CHILD WELFARE CASELAW/LEGISLATIVE UPDATE

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Juvenile Rights Practice
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I. Legislation, Regulations and Policies

Foster Care: Report Of Change Of Placement

Chapter 732 of the Laws of 2019 repeals Family Court Act § 1055(b)(i)(E) (addresses agency's authority to trial or final discharge child), and adds a new subdivision (5) to FCA § 1017 and a new subdivision (j) to FCA § 1055 which provide 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 attorneys for the parties and the attorney for the child not later than ten days prior to such change in any case in which the child is moved from the foster home or program into which he or she has been placed or in which the foster parents move out of state with the child.

Provided, however, that where an immediate change of placement on an emergency basis is required, the report shall be transmitted no later than the next business day after such change in placement has been made.

The social services official or authorized agency shall also submit a report to the attorneys for the parties and the attorney for the child or include in the placement change report any indicated report of child abuse or maltreatment concerning the child or (if a person or persons caring for the child is or are the subject of the report) another child in the same home within five days of the indication of the report. (But note: The bill was signed with an agreement to do a chapter amendment deleting the notice of SCR reports requirement - FCA § 1052-a still requires notice to the attorney for the child of a report in which the respondent is a subject or another person named - and changing the time-frame for the placement change notices.)

The official or agency may protect the confidentiality of identifying or address information regarding the foster or prospective adoptive parents. Reports regarding indicated reports of child abuse or maltreatment provided pursuant to this subdivision shall include a statement advising recipients that the information in such report shall be kept confidential, shall be used only in connection with a proceeding under this article or related proceedings under this act and may not be re-disclosed except as necessary for such proceeding or proceedings and as authorized by law. Reports may be transmitted by any appropriate means, including, but not limited to, by electronic means or placement on the record during proceedings in family court.

Chapter 732 adds a new clause (H) to FCA § 1089(d)(2)(vii) to require that a permanency order contain a direction that the social services official or authorized agency comply with the placement change reporting requirement.

Chapter 732 also adds a new paragraph (g) to Social Services Law § 358-a(3) that imposes the same placement change reporting requirement when an order approving a foster care placement instrument is issued.

The report of placement change requirements take effect on April 21, 2020.

Termination of Parental Rights: Exception to Mandated Filing Against Parents Involved In Immigration Matters

Chapter 125 of the Laws of 2019 amends Social Services Law § 384-b(3)(i)(D), which contains exceptions to the requirement that a termination of parental rights be filed when a child has been in foster care for fifteen of the most recent twenty-two months, to include instances in which the parent or parents are in immigration detention or immigration removal proceedings, or a prior immigration detention or immigration removal proceeding is a significant factor in why the child has been in foster care for fifteen of the most recent twenty-two months.

Chapter 125 takes effect on October 27, 2019.

The legislative memo states, inter alia:

Enforcement activities conducted by federal agencies too often result in unnecessary harm to children, families, and communities. When a parent has a child in the foster care system either prior to or because of immigration enforcement, it is very difficult for the parent to fulfill their court requirements to reunify with their child or in the alternative for child to be placed with relatives. Upon entering the detention system, parents frequently have tremendous difficulty navigating the system in order to visit their children, participate in family court proceedings, or fulfilling their required court mandated services.

To terminate parental rights would prematurely and permanently separate the parent and child, resulting in trauma and hardship to the family. In such situations, the local social services district should have the flexibility to consider the circumstances and delay the filing of a petition to terminate parental rights.

Foster Care: Application To Become Foster Parent Under FCA § 1028-a

Chapter 434 of the Laws of 2019 amends FCA § 1028-a (Application of a relative to become a foster parent) to allow an application to be made by a person related to the child as described under Social Services Law § 458-a(3)(a), (b), or (c) (i.e., person related to child through blood, marriage, or adoption; person related to half-sibling of child through blood, marriage, or adoption where person is prospective or appointed relative guardian of half-sibling; and adult with positive relationship with child, including, but not limited to, step-parent, godparent, neighbor or family friend).

The law took effect on October 29, 2019.

PINS/Educational Neglect: Truancy And School Misbehavior Allegations

Chapter 362 of the Laws of 2018 amends FCA § 735(d)(iii) to require that the designated lead agency review the steps taken by the school district or local educational agency and attempt to engage the district or agency in further diversion attempts if it appears that such attempts will be beneficial not only where the entity seeking to file a petition is a school district or local educational agency, but also where the parent or other potential petitioner indicates that the proposed petition will include truancy and/or conduct in school as an allegation. Where the school district or local educational agency is not the potential petitioner, the designated lead agency shall contact such district or agency to resolve the truancy or school behavioral problems

of the youth in order to obviate the need to file a petition or, at minimum, to remediate the education-related allegations of the proposed petition.

Chapter 362 also amends FCA § 735(g)(ii) to provide that the clerk of the court may not accept a petition for filing, where the proposed petition contains allegations of truancy and/or school misbehavior, unless there is a notice from the designated lead agency regarding the diversion efforts undertaken and/or services provided by the designated lead agency and/or by the school district or local educational agency to the youth and the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition.

Chapter 362 also adds a new FCA § 736(4), which states that where the petition contains allegations of truancy and/or school misbehavior and where the school district or local educational agency is not the petitioner and where, at any stage of the proceeding, the court determines that assistance by the school district or local educational agency may aid in the resolution of the education-related allegations in the petition, the school district or local educational agency may be notified by the court and given an opportunity to be heard.

Chapter 362 also amends FCA § 742(b) to clarify that the court may at any time order that additional diversion attempts be undertaken by the designated lead agency.

Chapter 362 amends FCA § 1012(f)(i)(A) to provide that educational neglect is a failure to provide education to the child "notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition."

Chapter 362 adds a new FCA § 1031(g), which states that where a petition alleges educational neglect, regardless of whether that is the sole allegation, the petition shall recite the efforts undertaken by the petitioner and the school district or local educational agency to remediate such alleged failure prior to the filing of the petition and the grounds for concluding that the education-related allegations could not be resolved absent the filing of a petition.

Chapter 362 adds a new FCA § 1035(g), which provides that where the petition contains an allegation of educational neglect, and where at any stage of the proceeding, the court determines that assistance by the school district or local educational agency would aid in the resolution of the education-related allegation, the school district or local educational agency may be notified by the court and given an opportunity to be heard.

Chapter 362 took effect on March 7, 2019.

CPLR: Judicial Notice Of Internet Materials

Chapter 223 of the Laws of 2019 is a chapter amendment to Chapter 516 of the Laws of 2018. Chapter 223 repeals CPLR Rule 4511(c), which provides for judicial notice of information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, and moves the text to a new CPLR § 4532-b, which states:

An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being

offered to prove.
A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected.
No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection.
Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.
The legislative memo states that concerns were raised that the original bill required technical amendments and its provisions should be in a different section of law.
Chapter 223 takes effect on the same date and in the same manner as Chapter 516, which took effect on December 28, 2018.

Abuse/Neglect: Reporting Of Abuse In Educational Setting
Chapter 363 of the Laws of 2018 amends the Education Law in relation to the reporting of abuse in an education setting. Chapter 363 takes effect September 3, 2019.

NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION

SUMMARY OF PROVISIONS:

Section 1 amends section 1125 of the education law to expand the definitions of child, employee, volunteer, educational setting, and administrator within Article 23-B to include all public schools, school districts, charter schools, nonpublic schools, boards of cooperative educational services (BOCES), approved preschool special education programs (4410s), state-operated and state-supported schools (4201s), approved private residential and non-residential schools for the education of students with disabilities including 853s, and Special Act School Districts. The exemption for New York City is eliminated. This section also expands the definitions of employee and volunteer to include bus companies that contract with such schools to provide transportation services to children.

Section 2 amends section 1126 of the education law to expand the responsibility to report allegations of child abuse to include licensed and registered physical therapists, licensed and registered occupational therapists, licensed and registered speech-language pathologists, teacher aides, school resource officers, school bus drivers, and the school bus driver's supervisors.

Section 3 makes a technical change.

Sections 4, 5 and 6 make amendments to ensure that the appropriate school administrator is notified in cases where the allegations of child abuse occur in a school other than a public school or school district.

Section 7 amends section 1132 of the education law to require specific training on reporting allegations of child abuse pursuant to Article 23-B of Education Law.

Section 8 amends section 1132 of the education law to require that all teachers and administrators, other than those in a school district or public school, and all school bus drivers employed on or after July 1, 2019 complete two hours of coursework or training regarding the identification and reporting of child abuse and maltreatment.

Section 9 amends section 1133 of the education law to give school administrators who reasonably and in good faith report to law enforcement allegations of child abuse in an educational setting immunity from any liability.

Section 10 adds a new section 1134 to education law to clarify that those individuals who are mandated to report child abuse and maltreatment to the Justice Center, and who report such abuse, shall be deemed to have satisfied the requirements of Article 23-B of the Education Law.

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.

Custody/Visitation: Felony Sex Offenders

Chapter 182 of the Laws of 2019 amends the rebuttable presumption in Domestic Relations Law § 240(1-c)(b) against custody or visitation to include a presumption against custody or unsupervised visits with a person who has been convicted of a felony sex offense, as defined in Penal Law § 70.80, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute such a felony sex offense, where the victim of such offense was the child who is the subject of the proceeding.
Chapter 182 takes effect on September 21, 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 takes 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.

Adoption: Same-Sex Couples

Chapter 258 of the Laws of 2019 amends Domestic Relations Law § 110 to state that a petition to adopt, where the petitioner's parentage is legally-recognized under New York State law, shall not be denied solely on the basis that the petitioner's parentage is already legally-recognized.

Chapter 258 took effect on September 16, 2019.

The legislative memo states:

Under existing New York law, judges already have the ability to grant an adoption of a child by a petitioner whose parentage is already legally-recognized. These adoptions are routinely granted and can be very important for many same-sex couples and their children.

While the spouse of a woman who gives birth to a child is presumed to be the child's parent, same-sex couples find themselves in a legally precarious position when traveling in places that do not fully respect the rights of non-biological parents even when they are married. A New York adoption would be honored in another jurisdiction, and afforded full faith and credit. This gives children the security that both their parents will be legally recognized wherever family members may be.

Already under existing law, judges may and routinely do grant these adoptions. Despite this clear legal authority, a Surrogate's Court in Brooklyn recently denied a married same-sex couple an adoption. This bill further codifies the existing law to explicitly state that a petition to adopt shall not be denied solely on the basis that the petitioner's parentage is already legally-recognized. This bill ensures that couples' access to such adoptions could not be fettered by future court decisions.

FAMILY FIRST PREVENTION SERVICES ACT

The OCFS has issued an Information Letter, 18-OCFS-INF-06, which serves as an introduction to the Family First Prevention Services Act (P.L. 115-123), and its impact on child welfare, for local departments of social services and voluntary authorized agencies, and to outline key provisions that impact child welfare.

The FFPSA makes significant changes to various sections of Titles IV-E and IV-B of the Social Security Act with the intent to keep children safely at home with their families and, when that is not possible, to utilize the least restrictive form of placement appropriate for the needs of the child. The FFPSA reforms federal financing to prioritize family based foster care over residential

care by limiting federal reimbursement for certain residential placements. The FFPSA also incentivizes the use of prevention services by authorizing Title IV-E reimbursement for evidence based, time-limited preventive services for a specific population to prevent foster care placement or support the safety, permanency or well-being of the child. In addition, the FFPSA provides new federal funding opportunities for kin navigator programs. The FFPSA also provides additional support under Title IV-B, including the establishment of an electronic interstate case processing system.
Link to Information Letter:
https://ocfs.ny.gov/main/policies/external/ocfs_2018/INF/18-OCFS-INF-06.pdf

Discrimination/Crimes Based On Gender Identity Or Expression

Chapter 8 of the Laws of 2019 amends the Executive Law, the Civil Rights Law, and the Education Law to prohibit discrimination based on gender identity or expression, defining "gender identity or expression" as "a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender."
Chapter 8 also amends Penal Law §§ 485.00 and 485.05 (hate crimes), and §§ 240.00 (offenses against public order; definition of terms, including "gender identity or expression"), 240.30 (aggravated harassment in the second degree), and 240.31 (aggravated harassment in the first degree), and Criminal Procedure Law § 200.50 (form of "hate crime" charge in indictment), to include acts motivated by the victim's gender identity or expression.
The Penal Law and Criminal Procedure Law amendments take effect on November 1, 2019, and the other amendments took effect on February 24, 2019.

CRIMINAL AND CIVIL ACTIONS RELATING TO SEXUAL ABUSE OF CHILDREN

Chapter 11 of the Laws of 2019 amends Criminal Procedure Law § 30.10(3)(f) to provide, in a criminal action alleging a sexual offense against a child under the age of 18, that a statute of limitations shall start to run when the victim turns 23 rather than when the victim turns 18 (the statute continues to provide that the clock starts when the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment).
Chapter 11 amends CPLR § 208 to provide that notwithstanding any statute of limitations or requirement that a timely notice of claim or notice of intention to file a claim be filed, an action may be brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute a specified sexual offense committed when such person was less than 18 years of age, against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of that conduct, until the victim reaches 55 years of age. Chapter 11 also amends related provisions in the General Municipal Law, the Court of Claims Act, and the Education Law.
Chapter 11 adds a new CPLR § 214-g, which allows actions barred by a period of limitations or a notice filing requirement, including actions that were previously dismissed, to be revived within a one year window which commences six months from the effective date of the act.
Chapter 11 amends CPLR Rule 3403(a) to establish a trial preference for cases which have been revived pursuant to CPLR § 214-g. Chapter 11 adds a new Judiciary Law § 219-d to require the

Chief Administrator of the courts to promulgate rules concerning the timely adjudication of revived claims.
Chapter 11 amends Judiciary Law § 219-c to require the Office of Court Administration to provide training for judges concerning crimes involving the sexual abuse of minors.
Chapter 11 took effect February 14, 2019, except that Judiciary Law § 219-c generally takes effect on August 14, 2019; training for revived cases shall commence by May 14, 2019; and rules must be promulgated pursuant to Judiciary Law § 219-d by May 14, 2019.

Criminal History Checks of Residential Program Employees

Chapter 56 of the Laws of 2019, Part I, amends Social Services Law § 378-a(1) (Access to conviction records by authorized agencies) to require that authorized agencies operating an OCFS-licensed or certified residential program for foster children request that the Justice Center for the Protection of People With Special Needs seek out DCJS and FBI criminal history information for every prospective employee of such program; and, prior to April 1, 2020 in accordance with a schedule developed by OCFS, for any person who is employed in a residential foster care program and has not previously had a clearance conducted in connection to such employment.

Social Services Law § 424-a(1)(b)(i) is amended in an analogous manner to require inquiries with OCFS by authorized agencies to determine whether any person who is actively being considered for employment, and any person who is already employed, is the subject of an indicated child abuse and maltreatment report on file with the statewide central register of child abuse and maltreatment.

Social Services Law § 422(4)(A) is amended with a new subparagraph (bb) that makes confidential central register reports and related information available to an entity with appropriate legal authority in another state to license, certify or otherwise approve residential programs for foster children, where disclosure of information regarding any prospective or current employee of such program is required by United States Code, Title 42, § 671(a)(20).

The law takes effect July 1, 2019.

Student Immunization: Public Health Law § 2164
Chapter 35 of the Laws of 2019 repeals Public Health Law § 2164(9), which contained the religious exemption from the statute's immunization requirement.
Chapter 35 also amends § 2164(7) to permit school authorities to admit a child without full proof of immunization "where the parent, guardian, or any other person in parental relationship to such child can demonstrate that a child has received at least the first dose in each immunization series required by this section and has age appropriate appointments scheduled to complete the immunization series according to the Advisory Committee on Immunization Practices Recommended Immunization Schedules for Persons Aged 0 through 18 Years."
From the legislative memo:

According to the Centers for Disease Control, sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles. According to State data from 2013-2014, there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity. This bill would repeal exemptions currently found in the law for children whose parents have non-medical objections to immunizations.
Chapter 35 took effect on June 13, 2019, provided that amendments to § 2164(7) shall expire and be deemed repealed June 30, 2020.

II. ABUSE/NEGLECT

Removal/Central Register/Investigation Of Abuse And Neglect

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 - Removal/FCA § 1028 Hearing

The Court holds that respondent is not entitled to a FCA § 1028 hearing where, in mid-February, he voluntarily left the home in which he, the children, and their mother resided when the mother kicked him out because he had been cheating on her. The word "removal" cannot be stretched so far.

ACS started an investigation around that time, but the Article Ten petition was not filed, and the order excluding respondent from the home was not entered, until March 7. Thus, it was not state intervention that caused respondent to leave the home and the children. Indeed, the order of protection does not contain language excluding him from a specific address, language which signals interference with the respondent's otherwise valid claim of residence. Respondent "was, essentially, a *non-custodial parent* at the time ACS filed its case."

Matter of William M.
(Fam. Ct., Kings Co., 3/18/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50389.htm

Practice Note: Support for the court's decision can be found in *Matter of Josephine BB.*, 114 A.D.3d 1096 (3d Dept. 2014), where the Third Department held that the respondent mother was not entitled to a 1028 hearing because physical custody had been transferred from the mother to the non-respondent father in a custody proceeding before the neglect proceeding had been commenced, and thus the child had not been removed pursuant to Article Ten.

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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/Reasonable Efforts

The Second Department reverses an order denying the mother's FCA § 1028 application for return of the child.

The Court first concludes that although the child has been returned to his parents' care, the mother's appeal is not academic, as the removal created a permanent and significant stigma.

On the merits, the Court notes that any concerns that the parents' substantial efforts to safety-proof their home were inadequate could have been mitigated by reasonable efforts, especially since petitioner had been directed to assist the family in safety-proofing the home and failed to do so. Also, the mother presented evidence establishing that she had taken substantial measures to safety-proof the home after the child was removed, and had taken the child to the doctor and dentist.

Matter of Saad A.

(2d Dept., 12/5/18)

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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

In this derivative abuse/neglect proceeding, the Second Department reverses an order granting the mother's FCA § 1028 application for the return of the subject child to her custody, noting that, at the hearing, the mother admitted to hitting her twelve-year-old son with an extension cord, leaving welts on his skin, because he would not clean his room and she wanted to get "control" over him; that although the mother testified that she only hit the child on his arms and legs, photographs admitted into evidence clearly show welts across his chest as well; and that since that incident, and as of the time of the hearing, the mother had failed to sufficiently address the mental health issues that led to the incident.

Matter of Tatih E.
(2d Dept., 1/23/19)

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ABUSE/NEGLECT - Post-Filing Removal With Consent
- Appeal/Mootness

Shortly before the filing of a neglect petition against respondent mother, the family court issued temporary orders of supervision and protection upon the mother's consent. Subsequently, petitioner filed a violation petition but, before doing so, asked the court to temporarily remove the child. The court did so, and commenced a hearing during which it rejected the mother's offer to consent to removal without also admitting that the removal was "necessary to avoid imminent risk to the child's life or health." The court made such a finding at the conclusion of the hearing. Although the mother later agreed to a resolution in which the violation petition was withdrawn, the neglect petition was adjourned in contemplation of dismissal, and the child was returned to her care, on appeal she challenges the family court's ruling rejecting her offer to consent to removal.

In a 3-2 decision, the Third Department majority, having found the mother's appeal moot, declines to apply the exception to the mootness doctrine. Issues arising from temporary removal orders need not evade review given the preference for appeals from FCA Article Ten orders. Also, any temporary removal order must be based on a finding that removal is necessary to avoid imminent risk to the child's life or health; the contention that this requirement can be waived at a respondent's convenience is not sufficiently substantial to warrant invoking the exception to the mootness doctrine.

The dissenting judges note that given the family court's belief that FCA §§ 1022 and 1027 require a factual finding that a child is in imminent danger before a temporary removal order may be issued, it is evident that the issue will readily recur before that court. Because removal procedures are of public importance, the consent issue is important to resolve. It also appears to be novel. Addressing the merits, the dissenting judges assert that a parent may consent to the temporary removal of a child at any stage of the proceedings, including a hearing under FCA § 1027. They note that FCA § 1021 allows for temporary removal without a court order if the parent gives written consent; such consent is a recognition that temporary removal is necessary to protect the child from harm and required in the best interests of the child.

Matter of Tyrell FF.
(3d Dept., 11/21/18)

Practice Note: It is worth mentioning that until 1988, FCA § 1028 permitted the court to continue removal in the absence of an imminent risk determination if the court found a substantial probability that the child would be found to be abused or neglected and that the final order of disposition would be an order of placement.

* * *

ABUSE/NEGLECT - Removal/Imminent Risk/Orders Of Protection
- Release To Non-Respondent Parent
- Domestic Violence

While the mother was napping with the three-year-old child, the father woke her up, and was angry and talking about other men. The mother said, in effect, "You know what, this is not working" - her latest attempt to reconcile with him - "[so] let's just co-parent." In response, the father jumped on top of her and strangled her to the point where she felt she could not breathe. The three-year-old woke up, and the other child came in from another room, and both children saw their father violently attacking their mother.

Upon a hearing, the Court finds the non-respondent mother to be a suitable parent pursuant to FCA § 1017, and releases the children to her under strict conditions to address her instability and provide support and monitoring to ensure she does not go back to the father. While the father's apartment is better for the children than life in a domestic violence shelter, the touchstone is not the material comforts of each parent's residence.

The children would be at imminent risk of harm in the care of respondent father. No protective order short of removal would ameliorate that risk, and the risk outweighs any harm to the children from removal. An order of protection directing the father to stay away from the mother would not mitigate the risk, and his visitation with the children must be supervised for now. The father's denials and prevarications contribute to this conclusion. This is a coercion-and-control type intimate partner violence case, with a long history of physical violence and emotional manipulation. The father's need to control the mother makes the risk that he will violate an order of protection unacceptably high.

Moreover, the father is "weaponizing" the children. He influences the children to see their mother as the blameworthy party and to see him as the victim. While the mother bears responsibility for not taking more assertive steps to leave the father sooner - if she reaches out to him now, she could end up becoming a respondent - the Court is concerned that if the father has the children, he will withhold visitation and goad the mother into coming to his residence to see the children, walking into a very dangerous situation.

Matter of Olivia S.
(Fam. Ct., Kings Co., 7/8/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51104.htm

* * *

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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ABUSE/NEGLECT - Disposition/Modification
- FCA § 1028 Hearings

Respondent maternal grandmother was granted an adjournment in contemplation of dismissal, and respondent mother submitted to the Court's jurisdiction pursuant to Family Court Act § 1051(a). An order of disposition placed the child directly with the grandmother.

The Court grants ACS's motion to modify the dispositional order and places the child directly with the maternal aunt, citing various deficiencies in the care provided by the grandmother. The Court rejects the grandmother's application for a FCA § 1028 hearing at this stage of the proceeding. *Matter of Elizabeth C.* (156 A.D.3d 193) does not apply. The issue for the Court to consider at this stage of the proceedings is not imminent risk, but rather the child's best interests. The grandmother must seek relief under Part 6 of Article Ten (New Hearing and Reconsideration of Orders), or via a custody proceeding.

Matter of K.A. v. M.C.
(Fam. Ct., N.Y. Co., 2/8/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50212.htm

*   *   *

ABUSE/NEGLECT - Head Trauma/Expert Testimony
- Removal/Imminent Risk

In this abuse proceeding in which it is alleged that the five-month-old child was admitted to the hospital presenting as unresponsive and having seizures, the Court ordered, with ACS's consent, that respondent mother be allowed to live with the child as long as the mother was not alone with the child - the child's maternal aunt or either grandmother supervised - and excluded the father from the home.

Upon a § 1028 hearing, the Court, crediting expert testimony presented by the father from a pediatric neurosurgeon who opined that the injuries were not the result of shaking, and that it was likely that this case would fall into the unknown causation category, grants the application. The Court concludes that neither the father nor the mother caused the injuries, and that close supervision by ACS and oversight by the Court will further insure the child's safety with her father in the home. There is no longer any reason to require that the mother be supervised at all times with the child.

Before her hospitalization, the child was, by all accounts, healthy and well cared for. The parents have given multiple, consistent accounts of the pertinent events. The father, who discovered the child slumped over with foam coming out of her mouth, called the mother at work and described the child's condition, and, upon her advice, called 911 immediately. His testimony, the account he gave to the ACS caseworker, and his tone in the recorded 911 calls, reveal feelings of extreme fear and panic generated by the inexplicable and sudden change in the child's condition. The

ACS caseworker has observed the father with the child, and indicates that the child appears happy with him and that all interactions have been appropriate. The father has fully complied with court orders.

With respect to the medical evidence, the Court notes, inter alia, that the child had no external injuries; that there are no new or old bone fractures; that her pediatrician's records show no concerns prior to the hospitalization; that the child lacked internal injuries to the head, such as retinal hemorrhages and skull fractures, which are a sign of abusive head trauma; and that it is significant that the father's expert felt strongly enough about his diagnosis to take time out to testify on two separates dates without compensation.

Matter of Brea E.
(Fam. Ct., Kings Co., 2/22/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50662.htm

* * *

ABUSE/NEGLECT - Confidentiality Of Records/Fair Hearing Decisions
FREEDOM OF INFORMATION LAW

In this Article 78 proceeding, petitioner law firm seeks a judgment pursuant to New York's Freedom of Information law directing OCFS and its Commissioner to produce decisions issued, and "legal standards and reasoning" used, at fair hearings conducted pursuant to Social Services Law § 422(8)(b) where the appellant was an employee of a child day care center or a Head Start program who contested an indicated report of abuse or maltreatment of a child who attended the day care center or program. Petitioner argues that fair hearing decisions are not subject to any FOIL exemption, and that even if they are, petitioner is entitled to redacted decisions under the SSL § 422(4)(A)(h) confidentiality exemption for bona fide research.

The Court first holds that the confidentiality protections in SSL § 422(4)(A) do not extend to fair hearing decisions. Such decisions are covered by SSL § 422(8), and that paragraph does not contain an express confidentiality provision. Confidentiality has been provided by OCFS in its regulations, but a regulation is not a "state or federal statute" covered by the FOIL exemption in Public Officers Law § 87(2)(a).

The State Administrative Procedure Act specifically provides for the release of decisions in SAPA § 307(3)(a). Under § 307(3)(b), an agency may delete information that involves an unwarranted invasion of personal privacy under POL § 89, and must delete confidential material protected by federal or state statute. The Court notes that the Justice Center for the Protection of People with Special Needs makes its hearing officer decisions public. For now, the Court leaves it to the parties to deal with the issue of redactions in the administrative process.

Because there would be no need for redactions under SSL § 422(4) if the bona fide research exception applies, the Court reaches that issue, and holds that the exception does not apply. The Court notes that petitioner has acknowledged that the only reason it is seeking information from

OCFS is for litigation purposes - i.e., so petitioner might better represent its clients in proceedings with OCFS.

The Court also concludes that petitioner has substantially prevailed and is entitled to attorneys' fees.

Lansner & Kubitschek v. OCFS/Poole
(Sup. Ct., Albany Co., 2/15/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29145.htm

* * *

ABUSE/NEGLECT - Removal/Constitutional Issues

The Ninth Circuit U.S. Court of Appeals holds that a San Diego County policy, under which the County takes children who are suspected of being abused from their homes to a shelter and subjects them to medical exams (including gynecological and rectal), without first notifying their parents and obtaining parental consent or judicial authorization, is unconstitutional. The exams violate the due process rights of the parents and the children's Fourth Amendment right to be free from unreasonable searches.

The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state. Barring exigent circumstances - a reasonable concern that material physical evidence might dissipate, or that an urgent medical problem exists requiring immediate medical attention - the state is required to notify parents and obtain parental consent or judicial approval before children are subjected to investigatory physical exams. The state must permit parents to be present for the exam. Although the County claims that the exams are conducted to assess children's "mental health" in a "light, pleasant atmosphere," the exams are investigatory because the physician is looking for signs of physical and sexual abuse. Because of mandated reporting obligations, an exam may turn investigatory even if it does not begin as such.

The district court erred in concluding that the exams were investigatory but that parental consent was not required because the procedures were not sufficiently invasive. Parents' due process rights are not dependent on the nature of the procedures involved or the environment in which the exams occur, or whether a child demonstrably protests.

With respect to the children's Fourth Amendment rights, the Court notes that even assuming, without deciding, that the "special needs" doctrine applies, the searches are unconstitutional under the doctrine's balancing test if performed without the necessary notice and consent. Although the County argues that the exams are "minimally intrusive" because they are "adjusted to the children's comfort level," the County routinely subjects children to these intimate and potentially upsetting procedures. While the initial assessment clearly serves to treat children's immediate needs and address potential dangers to other children at the shelter, it is less evident how the search at issue does so. The County's involvement with the juvenile court system throughout the dependency process provides it with ready access to request a warrant from the

juvenile court if necessary.

Mann v. County of San Diego
2018 WL 5623367 (9th Cir., 10/31/18)

Practice Note: Family Court Act § 1027(g) provides: "In all cases involving abuse the court shall order, and in all cases involving neglect the court may order, an examination of the child pursuant to [FCA § 251] or by a physician appointed or designated for the purpose by the court. As part of such examination, the physician shall arrange to have colored photographs taken as soon as practical of the areas of trauma visible on such child and may, if indicated, arrange to have a radiological examination performed on the child. The physician, on the completion of such examination, shall forward the results thereof together with the color photographs to the court ordering such examination. The court may dispense with such examination in those cases which were commenced on the basis of a physical examination by a physician. Unless colored photographs have already been taken or unless there are no areas of visible trauma, the court shall arrange to have colored photographs taken even if the examination is dispensed with." Family Court Act § 251 permits the court to direct physical or mental examinations by professionals designated for that purpose by the court for any person within its jurisdiction after the filing of a petition under the Family Court Act.
In certain circumstances, the court cannot, consistent with the child's Fourth Amendment rights, order an intrusive physical exam when the need for such an exam is insufficiently compelling. *See Matter of Shernise C.*, 91 A.D.3d 26 (2d Dept. 2011) (given conclusive evidence of sexual abuse provided by DNA test results showing that respondent was father of child born to subject child two years earlier, State's need for highly intrusive physical examination was so diminished as to render search unreasonable under Fourth Amendment; State has extraordinarily weighty interest in protecting children and in protecting due process rights of individual accused of child abuse by discovering and preserving evidence of abuse or ascertaining the absence thereof, but the child, "as the alleged victim, is entitled to no less protection under the Fourth Amendment than her stepfather would enjoy as an accused," and adolescent vulnerability intensifies intrusiveness of strip search and may result in serious emotional damage).

*   *   *

ABUSE/NEGLECT - Court-Ordered Investigation/Access And Entry (FCA § 1034)

The Court grants an application made by the Department of Social Services under FCA § 1034(2) for an order granting access and entry to the home. The Court finds probable cause to believe that an abused or neglect child may be found on the premises.

The report to the state central registry alleges that the mother failed to allow certain medically necessary testing for one of the children, who has a serious medical condition that requires four tests but has received only two of them. The mother also delayed testing of a different child, but that child's urgent needs were met without court involvement after a medical team overcame the mother's resistance. If a full investigation is not completed, the untested child may suffer from a chronic and life-threatening illness and may unknowingly be a source of contagion. The source of the report is not the biological father or any other potentially biased individual who seeks to

gain an advantage in custody litigation. The mother also has allegedly failed to have another child attend school, and her housing situation has been unstable.

The Court concludes that Suffolk County is a proper venue under CPLR 503 (applies to an action) and CPLR 506 (applies to a special proceeding). Family Court Act § 1015, which provides that "proceedings" under Article Ten may be originated in the county in which the child resides or is domiciled at the time of the filing of the petition, or in which the person having custody of the child resides or is domiciled, applies only to FCA § 1031 petitions and not to pre-petition applications under § 1034(2). The Legislature could not have thought that a § 1034(2) application should be subject to a transient potential respondent's residential shifting.

The Court also concludes that voicemail notice to the mother satisfied the requirement that the parent or other persons legally responsible be advised that, when denied sufficient access to the child or other children in the household, the child protective investigator may consider seeking an immediate court order to gain access.

Matter of L.R.
(Fam. Ct., Suffolk Co., 2/14/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29038.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)

Jurisdiction

ABUSE/NEGLECT - Jurisdiction/Deceased Child

The Court dismisses as moot a petition alleging abuse and neglect where the only subject child is deceased. Although the Court of Appeals held in Matter of Alijah C. (1 N.Y.3d 375) that an abuse petition may be adjudicated despite the death of the child, other cases establish that a deceased child cannot be the subject of a neglect petition, and can be the subject of an abuse petition only if there are other children for whom the respondent is legally responsible under FCA Article Ten. The Court declines to make a contrary determination based on the possibility that respondent will in the future become legally responsible for other children.

Matter of C.R.
(Fam. Ct., N.Y. Co., 5/23/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28430.htm

Respondent/Person Legally Responsible

ABUSE/NEGLECT - Respondent/Person Legally Responsible

The Second Department reverses findings of sexual abuse of respondent's cousin Sabrina, and derivative neglect of Zulena, concluding that respondent is not a person legally responsible for the children under FCA § 1012(g).

Respondent resided with the children for a period of time in their grandmother's apartment along with numerous adult relatives and children. Sabrina's mother testified that she never made respondent responsible for the children, and did not leave them alone with him, as there were always other caretakers present. Sabrina's older sister was responsible for the children care when the mother was at work or otherwise away from the home, and the children's grandmother and other adults were present in the apartment when the mother was at work.

Matter of Zulena G.
(2d Dept., 8/28/19)

*   *   *

ABUSE/NEGLECT - Respondent/Person Legally Responsible

The First Department upholds a determination that respondent was a person legally responsible for the child where he cared for her and assumed other household duties during the period in which the abuse occurred; held her out as his daughter; and arranged a family outing that included her with his then-girlfriend and her family. The fact that he may not have lived with the child consistently does not preclude a finding that he was legally responsible for the child's well-being during the relevant period.

In re Alisha A.
(1st Dept., 5/2/19)

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ABUSE/NEGLECT - Respondent/Person Legally Responsible
- Failure To Protect Child From Abuse
- Domestic Violence
- Exposing Child To Sexual Activity

The First Department finds sufficient evidence that the paternal grandparents were persons legally responsible for the six-year-old subject child where the child visited their home approximately every other weekend, often spending the night, and they cared for him during these visits; and they also cared for the child as part of their familial role.

The Court finds sufficient evidence that the grandparents neglected the child where he repeatedly disclosed that his sixteen-year-old cousin was sexually abusing the subject child's six-year-old half-brother, and the grandparents failed to protect the child from abuse. A finding of neglect against the father also is upheld because he was aware of the sexual abuse but failed to protect the subject child.

A finding of neglect against the father was properly made where he assaulted the mother outside of the courthouse in connection with a child support proceeding, which caused the mother to sustain visible injuries and ultimately retreat from seeking child support, and placed the child in imminent danger of physical impairment during an incident that occurred when the father was picking up the child for a visit.

Also, the father neglected the child by engaging in sexual activity in his presence, contributing to the child's inappropriate knowledge of sexual behavior.

In re Ja'Dore G.
(1st Dept., 2/21/19)

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ABUSE/NEGLECT - Respondent/Person Legally Responsible

The Second Department upholds a determination that respondent was a person legally

responsible for the care of the children where he transported one child to and from the paternal grandmother's home for weekend and summer break visits, where he also stayed overnight, fed the child, and performed other related tasks at the request of the grandmother, who was visually impaired; he came to visit at the family home and watched the children when their parents were out of the home; and the sexual abuse is alleged to have occurred during these visits to the grandmother's house and when respondent watched the children at the family home.

Matter of Kevin D.
(2d Dept., 2/27/19)

* * *

ABUSE/NEGLECT - Respondent/Person Legally Responsible

The First Department finds sufficient evidence that respondent was a person legally responsible for the children under FCA § 1012(g) where he had a three-year relationship with the children's mother; he dropped off and picked up the children at school and disciplined them when they were disrespectful to the mother; he admitted to only occasionally staying overnight at the mother's apartment and claimed to have another primary residence, but there was evidence that he actually lived in the apartment with the mother and the two children who resided with her; the children who did not live full time with their mother all reported that respondent was in her home whenever they were present and that he and the mother were always together; and respondent was the biological father of the mother's newborn child and was present daily, for at least the first month of this child's life, assisting the mother in caring for the newborn as well as all the other children.

In re Chance R.
(1st Dept., 1/22/19)

* * *

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

The First Department concludes that respondent, who had been in a six-year relationship with the child's mother, was a person legally responsible for the child under FCA § 1012(g) where the child referred to respondent as his stepfather; respondent picked the child up from school when the mother was working late; and the child and the mother regularly visited and stayed overnight at respondent's home.

The Court upholds the finding of neglect, noting that respondent pulled the mother's hair, threw her to the ground, and punched her, in the presence of the child, who saw his mother bleeding and called 911.

In re Adam C.
(1st Dept., 12/13/18)

*   *   *

ABUSE/NEGLECT - Respondent/Person Legally Responsible

The First Department finds sufficient evidence that respondent was a person legally responsible for the mother's eldest child where he had known the mother for ten years and was the father of the two youngest children; he provided financial support for the eldest child, whom respondent considered to be his son and who often referred to respondent as "daddy"; and respondent would arrange for the eldest child to spend weekends with him and would occasionally spend the night at her home, which permits an inference of substantial familiarity between the eldest child and respondent.

In re Jaiden M.
(1st Dept., 10/25/18)

Discovery

ABUSE/NEGLECT - Discovery - Expert Witnesses/Oral Depositions

The First Department reverses an order denying respondent father's motion to subpoena and depose petitioner ACS's medical expert witness, and grants the motion.

The father met his burden of demonstrating special circumstances. ACS failed to oppose the application and conceded that it does not know whether the doctor's testimony at the fact-finding hearing will support its allegations of child abuse. The excerpts from the child's medical records did not indicate the substance of the expert's expected testimony, including her expert opinion as to the extent of the child's injuries, her future prognosis, or the facts supporting her conclusion that the child's injuries were non-accidental.

In re Aliyah N.
(1st Dept., 4/18/19)

*   *   *

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 - Discovery/Mental Health Records

The petition alleges that respondent father sexually abused the child over the course of several years, starting when she was four years old. ACS has disclosed its intent to call the child's therapist from Post Graduate Center for Mental Health as an expert witness to "testify regarding the nature of her treatment of the subject child … related to her diagnosis of PTSD," and "testify that the behaviors and symptoms exhibited by the subject child are consistent with symptoms of PTSD suffered due to the respondent's actions, particularly the actions of sexual abuse."

Respondent's counsel filed a motion seeking the release of records from Post Graduate which relate to the child's mental health diagnosis and treatment. The attorney for the child opposes the request.

The Court first notes that because these records are covered by the state's physician-patient privilege and by HIPAA, "the Court cannot simply issue an order or a subpoena directing their production on the premise that they may be relevant in this proceeding." In assessing whether to authorize disclosure, the Court must weigh the public interest, the need of the party for the discovery, and the possible harm or injury to the child from the discovery.

The Court finds that the interests of justice significantly outweigh the child's need for confidentiality. The therapist's testimony will focus on the child's PTSD diagnosis, specific symptoms and behaviors, and mental health treatment, and how they relate to the child's allegations of sexual abuse. The records were authored by the therapist and likely relate to the basis of her opinion. The information in the records is not available through other sources.

However, in order to protect the best interests of the child and prevent unnecessary disclosure, the Court will conduct an in camera review of the records before permitting disclosure to counsel. Disclosure will be limited to information that is necessary and comports with the reason for the disclosure.

Matter of Valerie S.
(Fam. Ct., Bronx Co., 5/9/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50790.htm

* * *

CONFIDENTIALITY - Family Court Records Of Family Offense Proceeding

In this family offense proceeding, the Court grants the NYPD's motion for an order pursuant FCA § 166 releasing a copy of the court file and transcripts for consideration in connection with respondent husband's internal disciplinary proceeding.

The NYPD has attempted to obtain the wife's cooperation, but those attempts have been unsuccessful. The alleged assaultive actions by the husband against the wife could constitute serious crimes, and may show his unfitness as a police officer or a need for retraining in anger management.

The records would not be open to indiscriminate public inspection, and shall remain with the NYPD, its administrators and defense counsel and are not to be released to any other person or agency.

Matter of Nora S. v. Omar S.
(Fam. Ct., Kings Co., 7/29/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29233.htm

Warrants

FOSTER CARE - Warrant For Child

Family Court Act § 153 allows the Family Court to issue "in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child … whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary…."

In these foster care review proceedings, the First Department holds that § 153 does not authorize the issuance of a warrant for the protective arrest of a child who is neither a respondent nor a witness in the proceeding, for purposes of ensuring the child's health and safety rather than to compel his or her attendance in court.

Family Court Act § 718, a provision addressed to PINS runaways, cannot be the basis for an arrest warrant "by a statutory sleight of hand." Family Court Act § 1037, which authorizes a warrant to bring a child's parent or guardian rather than the child before the court, provides no authority relevant to these cases. The Referee in Zavion's case relied in part on the general parens patriae responsibility to "to do what is in the best interests of the children," but the parens patriae doctrine cannot create jurisdiction for Family Court that is not provided by statute. The "absence of interpretive caselaw supporting the issuance of a warrant [under § 153] for what in effect is a protective arrest is telling."

"It seems clear that ACS, with effective judicial backing, needs tools in cases such as this to maintain children, who have not been adjudicated juvenile delinquents but who chronically abscond, in controlled settings where they can be administered medically prescribed medication and receive appropriate therapeutic and other services without which there is the significant and demonstrated likelihood that they will be a danger to themselves or others but who, by regularly absconding, are likely to end up on the streets vulnerable and unprotected." However, "Family Court is constitutionally and statutorily constrained from undertaking what may seem to be a middle ground of issuing an arrest warrant under § 153 for protective purposes in what is essentially a civil context." The appropriate vehicle would seem to be a statutory amendment, "and we would encourage that undertaking." But the Court also notes that an arrest record could have future adverse ramifications for employment or otherwise, and that there is also the potential trauma that an arrest, especially if coupled with handcuffs or other restraints, may pose for an already fragile child. Thus, even if an arrest warrant were to be legislatively authorized for cases such as these, it should be carefully conditioned so as to be sensitive to these concerns.

In re Zavion O., In re Serenity R.L.
(1st Dept., 5/7/19)

Practice Note: It is worth noting that because there is no appellate decision to the contrary in the Second, Third or Fourth Department, trial courts throughout the state are bound by this ruling. *People v. Shakur*, 215 A.D.2d 184 (1st Dept. 1995).

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

CUSTODY/INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

In the context of an Article Ten proceeding during which the non-respondent father, who resides in New Jersey, filed a custody petition, the First Department holds that compliance with the Interstate Compact on the Placement of Children (Social Services Law § 374-a) is not required in connection with the father's application for custody.

The Court first rejects ACS's contention that the appeal has been rendered moot because, post-ICPC approval, the child is residing with the father in New Jersey. This case meets the criteria for the mootness exception. In addition, ambiguity exists as to the applicability of the ICPC to an out-of-state noncustodial parent, and this appeal raises important issues, such as whether applying the ICPC here is contrary to the plain meaning and legislative history of the statute, and whether it conflicts with a parent's right to substantive and procedural due process.

There is nothing in the statute or the legislative history to indicate that the ICPC was ever intended to apply to situations other than foster care or adoptive placements. Although the Association of Administrators of the Interstate Compact on the Placement of Children, the official body charged with implementing the ICPC, amended Regulation 3(2)(a) to include placements with out-of-state noncustodial parents, the regulation does not carry the force of law. An administrative agency cannot use its rule-making authority to extend statutory language to

apply to situations not intended to be embraced within the statute. The AAICPC contravened the legislature's intent to provide more opportunities for children in need of placements.

The Second Department's rulings to the contrary rely on a fundamental misreading of *Matter of Shaida W.* (85 N.Y.2d 453), which involved a kinship foster care placement in California and a retention of legal custody by the Commissioner.

The Court rejects ACS's argument that FCA § 1017(1)(a) provides an independent statutory basis for implementing ICPC procedures because it directs ACS to perform background checks to determine whether a non-respondent parent is someone with whom the "child may appropriately reside." There are other ways to ensure a child's safety, such as directing a hearing or requesting courtesy background checks from the other state, and, once a child is temporarily released into a non-respondent parent's care, § 1017(3) requires that the parent submit to the court's jurisdiction and thus comply with court orders.

Also, presupposing a parent is unfit pending completion of the ICPC infringes upon that parent's constitutional rights, and, here, ACS suggested that but for the ICPC protocol, which reportedly can take months, or even years to complete, the child would have been released to the father. Delegation of the Family Court's parens patriae role to an ICPC administrator, who is empowered to decide the father's suitability without providing supporting evidence or the possibility of judicial review, violates the father's right to procedural due process.

Finally, the Court acknowledges the arguments of the amici curiae that, given the possibility that the process could keep a child in foster care, and apart from a loving, competent parent, applying the ICPC to out-of-state parents harms children.

In re Emmanuel B.
(1st Dept., 7/16/19)

* * *

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN
ABUSE/NEGLECT - Release To Non-Respondent Parent

The Court holds that the Interstate Compact on the Placement of Children does not apply to the release of non-remanded children to out-of-state non-respondent parents.

The ICPC is intended to apply when a state authority has taken over the care and custody of a child and placed that child in foster care. In practice, a sending state will submit an ICPC application to the receiving state with the available information about the proposed placement resource. The receiving state will investigate the placement resource and notify the sending state if the placement resource is an appropriate caregiver in a safe environment. The child welfare authorities in the receiving state will be charged with the legal responsibility for monitoring the placement of the child if and when the child is sent.

The Court is not aware of any case in which the ICPC was held to apply to the release of a child, who had not been remanded to state custody, to an out-of-state, non-respondent parent. Here, the child was removed from her mother's care and custody and released to her non-respondent father. The child was never in the care and custody of ACS or a foster-care agency. Thus, the ICPC does not apply.

Matter of Solai J.
(Fam. Ct., Kings Co., 3/13/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29093.htm

* * *

ABUSE/NEGLECT - Visitation

ACS alleges in this abuse proceeding that the parents, the paternal grandmother, and the maternal grandfather abused the child, who suffered a fracture of his left arm while in their care.

The Second Department, relying on FCA § 1030, concludes that the family court did not err in awarding the paternal grandmother, who has completed her service plan and has acted properly when observed with the child, unsupervised access with the child on Saturdays from 10:00 a.m. until 12:00 p.m., to be followed by supervised access with the child, his three siblings, and their mother from 12:00 p.m. until 2:00 p.m., to be followed by further unsupervised access with the child from 2:00 p.m. until 7:00 p.m.; and, on Sundays, unsupervised access with the child.

The two hours of supervised access on Saturday affords ACS the opportunity to address any concerns that may come up and constitutes a sufficient safeguard.

Matter of Christopher M. S.
(2d Dept., 7/3/19)

* * *

ABUSE/NEGLECT - Visiting

The First Department upholds the family court's determination to grant two respondent mothers unsupervised visitation with their respective children, subject to compliance with precautionary measures specifically tailored to protect the children from harm.

There is no evidence in the record that either of the mothers had perpetrated the sexual abuse or posed any other safety risk to the children. The court prohibited other people from being present during visits, required that visits take place in the community, prohibited the children from being left with anyone other than their mothers during visits, and limited visits to twice weekly for a three hours a visit.

In re Kayla C.
(1st Dept., 2/14/19)

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ABUSE/NEGLECT - Visitation
VISITATION - Incarcerated Parent/Child's Mental Health Issues

In this Article Ten proceeding, the First Department upholds a determination denying, upon a hearing, respondent father's request for visitation at the correctional facility where he is incarcerated for the first-degree rape of his stepdaughter, the subject child's half-sister, in March 2014 when his stepdaughter was six years old.

The subject child, then approximately eighteen months old, was in the home when the rape occurred. He has not seen or spoken to his father since he was about two years old, has been diagnosed with autism spectrum disorder, and has cognitive and social deficits. He becomes aggressive and defiant when there are changes to his routine. He has tantrums, tries to run away when taken out in public or on public transportation, is hyperactive, and suffers from anxiety. Respondent's efforts to minimize the physical and emotional disruption the child would suffer in connection with traveling to and from the correctional facility show a lack of insight into the child's special needs.

The Court also notes the impact visitation would have on the stepdaughter and on the close sibling relationship.

The Court finds no error in the family court's determination allowing respondent to send letters that would be kept in agency files until more information from mental health professionals had been obtained by the family court.

In re Giovanni H.B.
(1st Dept., 5/9/19)

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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)

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VISITATION - Supervised/Prior Sexual Abuse

The Court grants unsupervised visits with the subject child to petitioner father, whose sister is no longer able to supervise visits, despite a finding in a 2015 Article Ten proceeding that petitioner sexually abused the subject child's older sibling, a derivative abuse finding with respect to the subject child, and petitioner's failure to complete a sex offender program and continued denial of the abuse allegations.

The Court notes, inter alia, that since the abuse proceeding, petitioner has followed court orders and engaged in therapy; that the factors contributing to the sexual misconduct allegations were addressed and a safety plan and strategies were implemented for petitioner to follow during parenting time, including not being alone with the child, never bathing her or changing her clothes, and being in public places with her; that during the time the paternal aunt supervised visits, reports indicated that visits went well and were deemed appropriate; and that the child, unaware of the Article Ten proceedings, loves petitioner and enjoys spending time with him, "and her innocence should be preserved by maintaining this relationship," which "should not be stymied due to the parties' financial inability to fund supervised visits through a third-party or consent to a mutually agreeable resource."

Petitioner is to re-enroll in individual counseling prior to any visits occurring. Unsupervised visits must take place during the day on Saturdays between 12 p.m. and 3 p.m., and occur in an open, public place, setting or venue in which there are three or more people present, excluding the theater, movies, and concerts. Petitioner must inform respondent mother of where the child will be during each visit. Any violation of this order shall result in the immediate suspension of visitation.

Matter of C.A. v. A.A.
(Fam. Ct., Bronx Co., 2/22/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50400.htm

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ABUSE/NEGLECT - Visitation/Parental Access

In this sexual abuse/domestic violence proceeding in which respondent father consented to abuse findings as to all four children pursuant to FCA § 1051(a), the family court denied the children's motion to have the father's parental access suspended.

The Second Department reverses. The evidence established that the children suffered from PTSD, experienced physical and mental manifestations of trauma when with the father, and expressed their desire that his access to them cease. In addition, each child corroborated the other's statements regarding the abuse they witnessed in the home.

Matter of Mia C.
(2d Dept., 1/16/19)

* * *

ORDERS OF PROTECTION - Subject To Custody/Visitation Order

Noting that an order of protection is intended to safeguard the rights of victims and is not a form of punishment, the Fourth Department concludes that the order of protection barring all contact between defendant and his child should be subject to any subsequent orders of custody and visitation issued by the family or supreme court in a custody, visitation or child abuse or neglect proceeding.

People v. Adam Smart
(4th Dept., 2/8/19)

* * *

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

Respondent is the child's sister and has been his guardian since the death of their mother in 2002. The neglect petition alleged that respondent often made statements to the child "to the effect that there is something wrong with him because of his sexual orientation," and had recently "bathed him in bleach because she felt he had poor hygiene."

Respondent and her counsel were present on December 2, 2016, when the family court scheduled a preliminary conference for February 2, 2017, a fact-finding hearing for March 8, 2017, and a permanency hearing for May 15, 2017. She did not appear on February 2. Her counsel appeared on March 8 and indicated that respondent was not present, and ACS's attorney stated that the parties had agreed to resolve the matter by entering into a voluntary placement agreement. The matter was adjourned to April 13, 2017. On that date, respondent was not present, and ACS's attorney indicated that respondent had contacted ACS "within the last week" and stated that "she'll provide dates within a week" to schedule a conference regarding the voluntary placement agreement. The court adjourned the matter to May 15, 2017, and instructed ACS to send respondent written notice that if she failed to appear in court on that date, an inquest would be held in her absence. On May 15, 2017, respondent did not appear and the court proceeded to fact-finding and disposition.

Respondent moved to vacate the order, alleging, among other things, that she was not served with a notice of inquest and her attorney never informed her that she was required to appear on May 15, 2017, and specifically denying that she bathed the child in bleach and made derogatory statements to the child concerning his sexual orientation. The court denied the motion.

The Second Department reverses and grants the motion. Although respondent was present when a permanency hearing was scheduled for May 15, 2017, there was no evidence in the record that she was served with a notice of inquest by ACS or had any knowledge that an inquest would be held should she fail to appear. Moreover, she demonstrated a potentially meritorious defense.

Matter of Avery M.
(2d Dept., 2/6/19)

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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)

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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)

* * *

FAMILY OFFENSES - Defaults

In this family offense proceeding, the Second Department upholds the denial of respondent's motion pursuant to CPLR 5015(a)(1) to vacate an order of protection that was entered after an inquest upon his default, noting that the motion was supported solely by an affirmation from respondent's counsel, who did not have personal knowledge of the facts constituting respondent's proffered excuse for not appearing.

Matter of Ramos v. Ramos
(2d Dept., 7/17/19)

* * *

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)

* * *

SUPPORT - Defaults

In this child support proceeding, the Second Department holds that the father's motion to vacate his default should have been granted where the father filed a petition seeking a downward modification of his support obligations, and, after discovery was conducted, an all-day hearing was scheduled for 9:00 a.m. on June 2, 2017; the father failed to appear at 9:00 a.m., and the Support Magistrate dismissed the petition by 9:30 a.m.; and the father arrived at 9:40 a.m. and moved to vacate his default.

The father explained that he had incorrectly calendared the time of the hearing. Although the family court has an interest in adhering to its time-specific calendaring process, there was a relatively short delay, proceedings had already taken place on the petition, there was no prejudice to the mother, and public policy favors resolving cases on the merits. The father also showed that he had a potentially meritorious petition.

Matter of Pecoraro v. Ferraro
(2d Dept., 1/9/19)

* * *

PATERNITY - Acknowledgment Of Paternity
- Defaults

In a proceeding in which petitioner seeks to vacate an acknowledgment of paternity, the Second Department upholds the vacatur of an order, issued upon respondent's default, that directed genetic marker testing.

Respondent was traveling by train from New Jersey and encountered delays that caused her to arrive slightly more than one hour late for the scheduled hearing. She had appeared at a majority of the prior court appearances, and she demonstrated the existence of a potentially meritorious defense.

The family court also did not err in dismissing the petition since petitioner failed to meet his prima facie burden to prove that the acknowledgment was signed by reason of fraud, duress, or material mistake of fact.

Matter of Timothy R. v. Laverne S.G.
(2d Dept., 5/8/19)

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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)

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TERMINATION OF PARENTAL RIGHTS - Defaults

The Second Department upholds the denial of the father's motion to vacate his default where he did not submit any evidence to substantiate his proffered excuse that he was the victim of an assault in another state on the day before he was scheduled to appear at the hearing.

Matter of Kamiyah D.B.V.
(2d Dept., 1/9/19)

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FAMILY OFFENSES - Defaults

The Second Department affirms an order denying respondent's motion to vacate a final order of protection that was issued on default where respondent alleged that his default was due to his confusion as to the start time of the hearing and that he would have appeared at 11:30 a.m. had he known that the hearing was scheduled to start at that time, and his counsel submitted an affirmation asserting that, due to law office failure, he inadvertently provided his client with a 2:30 p.m. start time.

Respondent and his counsel were both present in court when the hearing was scheduled, and the court confirmed the 11:30 a.m. start time with the parties and their respective counsel on subsequent occasions. The conclusory, undetailed, and uncorroborated claim of law office failure did not amount to a reasonable excuse, particularly since this was not the first time respondent had missed a scheduled hearing date.

Matter of Castellotti v. Castellotti
(2d Dept., 10/17/18)

Abandonment

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)

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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)

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TERMINATION OF PARENTAL RIGHTS - Abandonment
- Diligent Efforts

The Fourth Department finds legally insufficient evidence of abandonment where the father, after a prior attempt to establish paternity he had failed to adequately pursue, established paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition; and, thereafter, initiated communications with the child's caseworker, sent the caseworker at least four letters inquiring about the child and included a card and drawing for the child in at least one of those letters, and participated in a service plan review. These contacts were not minimal, sporadic, or insubstantial.

However, the Court finds that the father permanently neglected the child, noting, inter alia, that the father delayed in establishing paternity, and, although the caseworker did not speak to the father about filing a paternity petition, she never discouraged him from doing so and petitioner paid for DNA testing.

Matter of Jarrett P.
(4th Dept., 6/7/19)

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TERMINATION OF PARENTAL RIGHTS - Abandonment

The First Department, while upholding termination of the mother's parental rights based on abandonment, rejects the mother's claim that the agency, by threatening her with kidnaping charges after she failed to disclose the children's whereabouts while they were out on a trial discharge with her, discouraged her from contacting the agency.

In re Tiara Dora S.

(1st Dept., 3/7/19)

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TERMINATION OF PARENTAL RIGHTS - Abandonment/Insubstantial Contacts

The Third Department upholds an order terminating the mother's parental rights on abandonment grounds.

The mother saw the children only twice during the relevant six-month period for a total of about two hours, and became upset during both of these visits after hearing the children refer to their foster mother as "mommy" and made inappropriate comments to the children during the first visit and engaged in a verbal argument with the foster mother at the second visit. The suspension of the mother's parenting time does not preclude a finding of abandonment, particularly since the reinstatement of parenting time was entirely within her control but she did not sign the required releases or attend the appointments necessary to complete her mental health evaluation.

Although the mother communicated with petitioner and the agency case planner roughly a dozen times over the six-month period, the majority of those communications pertained to the scheduling of visits or the court-ordered mental health evaluation. The mother sought updates on the children only a few times, and made no meaningful attempts to stay apprised of the children's health and well-being by attending or inquiring about their doctor's appointments or their progress and educational development at their new schools.

Matter of Joshua M.
(3d Dept., 12/20/18)

Educational Neglect

ABUSE/NEGLECT - Educational Neglect/Home Schooling
- Derivative Neglect
- Failure To Provide Adequate Shelter

The First Department reverses findings of neglect and derivative neglect where the mother's living conditions were unsuitable, but there is no proof of impairment or an imminent danger of impairment. A police officer's testimony provided no information about the physical or mental condition of the children at the time of her visit.

However, a three-judge majority upholds findings of educational neglect as to the two older children, who were at least six years old and required to receive full-time educational instruction, and derivative neglect as to the younger children, where the mother failed to establish that she properly home-schooled the children. The mother did not establish that she was qualified to teach, especially with respect to elementary school-aged children, and knew her educational plan was not approved by the Department of Education. She failed to show that her instruction was substantially equivalent to that in public school, and that the children were educated for at least as many hours as provided in public school. Her use of college-level textbooks, and testing the

children using high school examination tests, did not constitute appropriate education. The mother did not persuasively explain how she spends twenty-five hours each week homeschooling the children when she also claims to be employed at an advertising firm in downtown Manhattan. The extent to which the children may have been harmed would be better evaluated if the children were tested, but that would require a degree of cooperation that has not been forthcoming from the parents.

The dissenting judges assert, inter alia, that even if the mother failed to comply with Department of Education regulations, the children were being homeschooled approximately five hours a day and were in compliance with the DOE's attendance requirements; that even assuming, arguendo, that the mother's conduct created an inference that the children were being educationally harmed, that inference was rebutted where the mother, a college graduate, had developed a curriculum that was consistent with the DOE's homeschooling regulations, tested the children periodically, and testified that they were meeting, if not exceeding, the DOE's standards; that New York State does not require teaching credentials for parents providing home instruction; and that the mother's lapse in judgment in not appreciating the strict rules is a far cry from the type of defective parental judgment that would support a finding of derivative neglect of children that were not even of school age at the time of the proceedings.

In re Puah B.
(1st Dept., 6/6/19)

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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)

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ABUSE/NEGLECT - Education Neglect
- Medical Neglect

The subject child is speech and language impaired and had an Individualized Education Program since third grade. When he was in fifth grade, he was diagnosed with attention deficit hyperactivity disorder and dyslexia. When he was in sixth grade, he was re-evaluated and was classified as emotionally disturbed. The mother disagreed with the recommendation that the child be placed in a special education class and requested an independent neuropsychological evaluation, and later revoked her consent to the IEP. The child transferred to a new school for seventh grade with no IEP in place. Subsequently, the child was diagnosed by a neurologist as having oppositional defiant disorder with ADHD, and was prescribed Adderall. The child was re-evaluated and again classified as emotionally disturbed. The mother consented to the IEP, but petitioner commenced this neglect proceeding.

The Second Department reverses findings of educational and medical neglect. Neither the mother's refusal to consent to the IEP nor her failure to follow up with independent neuropsychological testing constituted educational neglect. As for medical neglect, the Court notes that although the mother delayed in scheduling an independent neuropsychological evaluation and the child missed some doses of Adderall, the evidence did not establish inadequate medical care or a resulting impairment or imminent danger of impairment.

Matter of Jahzir Barbee M.
(2d Dept., 4/24/19)

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ABUSE/NEGLECT - Educational Neglect
- Leaving Child With Other Caretaker/Failure To Provide Supplies And Care

The First Department upholds a finding that respondent mother neglected the child where, during the 2015-2016 school year, the child was absent from school 64 times and late 40 times; the child demonstrated developmental and academic delays, performing below average in all areas, due at least in part to her poor attendance record; and the child's excessive absences also prevented her from receiving the services prescribed to her under her Individual Education Plan.

The Court, citing a requirement that minors five to seventeen years of age in New York City attend school on a full-time basis, rejects respondent's argument that the child was not required to attend school until the age of six.

Respondent also neglected the child by leaving her with her paternal grandmother with only the clothing the child was wearing, some of which was dirty, and without provisions for food or medical care. Respondent also failed to inform the grandmother, who agreed to care for the child for one day, that she planned to leave the child in the grandmother's care until the end of the school year. While respondent did return on one date to drop off medical documents and clothes for the child, it appears she only did so after being contacted by the agency.

In re Olivia J.R.
(1st Dept., 1/8/19)

Failure To Supply Care

ABUSE/NEGLECT - Failure To Supply Shelter And Care/Failure To Plan

After a physical altercation which resulted in an order of protection being issued against the teenage child and in favor of the father, respondents refused to allow the child to return home, claiming that they were afraid of him and that the child did not want to return home. The agency attempted to schedule a child safety conference, but respondents retained an attorney who insisted on communicating on their behalf and being present at any meeting. The agency then commenced this proceeding.

The First Department reverses a finding of neglect and remands for further proceedings. Although a child's history of disciplinary issues does not justify a parent in excluding the child from the home while failing to cooperate with the agency's efforts to address the child's problems and return the child, here there was a pending criminal proceeding and an order of protection, and respondents were entitled to show that there was a founded fear that it would be unsafe for the child to return home. The court limited evidence to the time period alleged in the petition and precluded other evidence concerning the child's behavior, and precluded evidence of respondents' attorney's communications with the agency, which was offered to show their willingness to meet and plan with the agency provided that the child was not present and their attorney could be present.

In re Elijah M.
(1st Dept., 7/9/19)

* * *

ABUSE/NEGLECT - Failure To Provide Care/Leaving Child With Relative

The Second Department reverses a finding of neglect against the mother where she and her aunt agreed that the children would stay with the aunt until the end of the summer; before school started the aunt agreed to keep the children for another month subject to certain conditions; and the mother did not pick up the children at the beginning of October as agreed.

There was no evidence that the children were not being well cared for by the aunt.

Matter of Zahir W.
(2d Dept., 2/20/19)

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)

Excessive Corporal Punishment/Physical Force/Evidence Of Injury

ABUSE/NEGLECT - Injuries Constituting Abuse
- Post-Petition Evidence

The Fourth Department upholds a finding of abuse, finding sufficient evidence where the twenty-one-month-old child sustained approximately twenty-five distinct bruises, including a black eye, a bruise on her forehead, a bruise on her right ear, and a bruise under her left eye; the child had an identifiable adult-sized bite mark on her arm and was missing large clumps of hair, and the pattern of hair loss and the child's reaction to having a doctor examine her scalp were consistent with the child's hair having been forcefully pulled from her head; the family court found that the mother's explanations - e.g., that the hair condition was related to a fungal infection and that the child would sometimes bite herself - were not credible; and the physicians who testified asserted that the bruises and other injuries were inflicted and not accidental.

The family court did not err in refusing to admit into evidence certain educational and medical records concerning the child's behavior approximately one year after the child was first removed from the mother's custody in this case.

Matter of Addison M.
(4th Dept., 6/14/19)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment/Impairment Of Child's Condition

The Fourth Department grants petitioner's request that an indicated report be amended to unfounded and sealed where, after confronting his ten-year-old son regarding the child's misbehavior, petitioner struck the child two to three times with a belt; at the fair hearing, petitioner testified that he struck the child over his clothing, and petitioner and the child's mother

testified that the child seemed unfazed and did not appear to be in or complain of being in pain either immediately or the following morning; and, the day after the incident, school personnel observed marks on the child's legs and back, and a case worker noted marks on the child's legs but did not see a mark on the back.

Other than a general reference in DSS records that the child was "upset" by the incident, DSS did not present evidence that the incident had a physical, mental, or emotional impact on the child.

Matter of Jonathan L. v. Poole
(4th Dept., 3/15/19)

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 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 Second Department reverses an order that, after a fact-finding hearing, dismissed neglect charges, and makes a neglect finding, where respondent mother attacked her pregnant sister, the children's aunt, with a knife, causing lacerations to her ear that required medical treatment, while the children were in the home.

Although the family court cited the absence of evidence that the children witnessed the incident, an imminent danger of physical, mental or emotional impairment should be inferred from the mother's egregious conduct while the children were in the home, and impairment or imminent danger of physical impairment should be inferred from the children's proximity to the violence.

Matter of Najaie C.
(2d Dept., 6/19/19)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department holds, inter alia, that the family court properly found that respondent father neglected the two youngest children, who were in the two-bedroom apartment in close proximity to the domestic violence incidents, and in danger of physical or emotional impairment.

In re Serenity G.
(1st Dept., 4/23/19)

* * *

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)

* * *

ABUSE/NEGLECT - Domestic Violence/Derivative Neglect

The First Department upholds findings of neglect and derivative neglect based on a domestic incident in the child's presence, noting, inter alia, that the child's statement that she was afraid of respondent demonstrated an imminent risk of emotional and physical impairment.

In re Justin E.
(1st Dept., 5/28/19)

* * *

ABUSE/NEGLECT - Domestic Violence/Impairment Of Children's Condition

The First Department upholds a finding of neglect based on repeated incidents of domestic violence between the father and mother where impairment could be inferred because the children were in close proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by it.

In re O'Ryan Elizah H.
(1st Dept., 4/2/19)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department upholds a finding of neglect against the father where, at the shelter where the mother and child were residing, the father placed his hands around the mother's neck during a heated argument, while the mother was holding the one-month old child, and the mother screamed that the father bit her finger. The child was in imminent danger of physical impairment due to her proximity to violence directed at the mother.

In re Bobbi B.
(1st Dept., 10/30/18)

* * *

ABUSE/NEGLECT - Domestic Violence

The First Department upholds a finding of neglect where respondent physically assaulted the children's mother in the children's presence, hitting her in the face with the back of his hand, punching her in the nose and drawing blood, and yanking her by the hair.

The children were upset, very scared and nervous, the elder child yelled "Stop it" during the fight, and the mother locked herself and the children in the bathroom to wait for the police.

In re Chandler A.
(1st Dept., 1/24/19)

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)

* * *

ABUSE/NEGLECT - Mental Illness

Upon a fact-finding hearing, the Court dismisses a neglect petition alleging mental illness, concluding that respondent's actions were not inconsistent with what a reasonable or prudent parent would have done in her situation.

There is no evidence before the Court suggesting that respondent could have anticipated that she would have to be psychiatrically hospitalized in June 2018. While she did attempt suicide and attend therapy for a period of time three years earlier, there is no evidence that in the years since then she has had any mental health issues. After not sleeping for two days and hearing voices for three days, she sought health treatment by going to the hospital, and made an appropriate safety plan for her children by leaving them in the care of a neighbor she knew and trusted. At the hospital, even in the midst of her psychosis, she was preoccupied with concern for the children.

There also is no evidence before the Court that the children, beyond missing their mother while she was hospitalized, were ever affected by her psychosis in June 2018.

Matter of Jonefe R.
(Fam. Ct., Bronx Co., 3/27/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50432.htm

* * *

ABUSE/NEGLECT - Mental Illness
- Defaults

The Fourth Department agrees with respondent mother that she did not default where she appeared at the two-day fact-finding hearing and was present when petitioner rested, and,

although she failed to appear on the next hearing date, the court merely issued its fact-finding determination.

However, there was sufficient evidence of neglect based on mental illness. Although the mother voluntarily sought treatment, she missed many follow-up appointments. Because of her delusions and paranoia, she often stayed at home with the shades drawn and refused to let her children go outside. Her second oldest child did most of the cooking because the mother was too depressed to do so, and she yelled at the children and called them names to keep from hitting them. She admitted being irritable and having a violent past, and continued to exhibit such behavior when she screamed at and threatened a caseworker in front of the children and struck the youngest child during a psychiatric assessment.

Matter of Amiracle R.
(4th Dept., 2/1/19)

Medical Neglect And Treatment

ABUSE/NEGLECT - Sexual Conduct

The Fourth Department finds sufficient evidence of neglect where the father slept in the same bed as the child, lying on top of her and moving up and down, and placed his genitals against the child's buttocks. Petitioner was not required to prove that the father's actions were done for the purpose of sexual gratification.

Impairment of the child's condition was established. She told others that she did not like it, it made her uncomfortable, and she wanted it to stop.

Matter of Kayla V.
(4th Dept., 9/27/19)

Practice Note: In contrast, a sexual gratification element comes into play when an Article Ten sexual abuse charge [FCA § 1012[e][iii]) requires proof of a specific Penal Law offense involving "sexual contact." *See*, *e.g.*, *In re Lesli R.*, 138 A.D.3d 488 (1st Dept. 2016) (intent inferred where respondent continued to touch stepdaughters after being told he was making them uncomfortable).

Leaving Child Alone Or Unsupervised Or With Harmful Individual

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)

*   *   *

ABUSE/NEGLECT - Leaving Child With Inappropriate Caretaker
- Failure To Secure Necessary Services

The Fourth Department upholds a finding of neglect where the mother left the subject child, who has autism and is nonverbal, alone in the home for multiple hours with the mother's teenage daughter, who also has autism; that there was proof that the daughter, whose individual service plan specified that she was not to be left home alone, was not capable of caring for the child; and that when agency staff arrived at the home, the child and the daughter were alone without supervision, a second-floor window was open, and the child was seen attempting to turn on the stove.

The mother knew she needed help caring for the child long before the situation in question arose, and had years to complete and submit the necessary paperwork to secure appropriate services for the child.

Matter of Edward T.
(4th Dept., 8/22/19)

*   *   *

ABUSE/NEGLECT - Leaving Child Unsupervised

The First Department upholds the denial of pro se petitioner's request for annulment of an indicated report where a four-year-old child fell from a bathroom window at the daycare facility where petitioner worked. Approximately an hour passed between the last time petitioner saw the child and when the child was admitted to a hospital after being found unconscious on the ground outside the facility.

In re Heavens v. State of New York Office of Children and Family Services
(1st Dept., 5/28/19)

*   *   *

ABUSE/NEGLECT - Domestic Violence
- Leaving Children Alone
- Allowing Neglect/Failure To Protect

Respondent and the subject children, one of whom is respondent's biological child, live with the father (also a respondent), who suffers from untreated posttraumatic stress and substance abuse disorders. On one occasion, the father returned home after drinking liquor and beer and displayed increasingly erratic behavior in the presence of the children. Respondent and the father had a verbal altercation which became physical, and the father threw his phone into a fire he had started in the backyard. Respondent and the father left the home, with the children alone and without a phone or any way to contact respondent. Respondent did not return to the house or communicate with the children for more than twenty-four hours and did not arrange for another adult to care for them, and the children became afraid when respondent did not return home or

contact them. The children eventually contacted their older sister through Facebook and then waited two hours for her to travel to their home. The sister called 911 and reported respondent and the father as missing persons. When the police responded to the home, the children had been alone for approximately twenty hours. Respondent and the father drove past the home while multiple police cars were parked outside and chose not to stop to check on the children, and stayed away for four more hours.

The Fourth Department upholds a finding of neglect, noting respondent's failure to provide adequate supervision, the children's exposure to domestic violence, and respondent's failure to take reasonable measures to protect the children from the effects of the father's unaddressed mental health and substance abuse issues.

Matter of Ricky A.
(4th Dept., 3/22/19)

*   *   *

ABUSE/NEGLECT - Exposure To Sex Offender

In 2015, ACS filed a petition alleging, inter alia, that respondent mother and respondent Cecil R. neglected the subject child by failing to maintain adequate shelter; that Cecil R. neglected the child by presenting an imminent danger based on a prior sexual abuse finding in an unrelated 2012 proceeding involving two other children, and his failure to complete a sex offender treatment program in connection with that prior finding; and that the mother failed to protect the child from Cecil R. Following a fact-finding hearing, the family court dismissed the above-mentioned charges.

The Second Department affirms. Although the 2012 findings were binding, petitioner failed to establish that Cecil R. still posed an imminent danger to the child, and thus failed to establish that the mother neglected the child by allowing Cecil R. to live in the home. Petitioner also failed to establish that Cecil R. and the mother neglected the child by failing to maintain adequate shelter.

Matter of Jordin B.
(2d Dept., 3/20/19)

*   *   *

ABUSE/NEGLECT - Leaving Child With Inappropriate Caretaker

The Second Department upholds a finding of neglect where, following statements by the mother on three separate dates that she did not want the child and intended to suffocate her, the father, who believed that the approximately six-month-old child was in danger of death or other harm, moved out of the mother's residence and left the child in the mother's care; and, after the father filed a habeas corpus petition and a family offense petition against the mother, "a chilling tape recording" was admitted into evidence that contained the mother's admission to the father that

she had harmed the child, and her threat to suffocate the child by placing a pillow over her head.

Matter of T.N.
(2d Dept., 1/9/19)

* * *

ABUSE/NEGLECT - Leaving Children Alone Or Unsupervised

The Court finds sufficient evidence of neglect where respondent mother, inter alia, dropped the children off at the babysitter and left "quickly," before insuring they were properly supervised, and her two-and-a-half year-old child was found alone on a stranger's doorstep in pajamas without shoes in the early hour of the morning. The mother told the caseworker that she saw an "appropriate" person, but did not identify the individual or indicate whether she got out of the car to walk the children inside the house. The Court assumes that had the mother walked the children into the house, she would have spoken to someone, and that if she had seen an "appropriate" person in the home, she would have provided the caseworker with his/her name.

In addition, a caseworker visited the mother's home and found the three children unsupervised. While the twelve-year-old child was with the four-year-old and two-year-old children, the mother had previously admitted to a caseworker that the twelve-year-old was incapable of taking care of himself or the other children due to certain cognitive issues.

Matter of A.M. v. H.M.
(Fam. Ct., Suffolk Co., 1/17/19)
https://www.law.com/newyorklawjournal/almID/1548245352NYNN173071/
(decision available upon request)

Derivative Abuse/Neglect

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)

* * *

ABUSE/NEGLECT - Derivative Neglect

The First Department upholds a finding of derivative neglect based on a 2010 neglect finding which was based on, inter alia, the father's sexual misconduct with his older child and failure to take prescribed psychotropic medication and receive mental health treatment.

Although the father has intermittently complied with services and participated in regular visitation with his other children, he has failed to acknowledge and accept responsibility for his past sexual misconduct, and made a unilateral decision to discontinue therapy and medication, which were ordered in the prior case.

In re Myracle N.P.
(1st Dept., 5/9/19)

* * *

ABUSE/NEGLECT - Derivative Neglect/Summary Judgment

ACS first filed neglect petitions against the mother in 2006, and ACS ultimately obtained findings as to the mother's seven children based on her untreated mental illness and violent aggressive behavior. In 2016, ACS filed petitions alleging that the mother neglected those seven children, and derivatively neglected her youngest child. ACS moved for summary judgment, and the family court granted the motion.

The Second Department affirms, noting that summary judgment under CPLR 3212 may be granted when it has been clearly ascertained that there is no triable issue of fact. ACS submitted, through the affirmation of counsel, prior orders finding neglect, directing the mother to undergo a full mental health evaluation and to comply with the resulting recommendations and treatment, and indicating that she had failed to do so. The prior conduct is sufficiently proximate in time to support a reasonable conclusion that the condition still exists.

Matter of Jaylhon C.
(2d Dept., 3/20/19)

* * *

ABUSE/NEGLECT - Derivative Neglect

In this derivative neglect proceeding, respondent mother did not appear for the fact-finding hearing and her attorney did not participate, but the attorney for the child moved for dismissal at the close of ACS's case. The Court granted the motion.

The Court notes, inter alia, that the mother has two prior neglect findings involving educational and medical neglect of the subject child's siblings; that the findings were entered one and two years prior to the child's birth, and are not sufficiently proximate in time to warrant a presumption of an ongoing risk of neglect; and that the mother complied with referrals for toxicology screenings, self-referred to a substance abuse treatment program, and completed a parenting skills program offered by the foster care agency.

Matter of Zippirah N.
(Fam. Ct., Bronx Co., 5/31/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51086.htm

Drug/Alcohol Abuse/Possession/Sale

ABUSE/NEGLECT - Alcohol Misuse/Possession Of Firearm

The First Department reverses a neglect finding premised on respondent's abuse of alcohol where there is no evidence that he lost self-control during repeated bouts of excessive drinking and thus the presumption of neglect is not triggered by FCA § 1046(a)(iii).

However, the Court upholds a finding where respondent was in possession of a firearm when the police arrived to stop an altercation he was having with his girlfriend, and hospital staff indicated that he "smelled like alcohol."

In re Caleah C.M.S.
(1st Dept., 7/11/19)

*   *   *

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 - Drug Misuse

The Fourth Department conclude that petitioner activated the presumption of neglect in FCA § 1046(a)(iii) by presenting evidence that respondent father had used cocaine nearly non-stop for the week preceding the removal of the children, that he admitted being addicted to drugs, that respondent mother called the police who arrived while the father was in the midst of injecting cocaine, and that dozens of hypodermic needles were found in respondents' house.

The presumption was not rebutted by evidence that the father is voluntarily and regularly participating in a recognized rehabilitative program. Although there was evidence suggesting that the father had enrolled in a treatment program at some prior time, the evidence does not establish

that he was regularly participating in that program where there is evidence establishing that he continued using drugs.

Matter of Jack S.
(4th Dept., 6/28/19)

Practice Note: The Fourth Department has repeatedly held - *e.g.*, in *Matter of Carter B.* - that "participation" in a rehabilitative program is illusory and does not rebut the statutory presumption where such participation plainly is having no impact on the respondent's drug misuse.
Link to *Carter B.*
http://nycourts.gov/reporter/3dseries/2017/2017_07066.htm

* * *

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)

* * *

ABUSE/NEGLECT - Drug/Alcohol Misuse

The First Department reverses a neglect finding where, even assuming petitioner established a prima facie case of drug misuse under FCA § 1046(a)(iii), respondent father rebutted the inference of neglect. The evidence failed to establish that the physical, mental or emotional condition of the child was impaired or placed at imminent risk of impairment.

The child was well cared for, healthy, and well fed and clothed, and his medical needs were addressed. Although respondent tested positive for alcohol and cocaine on several occasions, the child was in the care of a resident babysitter on those occasions, and he never used or was under the influence of drugs or alcohol in the child's presence. There is no evidence in the record that

respondent was under the influence of drugs or alcohol when visited by caseworkers when the child was in his care.

In re Royal P.
(1st Dept., 5/16/19)

*   *   *

ABUSE/NEGLECT - Drug Possession/Sale

The First Department upholds a finding of neglect where respondent mother placed the child in close proximity to narcotics and narcotics trafficking.

The mother, carrying cocaine and ecstasy, drove to New Jersey with her thirteen-year-old daughter to engage in a drug transaction, dropped off her husband and the child in a parking lot to wait for her, drove to an adjoining parking lot, sold cocaine to a male and gave him an ecstacy tablet, and then drove around the corner of the motel to pick up her child and husband, and, before she could exit the parking lot, the police arrested her in front of the child, who began to cry hysterically.

In re Eliani M.-R.
(1st Dept., 5/30/19)

Summary Judgment/Collateral Estoppel/Res Judicata

ABUSE/NEGLECT - Summary Judgment/Collateral Estoppel
- Adjournments/Stay Pending Criminal Appeal
- Motion To Vacate Fact-Finding

The Third Department upholds an order granting petitioner's motion for summary judgment adjudicating the child to be abused, rejecting respondent's contention that the family court abused its discretion when it granted petitioner's motion for summary judgment and gave collateral estoppel effect to respondent's criminal conviction prior to the resolution of his pending appeal. The determinative issue is whether he had a full and fair opportunity to litigate during the course of his criminal trial, not whether he has exhausted every avenue of appeal.

The family court did not abuse its discretion by not staying the Article Ten proceeding pending resolution of the criminal appeal. The interests of justice and the child's interest in receiving timely and effective judicial review in a permanency proceeding were served.

Should respondent prevail in his criminal appeal, there is nothing precluding him from petitioning the family court for relief.

Matter of Philomena V.
(3d Dept., 10/18/18)

*   *   *

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 - Summary Judgment
- Excessive Corporal Punishment

The Second Department reverses an order granting petitioner's motion for summary judgment where petitioner presented the evidence submitted at a FCA § 1028 hearing at which the mother, who is deaf and communicated through a sign language interpreter, gave various explanations for the scratches and other marks on the child's skin, and testified that she had difficulty controlling the child, who has been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder, and that she accidentally scratched the child while trying to restrain him.

The evidence at the § 1028 hearing revealed triable issues of fact as to whether the mother neglected the child.

Matter of Joseph Z.
(2d Dept., 6/19/19)

*   *   *

ABUSE/NEGLECT - Res Judicata

The Department of Child Services filed an initial petition alleging five children were CHINS but

failed to present sufficient evidence of the parents' alleged substance abuse. The trial court dismissed the case without prejudice and DCS filed a second petition containing nearly identical allegations the day after the first petition was dismissed. The court considered evidence and testimony that could have been presented during the first proceeding, and the children were ultimately adjudicated CHINS.

The Supreme Court of Indiana holds that the doctrine of res judicata - and more specifically claim preclusion - applies to bar a repeated filing of a CHINS petition based on evidence that could have been produced in the first filing. However, in this case the issue was not properly raised in the trial court.

Matter of Eq.W.
2019 WL 2635602 (Ind., 6/27/19)

Practice Note: These res judicata principles have been applied in New York child protective proceedings. *Matter of Alfonzo T.*, 79 A.D.3d 1724 (4th Dept. 2010) (court properly refused to admit evidence of incidents that were raised or could have been raised in separate petition previously filed; "To hold otherwise under the circumstances of this case would allow government agencies such as petitioner to bring successive proceedings alleging the same theory of neglect until the desired result was obtained, with the status of the child remaining undetermined throughout"); *Matter of Antonio U.*, 19 Misc.3d 1113(A) (Fam. Ct., Kings Co., 2008) (court dismisses allegations regarding incidents that took place prior to date first proceeding was dismissed with prejudice as barred by res judicata where those allegations were put in issue in prior action or might have been; however, educational neglect during period before dismissal of prior proceeding may be charged since ACS may not have known of child's attendance in time to file motion to amend first petition); *Matter of Yan Ping Z.*, 190 Misc.2d 151 (Fam. Ct., Kings Co., 2001) (principles regarding issue preclusion and mandatory joinder precluded petitioner from prosecuting charges which could have been included by amendment in initial neglect petition); *see also Matter of Stephiana UU.*, 66 A.D.3d 1160 (3d Dept. 2009) (evidence of excessive corporal punishment that predated, but was not raised in, prior proceeding was admissible to help court evaluate environment in which additional acts of excessive corporal punishment were inflicted).

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COLLATERAL ESTOPPEL – Prior Dismissal In Dependency Proceeding

A divided Arizona Supreme Court holds that issue preclusion may apply in a criminal proceeding when an issue of fact was previously adjudicated in a dependency proceeding and the other elements of preclusion are met.

Although criminal charges put at stake an accused's liberty, dependency proceedings affect liberty interests as well – the fundamental right of parents regarding their children's upbringing. The Court rejects the suggestion that the state does not take dependency proceedings as seriously as criminal prosecutions, and will forego dependency proceedings if issue preclusion may apply. If the state cannot prove a dispositive fact under the preponderance standard, it is unlikely to be

able to do so, absent new or additional evidence, in a subsequent criminal proceeding. The Court's opinion does not prevent the state from pursuing parallel or successive proceedings; it only prevents the state from re-litigating a factual issue that it had a full and fair opportunity to litigate where the related judgment has become final, i.e. any appeals have been exhausted.

Issue preclusion may properly be applied here. The State has conceded that there was a full and fair opportunity to litigate the issue before the juvenile court, the issue was essential to that court's judgment, the issue was actually litigated, and the State chose not to appeal, making the juvenile court's judgment final for purposes of preclusion. There was mutuality of parties because the State has brought its power to bear and is a party in both proceedings. In fact, the Attorney General's Office, which represented the agency in the dependency proceedings, not only has supervisory authority over county attorneys, but is also responsible for handling appeals of criminal cases originally tried by county attorneys, who must furnish that office with a statement of facts and legal authority for appellate purposes.

Although the State also argues that the issues are not the same because the two proceedings "are governed by different substantive law and different procedures," the precise issue here is whether defendant abused the child by shaking her, causing bleeding in her brain and eyes. This factual issue was adjudicated in the dependency proceeding against the State. The same factual issue is the basis for the criminal charge. The State has not pointed to any additional evidence it was foreclosed from presenting in the dependency proceeding that would apply in the criminal case, nor has it indicated any changed circumstances that would make re-litigation appropriate.

Crosby-Garbotz v. Fell
2019 WL 438194 (Ariz., 2/5/19)

Practice Note: In *Nelson v. Dufficy*, 104 A.D.2d 234 (2d Dept. 1984), lv denied 64 N.Y.2d 610, defendant argued that he could not be charged with first degree sexual abuse in a criminal proceeding because, upon a hearing, the family court had made a finding of only third degree sexual abuse in an Article Ten proceeding. The Second Department concluded that collateral estoppel did not apply, citing the fact that different prosecutorial agencies were involved, and the child protective nature of the family court proceeding; defendant had not shown that the issue of his guilt or innocence had necessarily been decided by the family court in his favor.
In *People v. Roselle*, 84 N.Y.2d 350 (1994), the Court of Appeals concluded that collateral estoppel did not apply where defendant's admission in the Article Ten proceeding, and his explanation regarding how the child had been burned, resulted in a neglect finding. The Court noted that the issues in the two proceedings were not the same; the issue in the Article Ten proceeding was defendant's ability to care for his daughter, not his criminal liability. Also, it was the County Attorney, not the District Attorney, who was charged with presenting the Article Ten case, and the presence in family court of a non-attorney District Attorney employee contemplated further development of the facts in any criminal prosecution.

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

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 – Hearsay/Child's Prior Testimony

The fourteen-year-old child refused to continue with her testimony at a FCA § 1028 hearing regarding her allegations of sexual abuse after she already had been cross-examined for three days by respondent's counsel. According to a letter from the child's therapist submitted to the court, it would be detrimental for her to return to testify.

The First Department holds that the child's incomplete testimony at the § 1028 hearing, which was stricken at that hearing, could be considered at the fact-finding hearing pursuant to FCA § 1046(a)(vi), subject to a statutory corroboration requirement. In § 1046(a)(vi), the Legislature intended to address the reluctance or inability of victims to testify. Respondent's arguments regarding the timing and circumstances of the incomplete testimony go to its weight, not its admissibility. In light of the corroboration requirement, respondent's due process concerns are unsupported.

In re Jaylyn Z.
(1st Dept., 3/14/19)

Practice Note: Given that FCA § 1046(a)(vi) has routinely been used as the basis for admitting the un-cross-examined, out-of-court statements of very young children, even as young as two-and-a-half [*see Matter of Heather P.*, 233 A.D.2d 912 (4th Dept. 1996) and *Matter of Department of Social Services o/b/o Carol Ann D.*, 195 A.D.2d 460 (2d Dept. 1993)], any argument that a child's prior testimony is not admissible at fact-finding under § 1046(a)(vi) seems rather weak. Where, as here, testimony was cut short, the real question should not be whether the testimony is admissible, but whether the court should give it the same weight as testimony that has been fully cross-examined by the respondent's counsel - the answer to that question should be no - and whether the testimony has been corroborated. In any event, prior testimony should be given more weight than a child's un-cross-examined, out-of-court statement.
Moreover, if a child's prior testimony, or any out-of-court statement by the child, is admitted not under FCA § 1046(a)(vi), but under a traditional hearsay exception, such as the exception for prior testimony in CPLR 4517, corroboration is not required. *Matter of Lydia K.*, 112 A.D.2d 306 (2d Dept. 1985), *aff'd* 67 N.Y.2d 681 (1986) (seven-year-old child's statement admitted as spontaneous declaration).

* * *

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 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/Exclusion Of Respondent

In this sexual abuse case, ACS asks that the allegedly abuse child (born in 2010) testify at the fact-finding hearing in camera, or via closed circuit television, on the ground that testifying in respondents' presence would be detrimental to her well-being. The attorney for the child supports ACS's motion, while counsel for the accused respondent opposes the motion and asks alternatively that a hearing be held to determine what specific trauma, if any, would result from in-court testimony.

When a request is made that a child testify outside the presence of a respondent, there is no presumption of necessity. The moving party must present evidence showing that the child would, in fact, be at risk of serious emotional harm if forced to testify in open court. It is not enough that the witness would merely be nervous or suffer some trauma in general; rather, it must be shown that testifying in the same room as the respondent would likely cause the harm. To satisfy this burden of proof, a movant must present the testimony or an affidavit of a qualified expert establishing a risk of trauma to the particular child, or that the child will not be able to freely testify if the respondent is present. A court need not hold an evidentiary hearing if the moving papers contain sufficient information upon which to base the decision.

Here, the Court concludes that ACS and the AFC have not made sufficient factual allegations in their papers, and orders a "vulnerability" hearing so ACS can attempt to meet its burden and the Court can properly balance the risk of actual emotional trauma to the child against respondents' right to due process.

Matter of Nakiah W.
(Fam. Ct., Bronx Co., 5/8/19)

http://nycourts.gov/reporter/3dseries/2019/2019_50791.htm

*   *   *

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 - Hearsay/Children's Statements
INDIAN CHILD WELFARE ACT

In this case involving Indian children and the Indian Child Welfare Act's clear and convincing evidence standard, the Maine Supreme Court holds that use of the children's hearsay statements did not violate due process.

In re Danielle H.
2019 WL 3819667 (Me., 8/15/19)

*   *   *

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/Statements Relevant To Diagnosis And Treatment

The Fourth Department concludes that, due to the mother's refusal or inability to inform hospital personnel of what had occurred, statements in the hospital records concerning how and why she was taken to the hospital were required for an understanding of her condition and thus were properly admitted as related to diagnosis and treatment and because they had the requisite indicia of reliability.

Matter of Zackery S.
(4th Dept., 3/15/19)

* * *

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

* * *

FAMILY OFFENSES - Hearsay Evidence

The Third Department holds that the hearsay exception in FCA § 1046(a)(vi) for children's statements regarding abuse or neglect is not applicable in a family offense proceeding.

By its terms, that statute applies only in hearings under FCA Articles Ten and Ten-A. Courts have applied the statute in custody and visitation proceedings where a child's out-of-court statements relate to abuse or neglect and are sufficiently corroborated, but FCA Article Eight essentially provides a civil forum to address criminal conduct, and is generally utilized between adult parties.

Matter of Kristie GG. v. Sean GG.
(3d Dept., 12/20/18)

* * *

ABUSE/NEGLECT - Hearsay/Unavailability Of Witness Due To Respondent's Misconduct

In this Article Ten proceeding in which it is alleged that the father perpetrated acts of domestic violence against the mother in the presence of the children, but the mother no longer intends to testify, the Court orders a Sirois hearing to determine whether the mother's hearsay statements may be admitted. ACS has met its burden to set forth facts demonstrating a "distinct possibility" that the father's actions induced the mother to refuse to testify.

The Court notes that a person engaging in witness tampering will rarely do so openly, resorting instead to subterfuge, and that ACS may rely on circumstantial evidence. The mother reported that she has been a victim of the father's emotional abuse for approximately twelve years and his physical abuse for the last eight years, including incidents in the presence of the children. She reported that the police responded to multiple incidents, that the father would lie to the police, and that she was never the one to call the police as she was afraid the father would lose his employment. She reported to her aunt that the father would tell the police that he feared for his and the children's safety, that on multiple occasions she was hospitalized because the father stated to the police that she was unstable, and that she feared that if she left the father she would lose her children and would have nowhere to live as their apartment belongs to him. The attorney for the children presented copies of family offense petitions, and evidence of the mother's subsequent requests for modification of protective orders as the parties tried to work things out.

Matter of M.V.
(Fam. Ct., Bronx Co., 6/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29205.htm

Sealed Records

ABUSE/NEGLECT - Hearsay Evidence - ORT/Statements Relevant To Treatment And Diagnosis/Sealed Criminal Records

The father moves to preclude from the fact-finding hearing portions of the Oral Report Transmittal; portions of hospital records; and a 911 recording and associated Sprint Report.

With respect to the ORT, the Court concludes that although the police officer was a mandated reporter, it appears that the information came from a layperson without a duty to accurately report the allegation to law enforcement. However, these portions are admissible to set the stage for the ACS investigation.

With respect to the hospital records, the Court concludes that the source of the statement in question was either the non-respondent mother, an EMT, or the child, and therefore that the statement is admissible as germane to diagnosis and treatment. If the source is the child, the statement also is admissible pursuant to FCA § 1046(a)(vi).

Use of the 911 Recording and associated Sprint Report is not barred by the sealing provisions in CPL § 160.50(1)(c) (referring to all official records and papers relating to the arrest or prosecution on file with the DCJS, or any court, police agency, or prosecutor's office). The 911 system was not designed to be a mechanism of law enforcement. In New York City, the public safety answering point is a 911 center where NYPD, FDNY, and emergency medical dispatch services are co-located, using universal technology. Although the individual who answers a 911 call in the first instance is an employee of the NYPD, and the recordings are maintained by the NYPD, the work of an emergency dispatcher is about first response and scene control.

When a 911 recording generates both a police investigation and a child protective investigation, and when each investigation leads to a separate legal proceeding, the 911 recording should be admissible in each court regardless of the case outcome in the other. The burden of proof in a criminal case is much higher than in a family court case, and termination of a criminal matter favorably to the defendant does not mean that the 911 recording is not probative in a child protective proceeding or should be excluded from consideration. Precluding this evidence would permit respondents to benefit from having been arrested and prosecuted criminally, and there is no sound policy reason why 911 recordings should generally remain unsealed forever whereas a recording that leads to a criminal case that is ultimately dismissed should be sealed. The chances that any given arrest will lead to a favorable termination of the matter and the sealing of official records is quite high. "Simply put, the CPL cannot be used to trump the truth-finding and child protective missions of Family Court."

Matter of Estrella G.-C.
(Fam. Ct., Kings Co., 4/12/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50545.htm

* * *

ABUSE/NEGLECT - Evidence - Sealed Criminal Records

In this domestic violence case, the fact-finding hearing commenced and respondent's counsel indicated that he would be seeking to admit the 911 recording concerning a domestic violence

incident. Respondent's criminal court case related to that incident was dismissed and sealed. The attorney for the child filed a motion to preclude the 911 recording under CPL § 160.50.

The Court denies the motion. The 911 recordings do not fall under the sealing statute. While a call to 911 may have the collateral effect of commencing a criminal investigation, such calls are not initiated by law enforcement action. Although the 911 recording may be maintained and used by law enforcement during an investigation, should one commence, the recording is not the work product of law enforcement.

Also, respondent asserts that the 911 recording contains exculpatory evidence since the maternal grandmother made the call and pretended to be the non-respondent mother. Sealing should not be used as a sword preventing respondent from putting on his defense in a related Article Ten matter. The dismissal and sealing of a criminal case is designed to restore the accused to the status he occupied before the arrest and prosecution (CPL § 160.60), but respondent still faces an Article Ten proceeding based on the same allegations that led to the criminal case.

Even if the Court were to hold that the 911 recording is covered by the sealing statute, disclosure of a sealed recording to a defendant to use in his defense in an Article Ten proceeding is authorized by CPL § 160.50(1)(d).

The Court also notes that respondent will need to lay the necessary foundation for admission of a business record.

Matter of Christal D.M.
(Fam. Ct., Kings Co., 3/29/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29087.htm

* * *

ABUSE/NEGLECT - Evidence/Sealed Criminal Records

The Court previously held in Matter of Carolina K. (55 Misc.3d 352) that a 911 recording was covered by the reference to "all official records" subject to sealing under Criminal Procedure Law § 160.50(1)(c), and was not admissible in the Article Ten proceeding.

The Court, disagreeing with certain post-Carolina K. decisions to the contrary, adheres to its prior ruling and refuses to admit into evidence a 911 recording of the subject child's statements regarding a domestic violence incident where the related criminal case brought against respondent father has been dismissed and sealed. While some recordings made by a government agency will qualify as an official record, other types of recordings will not. The NYPD and the NYC Fire Department work together to operate the 911 system, and the recording is kept on file with the NYPD.

The Court does note that a record from a criminal proceeding admitted in Family Court prior to dismissal and sealing would not be subject to retroactive preclusion. The Court also notes that coordination between agencies could ensure that where police records are needed to establish an

Article Ten cause of action, the District Attorney would not agree to dismissal while the Family Court matter is pending, or would agree to dismissal on condition that necessary records remain unsealed pending resolution of the Family Court matter. This is the way to both protect children and protect the rights of former criminal defendants.

Matter of Diyorhjon K.
(Fam. Ct., Kings Co., 9/3/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29280.htm

Expert Testimony

ABUSE/NEGLECT - Appeals
- Expert Testimony/Basis Of Opinion

The First Department rejects the agency's contention that respondent's appeal is not properly taken from an appealable paper where, although denominated a decision, the paper bears the standard language advising that any appeal from the "order" must be taken within thirty days, and is, in substance, an order finding that the children have been abused/neglected, which is appealable as of right.

The Court also concludes that an expert's opinion that the child's behavior and demeanor were consistent with a child who has been sexually abused was properly based on the testimony of another social worker who was subject to cross-examination, whose testimony was in evidence and found to be reliable, and whose credibility is not challenged by respondent.

In re Samantha F.
(1st Dept., 2/21/19)

Practice Note: The family court noted in its written opinion that the expert had not spoken to the child and had based her opinion on information she obtained from conversations with a Legal Aid Society social worker and the attorney for the children, "which is analogous to when a medical expert renders an expert opinion based on information conveyed by other medical staff or information contained in reports and records. The expert need not directly treat or interview the patient who is the subject of their expert opinion."
Link to family court decision:
http://nycourts.gov/reporter/3dseries/2018/2018_50126.htm

* * *

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)

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)

*   *   *

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

When the child Steven L. was four years old, his mother Tanya K. brought him to a hospital with severe bruising and swelling injuries to his scrotum and penis, and bruising on his left torso, right thigh, and the tops of both his feet.

The Second Department concludes that the family court properly found respondent Dennis T. to be a person legally responsible where Steven and his mother had moved from South Carolina into a motel with Dennis (and with Tanya's sister Tonya K., and Dennis's wife Deboara T. and their child Unity T.) in New York only two weeks prior to the filing of the petition. During the relevant period Dennis participated in Steven's care and was a regular member of the household, acting as the functional equivalent of a parent.

The Court also upholds findings of abuse of Steven made upon a hearing against Dennis and Tonya (Tanya has not appealed, and Deboara consented to findings of neglect), and a finding of derivative abuse of Unity made against Dennis, noting that Steven's injuries were the result of abuse and that only his mother, Dennis, Deboara, and Tonya had access to him in the relevant period. Dennis and Tonya failed to rebut the presumption of culpability.

Matter of Unity T.
(2d Dept., 11/7/18)

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ABUSE/NEGLECT - Presumption Of Abuse
- Appeal - Standing/Aggrieved Party

The family court found that petitioner established a prima facie case of abuse against both parents where the child, who was then four months old, had multiple fractured ribs in various stages of healing. The court dismissed the petition against the mother but made a finding against the father, concluding that the mother had satisfactorily rebutted the prima facie case but that the father had not.

The Fourth Department upholds the finding, noting that the presumption in FCA § 1046(a)(ii) extends to all the child's caregivers, especially when they are few and well defined.

The father is not aggrieved by, and thus cannot challenge, the dismissal of the petition against the mother.

Matter of Avianna M.-G.
(4th Dept., 12/21/18)

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ABUSE/NEGLECT - Presumption Of Abuse
- Derivative Abuse
- Medical Child Abuse (a/k/a Munchausen Syndrome by Proxy)

Upon a fact-finding hearing, the Court made findings of abuse and derivative abuse against the mother, and dismissed allegations of abuse and neglect as to the father.

Petitioner established a prima facie case of abuse through expert and other evidence that approximately twenty-one month old Amar, who was born prematurely and had ongoing medical problems, suffered acute liver failure after he was given a toxic dose of acetaminophen while in the hospital's general pediatric unit by someone other than medical personnel. Respondents failed to rebut the presumption with evidence of an accidental cause, or an underlying condition that could explain the toxic acetaminophen levels or acute liver failure.

Moreover, petitioner established that the mother fits the profile for medical child abuse (or "MCA," formally known as Munchausen Syndrome by Proxy). When factors typical of MCA are present, such as a child's prolonged illness with confusing symptoms defying diagnosis, recurring hospitalizations, surgery and other invasive procedures, and dramatic improvement after removal from the parent's access and care, courts have determined that the parent suffers from MSP. Here, Amar's condition improved while he was in a more closely monitored area in the hospital, and, when one-on-one supervision was instituted after respondents were suspected of MCA, there was no further suspected medical abuse.

However, the father had much less access to the child than the mother did. She was an almost constant presence at the child's bedside during his hospitalization. While the father's belief in the mother's innocence can, in retrospect, appear misguided, there is no evidence that he acted unreasonably or imprudently.

With respect to derivative abuse, the Court notes that the abuse of Amar took place from when he was six months old through the time the petitions were filed fifteen months later. The mother's conduct put the child at risk of death or serious injury on multiple occasions. One of the other children has a complicated medical history, including a seizure disorder, receiving services in school, and having a home health aide for eight hours per day.

Matter of Greysen G.
(Fam. Ct., Bronx Co., 10/19/18)
http://nycourts.gov/reporter/3dseries/2018/2018_51538.htm

*   *   *

ABUSE/NEGLECT - Presumption Of Abuse/Expert Testimony

The child was alone with respondent father when she stopped breathing. Respondent and a neighbor who was a retired nurse attempted to resuscitate the child, who was soon transported to a hospital for emergency medical attention, and then airlifted to another hospital, where she was

diagnosed with venous sinus thrombosis (clotting in a vein draining blood from the brain), bleeding on the brain and severe retinal hemorrhaging. The child had no bone fractures, bruising or other markings suggestive of abuse, nor was there any direct proof that respondent had behaved inappropriately toward the child. Nevertheless, a pediatrician versed in child abuse could find no explanation aside from non-accidental trauma.

After concluding that the evidence at the fact-finding hearing, including the pediatrician's testimony, activated the presumption of abuse in FCA § 1046(a)(ii), the Third Department concludes that respondent rebutted the presumption with expert testimony that the child's condition could have been the result of a natural disease.

Petitioner did present rebuttal testimony by an ophthalmologist, who stated that the child's retinal hemorrhaging could not be explained by the theory advanced by respondent's experts. But the ophthalmologist admitted that retinal hemorrhages could arise from causes other than trauma and that the medical community was divided on whether retinal hemorrhages were a secondary effect of brain problems rather than the result of direct trauma.

The Court confesses "puzzlement" at the family court's finding "that respondent's experts were somehow less credible because they felt strongly enough about his case to testify on his behalf without receiving compensation."

Matter of Liana HH.
(3d Dept., 10/18/18)

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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?

Disposition/Post-Disposition/Permanency

PERMANENCY HEARINGS - Reasonable Efforts/ADA

The Court of Appeals concludes (and ACS concedes) that the agency must comply with the Americans With Disabilities Act when making reasonable efforts to reunify children with parents who are disabled.

However, ACS's failure to offer or provide certain services does not necessarily mean that it has failed to make "reasonable efforts." The ADA's "reasonable accommodations" test is often a time- and fact-intensive process with multiple layers of inquiry. Permanency proceedings have distinct purposes and procedures and thus are not the appropriate forum to adjudicate affirmative claims brought under the ADA. The family court should not blind itself to ADA requirements placed on ACS and like agencies, and a court may look at the accommodations ordered by other courts in ADA cases for guidance as to what is feasible or appropriate with respect to a given disability. FCA § 1089's "reasonable efforts" standard and the ADA's "reasonable accommodation" requirement are in harmony in requiring that services be tailored to the specific needs of people with disabilities. But even as to accommodations that might be required under the ADA, the failure of ACS to offer or deliver such accommodations by the end of a given measuring period does not necessarily mean that ACS has violated the ADA or failed to make reasonable efforts under New York law.

Here, each of the ADA accommodations requested was eventually provided to respondent mother. Some were not provided immediately upon request - sometimes because of miscommunications, sometimes because of lack of follow-through by respondent or ACS personnel, and sometimes because processing eligibility through outside governmental agencies does not happen overnight. Other accommodations were provided with substantial effort by the court and respondent's attorneys. But each requested item was provided, and the permanency goal presently remains "Return to Parent." The family court took seriously respondent's need for services, was frustrated with ACS's slow pace in providing some of those services, and (aided by respondent's attorneys) did not let respondent's needs go unmet.

Matter of Lacee L.
(Ct. App., 10/18/18)

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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)

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ABUSE/NEGLECT - Orders Of Protection

In this Article Ten proceeding, the Third Department vacates a temporary order issued pursuant to FCA § 1029 requiring respondent putative father to submit to random urine, breath and other tests upon petitioner's request, engage in parent education services, meet with petitioner upon request, submit to one or more alcohol and drug evaluations, and "meaningfully engage and participate" in any recommended treatment plan "until discharged for successful completion."

Although the family court dismissed the neglect petition against respondent for failure to state a claim, this appeal directed at the scope of, and the court's authority to issue, FCA § 1029 orders raises a substantial and novel issue that is likely to recur, yet evade review.

The court had authority to issue, upon good cause shown, a temporary order of protection imposing upon respondent any "reasonable conditions of behavior" that were "necessary to further the purposes of protection." However, when the court entered the order, respondent did not have legal or physical custody of the child and had only limited parenting time, and the conditions bore no connection to respondent's parenting time.

Matter of Carmine GG.
(3d Dept., 7/3/19)

*   *   *

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 - 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

*   *   *

ABUSE/NEGLECT - Self-Incrimination Issues

In this child protection proceeding, respondent father appeals a dispositional order that prohibits him from residing in the family home with his wife and four children. Respondent came under court jurisdiction for assaulting an unrelated toddler for whom his wife was babysitting. After respondent completed court-ordered services, the Department of Health and Human Services recommended that respondent be allowed to return home. The prosecutor representing DHHS disagreed and urged the court to continue only supervised visitation. The court concluded that respondent's failure to admit responsibility for the toddler's injuries to his therapist as part of his services precluded him from returning to the family home and having unsupervised visitation with his children.

On appeal, respondent argues that the trial court violated his Fifth Amendment right against self-incrimination when it conditioned reunification on his admission. The Michigan Court of Appeals agrees.

The Court can reasonably conclude that an inculpatory statement by respondent could be used in the future by a criminal prosecutor. Any admission to his therapist would not be privileged against disclosure in this child protection proceeding.

Even though respondent initially waived his Fifth Amendment right to remain silent when he testified and denied responsibility, there was a sufficient showing of compulsion at the dispositional review hearing, where he had to choose between his liberty interests or his children.

The penalty exacted on respondent was obvious. He was ordered to remain outside the family home, was granted only supervised visiting time, and was informed by the government that he most likely faces the future termination of his parental rights to his four children. This could also be self-defeating because an admission may lead to criminal charges that end with respondent being taken away from his children due to incarceration. Even more, requiring respondent to admit to the child abuse after he had already testified at trial and denied any wrongdoing would subject him to possible perjury charges.

The case is remanded so that the trial can consider all the facts and circumstances while refraining from considering respondent's persistent claim of innocence in connection with the toddler.

In re Blakeman
2018 WL 5304949 (Mich. Ct. App., 10/25/18)

* * *

ABUSE/NEGLECT - Disposition/Hearing Requirement

The Second Department finds no error where the family court, after finding that respondent father had neglected the children by engaging in domestic violence, held a dispositional hearing at which ACS introduced an investigation report but no sworn testimony, and then released the children to the custody of their mother with ACS supervision, placed the father under ACS supervision for a period of six months with certain terms and conditions, and directed him to comply with an order of protection directing him to stay away from the children, their home, and their schools, except for ACS-sanctioned visitation, for a period of six months.

The father was not denied due process by the court's failure to take sworn testimony at the dispositional hearing. The father did not seek to cross-examine the caseworker who prepared the investigation report or offer evidence.

Matter of Aliyah T.
(2d Dept., 7/17/19)

* * *

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 - Reasonable Efforts/Order Terminating Requirement

The Fourth Department holds that after the agency established that respondent mother's parental rights to her older children had been terminated, the mother failed to establish that the statutory exception in FCA § 1039-b applies, and thus the family court properly determined that reasonable efforts were no longer required.

The mother had been living with the child's father, which was a barrier to reunification due to issues with domestic violence. Although the mother moved out of his house during the

proceedings, she did not do so of her own accord, and had never lived on her own before and still required parenting intervention.

Matter of Carmela H.
(4th Dept., 4/26/19)

* * *

ABUSE/NEGLECT/PERMANENCY HEARING - Contempt/Court-Ordered Services

Seventeen-year-old Kenneth, one of the subject children in this severe abuse case, suffers from brain and spinal cord injuries as a result a car accident in 2014. He is able to stand but cannot walk independently, requires the use of a specially constructed wheelchair, and has only limited use of his right hand. His speech is slurred, soft, and at times difficult to understand. His memory is impaired as a result of the accident. He also needs a multitude of individualized medical, therapeutic, and educational services, including physical therapy, occupational therapy, visual services, medical follow-ups, trauma-informed therapy and speech and language therapy. He has the ability to use toilet facilities, with assistance and on a schedule.

Upon a hearing, the Court holds the Commissioner of Social Services in civil contempt, finding, by clear and convincing evidence, that ACS violated the provisions of a permanency hearing order by failing to locate a home or other facility that was appropriate for Kenneth's needs, and to coordinate his care, treatment, therapy, education, and other services he required. Kenneth suffered harm as a result. ACS also violated FCA § 1015-a and 18 NYCRR § 441.21(b)(1).

ACS's defense was that it made good faith efforts to comply but was unable to do so, but the mere act of disobedience by ACS is sufficient to sustain a finding. Moreover, ACS had more than adequate time and resources. For instance, if ACS had not delayed for such a protracted period, Kenneth's wheelchair would have been completed long before the Court established deadlines; ACS did seek an extension of time, but not until weeks after the wheelchair measurements were to be completed and three days before the deadline for wheelchair delivery.

The Court also rejects ACS's contention that because it eventually complied with the order, the Court cannot award a sum greater than $250. ACS is mistaken in its assertion that the purpose of a civil contempt sanction is to compel compliance; the purpose is to compensate the injured party for loss or interference with that party's rights. In any event, ACS failed to establish compliance.

A party who commits separate and distinct violations of a court order, not incidental to a single transaction or event, is subject to sanctions for civil contempt for each violation. In addition, separate penalties for civil contempt may be imposed on a daily basis where, as here, the rights of the child were diminished on a daily basis. The Court imposes fines in the amount of $50 per day for each violation, totaling $17,150.

Matter of Kenneth R.
(Fam. Ct., N.Y. Co., 1/28/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29042.htm

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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)

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ABUSE/NEGLECT - Disposition/Modification
- Motion To Vacate Fact-Finding

In this neglect proceeding involving excessive corporal punishment, the Second Department affirms an order denying the mother's FCA § 1061 motion to modify the order of fact-finding and disposition so as to grant a suspended judgment and vacate the finding of neglect.

Although the mother's fear of losing her job as a result of the neglect finding is a concern, the family court properly concluded that such fear is outweighed by the fact that the child is still a minor, and the finding of neglect could prove significant in any future court proceeding.

Matter of Aaliyah B.
(2d Dept., 3/6/19)

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ABUSE/NEGLECT - Motion To Vacate

The Administration for Children's Services filed petitions alleging that the mother neglected her son through inadequate supervision and derivatively neglected her daughter. In an order of fact-finding and disposition that followed the mother's consent without admission pursuant to FCA § 1051(a), the family court found that she neglected the children, and released the children to her under ACS supervision for twelve months upon certain conditions, such as compliance with recommended services.

After expiration of the dispositional order, the mother moved pursuant to FCA § 1061 to vacate the fact-finding/dispositional order. The family court denied the motion.

The Second Department reverses, and grants the motion. The mother demonstrated that she had successfully completed the court-ordered programs, that she had fully complied with the conditions of the order of disposition, and that the requested modification of the order of fact-finding and disposition was in the best interests of the children.

Matter of Emma R.
(2d Dept., 6/19/19)

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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)

* * *

ABUSE/NEGLECT - Disposition - Violations/Modification Of Order
- Placement

The Second Department upholds the family court's modified order of disposition (see FCA § 1061), which placed the children in foster care due to the mother's violation of conditions of disposition, noting that the court was not required to find that the children were at imminent risk of harm if returned to the mother's care.

Matter of Jasir M.
(2d Dept., 12/26/18)

* * *

ABUSE/NEGLECT - Disposition/Motion To Modify
- Motion To Vacate Fact-Finding

In these neglect proceedings alleging domestic violence, respondent father consented to an order of fact-finding without admission pursuant to FCA § 1051(a), and the court later issued an order of disposition releasing the children to the custody of the mother under ACS supervision for six months, directing the father to complete certain counseling programs, and giving the father supervised parental access with the children. Subsequently, the father moved pursuant to FCA § 1061 to modify the order of disposition so as to grant a suspended judgment and to vacate the order of fact-finding. The court granted the father's motion.

The Second Department reverses, noting that despite his successful completion of certain court-ordered programs, the father failed to establish good cause given the serious and repeated nature of his conduct and his lack of remorse for his actions.

Matter of Alisah H.
(2d Dept., 1/16/19)

* * *

ABUSE/NEGLECT - Disposition/Custody Orders
CUSTODY - Hearing/Findings Of Fact

The Fourth Department remits a custody matter for further proceedings where the family court, without a hearing, granted the grandmother's petition for custody while failing to set forth the facts upon which the court relied.

Although it appears that the custody order was intended to resolve a pending child protective proceeding [see FCA §§ 1055-b and 1089-a], the court did not reference the applicable statute, and failed to hold a joint hearing upon the father's objection to the proposed custody arrangement and make the statutorily required findings.

Even assuming, arguendo, that the court did not intend to resolve the child protective proceeding pursuant to § 1055-b or § 1089-a, the court erred in failing to make an express finding that the grandmother met her burden of establishing extraordinary circumstances or analyze the best interests factors.

Matter of Susan T. v. Crystal T.
(4th Dept., 9/27/19)

* * *

ABUSE/NEGLECT - Disposition - Release To Non-Respondent Parent/Custody Orders

In the neglect proceeding, the mother made an admission that, when the proceeding was commenced, she was suffering from untreated postpartum depression with psychosis, and that this condition had prevented her from providing the child with a minimal degree of care.

The Third Department concludes that the family court did not err in releasing the child temporarily to the father's care pursuant to FCA § 1054 and dismissing his petition for sole custody. The Court notes that the father's involvement in the child's life had been limited before she was removed from the mother's care; that an order of protection directed the father "to refrain from committing the crimes enumerated therein" against his three other children for a five-year period; that the subject child's safety would be jeopardized if the mother was no longer under supervision or receiving services, which could not be ordered if the family court had awarded sole custody to the father pursuant to FCA Article Six; and that an award of sole custody to the father would have permanently separated the child from her half siblings.

Matter of Mariah K.
(3d Dept., 10/18/18)

Special Immigrant Juveniles

SPECIAL IMMIGRANT JUVENILES
CUSTODY

In this custody proceeding, the Second Department reverses an order that denied, without a hearing, the mother's motion for the issuance of an order making Special Immigrant Juvenile Status-related findings.

Although the family court believed it lacked jurisdiction after the child turned eighteen, there is no jurisdictional impediment where, as here, the petition was granted before the child turned eighteen.

Matter of Vasquez v. Mejia
(2d Dept., 3/13/19)

*   *   *

SPECIAL IMMIGRANT JUVENILES

The family court granted the father's guardianship petition, but denied the father's motion for the issuance of an order making findings that would enable the child to petition for Special Immigrant Juvenile status on the ground that the child "no longer lives with either parent." The father again moved for the issuance of such an order, and the court denied the second motion.

The Second Department makes the SIJ-related findings, noting, inter alia, that although the father had previously moved unsuccessfully for the issuance of an order, the law of the case doctrine does not bind appellate courts; that the issuance of a SIJ order is not dependent on the child

living with either parent; and that the child is in danger of being harmed by gang members if she returned to El Salvador.

Matter of Rina M.G.C.
(2d Dept., 2/27/19)

* * *

SPECIAL IMMIGRANT JUVENILES - Dependency/Juvenile Delinquency Placement

The Second Department, with one judge dissenting, agrees with the family court that for purposes of a request for special immigrant juvenile status (SIJS) findings, respondent's placement in the custody of the Commissioner of Social Services of the City of New York following his juvenile delinquency adjudication does not satisfy the requirement of dependency.

The impetus behind the enactment of the SIJS scheme is to protect a child who is abused, abandoned, or neglected and to provide him or her with an expedited immigration process. Respondent was not placed due to his status as an abused, neglected, or abandoned child. His violent acts and misconduct have resulted in painful and terrible consequences to his victims. In effect, respondent attempts to utilize his wrongdoings and the resultant juvenile delinquency adjudication as a conduit or a vehicle to meet the dependency requirement for SIJS. The Court "cannot fathom that Congress envisioned, intended, or proposed that a child could satisfy this requirement by committing acts which, if committed by adults, would constitute crimes…."

Contrary to the dissent's suggestion, the placement of a child in the "custody" of the Commissioner of Social Services in a juvenile delinquency proceeding is not the same as a "custody" determination in a child custody proceeding under Family Court Act Article 6.

The dissenting judge asserts that the SIJS scheme is not undermined by granting specific findings orders to abused, neglected, or abandoned children over whose custody the family court has accepted jurisdiction in a juvenile delinquency proceeding. While the majority is concerned about rewarding the child's misconduct, a specific findings order is not an award of SIJS. The family court does not make an immigration determination when it makes the requisite specific findings. Those findings merely allow the eligible child to apply for an immigration determination. Although New York does not equate children adjudicated as juvenile delinquents with adults convicted of crimes, the majority has, in effect, created an immigration consequence to the juvenile delinquency adjudications of abused, neglected, or abandoned children. The Court's holding is so broad that it would preclude neglected, abused, or abandoned children who have committed much less serious misconduct, including graffiti, or marijuana possession, from obtaining a specific findings order.

Matter of Keanu S.
(2d Dept., 10/17/18)

* * *

SPECIAL IMMIGRANT JUVENILES

The family court granted the mother's guardianship petition, and issued Special Immigrant Juvenile Status-related findings. Thereafter, the child submitted an I-360 petition for SIJS to the United States Citizenship and Immigration Services, which notified the child that the petition would be denied due to several deficiencies in the specific findings order. USCIS indicated, inter alia, that because the family court failed to consider the child's alleged involvement with the MS-13 gang, the court did not make an "informed decision" that it would not be in the child's best interests to be returned to El Salvador.

In family court, the mother moved to amend the specific findings order to address the deficiencies identified by USCIS. The court, in effect, denied the motion without specifically addressing any of the requested amendments.

The Second Department remits the matter for a hearing. Given USCIS's determination, the court should have considered the merits of the motion, if it had merit, amended the specific findings order. The record is insufficient to determine whether the court considered the child's alleged involvement with the MS-13 gang, which would not necessarily preclude a finding that it is not in the child's best interests to be returned to El Salvador.

Matter of Jose S.J.
(2d Dept., 1/16/19)

* * *

SPECIAL IMMIGRANT JUVENILES

In this guardianship proceeding, the Second Department reverses orders dismissing the guardianship petition, and denying the child's motion for the issuance of an order making Special Immigrant Juvenile findings, and awards guardianship and makes the SIJ findings, noting, inter alia, that the record supports a finding that it would not be in the best interests of the child to return to Nicaragua.

The child averred that she was harassed by gang members in Nicaragua, who threatened to hurt her and "told me to watch myself," that she was afraid to go to the police "because the gang members had friends in the police," that she told her mother about the gang members, but her mother was unable to protect her, and that she was afraid that, if she returned to Nicaragua, the gang members "will carry out the threats they made to me."

Matter of Grechel L.J.
(2d Dept., 12/26/18)

Destitute Children

DESTITUTE CHILDREN - Notice To Parents

The First Department concludes that the father did not show good cause to vacate the destitute child findings on the ground that he was not served with notice of the proceedings.

ACS made the requisite reasonable efforts to locate him. He was not listed on the children's birth certificates. An inquiry was made to the Putative Father Registry, which responded that no man was listed on the registry for these children, and the family court did not rule on the petitions until that response was received.

Although ACS served paternity petitions and summonses - the father concedes receipt of those documents by relying on them now - he did not answer them, appear on the return dates, or otherwise communicate with ACS in response, and the petitions were dismissed without prejudice. His silence supports ACS's conclusion that his whereabouts were, at the relevant time, unknown; it is not sufficient that the mother may have identified him as the alleged father in an oral conversation with ACS.

In re Nitthanean R.
(1st Dept., 10/16/18)

* * *

DESTITUTE CHILD - Disposition
CONTEMPT

The Third Department holds that the family court properly deemed the foster parents to be parties to the destitute child proceeding given that the child had been in their care for approximately fifteen months, albeit not consecutive months, and they had a "significant connection" to her (see FCA § 1094[c][1]).

The family court did not err in placing the child with DSS, with the child residing with the stepmother, and denying the foster parents' custody petition. The stepmother had a strong bond and commitment to the child and the child had been in her care for eleven months, while the foster parents had not seen the child in ten months, and the family court also considered the possible trauma that yet another change in residence would cause for the child.

The family court also was confronted with the foster parents' advanced ages; the foster mother testified as to her various medical conditions and limited ability to engage physically with the child, and stated that her daughter and the foster father primarily cared for the child. The child's father practiced Islam and the stepmother practiced the same while the child was in her care. The family court did not err in considering the age, race and religions of the foster parents and the stepmother.

The Court overturns a civil contempt finding where DSS was aware of and violated the family court's order limiting visitation with the stepmother, but contacted the court immediately after receiving the order to advise that the stepmother had been certified as a foster parent and that the child was residing with her. The AFC, who sought to have the child placed with the foster

parents, failed to establish that DSS's failure to comply with the order had prejudiced the child's rights.

Matter of Nilesha RR.
(3d Dept., 5/23/19)

Appeals

ABUSE/NEGLECT - Appeal/Aggrieved Party

The Second Department holds that although the appeal from the portion of the order of disposition that placed the child in the custody of petitioner must be dismissed as academic, since it has expired by its own terms and a subsequent permanency hearing returned the child to the parents, the child is aggrieved by and may challenge the finding that the mother derivatively neglected him.

Matter of Tyquan J.B.
(2d Dept., 7/31/19)

* * *

ABUSE/NEGLECT - Adjournment In Contemplation Of Dismissal
- Appeals/Waiver Of Right To Appeal

The neglect petition alleging that the father knew or should have known that the mother was taking unprescribed drugs during pregnancy was adjourned in contemplation of dismissal. As part of the ACD agreement, the father made a sworn admission to the factual allegations in the petition, and the family court issued an ACD order that included a finding that the father had admitted acts that constituted neglect. The court continued placement of the child with the grandparents under petitioner's supervision.

Subsequently, the father violated the terms and conditions of the ACD order. The court vacated the order, restored the neglect proceeding, and made a finding of neglect, continued placement with the grandparents, and placed the father under petitioner's supervision.

The Third Department upholds the finding of neglect. The family court was not limited to the evidence presented at the ACD violation hearing and properly relied upon other evidence and proceedings before it, including the father's sworn admission. The father, aware of the mother's drug addiction, failed to ensure that she did not abuse drugs during pregnancy.

The Court rejects the attorney for the child's contention that the father's appeal must be dismissed because he waived his right to appeal at the ACD proceeding. While the waiver was one of the conditions in the ACD order, the family court had merely ascertained that the father had reviewed the ACD conditions with his attorney, and the record does not reflect that the court mentioned the appeal waiver or its consequences, or that the father understood his appellate rights and that the appeal waiver was not an automatic consequence of his admission. Also, it is

within this Court's inherent authority to review any matter involving the welfare of a child in a family court proceeding.

Matter of Camden J.
(3d Dept., 12/27/18)

III. <u>FOSTER CARE/TERMINATION OF PARENTAL RIGHTS/ADOPTION</u>

Foster Care: Payments

FOSTER CARE - Payments To Provider

A panel majority (922 F.3d 69) held that the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 et seq., creates a privately enforceable right under 42 U.S.C. § 1983 so that some foster care parents and providers may sue States for costs related to childrearing.

The Second Circuit, in a 6-5 decision, denies rehearing en banc. The dissenting judges note, inter alia, that this issue now divides four United States Courts of Appeals, and that in implying this right of action, the majority tasks federal district judges with setting the rates at which this subset of foster care parents and providers should be compensated pursuant to a statute that contains not a word of guidance for making such judgments.

New York State Citizens' Coalition for Children v. Poole
2019 WL 3850752 (2d Cir., 8/16/19)

The Newsletter summary of the panel's decision:
Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("the Act") to strengthen the program of foster care assistance for needy and dependent children. One of the ways the Act does so is by creating a foster care maintenance payment program. Under this program, participating states receive federal aid in exchange for making payments to foster parents on behalf of each child who has been removed from the home of a relative. These payments are calculated to help foster parents provide their foster children with basic necessities like food, clothing, and shelter.
Plaintiff, the New York State Citizens' Coalition for Children, sues the Acting Commissioner for the New York State Office of Children and Family Services, on behalf of the Coalition's foster parent members, alleging that in violation of the Act, the State pays the foster parents inadequate rates that do not cover the costs of caring for their foster children. The district court found that the Coalition has standing to sue, but dismissed the suit, holding that the Act does not create an enforceable right to payments.
The Second Circuit, with a dissent, reinstates the suit. The Court agrees that the Coalition has standing, and rejects the State's argument that the Coalition is barred by the third-party standing rule. The Court, agreeing with the Sixth and Ninth Circuits and disagreeing with the Eighth Circuit, then holds that the Act grants foster parents a right to payments, enforceable through 42 U.S.C. § 1983.

Foster Care: Certification/Approval Of Home

FOSTER CARE - Approval Of Foster Home/Record Of Conviction

Pro se plaintiff's application to serve as a foster parent for his sister's grandson was rejected because New York State law mandates the disqualification of people convicted of certain felonies, including crimes of violence such as plaintiff's 40-year-old robbery conviction.

The Court grants defendants' motions to dismiss the complaint, concluding that plaintiff has no viable substantive due process claim since the interest of a biological relative in becoming a foster parent is not a fundamental liberty interest rooted in the Constitution, and has no procedural due process claim since the foster care system is a creature of state law that creates no entitlement to apply for, or acquire, foster parent status.

The cases cited by plaintiff - *Matter of Abel* (33 Misc.3d 710) and *Adoption of Corey* (184 Misc.2d 437) - involved existing custodial relationships, while this case involves an attempt to create a custodial relationship that does not yet exist.

Plaintiff's equal protection claim also fails since there is no allegation that others convicted of similar crimes are treated differently.

Sykes v. New York State Office of Children and Family Services
2019 WL 4688608 (S.D.N.Y., 9/25/19)

TPR: Surrenders

TERMINATION OF PARENTAL RIGHTS - Conditional Surrenders
- Appeal

The First Department dismisses as moot an appeal from the denial of the mother's motion to vacate her conditional surrender, on the ground that there was a substantial failure of a material condition, where the adoption of the child was finalized during the pendency of this appeal.

In any event, although petitioner complied with the statutory notice requirements, the mother waited over a year in moving to vacate the surrender after she knew or should have known that the foster father would no longer be an adoptive resource for the child. Moreover, the mother failed to provide petitioner with her updated contact information, as required under the judicial surrender.

In re Mehki L.W.
(1st Dept., 6/27/19)

TPR: Guardian Ad Litem

TERMINATION OF PARENTAL RIGHTS - Mental Illness/Guardian Ad Litem

In this termination of parental rights proceeding alleging mental illness, the Fourth Department finds reversible error where the family court failed to appoint a guardian ad litem for the mother when it became apparent that she was incapable of assisting in her defense.

Although the mother's attorney did not move for the appointment of a guardian ad litem, the court may make such an appointment on its own initiative. In any event, the mother's attorney did inform the court that the mother was unable to assist in her own defense and moved to strike

the mother's incoherent testimony. The court granted that motion, which was not opposed by petitioner or the attorney for the child. This was sufficient to alert the court to the issue of the mother's competence.

The mother, who had been diagnosed with, inter alia, schizophrenia, had been in and out of psychiatric hospitals throughout her life. At the time of the child's birth two years before the termination proceeding, the mother had been committed to a psychiatric unit after being found incompetent to stand trial in a criminal case. During the hearing in this proceeding, the mother was involuntarily committed to a psychiatric unit, and the matter had to be adjourned until her release. During the mother's brief testimony upon resumption of the hearing, the court and the AFC had to interrupt her repeatedly since her answers to questions were nonresponsive and, at times, completely nonsensical.

Matter of Jesten J.F.
(4th Dept., 12/21/18)

TPR: Petition

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)

TPR: Hearsay Evidence

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…."

*   *   *

TERMINATION OF PARENTAL RIGHTS - Hearsay Evidence/Agency Records
- Right Of Confrontation

In this permanent neglect proceeding, the First Department rejects the mother's objection that the agency relied solely on hearsay progress notes instead of offering the testimony of agency caseworkers with personal knowledge. The progress notes were not the sole evidence supporting the permanent neglect finding, which was also supported by the mother's own testimony.

Moreover, the progress notes were properly admitted under the business records exception to the hearsay rule and the agency properly relied on them to meet its burden.

In re Elizabeth E.R.T.
(1st Dept., 1/10/19)

Practice Note: In *In re Juvenile*, 843 A.2d 318 (New Hampshire 2004), the court held that there was no violation of the State Constitution's Confrontation Clause in a termination of parental rights proceeding in which the parent had no opportunity to cross-examine the unavailable caseworker who had prepared the case record upon which the petitioner relied.

* * *

TERMINATION OF PARENTAL RIGHTS - Adjournments
- Hearsay/Right Of Confrontation

In this permanent neglect proceeding, the First Department finds no error in the court's denial of the father's counsel's request for a continuance to secure further testimony from a former caseworker whose progress notes were admitted into evidence. The caseworker had abruptly resigned and moved out of state where she was not amenable to service of a subpoena.

In re Evan J.
(1st Dept., 11/13/18)

Practice Note: Particularly where progress notes prepared by an absent and unavailable witness comprise the petitioner's entire case, the respondent might try arguing that terminating parental rights in the absence of any opportunity to confront and test the source of all the proof in the case violates due process. *Compare Matter of M/B Child*, 8 Misc.3d 1001(A) (Fam. Ct., Kings Co., 2005) (Supreme Court's decision in *Crawford v. Washington* articulates principles that caution against expansion of traditional hearsay exceptions to curtail litigant's right to confront witnesses in civil proceedings involving important interests, such as the right to custody of one's child) *with In re Juvenile*, 843 A.2d 318 (New Hampshire, 2004) (pre-*Crawford*, no violation of State Constitution's Confrontation Clause in termination of parental rights proceeding where parent had no opportunity to cross-examine unavailable caseworker who had prepared case record).

TPR: Diligent Efforts

TERMINATION OF PARENTAL RIGHTS - Diligent Efforts/Failure To Plan
- Parent With Intellectual Disabilities

In this permanent neglect proceeding involving a mother with intellectual disabilities, the Court, upon a hearing, finds insufficient evidence of the agency's diligent efforts and the mother's failure to plan.

While the agency referred the mother to a multitude of services, arranged regular visitation, put a panoply of in-home services in place, gave written notice to the mother of the many

appointments her special needs children had with medical, mental health and service providers and provided directions to those appointments, "[w]hat the agency failed to do, however, was to create and implement a service plan that was tailored to [the mother's] specific needs."

In *Matter of Lacee L.* (32 N.Y.3d 219), the Court of Appeals recently examined the intersection of the reasonable efforts requirement at a permanency hearing and the Americans with Disabilities Act, and concluded that courts may look at the accommodations ordered by courts in other contexts for guidance as to what is feasible or appropriate with respect to a given disability. The United States Equal Employment Opportunity Commission has identified a broad range of accommodations that may be appropriate for people with intellectual disabilities in the workplace. This includes training or detailed instructions; having a trainer or supervisor give instructions at a slower pace; allowing additional time to finish training; breaking job tasks into sequential steps; using charts, pictures or colors; providing a tape recorder to record directions as a reminder of steps in a task; using detailed schedules for completing tasks; providing additional training when necessary; providing a job coach who can, inter alia, assist the employee in learning how to do the job; and providing intensive monitoring, training, assessment and support.

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

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

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

Matter of Xavier S. et al.
(Fam. Ct., Bronx Co., 1/9/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50120.htm

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TERMINATION OF PARENTAL RIGHTS - Diligent Efforts/Visitation
- Failure To Plan/Refusal To Acknowledge Abuse

The Fourth Department finds sufficient evidence that the mother permanently neglected the children. With respect to diligent efforts, the Court notes that after the mother failed to acknowledge the father's sexual abuse and instead prompted her oldest child to recant the allegations in a video that the mother later posted online, and her continued failure to acknowledge the abuse caused her two oldest children significant emotional and behavioral harm, petitioner was permitted to facilitate the mother's relationship with the children by means other than in-person visitation, which it did by arranging telephone contact, providing the mother with information from their school, and attempting to impress upon the mother the importance of emotionally supporting her children in light of the abuse. Despite the agency's diligent efforts, the mother failed to provide the children with appropriate emotional support by acknowledging the abuse.

The court did not err in admitting photographs depicting respondents' home at the time the children were initially removed. The photographs were relevant to support the service plans created for respondents. In any event, the court explicitly recognized their limited relevance.

Matter of Eden S.
(4th Dept., 3/15/19)

* * *

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)

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TERMINATION OF PARENTAL RIGHTS - Diligent Efforts/Incarcerated Parent - Visitation

The Fourth Department upholds a determination terminating the mother's parental rights on grounds of permanent neglect, noting, inter alia, that where the mother's family arranged for her to have five personal visits with the child after the commencement of her incarceration, the agency was not obligated to make duplicative efforts.

Matter of Callie H.
(4th Dept., 3/15/19)

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TERMINATION OF PARENTAL RIGHTS - Diligent Efforts

The Second Department upholds an order terminating the father's parental rights on grounds of permanent neglect, noting that although petitioner did not make arrangements for parental access, petitioner's diligent efforts must not be detrimental to the best interests of the child. Both children refused to visit with the father and, eventually, an order prevented petitioner from scheduling parental access. Petitioner was not obligated to seek modification of the order suspending parental access, and, moreover, the father did not oppose the motion that resulted in that order and never sought modification of the order.

Matter of Shakira M.S.
(2d Dept., 2/27/19)

TPR: Failure To Plan

TERMINATION OF PARENTAL RIGHTS - Denial Of Abuse/Self Incrimination

In this termination of parental rights proceeding, the New Hampshire Supreme Court finds no violation of respondent parent's State or Federal constitutional right against self-incrimination where the trial court, in finding that respondent had not corrected the conditions that led to findings of child abuse and neglect, drew an adverse inference from respondent's failure to acknowledge wrongdoing throughout the abuse and neglect proceeding.

The court's findings were based solely on evidence of sexual abuse perpetrated by respondent and the child's father. At the TPR hearing, the court heard testimony from the agency that the first step respondent had to take to correct the abuse and neglect was to "[a]cknowledge that there is a problem." Even though the court informed respondent that, under a State statute, her testimony would not be admissible in the criminal proceeding, respondent failed to avail herself of the protection provided by the statute. Because the court in a TPR proceeding must determine beyond a reasonable doubt whether the parent has failed to correct the conditions that led to the finding of abuse or neglect, a parent's ability to acknowledge the abusive or neglectful conditions may be a relevant factor in making that determination. Without the discretion to

consider the parent's silence, the court may be unable to meaningfully determine whether the parent has corrected the abusive or neglectful conditions.

The Court's decision should not be interpreted as approving a per se rule or condition that requires a parent to admit to wrongdoing to regain custody of her child or to maintain her parental rights. Rather, the Court holds only that the trial court is permitted to draw an adverse inference from a parent's failure to acknowledge wrongdoing where such an inference is relevant to determining whether to terminate parental rights.

In re C.O.
2019 WL 405957 (N.H., 2/1/19)

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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)

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TERMINATION OF PARENTAL RIGHTS - Mental Illness/Expert Testimony

The Court terminates respondent mother's parental rights on mental illness grounds. While the mother's expert witness believes that the mother's improvement in functioning, including her step-down in supportive living, her completion of peer support training, and her reduction in Klonopin use, makes it possible in the future for her to be well enough to be reunited with her children, the Court gives more weight to the testimony of petitioner's expert witness, who sees the mother's host of illnesses as chronic in nature, with the potential for setbacks given her mood dysregulation.

The mother has amassed a noteworthy skill set to help her manage the symptoms that she regular encounters. She has undertaken steps over the last two to three years to address her serious mental health impairments, and has made some strides in gaining incremental levels of independence. But unfortunately, and arguably most importantly, she continues to lack significant insight into how she would handle the stressors of raising two teenage children with their own trauma and issues, and younger children who have chosen to have no interaction with her in a year-and-a-half, all while managing her tremendous mental health challenges.

Matter of the K. Children
(Fam. Ct., Rockland Co., 1/14/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50117.htm

TPR: Disposition/Intervention

TERMINATION OF PARENTAL RIGHTS - Disposition/Best Interests - Recent Progress Made By Parent

In this termination of parental rights proceeding, the Second Department reverses an order that, after a hearing, revoked a suspended judgment and terminated the mother's parental rights, concluding that there was a violation of the suspended judgment order but the family court should not have terminated parental rights.

The mother had learned how to provide the special care the child needs and was emotionally attuned to the child's needs. She obtained stable housing and engaged in counseling. Although she expressed distrust of the preventive services workers and refused to provide releases for her

other children's schools, she never denied the workers access to her home or to her other children. She took responsibility for the initial neglect, and has cooperated with services and providers. Her interaction with the child was appropriate and positive, visits were going well, and the child's siblings are connected to him and want him to return to the home. The mother has a support system in place that she had not had previously.

Matter of Markel C.
(2d Dept., 5/1/19)

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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)

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TERMINATION OF PARENTAL RIGHTS - Disposition

In this permanent neglect proceeding, the Third Department rejects the parents' contention that the family court should have granted them a suspended judgment instead of terminating parental rights.

The mother had recently completed an inpatient treatment program for her alcohol and cannabis dependencies and had established a medication regimen to treat her mental health disorders, but had been sober for only 55 days, had not yet reached sustained remission and was at a high statistical likelihood of relapse during the first year following rehabilitation.

The father was incarcerated with a conditional release date of April 5, 2017 and a maximum release date of April 5, 2018. Although he testified that he completed an alcohol and substance abuse treatment program, reunification with the child following his release from prison hinged on his ability to implement plans to apply for temporary financial assistance, secure suitable housing for the child, continue treatment for alcohol and substance abuse and mental health issues, avoid triggers from his old lifestyle, obtain his general equivalency diploma and apply for full- or part-time employment.

The young child needed permanency after two years in foster care.

Matter of Brielle UU.
(3d Dept., 12/13/18)

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TERMINATION OF PARENTAL RIGHTS - Disposition/Termination Only As To One Parent

The First Department affirms an order terminating the father's parental rights based on abandonment, rejecting the father's contention that the court erred in terminating his parental rights while the mother received a suspended judgment and thus her parental rights remained intact. The petitions against the parents were predicated upon different facts, and the father never requested that disposition be delayed while the mother's case was still pending and did not oppose entry of the order or seek to vacate it once the mother received a suspended judgment.

In re Toussaint Thoreau E.
(1st Dept., 3/21/19)

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TERMINATION OF PARENTAL RIGHTS - Disposition

The Third Department finds no error where the Family Court terminated the father's parental rights and freed the child for adoption even though no termination proceeding had been filed against the mother.

The child was being cared for by relatives, and petitioner had a compelling reason for determining that filing against the mother would not be in the best interest of the child as the mother consented to the child being freed for adoption. Petitioner and the attorney for the child have informed the Court that the mother has been awaiting the outcome of this appeal before surrendering her parental rights.

Matter of Cherokee C.
(3d Dept., 6/27/19)

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TERMINATION OF PARENTAL RIGHTS - Disposition

Following an Oregon permanency hearing in which the plan was changed to adoption, the Department of Human Services filed a petition to terminate the mother's parental rights. The juvenile court found that the mother was unfit and that it was improbable that the child could be returned to her care, and that the child had a need for permanency that could be met by terminating the mother's parental rights and permitting the child's foster parents, his maternal uncle and aunt, to adopt him. However, the court dismissed the petition, finding that the child also had an interest in maintaining his bond with his mother and her parents, and that the child's need for permanency could be satisfied by permitting his foster parents to serve as his permanent guardians without terminating the mother's rights.

The Oregon Court of Appeals reversed and ordered termination, concluding that "leaving open the possibility of a return to mother creates its own instability" and was a "less-permanent" option that was not in the child's best interest.

The Oregon Supreme Court, in turn, reverses, noting the child's need to maintain his maternal familial relationships, and the fact that his need for permanency can be satisfied through a permanent guardianship with his maternal uncle and aunt.

Matter of R. D. D.-G.
2019 WL 2462627 (Oregon, 6/13/19)

TPR: Appeals

TERMINATION OF PARENTAL RIGHTS - Disposition/Child's Wishes
- Appeal - Record On Appeal/New Facts

The First Department affirms an order that, upon a finding of permanent neglect, terminated respondent mother's parental rights and committed custody and guardianship of the child to the agency and the Commissioner of Social Services, noting that although the thirteen-year-old child previously stated that she opposed adoption, this Court may take into consideration her current desire to be adopted by her long-term foster mother.

In any event, notwithstanding the child's previous opposition and the possibility that the foster mother would not be willing to adopt, termination was in the child's best interests following over ten years of failed attempts at reunification with the mother while the child was thriving in foster care.

In re Bianca J.N.
(1st Dept., 11/15/18)

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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.

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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)

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TERMINATION OF PARENTAL RIGHTS - Appeal - Right To Counsel/Anders Procedure

In Connecticut termination of parental rights cases in which the attorney appointed to represent an indigent party in the trial court declines to pursue an appeal, that party may seek the appointment of an appellate review attorney who, after reviewing the case and determining that there is a legitimate basis for an appeal, is required to represent the party on appeal.

The Connecticut Supreme Court first holds that the parent in this case has a right to appointed appellate counsel under the due process clause of the Fourteenth Amendment.

When such a right exists, due process does not permit the withdrawal of appointed counsel based solely on counsel's conclusory statement that he or she was unable to identify any nonfrivolous grounds for appeal. Before the appellate review attorney may withdraw, the attorney must demonstrate in an *Anders* brief (*see Anders v. California*, 386 U.S. 738) or at a hearing that the

record has been thoroughly reviewed for potential meritorious issues, and must take steps sufficient to facilitate review by the indigent parent and the presiding court for the purpose of determining whether the attorney accurately concluded that any appeal would be meritless.

In re Taijha H.-B.
2019 WL 4741766 (Conn., 9/27/19)

Adoption: Standing Or Certification Of Adoptive Parent

FOSTER CARE/CHILD CARE - Employment Bar Due To Conviction

In 1988, petitioner pleaded guilty to attempted second degree robbery for trying to snatch a woman's purse. As a result, she was permanently disqualified from working at any licensed childcare facility in Washington pursuant to regulations promulgated by respondent Department of Early Learning.

A sharply divided Washington Supreme Court holds that in light of petitioner's particular circumstances, the regulations prohibiting any individualized consideration of her qualifications at the administrative level violate her federal right to procedural due process as applied.

The Court notes, inter alia, that the conviction is over 30 years old, but the regulations treat petitioner identically to a person who has recently committed multiple acts of child abuse and give no weight to the fact that she was 22 years old at the time of her offense; that psychological and neurological studies show that the parts of the brain involved in behavior control continue to develop well into a person's 20s; that, at the time of the crime, petitioner was addicted to drugs, in domestic violence relationships, and in and out of homelessness; that because the sole disqualifying conviction occurred long ago under circumstances that no longer exist, it is highly likely that petitioner's permanent disqualification is erroneously arbitrary; that, properly and fairly conducted, an individualized determination will ensure that even if petitioner is ultimately disqualified, it will not be arbitrary but, instead, be based on her character, suitability, and competence to provide child care and early learning services to children; that Washington law provides that a conviction of robbery results in only a five-year disqualification from foster care license eligibility; and that judicial review does not provide sufficient procedural protections given the high risk of erroneous deprivation resulting from the extraordinarily high burden of showing beyond a reasonable doubt that the regulations were unconstitutional.

A concurring judge, providing the deciding vote, finds a substantive due process violation rather than a procedural due process violation.

Fields v. Department of Early Learning
2019 WL 759695 (Wash., 2/21/19)

* * *

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

Adoption: Surrogate Parenting Agreements

ADOPTION - Standing/Biological Parent
SURROGATE PARENTING AGREEMENTS

The Second Department concludes that the biological father of a child conceived with an anonymous egg donor and born to a gestational surrogate may adopt the child and thereby terminate any parental rights held by the gestational surrogate. Such an adoption advances the purpose of the adoption statute and should be permitted where adoption in the best interests of the child.

The Legislature, while rendering all surrogate parenting agreements void as against public policy, has drawn a distinction between commercial surrogacy contracts and noncommercial surrogacy contracts such as this one. While commercial surrogacy contracts subject participants, and those who assist in the formation of the contract, to civil penalties or felony conviction, the only sanction against unpaid surrogacy contracts is treating them as void and unenforceable. The Legislature recognized that parties might still enter into unpaid contracts; where, as here, there is no dispute because the genetic and gestational parents agree as to legal parentage, the protection of the gestational mother contemplated in the Domestic Relations Law is not implicated. The Legislature also made provision for the gestational surrogate to validly terminate her parental rights to a child born of a surrogate parenting contract.

The Family Court also erred in ruling that a biological parent may not adopt his or her own child. An order of filiation, primarily aimed at ensuring that the children have adequate financial support, would be a "shallow" remedy. To obtain judicial authorization to make decisions on behalf of the child, the father would also have to initiate a custody proceeding against the

gestational surrogate who had already renounced any tie to the child. A fictitious family structure leaving a gestational surrogate with no genetic ties or intention to be a parent as a legal parent is not in a child's best interests. The Court's conclusion is consistent with legislation recently passed by the State Senate and Assembly.

Matter of John. Joseph G.
(2d Dept., 6/26/19)

IV. CUSTODY/GUARDIANSHIP/VISITATION

Petition

VISITATION - Petition/Dismissal With Prejudice

The Third Department upholds the family court's dismissal of a pro se visitation petition for lack of subject matter jurisdiction, but concludes that since the determination was based solely upon a review of the sparse pro se petition and without reaching the merits, the court erred in dismissing the proceeding with prejudice.

Matter of David EE. v. Laquanna FF.
(3d Dept., 1/17/19)

Jurisdiction

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

In this custody modification/violation proceeding, the Second Department overturns a Queens County Family Court determination that New York's exclusive continuing jurisdiction ended. Although the child moved to Connecticut in August 2015, and attends elementary school and has a pediatrician there, the child retains a significant connection with New York, where the father and maternal and paternal family members reside, two of the child's physicians are located, and

the child frequently visits with the father. Substantial evidence was available in New York concerning the child's present and future welfare.

The Family Court also erred in its alternative holding that, even if it had jurisdiction, it would decline to exercise it on the ground that New York is an inconvenient forum. The father promptly commenced a violation proceeding in Putnam County shortly after the mother relocated with the child without his knowledge or the Family Court's permission. The distance between the Queens County Family Court and the Connecticut courts does not present any inconvenience to the father, the mother, or the child. The evidence relating to the father's claim that the mother has willfully denied him access to the child is located primarily in New York, where the majority of his access takes place. Any testimony by persons located in Connecticut could be presented by telephone, or audiovisual or other electronic means. The Family Court has already exercised jurisdiction over the father's contempt motion and has access to the records and files of the Putnam County Family Court, which handled this matter since its inception. The New York courts are more familiar with the case than a Connecticut court would be, and have greater ability to expeditiously resolve it. The child has an attorney appointed in New York who is familiar with the proceedings, and continuity of that representation would be preserved.

Matter of Helmeyer v. Setzer
(2d Dept., 6/5/19)

* * *

CUSTODY - Jurisdiction

In this custody proceeding, the court dismissed the father's cross petition "based on his failure to appear"; granted the mother "sole legal custody and physical placement of the minor child"; and granted the father "visitation in New York as the parties agree, not to include overnight visitation." The father's appeal from that order was dismissed on the ground that no appeal lies from an order entered upon default. The father then moved to vacate the order, arguing that the court lacked subject matter jurisdiction because New York was not the child's home state. The court denied the father's motion, concluding that New York was the home state, and noting that the father failed to raise any jurisdictional issues and in fact filed his own custody application.

The Fourth Department reverses, concluding that the court lacked jurisdiction. The father did not waive his challenge. A defect in subject matter jurisdiction may be raised at any time by any party or by the court itself, and cannot be created through waiver, estoppel, laches, or consent.

The court did not have jurisdiction under DRL § 76(1)(d), which confers jurisdiction when no court of any other state would have jurisdiction under the criteria specified in § 76(1)(a). New Jersey was the home state between the child's date of birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015). The UCCJEA confers continuing jurisdiction on the state that was the home state within six months before the commencement of the proceeding where, as here, a parent lives in that state without the child. Thus, New Jersey retained continuing jurisdiction until January 15, 2016 - i.e., six months after the child's alleged move to New York and one week after this proceeding was commenced on January 8, 2016. A home state

retains continuing jurisdiction irrespective of whether it acquired home state status by virtue of the child's residence since birth, or by virtue of the child's residence for six months.

The Court also rejects the mother's contention that there was subject matter jurisdiction because New York was the state in which the child was present at the commencement of the proceedings, noting that DRL § 76(3) states that the subject child's "[p]hysical presence … is not necessary or sufficient to make a child custody determination."

Matter of Nemes v. Tutino
(4th Dept., 4/26/19)

* * *

CUSTODY - Jurisdiction

The First Department holds that the family court properly determined that it did not have jurisdiction, and enforced a French custody order by returning the child to the father in France. Although the child wished to remain in New York with the mother, and suffered extreme anxiety at the idea of leaving, such evidence did not rise to the level of an "immediate threat" warranting invocation of emergency jurisdiction.

In re Francois B. v. Fatoumata L.
(1st Dept., 3/28/19)

* * *

FAMILY OFFENSES - Jurisdiction/UCCJEA

In this family offense proceeding, the Fourth Department concludes that the family court had emergency jurisdiction under DRL § 76-c(1), noting that the statute applies to emergencies involving parents; that the petitions allege acts of physical violence perpetrated by the father against the mother, resulting in her hospitalization in an intensive care unit for several days; and that although the father was incarcerated in Florida and thus posed no immediate threat, the mother, who had been hospitalized for several days and suffered significant injuries, including a subdural hematoma, had no knowledge regarding when the father would be released, and relocated to New York to be with family, who could help her with the then 11-month-old child, and to be safe in the event the father was released.

The Court rejects the father's inconvenient forum argument, noting that the inconvenient forum statute applies only after it is determined that a court has subject matter jurisdiction.

Matter of Alger v. Jacobs
(4th Dept., 2/1/19)

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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

Hague Convention

CUSTODY - Hague Convention

In this proceeding under the Hague Convention on the Civil Aspects of International Child Abduction in which the father seeks the return of the parties' minor child, the District Court concluded that Italy is the child's "habitual residence," and granted the petition subject to certain conditions notwithstanding its determination that repatriating the child would expose him to "a grave risk of harm."

The Second Circuit agrees with the habitual-residence determination, but concludes that the District Court erred because the most important protective measures it imposed are unenforceable and not otherwise accompanied by sufficient guarantees of performance. The matter is remanded for further proceedings concerning the availability of alternative ameliorative measures.

In cases in which a district court has determined that repatriating a child will expose him or her to a grave risk of harm, unenforceable undertakings are generally disfavored, particularly where there is reason to question whether the petitioner will comply with the undertakings and there are no other sufficient guarantees of performance. Here, many of the undertakings the District Court imposed need not - or cannot - be executed until after the child is returned to Italy.

The District Court may consider whether Italian courts will enforce key conditions, and international comity does not preclude district courts from ordering, where practicable, that one or both of the parties apply to courts in the country of habitual residence for available relief that might ameliorate the grave risk of harm, so long as the purpose of such an order is to ascertain the types of protections actually available, and the district court does not condition a child's return on any particular action by the foreign court. The District Court also could require the father to comply with a condition before the child is repatriated; and can request the aid of the United States Department of State, which can ascertain whether the Italian government is willing and able to enforce certain protective measures.

Saada v. Golan
2019 WL 3242029 (2d Cir., 7/19/19)

Indian Child Welfare Act

INDIAN CHILD WELFARE ACT
ABUSE/NEGLECT - Jurisdiction

The Second Department affirms an order granting the application of the Unkechaug Indian Nation to dismiss the FCA Article Ten proceeding and transfer jurisdiction to it pursuant to the Indian Child Welfare Act of 1978.

The Court first notes that although the ICWA applies only to federally recognized tribes, and the Unkechaug do not appear to be so recognized, the "New York ICWA" includes recognition of "[a]ny Indian tribe designated as such by the state of New York" (Social Services Law § 39), as well as federally recognized tribes and tribes recognized by the State of New York or by any other state (18 NYCRR § 431.18). The Unkechaug is so recognized by the State of New York.

Pursuant to the ICWA, an Indian tribe shall have jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Federal ICWA regulations of the Department of the Interior, Bureau of Interior Indian Affairs define the term "child-custody proceeding" as "any action, other than an emergency proceeding, that may culminate in" foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. The DOI has stated that ICWA would apply to an action in which a court was considering a foster care placement, but ultimately decided to return the child to the parents, because the action could have culminated in such a placement. The New York regulations, as amended on March 15, 2017, mirror the definition of child custody proceedings under the ICWA and the federal regulations. The fact that the definition of "child custody proceedings" under 18 NYCRR § 431.18(4) was not amended to include the language "may culminate in" until March 2017, approximately one month after the filing of this petition, is of no consequence. The ICWA and the federal regulations explicitly state that "where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard."

Matter of Dupree M.
(2d Dept., 4/3/19)

* * *

ABUSE/NEGLECT - Jurisdiction
INDIAN CHILD WELFARE ACT

In this Article Ten proceeding, the Second Department rejects the mother's contention that the Indian Child Welfare Act deprived the Family Court of jurisdiction where the mother failed to identify any Indian tribe of which she or either child is a member, and thus failed to meet her burden of providing sufficient information to put the Family Court on notice that the children may be "Indian children."

Matter of Baby Boy W.
(2d Dept., 6/26/19)

* * *

ADOPTION - Motion To Vacate
- Indian Child Welfare Act

The Second Department upholds an order that, while a divorce action was pending, denied the mother's motion to vacate the order of adoption in favor of respondent on the ground that the child is an Indian child and the adoption proceeding was not held in compliance with the Indian Child Welfare Act of 1978. The mother lacks standing. Only the child, the parent or Indian custodian from whose custody the child has been removed, and the Indian child's tribe have standing.

In addition, the mother's allegations of domestic violence during her marriage to respondent, and her claim that respondent "never intended to be a decent and loving parent to [the child] as promised," do not amount to fraud.

Matter of Connor
(2d Dept., 7/31/19)

* * *

ABUSE/NEGLECT/INDIAN CHILD WELFARE ACT

In this FCA Article Ten proceeding, the Second Department rejects the Indian Nation's contention that the family court was required to conduct a hearing under the Indian Child Welfare Act prior to removing the child from the temporary custody of the paternal uncle and returning the child to the mother's custody.

The statute [25 U.S.C. § 1912(e)] provides that "[n]o foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Here, the child had been placed temporarily with the paternal uncle upon the application of the Indian Nation, and was not being removed from the mother or an Indian custodian for placement in foster care.

Matter of Leslie T.
(2d Dept., 5/1/19)

Right To Counsel

ABUSE/NEGLECT - Right To Counsel/Administrative Proceedings

A New Jersey Appellate Court holds that the consequences of a child-abuse substantiation are of sufficient magnitude to warrant the appointment of counsel for an indigent defendant; that this right attaches to the administrative proceedings commenced when the government agency provides the parent or guardian with written notice that an investigation has substantiated abuse or neglect and also when a final agency decision has been appealed to this Court as of right, and this right to counsel includes the right to free transcripts; and that until such time as the Legislature makes provision, the right to counsel shall be enforced by courts and agencies through the appointment of pro bono counsel.

The Court notes that the consequences threatened or likely to result seem greater than those that have been found sufficiently dire to warrant the constitutional right to counsel in other settings; that child abuse proceedings are legally complex as, often, are the particular factual disputes that they pose; that indigent litigants are faced with the stress caused by the circumstances themselves and the potential for a child abuse or neglect substantiation, which carries additional significant consequences; and that, in attempting to avoid these consequences, the litigant must take on the Attorney General's office and the Division's witnesses and experts, and navigate all the procedural and substantive hurdles of litigation.

N.J. Dept. of Children and Families, Division of Child Protection and Permanency v. L.O.
2019 WL 2494542 (N.J. App. Div., 6/17/19)

* * *

CUSTODY/VISITATION - Right To Counsel/Effective Assistance

In this visitation proceeding brought by the incarcerated father, the Third Department orders a new hearing and assignment of new counsel to the father, concluding that he was deprived of his right to the effective assistance of counsel.

Counsel for both the father and the mother appeared to be unaware that there is a presumption favoring visitation that may be rebutted by demonstrating, by a preponderance of the evidence,

that visitation with the incarcerated parent would be harmful to the children's welfare or contrary to their best interests. Although the father did not bear the burden of proof, his counsel failed to elicit basic testimony relevant to the best interests issue. Counsel also spent an inordinate amount of time questioning the mother about her finances, engaged in an exhaustive and irrelevant inquiry regarding the mother's child from a different relationship, and, generally, displayed an overall lack of focus and purpose.

Also, the father and his counsel were at odds more often than not, which eventually caused the court to relieve counsel, but not until after summations began.

Matter of Aaron OO.
(3d Dept., 3/28/19)

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)

* * *

VISITATION - Standing/Same-Sex Couples

- *Supervised*
- *Domestic Violence*

Respondent is the biological mother of a child (born in 2008) conceived via artificial insemination during a same-sex relationship with petitioner, who has not adopted the child. The parties separated in 2009, and the child remained with respondent, who permitted petitioner to have parenting time for approximately two years but then terminated visitation.

The Third Department upholds the family court's determination that petitioner falls within the statutory definition of a parent and has standing to seek custody and parenting time. The "conception" test applies rather than a "functional" test that examines the relationship between petitioner and the child after the child's birth. Petitioner proved by clear and convincing evidence that she and respondent entered into an agreement to conceive the child and raise her as co-parents.

The Court rejects respondent's contention that petitioner is a parent "only by operation of law" and thus is not entitled to the same parenting time rights as a biological or adoptive parent. The presumption that parenting time was in the child's best interests was unrebutted. Petitioner has prior convictions for drug sales, but is no longer involved in illegal activities and now supports herself with income from several rental properties that she owns or manages. She has a history of family offenses and domestic violence, but the family court found that almost all of the proven bad acts had taken place before 2011, and that a subsequent text message did not rise to the level of a family offense.

Although no visits have occurred since the child was less than three years old, and the child does not know of petitioner as her mother, the child's lack of knowledge resulted solely from respondent's unilateral decision to cut off contact. Petitioner has consistently made every effort to regain contact allowed to her by the law.

The court properly designed a graduated schedule that begins in the supportive environment of therapeutic counseling and will transition slowly to supervised parenting time at first and, finally, after a period of months, to unsupervised contact.

Matter of Heather NN. v. Vinnette OO.
(3d Dept., 2/26/19)

* * *

CUSTODY/VISITATION - Standing/Equitable Estoppel

Nicole P., the biological mother of the two subject children, who were born via artificial insemination in September 2014 and May 2016 respectively, entered into a consent order with her former domestic partner, Jennifer C. The parties agreed to share joint custody, with physical custody and final decision-making authority to Nicole and a parenting time schedule for Jennifer. The parties entered into the consent order after the family court determined upon a hearing that

Jennifer established standing, via equitable estoppel, to seek custody or visitation. Nicole appeals from the determination as to standing.

The Second Department affirms. Equitable estoppel analysis is not precluded by the legal presumption arising because the older child was born when Nicole was still married to her former wife. The presumption was rebutted by clear and convincing evidence that there were no children of the marriage.

During the parties' relationship, they lived together with the children, splitting time as a unit between each other's homes. Jennifer participated in the prenatal care and births of both children, participated in raising the children as her children, and was held out by Nicole to others as the co-parent. Although the younger child is an infant, the older child regards Jennifer as her mother, calling her "mommy" and calling Nicole "momma." Nicole allowed Jennifer to have significant access to the children for approximately four months after their relationship ended, until Nicole then refused to allow access and these proceedings ensued.

Matter of Chimienti v. Perperis
(2d Dept., 4/17/19)

*   *   *

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)

Temporary Custody

CUSTODY - Hearing Requirement/Temporary Order

Upon an appeal brought by the attorney for the children, the First Department reverses an order that, without a hearing, granted the father's application for temporary custody. Modification of custody or visitation, even on a temporary basis, requires a hearing, absent a showing of an emergency.

Here, the court's determination was based exclusively on school records and allegations of educational neglect, which the parties were not given an opportunity to challenge at a hearing. Additionally, the attorney for the children objected based on statements and observations in a court-ordered investigation report regarding the father's violent nature and possible drug abuse.

In re Sandra Y. v. Jahi J.Y.
(1st Dept., 7/2/19)

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 - Expert Mental Health Testimony

The First Department affirms an order which eliminated respondent's weekly overnight visits and modified the parties' holiday and parenting schedule.

While the better practice would have been for the court to appoint a neutral forensic examiner where the circumstances included different views as to the reasons for the child's psychological difficulties, it was not reversible error to allow the child's treating psychiatrist, who was retained and paid by petitioner, to testify and make recommendations for modification of the access schedule. Respondent's expert disagreed with and criticized the treating psychiatrist's separation anxiety diagnosis, but his testimony was based solely on his review of trial transcripts, and he did not have the benefit of in-person interviews with the child or his parents.

In re Lela G. v. Shoshanah B.
(1st Dept., 5/9/19)

* * *

CUSTODY - Expert Witnesses/Discovery

The Second Department affirms an order awarding sole custody to the mother, concluding that the family court did not err in denying the request of the father, who proceeded pro se, for a copy of the forensic report prepared by the court-appointed evaluator.

The court provided the father with liberal access to the report over an extended period of time during which he could review the report upon request and take notes with regard to its contents. The father has failed to show that his ability to prepare for the hearing was prejudiced because he did not have his own physical copy of the report.

Matter of Raymond v. Raymond
(2d Dept., 7/10/19)

* * *

CUSTODY - Discovery/Expert Witnesses

The Court denies the mother's motion to quash the father's subpoena seeking the court-appointed forensic examiner's notes and underlying raw data, concluding that the value of disclosure outweighs the potential detrimental effects.

If the examiner was biased against the father, as he alleges, it is possible that the notes or raw data would contain evidence of such bias. In addition, disclosure may allow the father's attorney to inquire on cross-examination in a manner that will assist the Court in making its best interest determination.

The subpoena is modified to prohibit disclosure of the underlying notes and/or raw data to the father personally.

Matter of M.M. v. K.M.
(Fam. Ct., Rockland Co., 6/26/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51071.htm

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/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)

* * *

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)

* * *

CUSTODY/VISITATION - Lincoln Hearings/Child's Wishes
- Right To Counsel/AFC Duties

The Third Department upholds an award of joint custody with primary physical custody to the mother and parenting time for the father. Noting that the mother's contention that there should have been a Lincoln hearing for the older child is preserved since the mother's counsel "support[ed]" the attorney for the children's request for the hearing, a three-judge majority finds no error in the family court's failure to conduct a Lincoln hearing.

The family court noted that the testimony from the fact-finding hearing was "not remarkable nor extremely disturbing" and did not raise "any red flags," and the record was sufficiently developed. Although the wishes of the older child, who was nearly eleven years old at the time, were entitled to consideration, that was just one factor and is not dispositive.

The dissenting judges assert that there is no testimony or evidence revealing the preferences of the older child, or indication that the family court considered the child's wishes, and consideration of a child's wishes is not limited to unusual or disturbing circumstances. The attorney for the children said that the older child was "very articulate" and believed that an interview with her would be "enlightening." The attorney for the child must help the child articulate his or her position to the court, and obtaining a Lincoln hearing is often the best way to fulfill that obligation, and sometimes is the only way to protect the child's privacy. Such a request ordinarily indicates that the attorney for the child is aware of a need for such a hearing, and thus a hearing should be denied only for sound reasons. The older child had personal knowledge of matters that had given rise to the mother's concerns, and, without input from either the older child or the attorney for the children, the family court significantly expanded the father's parenting time beyond the schedule that was temporarily in effect while the litigation was pending.

Matter of Lorimer v. Lorimer
(3d Dept., 12/20/18)

* * *

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)

* * *

VISITATION - Change In Circumstances

The First Department reinstates the mother's petition for modification of visitation, concluding that a change in circumstances was sufficiently alleged where the mother alleged that the father had been making baseless accusations that she was subjecting the child to sexual abuse, and that the almost nine-year-old child's position on visitation had changed and she wanted to be able to spend one weekend per month with the mother.

In re Princetta S.S. v. Felix Z.J.
(1st Dept., 6/27/19)

* * *

CUSTODY - Lincoln Hearings/Child's Wishes

The First Department upholds an award of custody to the father, noting, inter alia, that the court did not err in declining to conduct an in camera interview of the child because the child's attorney stipulated that the child loved both parents and did not prefer to live with one rather than the other.

The child's purported change after the hearing from being neutral to wanting to live with the mother does not warrant a different determination since her attorney has not explained what caused the change of heart and the child may have been influenced.

In re Bunita B. v. Mark P.
(1st Dept., 11/29/18)

* * *

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)

Domestic Violence

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)

* * *

VISITATION - Domestic Violence
- Supervised/Suspended

The Third Department reverses an order that, in relevant part, suspended the father's parenting time with the exception of communication by telephone or electronic means, which the mother had the sole authority to terminate if she deemed it appropriate to do so.

The father engaged in physical violence and verbal abuse directed at the mother. Although the record supports supervised visitation, there is no evidence that visitation is detrimental to the child. Although the mother and maternal grandmother testified regarding concerns about the father's sexual behavior, these concerns were based on hearsay, and speculation from vulgar and inappropriate comments made by the father. Concern regarding abuse or potential abuse must have a basis in the record to justify a denial of visitation; uncorroborated hearsay alone is not enough.

Matter of Boisvenue v. Gamboa
(3d Dept., 11/29/18)

Relocation, Travel And Related Issues

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)

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CUSTODY - Relocation

The Third Department affirms an order granting the father's application for permission to temporarily relocate with the parties' child to Texas for a period of two years so he could attend an Army Intersective Physician Assistant Program.

The father is an active duty military service member and his attendance at the program will allow him to earn a greater income. Although other programs may be available in New York, the program in Texas will allow the father to earn his degree free-of-charge and without incurring debt.

It "is highly significant that the father specifically asserted that the requested relocation was not intended to be permanent, and that he promised to return to New York to again reside with the child, in proximity to the mother and the child's extended family members, following the completion of his program."

Matter of Michael BB. v. Kristen CC.
(3d Dept., 6/6/19)

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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)

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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)

* * *

CUSTODY - Relocation

Pursuant to a 2015 order, the father had sole legal and primary physical custody of the child and the mother had parenting time once a week. In 2016, the father was the victim of a violent attack and, as a result of safety concerns, relocated with the child to a nearby state. The mother then

sought primary physical custody, and the father requested permission to relocate with the child and a reduction of the mother's parenting time to once a month. Upon a fact-finding hearing, the family court, inter alia, granted the father permission to relocate, and reduced the mother's parenting time to every other week.

The Third Department affirms. The father testified that, because of his involvement in the criminal prosecution, his assailant and the assailant's associates posed an ongoing threat to him and, by extension, the child. Since relocating with the assistance of a District Attorney's office, he had secured adequate housing, obtained employment, and enrolled the child in a new school, where she had successfully finished out the remainder of the school year. In their new location, they had a large support system. The father had been the child's primary caretaker for nearly her entire life and the mother had often foregone meaningful participation in the child's care.

The mother's testimony demonstrated, inter alia, that she continued to live with her significant other, a registered level two sex offender who, pursuant to the 2015 order, could not be present during the mother's parenting time. The distance between the mother's home and the father's new home was not so prohibitive that the mother's parenting time had to be severely curtailed.

Matter of BB. Z. v. CC. AA.
(3d Dept., 11/21/18)

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CUSTODY - Travel Issues

The First Department finds no error where the court permitted the mother, the custodial parent, to travel to Japan with the child for one month each year, upon six weeks' notice to the father but without obtaining his prior consent. The provision of the 2010 stipulation that requires the father's consent is inconsistent with the mother's sole legal custody.

In re Kayo I. v. Eddie W.
(1st Dept., 2/14/19)

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CUSTODY - Relocation/Violations
- Hearing Requirement
VISITATION

During a brief hearing at which the father testified in person and the mother testified by telephone from Florida, the mother alleged that she had gone to Florida to visit her mother and learned two days later that she had been evicted from her Bronx apartment, claimed that her physician had advised her not to travel because she was in the final month of a high-risk pregnancy, and testified that she did not intend to return to New York.

The First Department concludes that the family court properly remedied the mother's relocation in violation of a prior order, and the impairment of the father's visitation rights, by ordering that the father have visitation on particular dates during the child's upcoming winter and spring school breaks, and by directing the mother to pay for the child's travel expenses.

The court correctly determined that the relocation constituted a change in circumstances, but abused its discretion in denying the father's petition for modification of custody without a full hearing. Since the father had raised concerns in his petition about the child's education, the parties should have had the opportunity to present evidence about that and other relocation factors.

In re Michael B. v. Latasha T.-M.
(1st Dept., 11/20/18)

* * *

CUSTODY - Change In Circumstances/Relocation

The First Department, after noting that the family court applied the wrong standard when it held a full custody hearing without requiring the mother to make an evidentiary showing that there has been a sufficient change in circumstances, concludes that the mere fact that the mother voluntarily moved from the Bronx to Middletown, New York does not constitute a change in circumstances.

In re Kahlisha K.J. v. Eddie R.
(1st Dept., 12/6/18)

* * *

CUSTODY - Relocation
- Education Issues
- Appeal

The father is married and lives in New York City with his four other children. The mother, who has taken care of the subject child since his birth, is also married and lives in Saratoga County. Pursuant to a December 2014 order, the parties had joint legal custody with the mother having primary physical custody and the father having parenting time on three weekends of each month, as well as during school vacations.

Following a trial and a Lincoln hearing, the family court, among other things, granted the father's petition and awarded him physical custody and permitted him to relocate the child to New York City contingent upon his enrollment in Harlem's Children Zone, Promise Academy for the 2017-2018 school year.

The Third Department reverses and orders a new hearing. By imposing the Promise Academy condition, the court erroneously elevated the child's matriculation at Promise Academy from one factor to be considered to the sole dispositive factor.

Although the Court was advised at oral argument by the attorney for the child that the child is presently on a waitlist for Promise Academy but that there are other schools in New York City where the child could be enrolled, and the Court's authority is as broad as that of family court, the record is not sufficiently developed to make independent findings as to the other schools.

Matter of Lionel PP. v. Sherry QQ.
(3d Dept., 3/28/19)

* * *

CUSTODY - Relocation

The Third Department upholds a determination that the mother had valid and sound reasons for seeking to relocate with the children to Dansville, more than 50 miles away from the father's home in the Town of Corning, Steuben County.

The Court notes that the mother remarried and sought to combine residences with her husband, the children's stepfather, who was contractually required to live within 25 miles of the hospital where he worked as a psychiatrist; that the relocation would reduce the mother's daily commute to and from college, which would, in turn, allow her to spend more time with the children; that the stepfather, who has two children of his own, had been assisting the mother financially while she pursued her undergraduate degree, but could not sustain the financial burden of maintaining separate households long term; that the children had developed positive relationships with the stepfather and his children; that the mother presented evidence that the children would enjoy smaller class sizes and a greater offering of extracurricular activities in Dansville; and that although the relocation makes the father's weekday parenting time difficult, the parties had successfully co-parented from a similar distance for over five years and the father had proven an ability to exercise consistent and meaningful parenting time, and the family court fashioned a parenting time schedule that afforded the father greater time during the children's summer breaks and directed that the mother be responsible for all transportation.

Matter of Hoppe v. Hoppe
(3d Dept., 10/18/18)

* * *

CUSTODY - Relocation

The Fourth Department upholds an order authorizing the father to relocate with the children to North Carolina.

The father established that relocation would enhance the children's lives economically,

emotionally, and educationally. The father and the children would unite with the father's new wife and her daughter, with whom the children are close, which would allow for the combination of two incomes and consolidation of household expenses. The father, who was the children's primary caretaker, has another child in North Carolina with whom the children have a close relationship. The children expressed their desire to relocate.

The relocation will affect the frequency of the mother's visitation, but the father demonstrated his willingness to foster communication and facilitate extended visitation during school recesses and summer vacation, including by bearing the costs and responsibility for transportation.

Matter of Townsend v. Mims
(4th Dept., 12/21/18)

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CUSTODY - Agreements/Stipulations - Relocation
- Hearing Requirement

The Second Department reverses an order that, without a hearing, dismissed the father's petition seeking to enjoin the mother from relocating with the children from Mamaroneck, New York, to Woodbridge, Connecticut, and orders a hearing.

In a stipulation that was so-ordered and incorporated into the judgment of divorce, the parties had agreed to joint custody, with the mother being the primary residential custodian. The stipulation permitted the mother to relocate within 55 miles of her current residence without the express written permission of the father or a court order. The father argued below that the relocation, while within 55 miles of the Mamaroneck residence, would not be in the children's best interests.

Although the family court found that the stipulation was dispositive, no agreement of the parties can bind the court to a disposition other than that which is in a child's best interest. An agreement is merely a factor to be considered. Also, the father made an evidentiary showing that the proposed move might not be in the children's best interests, and thus facts and circumstances essential to the best interests analysis remain in dispute.

Matter of Jaimes v. Gyerko
(2d Dept., 10/24/18)

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CUSTODY - Relocation

Upon a hearing, the Court awards sole legal and residential custody to the mother, but denies her request for permission to relocate with the child to Georgia, concluding that the mother has failed to demonstrate that relocation is warranted due to "economic necessity."

The mother has not established that she has a job opportunity in Georgia at this time, and, while she engaged in a job search in New York, she has failed to demonstrate how, if at all, she leveraged her master's degree in conducting that search, and whether her search in New York was equivalent to her job search in Georgia. The mother argues that she cannot maintain her house in Georgia in addition to a comparable residence in New York, but conceded at the hearing that she had not considered the possibility of renting out her Georgia house to tenants who would pay her (her mother, who currently resides in the house, does not pay any expenses), and agreed that such an arrangement is an option.

Moreover, considering the distance, the child's young age and level of development, and the father's current practice of exercising substantial parenting time with the child on nearly a daily basis, even a liberal visitation schedule including multiple weekends and extended visits in the summer would be insufficient to preserve the relationship the father endeavors to maintain.

Matter of R.M.M. v. J.A.S.
(Fam. Ct., Nassau Co., 1/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50235.htm

Violations/Contempt/Interference With Parent-Child Relationship

CONTEMPT

The Third Department reverses a determination finding the mother in civil contempt for two violations where the mother did not provide the father with a specific address where the child could be located when the child was taken out of New York, but the father conceded that the mother had provided him with advance notice by text message of her intent to take the child on vacation in North Carolina and that it was possible for him to reach the mother and the child by cell phone during that time; and the father was not harmed in any way by the mother's failure to provide him with an accurate residence address.

Matter of Ryan XX.
(3d Dept., 9/12/19)

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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)

* * *

CUSTODY/VISITATION - "Parental Alienation"/Interference With Parent-Child Relationship - Change In Circumstances

The Court, after a lengthy discussion of "parental alienation," notes that, as a legal concept, it requires: "(1) that the alleged alienating conduct, without any other legitimate justification, be directed by the favored parent, (2) with the intention of damaging the reputation of the other parent in the children's eyes or which disregards a substantial possibility of causing such, (3) which proximately causes a diminished interest of the children in spending time with the non-favored parent and, (4) in fact, results in the children refusing to spend time with the targeted parent either in person, or via other forms of communication."

Here, the father must prove that the conduct occurred, and that it was outrageous and egregious conduct of such a pervasive nature as to result in the alienation of his children from him. Upon a hearing, the Court concludes that the father has failed to meet his burden.

The Court notes, inter alia, that in some instances the mother's conduct, such as the scheduling of activities for highly-active and industrious daughters, or providing a cell phone in order to keep in touch with the older daughters, had an underlying legitimacy; that if the mother was continuously badmouthing the father over the period from the divorce to the hearing - nearly three years - there would be some evidence of the daughters increasingly and more persistently declining to see their father, but there is no such proof; and that even if the mother intended to alienate these children from their father, she failed.

The father's experts stated that the mother's conduct resulted in a form of "moderate alienation," as opposed to "severe alienation." The latter results in a child's complete refusal to visit, while the former causes the child to have only a chilly reaction to contact with the targeted parent and a changed, less-loving relationship. There is no support for a finding of "moderate alienation" or "partial rejection" of a parent in New York cases. Moreover, the Court cannot fine-tune the concept to apply it with any accuracy.

While the parties concede that the breakdown in their communication is a substantial change in circumstances, the Court declines to modify the terms of the agreement and judgment of divorce, and thus, except as otherwise stated in this decision, the parenting times prescribed by the agreement apply unless the parents agree otherwise.

J.F. v. D.F.
(Sup. Ct., Monroe Co., 12/6/18)
http://nycourts.gov/reporter/3dseries/2018/2018_51829.htm

* * *

VISITATION - Contempt

The First Department concludes that the court properly denied the mother's motion to hold the father in civil contempt for disobeying a temporary visitation order where the mother's right to visitation time was not ultimately affected, but erred in denying the motion on the ground that the father acted "per the instructions of counsel."

In re Shelley H. v. Melvin Jermaine R.
(1st Dept., 5/30/19)

* * *

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

* * *

CUSTODY/VISITATION - Stipulations

The Second Department affirms an order that, after a hearing, granted the mother's petition to

enforce a stipulation of settlement to the extent of directing the father to refer to the parties' child by the child's English legal name when addressing the child or introducing the child to others, or when the father is in conversation with others with the child present.

The family court properly credited the mother's testimony regarding the parties' intent in entering into the stipulation, and determined that it was in the child's best interests to enforce the provision, which was added to the stipulation because the father's practice of referring to the child by a name other than the English legal name had been distressing and confusing to the child.

Matter of Preston v. Hormadaly
(2d Dept., 4/10/19)

* * *

CUSTODY - Interference With Parent-Child Relationship/Change Of Circumstances
- Joint Custody

The Judgment of Divorce awarded the parents joint legal and physical custody of the child, subject to a schedule set forth within the 2015 Stipulation of Settlement providing for a split ("50/50") weekday custodial schedule with alternating custodial weekends, and for vacations, school recess and holidays.

The Court, finding no significant change of circumstances, denies the petition of each party seeking sole custody. The Court notes, inter alia, that although the father admitted that he interfered with the mother's custody in July 2018, his behavior was an anomaly; that each parent attempted to attack the other's parenting skills, but the incidents alleged were in no way indicative of a continued pattern of behavior; and that removing the child from his established and stable routine of the past three years would be traumatic and upsetting.

However, because of the father's interference with the mother's custody, the Court will award her compensatory custodial time - i.e., two additional non-consecutive weeks of her choice between June 2019 and August 2019.

Stephanie R. v. John R.
(Sup. Ct., Suffolk Co., 3/22/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50444.htm

* * *

CUSTODY/VISITATION - Contempt/Violations

The Third Department upholds a finding of civil contempt where the father asserts that he never prevented his daughter from visiting with her mother, but he vested the daughter with the authority to determine whether she wanted to visit and made no efforts to facilitate compliance with court-ordered visitation.

Matter of Richard GG. v. M. Carolyn GG.
(3d Dept., 2/21/19)

Grandparents, Siblings and Other Relatives/Extraordinary Circumstances

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)

* * *

GUARDIANSHIP/CUSTODY - Extraordinary Circumstances

Upon the father's appeal, the Second Department upholds orders granting the maternal aunt's kinship guardianship petitions, concluding that she demonstrated extraordinary circumstances,

and that the award of guardianship was in the children's best interests.

The father was incarcerated when the children were very young, and remained incarcerated at the time of the hearing. The mother was found to have neglected the children, and did not oppose the aunt's petitions. The aunt assumed full responsibility for the children's care for at least three years, and the children had lived with her for most of their lives.

With respect to best interests, the Court notes that the aunt provided for the children's medical, educational, and special needs, and provided a stable home.

Matter of Tanisha M.M.
(2d Dept., 3/13/19)

* * *

VISITATION - Grandparents/Standing

L.G., the subject child in this visitation proceeding, was born on November 22, 2015. Respondent L.A. is L.G.'s mother, and respondent N.G. is L.G.'s putative father. Petitioner C.D. alleges that she is L.G.'s paternal grandmother, and that she lived with her son, the mother, and L.G. for two years. L.A. moves to dismiss the petition on the grounds that C.D. lacks standing. She asserts that there is no order of filiation and no acknowledgment of paternity.

The Court denies the motion. DRL § 72 does not require C.D. to show a pre-existing order or acknowledgment. L.A. has not controverted C.D.'s allegation that she is L.G.'s paternal grandmother. Even if L.A. had challenged C.D.'s sworn allegation that she is a grandparent, C.D. is entitled to an opportunity at a hearing to prove by clear and convincing evidence that she is the child's paternal grandmother.

C.D. v. L.A. and N.G.
(Fam. Ct., Kings Co., 4/4/19)
http://nycourts.gov/reporter/3dseries/2019/2019_29163.htm

* * *

CUSTODY - Extraordinary Circumstances/Mental Health Issues

The Third Department upholds an order awarding the mother and the aunt joint legal custody and the aunt primary physical custody of the child, concluding that the aunt established extraordinary circumstances.

The Court notes that since 2007, when the mother consented to a finding of neglect, the child has resided with the aunt while the mother has had parenting time that was supervised until 2010; that due to the dysfunctional relationship between the mother and the aunt, the years have been incredibly litigious and stressful for the child, the mother and the aunt; that the mother, who has been treated for mental health issues in the past, denied any current need for treatment, and was

largely unaware of the nature and purpose of services the child was receiving at school; that the mother works part time, has remarried, had a second child and moved into a new residence where the subject child would have his own room, but the child was "challenging," and the mother often had a difficult time parenting, would terminate parenting time early, attributed much of the blame to the child and his mental health issues, and had little insight into her own responsibility to deescalate situations with the child.

Matter of Melissa MM. v. Melody NN.
(3d Dept., 2/28/19)

* * *

VISITATION - Grandparents/Best Interests

The Fourth Department reverses orders awarding the paternal grandmother visitation over the objections of the mother and the father.

Even assuming the grandmother established standing, visitation is not in the children's best interests. Because the parents are fit, their decision to prevent the children from visiting the grandmother is entitled to "special weight." Additionally, their decision is founded upon legitimate concerns.

After a dispute at the grandmother's home involving the father and his brother, a report of child abuse or maltreatment was made to the OCFS. The reporter's identity is confidential, per the normal protocol, but the grandmother is an attorney, a longtime practitioner in family court, and an administrative law judge in the OCFS. The report was investigated by Child Protective Services and determined to be unfounded. The grandmother subsequently escalated the minor incident into a full-blown family crisis by initiating family court proceedings rather than making a good faith attempt to fix her family relationships without resorting to litigation. She ignored the damaging impact her behavior would have on family relationships and made no effort to mitigate that impact. There is now palpable animosity between the parties that threatens to disrupt the harmonious functioning of the family unit.

Matter of Jones v. Laubacker
(4th Dept., 12/21/18)

Visit Supervision And Scheduling

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 - 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)

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VISITATION - Delegation Of Court's Authority/Child's Wishes
- Hearing Requirement

The Second Department finds reversible error where the family court determined that it would not compel either child to visit with the mother and left the determination as to whether there should be access at all to the children.

Moreover, the record is inadequate to support the court's refusal to order at least the resumption of therapeutic visits, and the court's finding that the father had done all that he could to encourage the children to visit with the mother. The court made its determination based only upon its review of the papers, the in camera interviews, and the colloquy with the unrepresented parties, which occurred in the absence of the attorney for the children. The court did not conduct a hearing, did not direct a forensic examination, and did not seek information from the clinicians involved in the lapsed therapeutic visits. The mother was not afforded the opportunity to challenge, with her own evidence or through cross-examination, the father's assertions.

Matter of Mondschein v. Mondschein
(2d Dept., 8/28/19)

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CUSTODY - Right To Counsel/Child
VISITATION - Delegation Of Court's Authority

The Fourth Department upholds a determination awarding sole custody to the father, noting, inter alia, that the attorney for the child properly substituted judgment where the record supports a finding that the child, who was five years old at the time of the hearing, lacked the capacity for knowing, voluntary and considered judgment, and that another outcome would have placed the child at risk. The mother's refusal to believe the child's disclosure of sexual abuse and her continued commitment to the alleged abuser rendered her unfit to have custody.

However, the court erred in delegating its authority to set a visitation schedule either to the parties, or to the supervising agency.

Matter of Edmonds v. Lewis
(4th Dept., 8/22/19)

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VISITATION - Incarcerated Parent/Frequency Of Visits

The Third Department affirms an order awarding the incarcerated father visits with the children twice per year - once in April and once in October - with weekly telephone contact with the children each Wednesday.

The family court failed to make fact findings but this Court may reach an independent determination. As the father argues, recent social science research strongly supports the legal presumption that children benefit from continuing contact with an incarcerated parent. Nonetheless, the best interests of a child, and particularly a young child, may not be served by imposing in-person visits to a correctional facility. The atmosphere and setting of such visits may be traumatic to the child and his or her view of the parent. Other means of contact, such as frequent phone calls and letters, can provide children and incarcerated parents meaningful communication and ways to continue and strengthen their relationships, without subjecting young children to unnecessary distress.

Here, the children were six and seven years old at the time of the hearing. The mother described a history of domestic violence that had occurred in front of at least one of the children, and she remained concerned for both her safety and the mental well-being of the children, who were exhibiting behavioral difficulties following contact with the father. The father is serving a lengthy sentence and is not eligible for release until, at the earliest, 2021.

A dissenting judge would order that visits take place four times a year.

Matter of Benjamin OO.
(3d Dept., 3/21/19)

* * *

VISITATION - Schedule

The Second Department modifies the family court's order by deleting a provision granting the father parental access on the third weekend of every month from Saturday at 12:00 p.m. until Sunday at 12:00 p.m., and substituting an award of parental access on Thursdays from release from school or, if no school, from 12:00 p.m., until 5:30 p.m., and on alternate weekends from Saturday at 10:00 a.m. to Sunday at 6:00 p.m.; deleting a provision directing pick up and drop off at the police precinct station house closest to the mother's residence, and substituting a provision directing pick up and drop off curbside at the mother's residence or such other location agreed upon by the parties; deleting a provision directing that parental access not adversely affect the children's school, religious, or extracurricular activities; deleting a provision directing that if parental access had to be cancelled by the father for any reason, he could not make up that access unless the parties agreed otherwise; and adding a provision granting parental access in odd years on Christmas Eve from the earlier of 12:00 p.m. or release from school to 9:00 p.m.

The Court notes, *inter alia*, that the father has previously exercised weeknight and overnight alternating weekend parental access without the mother raising any serious issues or concerns; that the Christmas-time provision fails to take into account the importance of the children's relationship with the father and his extended family; and that because the mother can unilaterally

determine the children’s non-school activities without prior consultation with the father, and had asserted that the children were so busy that establishing a fixed schedule would be difficult, the provision giving primacy to other activities could result in an undue curtailment of the father’s parental access.

Matter of Cuccia-Terranova v. Terranova
(2d Dept., 7/3/19)

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VISITATION - Change In Circumstances
- Supervised

In this visitation proceeding, the Fourth Department concludes that the father failed to establish a change in circumstances where the father’s marriage, new home, and diagnosis with sleep apnea are changes to the father’s personal circumstances that do not reflect a need for change to ensure the best interests of the children; and that even if the children want to spend additional time with the father, the established arrangement should not be changed solely to accommodate the children’s desires, particularly where, as here, the children are unaware that visitation has been supervised by their grandmother because the father was convicted of sexually abusing his daughter and is a registered sex offender.

In any event, with respect to best interests, the Court notes that in light of the five years during which the grandmother successfully supervised visitation, the isolated incident involving the grandmother's unwillingness to allow the father’s wife into her home did not warrant modifying the prior order to replace the grandmother with the father’s wife as the visitation supervisor; and that the father’s wife, who did not know the details of the sexual abuse and believed that it occurred accidentally while the father was asleep, would supervise visits through a very different lens than would the grandmother, whose allegiance is to the children.

Matter of William F.G. v. Lisa M.B.
(4th Dept., 2/1/19)

*   *   *

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Matter of William F.G. v. Lisa M.B.
(4th Dept., 2/1/19)

Visits With Incarcerated Parent

VISITATION - Incarcerated Parent

The Fourth Department upholds an order denying the incarcerated father's request for in-person visitation with the child at the correctional facility where the child, who was approximately 2½ years old at the time of the hearing, did not have a significant relationship with the father, who last saw the child when he was 15 months old; the child had no relationship with the paternal relatives with whom he would have to travel more than two hours each way to visit the father; and the atmosphere and setting of the visits could be traumatic to the child and his or her view of the father;

Matter of Kelly v. Brown
(4th Dept., 7/31/19)

Appeals

CUSTODY - Appeal/Defaults
- Right To Counsel/Waiver

In this custody proceeding, the Fourth Department, with two judges dissenting, first concludes that the mother's contention that the family court failed to ensure that her waiver of the right to counsel was knowing, intelligent, and voluntary is reviewable despite her default. Notwithstanding the prohibition in CPLR 5511, the appeal brings up for review those matters which were the subject of contest before the trial court. Here, the mother's request to waive the right to counsel and proceed pro se places in issue whether the court fulfilled its obligation to ensure a valid waiver. Moreover, the day after the court allowed the mother to proceed pro se, the father's attorney questioned whether the mother should be representing herself, and the court determined that it had acted appropriately.

The court's inquiry was sufficient. The mother, who had previously discharged or consented to the withdrawal of several attorneys, was advised that proceeding without the assistance of trained and qualified counsel might be difficult or detrimental and that she would be required to follow

the rules of evidence. The mother demonstrated the ability to proceed pro se by, among other things, issuing subpoenas to witnesses and filing exhibits.

One dissenting judge notes that when a party has requested relief and is not opposed by another party, and the court grants the requested relief, there has been no contest and no aggrievement. The other dissenting judge notes that a party may appeal where an order is entered in part on a default and review of that order is sought with respect to a contested inquest or an intermediate order necessarily affecting the final determination, but the relevant orders here were entered entirely on the mother's default and she is not seeking review of either a contested inquest or an intermediate order.

Matter of DiNunzio v. Zylinski
(4th Dept., 8/22/19)

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VISITATION - Appeal/Standing

The Third Department holds that respondent non-custodial father has no standing to pursue an appeal from an order awarding the paternal grandmother supervised visitation with the children once a month for two hours.

The father was not aggrieved by the order, which did not affect his legal rights or direct interests. Although he was a party, he did not seek affirmative relief.

Matter of Cheryle HH. v. Benjamin II.
(3d Dept., 7/3/19)
http://nycourts.gov/reporter/3dseries/2019/2019_05354.htm

* * *

CUSTODY - Appeal/Mootness

The Third Department concludes that the grandmother's appeal from an order that, inter alia, dismissed her custody application is moot due to adoption of the child.

Matter of Gail UU. v. Constance UU.
(3d Dept., 7/3/19)

Practice Note: Post-termination of parental rights, "[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." 18 NYCRR § 421.19(i)(5)(i).

* * *

CUSTODY - Extraordinary Circumstances
- Adjournments
- Right To File
VISITATION - Delegation Of Authority

The Third Department upholds an order awarding custody of the children to their great aunt.

The court did not err in denying an adjournment when the mother failed to appear for the last day of trial. Her attorney stated that the mother was being evicted from her apartment, but the eviction had been pending for some time and the attorney conceded that it did not appear that marshals had actually been dispatched to remove the mother from her apartment. The mother also had a history of leaving while the proceedings were in progress.

The great aunt established extraordinary circumstances. There was a neglect finding based on the mother's acute depression and reported suicidal thoughts, her refusal of treatment, and her admission that her untreated mental health conditions made her incapable of caring for the children, and she had failed in the nearly two years since the children's removal to participate and progress in needed mental health services.

However, the court erred in granting the mother only so much supervised contact as was "deemed appropriate" by the great aunt. The court may not delegate its authority to make such decisions to a party. The court also erred in ordering that any petition filed by the mother to modify or enforce the orders may not be scheduled without a judge's permission. Public policy mandates free access to the courts and it is error to restrict such access without a finding that the restricted party engaged in meritless, frivolous, or vexatious litigation, or otherwise abused the judicial process.

Matter of Lakeya P. v. Ajja M.
(4th Dept., 2/1/19)

V. <u>PATERNITY/CHILD SUPPORT</u>

PATERNITY - Equitable Estoppel

The Second Department affirms an order of filiation and an order that, after a hearing on the issue of equitable estoppel, denied respondent's application for DNA genetic marker testing.

While the contact between respondent and the child was somewhat minimal, the child considered him to be, and he held himself out as, her father. The mother testified to an exclusive sexual relationship with respondent during the relevant period. The child was interviewed by the court in camera, and stated that she wants a relationship with respondent, whom she considered to be her father and called "dad." She referred to respondent's older children as her sister and brother and indicated that she had a personal relationship with them.

Matter of Shaundell M. v. Trevor C.
(2d Dept., 12/5/18)

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PATERNITY - Equitable Estoppel

In this paternity proceeding, the Third Department reverses the family court's determination applying equitable estoppel to preclude genetic marker testing, and remits the matter for testing, where respondent mother gave birth to the subject child in 2003 while she was in a relationship with respondent William P., and had a single sexual encounter with petitioner in 2003.

William P. satisfied his initial burden by presenting evidence of a long-term parent-child bond, but petitioner presented evidence that, prior to his incarceration, the child and the mother resided with him for approximately 2½ years; that, since being incarcerated, he has regularly communicated with the child; that his family has had a relationship with the child; and that the child understands that William P. is her "legal" father but that there is a significant chance that petitioner is her biological father. Although some communication between petitioner and the child may have violated a court order, that communication nevertheless occurred and has had a clear effect on the child that cannot be mitigated by refusing to order a DNA test. In fact, DNA testing can mitigate the turmoil in the child's life that presently exists because she does not know who her biological father is.

Although testing could have an impact on the child's relationship with William P., this relationship is already tumultuous, and some of this tumult may stem from the child's uncertainty as to whether petitioner is her biological father. If the child learns that William P. is her biological father, this information would positively benefit their relationship.

The Court is mindful that, if petitioner is found to be the biological father, his lengthy incarceration would prevent the child from enjoying a "traditional" parent-child relationship with him, but they would be able to communicate by way of letters and telephone contact, and potentially through visitation at the prison. The benefit to the child of definitively establishing

paternity outweighs any negative impact that an untraditional parent-child relationship may have.

Matter of Stephen N. v. Amanda O.
(3d Dept., 6/6/19)

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PATERNITY - Equitable Estoppel

The mother commenced this paternity proceeding seeking to have Ricardo R. E. adjudicated the father. The child was conceived and born while petitioner was married to another man ("the husband").

The Second Department reverses an order that, upon a hearing, dismissed the proceeding, and finds paternity. Although petitioner failed to rebut the presumption of legitimacy by clear and convincing evidence, genetic testing is not in the child's best interests and equitable estoppel should be applied.

Ricardo was present at the child's birth, gave the child his surname, and is recorded as the father on the child's birth certificate. He lived with the child since his birth, supported the child financially, was actively involved in his care, and established a loving father-son relationship with the child over the first three years of the child's life before the husband asserted paternity. The father-son relationship between Ricardo and the child continued to exist at the time of the hearing, and Ricardo refers to the child as his son.

The husband, who was aware before the child's birth that he might be the biological father, was not involved in prenatal care or present at the child's birth, and did not meet or attempt to contact the child after his birth. He was employed, but never provided financial support. To permit the husband to assume a parental role now would be unjust and inequitable.

Matter of Onorina C.T.
(2d Dept., 5/1/19)

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SUPPORT - Enforcement Of Agreement

A New Jersey court issued a judgment of divorce that incorporated the parties' separation agreement, which in pertinent part stated that, "[n]otwithstanding the future residence or domicile of either party, this Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance with the laws of the State of New Jersey."

The Fourth Department declines to enforce the parties' choice of law provision, which violates strong New York public policies. Under New York law, child support obligations must be calculated pursuant to the Child Support Standards Act, and a duty of support cannot be eliminated or diminished by the terms of a separation agreement. In addition, whereas New

Jersey law provides that child support obligations generally end when a child reaches the age of 19, in New York the duty to support a child until the age of 21 is a matter of fundamental public policy.

Matter of Brooks v. Brooks
(4th Dept., 4/26/19)

* * *

PATERNITY - Res Judicata

In this paternity proceeding involving a foster child whose mother has executed a conditional surrender, the agency, citing res judicata principles, asserts that the alleged father's petition should be dismissed because he filed a prior paternity petition that was dismissed with prejudice.

The Court, noting that it has some discretion to hear a petition even though a previous petition was dismissed with prejudice, denies the agency's motion. The prior petition was dismissed within the context of a termination of parental rights proceeding, where the judge found that there is no consent or notice father. The issue of biological and legal paternity went unaddressed. Also, petitioner, who was unrepresented prior to the filing of the current petition, was not afforded the opportunity to participate in the termination of parental rights hearing.

Matter of Alex A. v. Nivia A.
(Fam. Ct., Bronx Co., 5/9/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50714.htm

VI. <u>ETHICAL ISSUES AND ROLE OF ATTORNEY FOR THE CHILD AND JUDGE</u>

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.

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CUSTODY - Appeals
- Right To Counsel
- Change In Circumstances/Best Interests
- Child's Wishes

In this custody proceeding, the Second Department rejects the mother's contention that the attorney for the child lacks authority to take an appeal on behalf of the child from an order transferring custody to the mother. This Court has previously entertained appeals in custody cases taken solely through an attorney appointed to represent the child, albeit without discussing the attorney's authority. When an attorney is appointed by the court to represent a child in a contested custody proceeding, that attorney must be afforded an opportunity to fully participate in the proceeding. The Court notes that FCA § 1120(b) provides that the appointment of an attorney for the child continues without further court order where that attorney or one of the parties files a notice of appeal.

Although it may be inappropriate to entertain a child's request for a change in custody where the parent preferred by the child is unwilling to accept the transfer, or a child's attempt to prevent a transfer of custody from a parent who is no longer opposed to the change, in this case the father, while not having filed and perfected his own appeal, has submitted a brief arguing for reversal. And, since enforcement of the order has been stayed pending determination of this appeal, the father remains the custodial parent.

The Court also rejects the mother's contention that the child is not aggrieved by the order. The attorney for the child's advocacy was based in large part on the child's clearly expressed preference. More importantly, a teenaged child has a substantial interest in the outcome of parents' custody litigation. "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." The attorney for the child must advocate for the child's wishes and best interests precisely because the child has a vital interest and a voice that should be heard.

The Court then concludes that the Family Court erred in holding a full custody hearing without first finding a sufficient change in circumstances. Litigation over established, court-approved custody and access arrangements can be unsettling and traumatic for children, and thus courts must consider whether an appropriate basis for judicial intervention has been articulated. This petition, and the mother's previous petition, were brought relatively close together and contained some similar or overlapping allegations. Even if a hearing was required, the Family Court should have confined the testimony to the alleged changes. Moreover, the Family Court failed to state the reasons for its determination. The parties, the child, and their counsel were entitled to an explanation for the Family Court's decision to vastly alter the life of the child by removing her from the home of the custodial parent with whom she had resided for approximately nine years.

The record is sufficient to permit this Court to make its own factual findings, and the Court concludes that there was not a sufficient change in circumstances, noting, inter alia, that the evidence strongly suggested that the child's academic challenges were longstanding and that the father had developed effective strategies for helping the child and motivating her; that while the child's taking and/or distribution of explicit photos is a matter of concern given the way in which photos can spread on the Internet, the father's response was more proactive than the mother's; and that the mother's move from a location approximately three hours away to one that was forty-five minutes away did not constitute a change in circumstances.

Finally, even assuming that the mother established a change in circumstances, modification of the custody order was not in the child's best interests. The Court notes, inter alia, that the Family Court erred in failing to give due consideration to the expressed preferences of the child, who was fourteen and fifteen years old at the time of the proceedings.

Matter of Newton v. McFarlane
(2d Dept., 6/5/19)

* * *

PATERNITY - Equitable Estoppel/Hearing Requirement
- Right To Counsel - Child

In this paternity/support proceeding, the Third Department reverses an order directing a genetic marker test of the child, the mother and respondent to confirm respondent's paternity, concluding that the family court did not possess adequate information regarding the equitable estoppel issue and the child's best interests. From the child's grandmother, the attorney for the child had learned that the child might believe that someone else is his father. However, the record does not indicate that the AFC discussed that belief with the child, and, beyond a few short and scattered statements, there was no evidence or discussion of who has a parent-child relationship and whether, due to equitable estoppel, a genetic marker test would not be in the child's best interests.

Moreover, the child did not receive the effective assistance of counsel from the second AFC. There is no indication that the AFC consulted with the child, who was 4½ to 6 years old during the litigation. Although there was a risk of raising parentage concerns not harbored by the child, “a patient, careful and nuanced inquiry is not only possible, but necessary (citation omitted).” Although the first AFC had asserted equitable estoppel, the second AFC withdrew that argument, which further supports the conclusion that the child did not receive the effective assistance of counsel.

Matter of Schenectady County Department of Social Services v. Joshua BB.
(3d Dept., 1/17/19)

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CUSTODY - Right To Counsel/Child

In 2016, the parents consented to a joint custody order with primary physical custody to the mother and parenting time to the father. In 2017, the mother sought to eliminate the scheduled parenting time and substitute an arrangement that would allow the child to visit his father as he wished. Following a fact-finding hearing, at which the father did not appear, and a Lincoln hearing, the family court dismissed the mother’s petition. The attorney for the child appeals.

The Third Department reverses, agreeing with the appellate attorney for the child that the trial AFC provided ineffective assistance of counsel.

The AFC must help the child express his or her wishes to the court, and take an active role in the proceedings. Here, the AFC met the first objective, but, given the mother’s limited testimony - the family court understandably characterized the record as “thin” - the AFC should have taken a more active role by presenting witnesses who could speak to the child’s concerns and/or by conducting a more thorough cross-examination of the mother. During his brief cross-examination, the AFC child did not attempt to elicit additional information about his client’s behavior and demeanor relative to his visits with the father.

Matter of Payne v. Montano
(3d Dept., 11/21/18)

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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)

* * *

ADOPTION - Consent Of Adoptee

In this proceeding for the adoption of respondent, a 64-year-old woman with a profound intellectual disability and very limited verbal ability who resides in a family care home, the Surrogate's Court appointed Mental Hygiene Legal Service to represent respondent, and found good cause to appoint a guardian ad litem even though MHLS had objected to the appointment and requested that the court conduct an interview of respondent in the presence of counsel. After a hearing, the Surrogate's Court granted the petition.

The Third Department affirms. When an adoptee is over the age of 14, his or her consent is required, "unless the judge or surrogate in his [or her] discretion dispenses with such consent." DRL § 111(1)(a). This exception avoids categorically prohibiting adoptions of those who are over the age of 14 but are incapable of giving consent, including an entire class of adoptees who are so severely disabled that they simply lack the ability to communicate consent. The determination as to whether consent should be waived is encompassed within the same best interests analysis that a judge or surrogate must undertake when deciding whether to approve the adoption. The Court observes in a footnote that the court below erred in holding that the guardian ad litem could waive consent, which is a uniquely judicial function that cannot be delegated.

Matter of Marian T.
(3d Dept., 11/21/18)

* * *

JUDGES - Bias

In this support proceeding in which enforcement of a North Carolina order is sought, the Court denies respondent father's motion for recusal where the father filed both an Article 78 proceeding against the Court and the prosecuting Assistant Corporation Counsel seeking a writ of mandamus, and a civil rights action pro se against the City of New York, the Family Court, this Court, and the ACC alleging various violations of his Federal constitutional rights. Both cases have been dismissed.

There is no statutory basis for disqualification. The Court has no direct, personal, substantial, or

pecuniary interest in the outcome of these child support proceedings directly benefitting only the mother, child, and North Carolina. A litigant cannot be allowed to create a sham controversy by suing a judge without justification and then seeking recusal.

Matter of Christel D.
(Fam. Ct., Kings Co., 1/30/19)
http://nycourts.gov/reporter/3dseries/2019/2019_50135.htm

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JUDGES - Bias/Personal Knowledge Of Adjudicatory Facts

The inquiring judge is presiding in a custody case and has received a neglect petition involving the same family which alleges that one parent falsely reported to Child Protective Services that the other parent, in open court, physically attacked the child during an appearance before the inquiring judge, and that the judge told him/her not to take the child to the hospital. The judge has personal knowledge that no such incident occurred, as do numerous "lawyers, clerks, court officers, and the court reporter."

The Advisory Committee on Judicial Ethics concludes that the judge may preside in both cases, provided he/she can be fair and impartial in each, a matter left to the judge's sole discretion.

The judge has no impermissible personal knowledge of the pertinent allegation in the neglect matter, i.e. whether one parent made the alleged report to Child Protective Services. As for the falsity of the alleged report, a judge may, in legally appropriate circumstances, judicially notice matters of public record such as whether a child was physically attacked in open court during a proceeding before him/her. In any event, the judge is not likely to be a material witness in the proceeding.

Further, a judge, due to specialized learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination based upon appropriate legal criteria, despite his/her awareness of facts that cannot properly be relied upon in making the decision.

Opinion: 18-104
NYLJ, 1/11/19, at 4, col. 4
(6/21/18)
http://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/18-104.htm

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ETHICS - Communication With Represented Person
RIGHT TO COUNSEL - Child

Upon a six-day hearing in this matrimonial action, the Court grants plaintiff father's motion to disqualify defendant mother's counsel for violating Rule 4.2 of the Rules of Professional

Conduct by talking to the children, without their attorney's consent, about a private investigator the mother and counsel believed was working with the father and the police to engineer the mother's arrest to influence the outcome of their custody dispute. Counsel violated the children's due process rights.

Counsel's contact with the children was not of a social nature, unrelated to his representation of defendant. According to his own testimony, he drove to defendant's home to rescue her from an unlawful arrest and shield the children from a private investigator they knew was employed by their father. The children are eight and ten years old. They were captive listeners in counsel's vehicle. Despite the absence of credible evidence of the existence of a plot to arrest defendant, counsel chose to play the role of savior. He risked influencing the children to think favorably of counsel and the mother and unfavorably of the father. An attempt to influence the children's opinion of a parent during a custody dispute is adverse to the best interests of the children.

Even if counsel believed that his presence was necessary to thwart the mother's possible arrest, his failure to notify the attorney for the children before or after the events, and his obstinate defense of his conduct and indifference to the attorney-client relationship between the children and their counsel, justify his disqualification to protect the rights of the children.

Anonymous 2017-1 v. Anonymous 2017-2
(Sup. Ct., Nassau Co., 10/23/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28337.htm

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ETHICS - Communications With Represented Party
RIGHT TO COUNSEL

In this post-divorce litigation, the Court grants the attorney for the child's motion for disqualification of plaintiff's attorney where that attorney, who is the child's step-grandfather and attends family gatherings and social events attended by the child, has communicated with the child in the absence of the AFC.

Although there is no claim that plaintiff's attorney has discussed the case with the child, the child is a minor who suffers from various behavioral and mental health issues, and may not be privy to or fully understand all of the issues involved in the litigation and recognize if and when pleasantries turn into communications involving the subject of representation. The child should not be burdened with the risk that the litigation will be discussed when interacting with plaintiff's attorney in the absence of his attorney.

The Court also notes the impact on the child of having a family member, whom he presumably trusts, advocate for one parent and not the other. Finally, it is a possibility that plaintiff's attorney will be called as a witness.

R.M. v. E.M.
(Sup. Ct., Nassau Co., 4/29/19)

http://nycourts.gov/reporter/3dseries/2019/2019_29154.htm

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ABUSE/NEGLECT - Right To Counsel
ETHICS - Conflict Of Interest

The Second Department, upholding a determination that the father inflicted excessive corporal punishment on Walgely on one date and derivatively neglected Oliver, and a determination dismissing another excessive corporal punishment charge where Walgely recanted her allegation at the fact-finding hearing, finds no error where the court failed to appoint separate attorneys for the children during the fact-finding hearing after Walgely requested that she return to the father's home.

Matter of Oliver A.
(2d Dept., 12/19/18)

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ETHICS - Conflict Of Interest/Joint Representation
CUSTODY/VISITATION - Right To Counsel

In this sibling visitation proceeding filed by the mother, the Court disqualifies the attorney for the children, and appoints two new AFCs, where one child does not wish to visit with his half-siblings because he associates sibling contact with trauma suffered during visits to the home where the mother resided with Alejandro R. and the other children; and the AFC has learned that the other children may be okay with sibling visits. This is a clear conflict of interest.

The AFC cannot remain on the case at all because she has represented all three children for many years and obtained privileged communications regarding a variety of issues potentially relevant to this proceeding. There are some circumstances in which an adult may waive a conflict of interest in writing, but a minor must be presumed to lack the ability to knowingly make such a waiver.

Matter of Noelle M. v. Christopher C.
(Fam. Ct., Rockland Co., 3/8/19)
http://nycourts.gov/reporter/3dseries/2019/2019_51064.htm

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CUSTODY - Relocation
- Right To Counsel/Role Of The AFC

In this divorce action, the Court denies plaintiff wife's request for permission to relocate with the children from Brooklyn to Bronxville, New York.

The Court notes, inter alia, that the relocation would negatively impact the quantity and quality of the children's future contact with the father; that aside from the mother's opinion, there is no evidence in the record that the public school in Bronxville is superior to the public school in Brooklyn Heights; that the mother's plan to move the children from the only home they have ever had, in a neighborhood that has been the center of their universe with two loving and cooperative divorced parents, shows a lack of insight into the difficulties involved; and that the Court "is reluctant to judicially assert that a bigger house in Suburbia or a suburban school district is prima facie evidence that would warrant relocation."

The Court indicates that it granted the parties' joint application, which was joined by the attorney for the children, to have no in camera interview of the children, ages 5 and 6. In a footnote, the Court notes that the AFC substituted judgment because the children were not aware of the proposed relocation, and that the AFC ultimately opposed relocation.

E.M.M. v. W.M.
62 Misc.3d 1201(A)
(Sup. Ct., Kings Co., 12/5/18)

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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)

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ETHICS - Conflict Of Interest
VISITATION/CUSTODY - Right To Counsel/AFC

The Court denies defendant husband's motion for appointment of a separate attorney for the child to represent one of the parties' two children where the 14- and 16-year-old children have differing parenting time scheduling preferences but both want strong relationships with both parents.

This difference of opinion over scheduling does not create a conflict of interest for the AFC. She can advocate for each child's position without prejudicing the rights of the other child. The cases cited by defendant involve divergent residential preferences based upon each parent's fitness.

Moreover, the AFC has had a relationship with both children since being appointed in October 2017. The children trust her and want her to continue to represent both of them despite their different views of the parenting schedule.

M.M. v. K.M.
(Sup. Ct., Nassau Co., 11/16/18)
http://nycourts.gov/reporter/3dseries/2018/2018_28369.htm

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CUSTODY/VISITATION - Right To Counsel/Child
- Parental Contact Schedule
SUPPORT

The Third Department rejects the mother's contention that the Family Court improperly awarded joint legal custody to the father and changed the parenting time order.

The Court first denies the mother's motion to strike the attorney for the child's brief on the ground that that the AFC failed to indicate in her brief whether she had met with the child, what the child's preferences were and why she was substituting her judgment. In her responding affirmation, and again during oral argument, the appellate AFC confirmed that she had interviewed the child and had determined that the arguments made by the trial attorney were still appropriate arguments on appeal. (In a footnote, the Court rejects the father's contention that the mother has no standing to bring the motion, since a child in a custody matter does not have full party status.)

However, given the child's age, the Family Court should not have ordered that the child "may" contact the mother at least once each day. Rather, the father should have been directed to facilitate at least one daily phone call from the child to the mother during parenting time.

The Family Court erred in suspending the father's child support obligation and ordering the money collected during that period to be credited back to the father. A court may suspend

payments where the custodial parent has wrongfully interfered with or withheld visitation, but absent special circumstances, not present here, the suspension must be prospective. And, the strong public policy against restitution or recoupment of support payments is applicable.

Matter of Kanya J. v. Christopher K.
(3d Dept., 8/1/19)

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VISITATION/PARENTAL ACCESS - Role Of AFC

The Second Department upholds an order limiting the father's parental access to letters approved by the attorney for the child.

Matter of Velasquez v. Kattau
(2d Dept., 12/19/18)

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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)

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CUSTODY - Defaults
- Right To Counsel

The First Department grants the mother's motion to vacate an order awarding custody to the father upon an inquest and the mother's default, noting that although the mother did not demonstrate a reasonable excuse for her default, she had a meritorious defense. The children have resided primarily with her, and the evidence was insufficient to permit an informed change of circumstances determination. Also, the court failed to sua sponte appoint an attorney for the children, which, given the lack of sufficient evidence, would have been advisable.

Default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously.

In re Abel A. v. Imanda M.
(1st Dept., 12/27/18)