broken her ribs as a result of an intentional act, it is highly likely it would have resulted in a mark that her pediatrician would have been unlikely to miss.

Moreover, the attorney for the child's expert testified that it is significant that the parents brought B. immediately to the emergency room, which would not be how parents would generally act had they abused their child. The parents also took B. to her well visits, which indicates that they had no reason to suspect B.'s ribs had been broken.

Matter of Blair D. v. Taylor T.
(Fam. Ct., Bronx Co., 8/7/20)
https://www.law.com/newyorklawjournal/almID/1598611351NYredacted/

Disposition/Post-Disposition/Permanency

PERMANENCY HEARINGS - Age-Appropriate Consultation

The Third Department finds error where the family court failed to conduct an age-appropriate consultation with the child at the permanency hearing. Although the statute does not require a young child to be personally produced in court, the family court must find some age-appropriate method of consultation with the child.

Here, the attorney for the child informed the court of the reasons why it was inappropriate for the child to be present, and offered his opinion that remaining in foster care was best for the child, but did not articulate the child's wishes to the court.

Matter of Sandra DD.
(3d Dept., 7/16/20)

* * *

PERMANENCY HEARINGS - Age-Appropriate Consultation
- Appeal/Mootness
- Permanency Goal

The Third Department first notes that although petitioner has filed a petition to terminate respondent's parental rights and there has been another permanency hearing since the order at issue, the appeal is not moot since the family court, by changing the permanency goal, altered petitioner's obligations from working toward reunification to working toward permanent placement and termination of parental rights.

Although the family court failed to conduct an age-appropriate consultation with the child, reversal is unnecessary. There was extensive testimony regarding the child's emotional state and best interests, and respondent's ability to handle the child's special needs. An evaluation report which was admitted noted the child's feelings about his foster care placement and connection to the foster parents, and emphasized that transferring the child to respondent's care would be

detrimental to the child's long-term functioning. The attorney for the child conveyed the child's feelings about the "uncertainty of his future," and one of the foster parents recounted certain questions the child had asked her in which he indicated his feelings about being adopted.

The court did not err in limiting certain testimony regarding the foster parents' home environment and disciplinary tactics, as the relevant inquiry was whether the permanency goal should be modified, not whether respondent's parental rights should be terminated or whether the foster parents were fit to serve as the child's adoptive parents.

Matter of Isayah R.
(3d Dept., 12/24/20)

* * *

PERMANENCY HEARING - Age-Appropriate Consultation With Children

In this permanency proceeding, the Third Department notes that the family court conducted an age-appropriate consultation with the children, who now reside in Iowa with their foster family, by having them appear telephonically.

Matter of Dakota F.
(3d Dept., 2/20/20)

* * *

ABUSE/NEGLECT - Orders Of Protection
- Appeal

In this Article Ten proceeding, the Family Court issued temporary orders of protection - one against the mother and one against the father - requiring that the parents, among other things, allow petitioner to "see the children … and the home at reasonable times and for reasonable durations." After accessing the parents' home, petitioner withdrew the neglect petitions, and the court vacated the temporary orders of protection and dismissed the neglect petitions with prejudice. The father and the mother appeal from the temporary orders of protection, challenging only the propriety of the condition that allowed petitioner entry into their home.

The Third Department declines to invoke the exception to the mootness doctrine and dismisses the appeals, but states in a footnote that "[w]ere we to apply the exception, we would find that, in these circumstances, the condition allowing access to the parents' home lacked the requisite connection for the protection of the children (see Matter of Carmine GG. [Christopher HH.], 174 AD3d at 1000-1001)."

Matter of Marcus TT.
(3d Dept., 11/25/20)

* * *

PERMANENCY HEARINGS - Reasonable Efforts

The Court denies ACS's motion for an "interim" finding of reasonable efforts, concluding that the Family Court Act does not provide authority for such findings, which must be made "[a]t the conclusion of each permanency hearing."

During the current public health emergency, the federal Children's Bureau has indicated that the requirement for annual permanency hearings is not being waived. ACS is primarily concerned with restoring federal financial participation ("FFP") for this case, given that there has not been a reasonable efforts finding made in more than twelve months. But FFP is dependent on a number of conditions being met, and, typically, the reason a New York is found to be ineligible relates to foster parent licensing or one of the criteria other than timely reasonable efforts findings.

Thus, before the Court will consider entering an "interim" reasonable efforts finding, or making such a finding without conducting a permanency hearing, the agency must make a prima facie showing of need by establishing, with an affidavit from someone with knowledge who references every other condition for FFP, that the case would be eligible for FFP if there were a reasonable efforts finding. While this case may not currently be eligible for FFP, eligibility can be restored prospectively as soon as a judicial reasonable efforts determination is made.

Until there is a Virtual Part available for permanency hearings, the Court will, if the agency makes a prima facie showing of need and obtains the consent of all relevant parties, so-order an appropriate stipulation as to reasonable efforts that includes the specific bases for that determination.

Matter of Milagros M.
(Fam. Ct., Kings Co., 5/7/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50518.htm

* * *

ABUSE/NEGLECT - Medical Neglect
- Modification Of Disposition

The First Department upholds findings of abuse and derivative abuse, but vacates a finding of neglect where respondent Maria R. delayed in seeking medical care after the child Ashlynn developed an unexplained rash or burn on her face was medical neglect. Respondent monitored the child's condition, and there was no indication that the delay impaired or threatened to impair the child's health.

The Court also finds error in the family court's denial of respondents' motions pursuant to FCA § 1061 for a trial discharge of Ashlynn and Yeovanny. Those children had recently been placed in their fourth foster home, and the agency was already investigating a fifth placement. Respondents had complied with all services, including full mental health evaluations ordered by the court at disposition, regularly attended unsupervised visitation, and those who observed them

interact with the children all reported that they were loving and caring parents whose parenting skills were continually improving. Although respondents continued to maintain that Ian and Yeovanny's injuries were accidental, their acceptance of ultimate responsibility for the injuries was demonstrated by their conduct.

The emotional harm to the children was documented but "disturbingly downplayed by both petitioner and the court." Ashlynn suffered from severe anxiety, nightmares, and other mental health issues that her therapist and agency caseworker attributed to being separated from respondents and shuttled through a succession of foster care placements. Ashlynn had to be taken to a hospital emergency room for night terrors shortly after she began living in her fourth foster home.

The case is remanded to a different family court judge for further proceedings.

Matter of Ashlynn R.
(1st Dept., 12/22/20)

* * *

VIRTUAL HEARINGS
RIGHT OF CONFRONTATION
RIGHT TO COUNSEL

Over respondent parents' objections, the Court decides to hold a virtual hearing in connection with the kinship foster parents' petitions for guardianship.

Matters which may be heard virtually during the pandemic and the number of Virtual Parts available have increased steadily. There is still no certainty as to when in-person hearings will fully resume in New York City Family Court. Under Judiciary Law § 2-b(3), the Court has the power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." The technologies being employed to conduct virtual hearings are readily available to anyone who owns either a cell phone or smart phone. During COVID-19, courts across this country have become virtual, as have businesses, law firms, doctor's offices, schools and universities, and people are relying on platforms such as Zoom, Skype for Business and Microsoft Teams to conduct multi-billion dollar deals, educate students, conduct hearings and save lives. These platforms are easy to access and they work. The Court is no less able to make credibility findings in hearings which are conducted virtually than in hearings conducted in person.

Without determinations at permanency hearings and in custody and guardianship cases, children will continue to languish in a state of uncertainly and instability. "Arguments that a parent's right to the trial of their choosing outweighs a child's right to permanency in their lives [are] not persuasive."

The Court also rejects the parents' claims regarding ineffective assistance of counsel. Attorneys are able to participate fully in virtual hearings - examining witnesses and making objections and

applications as appropriate. During the hearing, attorneys and clients can communicate via text or email, and can ask for breaks and/or to go off the record in order to consult further. Adjournments can be granted between direct and cross examination and after each party has rested in order to allow for further consultation.

The witnesses must testify via video rather than telephone. Counsel have made valid arguments as to the potential unreliability of telephone testimony, including the inability to know whether a witness is reading from notes or another source, and whether the witness is in the presence of someone who is coaching them or preventing them from testifying truthfully. And, it is challenging to make accurate credibility findings when one cannot see a witness's face and facial expressions, and testimony via telephone would hinder an attorney's ability to engage in fully effective advocacy.

The parties are directed to provide the Court and counsel with witness lists within two weeks with information as to whether a witness will be able to testify via video, and if not, an explanation as to why not. Given the availability of foster care agencies and their resources, there are any number of ways to ensure that all parties may appear via video.

Matter of Haydee F. v. ACS-NY
(Fam. Ct., N.Y. Co., 10/28/20)
https://www.law.com/newyorklawjournal/almID/1605284627NYG1524619/

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FOSTER CARE - Motion For Re-Entry

The Court denies the child's motion pursuant to FCA § 1091 for a return to foster care placement, noting, inter alia, that the child is incarcerated at Rikers Island and facing several felony charges as an adult, including criminal sexual act in the first degree, which carries a mandatory minimum prison term of 5 years and a maximum term of 25 years if he is found guilty and sentenced as an adult; that criminal defense counsel has indicated that the judge in the criminal case is not granting the child youthful offender status; and that the Court has no information indicating that the child could be released from jail if it ordered his return to foster care.

There is no compelling reason to order a return to foster care placement.

Matter of K.U.
(Fam. Ct., Bronx Co., 12/14/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20339.htm

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PERMANENCY HEARINGS - Termination Of Placement/Trial Discharge

Upon a permanency hearing, the Court decides to terminate placement of the five-year-old child,

who has been in three foster homes since birth, rather than order a trial discharge. The continued involvement of HeartShare/St. Vincent's would be more harmful than helpful, even taking into account the possibility that the parents might not give the child the best care at all times in the next few months.

No fewer than six agency case planners have appeared in court or signed reports, not including agency supervisors or ACS employees. The Court never ordered the mother to complete a parenting skills course, but the agency decided to add it to her service plan anyway, and had no particular reason to do so aside from the idea that "even the best parent" could benefit. Despite a clinical judgment that did not include individual therapy or counseling, the agency has complained that the mother refused to engage in psychotherapy. During a trial discharge, the agency may make further attempts to add to the service plan and then fail to find an appropriate program, confuse the issues, or otherwise create barriers to full reunification.

The agency's continued rehashing of issues that have been previously addressed suggests bad faith. The agency has failed to comply with court orders requiring it to conduct a trial discharge conference and commence a trial discharge within certain parameters. This suggests a cavalier attitude towards the authority of the Court, and there is a risk that the agency will intentionally provide misleading information in an effort to undermine final discharge.

The child's well-being has suffered while in the agency's care. The agency is pursuing termination of parental rights, but has not placed the child in a pre-adoptive home. The Court doubts the agency's judgment when it comes to permanency planning.

Twice-monthly home visits during a trial discharge would mean twice-monthly body checks and the associated privacy invasion. Termination of placement is not without risk to the child given the mother's history of mental illness and the father's use of alcohol, but the touchstone for the Court's decision is "least detrimental alternative."

"When viewed through this clarifying lens, the choice in this case becomes clear: Amaya should be released to her parents and her placement completely terminated, without further involvement of the foster care agency. The damage done to her while in foster care and the risk of future disruption or confusion caused by the agency itself outweighs the risk of harm to her to be returned to her mother without further supervision. In this case, five years of state intervention has been enough."

Matter of Amaya C.
(Fam. Ct., Kings Co., 1/13/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20014.htm

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***P**ERMANENCY PROCEEDINGS*
CUSTODY/GUARDIANSHIP

Against the backdrop of permanency proceedings, Mr. N., the father of F., seeks a transfer of

custody from the mother, and also seeks kinship guardianship of H., whose father has been served and has not appeared. Mr. N. now resides in Oklahoma with F. and H., who have been with him since 2018.

The Court grants Mr. N.'s petitions, noting that removal of the children due to the mother's neglect and her failure to engage in any services designed to reunify her with her children demonstrates a sufficient change in circumstances; that F. has not resided in the mother's care since 2017; that F. is doing well in school and no longer requires an IEP; that the mother has not permitted access to her home; that emotional manipulation of the children indicates that the mother is less capable of providing for the children's emotional and intellectual development; that courts have repeatedly recognized the importance of keeping siblings together; that because of the mother's sporadic contact with F. and history of unpredictable and inappropriate behavior, supervised parenting time for the mother is necessary; that, in the guardianship proceeding, extraordinary circumstances exist in that the father has essentially abandoned H. and the mother has persistently neglected her; and that after H. went to reside with Mr. N., the mother did not have any in-person contact with her until the agency arranged a visit on February 6, 2020, and has not offered any explanation for her refusal to visit with her children.

Matter of W.N. v. Hope B.
(Fam. Ct., Onondaga Co., 4/21/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50559.htm

Appeals

ABUSE/NEGLECT - Injuries Constituting Abuse
- Derivative Neglect
- Appeal/Record On Appeal

The Fourth Department finds sufficient evidence of abuse, and upholds findings of derivative neglect, where the "persisting" scarring of the wounds inflicted on the child by the mother constituted protracted disfigurement, and the mother's beating of the child was prolonged.

The court's destruction of certain trial exhibits does not preclude adequate appellate review since the information can be gleaned from the record and there is no dispute as to the accuracy of that information.

Matter of Aaren F.
(4th Dept., 3/13/20)

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ABUSE/NEGLECT - Appeal/Discovery Ruling

In this Article Ten proceeding, the Third Department holds that an order effectively deferring a determination as to discovery of medical records until after an in camera review is not appealable as of right since it is possible that the in camera review will result in all of the records

being shielded from disclosure.

Matter of Joseph OO.
(3d Dept., 10/22/20)

III. FOSTER CARE/TERMINATION OF PARENTAL RIGHTS/ADOPTION

TPR: Surrenders

TERMINATION OF PARENTAL RIGHTS - Surrenders/Post-Adoption Contact
VISITATION

The Second Department upholds the family court's determination that the biological mother violated the post-adoption contact provisions of the judicial surrender by posting photographs with the child on Facebook, rendering the post-adoption contact agreement null and void.

Additionally, post-adoption contact provisions of a judicial surrender will be enforced only where the court determines that enforcement is in the child's best interests. Here, the child experienced emotional and behavioral issues following visits with the biological mother.

Matter of Scott v. Rhodes
(2d Dept., 11/18/20)

TPR: Petition And Mandatory Filing

TERMINATION OF PARENTAL RIGHTS - Petition
- Failure To Plan

The First Department finds that the permanent neglect petitions were not defective for failing to specify the agency's diligent efforts, and that any alleged deficiency was cured by the introduction into evidence at the fact-finding hearing of the case progress notes and the testimony of the caseworker.

The Court upholds the finding of permanent neglect, noting, inter alia, that the agency formulated a service plan tailored to address respondent's anger management issues and parenting challenges and assist in domestic violence prevention, and that respondent continued to exhibit behaviors that the programs she attended were supposed to help remedy and thus failed to gain insight into her parenting problems and undercut the value of her participation.

In re Lamani C.H.
(1st Dept., 1/16/20)

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TERMINATION OF PARENTAL RIGHTS - Petition/Amendment

The Second Department finds no error where, in a proceeding to terminate the mother's parental rights on the ground of permanent neglect, the court granted petitioner's mid-fact-finding hearing motion for leave to amend the petition to add a cause of action for abandonment (see CPLR 3025[b]).

The original petition alleged that for approximately six months prior to the filing of the petition, the mother failed to visit with the child, failed to maintain contact with petitioner, and had not reached out to the caseworker for updates. These allegations also sufficiently allege a cause of action for abandonment.

Matter of Ruben J. D.
(2d Dept., 1/8/20)

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TERMINATION OF PARENTAL RIGHTS - Petition/Amendment

The Supreme Court of Idaho finds no error where the magistrate court allowed the agency to amend its petition to terminate by adding a separate, alternate basis for termination and granted a two-week continuance to the father to respond to the alternate theory.

The father's counsel has failed to identify prejudice other than in the abstract. The evidence the father could have presented to challenge the second basis for termination (neglect through failure to follow the case plan) would have been the same as evidence he presented to challenge the first basis (inability to discharge parental responsibilities).

Department of Health and Welfare v. John Doe
2020 WL 1887805 (Idaho, 4/16/20)

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TERMINATION OF PARENTAL RIGHTS - Twelve Of Twenty-Two Months In Placement

In Ohio, an agency must file a motion for permanent custody if the child has been in the "temporary custody of one or more public children services agencies * * * for twelve or more months of a consecutive twenty-two-month period."

The Supreme Court of Ohio holds that there is nothing in the plain language of the statute that requires the agency to wait until a child has been in its custody for twenty-two months before filing a motion for permanent custody. The statute requires only that the child must have been in the custody of the agency for twelve or more months of a consecutive twenty-two-month period. This might include a situation where a child had been in temporary custody for six months on one occasion, was briefly out of agency custody, and then returned to temporary custody for another six months - all within a consecutive twenty-two-month period - and it may also include a situation where a child has been in the temporary custody of an agency for twelve consecutive months. The statute does not require a twenty-two-month minimum period of time of agency involvement with the child.

In re N.M.P.
2020 WL 1879619 (Ohio, 4/16/20)

TPR: Right To Counsel

TERMINATION OF PARENTAL RIGHTS - Right To Counsel

In this termination of parental rights proceeding alleging mental illness, the Second Department concludes that the failure of the mother's counsel to attend the court-ordered psychological examination despite the mother's right to have counsel present did not deny the mother the effective assistance of counsel.

Counsel was provided with notice of the evaluation, received the evaluator's report and conducted a detailed cross-examination of the evaluator, and successfully moved for appointment of an independent psychiatric evaluator.

Matter of Margaret K.K.
(2d Dept., 12/2/20)

TPR: Hearsay Evidence

TERMINATION OF PARENTAL RIGHT - Evidence/Case Records

In this termination of parental rights proceeding, the Fourth Department respondents' contention that, during the fact-finding hearing, the family court erred in admitting in evidence notes prepared by two of petitioner's caseworkers.

A proper foundation was laid by the caseworkers' respective supervisors, who were familiar with petitioner's record-keeping practices.

Matter of Carmela H.
(4th Dept., 7/17/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Hearsay Evidence/Permanency Reports

In this termination of parental rights proceeding, the Fourth Department finds no error in the admission of certain permanency reports, which were admissible under the business record exception to the hearsay rule.

Matter of Matilda B.
(4th Dept., 10/9/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Hearsay Evidence/Child's Out-of-Court Statements

In this termination of parental rights proceeding, the Maine Supreme Court finds no error in the admission of the child's out-of-court statements under a state statute (22 M.R.S. § 4007[2]) that

permits such statements to be admitted in a child protective proceeding.

In re Nicholas W.
2020 WL 486926 (Me., 1/30/20)

Practice Note: New York's FCA § 1046(a)(vi) has not yet been applied in a termination of parental rights proceeding, but has been applied in custody/visitation proceedings. *In re Khaliah T.*, 99 A.D.3d 537 (1st Dept. 2012), *lv denied* 20 N.Y.3d 854; *Matter of Rosario WW. v. Ellen WW.*, 309 A.D.2d 984 (3rd Dept. 2003); *Matter of Linda P.*, 240 A.D.2d 583 (2d Dept. 1997).
In Maine, 22 M.R.S.A. § 4002(3) states that a "Child protection proceeding" includes "a proceeding on a termination petition…."

Right To Be Present

TERMINATION OF PARENTAL RIGHTS - Right To Be Present/Adjournments

In this termination of parental rights proceeding, the Fourth Department, noting the "unique circumstances," finds reversible error where the court denied respondent's attorney's request for an adjournment when respondent failed to appear.

The court was aware of the mother's history of mental illness. This was the first request for an adjournment on the mother's behalf, and the child's situation would remain unaltered if the adjournment had been granted. There were serious concerns about the mother's competency to assist in her own defense, which raised the question of whether it was necessary to appoint a guardian ad litem.

Matter of Hayden A.
(4th Dept., 11/20/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Right To Be Present

The juvenile court terminated the father's parental rights while he was incarcerated. He made clear that he strongly desired to participate in the termination trial by phone or in person. Despite this, most of the three-day trial occurred in his absence. He was allowed to appear only by phone and for only a portion of the third day.

The Washington Supreme Court reverses and remands for a new trial, concluding that the trial violated due process. The Court notes, inter alia, that testimony in person not only bolsters the accuracy of a credibility assessment but also reduces the risk of error by impressing the fact-finder with the importance of the decision; that the father's absence deprived him of the opportunity to hear the vast majority of the State's evidence and assist his attorney in responding; that any delay to facilitate the father's transport or alternative procedures for his full participation - such as telephonic participation for the entire hearing or a bifurcated trial with an opportunity for him to review transcripts of the State's evidence - would be relatively minimal;

and that if a petitioner shows a violation of procedural due process, the appropriate remedy is generally reversal and remand for proceedings with constitutionally adequate procedures.

Matter of M.B.
2020 WL 4211749 (Wash., 7/23/20)

TPR: Diligent Efforts

TERMINATION OF PARENTAL RIGHTS - Diligent Efforts/Intellectual Disabilities

The First Department upholds an order dismissing the petition to terminate the mother's parental rights, agreeing that petitioner did not meet its burden of showing that it exercised diligent efforts.

Petitioner did not assign the case, which involved a cognitively impaired mother, to a caseworker with relevant expertise, or ensure that the caseworker was appropriately trained, or consulted at the outset with individuals with relevant expertise in devising the mother's service plan.

Petitioner justifies its failure to expand visitation based on its caseworker's safety concerns, but provides no reason to revisit the family court's determination that those concerns were exaggerated. Petitioner fails to address the logistical challenges presented by the visitation space provided for the mother and her four special needs children.

Petitioner did not refer the mother to ongoing day habilitation services offered by the Office for People with Developmental Disabilities, and the mother substantially completed the services to which she had been referred.

"As amici curiae note, people with intellectual disabilities possess the ability to be successful parents and should receive services and support appropriately tailored to their needs."

In re Xavier Blade Lee Billy Joe S.
(1st Dept., 10/29/20)

Here is the Newsletter summary of the family court's decision:
62 Misc.3d 1212(A) (Fam. Ct., Bronx Co., 1/9/19)
In this permanent neglect proceeding involving a mother with intellectual disabilities, the Court, upon a hearing, finds insufficient evidence of the agency's diligent efforts and the mother's failure to plan.
While the agency referred the mother to a multitude of services, arranged regular visitation, put a panoply of in-home services in place, gave written notice to the mother of the many appointments her special needs children had with medical, mental health and service providers and provided directions to those appointments, "[w]hat the agency failed to do, however, was to create and implement a service plan that was tailored to [the mother's] specific needs."
In Matter of Lacee L. (32 N.Y.3d 219), the Court of Appeals recently examined the intersection of the reasonable efforts requirement at a permanency hearing and the Americans with

Disabilities Act, and concluded that courts may look at the accommodations ordered by courts in other contexts for guidance as to what is feasible or appropriate with respect to a given disability. The United States Equal Employment Opportunity Commission has identified a broad range of accommodations that may be appropriate for people with intellectual disabilities in the workplace. This includes training or detailed instructions; having a trainer or supervisor give instructions at a slower pace; allowing additional time to finish training; breaking job tasks into sequential steps; using charts, pictures or colors; providing a tape recorder to record directions as a reminder of steps in a task; using detailed schedules for completing tasks; providing additional training when necessary; providing a job coach who can, inter alia, assist the employee in learning how to do the job; and providing intensive monitoring, training, assessment and support.

Here, the agency has not taken steps to ensure that information concerning the children's disabilities and services was presented in a manner that the mother could understand. She requires ongoing education concerning her children's evolving needs, which is not something a parenting skills class of limited duration with a curriculum not tailored to the children's individual needs, even one designed for intellectually disabled parents, could satisfy.

The Court notes that the lack of expertise and resources when working with parents with intellectual disabilities who are involved in the child welfare system is a pervasive national problem. A 2012 report issued by the National Council on Disability makes recommendations akin to ADA accommodations identified by the EEOC for the employment context. The report notes that permanency timelines which contemplate the commencement of a termination of parental rights proceeding if a child remains in care more than 15 of the most recent 22 months are unduly burdensome on parents with disabilities, who may require more time to address the concerns that led to removal of the children than non-disabled parents. But the Court need not consider whether diligent efforts must include more than currently available services have to offer, since the agency failed to make a referral for critical services that were in fact available through the Office for People With Developmental Disabilities.

The evidence also does not establish a failure to plan. The mother gained insight and developed skills in response to appropriately tailored interventions. Since a parent with an intellectual disability learns through repetition and at a slower pace, additional time to successfully master certain skills would constitute a reasonable accommodation. One of the children, who has extensive special needs, had been in the mother's care for nearly a year with the agency's consent. The mother's failure to complete individual counseling was not a barrier to reunification inasmuch as there was no mental health condition identified which necessitated such counseling.

* * *

TERMINATION OF PARNTAL RIGHTS - Diligent Efforts/Mental Health Issues

The Fourth Department upholds an order terminating the mother's parental rights, rejecting her contention that because of her possible mental health issues, petitioner was required to do more than merely provide her referrals for services and leave her to manage them on her own.

Petitioner did more than just provide referrals. Among other things, petitioner regularly checked the mother's progress, repeatedly encouraged her to actively participate in the recommended

services despite her unwillingness to do so and her refusal to accept the need for those services, and attempted to send the mother transportation stipends.

Matter of Janette G.
(4th Dept., 3/20/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Diligent Efforts/Failure To Plan Or Maintain Contact

The Second Department reverses an order terminating the mother's parental rights, noting, *inter alia*, that after a court-directed trial discharge commenced, petitioner did not provide any assistance with regard to transferring the child from his school in Brooklyn to a school closer to the mother in Manhattan or transporting the child to and from his school, and did not provide other appropriate services to the family; that petitioner's witness alleged that the trial discharge failed after petitioner became aware that the mother had not taken the child into her full-time custody, but, according to the mother, the child spent weeknights with the foster mother in Brooklyn because of the long commute between the mother's apartment in Manhattan and the child's school in Brooklyn; and that after the trial discharge failed, the mother consistently attended her scheduled supervised parental access two hours per week until the permanent neglect petition was filed.

Matter of Tai-Gi K. Q.-N. B.
(2d Dept., 1/29/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Constitutionality Of Statute/Diligent Efforts/Excused Due To Aggravating Factors - Self Incrimination

In this termination of parental rights proceeding, the Delaware Supreme Court rejects the parents' constitutional challenges.

The Court finds no due process violation where the parents allege that the agency should have searched for a Spanish-speaking foster family before placing her in an English-speaking home. Although language should be considered in placements, whatever language barrier existed did not lead to the court's decision to terminate parental rights. None of the witnesses relied on a language barrier to support their observations and opinions, and the court did not rely on a language barrier to conclude that the parents lack the necessary parenting skills.

The statute excusing the State from pursuing reasonable efforts to reunify the family based on "aggravating factors" - including abandonment, prior felony conviction, involuntary termination of parental rights over a sibling, chronic abuse or life-threatening abuse - is not unconstitutional

on its face and as applied. Although the father argues that the State must allow for some sort of case planning before terminating parental rights, the Court is not persuaded that, given the severity of the grounds for termination, and the option to case plan in any given case, excusing the requirement to pursue reasonable efforts creates an impermissible risk of erroneous termination in every possible case, and, in this case, requiring reasonable efforts to reunify the family would likely not have led to a different result.

The trial court did not improperly condition parental rights on admissions of culpability for the injuries to the subject child's older sibling. When the parents are in the best and only position to know reliably what happened, the tension between the Fifth Amendment and parental rights is inevitable. When this happens, it is important to distinguish between an affirmative order requiring admission, which violates the right not to self-incriminate, and an order setting reasonable conditions for returning the child. The severity of the sibling's injuries and the lack of reasonable explanation contributed to the court finding the home unsafe - without knowing the cause, the court could not determine a remedy. The parents did not have the right to avoid the consequences of no explanation for the injuries. Moreover, the court found the lack of explanation was not dispositive alone, and provided additional reasons for its conclusion that the conditions resulting in the prior findings likely continue to exist.

Sierra v. Department of Services For Children, Youth and Their Families
2020 WL 4745278 (Del., 8/17/20)

TPR: Failure To Plan

TERMINATION OF PARENTAL RIGHTS - Failure To Plan/Problems Related To Poverty

A California appeals court reverses an order terminating the father's parental rights where the state removed the child based only on allegations against the mother; the father subsequently claimed that his situation had changed and that he had gained permanent full-time employment with benefits as well as a permanent place to live; the court denied his request for custody, concluding that he had shown that his circumstances were changing, but not that they had changed; and the court concluded that giving the father custody would be detrimental to the children.

A juvenile court "may not terminate parental rights based on problems arising from the parent's poverty, a problem made worse, from a due process standpoint, when the department didn't formally allege those problems as a basis for removal."

In re S.S.
2020 WL 5868568 (Cal. Ct. App., 4th Dist., 10/2/20)

TPR: Mental Illness And Intellectual Disability

TERMINATION OF PARENTAL RIGHTS - Mental Illness/Mandated Examination

The Third Department reverses an order terminating the mother's parental rights on mental

illness grounds where a court-appointed expert, who had previously evaluated respondent in the context of an emergency removal, was unable to conduct an examination, as required by statute.

There was no basis for finding that respondent, who was involuntary committed for a period of time, refused to be evaluated or made herself unavailable. After respondent's release, no further attempt was made to schedule an evaluation. Even though respondent raised no objection, the statutory mandate requires reversal.

Matter of Rahsaan I.
(3d Dept., 2/20/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Intellectual Disability

The Third Department upholds an order terminating parental rights upon a finding that respondent is an intellectually disabled parent.

The licensed clinical psychologist called by petitioner stated, inter alia, that although respondent could be trained to provide the child with basic and rudimentary care, like feeding and bathing, when faced with circumstances like those prompting the child's removal, she would have "an exceedingly if not impossible time trying to make the appropriate decisions" due to her cognitive deficits; and that assistance from family members or outside sources would "take[] the onus" off respondent to make appropriate decisions, but would still require her to identify situations that required assistance from others, and to learn to seek help in those situations.

In a footnote, the Court notes that the attorney for the child on appeal, while supporting affirmance, also provided a cogent review of the legal requirements established by federal law for the protection of people with disabilities, and asserted the need to recognize that parents with disabilities are separated from their children at disproportionately high rates.

Matter of Amirah P.
(3d Dept., 10/29/20)

TPR: Disposition/Intervention

TERMINATION OF PARENTAL RIGHTS - Disposition
ABUSE/NEGLECT - Notification Of Relatives/FCA § 1017
CUSTODY - Separation Of Siblings

The Fourth Department dismisses the great-aunt's appeal from an order terminating parental rights because she is not aggrieved by that order, and upholds an order dismissing her custody petition.

Even assuming, arguendo, that the agency violated its statutory duty under FCA § 1017 to inform the aunt of her right to seek to become a foster parent or obtain custody of the

child, reversal is not required because the aunt was not prejudiced. At all relevant times, the aunt knew that the child had been placed in foster care, and did not express any interest in seeking foster care placement or custody until two years after the child was born. Indeed, shortly after the child was born, the aunt declined to be considered a resource because she was already overwhelmed with caring for the child's siblings.

It was not in the child's best interests to reside with the aunt merely because she had custody of the child's siblings, especially in light of the fact that the child has never resided with her siblings. Moreover, the relationship the child has with her siblings was initiated and encouraged by the foster parents.

Matter of Sandy L.S. v. Onondaga County Department of Children and Family Services
(4th Dept., 11/20/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition

Although the record supports the court's determination that adoption by the foster parents is in the children's best interests, the First Department remands the matter for a new dispositional hearing with respect to one of children, whose attorney has reported that the child is no longer in the same pre-adoptive home, is now sixteen years old, and does not consent to being adopted.

In re Shilloh M.J.
(1st Dept., 5/28/20)

TPR: Appeals

TERMINATION OF PARENTAL RIGHTS - Appeal/Notice Of Appeal

Respondent contends that the affidavit submitted with her notice of appeal demonstrates that she intended to appeal a November 2016 order terminating her parental rights, rather than an April 5, 2018 permanency hearing order, and asks the Court to "construe [her appeal] as such, and deem it timely filed."

The Third Department dismisses the appeal. The order terminating respondent's parental rights was entered and mailed to respondent in November 2016, 18 months before her May 2018 notice of appeal. Thus, even if the Court were to construe the notice of appeal as respondent requests, it was not filed and served within 35 days after the order was mailed to respondent, and thus was untimely and the Court lacks jurisdiction to hear the appeal.

Although the Court may treat a notice of appeal which contains an inaccurate description of the judgment or order appealed from as valid, it may not amend a notice of appeal so as to insert therein an order from which no appeal has in fact ever been taken.

Matter of Alan VV.
(3d Dept., 6/25/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Appeal/Mootness

The First Department dismisses as moot an appeal from an order denying the mother's motion to vacate her default in this termination of parental rights proceeding, since the child has been adopted.

In re Chon-Michael S.
(1st Dept., 2/27/20)

Practice Note: Under 18 NYCRR § 421.19(i)(5)(i), "[i[f the order committing custody and guardianship is appealed, the [adoption] petition may not be filed until after the appeal is finally resolved and then only if the order of commitment remains in place." See *In re Jayden N.*, 156 A.D.3d 543 (1st Dept. 2017) (court correctly declined to expedite adoption where appeal from termination order was pending). This regulation should govern when an appeal has been taken from an order denying a motion to vacate that was made promptly after a default judgment.

IV. CUSTODY/GUARDIANSHIP/VISITATION

Jurisdiction

CUSTODY - Jurisdiction/Record Of Communications Between Courts

In this custody proceeding in which the mother seeks modification of a North Carolina order awarding custody of the child to the maternal grandmother, the Second Department upholds an order that dismissed the proceeding for lack of subject matter jurisdiction.

Under the UCCJEA, communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties and a record need not be made of that communication. As to other communications, a record must be made of the communication between the two courts and the parties must be informed promptly of the communication and granted access to the record. If the parties are not able to participate in that communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

Here, at the time the family court communicated with the North Carolina court, counsel for the parties were before the North Carolina court on a conference involving that case. Additionally, the communication between the two courts apparently related to matters involving schedules, calendars, court records, and similar matters, for which a record was not required.

Matter of Quevedo v. Overholser
(2d Dept., 10/14/20)

* * *

CUSTODY - Jurisdiction

The Second Department upholds the family court's determination dismissing the father's custody petition on the ground that a Florida court would be the more appropriate forum.

The child has not resided in or had a significant connection to New York since 2015. Although the New York court has greater familiarity with the background facts and issues than any court in Florida, the relevant evidence as to the child's care, education, and development over the last four years is in Florida. The mother's past actions in using excessive corporal punishment on the child, which precipitated the child's moves to North Carolina and then to Florida, also weigh in favor of the court declining jurisdiction.

Matter of Sanchez v. Johnson
(2d Dept., 12/16/20)

* * *

CUSTODY - Jurisdiction

- Right To Counsel/Child

The family court granted respondent mother's motion to dismiss the father's petitions for, inter alia, modification of a prior order of custody on the ground that New York is an inconvenient forum under Domestic Relations Law § 76-f. The father filed the petitions after the mother moved to California with the parties' five-year-old child without informing the father, who was incarcerated at the time.

The Third Department concludes that California is an appropriate forum and New York is an inconvenient forum. The father filed the modification petition just two weeks after the mother relocated to California, and thus the additional time it took to dispose of this proceeding does not militate in favor of finding that New York is an inconvenient forum.

However, although evidence of the father's criminal history is available in New York, and the court here is familiar with the parties and the allegations of domestic violence, the circumstances have changed. Evidence that the father abused the mother in front of the child, that an order of protection had previously been entered against the father in New York for domestic violence, and that the mother moved to California to avoid any further abuse, weighs heavily in favor of California. Although California is a great distance from New York, the greater financial burden would be placed on the mother. The majority of the relevant evidence is located in California, and it does not appear that the child has any connection with New York other than the father and a paternal grandmother.

The attorney for the child in New York was having trouble providing effective representation inasmuch as it was difficult to communicate with the child by telephone.

The family court erred in dismissing the petitions instead of staying the proceedings pending the commencement of proceedings in California.

Matter of Coia v. Saavedra
(4th Dept., 6/12/20)

* * *

VISITATION - Jurisdiction

The family court found that New York, where the mother resides, was an inconvenient forum, noting that it had conferenced with the court in Arizona and determined that the Arizona court was familiar with the facts and could decide the issues expeditiously, as there was already a matter pending between the parties in Arizona; and that most witnesses who could attest to the child's well-being were available in Arizona.

The Third Department reverses, noting that this is an enforcement proceeding and the sole issue concerns the conduct of the parents regarding the current order; that the bulk of testimony as to whether the father violated the order will come from the mother, who is located in New York, and any witnesses she may call; that any testimony from the father can be presented by

telephone, audiovisual means or other electronic means; that the New York court is far more familiar with the case than the Arizona court and in a better position to interpret the meaning of its own order; and that the mother, who is indigent and gas counsel in New York, submitted an affidavit showing that she will not be able to travel to or retain counsel in Arizona, and the court was unable to conclude whether Arizona could provide indigent legal representation.

Matter of Sadie HH. v. Darrin II.
(3d Dept., 2/20/20)

* * *

CUSTODY/VISITATION - Jurisdiction/Foreign Judgments - Enforcement And Modification

The Third Department holds that under the UCCJEA, New York, which has jurisdiction, is required to recognize and enforce a 2007 Connecticut judgment where it included a delegation of authority that was apparently proper in Connecticut but would not be proper if ordered by a New York court.

When courts of this state uphold the validity of a foreign divorce decree, they must recognize all provisions of the decree except in the rare instance where a provision violates the public policy of this state. Although courts in our state cannot delegate authority to decide whether, or under what terms, a noncustodial parent may visit with his or her child, New York does not deem an order containing such a delegation to be inherently vicious, wicked, shocking to our moral sense or obnoxious to this state's public policy.

Although the UCCJEA provides jurisdiction for New York courts to modify an out-of-state order, it does not prescribe the standard to be used. A court must look to the substantive law of New York, and thus, in this case, the father was required to demonstrate a change in circumstances. The family court properly found that the father failed to do so. After the child moved from Connecticut to New York, she was approximately the same distance from the father in Virginia and had the same amount of contact with him that she had before the move.

The family court did not violate its fiduciary obligation under Domestic Relations Law § 240(1)(a). Although the father was incarcerated for failing to pay support and has not paid any support since 2012, there is no indication in the record that the child's needs are not being met.

Matter of Paul JJ. v. Heather JJ.
(3d Dept., 6/18/20)

* * *

CUSTODY - Referees

In initial custody proceedings that terminated, the father, mother, and mother's counsel executed an order of reference and stipulation agreeing that a Family Court Referee would "hear and determine the … matter and any cross petitions and any supplemental petitions filed prior to its

conclusion, as well as any future petitions and supplemental petitions with respect thereto." When new petitions were filed, the mother made an application to have the case transferred from the Referee to a Family Court judge. That request was denied.

The First Department finds error, concluding that once the prior proceedings were terminated, and the parties filed completely new petitions which did not seek enforcement or modification of extant orders from the prior proceedings, the stipulation regarding the Referee's jurisdiction had no effect. Use of the word "future" in this stipulation did not bind the parties for all times and in all subsequent proceedings concerning this child.

In re Shaun C.S. v. Kim N.M.
(1st Dept., 3/26/20)

Indian Child Welfare Act

ABUSE/NEGLECT - Jurisdiction
INDIAN CHILD WELFARE ACT

In this dependency proceeding, a California appeals court concludes that Indian Child Welfare Act notice requirements were not triggered when the mother filed a Parental Notification of Indian Status form and indicated, "I may have Indian ancestry," and left blank the area designated for her to identify the name of any tribe. A claim that a parent, and thus the child, may have Native American heritage is insufficient to trigger ICWA notice requirements if the claim is not accompanied by other information.

In re M.R.
2020 WL 2059935 (Cal. Ct. App., 5th Dist., 4/29/20)

Standing

CUSTODY/VISITSTION - Standing/Equitable Estoppel/Same-Sex Couples

Petitioner and respondent mother were in a relationship and became engaged in 2009, but they never married because, at that time, same-sex marriage was not recognized under New York law. Their romantic relationship ended in early 2010, and petitioner moved out of their residence. That summer, the mother engaged in sexual relations with respondent father, resulting in her becoming pregnant with the subject child.

The Fourth Department, with one judge dissenting, holds that petitioner does not have standing under Domestic Relations Law § 70(a) to seek joint custody of, and visitation with, the child, which would result in a tri-custodial arrangement among respondents and petitioner.

In Matter of Brooke S.B. v. Elizabeth A.C.C. (28 N.Y.3d 1), the Court of Appeals held that "where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70."

The Court rejects the contention made by petitioner and the attorney for the child that the facts of this case are a natural extension of the reasoning in Brooke S.B., and that although there was no pre-conception agreement, there was a post-conception agreement for petitioner to raise the child as a parent. DRL § 70(a) simply does not contemplate a court-ordered tri-custodial arrangement. DRL § 70 (a) states that "either" parent may seek custody or visitation. The term "either" limits a child to two parents, and no more than two, at any given time.

The Court also notes that while an equitable estoppel argument is a logical extension of Brooke S.B., the doctrine must be considered within the confines of DRL § 70, which does not allow a tri-custodial arrangement.

In a concurring opinion, a judge asserts, "I respectfully disagree with the dissent's supposition that either the United States Supreme Court or the New York Court of Appeals has held that a child has a 'fundamental liberty interest . . . in preserving [his or] her family-like bonds.' I further disagree that any such liberty interest possessed by the child may be lawfully elevated to such a height that it could outweigh a parent's rights, like in the circumstances presented by this case."

Matter of Tomeka N.H. v. Jesus R.
(4th Dept., 3/20/20)

* * *

CUSTODY/VISITATION - Standing/Equitable Estoppel/Same-Sex Couples
LAW OF THE CASE DOCTRINE

The Fourth Department reaches the same conclusion it reached in Matter of Tomeka N.H. v. Jesus R. (this issue), and also rejects petitioner's contention that the court was bound to apply equitable estoppel as the law of the case because it had denied the mother's motion to dismiss.

Matter of Wlock v. King
(4th Dept., 3/20/20)

Kinship Guardianship

KINSHIP GUARDIANSHIP

The children's grandmother executed kinship guardianship petitions pursuant to the Subsidized Kinship Guardian Program for her two grandchildren. Pursuant to Social Services Law § 458-b, the Administration for Children's Services and the grandmother executed Kinship Guardianship Assistance and Non-Recurring Guardianship Agreements, which provided monthly subsidies for each child, and stated that subsidies will be provided until the children turn 18 if the children were under 16 at the time the agreement was executed. However, if the children were older than 16 at the time of execution, the subsidies would continue until the children turned 21, provided that certain statutory conditions were met. When the grandmother executed the agreement, her grandchildren were both under 16 years of age. The family court approved the guardianship

petitions and the children were discharged from foster care.

The grandmother subsequently moved pro se to extend the subsidies for both children until they reach 21 years of age. While the motion was pending, the Legislature amended the statute to expand the legal definition of a "prospective relative guardian" and made subsidies available to all children until the age of 21 when certain conditions are met regardless of the child's age at the time the contract was executed. The Legislature was silent as to the retroactivity of the law. The family court denied the motion and declined to apply the statute retroactively.

The First Department reverses. The amended statute is remedial in nature. The intent was to remove the disparity created between guardians, and foster/adoptive parents who are able to obtain subsidies notwithstanding the age of the child at the time of fostering or adoption. Although a remedial amendment will be applied retroactively only if it does not impair vested rights, the amendment does not create a new entitlement; rather it expands existing benefits to a class of persons arbitrarily denied those benefits by the original legislation. Even assuming arguendo that the amended statute impaired ACS's vested contractual rights or increased its financial liabilities, impairment of a contract will be upheld if the impairment is reasonable and necessary to accomplish a legitimate public purpose.

In re Jaquan L.
(1st Dept., 1/9/20)

Mental Health Evaluations/Discovery

CUSTODY - Mental Health Evaluations
- Child's Wishes/In Camera Interview

The Second Department reverses an order that dismissed the mother's petition to relocate to New Jersey with the child, and remits the matter for an in camera interview with the child, preparation of an updated forensic report, a further hearing, and a new determination of the mother's petition.

The forensic evaluator did not interview the mother's boyfriend or determine his impact on the child, and, since there was no in camera interview, the views of the child were not elicited. In effect, the family court found that, in the absence of reliable information from the forensic evaluator, there was no information.

Matter of Gomez v. Martinez
(2d Dept., 11/4/20)

* * *

VISITATION - Mental Health Evidence/Issues

Noting that the child's mental health progressively declined following her introduction to the father, and that the child's mental health counselor testified regarding the mental health issues

stemming from the child's difficulty in adjusting to the father's sudden presence in her life, the Third Department concludes that the family court erred in precluding the counselor from testifying as to statements made by the child that formed the basis for her diagnosis and treatment. This prevented the introduction of evidence that may have helped the court determine the cause of the child's distress and fashion appropriate parenting time provisions.

The family court also erred in refusing to adjourn the fact-finding hearing to allow the attorney for the child to present testimony from a mental health professional who had evaluated the child when, during the pendency of the fact-finding hearing, the child presented at the Comprehensive Psychiatric Emergency Program in crisis. The court erred in ruling that this was inadmissible post-petition proof.

The matter is remitted for a new hearing before a new judge. Given the testimony from the child's counselor that it would be a conflict of interest for her to counsel the father and the child together, the family court, if it orders therapeutic visitation, should direct that such visitation be conducted by someone other than the child's counselor.

Matter of Jill Q. v. James R.
(3d Dept., 7/2/20)

* * *

VISITATION - Change In Circumstances
- Mental Health Evidence

The Third Department finds error in the family court's determination denying the mother any visitation with the child.

Although the mother testified that she had not seen the child in nine years due to her drug abuse, in that time she recognized she had problems and took steps to address them. She made efforts to reach out to the child, regained custody of some of her other children, and was employed and had stopped using drugs for at least three years.

The forensic examiner cited the improvements made by the mother as a basis for finding that her life was chaotic, but sanctioning this rationale would essentially give no incentive to any parent to achieve stability. The forensic evaluator essentially acquiesced to the father's preferences that the child have no contact with the mother and, in effect, gave them a higher priority over any court directive.

Although the family court found that the mother could not control her emotions during the trial, there was little evidence, if any, indicating that she displayed the same emotional outbursts either with the children who lived with her or outside the courtroom setting.

Matter of Jessica D. v. Michael E.
(3d Dept., 4/2/20)

Discovery Sanctions

CUSTODY - Discovery/Sanctions

In this custody proceeding, the Third Department finds reversible error where the family court precluded the father from introducing evidence at the fact-finding hearing.

Although the father failed to comply with court-ordered deadlines for responsive pleadings and discovery, the record lacks any evidence of willfulness that would warrant the drastic sanction of complete preclusion. The Court notes, inter alia, that the father's new counsel, who was assigned after a conference during which the initial discovery schedule was established, later stated that delay in responding "is predominantly my fault and I will make that very explicitly clear on the record."

Matter of Tara DD. v. Seth CC.
(3d Dept., 2/20/20)

Hearings/Evidence/Witnesses/Lincoln Hearings And Child's Wishes

CUSTODY - Hearing Requirement/Right To Be Present

During an appearance at which the family court stated that it was not "making any findings" and would make findings only after a future hearing, the father apparently grew frustrated with the proceedings and walked out of court. As the father was leaving, the court warned him that it would issue a permanent order in his absence. Thereafter, the court held a hearing, took testimony from the mother, and issued an order awarding sole legal and physical custody of the child to the mother, with supervised visitation with the father as mutually agreed by the parties.

The Fourth Department reverses. Custody determinations should generally be made only after a full and plenary hearing and inquiry. The court proceeded in the absence of adequate notice to the father of a hearing.

Matter of Williams v. Davis
(4th Dept., 1/31/20)

* * *

CUSTODY/VISITATION - Hearing Requirement

Where the court held nine conference appearances and conducted two in camera interviews with the children, the Second Department holds that the court erred in not holding a plenary hearing to determine custody and parental access.

There are disputed factual issues regarding the father's parental access. The court erred in relying on the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by the parties. The court's relied on relevant information, as opposed to

admissible evidence.

Matter of Corcoran v. Liebowitz
(2d Dept., 12/30/20)

* * *

CUSTODY - Lincoln Hearings
- Hearing Requirement
- Hearsay Evidence
- Education Issues/Work Schedule Of Parent

The First Department concludes that the family court erred in awarding the father primary physical and sole legal custody upon a finding that the child resided primarily with his grandmother rather than with the mother. The court based this finding solely on an in camera interview with the child, then eight years old, and the father's hearsay testimony regarding the grandmother's statements.

The child made inconsistent statements about where he spent the majority of his time. Even if he had been definitive, a court holding a Lincoln hearing should not use information which has not been previously mentioned and is adverse to either parent without checking on its accuracy in an open hearing. There are grave risks involved in a private interview of a child who has been subjected to emotional stresses that may produce distorted images of the parents and the situation.

The father was unable to state when he had a conversation with the grandmother or give any other details. Although the mother's attorney failed to object, the court could not rely on it as the basis for a determination that would upend the custody order that had been in place for virtually the entirety of the child's life. The mother directly contradicted the father's testimony.

Moreover, the record is not adequate to establish whether the custody order was in the child's best interests. The child would likely have to change schools because the parties reside in different zip codes, and the court did not receive any evidence about where the child would attend school if custody was transferred or what impact it would have on the child. The child was doing well in his school, which he had attended since pre-kindergarten. The mother was involved with the child's education, and the father was not.

The court heard no evidence about the father's work schedule, except that it prevents him from attending parent-teacher conferences. The father resided with his girlfriend and her 14-year-old daughter, and it is unclear whether awarding the father primary physical custody could result in granting de facto physical custody to a nonparent with no biological relationship to the child.

Matter of Edwin E.R. v. Monique A.-O.
(1st Dept., 11/5/20)

* * *

CUSTODY - Change In Circumstances/Hearing Requirement
- Sanctions/Violations
JUDGES - Bias/Disqualification Upon Remittal

The Third Department holds that the family court erred in dismissing the mother's modification petitions without conducting a hearing where the court did not liberally construe the mother's pro se petitions, accept her allegations as true, afford her the benefit of every possible inference or resolve credibility issues in her favor.

Rather than accept the mother's allegations as true, the court improperly made factual findings and credibility determinations, which have no place in an order resolving a motion to dismiss for failure to state a claim.

Although the court conducted a full evidentiary hearing on the father's violation petition, there was a considerable degree of overlap between the allegations raised by the father and the mother in their petitions. The improper dismissal of the mother's petition, which occurred prior to the conclusion of the violation hearing, tainted the court's determination on the violation petition. The court created a situation in which only the father could pursue and obtain relief on allegations that were also raised by the mother.

The court also improperly sanctioned the mother by modifying the joint legal custody order and granting the father sole legal custody without determining whether there had been a change in circumstances.

The matter is remitted for further proceedings before a different judge. Considering the long and tortured history between the parents and the impact that such turmoil has had on the children, the court shall commence proceedings within 45 days of the date of this decision. Based upon the potentially divergent positions of the children, the court should consider whether the assignment of separate attorneys for the children is warranted.

Matter of Gerard P. v. Paula P.
(3d Dept., 8/13/20)

* * *

CUSTODY/VISITATION - Hearsay Evidence/Child's Out-of-Court Statements

The Third Department concludes that the child's out-of-court statements regarding having been struck in the face by the father's fiancée were sufficiently corroborated where the child provided consistent accounts, and, although the child's repetition of the accusation, standing alone, is not sufficient, the evidence also demonstrated that the child was in the sole care of the fiancée at the time the injury occurred.

Matter of Cassidy S. v. Bryan T.
(3d Dept., 2/20/20)

* * *

CUSTODY - Child's Wishes/Change In Circumstances

In this custody proceeding, the Fourth Department finds that the mother failed to prove a change in circumstances where her children expressed a preference for living with her, which can be a change in circumstances, but the children were seven years old and five years old, and the Court considers them too young and not of sufficient maturity for their alleged desires to demonstrate a change in circumstances.

Matter of Williams v. Reid
(4th Dept., 10/2/20)

* * *

VISITATION - Child's Wishes
- Contempt

The Court holds that it may order a parent to impose discipline on children who voluntarily refuse to engage in court-ordered visitation with the other parent, and use its contempt powers to enforce such a directive.

Because it would not be appropriate for the Court to order the children (ages 10, 12 and 14) to comply under threat of contempt, and because the children were within the household of their mother, the logical step was to require the mother, the primary residential parent, to take away the children's privileges and restrict their activities until they comply with the visitation order.

Although the attorney for the children argued that the Court should "hear the children's voices," the children offered no justification for refusing to follow the order. They told the Court that they can decide their own best interests, a notion that this Court, and hundreds of other New York courts, have routinely rejected.

The Court did not order the mother to guarantee that the children visit. The Court simply required the mother to take disciplinary steps - all undisputedly within her control - until the children visit with their father.

Matthew A. v. Jennifer A.
(Sup. Ct., Monroe Co., 9/18/20)
http://nycourts.gov/reporter/3dseries/2020/2020_51071.htm

* * *

VISITATION/CONTEMPT - Virtual Hearings

In this divorce case, the father, having been unable to see his children since the advent of the COVID-19 crisis, brought a motion to compel the mother to comply with an existing parenting

order, and a motion seeking to hold the mother in contempt of court for failing to vacate the former marital residence so that the closing on its sale can proceed.

The Court first notes that given its familiarity with this long-pending case, it was able to address the visiting issue without having to hold a virtual evidentiary hearing and contend with the related operational demands. Social workers from Comprehensive Family Services, an independent family support agency, will be physically present to supervise the mandated transfers of the children from one parent to the other. This will facilitate the transfer process, and help allay any concerns that either child might have about going to the father's home - especially any COVID-19-related fears that the mother may have stoked.

The Court does not find contempt. The mother, who refuses to leave the apartment, has violated lawful court orders and her actions have impaired and prejudiced the father's rights. However, it is highly problematic, and perhaps even impermissible, to conduct a virtual hearing in a proceeding that could result in the mother being sentenced to jail. The mother has frequently been prone to disruptive outbursts in the courtroom, and the Court is skeptical as to whether the mute feature on the Skype for Business platform will afford the Court the same level of control in a virtual courtroom. Another concern is how to utilize a Mandarin interpreter remotely; absent enhancements to Skype, the translation process, instead of being simultaneous and flowing, will be delayed and fragmented. A contempt hearing is far too serious a proceeding to operate under these less than optimum conditions.

In any event, it would be unthinkable to incarcerate anybody for an offense like this during the COVID-19 outbreak, with the serious threat of infection rendered even more acute by the inevitable conditions of incarceration. Also, the Court would be reluctant to do anything that might result in the mother ending up on the street in the middle of the pandemic, as she claims she will, especially considering that the children continue to reside primarily with her. Moreover, the power to evict the mother cannot be exercised at this time because of the Governor's Executive Order 202.8. As a remedy, the proceeds from any eventual sale will be distributed equitably, not equally, The father's share shall be increased and the mother's share decreased in accordance with whatever loss in the selling price is attributable to the mother having prevented the sale from closing as scheduled.

S.C. v. Y.L.
(Sup. Ct., N.Y. Co., 5/18/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50590.htm

* * *

CONTEMPT - Virtual Hearings

In this proceeding in which the Court will determine whether to hold plaintiff-husband in civil and criminal contempt for engaging in spoliation of evidence, and violating orders related to the installation of and attempted deletion of iPhone spyware, and will consider sanctions against defendant-wife for making a false affidavit regarding her knowledge about that spyware, the Court holds that pursuant to Judiciary Law § 2-(b)3, it has the authority to order a trial or hearing

to proceed virtually over the objections of a party, even where one of the remedies sought is criminal contempt.

In *People v Wrotten*, 14 N.Y.3d 33, the Court of Appeals, noting that live televised testimony is an exceptional procedure to be used in exceptional circumstances as necessary, permitted the 83-year-old complainant to testify by live two-way video technology. The global pandemic is an "exceptional circumstance." Moreover, the technology available at this time exceeds the technology available when *Wrotten* was decided in 2009. The defendant in *Wrotten* faced the possibility of imprisonment, and thus plaintiff's contention that the Court is prohibited from proceeding because of the risk of imprisonment is unavailing.

The Court will allow arrangements to be made for plaintiff and counsel to safely enter the courthouse to review evidence. While breakout rooms for the Teams platform are not yet operational, the Court will accommodate reasonable requests for opportunities for counsel to speak with clients privately via telephone, or for a side bar with the Court without clients present. The Teams platform allows parties and counsel to see each other and the Court simultaneously.

C.C. v. A.R.
(Sup. Ct., Kings Co., 9/30/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20245.htm

* * *

FAMILY OFFENSES - Lincoln Hearing

The First Department concludes that in a hearing regarding a request for an order of protection, it would have compromised the parties' due process rights if the court had considered statements made by the child in a Lincoln hearing without the parties and their counsel present.

In re Judith L.C. v. Lawrence Y.
(1st Dept., 1/30/20)

Education Issues

CUSTODY - Change In Circumstances/Best Interests
- Education Issues

The Fourth Department upholds an order that, upon a finding of changed circumstances and a best interests finding, awarded the parties joint custody, with physical custody to the father.

Since entry of the prior order which awarded the mother physical custody, the child had a significant decline in her school grades and failed three of her classes, and had multiple instances of tardiness and unexcused absences; and her anxiety and depression significantly increased, in part as a result of living in the mother's home.

Regarding best interests, the Court notes that the mother works six nights a week and the child was alone at home during those times; that since the child has been living with the father pursuant to a temporary custody order, the child's school grades have risen significantly, and the father has provided the child with a tutor and transported her to summer school and a part-time job; and that while the father is at work, his wife is able to be with the child.

Matter of McGee v. McGee
(4th Dept., 2/7/20)

* * *

CUSTODY - Education Issues/Child's Wishes

The Fourth Department reverses an order denying the father's request for primary residential custody.

The Court notes that the only factor that weighs in favor of the mother is the existing custody arrangement, which had been in place for a lengthy period of time; that although the subject child has a brother at the mother's house, that is not a factor that favors the mother because both parties have other children and thus an award of primary residential custody to either party would necessarily separate the child from some of her siblings; that while the mother had primary residential custody, the child performed poorly at school and experienced a significant increase in her depression; that due to the mother's work schedule, the child was required to arise before 5:00 a.m. and be taken to a relative's house, where the child stayed for two hours before going to school; that the mother is unable to assist the child with school work, or schedule or attend the child's medical and mental health counseling appointments, while the father is able to help the child; that the wishes of the 14-year-old child are entitled to great weight; and that the attorney for the child supported the child's wish to live with the father in Family Court and on appeal.

Matter of Alwardt v. Connolly
(4th Dept., 5/1/20)

Decision-Making Authority

CUSTODY - Joint Custody/Decision-Making Authority

The Third Department upholds a determination that a shared physical custody arrangement is in the child's best interests, and the supreme court's award of joint legal custody. Despite the mother's testimony as to the father's verbal abuse and threatening behavior toward her in front of the child, which had previously resulted in an order of protection in her favor, the evidence reflects that the parties have been able to communicate with one another, largely via text messages, in order to provide for the child's needs.

However, the court erred in awarding final decision-making to the father on medical matters. Although the court noted its "concern" that the mother would marginalize the father's

participation in decision-making, it ignored the father's potential to exhibit the same conduct. The record shows that it is the mother who has demonstrated the greater capacity to make appropriate and timely medical decisions for the child, and supports an award of final decision-making to the mother on medical issues if, after extensive discussion and deliberation, the parties are unable to come to an agreement.

Two dissenting judges would provide neither party with final medical decision-making authority. This will require that the mother and father meaningfully communicate on these matters and that they keep one another apprised of not only medical issues, but any issue of importance relative to the child. Providing either party with final decision-making authority on medical issues will weaponize the situation.

Elizabeth B. v. Scott B.
(3d Dept., 12/17/20)

Parent Work Schedule

CUSTODY - Custodial Parent's Work Schedule

The Fourth Department upholds an order awarding the father sole legal and residential custody, noting, inter alia, that the father is an active and capable parent notwithstanding his work schedule, and that it is well settled that a more fit parent will not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations.

Matter of Gilbert v. Nunez-Merced
(4th Dept., 3/13/20)

Domestic Violence

CUSTODY - Appeal/Preservation - Domestic Violence

The Court of Appeals finds unpreserved the mother's claim under Domestic Relations Law § 240(1)(a) that the trial court failed to consider the effects of domestic violence on the best interests of the children when it awarded custody to the father. The parties never litigated, and the court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constitutes "a sworn petition" for purposes of the statute or whether defendant proved allegations of domestic violence "by a preponderance of the evidence."

Dissenting, Judge Rivera, joined by Judge Wilson, asserts that the mother preserved her claim. She made a sworn allegation in a family offense petition that the father committed acts of violence against her, and the petition was admitted into evidence at the father's divorce proceeding. The mother also testified to the alleged abuse, and provided additional evidence to corroborate her allegations. The statute is self-executing, and operates, like any other procedural rule, without the need for a party to parrot its language to the trial court. There is no credible argument that the court was unaware that domestic violence is a statutorily prescribed factor in its best interest analysis. The majority's rule undermines the statutory mandate that judges

properly consider allegations of abuse proven by a preponderance of the evidence, and the effect of domestic violence on a child, when deciding custody and visitation.

Cole v. Cole
(Ct. App., 6/23/20)

* * *

CUSTODY - Domestic Violence

After determining that domestic violence perpetrated by the mother's ex-boyfriend constitutes a change in circumstances, the Third Department upholds an order denying the father's request for sole residential custody, noting, inter alia, that although the mother minimized the potential harm caused to the children, she used the father as a support system to protect the children following the incident and removed the ex-boyfriend from her home, and, as of the time of the hearing, the domestic violence problem had been resolved.

Matter of Daniel C. v. Joanne C.
(3d Dept., 4/9/20)

Relocation, Travel And Related Issues

CUSTODY - Relocation

The Third Department finds ample evidence that the mother interfered with the father's parenting time, denied the father any access to the children for approximately three years, unilaterally relocated with the children to Georgia, and did not advise the father of the children's whereabouts or provide any contact or communication between the father and the children. Thus, the father established a change in circumstances,

Nevertheless, the Court finds record support for the family court's determination that the mother's relocation with the children to Georgia is in the children's best interests. Although the mother's intentional interference in the father's relationship with the children per se raises a strong probability that she is unfit to act as the custodial parent, the father failed to proffer any reason for his failure to seek court assistance in obtaining the return of the children prior to the mother's petition in 2017.

The mother's boyfriend testified that he earns $80,000 per year. They have a four-bedroom house with a swimming pool. The schools have programs to address the oldest child's special educational needs, and there are doctors and specialists to address the youngest child's special physical needs. The mother is able to transport the children to and from school and is available throughout the day to care for the children. The mother testified that the children are well-bonded to her other children.

In contrast, the father has a chaotic, crowded household and a history of domestic violence, most notably in using corporal punishment against the children.

Matter of William V. v. Bridgett W.
(3d Dept., 4/2/20)

Practice Note: The Court notes that the attorney for the children in family court argued that the father should have custody, while the AFC on appeal argued that the family court's order should be affirmed. It is not typical, but not a rare occurrence, for the appellate AFC to argue for a result different from that favored by the trial AFC due to, inter alia, a change in the child's position, or a child's acquisition of decision-making capacity in the interim period.

* * *

CUSTODY - Relocation

The First Department upholds the court's determination permitting the mother to relocate with the child to North Carolina where the mother would have family support, educational and medical resources, and employment opportunities; and the father's concern that a move would disrupt the child's continuity of medical care was unfounded, as the mother testified that she had already consulted with the child's doctors in New York and arranged for them to consult with the medical team at the hospital in North Carolina in advance of their arrival.

In re Monique J. v. Keith S.
(1st Dept., 10/13/20)

* * *

CUSTODY - Relocation

The Second Department upholds an order permitting the mother to relocate with the child to Ohio where the mother wanted to relocate in order to live with her new husband, who was stationed there as a member of the military, and with the child's new half-sibling; the move would enhance the child's life economically and emotionally; and the child's relationship with the father could be preserved through a liberal parental access schedule, including, but not limited to, unlimited access to the child in Ohio, frequent telephone and video contact, and extended summer and holiday visits.

Matter of Jose v. Guilford
(2d Dept., 11/25/20)

* * *

CUSTODY - Relocation

The Fourth Department concludes that the court erred in dismissing, without a hearing, the mother's petition seeking permission to relocate with the child from Ontario County to Monroe County.

The mother alleged that she had specific employment advancement opportunities at her job in Monroe County, and that the relocation would enhance the child's extracurricular activities. The attorney for the child indicated that the child favored relocation, another factor that may support a relocation petition.

Matter of Betts v. Moore
(4th Dept., 11/20/20)

* * *

CUSTODY - Relocation
- Violations

The Second Department reverses an order that awarded the father sole legal and physical custody if the mother failed to return the child to New York City within 30 days of the date of the order, where the father alleged that the mother had violated the terms of an existing order of custody and parental access.

The family court's conditional directive was meant to punish the mother for moving with the child to Sweden and was not based on a best interests determination. The court should not have considered a change in custody in the absence of an application for such relief with notice to the mother. Also, there was evidence that it was in the child's best interests to remain in the custody of the mother.

Matter of Ross v. Ross
(2d Dept., 7/1/20)

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CUSTODY - Relocation Issues
- Judicial Notice

The mother, asserting that she was complying with a geographical restriction in the parties' settlement agreement, moved over the father's objections. The father commenced this modification proceeding, alleging that the mother had exceeded the 40-mile geographical limit, and seeking primary physical custody of the children. The family court, taking judicial notice that the mother had moved approximately 39 miles, found that she had complied with the geographical restriction. Subsequently, the court found that, although there had been a change in circumstances, a modification of custody was not justified.

The Third Department affirms. Even if the family court erred in making its judicially noticed finding, the settlement agreement did not provide that the father was entitled to primary physical custody following a move by the mother outside of the 40-mile radius. Rather, the provision contemplates a best interests determination of custody and parenting time.

A dissenting judge notes that the family court never disclosed the basis for its 39-mile

calculation, and announced it after testimony had concluded and only in the context of its written decision. The parties never had an opportunity to dispute the basis for the judicially noticed finding. Moreover, the court did not address the effect on its custody determination of a move greater in distance than allowed for by the agreement. The parent seeking to relocate bears the burden of demonstrating that the proposed relocation is in the children's best interests. (In a footnote, the majority asserts that this was not a relocation proceeding, and that the father, as the party seeking the modification, bore the burden of demonstrating that a modification of the prior order was in the children's best interests.)

Matter of Lonny C. v. Elizabeth C.
(3d Dept., 8/20/20)

* * *

CUSTODY - Relocation

The Third Department upholds an order that granted the mother's application to relocate with the child to North Carolina, noting, *inter alia*, that the mother testified that she was terminated from her hourly employment because she had to frequently miss work when the child was sick and could not attend day care, and was unable to pay her living expenses and was on the verge of being evicted from her one-bedroom apartment; that the mother stated that she could not rely on the father to provide backup child care, and did not have family in the area who could help; that the mother testified that, in North Carolina, she would have greater support from her family, and had secured salaried employment and could afford a two-bedroom apartment; and that the mother repeatedly testified as to her intention and willingness to foster a meaningful relationship between the father and the child, and the child and her half-sister, through regular periods of parenting time and liberal phone and video contact, and offered to assist with transporting the child to the father and defray transportation costs incurred by the father.

Matter of James TT. v. Shermaqiae UU.
(3d Dept., 6/18/20)

* * *

CUSTODY - Medical Issues/Change In Circumstances
- Child's Wishes
- Relocation Issues

In this proceeding involving a former, and now divorced same-sex couple who were awarded joint legal and physical custody subject to detailed parental access, the Court concludes that the mother, who now resides in New Jersey with her fiancée, has failed to sufficiently allege a change in circumstances warranting an award of sole custody.

The mother has failed to cite anything specific that the ex-wife, who lives in Brooklyn, has done to place the child at risk of exposure to Coronavirus. The parties communicate and have developed an appropriate plan for the child to lower his exposure to the disease by reducing the

number of exchanges. The child is being transported back and forth by car, and the mother has had the option of staying in Brooklyn, which is something she usually does when she has parenting time with the child during the week. Although the mother makes much of the fact that New York is a "hotspot," New Jersey is second in the nation in infections.

The child's desire to remain in New Jersey is only one of the many factors to be examined. Given the unprecedented times in which we are living, the child may be exhibiting a desire for stability and peace in reaction to the mother's unrelenting pursuit of sole custody.

Matter of Jennifer R. v. Lauren B.
(Fam. Ct., Kings Co., 4/22/20)
http://www.nycourts.gov/reporter/3dseries/2020/2020_20094.htm

* * *

CUSTODY - Relocation

The Third Department upholds the family court's determination granting the mother permission to relocate with the children to Arizona.

The mother wanted to continue her education and attain a Bachelor's degree and have better living conditions. She would be living with her friend, rent free in a five-bedroom home, along with the friend's nine-year-old son. The mother believed the children would receive a better education in the Arizona school district after she researched the school the children would attend. The mother researched and determined that the dry air in Arizona would be better for her son's asthma and found a treatment provider. She would look for a part-time job and was willing to pay for the children's travel expenses to see the father. The mother has been the primary caretaker while the father has been sporadically present in the children's lives – being absent for years at a time – and has not provided stable financial or emotional support. The visitation schedule provides more stable and predictable parenting time for the father and preserves his relationship with the children.

Matter of Kristen MM. v. Christopher LL.
(3d Dept., 4/2/20)

* * *

CUSTODY - Relocation

The Second Department, reversing the family court's determination, concludes that the children's best interests would be served by relocating to South Carolina to live with the mother.

Although both parties are loving and fit parents, the mother had been the primary caregiver until August 2018, when the family court issued a temporary order awarding the father physical custody. The children, who were 9 and 10 years old at the time of the hearing, had established a primary emotional attachment to the mother and expressed their desire to relocate. Although a

child's preference is not determinative, it is some indication of what is in the child's best interests, particularly where an interview demonstrates the child's level of maturity and ability to articulate his or her preferences.

The mother was diagnosed with multiple sclerosis in 2015, and had support from the maternal grandmother and extended family in South Carolina, which she did not have in New York. She was gainfully employed in South Carolina and residing with the maternal grandmother, with whom the children would also live. The mother would foster a positive relationship between the father and the children.

Matter of Masiello v. Milano
(2d Dept., 2/5/20)

* * *

CUSTODY - Travel Restrictions

In this custody proceeding, the First Department concludes that in view of the mother's strong familial ties to her home country and her lack of significant family, employment or property in this country, the court did not err in ordering that neither parent may travel outside the country with the child without the prior written consent of the other parent.

In re Kaleem U. v. Halima S.
(1st Dept., 3/12/20)

Violations/Contempt/Interference With Parent-Child Relationship

VISITATION - Violations
JUDGES - Ex Parte Communications

The Third Department concludes that the family court should not have had an ex parte conversation with the grandmother, who approached the bench without the court's invitation, and spoke with the court in familiar tones and patted his head. Although the court invited the mother's attorney to the bench and the grandmother's attorney was present, the mother, the pro se father and the attorneys for the children were not present.

However, the mother's counsel wrote to all counsel conveying this conversation, and nothing of substance was discussed, and thus the record does not disclose any prejudice to the mother. Recusal was not required.

The family court did not err in concluding that although the grandmother should have filed an application for supervision of visitation before the court-ordered visit was to take place, her violation of the visitation order was not willful where she refused to bring the children for a two-week unsupervised visit because of the mother's then-recent conviction for selling drugs and a concern for the children's safety.

Matter of Tamika B. v. Pamela C.
(3d Dept., 10/22/20)

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CUSTODY/VISITATION - Disparaging Other Parent
- Social Media Issues/First Amendment

The Supreme Judicial Court of Massachusetts holds that a nondisparagement order in a divorce case, which precluded the parties from posting disparaging remarks about the other spouse or the ongoing litigation on social media, was an unconstitutional prior restraint on the father's freedom of expression.

No showing was made linking communications by either parent to any grave, imminent harm to the child. As a toddler, the child is too young to be able to either read or to access social media. The concern about potential harm that could occur if the child were to discover the speech in the future is speculative and cannot justify a prior restraint.

Judges still can make clear to the parties that their behavior, including any disparaging language, will be factored into any subsequent custody determinations.

Shak v. Shak
2020 WL 2214345 (Mass., 5/7/20)

* * *

CUSTODY - Interference With Parent-Child Relationship

The Court concludes that although the mother has engaged in alienating behavior, the children would not benefit from a change of custody given the passage of time since the father has had any contact with them, the children's ages (16 and 13) and the bond between them, their lifestyle and religious upbringing, the bond between the mother and the children, and the father's own lack of affirmative action.

The father had ample opportunity to combat the mother's actions. He refused to seek contempt, an immediate change of custody, or any other available remedy. He feared "getting [the mother] in trouble" or having the children removed from the mother's care, and blamed the Court for not "helping" him, while refusing to take affirmative action to maintain his relationship with the children. He has made no preparations for the children to be in his care, and the acute trauma the children would suffer due to a change of custody outweighs the long term effects of the children remaining in the mother's care.

"This decision should not be misconstrued as court or societal acceptance of or acquiescence to parental alienation. Instead, it should serve as a sharp example and warning that parental alienation exists, and when signs are present, both the court and the parents must be proactive in desisting any alienating behaviors early on, before it becomes so pervasive and unyielding that

the parent child relationship is completely eradicated. If not, then parental alienation only serves to reward the alienating parent for the actions, sending a resounding message that alienated parents have no hope of a relationship with their children."

Matter of Eddie S. v. Sylvia S.
(Fam. Ct., Bronx Co., 2/26/20)
http://nycourts.gov/reporter/3dseries/2020/2020_50296.htm

Grandparents, Siblings and Other Relatives/Extraordinary Circumstances

CUSTODY - Grandparents/Extraordinary Circumstances

Under Domestic Relations Law § 72, an "extended disruption of custody," which constitutes an extraordinary circumstance, includes a prolonged separation of the parent and child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the grandparent. A court must determine on a case-by-case basis whether the level of contact between the parent and child precludes a finding of extraordinary circumstances.

The Second Department upholds an award of sole legal and physical custody to the maternal grandmother where the child, who was born in 2006, lived with his mother and grandmother in the grandmother's home from his birth until 2012, when the mother moved out after an argument; and, although the mother visited regularly, maintained daily telephone contact, resided with the grandmother and the child for approximately two months in 2016, and provided input with regard to some of the decisions affecting the child, the grandmother was the child's primary caregiver, provided for him physically and financially, and made all major decisions regarding his health, education, and welfare.

Matter of Mumford v. Milner
(2d Dept., 5/27/20)

* * *

CUSTODY - Grandparents/Extraordinary Circumstances

In this custody proceeding, the parties are the father, and the maternal grandmother with whom the child has resided since June 2011. The child first resided with the grandmother while he was in his mother's custody, and then in the grandmother's temporary custody after the mother moved out and a neglect proceeding was commenced against her. The father then filed a custody petition, which was dismissed in December 2013 because he did not have a stable living situation or any way to support the child. In February 2015, the father filed this custody petition, and the grandmother filed a cross petition. The family court found extraordinary circumstances, and, after a best interests hearing, awarded custody to the grandmother.

The Second Department affirms, citing the separation of the father and the child for at

least twenty-four continuous months. Although the mother was present and had custody during a portion of the period the child resided with the grandmother, the "reality" was that the grandmother cared for the child, with no financial contribution by the father. Even if the period when the mother resided with the grandmother is excluded, the father did not file this petition until more than two years after the mother moved out and the grandmother obtained temporary custody.

Matter of Bruen v. Merla-Profenna
(2d Dept., 3/4/20)

* * *

VISITATION - Grandparents/Standing

The Second Department reverses an order that, after a hearing, found that the maternal grandmother lacked standing to seek visitation..

Although the grandmother may have been aware of the mother's misconduct - the mother fled to Argentina with the child without the father's permission - which deprived the father of contact with the child over a period of years, any knowledge or participation in that misconduct does not deprive her of standing.

However, upon remittal, any knowledge, acquiescence, or participation by the grandmother in the mother's misconduct is a factor to be weighed by the family court in determining whether visitation is in the best interests of the child.

Matter of Noguera v. Busto
(2d Dept., 12/9/20)

* * *

CUSTODY - Extraordinary Circumstances/Domestic Violence

The Fourth Department affirms an order awarding sole custody of the child to petitioner maternal grandmother, finding sufficient evidence of extraordinary circumstances.

The Court notes, *inter alia*, that the father was not a caregiver, had not been visiting, and had not been a part of the child's life for half of her sixteen months; that when he learned the child had been removed from the mother, he refused the mother's request that he take the child, who was instead briefly placed with a relative of her half-sisters; that after the child was placed with petitioner, the father took no steps to engage in the child's life and even avoided his family members' efforts to facilitate visitation; and that he has a history of domestic violence against the mother in the presence of another child and while the mother was pregnant with the subject child, against the mother of one of his other children, and against children, and had failed to comply with the terms of an order of protection in favor of one of his other children.

Matter of Miner v. Torres
(4th Dept., 1/31/20)

Visit Supervision And Scheduling

VISITATION - Delegation Of Court's Authority

The Third Department finds error in the trial court's order granting the husband the right to exercise parenting time with the child at the end of the school day if he is available and the wife cannot pick up the child.

The parties were unable to agree on how the child should spend time with each parent, and this provision would necessitate much communication and cooperation between them. The provision also delegates to the husband the authority to determine parenting time, which the court could not do.

Donna E. v. Michael F.
(3d Dept., 7/9/20)

* * *

VISITATION - Supervised

The family court determined that the need for supervised visitation between the father and the child had not been demonstrated, but ordered that a third-party adult be present at all times during visitation to facilitate communication between the father and the child because of the father's demonstrated speech impairment.

The Third Department concludes that continued supervised visitation is not only necessary, but should be conducted in a more controlled, therapeutic environment that can afford the father and the child not only safe but more meaningful visitation. The Court notes, inter alia, that both the father and the father's sister, who had been supervising visits, acknowledged that the child and the father have made little progress in their relationship, engage in very little direct communication, with the sister generally serving as an intermediary and relaying the child's communications to the father, and are incapable of any type of bonded relationship despite nearly eight years of court-ordered supervised visitation; that the father has not acknowledged that the child requires therapy and has not been willing to participate in therapy; and that the father lacks insight with respect to the illicit and improper relationship he had with the child's mother - he was born in 1957, she was born in 1989, they first engaged in sexual intercourse when the mother was 13 years old, and she later became pregnant with the child when she was 16 years old.

Matter of Michael U. v. Barbara U.
(3d Dept., 12/24/20)

* * *

VISITATION - Supervised

The Third Department upholds an order denying the father's request for more liberal parenting time, including unsupervised time.

The father has a long history of opioid addiction. He completed outpatient treatment in 2018, and, since a 2017 probation order, has consistently tested negative for drug use. He has maintained full-time employment as a subcontractor and resides with his parents and his 16-year-old son from a prior relationship, of whom he has full custody. From February 2017 to February 2018, he exercised supervised visitation on alternating weekends and one weekday each week at his parents' home; the paternal grandfather and the father's sister, who supervised the visitation, testified that they perceive no safety concerns.

However, the father's sobriety is a relatively new development. He continues to be medically assisted in treatment via a twice daily regimen of Suboxone, and he admitted that it is "an everyday fight to stay away from [his] addiction." He also tends to minimize his conduct and deflect blame for his poor decision-making.

Matter of Curtis D. v. Samantha E.
(3d Dept., 4/2/20)

Visits With Incarcerated Parent

VISITATION - Incarcerated Parent
- Violations/Willfulness

The Third Department upholds a determination that the mother violated a prior visitation order but the violation was not willful, and that, based on a change in circumstances, mandated prison visits with the father were not in the child's best interests.

After entry of the previous order, the father was transferred to a prison facility roughly 350 miles from the child's residence, requiring an approximately 11-hour roundtrip car ride. Although a diagnosis cannot be confirmed until the child reaches the age of three, the child is believed to be on the autism spectrum, was nonverbal, and was exhibiting aggressive behavior and would thrash, scratch his face and hurt himself during car rides. Also, there was "growing animosity' between the parents.

The mother did not comply with the requirement that she bring the child for monthly prison visits due to a combination of factors, including the child's emerging developmental delays and behavioral issues, a lack of financial resources and the father's inappropriate behavior and comments toward her.

Matter of Jemar H. v. Nevada I.
(3d Dept., 4/16/20)

V. PATERNITY/CHILD SUPPORT

PATERNITY - Equitable Estoppel

The Second Department concludes that the doctrine of equitable estoppels should not have been applied against petitioner in this paternity proceeding where the only evidence of an operative parent-child relationship with another man, Joseph T., came from the child's foster mother, who testified that the child called the Joseph T. "daddy" during weekly supervised visits, and that they were affectionate with each other at the visits. Joseph T. did not appear in court and did not testify at the hearing.

Moreover, petitioner did not acquiesce in the establishment of any relationship. He testified that, until the child was removed from the mother's care, he did not know she was married to Joseph T. He commenced this proceeding approximately one month after he learned that his paternity was not established.

Matter of Luis V. v. Laisha P. T.
(2d Dept., 6/10/20)

* * *

PATERNITY - Equitable Estoppel

The First Department affirms an order that denied respondent's motion to dismiss the paternity petition on equitable estoppel grounds and ordered him to submit to DNA testing.

There was no binding and enforceable oral or written agreement between the parties, either before or after respondent donated his sperm. An unsigned, non-final preconception agreement cannot be used to equitably estop a mother from asserting paternity as to a known sperm donor.

In re Claudia B. v. Darrin M.
(1st Dept., 7/9/20)

* * *

PATERNITY - Equitable Estoppel

Respondent Mr. P. is the birth mother of the child O. Mr. P. recently transitioned to become a male, uses the name "A" (a male first name), and prefers masculine pronouns. Mr. P. has three children, but only O is biologically related to Mr. P. The other two were adopted by him. All three children reside with Mr. P. and his fiancé, Ms. K.

Petitioner Mr. F. and respondent Mr. P. became acquainted while they were both working security jobs. Mr. F. heard Mr. P. talking about wanting to conceive a child, and offered to donate his sperm. Mr. F. knew Mr. P. was a lesbian and was in an established relationship with Ms. K.

The Court dismisses the petition, applying the doctrine of equitable estoppel. O has resided exclusively with Mr. P. and Ms. K., whom he knows as his father and mother, and identifies Mr. P.'s other children as his siblings. Mr. F. admitted that at the time of conception, he knew and agreed that Mr. P. and Ms. K. would be raising O. It is Mr. F.'s burden to prove by clear and convincing evidence that there was an intent to co-raise the child, and he failed to do so. He is a complete stranger to O, and delayed taking steps to establish paternity while another person has fulfilled the father role for the child. Mr. F. has failed to prove that it is in O's best interests to conduct Genetic Marker Testing. Also, Mr. F. believes Mr. P. is not capable of turning O into a man.

Finally, although Mr. F. might initially have thought O was not his, and even if he had difficulty locating Mr. P. to have him served and Mr. P. thwarted Mr. F.'s attempts to locate him, the Court's decision must be grounded in what is best for O.

Matter of a UIFSA Paternity Proceeding o/b/o J.F. v. R.P.
(Fam. Ct., Erie Co., 2/19/20)
http://nycourts.gov/reporter/3dseries/2020/2020_20135.htm

* * *

PATERNITY - Equitable Estoppel

The Second Department upholds application of equitable estoppel where respondent had long-assumed the role of a parent, led the children to believe he was their father, and provided financial support to the children for most of their lives.

Neither the rumor allegedly perpetrated by the mother that respondent was not the father, nor the deterioration of his relationship with the children beginning around the time these petitions were filed, militate against application of equitable estoppel.

Matter of Rosa Y. A. P.
(2d Dept., 6/3/20)

VI. SPECIAL IMMIGRANT JUVENILES

SPECIAL IMMIGRANT JUVENILES
GUARDIANSHIP

In this guardianship proceeding commenced by the mother in order to obtain specific findings that would enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status, the Second Department holds that the family court should not have dismissed the petition on the ground that paternity had not been established.

The Second Department makes the required SIJS findings.

Matter of Mardin A. M.-I.
(2d Dept., 10/14/20)

* * *

SPECIAL IMMIGRANT JUVENILE STATUS

In this guardianship proceeding, the First Department grants the child's motion for an order of special immigrant juvenile findings, noting, inter alia, that the child had had no contact with his parents, and received no support from them, since at least September 2014, which established that reunification was not viable due to neglect or abandonment; that the parents' consent to the appointment of a guardian and waiver of service also demonstrate an intent to relinquish parental rights; that in determining whether reunification was viable, the family court should not have refused to consider evidence of events that occurred after the child's 18th, but before his 21st, birthday; and that the child suffered political persecution in Albania that his parents were unable to prevent, and had had no recent contact with his parents and was not sure if they would accept him if he returned.

In re Lavdie H.
(1st Dept., 6/4/20)

* * *

SPECIAL IMMIGRANT JUVENILE STATUS
GUARDIANSHIP

In this guardianship proceeding, the father seeks appointment as guardian of his daughter, and factual findings for purposes of an application for Special Immigrant Juvenile Status. The matter was deemed essential, and thus needed to be heard on the record, despite the Court's reduced operations due to the coronavirus pandemic, because the child will soon turn 21 years old, at which time the Court will be divested of subject matter jurisdiction. The matter was heard virtually.

Over the mother's objection, the Court awards guardianship, and also makes the SIJS findings,

noting that the child testified that the father has been an integral and consistent presence in her life, providing both financial and emotional support, and, although she does not live with the father, that is not a requirement for guardianship; that, as a practical matter, the guardianship would last a matter of days and the only reason for it is to serve as a possible pathway toward citizenship, and there is nothing improper about that motivation and providing that capability to the child is in her best interest; and that the mother and child have not been in contact for the last two years, the mother has provided no financial support for over two years, and the mother testified that the only reason she contests the application is because she fears for her own immigration status if there is a finding that she has abandoned the child.

Matter of M.G.M.L.
(Fam. Ct., Rockland Co., 6/8/20)
http://www.nycourts.gov/reporter/3dseries/2020/2020_20141.htm

VII. ETHICAL ISSUES AND ROLE OF ATTORNEY FOR THE CHILD AND JUDGE

CUSTODY - Right To Counsel/Role Of AFC
- Child's Wishes
- Mental Health Evaluations

The Second Department reverses an order that awarded residential custody of the children to the father, concluding that the attorney for the children, who supported the father, improperly substituted judgment and took a position that was contrary to the wishes of her clients, who were thirteen and eleven years old at the time of the hearing, and were both on the high honor roll and involved in extracurricular activities.

The AFC's failure to support her clients' position is particularly troubling due to the allegations of domestic violence made by both the mother and the children; had the AFC engaged in a more robust representation of her clients, evidence of the father's alienating behavior could have been more fully presented. When appearing before this Court for oral argument, the AFC stated that her clients were not doing well, but she hoped they would improve. She continued to argue in support of the father, in opposition to the wishes of her clients, who were fifteen and almost thirteen at the time.

The children were certainly not too young, nor was there evidence establishing that for some other reason they were unable to make a knowing, voluntary, and considered judgment. While the trial court found that the mother had "over parentified the two girls" and that they had "become totally dependent upon" the mother, and the father was concerned about the amount of school the children missed while in the mother's custody, there was no proof of a substantial risk of serious imminent harm.

The Court also notes that the trial court failed to take into account the stated preferences of the children as some indication of their best interests, and that the better practice would have been to order an updated forensic evaluation of the parties and the children, particularly where issues of parental alienation, parentification, and Munchausen syndrome by proxy were raised.

Silverman v. Silverman
(2d Dept., 7/29/20)

* * *

ADOPTION - Right To Counsel/Child

In this adoption proceeding, the Third Department finds no abuse of discretion where the family court failed to appoint an attorney for the child. Such an appointment was not mandatory, no request for an appointment was made, and the record lacks proof of any demonstrable prejudice to any party or the child.

Matter of Lillyanna A.

(3d Dept., 1/16/20)

***Practice Note*: Regardless of whether every child who is the subject of an adoption proceeding should have the right to counsel, it is clear that when the child was represented by counsel in a termination of parental rights proceeding, and continues to be represented by counsel in a related permanency proceeding, the adoption is a critical stage of the ongoing proceedings at which the child should have a right to counsel.**

* * *

CUSTODY - Right To Counsel/Child
- Lincoln Hearings

The Fourth Department upholds an order awarding custody to the father, noting that the father established a change of circumstances where the mother engaged in conduct designed to alienate the children from the father.

The Court finds unpreserved the mother's contention that the attorney for the children was ineffective because he advocated a position that was contrary to the children's wishes, noting that the mother failed to make a motion seeking the AFC's removal.

In any event, the record supports a finding that the children, ages ten and seven at the time of the proceeding, lacked the capacity for knowing, voluntary and considered judgment, and that following the children's wishes would have placed them at a substantial risk of imminent and serious harm. The family court did not err in declining to conduct a *Lincoln* hearing, since the AFC expressed the children's wishes, and there are indications in the record that they were being coached on what to say to the court.

A dissenting judge asserts that the court should have held a *Lincoln* hearing, noting that the AFC substituted his judgment for that of the children and advocated that custody be transferred from the mother to the father, even though the children had been in the mother's custody since birth and the father admitted to having committed an act of domestic violence against the mother.

Matter of Muriel v. Muriel
(4th Dept., 1/31/20)

* * *

JUDGES - Bias/Interference In Proceeding
CUSTODY - Interference With Parent-Child Relationship

The Second Department, reaching the mother's unpreserved claim, reverses an order awarding sole legal custody to the father and remits the matter for a new hearing before a different judge, concluding that the family court was biased against the mother and deprived her of a fair and impartial hearing.

The court cross-examined the mother on matters irrelevant to a determination of custody, including referring to the mother as "emotionally excessive" and inquiring as to how many online dating web sites the mother utilized at the time she met the father, and when the mother and the father became intimate. The court asked the mother, "so you were looking to start a relationship with someone?" and then commented, "And so you were married at the time?" Although the father was also married when he began his relationship with the mother, no such questions or comments were directed to him. The court's inquiry of the mother exceeded 30 pages of transcript. Although the court also questioned the father, the first inquiry related to setting up a parental access schedule, and the second set of inquiries appeared designed to elicit testimony that was unfavorable to the mother, with the court intimating on one occasion that the mother was practicing "extortion" against the father in order to gain an advantage in the proceedings.

However, since there is evidence that the mother interfered with the father's parental access, temporary sole legal and physical custody shall remain with the father, with parental access to the mother.

Matter of Siegell v. Iqbal
(2d Dept., 3/25/20)

*** * ***

TERMINATION OF PARENTAL RIGHTS - Right To Counsel/Child

The Pennsylvania Supreme Court holds that, given the critical importance and permanency of termination proceedings, as well as children's inability to navigate the termination process themselves, appellate courts should engage in sua sponte review to determine if the lower court appointed counsel to represent the legal interests of the children in a contested termination proceeding.

Where the court has appointed a guardian ad litem/counsel to represent both the child's best interests and legal interests, appellate courts also should verify sua sponte that the court made a determination that the attorney could represent the child's best interests and legal interests without conflict.

However, where the court determined that counsel does not have a conflict representing the child's best and legal interests, an appellate court should not look behind the face of the order, sua sponte, to determine whether counsel had a conflict.

In addition, appellate courts should not review sua sponte whether a GAL/counsel sufficiently advocated for the child's legal interests by insuring that the child's preferred outcome is placed on the record. The absence of a child's preference on the record does not equate to a failure to ascertain the child's preferred outcome or to provide effective representation. Children understandably may resist stating whether their parents' rights should be terminated and declaring their preference between their biological and foster parents.

Moreover, counsel has a duty of confidentiality, and should not be compelled to disclose the child's preferences. This decision is best left to counsel, and to the lower court which has often witnessed the child, relevant family members, and other stakeholders through months of hearings.

In re Adoption of K.M.G.
2020 WL 6580616 (Pa., 11/10/20)

***Practice Note*: In New York, the attorney for the child has a statutory obligation to communicate the child's wishes to the court. FCA § 241; *Matter of Derick Shea D.*, 22 A.D.3d 753 (2d Dept. 2005) (orders terminating parental rights reversed, and matter remitted for new dispositional hearing, where child's lawyer expressed opinion that best interests of children, ages ten and fourteen, called for termination of parental rights, and set forth his reasoning, but failed to state that children had expressed desire to be returned to mother).**

* * *

JUDGES - Bias

In the context of a custody dispute, the trial judge accepted a Facebook "friend request" from the mother after a contested hearing, but before rendering a decision. In the course of their 25-day Facebook "friendship," the mother "liked" 16 of the judge's Facebook posts, "loved" two of his posts, commented on two of his posts, and "shared" and "liked" several third-party posts related to an issue that was contested at the hearing. The judge never disclosed the Facebook friendship or the communications, and he ultimately ruled entirely in the mother's favor.

After discovering the Facebook friendship, the father moved for reconsideration, requesting judicial disqualification and a new hearing. The judge admitted to the Facebook interactions, but denied the motion and claimed that he was impartial because he had already decided on his ruling prior to accepting her friend request. The court of appeals reversed and remanded with directions that the case proceed before a different judge.

The Wisconsin Supreme Court affirms, concluding that the extreme facts of this case rebut the presumption of judicial impartiality and establish a due process violation.

Miller v. Carroll
2020 WL 3244864 (Wis., 6/16/20)

* * *

ETHICS - Communication With Represented Person
CUSTODY - Right To Counsel/Child

The Second Department concludes that the Family Court erred in disqualifying the

mother's attorney where there was evidence that the child had forwarded email communications that she had written to the attorney for the child to the mother and the mother's attorney, but the father presented no evidence that the mother's attorney solicited those emails or otherwise communicated with the child.

Matter of Lopresti v. David
(2d Dept., 1/29/20)

* * *

CUSTODY - Appeals

The Fourth Department concludes that where neither the attorney for the child nor the mother filed a notice of appeal, the AFC's contention that the court should have awarded sole custody to the mother is not properly before the Court.

Matter of Latray v. Hewitt
(4th Dept., 3/13/20)

* * *

CUSTODY - Relocation
- Role Of AFC

The Second Department affirms April 4, 2019 orders that, inter alia, awarded the father sole legal and physical custody and permitted him to relocate with the children to Kansas.

Although the attorney for the children advocated awarding custody to the mother, the children were too young (born in March 2016 and November 2017) to express their desires and the AFC relied on certain information which was not credited by the court.

Noting that this was an initial custody determination and thus strict application of the factors relevant to relocation is not required, the Court observes that the father had a strong support system in Kansas since the parties had previously lived there and the father had extended family in that area of Kansas, while the mother had no family or long-standing friends in the area where she resided.

Matter of Williamson v. Williamson
(2d Dept., 4/29/20)

* * *

TERMINATION OF PARENTAL RIGHTS - Right To Counsel/Child
ETHICS - Conflict Of Interest

In this termination of parental rights proceeding, the Fourth Department upholds the

denial of respondent father's motion for disqualification of the public defender's office from representing the mother where a prior attorney-client relationship existed between the father and the public defender's office. The father failed to establish that his interests and the mother's interests were materially adverse where both parents wanted to have the child placed with family members rather than in foster care.

The court also did not err in denying the father's request for removal of the legal aid society-employed attorney for the child due to a conflict where other attorneys from the same legal aid society previously represented two of the mother's other children in an unrelated proceeding and advocated that they be placed with the mother's relative, whereas the AFC in this case advocated placing the child in foster care. The AFC did not fail to advocate for the child's best interests. The other children of the mother had not developed a relationship with this child, who has lived with his foster parents for the vast majority of his life.

Matter of Carl B.
(4th Dept., 3/13/20)

* * *

ETHICS - Conflict Of Interest
CUSTODY - Right To Counsel Of Choice

In this custody proceeding, the Second Department finds no error in the disqualification of the attorney for the grandmother where the attorney had previously represented the father on an assault matter and a drug charge. The prior representation created the appearance of a conflict of interest and a substantial risk of prejudice.

Matter of Blauman-Spindler v. Blauman
(2d Dept., 6/10/20)

* * *

CUSTODY - Right To Counsel - Child/Effective Assistance On Appeal

In the father's appeal in this custody matter, the attorney for the children, who had represented the children in family court, initially submitted a letter expressing his views as to the children's best interests, and stating that he did not intend to file a brief because the children - then approximately ten and six years old - were "too young to formulate an independent opinion and provide a foundation for their respective opinions." The Third Department rejected the letter and directed the AFC to submit a brief. The AFC filed a brief in which he again cited his clients' alleged inability to form an opinion, and, without stating the children's preferences, discussed the factors pertinent to a best interests analysis and concluded that the order should be affirmed.

The Third Department assigns a new AFC on appeal, concluding that the children were

denied the effective assistance of counsel. It was the AFC's obligation to "consult with and advise the child[ren] to the extent of and in a manner consistent with [their] capacities" (22 NYCRR 7.2[d][1]). At ten, the older child was certainly old enough to be capable of expressing her wishes, and whether the younger child had the capacity to do so was not solely dependent upon her calendar age, but also upon such individual considerations as her level of maturity and verbal abilities.

Even when it is appropriate for an AFC to substitute his or her judgment for the child's preferences, the AFC must inform the family court of the child's wishes if authorized by the child to do so (see 22 NYCRR 7.2[d][3]). Here, the AFC's brief does not indicate the children's wishes, or refer to 22 NYCRR 7.2 or to the analysis the rule requires an AFC to undertake before advocating for a position that does not express the child's wishes. Also, 22 NYCRR 7.2 does not require either the child or the AFC to make any best interests determination; that determination is to be made by the court.

Also, although the AFC met with the children during the family court proceeding, it does not appear that he met or spoke with them again during the appeal and discharged his obligations to them at that stage.

Matter of Jennifer VV. v. Lawrence WW.
(3d Dept., 4/2/20)

*** * ***

CUSTODY - Right To Counsel/Child

The Fourth Department, upholding a determination to award the mother sole legal and physical custody where the father was alienating the ten-year-old child from the mother, and upholding the denial of the father's motion for removal of the trial attorney for the child, rejects the appellate AFC's contention that the trial AFC's advocacy of a position contrary to the child's wishes deprived the child of effective assistance of counsel.

The father's persistent and pervasive pattern of alienating the child from the mother is likely to result in a substantial risk of imminent, serious harm to the child. The child's stated wishes were to have no contact with the mother, and to follow those wishes would be tantamount to severing the child's relationship with her mother.

Matter of Grabowski v. Smith
(4th Dept., 4/24/20)

*** * ***

CUSTODY - Right To Counsel/Child
- Adjournments

In this custody proceeding, the Fourth Department rejects the mother's contention that the

court erred in failing to adjourn the matter when it substituted a new attorney for the child during the trial because of a conflict of interest.

The new AFC had not met with the mother, the child, or petitioner, but the mother had not responded to the prior AFC, and there was no indication that she would respond to the new AFC.

Moreover, in light of the child's young age, she would not have been able to express her wishes to the AFC. The new AFC actively participated in the trial and assured the court that she would look at a copy of the transcripts and submit a written closing summation at a later time, which she did.

Matter of Watkins v. Hart
(4th Dept., 10/2/20)

*** * ***

ETHICS - Advocate-Witness Rule
RIGHT TO COUNSEL

In this family offense proceeding, the Court grants respondent mother's application for disqualification of the father's attorney, who recounted while appearing in court alleged events that the attorney, and not the father, witnessed. Although the father states that he does not intend to call his attorney, that does not mean there is no potential for him to be called by the mother.

The father invokes the advocate-witness rule exception applicable when disqualification would work a substantial hardship to the client because of the distinctive value of the lawyer in the particular case. The father cites his attorney's purported unique knowledge of the intersection of family law and mental health issues, and the time and expense that would be required to get another attorney sufficiently familiar with the circumstances and filings in these proceedings. However, the Rule 3.7 commentary refers to the relevancy of one or both parties reasonably foreseeing the possibility of the lawyer becoming a witness, and, at the very first appearance in this matter, counsel made the decision to insert himself into the proceeding as a witness, and the Court raised its concerns. The case law is clear that adverse financial consequences do not justify a denial of disqualification.

The Court also rejects the father's attorney's argument that this issue has no bearing on the parties' custody case. Even if the matters are heard separately, the Court must consider the effect of any domestic violence upon the best interests of the children. The two matters are inextricably intertwined.

B.B. v. E.E.
(Fam. Ct., West. Co., 9/10/20)
https://www.law.com/newyorklawjournal/almID/1600975836NYredacted/

* * *

CUSTODY/VISITATION - Right To Counsel/Child
ETHICS - Advocate-Witness Rule

In this visitation proceeding, the attorney for the child stated in a summation letter to the family court that, in interviews, the child did not "express any fear of [the] father" and "indicated a willingness to visit with [the] father." In its decision, the court directly referenced this letter, and used this language within its findings.

The Third Department rejects the mother's contention that the court improperly relied on the position of the attorney for the children, as set forth in his summation letter. The court's thorough written decision reviewed the evidence presented at the fact-finding hearing, and did not improperly adopt the AFC's stated position.

Matter of Nicole R. v. Richard S.
(3d Dept., 6/18/20)

***Practice Note*: It would have been salutary had the Third Department mentioned that any factual claims made by an AFC in summation that are not already reflected in the record constitute unsworn testimony that the court may not consider.**

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ETHICS - Duty To Inquire Regarding Illegal Conduct

The ABA addresses Model Rule 1.2(d), which prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent.

That knowledge may be inferred from the circumstances, including a lawyer's willful blindness to or conscious avoidance of facts. Accordingly, where facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity.

Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge," other rules may require the lawyer to inquire further. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4.

If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules.

This opinion does not address the application of these rules in the representation of a client

or prospective client who requests legal services in connection with litigation.

***Formal Op. 491*, Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings**
(ABA Standing Comm. on Ethics & Prof'l Responsibility, 4/29/20)

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VISITATION - Grandparents
- Hearing Requirement
- Right To Counsel/Child

The First Department finds reversible error where the family court awarded the paternal grandparents visitation without conducting a full trial. The decision was based only on the grandmother's partial testimony. The mother was not present due to a medical procedure she was undergoing in North Carolina.

Even if the court was justified in drawing a negative inference from the mother's failure to give testimony, the court failed to afford the attorney for the child an opportunity to ascertain the seven-year-old child's position. "Although the Family Court appropriately appointed an AFC, he did not let her do her job. The child's position in this case was particularly important because of the mother's representations that the child did not want to see the grandparents so soon following her father's death and would be traumatized by such visitation."

If after a full hearing the family court determines awards visitation, it should clarify the award vis-a-vis each grandparent, given that they filed separate petitions and were not jointly represented by counsel, and may be separated.

In re Donna F.T. v. Renee G.-T.
(1st Dept., 6/18/20)

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CUSTODY/VISITATION - Right To Counsel/Role Of AFC
- Discovery/Mental Health Reports

In this divorce proceeding, the Court grants plaintiff father's motion and directs that the attorney for the 14-year-old child is not to show the forensic report to the child, and may discuss the report in age-appropriate terms without directly quoting the report.

Rule 7.2 does not supersede the parens patriae doctrine. The Court must strike a balance between the role of the AFC and the Court's parens patriae role where, as here, a determination is made as to what information from a therapeutic visitation report is shared with a 14-year old child during a visitation dispute. The child has the right to have her voice heard in court but does not have unfettered access to the court process. The child

testifies at an in camera interview, not in open court, and does not sit next to the AFC for the trial or appear at oral arguments. Her testimony is sealed pursuant to CPLR 4019 and cannot be viewed by either the parents or their attorneys. These limitations are designed to protect the child. The Court notes that the child allegedly has used specific quotes from the report to question the therapist and to negatively impact the therapeutic supervised visitation with the father.

The Court rejects the father's request that the AFC seek permission in connection with future communications with the child. As noted in Matter of Newton v. McFarlane (174 A.D.3d 67), "a teenaged child has a real and substantial interest in the outcome of litigation between the parents as to where the child should live and who should be entrusted to make decisions for the child. It seems self-evident that the child is the person most affected by a judicial determination on the fundamental issues of responsibility for, and the environment of, the child's upbringing. To rule otherwise would virtually relegate the child to the status of property, without rights separate and apart from those of the child's parents."

Clarence M. v. Martina M.
(Sup. Ct., Kings Co., 5/11/20)
http://www.nycourts.gov/reporter/3dseries/2020/2020_20108.htm