CHILD WELFARE CASELAW/LEGISLATIVE UPDATE

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I. Legislation, Regulations and Policies

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.

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.

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

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)

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ABUSE/NEGLECT - Removal/Imminent Risk

The family court granted petitioner's FCA § 1027 removal application where the petition alleged, inter alia, that the mother resided with the child with the mother's mentally ill uncle in his apartment and allowed her uncle to care for the child while she worked overnight shifts; the court allowed the mother to move with the child into her sister's apartment in Queens and directed her to not leave New York with the child despite her stated plan to move to another sister's home in Texas; the court subsequently learned that the child had been living without petitioner's permission with the maternal grandmother on Long Island rather than with the mother and the aunt in Queens; and the mother explained that she had to return to work and needed overnight care for the child, and maintained that she had contacted petitioner to inform the caseworker that the child was staying with the maternal grandmother while the mother worked and looked for an apartment where she could reside with the child.

The Second Department reverses, noting that the family court's concerns about, inter alia, whether the mother would keep in contact with petitioner or return to court for continued proceedings did not establish an imminent risk that could not be mitigated by reasonable efforts to avoid removal.

Matter of Cameron L.
(2d Dept., 12/24/19)

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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)

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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)

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ABUSE/NEGLECT - Removal/Imminent Risk
- Domestic Violence.

The Second Department affirms an order that, upon a FCA § 1027 hearing, granted petitioner's application for the temporary removal of the children from the custody of the mother and placed the children in the custody of petitioner.

The evidence demonstrated that the mother, despite her awareness of a full stay-away order of protection barring the father from being near the children, had asked and allowed him to care for the children on more than one occasion. Her conduct minimized the seriousness of the father's domestic violence against her in the presence of the children, and exhibited a significant lack of awareness of and insight into the impact that witnessing such violence would have upon the children.

Matter of Melody M.
(2d Dept., 10/16/19)

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ABUSE/NEGLECT - Removal

Respondent mother was a non-respondent on a neglect petition filed against Joshua's father Mr. F. for allegedly punching the mother in the presence of both small children. Joshua was released to the mother, and Kanan was released to the mother and his father Mr. O. Subsequently, ACS filed this neglect petition against the mother alleging that she left Kanan with his father without

having any contact with the father or the child, and left Joshua with his paternal grandmother without any contact until she apologized for disappearing but still did not take the child back.

Upon a FCA § 1027 hearing, the Court finds that there is insufficient proof of imminent risk that cannot be ameliorated by orders of this Court.

The mother, who just turned twenty-one, was not charged with neglect until she did not follow ACS's order to enter the shelter system and instead left each child with a paternal family member without maintaining adequate contact. She left the boys with family members because she was trying to create a better life for them by focusing on earning money at a short-term full-time job and was also seeking to improve herself by attending classes at the Door community service center. She did not feel she could manage the job and her services while caring for two very young children without added support from her own family that she lacked. She exercised good judgement in choosing caretakers and was correct in believing they would take good care of them.

The problem is that the mother did not clearly communicate her needs to each caretaker and then did not maintain regular contact with the children or their caretakers while she was gone. She misjudged in thinking that this plan was in the best interests of her children. But the Court is cognizant of her young age and brain development and credits her testimony that she has learned from her mistake.

The issue is not whether ACS can establish neglect, but whether at this time the children would be at imminent risk. Moreover, the harm suffered by Kanan was apparent in the ACS report indicating that he cried every time his mother left him at the end of a court-ordered visit. For Joshua, who is only ten months old, the loss of daily bonding time with his mother is critical.

Matter of Joshua F.
(Fam. Ct., Kings Co., 11/12/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51859.htm

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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)

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ABUSE/NEGLECT - Removal/Imminent Risk

The Court temporarily releases the infant child pursuant to FCA § 1027, noting, inter alia, that the parents brought the child to the hospital because he was exhibiting signs of pain in his right lower leg, but the child had no other injuries and was treated and permitted to go home the next day even though a report had been made to the State Central Register; that there are varied and competing medical opinions regarding the manner in which the child sustained a fractured tibia, the injury could have been accidental or non-accidental, and the mother's explanation remained consistent and could be a possible cause; that ACS found the home safe and suitable, and, until the date of an emergency removal, the child was safely in the care of his parents while being supervised by ACS, which determined that the child was safe as long as a safety plan remained in effect; that it was not until a doctor informed ACS that the child's injury was consistent with abuse and not adequately explained by the parents that ACS decided to remove him, which was not "glaringly new" information; and that although the child was placed with his maternal grandmother, he has experienced trauma evidenced by bouts of crying while waking up nightly, and the mother has had to sleep over at the grandmother's home to assist in soothing the child.

With a number of measures and services in place, any harm or imminent risk of harm can reasonably be mitigated.

Matter of Nathan G.-C.
(Fam. Ct., Bronx Co., 10/30/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51770.htm

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PSYCHOTHERAPIST-PATIENT PRIVILEGE
ABUSE/NEGLECT - Reporting Requirement

Under California's Child Abuse and Neglect Reporting Act, sexual abuse includes "sexual exploitation," which cover any person who knowingly "downloads," "streams," or electronically "accesses" child pornography.

Plaintiffs are two licensed marriage and family therapists and one certified alcohol and drug counselor with significant experience treating patients with sexual disorders, addictions, and compulsions. According to the complaint, plaintiffs' patients include many persons who, during the course of voluntary psychotherapy, have admitted to downloading or electronically viewing child pornography but who, in plaintiffs' professional judgment, do not present a serious risk of sexual contact with children. Plaintiffs contend that the basic norm of confidentiality protected by the psychotherapist-patient privilege applies and that the statute violates their patients' right to privacy under Article I, § 1 of the California Constitution and the Fourteenth Amendment of

the United States Constitution. The trial court dismissed the complaint, and the Court of Appeal affirmed.

A sharply split Supreme Court of California reverses, holding that plaintiffs have asserted a cognizable privacy interest under the California Constitution and that their complaint survives demurrer. The burden shifts to the state to demonstrate a sufficient justification for the incursion on privacy, and the question is whether the statute's purpose of protecting children is actually advanced by mandatory reporting of psychotherapy patients who admit to possessing or viewing child pornography.

The Court does not hold that patients' communications with their therapists are protected when the therapist believes the patient has committed hands-on sexual abuse or poses a threat of doing so. All statutory exceptions to the psychotherapist-patient privilege, including the dangerous patient exception, still apply.

Matthews v. Becerra
2019 WL 7176898 (Cal., 12/26/19)

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)

Discovery

ABUSE/NEGLECT - Discovery

In this proceeding alleging sexual abuse, neglect, and derivative abuse and neglect, respondent, the father of one of the subject children, served subpoenas upon the non-party mother and the non-party father of two of the children seeking their depositions and the production of all written documents referencing, inter alia, allegations of child abuse and neglect and domestic violence. The non-party father moved, and the mother cross-moved, to quash the subpoenas. The court granted the motion and the cross motion.

The Second Department reverses, noting that under CPLR 3101(a)(4), there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a nonparty, upon notice stating the circumstances or reasons such disclosure is sought or required; that the words "material and necessary" are to be interpreted liberally to require disclosure of any facts which will assist preparation for trial by sharpening the issues and reducing delay and prolixity; that if there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered material; that the crux of respondent's defense is that the mother has a history of fabricating allegations against him, including an allegation that he tried to murder or harm her and the children; and that the nonparties failed to sustain their burden of demonstrating that the requested disclosure was "utterly irrelevant" to the proceeding or that the futility of the process to uncover anything legitimate is inevitable or obvious.

Matter of Grover S.
(2d Dept., 10/9/19)

* * *

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)

* * *

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 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)

* * *

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)

* * *

ABUSE/NEGLECT - Hearsay/Admissions By Respondent
- Interpreters

The Second Department concludes that the child's out-of-court statements regarding sexual abuse were sufficiently corroborated by respondent father's statement to the police, noting that the law concerning the suppression of evidence and the exclusionary rule is not applicable to a civil proceeding.

The family court did not err in proceeding with the fact-finding hearing with an interpreter appearing remotely over Skype. Non-English speaking litigants are entitled to an interpreter at proceedings to enable them to participate meaningfully in their trial and assist in their own defense. The procedures utilized by the court allowed the father to meaningfully participate.

Matter of Omnamm L.
(2d Dept., 11/27/19)

* * *

TERMINATION OF PARENTAL RIGHTS - Defaults

In this termination of parental rights proceeding, the First Department upholds the denial of respondent father's motion to vacate an order which determined that he is a notice-only father where respondent asserted that he was late arriving at court because he chose to attend a meeting with his shelter worker, but failed to provide substantiating evidence or explain why he made no

attempt to contact his attorney, the Family Court, or the agency about his inability to appear at the hearing.

In re Sariyah L.J.
(1st Dept., 9/26/19)

* * *

SUPPORT - Defaults

In this support proceeding, the Third Department upholds the denial of respondent's motion to vacate an order issued on default where respondent asserts, inter alia, that his military service prevented him from attending the fact-finding hearing.

The father was present in court when the hearing was scheduled and did not indicate that he was unable to attend, nor did he assert that he had any work or military commitments. The purpose of Military Law § 303 is to prevent default judgments from being entered against military personnel without their knowledge.

Matter of Ronelli-Dutcher v. Dutcher
(3d Dept., 10/17/19)

* * *

TERMINATION OF PARENTAL RIGHTS - Defaults

In this termination of parental rights proceeding, the First Department upholds the denial of the mother's motion to vacate where she failed to provide any details or documentation to support her claim that she was incarcerated on the date of the hearing, or, with respect to another hearing, to support her claim of illness. She also failed to explain her failure to notify her attorney or the court.

In re Giselle H.G.
(1st Dept., 10/17/19)

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)

* * *

TERMINATION OF PARENTAL RIGHTS - Abandonment/Discouraging Contact

The Third Department upholds an order terminating the father's parental rights on the ground of abandonment, noting, *inter alia*, that the family specialists did not discourage contact with the children by raising the possibility of a judicial surrender.

They discussed all potential options with the father, including the possibility of a surrender because of the length of time the children had been in foster care and the father's incarceration. Petitioner cannot be faulted for attempting to pursue a permanency plan that would afford the children some measure of stability.

Matter of Damien D.
(3d Dept., 10/24/19)

* * *

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)

* * *

ABUSE/NEGLECT - Disposition/Violations
- Educational Neglect

In this Article Ten proceeding, the Third Department upholds an order which determined that respondent willfully violated a dispositional order by failing to, among other things, ensure that the child (born in 2004) attend school; and that modified the dispositional order by temporarily placing the child pending respondent's completion of necessary services.

The Court notes that notwithstanding her academic achievement, the child's rate of absenteeism adversely affected her ability to qualify for and participate in certain advanced or accelerated programs; that any student who fails to attend at least 75% of his or her class time risks not earning sufficient credit to move on to the next grade level, regardless of the student's overall academic performance; that the child's high rate of absenteeism could impair her ability to form peer relationships and her social and emotional growth; and that respondent rejected mental health treatment and otherwise failed to provide any insight into why the child was not able to timely and regularly attend school, and failed to articulate any plan addressing the problem.

Matter of Hayley QQ.
(3d Dept., 10/17/19)

Creating Risk Of Injury

ABUSE/NEGLECT - Creating Risk Of Injury

Respondent discharged a firearm from inside the home that he shared with the child and the child's mother. The shots were fired through the front door and into the driveway. Neither the child nor the mother was home at the time of the incident. The court made a finding of neglect, noting that the child could have been present in the driveway and that a reasonable and prudent parent would not have engaged in such behavior.

The Third Department reverses. Although petitioner and the attorney for the child argue that the child and the mother could have returned to the home at any time and traveled through the likely path of the shotgun pellets, that did not occur and the danger was only hypothetical rather than near or impending. The problem with the proof is not that, fortuitously, nothing happened to the child, but rather that nothing could have happened because the child was not home.

Matter of Jordyn WW.
(3d Dept., 10/17/19)

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)

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 - Domestic Violence

The Second Department upholds a finding of neglect where, during one incident, respondent father ran at the mother screaming, causing the child to cry and say, "Daddy, stop;" the mother locked herself and the child in a bedroom to escape the father's verbal abuse; the father then broke down the door, causing a piece of molding to fly across the room, landing near the child; and, once in the room, the father pushed the mother out of the way, grabbed the child, and walked out of the room, and the child became upset and screamed, "Mommy. Mommy, come back;" and, during another incident, the father ran up to the mother as she was playing with the child, pressed his forehead against the mother's forehead, and screamed profanities at her, causing the child to cry, and, following that incident, the child started to repeat the father's insults to the mother.

Matter of Cerise M.
(2d Dept., 11/13/19)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department upholds a finding of neglect where the police officer called to the scene concluded that respondent and the mother were aggressors and arrested them both; respondent himself testified that when the mother pushed him he pushed her back, and he continued to engage with her even after the child repeatedly asked them to stop fighting; respondent may have been involved in telling the child to stay in the bathroom, but "this was in any event a dubious protective measure, given the extremely small size of the apartment … and the child's almost certain ability to hear the screaming and struggling over a knife even from behind the bathroom door;" respondent entered the bathroom with his fingers lacerated and bloodied by the mother's use of a kitchen knife, and exposed the child to the full extent of the violence; and although respondent cites the child's use of the word "sad," the child said she was "scared," and she was in close physical proximity to the altercation, which involved screaming, pushing, biting, and lacerations by knife.

In re Kimora D.
(1st Dept., 10/31/19)

* * *

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)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department upholds a finding of neglect where, at about 3:00 a.m., the father grabbed the mother by the throat, pushed her against the wall and choked her. All three children were present in the apartment at the time and the eldest child saw what was transpiring and "yelled, stop, poppy, stop."

The children were in imminent danger of physical impairment due to their proximity to the violence.

In re J.R.M.-C.
(1st Dept., 10/29/19)

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/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 Unsupervised
- Medical Neglect

The First Department upholds a finding of neglect where the mother placed her then eighteen-month-old daughter in the control of her nine-year-old son for brief periods of time when the children were sent to retrieve mail from the lobby of their building. Her son had a history of emotional and behavioral issues that made this particularly inappropriate.

The mother was aware that he had engaged in dangerous and destructive behavior, including attempting to set fires, and had expressed extreme jealousy of his sister and written a letter to the mother stating that he felt unloved. Her daughter was still learning to walk on stairs, and, on numerous occasions, she encouraged her son to walk with her daughter down multiple flights of stairs without adult supervision. On at least one occasions, her son engaged in sexual behavior with his sister while alone with her in the building's elevator.

The mother failed to continue with recommended therapy for her son after his school disciplined him for offering to give a female classmate money for sex. Her failure to adequately address his emotional and psychiatric needs adversely affected his mental health and posed a risk to other children.

In re S.H.
(1st Dept., 10/17/19)

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 - 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 a finding of derivative neglect in light of the prior neglect finding, the father's failure to address his substance abuse and domestic violence issues, and the vulnerable age of the subject child, who was days old at the commencement of this proceeding. The father's acts of domestic violence and drug use in 2014 were sufficiently proximate in time to warrant the court's conclusion that the conditions persisted.

Matter of Javaris K. C.
(2d Dept., 11/20/19)

* * *

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)

* * *

ABUSE/NEGLECT - Derivative Abuse/Summary Judgment
- Visitation

The First Department upholds a finding of derivative abuse via summary judgment where, before the subject child was born, respondent was convicted upon a jury trial of raping the subject child's then seven-year-old half-sister and filming the sexual assault, and was sentenced to 25 years to life in prison.

The presumption in favor of parental visitation was rebutted where the now five-year-old child has never met respondent, who has been incarcerated for the entirety of the child's life; and respondent continues to deny his guilt following his conviction, and has failed to attend a sex offender program and contends that he does not need sex offender treatment. While respondent has suggested that visitation could be facilitated by the child's paternal grandmother, she is a complete stranger to the child.

In re Jonathan R.F.-C.
(1st Dept., 10/1/19)

Sexual Abuse

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)

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/Alcohol Misuse

The Fourth Department upholds a neglect finding based on the presumption in FCA § 1046(a)(iii) where respondent mother lost a job due to her drug use; she appeared intoxicated due to drugs or alcohol on one occasion when police officers arrived to check on respondent father; the mother admitted that she used cocaine during the relevant time period; and she took prescription drugs in a suicide attempt that left her hospitalized.

Matter of Jack S.
(4th Dept., 10/4/19)

* * *

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)

* * *

ABUSE/NEGLECT - Alcohol Misuse

The Fourth Department finds sufficient evidence of neglect where, in one incident, the mother consumed alcohol in the middle of the day and, after seeing her then fourteen-year-old child pour out the remaining alcohol, she locked him out of the house before falling into a sleep from which she could not be awakened, and the two other children, who were under the age of ten, were thus without supervision; in another incident, the mother consumed alcohol and the oldest child observed her "passed out" on the couch with empty beer cans next to her; the children had been removed in 2013 and placed with the maternal grandmother and stepfather due to the mother's

substance abuse issues, she had relapsed twice before, and the children had only recently been returned to her custody; and the oldest child testified that he and his siblings were afraid of the mother when she consumed alcohol and this testimony was corroborated by the testimony of the caseworker who interviewed the younger siblings.

Matter of Nevaeh L.
(4th Dept., 11/15/19)

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 - 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

The First Department finds sufficient evidence of sexual abuse where the child's out-of-court statements were sufficiently corroborated by testimony of a caseworker and the child's mother showing that the child consistently reported the abuse.

In re Mariah B.
(1st Dept., 12/26/19)

* * *

ABUSE/NEGLECT - Findings Of Fact
- Corroboration
- Allowing Abuse Or Neglect

The Fourth Department first concludes that the family court failed to satisfy its obligation to set forth the facts essential to its decision with respect to the mother's motion to dismiss and the ultimate fact-finding and dispositional determinations. The verbatim repetition of allegations from the petition in spaces on the preprinted order is insufficient.

After noting that the record is sufficient to enable the Court to address the merits, the Court concludes that petitioner failed to establish a prima facie case of neglect based on an incident involving age-inappropriate sexual conduct between the youngest child and a non-family member. The then five-year-old child's out-of-court statements to two caseworkers were not sufficiently corroborated. Although the disclosure reflected age-inappropriate knowledge of sexual matters, there was no other evidence tending to support the reliability of the statements. Although the caseworkers asserted that they utilized forensic interviewing techniques to avoid leading the child, there is no evidence establishing that either caseworker was qualified to give expert validation testimony.

In addition, petitioner did not prove that the mother became aware of the incident at a time when she could have acted to avoid harm or the risk of harm.

Matter of Carmellah Z.
(4th Dept., 11/15/19)

* * *

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)

* * *

ABUSE/NEGLECT - Hearsay Evidence - Business/Medical Records

The Second Department, while finding no error in the admission of hospital records that were properly certified and contained the requisite delegation of authority, agrees with the family court's determination that the hair follicle testing records also were admissible.

While the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or establish that the records were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business.

Here, the DSS presented testimony from a case manager from the Family Court Treatment Alternatives for Safer Communities program that the hair follicle test results provided by an outside laboratory were incorporated into her office's reports and routinely relied upon when issuing hair follicle test reports. The DSS also established that each participant in the chain that produced the reports acted in the regular course of business.

Matter of Sincere S.
(2d Dept., 10/23/19)

* * *

ABUSE/NEGLECT - Hearsay Evidence/FCA § 1028 Hearing Testimony

The Second Department finds reversible error where the family court, at a fact-finding hearing, admitted into evidence FCA § 1028 hearing transcripts which included hearsay that formed the basis of the court's fact-finding of neglect.

Section 1028 hearings were not intended to replace fact-finding hearings, as the evidentiary standards are different. CPLR 4517, which governs the admissibility of prior testimony in a civil action, is applicable here (see FCA § 165) since the Family Court Act does not address the issue. Under CPLR 4517(a)(3), prior trial testimony of a witness may be used by any party for any purpose against another party if the court finds that such witness is dead or otherwise unavailable. Here, the family court made no such finding.

Matter of Louie L.V.
(2d Dept., 10/23/19)

* * *

ABUSE/NEGLECT - Right Of Confrontation

The Second Department finds no error where the family court permitted the child to testify at the fact-finding hearing via closed-circuit television, noting that the child expressed fear about seeing the father during her testimony and worried she would not be able to testify if she saw him; and that the child was subject to vigorous cross-examination after her direct testimony.

Matter of Nevaeh L.-B.
(2d Dept., 12/4/19)

* * *

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)

* * *

ABUSE/NEGLECT - Hearsay Evidence/DSS Records

In this FCA Article Ten proceeding, the Court denies petitioner's application for the admission into evidence, under the business records rule, of certified child protective services investigative progress notes.

The Court notes, *inter alia*, that many of the entries consist of statements, reports and even rumors provided by persons under no business duty to report to petitioner; that none of the three caseworkers who testified stated that the progress notes were contemporaneously recorded; and that the progress notes were not timely furnished to counsel before the fact-finding hearing, and thus respondent's counsel did not have an adequate opportunity to cross-examine witnesses or investigate and obtain evidence, if any, to rebut the third-party statements and information in the notes.

Matter of Andreija E.
(Fam. Ct., Montgomery Co., 12/9/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29374.htm

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

TERMINATION OF PARENTAL RIGHTS - Expert Testimony/Hearsay Basis

In this termination of parental rights proceeding, the Fourth Department holds that the admission of certain testimony by petitioner's expert did not violate the mother's right to due process under the two-part test stated in *Matter of Floyd Y.* (22 N.Y.3d 95) (hearsay basis testimony by expert may be admitted at Mental Hygiene Law Article Ten commitment hearing if hearsay is reliable and probative value in assisting jury to evaluate expert's opinion substantially outweighs prejudicial effect).

In the TPR context, a court may apply the professional reliability hearsay exception to the foundational requirements for expert testimony without addressing *Floyd Y.*

Matter of Fredericka S.
(4th Dept., 10/4/19)

* * *

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 - 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 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 - Order Of Protection

In this sexual abuse case, the Third Department concludes that the family court abused its discretion when it vacated a stay-away order of protection and allowed respondent father unsupervised visitation.

The Court notes, inter alia, that in addition to sexual abuse allegations, the petition speaks to the emotional stress on the child resulting from respondent's threatening behavior towards the mother; that the psychologist whose reports were admitted into evidence was highly critical of the interview methods utilized by petitioner's caseworkers, but the record should have been further developed before this determination was made, particularly given respondent's ongoing, threatening behavior towards the mother and others, including judges, via text message and on social media; and that the psychologist characterized respondent's behavior and statements as "unconventional," and noted that "he has never been violent or caused harm to [the child] or [the mother]," but domestic violence is not limited to physical violence and respondent's behavior should not have been diminished as simply "unconventional."

Matter of Andreija N.
(3d Dept., 11/27/19)

* * *

PERMANENCY HEARINGS - Permanency Goal/Order Directing Filing Of TPR Petition

The Third Department holds that the family court erred in modifying the permanency goal to placement for adoption without directing petitioner to commence a proceeding to terminate respondent's parental rights. Nothing in the statute permits a permanency goal of placement for adoption to be imposed in the absence of a concurrent petition to terminate the respondent's parental rights.

The statute also does not permit the court to select and impose on the parties two or more goals simultaneously. Here, the court stated that another permanency hearing would be scheduled in six months and that it was the court's "expectation and hope" that the goal could be changed back to reunification at that time. The effect was to impose two concurrent, contradictory goals of placement for adoption and reunification. Although the court apparently intended to encourage respondent to make further efforts to progress toward reunification with the child, the statutory language does not permit the method used to advance that purpose.

Matter of Joseph PP.
(3d Dept., 12/26/19)

* * *

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

* * *

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

* * *

PERMANENCY HEARINGS - Post-Termination Appearance By Parent
CONFIDENTIALITY - Exclusion From Courtroom

The Court declines to permit the biological mother (or father) to appear with counsel for the children's post-termination permanency hearings.

The presumption in favor of public access to court proceedings is subject to challenge when the interests of children are implicated. Family Court Act § 1043, which states that "the general public may be excluded from any hearing under this article and only such persons and the representatives of authorized agencies admitted thereto as have an interest in the case," has been applied outside the Article Ten context, including in termination of parental rights proceedings brought under SSL § 384-b. Section 1043 is applicable here since Article Ten-A has no contrary provision.

Specific guidance as to when people may be excluded from the courtroom is provided by the factors specified in 22 NYCRR § 205.4. The permanency hearing likely will be focused on adoption by the foster mother, and the mother's presence could become disruptive and have a chilling effect on the parties' willingness to openly discuss the children. All parties have objected to the mother being present. Although she argues that she is not the "general public," her parental rights have been terminated and thus she no longer has any legal relationship to the children or the proceedings, and exclusion would be consistent with statutory and case law that provides no protections for biological parents of children who have been freed for adoption.

Although counsel argues that the mother needs to attend to obtain information because she has an appeal pending in the termination of parental rights proceeding, the Court is solely concerned with the best interests and privacy interests of the children in this case. If the children do appear and participate at the permanency hearing, there could be contact that is not allowed by statute and may not be in the best interests of the children.

Matter of A.C.
(Fam. Ct., Onondaga Co., 12/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29378.htm

* * *

ABUSE/NEGLECT - Motion To Vacate Fact-Finding

ACS filed neglect petitions alleging that the mother failed to obtain mental health treatment and had been hospitalized for psychiatric reasons. The children were placed in their father's custody, and the mother was allowed supervised parental access, which was expanded to four hours of unsupervised parental access conditioned upon her continued compliance with mental health treatment. In March 2017, upon the mother's consent without admission pursuant to FCA § 1051(a), the court found neglect, but suspended judgment for one year. The mother was required to continue with her mental health treatment, including taking any recommended medication, keep ACS apprised of her address, and visit with the children. The court granted overnight parental access, with ACS having discretion to expand to overnight weekend parental access, and released the children to the custody of the father, under ACS supervision and upon certain conditions.

In May 2018, the mother moved pursuant to FCA § 1061 to vacate the neglect finding, and submitted, inter alia, letters from her treating clinicians, which established that she had been in psychotherapy since March 2016 and was compliant, and no medication had been ordered; a report from ACS indicating that the eldest child particularly enjoyed overnight weekend parental access, that the mother was compliant with court-ordered services, and that ACS would not be seeking an extension of supervision; and a certificate establishing that the mother had completed a parenting skills class. The court denied the mother's motion.

The Second Department, finding good cause, grants the mother's motion.

Matter of Aaliyah T.
(2d Dept., 11/13/19)

* * *

ABUSE/NEGLECT - Motion To Vacate Finding

The Court grants respondent mother's FCA § 1061 motion to vacate a finding of neglect, made on consent under FCA § 1051(a), where a period of supervision ended with respondent having fully complied with the terms of the dispositional order and completed all services, and with the child doing well in the mother's care. The Court dismisses the petition with prejudice.

There are four factors to be considered: the respondent's prior child protective history; the seriousness of the offense; the respondent's remorse and acknowledgment of the abusive/neglectful nature of his or her act; and the respondent's amenability to correction, including compliance with court-ordered services and treatment.

Here, the mother has a prior neglect finding based on conduct in 2011 and earlier, and the "offense" in this case is entirely derivative and involves an allegation that as of the time of the child's birth, the mother had not addressed the services required by the dispositional order in the prior case. She has demonstrated heartfelt remorse and sincere acknowledgement of past problematic behaviors, including exposing her child to an abusive relationship and her inappropriate emotional responses to stressful situations. Throughout the almost two years this case was pending, she was amenable to service interventions, including trauma-focused

counseling. She learned the risk posed to her children when she remains with an abusive partner, and appreciates how her past traumas as a domestic violence victim affected her parenting and behavior.

The mother speaks powerfully about the continued impact of the neglect finding on her self-esteem, and she paid the ultimate price when she lost her parental rights to her son in 2016. She has obtained a GED and a full-time job, but the neglect finding has created a barrier to obtaining jobs. She has dreamed of having a career in the a "helping" profession. "Parents who have learned and benefitted from the interventions of the Family Court after a neglect finding should be supported and encouraged in pursuing the same dreams and career goals as any other parent."

Matter of Aubrey R.
(Fam. Ct., Kings Co., 10/15/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29321.htm

* * *

ABUSE/NEGLECT - Disposition/Motion To Vacate Or Modify

The neglect petition filed against the mother alleged that the child Sophia W., then age seven months, was treated at a hospital after ingesting marijuana, and that there were incidents of domestic violence perpetrated by the father against the mother in the presence of the children. The mother consented to a finding of neglect, and the dispositional order placed the child in ACS custody and directed that the children be released to the custody of the mother on a trial basis by a date certain. The mother subsequently moved to vacate the fact-finding and for a retroactive suspended judgment. The family court denied the motion.

The Second Department affirms. The mother has complied with services including parenting-skills courses and therapy, and has planned for the housing, educational, and medical needs of the children, and she is a public school employee, but the family court did not err given the grave medical harm to Sophia W., and the young age of the children.

Matter of Sophia W.
(2d Dept., 10/2/19)

* * *

***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)

III. FOSTER CARE/TERMINATION OF PARENTAL RIGHTS/ADOPTION

TPR: Petition And Mandatory Filing

TERMINATION OF PARENTAL RIGHTS - Petition/Conform Pleadings To Proof
- Appeal/Preservation

The Fourth Department concludes that although the petitions did not allege mental illness as a ground for termination of parental rights, the mother did not object to the evidence relating to that ground and thus the family court did not err in sua sponte conforming the petitions to the proof.

Matter of Destiny S.
(4th Dept., 11/8/19)

* * *

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)

* * *

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)

* * *

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)

* * *

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: 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/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

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 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 - Self Incrimination

After a court found that the father sexually abused his stepdaughter, he was required to select and complete a sex-offender treatment program. He briefly attended a program but stopped when it required an admission of wrongdoing. The father has always denied the sexual abuse, and the mother has likewise never believed her daughter.

The Indiana Supreme Court, finding no constitutional violation, upholds termination of the father's parental rights. In civil proceedings, a court can draw a negative inference from invocation of the Fifth Amendment privilege against self-incrimination. The trial court here correctly noted that the father could choose not to answer questions during sex-offender treatment, but the court could then "infer what his answer[s] might have been."

The court's order did not require the father to admit to a crime at the risk of losing his parental rights. There is a distinction between a court-ordered case plan that mandates admission of culpability for family reunification, and one that requires meaningful therapy. The court ordered the father to "select" and "complete a course of sex offender treatment" from options the agency would provide, within sixty miles of his home. The father points to no evidence that he sought out a different program; that he asked the agency to provide other options; or that there were no treatment programs available, within sixty miles of his home, that did not require an admission of sexual abuse.

Matter of Ma.H. et al. v. Indiana Department of Child Services
2019 WL 5617008 (Ind., 10/31/19)

TPR: Mental Illness

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)

TPR: Disposition/Intervention

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)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition - Suspended Judgment/Best Interests

The Third Department affirms an order denying petitioner's motion to revoke the suspended judgment and terminate the father's parental rights, noting, *inter alia*, that respondent missed two casework contacts, two home visits and two or three visits with the child, but the caseworker acknowledged that he often texted with the father, that he had initially allowed casework contacts and home visits to be rescheduled, and that it was possible that his case notes did not record all the communications he had with the father; that the father communicated to the caseworker in advance when he was running late or unable to attend, and, when he missed drug and alcohol screens, he was permitted to reschedule tests on the few occasions when he was unable to provide a sample; and that although everyone agreed that it was not appropriate for the child to have contact with the father's ex-fiancée, and respondent conceded that it took longer than expected to separate from the ex-fiancée, he explained that neither had the financial resources to find independent housing, and petitioner initially permitted an arrangement where the ex-fiancée and her children would leave the mobile home to stay with a friend while the child was with the father.

The court also did not err in discharging the child to the father. The forensic evaluator's report noted, among other things, that the foster parents "infantilized" the child; the parent educators who transported the child to and from visits testified that the child was excited and happy to spend time with the father; and there was an "extremely positive" bond between the father and the child that was "psychologically beneficial" to the child.

Matter of Collin Q.
(3d Dept., 12/12/19)

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.

* * *

TERMINATION OF PARENTAL RIGHTS - Appeal/Mootness

The Second Department concludes that respondent mother's appeal from the denial of her motion to vacate an order terminating parental rights must be dismissed as academic since the child was legally adopted.

Matter of Albert James G.
(2d Dept., 10/30/19)

Adoption: Standing Or Certification Of Adoptive Parent

ADOPTION - Transgender Father

In each of these two private placement adoption proceedings, the father, who has transitioned from female to male gender, seeks to adopt a child who is already the father's by virtue of the child's birth during the father's marriage to the child's mother. Petitioners argue that because their parental status may depend on where they are living or traveling with their child, adoption is needed to ensure their parental status and promote their child's best interests. The birth mothers consent to the respective husband's proposed adoption.

The Court approves the adoptions, noting, inter alia, that in a substantial majority of the 192 United Nations member countries, as well as many states in this country, New York State's legal

protections for petitioners' parentage might not be available unless they have an adoption decree; and that although a recent amendment to DRL § 110, which prohibits denial of an adoption solely because a petitioner's parentage is already legally recognized, is intended to protect parents in other circumstances, there is the potential that these families will not be treated with the fairness and equality envisioned in Governor Cuomo's statement regarding the § 110 amendment.

Matter of A and LU
(Fam. Ct., Kings Co., 12/12/19)
http://nycourts.gov/reporter/pdfs/2019/2019_33642.pdf

IV. CUSTODY/GUARDIANSHIP/VISITATION

Jurisdiction

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/VISITATION - Jurisdiction

The Court holds that under Domestic Relations Law § 76-a(1), there is a significant connection with New York State where, although the child and the mother have been living exclusively in North Carolina since 2014 and this move was contemplated by both parties and referenced within the 2014 order, the father has enjoyed regular visitation with the child approximately once per month and on certain holidays as set forth in the order.

However, pursuant to DRL § 76-f(1) the Court declines to exercise jurisdiction because New York is an inconvenient forum. The Court notes, inter alia, that the burden of traveling should not be borne by the child if that is avoidable; that the father has substantially greater resources with which to litigate in another jurisdiction and does not have the same child care concerns while traveling; that although the parties do have an agreement to litigate in New York, this factor is given no more weight than other factors, particularly when adhering to the agreement would be contrary to public policy; that the majority of the witnesses and other evidence needed is located in North Carolina, and this Court has no subpoena power outside the state; and that the 2014 order was issued by another judge on consent without a hearing, and this Court has very limited knowledge of this family.

P.M. v. M.G.
(Fam. Ct., West. Co., 10/24/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51720.htm

* * *

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 - Standing
- Extraordinary Circumstances/Best Interests

The Third Department upholds an award of custody to the stepmother and visitation to each parent.

The family court erred in concluding that the stepmother was a de facto parent with standing to seek custody under the Court of Appeals decision in Matter of Brooke S.B. v. Elizabeth A.C.C. (28 N.Y.3d 1). Leaving the child with three parents who would all simultaneously have standing to seek custody does not comport with Brooke S.B.

However, the stepmother demonstrated extraordinary circumstances and the award of custody was in the child's best interests. The Court notes, inter alia, that the mother had little contact with the child for five years, including not seeing him at all for three continuous years, while the child was at a formative age and being raised by the father and stepmother; that starting in 2012, the mother began to consistently visit and has continued to do so, but remained uninvolved in the child's medical and educational life and was only minimally involved in his extracurricular activities, and took little initiative to learn about the child's life outside of her parenting time; that the child, who was 12 years old at the time of the hearing, had lived with the stepmother since he was 2½ years old, and she provided day-to-day care and they formed a close bond; that the mother cannot be faulted for allowing the child to remain with the stepmother while the custodial father was also present in the household, but when the father informed her in 2016 that he no longer lived with the stepmother and the child, the mother waited approximately 10 months to seek custody.

Matter of Shanna O. v. James P.
(3d Dept., 10/17/19)

* * *

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)

* * *

GUARDIANSHIP - Standing

The Court dismisses the guardianship petition, concluding that it has the inherent authority to dismiss for lack of standing, and must do so in its role as parens patriae in order to protect the child. While the guardianship statutes should be read broadly, the petitioner must demonstrate a sufficient nexus to the child, including, but not limited to blood, marriage, legal obligation, or the previous assumption of caretaking responsibilities.

Here, petitioner has stated only that she cared for the child on a handful of occasions and that the child had visited her with his mother over the years. Friendship, even when it includes membership in an extended social family for many years, and concern for the child, does not suffice.

Matter of A.W.J.
(Fam. Ct., Bronx Co., 10/24/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29328.htm

* * *

CUSTODY/VISITATION - Counsel/Expert Fees
- Equitable Estoppel

Domestic Relations Law § 237(b), which is an exception to the general rule that each party is responsible for his or her own legal fees, states that "upon any application ... concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires …." This statute, like DRL § 70, does not define the term "parent."

In a case of first impression, the First Department holds that in a proceeding to establish standing under § 70, a court has discretion to direct the "more monied" party to pay the other party's counsel and expert fees under § 237 before the other party has been adjudicated a parent. Highly inequitable results would flow in this case from permitting the party with far greater resources to seek custody without allowing the child's primary parent to seek counsel fees so she can defend against the application.

The trial court also did not err in directing petitioner to pay 100% of the costs for the attorney for the child and a neutral forensic evaluator. A court may allocate payment of a neutral forensic evaluator according to the parties' financial positions.

The Court rejects petitioner's contention that the trial court's articulation of eleven estoppel factors to be considered at trial unfairly requires her to prove each factor by clear and convincing evidence. The trial court's list is neither exclusive nor dispositive, and includes criteria proposed by both parties and closely tracks evidence relied upon in other cases.

In re Kelly G. v. Circe H.
(1st Dept., 12/17/19)

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 - Experts/Mental Health Issues

- *Delegation Of Court's Authority*

The Second Department reverses an order that awarded the father temporary legal and physical custody; directed the children to participate along with the father in the "Turning Points for Families" program conducted by a social worker who testified for the father; prohibited the mother from having any contact with the children until 90 days after that program commenced; and directed the mother to sign any necessary releases and authorization for the program.

Although a psychologist who testified for the father stated that the children were alienated from him, she did not conduct a forensic evaluation, she acknowledged having continued to provide therapy to the father relating to his situation with the children after she terminated court-ordered family therapy sessions, and she did not indicate that the program was necessary. The court should not have considered the social worker's report since the parties were not given the opportunity to review the report or cross-examine the social worker, and there is no indication that the court independently analyzed whether the social worker's recommendations were in the best interests of the children. The court should not have delegated to the social worker its decision-making authority.

Matter of Suarez v. Suarez
(2d Dept., 10/9/19)

* * *

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)

* * *

CUSTODY - Discovery/Sanctions

The Fourth Department rejects the father's contention that the family court abused its discretion by precluding him from introducing evidence at the custody hearing as a sanction for his willful failure to respond to the mother's interrogatories.

The discovery sanction did not adversely affect the children's right to have issues affecting their best interests fully explored.

Matter of Serna v. Jones
(4th Dept., 12/20/19)

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 - 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 - Lincoln Hearings

The Third Department "note[s] [its] displeasure that the attorney for the children made repeated references to the Lincoln hearing in the appellate brief that he submitted on their behalf…. Family Court's promise of confidentiality should not be lightly breached, and these transcripts are sealed."

Matter of Ellen TT. v. Parvaz UU.
(3d Dept., 12/26/19)

* * *

CUSTODY - Child's Wishes

The Second Department upholds an award of custody to the father, noting, inter alia, that the family court did not fail to give sufficient weight to the wishes of the child, who was 14 and 15 years old at the time of the fact-finding hearing.

The child's wishes are outweighed in this case by other circumstances, including her schooling, nutrition, residential stability, parental structure, and current circumstances which allow the child to remain in the lives of both parents and to see and speak to the mother almost every day.

Matter of Acosta v. Lorber-Acosta
(2d Dept., 12/24/19)

* * *

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

* * *

CUSTODY - Hearing Requirement
- Appeal/Mootness

The Second Department reverses an order dismissing, without a hearing, the mother's custody petition, which was filed more than a year after the family court found that the mother neglected the children and placed them. There are no facts in the record that would bring this case within the narrow exception to the general right to a hearing. The petition for custody may be heard jointly with any permanency hearing.

This appeal was not rendered academic by a permanency hearing order which apparently changed the permanency goal from legal guardianship with the maternal grandmother to guardianship with a different relative.

Matter of Barcene v. Parrilla
(2d Dept., 10/23/19)

* * *

ABUSE/NEGLECT/CUSTODY - Findings Of Fact

The Third Department concludes that the family court, at a joint hearing addressing the mother's custody modification petition and the dispositional phase of a neglect proceeding brought against the father, erred by failing to make findings of fact as required by CPLR 4213(b) where the court merely credited and adopted statements made by the attorneys in their closing statements. The facts recited in a closing statement reflect the position of a particular party, not the evidence from a hearing.

Matter of Kathleen K. v. Daniel L.
(3d Dept., 11/21/19)

* * *

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)

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)

* * *

CUSTODY - Domestic Violence

The Second Department upholds an order granting the father's petition for sole custody, noting, inter alia, that the mother did not seek medical or police intervention for the alleged domestic violence, she acknowledged that once the parties ceased living together in December 2016, there were no further incidents, and she consented to the lifting of an order of protection against the father.

Matter of Cassissa v. Solares
(2d Dept., 10/2/19)

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
- 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)

* * *

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)

* * *

CUSTODY/VISITATION - Relocation/Travel

The First Department finds no basis in the record for the strict relocation provision prohibiting the mother from moving out of her apartment with the children without first obtaining the father's written consent or the court's permission. Given the parenting schedule established by the court, the ten mile radius proposed by the mother is an appropriate distance for relocation without the need for the father's consent or court approval.

Although the mother contends that the father should not be allowed to travel with the children to India because India is not a signatory to the Hague Convention on the Civil Aspects of

International Child Abduction, the court's implicit finding that the father is likely not an abduction threat has a sound basis in the record since the father has substantial real estate holdings, which he manages, in the New York area, holds a TLC license, has family in New York, and testified that he wants the children, who are United States citizens, to remain in the United States.

In re Ece D. v. Sreeram M.
(1st Dept., 11/12/19)

* * *

CUSTODY - Relocation/Change In Circumstances
- Domestic Violence
- Best Interests
VISITATION

An order was issued upon consent awarding the parties joint legal custody of the children, with the mother having primary physical placement and the father having set parenting time. Subsequently, the father relocated to South Dakota and sought physical custody and permission to move the children. Following a trial and a Lincoln hearing, the family court granted the father's petition, and afforded the mother parenting time that included almost all of the children's summer vacation.

The Third Department, finding a change in circumstances, affirms, noting, inter alia, that the father has been the children's primary caregiver for long stretches of time; that he moved to South Dakota to take a steady job after failing to find one in New York and has secured appropriate lodging for himself, his soon-to-be wife and their children; that he testified that the school in South Dakota had programs to address the son's special educational needs, and that he and his fiancee could provide the structured environment the son needed and lacked in New York; that the family court found that the father was candid in discussing his domestic violence history and credited his claim that he had finally obtained an accurate mental health diagnosis and was in active treatment; and that the mother had a chaotic household, a succession of boyfriends with criminal backgrounds and/or substance abuse issues, a lack of steady employment and deficits of parental supervision and judgment.

Matter of Adam OO. v. Jessica QQ.
(3d Dept., 10/24/19)

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CUSTODY - Relocation

The First Department upholds an order permitting the mother to relocate with the child to Edison, New Jersey where the mother and the child are living in a cramped one-bedroom apartment with the maternal grandmother in an area the mother believes is not child-friendly and is potentially dangerous; the move will allow the child to attend a good public school that

provides busing, and the mother will be able to maintain full-time employment without having to transport the child to and from school; and although FaceTime contact is not an equal substitute for physical contact, the child wishes to move the short distance and the mother testified that she would assume the burden of transporting the child to and from visits with the father.

In re Cindy F. v. Aswad B.S.
(1st Dept., 10/22/19)

* * *

CUSTODY - Relocation
VISITATION - Schedule

The Third Department upholds a determination permitting the mother to relocate with the children to Arizona where the mother was unemployed and her limited education and employment history made it difficult for her to find work in or around her rural town; her employment prospects were further limited by a lack of child care, as she did not have nearby family members that could help her and the father's family no longer spoke to her; her home had sustained considerable water damage, which was causing the ceiling and floors to collapse, and also suffered from a rodent infestation, and this hindered the children socially because they were unable to invite friends over; the mother was receiving public assistance and thus could not remedy the home conditions, and, although he owned the home with her, the father had refused to assist; the children's maternal grandfather and step-grandmother, as well as other extended family, reside in Arizona; the mother testified that Arizona presented greater employment and educational opportunities for her and that she and the children could live rent free with the grandparents in a three-bedroom house; and the father's relationship with the children could be meaningfully preserved through frequent phone/audiovisual contact and extended periods of parenting time.

However, the matter is remitted to the family court because the provision awarding the father parenting time "as the parties may reasonable agree[,] with a minimum period of time to be established by the parties," is inadequate. Although the parties had previously been able to decide upon a parenting time schedule, the mother's relocation presents geographic and financial obstacles that did not exist before. The court should have included specific parameters for parenting time.

Matter of Rebekah R. v. Richard R.
(3d Dept., 10/17/19)

Violations/Contempt/Interference With Parent-Child Relationship

CUSTODY - Child's Wishes
- Experts - Parental Alienation/Interference With Parent-Child Relationship

The Fourth Department upholds a determination awarding custody to the father, noting that all factors weighed in favor of the father except the 15-year-old child's wishes; that the court

properly determined that the child's wishes were not entitled to great weight since the child was so profoundly influenced by his mother "that he cannot perceive a difference between" the father's abandonment of the marriage and abandonment of him; and that the father's expert did not diagnose "parental alienation syndrome," which is not routinely accepted as a scientific theory by New York courts, and testified instead that the type of conduct in which the mother engaged resulted in the child becoming alienated from the father.

Matter of Krier v. Krier
(4th Dept., 12/20/19)

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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)

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CUSTODY - Grandparents/Extraordinary Circumstances

The First Department affirms an order granting custody the maternal grandmother, concluding that, given the child's need for stability in the aftermath of her mother's sudden death, the grandmother demonstrated extraordinary circumstances, and standing to seek custody, where, for about four years before the mother's death, the mother and the child had lived in the grandmother's household and the mother and grandmother together provided for all the child's financial and other needs; and the father, who resided with the child for about two years after her birth until the mother moved out with the child, thereafter saw the child sporadically and provided minimal financial support.

In re Lenora D. v. Richard J.R.
(1st Dept., 10/3/19)

* * *

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 - Delegation Of Authority

The Fourth Department finds no error in an order directing that the mother's parenting time be supervised "at such times and locations as the Petitioner Mother and Respondent Father mutually agree."

Although a court cannot delegate its authority to determine visitation to either a parent or a child, it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances. Although the parties have an acrimonious relationship, the evidence shows the father's commitment to ensuring contact between the children and their maternal relatives, including the mother. Since the mother's visitation will be supervised, any concerns about future false allegations by the mother regarding the father's sexual abuse have been alleviated.

Matter of Ballard v. Piston
(4th Dept., 12/20/19)

* * *

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)

* * *

VISITATION - Delegation Of Court's Authority
- Order Directed At Non-Party

The Third Department finds error where the family court delegated authority to the father to determine whether visitation would take place under certain circumstances. Although the father can choose to temporarily suspend visitation while the mother is hospitalized for a mental health condition, the court went too far in giving the father, who is not a doctor or otherwise trained in recognizing and treating mental health conditions, that same authority in vaguely-defined situations where the mother is "decompensating or otherwise having an issue with her bipolar condition," and in permitting him to require supervision of visitation in the aftermath of those situations without further court intervention. The Court has no doubt that if the father believes or is informed that the mother is unstable, he will seek court permission to withhold or limit visits to protect the child.

The court also erred in directing the mother's boyfriend - a nonparty, over whom the court had not obtained jurisdiction - to advise the father of any medical or mental issues the mother may experience "as they are occurring or as soon as practicable thereafter."

Matter of Aree RR. v. John SS.
(3d Dept., 10/31/19)

* * *

VISITATION - Scheduling/Delegation Of Court's Authority

The First Department affirms an order granting the father four annual supervised visits with the children approximately three months apart for two hours each, and providing that the children may have additional visits in their discretion.

The father has a history of being unable to control his anger, using corporal punishment on the children and screaming and speaking poorly of their mother during phone calls, causing the children distress. The court did not improperly delegate its authority to the children.

In re Edward L. v. Jasmine M.
(1st Dept., 10/3/19)

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 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/VISITATION - Right To Counsel/Child

The Third Department finds reversible error in the family court's failure to appoint an attorney for the child where the court had appointed an AFC in connection with a previous proceeding that resulted in a stipulated order, and, less than two months later, the parties' relationship deteriorated significantly.

The lack of an AFC was prejudicial. The mother called the child's therapist as a witness and no objection was raised when the therapist testified regarding information the child had disclosed in therapy. An AFC presumably would not have let the parents use the child's statements and therapist as weapons to support their own goals. Also, the father testified regarding hearsay statements made by the child and an AFC could have objected. An AFC also could have called witnesses, asked questions of the parties' witnesses, or presented other evidence.

Matter of Marina C.
(3d Dept., 11/27/19)

* * *

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)

* * *

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/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.

* * *

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)

* * *

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)

* * *

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