CHILD WELFARE CASELAW/LEGISLATIVE UPDATE

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I. LEGISLATION, REGULATIONS AND POLICIES

FOSTER CARE REENTRY PROCEEDINGS

Chapter 798 of the Laws of 2021, which took effect on December 22, 2021, amends Family Court Act provisions pertaining to motions to re-enter foster care.

A new FCA § 355.3(7) and FCA § 756-a(i) state that a youth who was formerly a respondent pursuant to Article Three or Seven may be eligible to file a motion pursuant to FCA Article Ten-B and may be subsequently placed into foster care, in a supervised setting as defined in SSL § 371(22) or in a foster family home, which shall include a kinship placement or a placement with fictive kin.

Chapter 798 substantially amends FCA Article Ten-B, § 1091 (Motion to return to foster care placement), and amends FCA §§ 1055(e) and 1088 in a complementary fashion.

For purposes of Article Ten-B, "Former foster care youth" shall mean a youth: (i) who has attained the age of eighteen but is under the age of twenty-one and who had been discharged from a foster care setting on or after: (A) attaining the age of eighteen due to a failure to consent to continuation in foster care; or (B) attaining the age of sixteen but who is or is likely to be homeless unless returned to foster care; and (ii)(A) placed in foster care with a local social services district or authorized agency, as applicable, pursuant to FCA Article Three, Seven, Ten, Ten-A or Ten-C SSL § 358-a,; or (B) freed for adoption in accordance with FCA § 631 or SSL § 383-c, 384 or 384-b but has not yet been adopted; or (C) placed with the OCFS as a juvenile delinquent for a non-secure level of care pursuant to FCA Article Three. FCA § 1091(a)(1).

"Foster care setting" shall not include placements in a limited secure or secure level of care with the OCFS; or (B) a limited secure level of care where the placement was made in a county that has an approved "close to home" program pursuant to SSL § 404. Provided however, a youth who was previously placed in a limited secure or secure level of care but was subsequently transferred to a non-secure level of care may still be eligible to re-enter if such youth was ultimately released from a non-secure setting. FCA § 1091(a)(2).

A motion to return a former foster care youth to the custody of the social services district from which the youth was most recently discharged, or, in the case of a youth previously placed with the OCFS, to be placed in the custody of the social services district of the child's residence, or, in the case of a child freed for adoption, the social
services district or authorized agency into whose custody and guardianship such child has been

placed, may be made by such former foster care youth, or by the applicable official of the local social services district, authorized agency or the OCFS upon the consent of such former foster care youth, if there is a compelling reason for such former foster care youth to return to foster care. FCA § 1091(b).

With respect to a former foster care youth discharged on or after his or her eighteenth birthday, the court shall not entertain a motion filed after twenty-four months from the date of the first final discharge that occurred on or after the former foster care youth's eighteenth birthday; provided further, however, that during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic, such motion shall be heard and determined on an expedited basis; provided further, a former foster care youth shall be entitled to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion pursuant to this section and, to the extent federally allowable, any requirement to enroll in and attend an educational or vocational program shall be waived for the duration of such state of emergency. Subsequent to a former foster youth's return to placement without making a motion, as authorized under this section during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic, nothing herein shall prohibit the local social services district from filing a motion for requisite findings needed to subsequently claim reimbursement under Title IV-E of the federal social security act to support the youth's care, and the family court shall hear and determine such motions on an expedited basis. FCA § 1091(c)(1).

With respect to a former foster care youth discharged prior to his or her eighteenth birthday, the court shall not entertain a motion filed after his or her twentieth birthday; provided further, however, that during the state of emergency declared pursuant to Executive Order 202 of 2020, or any extension or subsequent order issued, such former foster youth shall be entitled to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion in accordance with paragraph one of this subdivision and, to the extent federally allowable, any requirement to enroll in and attend an educational or vocational program shall be waived for the duration of the state of emergency. Subsequent to a former foster youth's return to placement without making a motion, as authorized under this section during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic, nothing herein shall prohibit the local social services district from filing a motion for requisite findings needed to subsequently claim reimbursement under Title IV-E of the federal social security act to support the youth's care, and the family court shall hear and determine such motions on an expedited basis. FCA § 1091(c)(2).

A motion made pursuant to this article by the applicable official of the local social services district, authorized agency or the OCFS shall be made by order to show cause. Such motion shall show by affidavit or other evidence that: (1) the former foster care youth has no reasonable alternative to foster care; (2) the former foster care youth consents to enrollment in and attendance at an appropriate educational or vocational program, unless evidence is submitted that such enrollment or attendance is unnecessary or inappropriate, given the particular circumstances of the youth; (3)

re-entry into foster care is in the best interests of the former foster care youth; (4) the former foster care youth consents to the re-entry into foster care; and (5) in the case of a former foster youth discharged from foster care on or after attaining the age of sixteen, the youth is or is likely to be homeless unless returned to foster care. FCA § 1091(d).

A motion made pursuant to this article by a former foster care youth shall be made by order to show cause on ten days notice to the applicable official of the local social services district, authorized agency or the OCFS. Such motion shall show by affidavit or other evidence that: (1) the requirements outlined in paragraphs one, two, three, four and, if applicable, paragraph five of subdivision (d) of this section are met; and (2) the applicable official of the local social services district, authorized agency or the OCFS consents to the re-entry of such former foster care youth, or the applicable official of the local social services district, authorized agency or the OCFS refuses to consent to the re-entry of such former foster care youth. FCA § 1091(e).

If at any time during the pendency of a proceeding brought pursuant to this article, the court finds a compelling reason that it is in the best interests of the former foster care youth to be returned immediately to the custody of the applicable local commissioner of social services or official of the applicable authorized agency or the OCFS, pending a final decision on the motion, the court may issue a temporary order returning the youth to the custody of such local commissioner of social services or other official. FCA § 1091(f)(1).

Where the applicable official of the local social services district, authorized agency or the OCFS has refused to consent to the re-entry of a former foster care youth, the court shall grant a motion made pursuant to subdivision (e) of this section if the court finds and states in writing that the refusal is unreasonable. For purposes of this article, a court shall find that a refusal to allow a former foster care youth to re-enter care is unreasonable if: (i) the youth has no reasonable alternative to foster care; (ii) the youth consents to enrollment in and attendance at an appropriate educational or vocational program, unless the court finds a compelling reason that such enrollment or attendance is unnecessary or inappropriate, given the particular circumstances of the youth; and (iii) re-entry into foster care is in the best interests of the former foster care youth. FCA § 1091(f)(2).

Upon making a determination on a motion filed pursuant to this article, where a motion has previously been granted pursuant to this article, in addition to the applicable findings required by this article, the court shall grant the motion to return a former foster care youth to the custody of the applicable local commissioner of social services or official of the applicable authorized agency or the OCFS, (i) upon a finding that there is a compelling reason for such former foster care youth to return to care; (ii) if the court has not previously granted a subsequent motion for such former foster care youth to return to care pursuant to this paragraph; and (iii) upon consideration of the former foster care youth's compliance with previous orders of the court, including the youth’s previous participation in an appropriate educational or vocational program, if applicable. FCA § 1091(f)(3).

Executive Law § 507-a(5) is amended to state that a youth who remains in placement beyond the age of 18 in the discretion of the OCFS may reside in a placement in an authorized agency until the age of twenty-one, provided that such youth attend a full-time vocational or educational

program and are likely to benefit from such program.

QUALIFIED RESIDENTIAL TREATMENT PROGRAM: CHAPTER 56, PART L OF THE LAWS OF 2021

Assessment Of Appropriateness of Placement In A Qualified Residential Treatment Program (new Social Services Law § 409-h)

A "Qualified residential treatment program" is a program that is a non-foster family residential program in accordance with 42 U.S.C. §§ 672 and 675a and the state's approved title IV-E state plan. SSL § 409-h(4).

A "Qualified individual" shall mean a trained professional or licensed clinician acting within their scope of practice who shall have current or previous relevant experience in the child welfare field. Provided however, such individual shall not be an employee of the OCFS, nor shall such person have a direct role in case management or case planning decision making authority for the child for whom such assessment is being conducted, in accordance with 42 U.S.C. §§ 672 and 675a and the state's approved title IV-E state plan. SSL § 409-h(5).

Prior to a child's placement in a qualified residential treatment program, but at least within thirty days of the start of a placement in a qualified residential treatment program of a child in the care and custody or the custody and guardianship of the commissioner of a local social services district or the OCFS that occurs on or after September 29, 2021, a qualified individual shall complete an assessment as to the appropriateness of such placement utilizing an age-appropriate, evidence-based, validated, functional assessment tool approved by the federal government for such purpose. Such assessment shall be in accordance with 42 U.S.C. §§ 672 and 675a and the state's approved title IV-E state plan and shall include, but not be limited to: (i) an assessment of the strengths and needs of the child; and (ii) a determination of the most effective and appropriate level of care for the child in the least restrictive setting, including whether the needs of the child can be met with family members or through placement in a foster family home, or in a setting specified in paragraph (c) of this subdivision, consistent with the short-term and long-term goals for the child as specified in the child's permanency plan. Such assessment shall be completed in conjunction with the family and permanency team established pursuant to paragraph (b) of this subdivision. SSL § 409-h(1)(a).

The family and permanency team shall consist of all appropriate biological family members, relatives, and fictive kin of the child, as well as, as appropriate, professionals who are a resource to the family of the child, including but not limited to, the attorney for the child or the attorney for the parent if applicable, teachers, medical or mental health providers who have treated the child, or clergy. In the case of a child who has attained the age of fourteen, the family and permanency team shall include the members of the permanency planning team for the child in accordance with 42 U.S.C. § 675 and the state's approved title IV-E state plan. SSL § 409-h(1)(b).

Where the qualified individual determines that the child may not be placed in a foster family home, the qualified individual must specify in writing the reasons why the needs of the child cannot be met by the child's family or in a foster family home. A shortage or lack of foster family homes shall not constitute circumstances warranting a determination that the needs of the child cannot be met in a foster family home. The qualified individual shall also include why such a placement is

not the most effective and appropriate level of care for such child. Such determination shall include whether the needs of the child can be met through placement in: (i) An available supervised setting, as such term is defined in SSL § 371 (see below); (ii) If the child has been found to be, or is at risk of becoming, a sexually exploited child as defined in SSL § 447-a, a setting providing residential care and supportive services for sexually exploited children; (iii) A setting specializing in providing prenatal, post-partum or parenting supports for youth; or (iv) A qualified residential treatment program. SSL § 409-h(1)(c).

(Note: New SSL 371(22) states that "Supervised setting" shall mean a residential placement in the community approved and supervised by an authorized agency or the local social services district in accordance with the regulations of the OCFS to provide a transitional experience for older youth in which such youth may live independently. A supervised setting includes, but is not limited to, placement in a supervised independent living program, as defined in SSL § 371(21).)

The qualified individual or their designee shall promptly, but no later than five days following the completion of the assessment, provide the assessment, determination and documentation pursuant to subdivision (1) of this section to the court, the parent or guardian of the child, and to the attorney for the child and the attorney for the parent, if applicable, and a written summary detailing the assessment findings required pursuant to subdivision (1) to either the local social services district or the OCFS that has care and custody or custody and guardianship of the child, as applicable, and the parties to the proceeding, redacting any information necessary to comply with federal and state confidentiality laws. SSL § 409-h(2).

Where the qualified individual determines that the placement of the child in a qualified residential treatment program is not appropriate after the assessment conducted pursuant to subdivision (1), the child's placement shall continue until the court has an opportunity to hold a hearing to consider the qualified individual's assessment and make an independent determination required pursuant to SSL § 393 or Family Court Act §§ 353.7, 756-b, 1055-c, 1091-a or 1097. Provided however, nothing herein shall prohibit a motion from being filed pursuant to FCA §§ 355.1, 764, or 1088. If the appropriate party files such motion, the court shall hold a hearing, as required, and also complete the assessment required at the same time. The court shall consider all relevant and necessary information as required and make a determination about the appropriateness of the child's placement based on standards required pursuant to the applicable sections. SSL § 409-h(3).

Post-Placement Court Review Proceedings

Placement Under SSL § 358-a, 383-c, Or 384-b

New SSL § 393 applies when a child is placed on or after September 29, 2021 and resides in a qualified residential treatment program, as defined in SSL § 409-h, and whose care and custody were transferred to the commissioner of a local social services district in accordance with SSL § 358-a, or whose custody and guardianship were transferred to the commissioner of a local social services district in accordance with SSL § 383-c or 384-b. SSL § 393(1).

Within sixty days of the start of a placement in a qualified residential treatment program, the court shall:

Consider the assessment, determination, and documentation made by the qualified individual pursuant to SSL § 409-h;
Determine whether the needs of the child can be met through placement in a foster family home and, if not, whether placement of the child in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the child, as specified in the child's permanency plan; and
Approve or disapprove the placement of the child in a qualified residential treatment program. Provided that, where the qualified individual determines that the placement of the child in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the court may only approve the placement of the child in the qualified residential treatment program if:
(A) the court finds, and states in the written order that:
(1) circumstances exist that necessitate the continued placement of the child in the qualified residential treatment program;
(2) there is not an alternative setting available that can meet the child's needs in a less restrictive environment; and
(3) that continued placement in the qualified residential treatment program is in the child's best interest; and
(B) the court's written order states the specific reasons why the court has made the findings required pursuant to (A).
Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. SSL § 393(2)(a).

At the conclusion of the review, if the court disapproves placement of the child in a qualified residential treatment program the court shall, on its own motion, determine a schedule for the return of the child and direct the local social services district to make such other arrangements for the child's care and welfare that is in the best interest of the child and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. SSL § 393(2)(b).

The court may, on its own motion, or the motion of any of the parties or the attorney for the child, proceed with the court review on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing upon the consent of all parties. Provided further, in the event that the court conducts the court review but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (A) above and provide such written order to the parties and the attorney for the child expeditiously, but no later than five days. SSL § 393(3).

Documentation of the court's determination shall be recorded in the child's case record. SSL § 393(4).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such child,

including but not limited to the child's permanency hearing, provided such approval is completed within sixty days of the start of such placement. SSL § 393(5).

Placement In Juvenile Delinquency Proceeding

New FCA § 353.7 (Placement in qualified residential treatment programs) shall apply when a respondent is placed on or after September 29, 2021and resides in a non-secure setting that is a qualified residential treatment program, as defined in SSL § 409-h, and whose care and custody were transferred to a local social services district or the OCFS in accordance with this article. FCA § 353.7(1).

When a respondent is in the care and custody of a local social services district or the OCFS pursuant to this article, such social services district or office shall report any anticipated placement of the respondent into a qualified residential treatment program to the court and the attorneys for the parties, including the attorney for the respondent, forthwith, but not later than one business day following either the decision to place the respondent in the qualified residential treatment program or the actual date the placement change occurred, whichever is sooner. Such notice shall indicate the date that the initial placement or change in placement is anticipated to occur or the date the placement change occurred, as applicable. Provided, however, if such notice lists an anticipated date for the placement change, the local social services district or OCFS shall subsequently notify the court and the attorneys for the parties, including the attorney for the respondent, of the date the placement change occurred, such notice shall occur no later than one business day following the placement change. FCA § 353.7(2)(a).

When a respondent whose legal custody was transferred to a local social services district or the office of children and family services in accordance with this article resides in a qualified residential treatment program, and where such respondent's initial placement or change in placement in such qualified residential treatment program commenced on or after September 29, 2021, upon receipt of notice required pursuant to paragraph (a) of this subdivision and motion of the local social services district or the OCFS with legal custody of the respondent, the court shall schedule a court review to make an assessment and determination of such placement in accordance with subdivision (3) of this section. Notwithstanding any other provision of law to the contrary, such court review shall occur no later than sixty days from the date the placement of the respondent in the qualified residential treatment program commenced. FCA § 353.7(2)(b).

Within sixty days of the start of a placement of a respondent referenced in subdivision (1) of this section in a qualified residential treatment program, the court shall:
(i) Consider the assessment, determination, and documentation made by the qualified individual pursuant t SSL § 409-h;
(ii) Determine whether the needs of the respondent can be met through placement in a foster family home and, if not, whether placement of the respondent in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the respondent as specified in the respondent's permanency plan; and
(iii) Approve or disapprove the placement of the respondent in a qualified residential treatment program. Provided that, where a qualified individual determines that the placement of the

respondent in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the court may only approve the placement of the respondent in the qualified residential treatment program if: (A) the court finds, and states in the written order that: (1) circumstances exist that necessitate the continued placement of the respondent in the qualified residential treatment program; (2) there is not an alternative setting available that can meet the respondent's needs in a less restrictive environment; and (3) that continued placement in the qualified residential treatment program serves the respondent's needs and best interests or the need for protection of the community; and (B) the court's written order states the specific reasons why the court has made the findings required pursuant to clause (A) of this subparagraph.
(iv) Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. FCA § 353.7(3)(a).

(b) At the conclusion of the review, if the court disapproves placement of the respondent in a qualified residential treatment program the court shall, on its own motion, determine a schedule for the return of the respondent and direct the local social services district or OCFS to make such other arrangements for the respondent's care and welfare that is in the best interest of the respondent and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. FCA § 353.7(3)(b).

The court may, on its own motion, or the motion of any of the parties or the attorney for the respondent, proceed with the court review required pursuant to this section on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing pursuant to this subdivision upon the consent of all parties. Provided further, in the event that the court conducts the court review requirement pursuant to this section but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (3)(a)(iii)(A) of this section and provide such written order to the parties and the attorney for the respondent expeditiously, but no later than five days. FCA § 353.7(4).

Documentation of the court's determination pursuant to this section shall be recorded in the respondent's case record. FCA § 353.7(5).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such respondent, including but not limited to the respondent's permanency hearing, provided such approval is completed within sixty days of the start of such placement. FCA § 353.7(6).

Permanency Hearing In Juvenile Delinquency Proceeding

New FCA § 355.5(10) states that where the respondent remains placed in a qualified residential treatment program, the commissioner of the local social services district or the OCFS with legal custody of the respondent shall submit evidence at the permanency hearing with respect to the respondent:

(a) demonstrating that ongoing assessment of the strengths and needs of the respondent cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment, and that the placement is consistent with the short-term and long-term goals for the respondent, as specified in the respondent's permanency plan;
(b) documenting the specific treatment and service needs that will be met for the respondent in the placement and the length of time the respondent is expected to need the treatment or services; and
(c) documenting the efforts made by the local social services district or the office of children and family services with legal custody of the respondent to prepare the respondent to return home, or to be placed with a fit and willing relative, legal guardian or adoptive parent, or in a foster family home.

Placement In PINS Proceeding

New FCA § 756-b (Court review of placement in a qualified residential treatment program) shall apply when a respondent is placed on or after September 29, 2021 and resides in a qualified residential treatment program, and whose care and custody were transferred to a local social services district in accordance with this part. FCA § 756-b(1).

When a respondent is in the care and custody of a local social services district pursuant to this part, such social services district shall report any anticipated placement of the respondent into a qualified residential treatment program to the court and the attorneys for the parties, including the attorney for the respondent, forthwith, but not later than one business day following either the decision to place the respondent in the qualified residential treatment program or the actual date the placement change occurred, whichever is sooner. Such notice shall indicate the date that the initial placement or change in placement is anticipated to occur or the date the placement change occurred, as applicable. Provided, however, if such notice lists an anticipated date for the placement change, the local social services district shall subsequently notify the court and the attorneys for the parties, including the attorney for the respondent, of the date the placement change occurred; such notice shall occur no later than one business day following the placement change. FCA § 756-b(2)(a).

When a respondent whose legal custody was transferred to a local social services district in accordance with this part resides in a qualified residential treatment program, and where such respondent’s initial placement or change in placement in such qualified residential treatment program commenced on or after September 29, 2021, upon receipt of notice required pursuant to paragraph (2)(a) and motion of the local social services district, the court shall schedule a court review to make an assessment and determination of such placement in accordance with subdivision (3). Notwithstanding any other provision of law to the contrary, such court review shall occur no later than sixty days from the date the placement of the respondent in the qualified residential treatment program commenced. FCA § 756-b(2)(b).

Within sixty days of the start of a placement of a respondent referenced in subdivision (1) in a qualified residential treatment program, the court shall:
(i) Consider the assessment, determination and documentation made by the qualified individual pursuant to SSL § 409-h;

(ii) Determine whether the needs of the respondent can be met through placement in a foster family home and, if not, whether placement of the respondent in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the respondent as specified in the respondent's permanency plan; and
(iii) Approve or disapprove the placement of the respondent in a qualified residential treatment program. Provided that, where the qualified individual determines that the placement of the respondent in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the court may only approve the placement of the respondent in the qualified residential treatment program if:
(A) the court finds, and states in the written order that:
(1) circumstances exist that necessitate the continued placement of the respondent in the qualified residential treatment program;
(2) there is not an alternative setting available that can meet the respondent's needs in a less restrictive environment; and
(3) that it would be contrary to the welfare of the respondent to be placed in a less restrictive setting and that continued placement in the qualified residential treatment program is in the respondent's best interest; and
(B) the court's written order states the specific reasons why the court has made the findings required pursuant to clause (A) of this subparagraph.
(iv) Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. FCA § 756-b(3)(a).

At the conclusion of the review, if the court disapproves placement of the respondent in a qualified residential treatment program the court shall, on its own motion, determine a schedule for the return of the respondent and direct the local social services district to make such other arrangements for the respondent's care and welfare that is in the best interest of the respondent and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. FCA § 756-b(3)(b).

The court may, on its own motion, or the motion of any of the parties or the attorney for the respondent, proceed with the court review required pursuant to this section on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing pursuant to this subdivision upon the consent of all parties. Provided further, in the event that the court conducts the court review requirement pursuant to this section but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (3)(a)(iii)(A) of this section and provide such written order to the parties and the attorney for the respondent expeditiously, but no later than five days. FCA § 756-b(4).

Documentation of the court's determination pursuant to this section shall be recorded in the respondent's case record. FCA § 756-b(5).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such

respondent, including but not limited to the respondent's permanency hearing, provided such approval is completed within sixty days of the start of such placement. FCA § 756-b(6).

Permanency Hearing In PINS Proceeding

New FCA § 756-a(h) states that where the respondent remains placed in a qualified residential treatment program, the commissioner of the local social services district with legal custody of the respondent shall submit evidence at the permanency hearing with respect to the respondent:
(i) demonstrating that ongoing assessment of the strengths and needs of the respondent continues to support the determination that the needs of the respondent cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the respondent in the least restrictive environment, and that the placement is consistent with the short-term and long-term goals of the respondent, as specified in the respondent's permanency plan;
(ii) documenting the specific treatment or service needs that will be met for the respondent in the placement and the length of time the respondent is expected to need the treatment or services; and
(iii) documenting the efforts made by the local social services district with legal custody of the respondent to prepare the respondent to return home, or to be placed with a fit and willing relative, legal guardian or adoptive parent, or in a foster family home.

Placement In FCA Article Ten Proceeding

New FCA § 1055-c (Court review of placement in a qualified residential treatment program), shall apply when a child is placed on or after September 29, 2021 and resides in a qualified residential treatment program, and whose care and custody were transferred to the commissioner of a local social services district in accordance with this article. FCA § 1055-c(1).

Within sixty days of the start of a placement of a child in a qualified residential treatment program, the court shall:
(a) Consider the assessment, determination, and documentation made by the qualified individual pursuant to SSL § 409-h;
(b) Determine whether the needs of the child can be met through placement in a foster family home and, if not, whether placement of the child in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the child, as specified in the child's permanency plan; and
(c) Approve or disapprove the placement of the child in a qualified residential treatment program. Provided that, where the qualified individual determines that the placement of the child in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the court may only approve the placement of the child in the qualified residential treatment program if:
(i) the court finds, and states in the written order that:
(A) circumstances exist that necessitate the continued placement of the child in the qualified residential treatment program;
(B) there is not an alternative setting available that can meet the child's needs in a less restrictive environment; and

(C) that continued placement in the qualified residential treatment program is in the child's best interest; and
(ii) the court's written order states the specific reasons why the court has made the findings required pursuant to subparagraph (i).
(d) Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. FCA § 1055-c(2).

At the conclusion of the review, if the court disapproves placement of the child in a qualified residential treatment program the court shall, on its own motion, determine a schedule for the return of the child and direct the local social services district to make such other arrangements for the child's care and welfare that is in the best interest of the child and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. FCA § 1055-c(3).

The court may, on its own motion, or the motion of any of the parties or the attorney for the child, proceed with the court review required pursuant to this section on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing pursuant to this subdivision upon the consent of all parties. Provided further, in the event that the court conducts the court review requirement pursuant to this section but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (2)(c)(i) of this section and provide such written order to the parties and the attorney for the child expeditiously, but no later than five days. FCA § 1055-c(4).

Documentation of the court's determination pursuant to this section shall be recorded in the child's case record. FCA § 1055-c(5).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such child, including but not limited to the child's permanency hearing, provided such approval is completed within sixty days of the start of such placement. FCA § 1055-c(6).

Permanency Proceedings Under FCA Article Ten-A

The permanency report requirement in FCA § 1089(c) is amended with a new subparagraph (6) which states that where the child remains placed in a qualified residential treatment program, the commissioner of the social services district with legal custody of the child shall submit evidence at the permanency hearing with respect to the child:
(i) demonstrating that ongoing assessment of the strengths and needs of the child continues to support the determination that the needs of the child cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment, and that the placement is consistent with the short-term and long-term goals for the child, as specified in the child's permanency plan;
(ii) documenting the specific treatment or service needs that will be met for the child in the placement and the length of time the child is expected to need the treatment or services; and

(iii) documenting the efforts made by the local social services district to prepare the child to return home, or to be placed with a fit and willing relative, legal guardian or adoptive parent, or in a foster family home.

Notice Of Placement Change In Article Ten Or Ten-A Proceeding

FCA § 1017(5) is amended with a new subparagraph (b), FCA § 1055(j) is amended with a new subparagraph (ii), and FCA § 1089(d)(2)(vii)(H) is amended with a new subparagraph (ii), which state that when a child whose legal custody was transferred to the commissioner of a local social services district in accordance with this section resides in a qualified residential treatment program, and where such child's initial placement or change in placement in such program commenced on or after September 29, 2021, upon receipt of notice of a change in placement and motion of the local social services district, the court shall schedule a court review to make an assessment and determination of such placement in accordance with FCA § 1055-c (or, in an Article Ten-A proceeding, SSL § 393, or FCA § 1055-c, 1091-a, or 1097). Notwithstanding any other provision of law to the contrary, such court review shall occur no later than sixty days from the date the placement of the child in the qualified residential treatment program commenced.

Placement Of Former Foster Care Youth In FCA Article Ten-B Proceeding

New FCA § 1091-a (Court review of placement in a qualified residential treatment program) shall apply when a former foster care youth is placed on or after September 29, 2021, and resides in a qualified residential treatment program, and whose care and custody were transferred to a local social services district or the OCFS in accordance with this article. FCA § 1091-a(1).

When a former foster care youth is in the care and custody of a local social services district or the OCFS pursuant to this article, such social services district or OCFS shall report any anticipated placement of the former foster care youth into a qualified residential treatment program to the court and the attorneys for the parties, including the attorney for the former foster care youth, forthwith, but not later than one business day following either the decision to place the former foster care youth in the qualified residential treatment program or the actual date the placement change occurred, whichever is sooner. Such notice shall indicate the date that the initial placement or change in placement is anticipated to occur or the date the placement change occurred, as applicable. Provided, however, if such notice lists an anticipated date for the placement change, the local social services district or office shall subsequently notify the court and attorneys for the parties, including the attorney for the former foster care youth, of the date the placement change occurred; such notice shall occur no later than one business day following the placement change. FCA § 1091-a(2)(a).

When a former foster care youth whose legal custody was transferred to a local social services district or the OCFS in accordance with this article resides in a qualified residential treatment program, and where such former foster care youth's initial placement or change in placement in such qualified residential treatment program commenced on or after September 29, 2021, upon receipt of notice required pursuant to (2)(a) and motion of the local social services district, the court shall schedule a court review to make an assessment and determination of such placement in accordance with subdivision (3). Notwithstanding any other provision of law to the contrary, such

court review shall occur no later than sixty days from the date the placement of the former foster care youth in the qualified residential treatment program commenced. FCA § 1091-a(2)(b).

Within sixty days of the start of a placement of a former foster care youth referenced in subdivision (1) in a qualified residential treatment program, the court shall:
(a) Consider the assessment, determination, and documentation made by the qualified individual pursuant to SSL § 409-h;
(b) Determine whether the needs of the former foster care youth can be met through placement in a foster family home and, if not, whether placement of the former foster care youth in a qualified residential treatment program provides the most effective and appropriate level of care for the former foster care youth in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the former foster care youth, as specified in the former foster care youth's permanency plan; and
(c) Approve or disapprove the placement of the former foster care youth in a qualified residential treatment program. Provided that, where the qualified individual determines that the placement of the former foster care youth in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the court may only approve the placement of the former foster care youth in the qualified residential treatment program if:
(i) the court finds, and states in the written order that:
(A) circumstances exist that necessitate the continued placement of the former foster care youth in the qualified residential treatment program;
(B) there is not an alternative setting available that can meet the former foster care youth's needs in a less restrictive environment; and
(C) that continued placement in the qualified residential treatment program is in the former foster care youth's best interest; and
(ii) the court's written order states the specific reasons why the court has made the findings required pursuant to subparagraph (i).
(d) Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. FCA § 1091-a(3).

At the conclusion of the review, if the court disapproves placement of the former foster care youth in a qualified residential treatment program the court shall, on its own motion, determine a schedule for the return of the former foster care youth and direct the local social services district or OCFS to make such other arrangements for the former foster care youth's care and welfare that is in the best interest of the former foster care youth and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. FCA § 1091-a(4).

The court may, on its own motion, or the motion of any of the parties or the attorney for the former foster care youth, proceed with the court review required pursuant to this section on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing pursuant to this subdivision upon the consent of all parties. Provided further, in the event that the court conducts the court review requirement pursuant to this section but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (3)(c)(i) of this section and provide such written order to the

parties and the attorney for the former foster care youth expeditiously, but no later than five days. FCA § 1091-a(5).

Documentation of the court's determination pursuant to this section shall be recorded in the former foster care youth's case record. FCA § 1091-a(6).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such former foster care youth, including but not limited to the former foster care youth's permanency hearing, provided such approval is completed within sixty days of the start of such placement. FCA § 1091-a(7).

Placement Of Destitute Child In FCA Article Ten-C Proceeding

New FCA § 1097 (Court review of placement in a qualified residential treatment program) shall apply when a child is placed on or after September 29, 2021 and resides in a qualified residential treatment program, and whose care and custody were transferred to a local social services district in accordance with this article. FCA § 1097(1).

When a child is in the care and custody of a local social services district pursuant to this article, such social services district shall report any anticipated placement of the child into a qualified residential treatment program to the court and the attorneys for the parties, including the attorney for the child, forthwith, but not later than one business day following either the decision to place the child in the qualified residential treatment program or the actual date the placement change occurred, whichever is sooner. Such notice shall indicate the date that the initial placement or change in placement is anticipated to occur or the date the placement change occurred, as applicable. Provided, however, if such notice lists an anticipated date for the placement change, the local social services district shall subsequently notify the court and attorneys for the parties, including the attorney for the child, of the date the placement change occurred, such notice shall occur no later than one business day following the placement change. FCA § 1097(2)(a).

When a child whose legal custody was transferred to a local social services district in accordance with this article resides in a qualified residential treatment program, and where such child's initial placement or change in placement in such qualified residential treatment program commenced on or after September 29, 2021, upon receipt of notice required pursuant to (2)(a) and motion of the local social services district, the court shall schedule a court review to make an assessment and determination of such placement in accordance with subdivision (3). Notwithstanding any other provision of law to the contrary, such court review shall occur no later than sixty days from the date the placement of the child in the qualified residential treatment program commenced. FCA § 1097(2)(b).

Within sixty days of the start of a placement of a child referenced in subdivision (1) in a qualified residential treatment program, the court shall:
(a) Consider the assessment, determination, and documentation made by the qualified individual pursuant to SSL § 409-h;

(b) Determine whether the needs of the child can be met through placement in a foster family home and, if not, whether placement of the child in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment and whether that placement is consistent with the short-term and long-term goals for the child, as specified in the child's permanency plan; and
(c) Approve or disapprove the placement of the child in the qualified residential treatment program. Provided that, where the qualified individual determines that the placement of the child in a qualified residential treatment program is not appropriate in accordance with the assessment required pursuant to SSL § 409-h, the court may only approve the placement of the child in the qualified residential treatment program if:
(i) the court finds, and states in the written order that:
(A) circumstances exist that necessitate the continued placement of the child in the qualified residential treatment program;
(B) there is not an alternative setting available that can meet the child's needs in a less restrictive environment; and
(C) that continued placement in the qualified residential treatment program is in the child's best interest; and
(ii) the court's written order states the specific reasons why the court has made the findings required pursuant to subparagraph (i).
(d) Nothing herein shall prohibit the court from considering other relevant and necessary information to make a determination. FCA § 1097(3).

At the conclusion of the review, if the court disapproves placement of the child in a qualified residential treatment program the court shall, on its own motion, determine a schedule for the return of the child and direct the local social services district to make such other arrangements for the child's care and welfare that is in the best interest of the child and in the most effective and least restrictive setting as the facts of the case may require. If a new placement order is necessary due to restrictions in the existing governing placement order, the court may issue a new order. FCA § 1097(4).

The court may, on its own motion, or the motion of any of the parties or the attorney for the child, proceed with the court review required pursuant to this section on the basis of the written records received and without a hearing. Provided however, the court may only proceed with the court review without a hearing pursuant to this subdivision upon the consent of all parties. Provided further, in the event that the court conducts the court review requirement pursuant to this section but does not conduct it in a hearing, the court shall issue a written order specifying any determinations made pursuant to (3)(c)(i) of this section and provide such written order to the parties and the attorney for the child expeditiously, but no later than five days. FCA § 1097(5).

Documentation of the court's determination pursuant to this section shall be recorded in the child's case record. FCA § 1097(6).

Nothing in this section shall prohibit the court's review of a placement in a qualified residential treatment program from occurring at the same time as another hearing scheduled for such child, including but not limited to the child's permanency hearing, provided such approval is completed within sixty days of the start of such placement. FCA § 1097(7).

Uniform Rules of the Family Court, § 205.18: Hearings and Submission of Reports and Assessments on the Placement of a Child in a Qualified Residential Treatment Program
This new rule is effective September 29, 2021.

Section 205.18. Hearings and Submission of Reports and Assessments on the Placement of a Child in a Qualified Residential Treatment Program

(1) The Commissioner of the local social services district or other agency requesting placement (hereafter "Commissioner") shall file a petition or a motion requesting a court hearing on the placement of a child in a "qualified residential treatment program" prior to or no later than five days after entry of the child into the placement. The Commissioner shall serve, send or securely transmit notice to all counsel, the parties, the attorney for the child and, if the child is ten years of age or older, the child, of the date, time and court part in which the case will be heard. At that appearance, the court shall either make a determination as to the appropriateness of and need for the placement or schedule a hearing for such determination. The determination shall be made no later than 60 days of the placement of the child in the "qualified residential treatment program."

(2) The Commissioner shall arrange for the completion of an assessment and report by a "qualified individual" no later than 30 days after the date of the child's placement in the "qualified residential treatment program" and shall submit it to the court and serve. send or securely transmit it to counsel, the parties and the attorney no later than five days after completion of the report by the "qualified individual" but in no event less than ten days prior to the first scheduled hearing at which a determination will be made.

(3) The report and assessment shall include:

(a) The qualifications and training of the "qualified individual" preparing the report and assessment, including information as to affiliations, if any, with any state, local or authorized agency in the State of New York that provides placement services for children;
(b) The names of all caseworkers, mental health professionals and family members who contributed to the report and assessment as members of the team: including any members suggested by the child if the child is fourteen years of age or older;
(c) An evaluation of the strengths and needs of the child and the need for the child's placement in the designated qualified residential treatment facility (hereinafter "facility");
(d) The reasons why the needs of the child cannot be appropriately and effectively met in a kinship or non-kinship foster home placement;
(e) The specific facility and the level of care in which the child is or will be placed;
(f) A description of the designated facility and the specific treatment services offered to the child at that facility;
(g) The short term and long-term goals of the child's placement and how the placement at the designated facility meets those goals;
(h) How the placement in the specific facility and level of care is the most effective and appropriate placement in the least restrictive environment for the child;

(i) Documentation of the time frame and plan for the child's discharge from the qualified residential treatment facility; and
(j) Any mental health diagnosis and the basis for that diagnosis, as well as a summary of any diagnostic and treatment records, regarding the child within the past three years; provided that the diagnosis and treatment records shall be provided upon the request of counsel for a party, the attorney for the child or the court.

(4) If the court denies the Commissioner's application for the child to be placed in the specific "qualified residential treatment program" and/or level of care recommended by the Commissioner, the Commissioner shall submit a new report and assessment within ten days of the court's denial. The new report and assessment shall include a short term and long-term plan for the child including an alternative placement and/or return to parent/guardian. If the alternative placement is a qualified residential treatment program, a new assessment by a "qualified individual" must contain the information required by subdivision three of this section and must be provided to the court and all parties, including the attorney for the child, no later than five days after completion of the report by the "qualified individual" but in no event less than ten days prior to the adjourned date. In such a case, the court shall make a determination of approval or disapproval of the placement in the "qualified residential treatment prom-am." not later than 60 days after the placement of the child in such program

(5) A court review as to whether the child's placement in the "qualified residential treatment program" remains necessary shall be scheduled by the court no later than the next permanency or extension of placement hearing. The Commissioner shall serve, send or securely transmit notice to the parties, counsel and attorney for the child and shall submit a new report and assessment within five days of its completion but not less than ten days prior to the scheduled hearing. At each permanency or extension of placement hearing following the approval of the placement in the "qualified residential treatment program," the commissioner of the local social services district shall provide a new report and assessment including the information required by subdivision three of this section. The new report and assessment submitted for each such hearing shall include the information required by subdivision three of this section.

Dated: August 19, 2021

MARIHUANA REGULATION AND TAXATION ACT

Chapter 92 of the Laws of 2021 was signed by Governor Cuomo on March 31, 2021. Generally the Act took effect immediately.

Neglect Cause of Action/Central Register Reports Based on Drug Misuse:
Amended FCA § 1046(a)(iii) (prima facie evidence of neglect based on drug/alcohol misuse) states:
Provided however, the sole fact that an individual consumes cannabis, without a separate finding that the child's physical mental or emotional condition was impaired or is in imminent danger of becoming impaired established by a fair preponderance of the evidence shall not be sufficient to establish prima facie evidence of neglect;

Amended SSL § 422(6) states that any report indicated for maltreatment based solely on the purchase, possession or consumption of cannabis, without a showing by a fair preponderance of the evidence that the child's physical, mental or emotional condition was impaired or was in imminent danger of becoming impaired in accordance with the definition of child maltreatment as provided for in SSL § 412, shall immediately be sealed upon a request pursuant to SSL § 422(8) or SSL § 424-a.

Certification and Approval of Foster/Adoptive Parents:
Amended Social Services Law § 378-a(2)(e)(1) states, with respect to certification or approval of a prospective foster parent or adoptive parent who has a felony conviction within the past five years for a felony drug-related offense, that the application shall be denied unless such offense is eligible for expungement pursuant to CPL § 160.50.

SUPPORTS AND SERVICES FOR YOUTH SUFFERING FROM ADVERSE CHILDHOOD EXPERIENCES

Chapter 56 of the Laws of 2021, Part JJ, Subpart A, which takes effect on April 1, 2022, adds a new Title 12-A to the Social Services Law.
SSL § 370-c states:
Youth suffering from or at risk of adverse childhood experiences may be eligible for a range of appropriate services and supports that enhance protective factors, or are culturally competent, evidence based and trauma informed and beneficial to the overall health and well-being of the youth, including but not necessarily limited to available: (i) appropriate health and behavioral health services provided to youth who are otherwise eligible under Public Health Law § 2510 and SSL § 365-a(2); (ii) preventive services provided to youth who are otherwise eligible pursuant to SSL § 409-a; (iii) services provided to youth who are otherwise eligible pursuant to SSL § 458-m(2); or (iv) to the extent funds are specifically appropriated therefor, any other services necessary to serve youth suffering from adverse childhood experiences.
The OCFS, in consultation with the Office of Temporary and Disability Assistance, the Office of Mental Health, the Office of Addiction Services and Supports, the Department of Health and not-for-profit organizations that have expertise providing services to individuals suffering from adverse childhood experiences, shall develop or utilize existing educational materials to be used to educate parents, guardians and other authorized individuals about adverse childhood experiences including the environmental events that may impact or lead to adverse childhood experiences, the importance of protective factors and the availability of services for children at risk of or suffering from adverse childhood experiences. Such information shall be made available electronically and shall be posted on each agency's website.
This legislation also includes related amendments to the Education Law, Public Health Law, and Social Services Law. New SSL § 131-aaa (Availability of adverse childhood experiences services) states that each local social services district shall be required to make available to applicants and recipients of public assistance who are a parent, guardian, custodian or otherwise responsible for a child's care, educational materials developed pursuant to SSL § 370-c(2) to educate them about adverse childhood experiences, the importance of protective factors and the availability of services for children at risk for or suffering from adverse childhood experiences. The educational materials may be made available electronically and shall be offered at the time of application and

recertification.

GUARDIANSHIP, CUSTODY, VISITATION, AND ADOPTION: BLINDNESS OF CARETAKER

Chapter 442 of the Laws of 2021, which takes effect on January 6, 2022, adds new Domestic Relations Law § § 75-m and 111-d, adds new Family Court Act §§ 643 and 658, and adds a New Social Services Law § 393, which, collectively, provide that a request for guardianship, custody, visitation, or adoption may not be denied, and that the DSS shall not seek custody or guardianship of a child, solely on the basis that a caretaker is blind.

Blindness shall be considered relevant only to the extent that the blindness affects the best interests of the child. "Blind" or "blindness" means vision that is 20/200 or less in the best corrected eye; or vision that subtends an angle of not greater than twenty degrees in the best corrected eye.

The legislative memo notes that "[t]he presumption that blindness automatically means parental incompetence is a misconception. Given the proper tools and education, blindness can be reduced to a physical nuisance. Because many sighted people do not understand the techniques that blind people use to accomplish everyday tasks, sighted judges, social workers, and state officials assume that those tasks cannot be completed by a blind person. Using alternative techniques, blind people are capable of living independent, productive lives, which include providing safe and loving homes for their children."

ABUSE/NEGLECT: IMPLICIT BIAS IN STATE CENTRAL REGISTER DECISION-MAKING

Chapter 56 of the Laws of 2021, Part JJ, Subpart A, which takes effect on April 1, 2022, amends the Social Services Law to address implicit bias in Central Register decision-making.

SSL § 422(2)(a) is amended to state that the Central Register transmits information to the appropriate local child protective service for investigation "after utilizing protocols that would reduce implicit bias from the decision-making process[.]"

SSL § 421(2)(c) is amended to state that the OCFS shall update guidelines, standards and criteria issued to the local child protective services to include protocols to reduce implicit bias in the decision-making processes, strategies for identifying adverse childhood experiences, and guidelines to assist in recognizing signs of abuse or maltreatment while interacting virtually. SSL § 413 is amended in like fashion with a new subdivision (5) which addresses training issued to persons and officials required to report cases of suspected child abuse or maltreatment.

KINSHIP CAREGIVERS

Chapter 246 of the Laws of 2021, which took effect on July 16, 2021, amends SSL § 371 with a new subdivision (22) which defines "Kinship caregiver" as:

A relative or non-relative who is acting as a parent and who:

(a) is related to the child through blood, marriage or adoption;

(b) is related to a half-sibling of the child through blood, marriage or adoption; or

(c) is an adult with a positive prior relationship with the child, a half-sibling of the child or the child's parent, including, but not limited to, a step-parent, godparent, neighbor or family friend.
The legislative memo states that since the early 2000's, New York has provided funding for kinship programs and enacted numerous laws supportive of kinship families. The annual budget funds a Kinship Navigator tasked with operating an information, referral, and education program for "kinship caregivers" and also funds local kinship services, as well as "Kinship Guardianship Assistance Program," in Social Services Law § 458-a. The bill's definition of "kinship caregiver" is consistent with § 458-a, as well as current practice and interpretation.

VISITING BY INCARCERATED PARENTS

Chapter 355 of the Laws of 2020, which takes effect on December 23, 2021, adds a new Corrections Law § 72-C that requires the Commissioner to place persons in correctional institutions or facilities located in closest proximity to where the inmate's minor child or children reside, provided such placement is appropriate and is in the best interest of the child, and the incarcerated parent gives their consent to such placement.
DOCCS, in consultation with the Office of Probation and Correctional Alternatives and the Office of Children and Family Services, must develop assessment procedures and criteria, and submit an annual report regarding the implementation of the statute to various government officials.
The legislative memo states: "Over 100,000 children in New York State have at least one parent in state prison. At present, a majority of individuals are being housed in facilities that are hours away from their children and families. Experts in the field of criminal justice, child development, and child welfare agree that in the vast majority of cases, a child who has a parent in prison benefits from being able to have personal contact and communication with them. Consistent, ongoing contact in the form of in-person visiting reduces the strain of separation, lowers recidivism, and is the single most important factor in determining whether a family will reunite after a prison term. The criteria for deciding where individuals are housed, including decisions about transfers should include proximity to a child security, mental health, and medical needs. It is important that a child maintain a relationship with their parent and increase their access and contact to their parent in prison. Furthermore, proximity offers many benefits for corrections, the incarcerated parent, and successful reentry. Research demonstrates visits with family and children improve institutional adjustment, decrease disciplinary infractions, and promotes lower recidivism rates."

FOSTER CARE RE-ENTRY DURING COVID-19 EMERGENCY

Chapter 346 of the Laws of 2020, which took effect on December 15, 2020, amended Family Court Act §§ 1055(e) and 1091 to allow a former foster care youth to re-enter the foster care system without having to file a motion with the family court during the state of emergency declared pursuant to Executive Order 202 of 2020 in response to the COVID-19 pandemic.
Chapter 34 of the Laws of 2021, signed by the Governor on February 16, 2021 and effective immediately, further amends the statutes, which now read as follows:
FCA § 1055(e)
(e)(i) No placement may be made or continued under this section beyond the child's eighteenth birthday without his or her consent and in no event past his or her twenty-first birthday. However,

a former foster care youth under the age of twenty-one who was previously discharged from foster care due to a failure to consent to continuation of placement may make a motion pursuant to [FCA § 1091]to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges. In such motion, the youth must consent to enrollment in and attendance at a vocational or educational program in accordance with [FCA § 1091(a)(2)].

(ii) Provided, however, that during the state of emergency declared pursuant to Executive Order 202 of 2020, or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic:

(A) A former foster care youth under the age of twenty-one who was previously discharged from foster care due to a failure to consent to continuation of placement pursuant to [FCA § 1091] may:

(1) make a motion pursuant to [FCA § 1091] to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges which shall be heard and determined on an expedited basis; or

(2) request to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion pursuant to [FCA § 1091].

(B) To the extent federally allowable, any requirement to enroll in and attend a vocational or educational program shall be waived for the duration of such state of emergency.

(C) During such state of emergency, the local commissioner of social services or other officer, board or department authorized to receive children as public charges shall be authorized to place such former foster care youth requesting to return to foster care placement without obtaining prior court approval and shall grant that request upon a determination that the youth has met the requirements of [FCA § 1091(a)]. Upon placement of a former foster care youth pursuant to this paragraph, the agency shall file a motion for judicial approval of the placement pursuant to [FCA § 1091] and to schedule the next permanency hearing.

(D) To the extent a former foster care youth is denied the request to return to the custody of the local commissioner of social services, or other board or department authorized to receive children as public charges pursuant to this paragraph, nothing in this paragraph shall preclude such youth from subsequently filing a motion as authorized pursuant to [FCA § 1091], and the family court shall hear and determine such motion on an expedited basis.

FCA § 1091

A motion to return a former foster care youth under the age of twenty-one, who was discharged from foster care due to a failure to consent to continuation of placement, to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges, may be made by such former foster care youth, or by a local social services official upon the consent of such former foster care youth, if there is a compelling reason for such former foster care youth to return to foster care; provided however, that the court shall not entertain a motion filed after twenty-four months from the date of the first final discharge that occurred on or after the former foster care youth's eighteenth birthday; provided further, however, that during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic, such motion shall be heard and determined on an expedited basis; provided further, a former foster care youth shall be entitled to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges without making a motion pursuant to this section and, to the extent federally allowable,

any requirement to enroll in and attend an educational or vocational program shall be waived for the duration of such state of emergency. Subsequent to a former foster youth's return to placement without making a motion, as authorized under this section during the state of emergency declared pursuant to Executive Order 202 of 2020 or any extension or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic, nothing herein shall prohibit the local social services district from filing a motion for requisite findings needed to subsequently claim reimbursement under Title IV-E of the federal social security act to support the youth's care, and the family court shall hear and determine such motions on an expedited basis.

Chapter 34 shall expire on the same date and in the same manner as the state of emergency declared pursuant to executive order 202 of 2020 or any extension or subsequent executive order issued in response to the COVID-19 pandemic, at which time the provisions of this act shall be deemed repealed; provided, however, that:

any request by a former foster care youth under the age of twenty-one who was previously discharged from foster care due to a failure to consent to continuation of placement pursuant to FCA § 1091 to return to the custody of the local commissioner of social services or other officer, board or department authorized to receive children as public charges that has been received but not finally decided by such date shall be determined in accordance with the provisions of this act; and;

effective immediately, the office of children and family services and the office of court administration are hereby authorized to promulgate such rules and regulations as may be necessary to implement the provisions of this act on an emergency basis.

FOSTER CARE AND PERMANENCY HEARINGS DURING PANDEMIC: YOUTH OVER AGE OF TWENTY-ONE (Chapter 56 of the Laws of 2021, Part FF, effective April 16, 2021)

Notwithstanding any provision of law to the contrary and in accordance with § 4 of Division X of the federal Consolidated Appropriations Act of 2021 (P.L. 116-260) or any successor legislation, **until October 1, 2021 or a date authorized pursuant to successor legislation**:

(1) A youth may not be required to leave foster care or be found to be ineligible for title IV-E foster care maintenance payments solely due to such youth's age or such youth being deemed to not have met a condition of § 475(8)(B)(iv) of the federal Social Security Act;
(2) A youth who was previously in foster care and was discharged from foster care after obtaining the age of 18, on or after April 1, 2020, shall be permitted to voluntarily return to and remain in foster care, as authorized by the federal legislation, or any such date as may be authorized pursuant to successor legislation;
(3) Notwithstanding the age limitations for foster care contained in articles 3, 7, 10, or 10-A of the Family Court Act, youth who stay in foster care beyond age 21 pursuant to this law shall continue to have permanency hearings at the same intervals as such hearings would otherwise occur if such youth remained in care and had not obtained the age of 21; and the family court shall be authorized to conduct such proceedings and issue determinations pursuant to FCA Article 10-B without regard to the youth's age or such youth being deemed to not have met a condition of § 475(8)(B)(iv) of the federal Social Security Act. The matter shall be heard and determined on an expedited basis.

PINS/ABUSE AND NEGLECT: "INCORRIGIBILITY"

Chapter 97 of the Laws of 2021, which took effect on April 6, 2021, removes from Family Court Act Article Seven (§§ 712, 732, and 773), and Article Ten (§ 1012), references to youth being "incorrigible" and to "incorrigibility."

The Legislative memo states:
The use of the word "incorrigible" in the context of family or children's courts dates back to the first juvenile court in Chicago in the late 1800s. It was adopted in New York when the first children's courts were established in the early 20th century and has carried over in each iteration of our juvenile or family court system since that time. Primarily applied to girls, and disproportionately to girls of color, this term – in practice – tends to single out girls of color for behaviors that do not match stereotypical feminine behavior.
"Incorrigible" is defined as a person who is "incapable of being corrected, not reformable" (Merriam-Webster) and, thus this term is completely out of line with the current understanding of the goals of our Family Court system.
The approach now in our Family Court system and more generally is to look for what is needed in order to help young people and to provide for the needs of children, a goal that is at odds with defining a young person as "incapable of being corrected." Eliminating the use of this term would be a step forward for all young people, particularly for girls and girls of color who have disproportionately been the subject of this archaic and harmful label.
Racial justice and gender justice impact: This bill would have a positive impact on racial and gender justice in New York. The use of "incorrigibility" as a basis for Family Court intervention disparately impacts and harms girls and young women of color. Eliminating this term from the Family Court Act will send a positive message and will assist in the efforts to achieve full equality and empowerment for girls, young women, and people of color.

CPLR: DOMESTIC VIOLENCE ADVOCATE-CLIENT PRIVILEGE

Chapter 309 of the Laws of 2021, which took effect on July 23, 2021, amends CPLR § 4510 to add to the rape crisis counselor-client privilege a new domestic violence advocate-client privilege that applies in connection with any victim of domestic violence as defined in Social Services Law § 459-a.
A "Domestic violence advocate" means any person who is acting under the direction and supervision of a licensed and approved domestic violence program and has satisfied the training standards required by the OCFS.
A "Domestic violence program" means a residential program for victims of domestic violence or a non-residential program for victims of domestic violence as defined in SSL § 459-a or any similar program operated by an Indian tribe as defined by § 2 of the Indian law.
CPLR § 4510 also is amended to state that a domestic violence advocate shall not be required to treat as confidential a communication by a client which reveals a case of suspected child abuse or maltreatment pursuant to title six of SSL article six.
The legislative memo states:

Domestic violence is as serious an issue as sexual assault. In both situations, the victim is traumatized and often reluctant to speak candidly about their experience. Providing a domestic violence advocate-victim privilege - as we already provide a rape crisis counselor-victim privilege - will encourage more open, honest and healthy communication between domestic violence victims and their counselors.

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

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

Fair Preponderance Standard

SSL § 412(6) is amended to state that an "unfounded report" results when an investigation commenced on or after January 1, 2022 does not determine that a fair preponderance of the evidence of the alleged abuse or maltreatment exists.

SSL § 412(7) is amended to state that an "indicated report" results when an investigation commenced on or after January 1, 2022 determines that a fair preponderance of the evidence of the alleged abuse or maltreatment exists.

SSL § 422(5)(a), which addresses sealing of unfounded reports, and SSL § 422(5)(c), which addresses expungement, are amended to incorporate the fair preponderance standard.

SSL § 422(8)(a) and (c), which address requests to amend indicated reports and fair hearings, are amended to incorporate the fair preponderance standard.

FCA § 651-a, which governs the admissibility of central resister reports in custody/visitation proceedings, is amended to incorporate the fair preponderance standard.

Interplay With Article Ten Proceedings, And Fair Hearings

SSL § 422(8)(a)(ii) is amended to state that where a FCA Article Ten proceeding based on the same allegations that were indicated is pending, a request to amend the report shall be stayed until the disposition of the family court proceeding. In the documents sent by the child protective service (CPS) to OCFS, the CPS must include a copy of any petition or court order based on the allegations that were indicated.

SSL § 422(8)(b)(ii) is amended to state that in a fair hearing, where a Family Court Act Article Ten petition alleges that a respondent in that proceeding committed abuse or neglect against the subject child in regard to an allegation contained in an indicated report: (A) a finding by the court that such respondent did commit abuse or neglect shall create an irrebuttable presumption in the fair hearing that the allegation is substantiated by a fair preponderance of the evidence as to that respondent on that allegation; and (B) where the CPS withdraws the petition with prejudice, or the family court dismisses the petition, or the family court finds on the merits in favor of the respondent, there shall be an irrebuttable presumption in the fair hearing that the allegation as to that respondent has not been proven by a fair preponderance of the evidence.

Inquiries By Child Care Providers And Licensing Agencies

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

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

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

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

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

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

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

Upon a determination that the act or acts of abuse or maltreatment are relevant and reasonably related, OCFS shall notify the subject and inform the inquiring party that the person about whom such inquiry was made is the subject of an indicated report.

II. ABUSE/NEGLECT

Removal/Central Register/Investigation Of Abuse And Neglect

ABUSE/NEGLECT - Visitation
- Post-Dispositional Removal

Following a finding of neglect as to the elder child, the mother was awarded unsupervised overnight parental access, twice weekly. Following a finding of derivative neglect as to the younger child, the mother was awarded custody of the younger child, under ACS supervision.

Thereafter, ACS moved to suspend access as to the elder child, and sought removal of the younger child. The family court, after a hearing, granted the motion, and limited the mother's contact with the elder child to supervised parental access.

The Second Department affirms. The mother frequently disregarded directives and rules imposed by ACS; disregarded the rules of the foster care agency by, inter alia, returning the elder child to her foster parents sometimes hours after her scheduled return; and had a history of obstreperous behavior at the homeless shelter where she resided with the younger child and violating shelter rules, resulting in her discharge from that facility; used marijuana in the younger child's presence; and failed to complete all service referrals and to gain insight from those she did complete.

Matter of Princess A.E.
(2d Dept., 4/14/21)

* * *

DISCOVERY - Central Register Records/Evidence
- Subpoenas
ABUSE/NEGLECT

In this Housing Court proceeding in which J.A.K. alleges that V.M. harassed her with intent to cause her to vacate the premises by making unfounded allegations to ACS, the Court denies ACS's motion to quash a subpoena seeking information regarding plaintiff's cases.

J.A.K. is legally entitled to receive copies of unfounded reports under SSL § 422(5)(a)(iv), and to offer them into evidence. Although ACS argues that exceptions within § 422(5)(b) do not apply in Housing Court, § 422(5)(b) contains no such limitation.

The Court also excuses the failure to provide notice under CPLR § 2307. The litigants have addressed the merits of the subpoena. Petitioner is an unrepresented litigant who was likely unfamiliar with the requirements of § 2307. For the Court to require unrepresented litigants in this high-volume court to make motions, prior to the issuance of subpoenas directed at government agencies, would do little to advance these proceedings' summary nature.

J.A.K. v. V.M.

(Civil Ct., Bronx Co., 6/11/21)
https://www.law.com/newyorklawjournal/almID/1623795691NY53182020/

* * *

ABUSE/NEGLECT - Order Of Protection Excluding Parent/FCA § 1027

The First Department concludes that the father was entitled to the due process protections afforded by FCA § 1027 where ACS stipulated that he was a caretaker for the child, and the father's testimony that he and the mother lived together with the child up until the incident underlying the Article Ten proceeding was unchallenged.

The applicable standard was whether the temporary order of protection for the child sought by ACS (the JRP appeals brief reveals that it was a stay away order) was necessary to eliminate an imminent risk to the child's life or health, not whether there was "good cause shown." It is undisputed that ACS did not meet this burden.

Matter of Kevin W.
(1st Dept., 5/27/21)

* * *

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

The Second Department reverses an order that, after a hearing, granted respondents' application pursuant to FCA § 1028(a) for the return of the children.

Petitioner established a prima facie case of child abuse against the parents by presenting evidence that injuries one child sustained would not ordinarily occur absent an act or omission of the caregiver, and that the parents were the child's caregivers during the relevant time period. Petitioner's expert in child abuse pediatrics testified that the then two-month-old child had multiple rib fractures, which appeared to have been sustained at different times, as well as fractures in his legs and a laceration of his spleen, and further testified within a reasonable degree of medical certainty that these injuries were caused by non-accidental trauma. The parents failed to rebut the presumption.

The risk to the other children could not be mitigated by the conditions imposed by the court.

Matter of Chase P.
(2d Dept., 11/10/21)

* * *

ABUSE/NEGLECT - Removal/Imminent Risk

The Second Department reverses a determination denying the mother's FCA § 1028 application for return of the children where petitioner alleged that after the father slapped and choked the mother in the presence of their three young children, the mother was directed to, among other things, cooperate with petitioner in its supervision of the children and enforce a series of orders of protection issued against the father, but failed to do so.

While the mother was initially reluctant to cooperate with petitioner's investigation or enforce the orders of protection, after the children were removed she testified that she would do so. She substantially complied with the service plan, and her testimony showed that she understood the threat the father posed to her and the detrimental effect observing domestic violence would have on her children. Petitioner's witnesses testified that they had no concerns regarding the safety or well-being of the children while in the mother's care.

Any concerns that the mother would be unable or unwilling to enforce the orders of protection or prevent the father from entering her home could have been mitigated by reasonable efforts. Petitioner offered to change the locks and place rail guards on the windows of the mother's home, but never did so.

Matter of Iven J.E.
(2d Dept., 1/20/21)

* * *

ABUSE/NEGLECT - Removal/Imminent Risk

The First Department upholds the denial of the mother's FCA § 1028 application in light of the mother's history of untreated mental illness and substance abuse, prior neglect findings against her, lack of insight into her mental illness, and a history of noncompliance with a dispositional order directing her to treat her psychiatric illness.

While the mother was making strides in addressing her issues, the court also considered the children's expressed preference for the kinship foster home, thereby resolving doubts in favor of protecting the children.

Matter of God McQ.
(1st Dept., 7/1/21)

* * *

ABUSE/NEGLECT - Criminal History Of Parent
- Removal

In this dependency proceeding, a California appeals court vacates the trial court's jurisdictional finding and removal order, which were based solely on the father's incarceration and criminal record.

The evidence supports a reasonable inference that there is a substantial risk the father will commit crimes - even violent crimes - in the future. But that is not the same as a substantial risk that the child will be harmed. Nothing in the record suggests that any of the father's crimes were against children or involved children. Although, on an abstract level, violent crime is incompatible with child safety, the agency cannot use such generalities to satisfy its burden of proving an identified, specific hazard in the child's environment that poses a substantial risk of serious physical harm to him. There is no evidence to connect the father's violent criminal history with any likelihood of future domestic violence that could pose a danger to the child.

Under certain circumstances, an incarcerated parent's failure to ensure that a child is protected from an abusive situation of which the incarcerated parent knew or should have known, and/or a parent's inability to make proper arrangements for the care of a child during the parent's incarceration, may provide a basis for jurisdiction. But neither situation is alleged here.

In re J.N.
2021 WL 1232439 (Cal. Ct. App., 2d Dist., 4/2/21)

* * *

ABUSE/NEGLECT - Removal/FCA § 1028 Hearing

After DSS removed the children from the parents' care and placed them with the paternal grandmother and the paternal grandfather, the grandparents failed to pass a clearance check and DSS removed the children from the grandparents' home and placed them in a non-kinship foster home. The grandmother asked for a hearing pursuant to Family Court Act § 1028, and the family court denied the application, determining that the grandmother did not have standing.

The Second Department concludes that the grandmother is a person legally responsible for the care of the children, and thus entitled to a § 1028 hearing. The children lived with her for months at a time, when she purchased food and clothes for the children, did their laundry, fed them, brought them to and from school, church, and extracurricular activities, acted as the contact person for the school in case the children were ill or injured, and attended medical appointments with them. These actions, parental in nature and over an extended period of time, support a determination that the paternal grandmother was the functional equivalent of a parent to the children. The family court's denial of her application also deprived her of her due process rights.

Matter of Kavon A.
(2d Dept., 3/31/21)

Jurisdiction

ABUSE/NEGLECT - Jurisdiction

The First Department agrees with the family court that the dispositional hearing could not proceed with respect to the older child, who had reached the age of eighteen during the pendency of the proceedings and was not in foster care.

Matter of Angelica A.
(1st Dept., 3/16/21)

* * *

ABUSE/NEGLECT - Jurisdiction/UCCJEA

The child, a United States citizen, had lived in New York prior to being taken by the father to Pakistan in 2019 and then left in Pakistan in the care of the mother. In 2020, the State Department repatriated the child, then sixteen years old, to the United States because of grave concerns that she was being brutally beaten and coerced into an arranged marriage. Upon being returned to New York by the State Department almost a year later, the child was immediately placed in the care of ACS and an abuse petition was filed against her parents.

Respondents moved for dismissal of the abuse petition on the grounds that New York lacks jurisdiction under the UCCJEA, claiming that New York lacks home state jurisdiction because the child was in Pakistan, not New York, during much of the six-month period immediately prior to commencement of the abuse proceeding.

The Court denies the motion to dismiss. Pakistan is treated as a state under the UCCJEA. The Court rejects the attorney for the child's argument that the UCCJEA is inapplicable because the laws of Pakistan violate fundamental human rights.

The time the child spent in Pakistan constituted a temporary absence from New York State, and thus did not interrupt the six-month period prior to commencement of the proceeding which established New York's home state jurisdiction. The father stated that he intended the trip to Pakistan to only be a short vacation, which was extended several times due to the child's health problems and restrictions on travel due to Covid-19. The mother, in whose care the child was left, was not residing in her own home. Moreover, if respondents did not permit the child to return to New York because they were forcing her into an arranged marriage, it would be a wrongful retention of the child in Pakistan.

Even if New York was not the home state at the time the abuse petition was filed, the allegations show that the child is in real and immediate danger, and thus the Court can properly take temporary emergency jurisdiction under DRL § 76-c. No custody proceeding has been commenced in Pakistan. The child had been brutally and repeatedly beaten for failing to acquiesce to the arranged marriage. She was struck about the head, requiring hospitalization and causing headaches and vision loss that persist. While the beatings were carried out by an uncle, they were done with the full knowledge, and presumably the acquiescence, of respondents.

Matter of Saida A.
(Fam. Ct., N.Y. Co., 2/1/21)

http://nycourts.gov/reporter/3dseries/2021/2021_21049.htm

Petitions

ABUSE/NEGLECT - Petitions/Court's Authority To Direct Filing

The father commenced a proceeding seeking to modify an order of custody. After reviewing the petition, the family court issued an order directing, inter alia, that an investigation under FCA § 1034 be conducted. Prior to a hearing on the modification petition, DSS submitted reports of its investigation. The court, sua sponte, directed DSS to commence a neglect proceeding against the father and the mother.

Upon DSS's appeal, the Third Department holds that the family court lacked authority to order a child protective agency, such as DSS, to commence a neglect proceeding against a parent. Under FCA § 1032(b), the court has authority to direct only that a "person" file a petition. Primary responsibility for initiating such proceedings has been assigned by the Legislature to child protective agencies, which may file a petition whenever in their view court proceedings are warranted.

Matter of Donald QQ. v. Stephanie RR.
(3d Dept., 10/21/21)

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

ABUSE/NEGLECT - Notice To And Intervention By Non-Respondent Parent

The Supreme Court of Wyoming concludes that the father's right to due process was violated, and he was materially prejudiced, when he was not notified as required by state law during the early stages of the child protection action brought against the mother.

The father was not informed when the child was taken into protective custody, or of the shelter care hearing the next day even though the shelter care hearing report identified the father and listed his address. The State did not personally serve the father with the petition or the order setting his initial hearing until nearly a month after the proceedings began. The State's and juvenile court's actions in this case exacted the same consequences against the father as if a petition had been filed, without giving him the protections due under state law.

Providing a parent an early opportunity to participate in a juvenile case is important because termination proceedings are largely based on the parent's conduct from the time the child is taken into custody until the court decides that further assistance to the parent is futile. The father's lack of involvement in the juvenile court action and lack of contact with the child necessarily colored the court's determination that it was appropriate to release the agency from its obligation to reunite the family. Had the father been notified when the agency filed the neglect petition against the mother and took the child into custody, it is possible he could have attended visitation for several

additional weeks, and asserted his ability to care for the child before the agency and the court set the course on non-family placement.

In re AA
2021 WL 320935 (Wy., 2/1/21)

* * *

ABUSE/NEGLECT - Appeal/Mootness
INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The child's maternal grandmother, a Georgia resident, had a legal custody order at the time the child was removed from the mother's home in New York and remanded into the custody of petitioner agency. The family court, invoking the Interstate Compact on the Placement of Children, denied the grandmother's motion for the release of the child into her care on the ground that the court had the responsibility and the obligation to obtain evidence as to whether the child could safely and appropriately reside with the grandmother. On appeal, the grandmother and the attorney for the child argue that the family court erred in its determination that the ICPC applied to this case.

The First Department concludes that although, given the grandmother's legal right to custody, the family court erred in invoking the ICPC, the issue was rendered moot when a Georgia court granted the grandmother's petition for a writ of habeas corpus and returned the child to her care. Moreover, the issue will not typically evade judicial review.

Matter of Genesis H.
(1st Dept., 5/20/21)

* * *

ABUSE/NEGLECT - Disposition/Custody Orders

Without objection, the family court heard a neglect proceeding and a custody proceeding together, with DSS going forward with its petition first. The court found that the mother neglected both children, and that the father demonstrated a change in circumstances since entry of the prior custody order. The court awarded the father sole custody with limited supervised visitation for the mother, and issued a final order effectuating the modified custody arrangement. On a later date, the court held a dispositional hearing in the neglect proceeding, upon which the court adjudicated the children to be neglected, ordered that the mother receive mental health services, and placed the mother under DSS supervision for one year.

The Third Department rejects the mother's contention that the family court violated FCA § 1052(a)(vii) by combining a FCA Article Six custody order with an order placing her under DSS supervision. Although § 1052 precludes the court from combining such orders in a dispositional order, that is not what happened in this case.

Matter of Ryan P. v. Sarah P.
(3d Dept., 9/16/21)

* * *

CUSTODY/INTERSTATE COMPACT

The Third Department declines to hear the father's unpreserved (and also moot) claim that the application of the ICPC to his custody petitions posed a "bureaucratic barrier" to his efforts to obtain custody that "infringe[d] upon [his] substantive and procedural due process rights as a parent."

However, the Court notes that the father poses a "substantial and novel" question that could potentially implicate the exception to the mootness doctrine, and asserts in a footnote that, were it to address the issue, it "would find, for the reasons stated by the First Department in Matter of Emmanuel B. (Lynette J.) (175 AD3d at 55-60), that the ICPC does not apply to out-of-state parents."

Matter of David Q. v. Schoharie County Department of Social Services
(3d Dept., 11/18/21)

* * *

INTERSTATE COMPACT

In this termination of parental rights action, the Kentucky Supreme Court holds that the ICPC does not apply to interstate placements of children with biological parents against whom no credible allegations of abuse or findings of abuse or neglect have been made.

The Court notes that ICPC home studies can create significant and unnecessary delays for a child and his or her family, and that, in this case, such delay created the very basis used for the termination petition filed against the father. Kentucky judges retain the authority to make custody determinations based on the best interests of a child, and priority for custody must be given to the parent of the child. While revisions to the model ICPC and the Kentucky statute in 2013 attempted to clear some of the confusion surrounding its misapplication to parents, in this case the court and the agency were mistaken in their understanding of what the law required.

A.G. v. Cabinet for Health and Family Services
2021 WL 1679678 (Ky., 4/29/21)

Summary Judgment/Collateral Estoppel

ABUSE/NEGLECT - Summary Judgment/Collateral Estoppel
- Disposition/Sex Offender Program

The Second Department upholds a finding of neglect made upon petitioner's motion for summary judgment where the father's conviction for endangering the welfare of a child was based upon the same acts alleged to constitute neglect. The slight discrepancy between the date range of the incidents alleged in family court and the date range of the incidents to which the father pleaded guilty did not raise a triable issue of fact as to whether the same incidents were involved in both proceedings.

The family court did not err in requiring the father to engage in a sex offender program where the petition alleged sexual abuse but there was no sexual abuse finding.

Matter of Tereza R.
(2d Dept., 11/17/21)

* * *

ABUSE/NEGLECT - Summary Judgment

The Court denies ACS's motion for summary judgment in this neglect proceeding where ACS has submitted on Department of Homeless Service records, affidavits from the foster father F.P. and from M.G. from CPS, and the Oral Report Transmittal, to support its contention that there is no triable issue of fact.

The DHS records contain references to and include records from other entities, and such outside records contained within an organization's business records are generally inadmissible without additional facts. The Department of Education records suggest that the child J.M.M. may not have been an appropriate caretaker for his brothers, but, as both the attorney for the children and counsel for respondent indicate, fifteen-year-old J.M.M.'s adequacy as a babysitter is at issue and presents a triable fact.

Furthermore, the Court wants to afford counsel the opportunity to cross examine both F.P. and M.G. since there may be facts that were not included in their affidavits and could tend to contextualize the situation, and the circumstances and context of respondent's admissions is important information.

Matter of C.M.M.
(Fam. Ct., Bronx Co., 12/14/21)
https://nycourts.gov/reporter/3dseries/2021/2021_51278.htm

Hearings: Dismissal/Right To Be Present/Defaults/Adjournments

TERMINATION OF PARENTAL RIGHTS - Adjournments

In this termination of parental rights proceeding, the Second Department finds no error in the denial of an adjournment where the mother had a history of missing court dates; she had previously been granted an adjournment based on her representation that she could not afford to travel from Pennsylvania to New York, and the court, conditioned upon the mother's compliance with

petitioner's request for a verified permanent out-of-state address so the mother could receive transportation assistance, granted that adjournment on a final basis; and, when the mother failed to appear, her counsel proffered the same excuse, but conceded that the mother had failed to comply with the court's directive to provide petitioner with a verified permanent out-of-state address.

Matter of Mathew B.C.
(2d Dept., 12/1/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Defaults

The Second Department affirms an order that denied the father's motion to vacate an order which, upon his failure to appear at a fact-finding hearing, determined that he was only entitled to notice of the proceedings and that his consent to the child's adoption was not required under DRL § 111.

The father, who was incarcerated, alleged that the day before the hearing, he was transferred to a different prison. However, he did not provide an affidavit attesting to this fact or any documentation substantiating it, relying instead on an affirmation by his counsel, who had no personal knowledge of the relevant facts. Moreover, assuming the father was transferred as alleged, he did not provide an explanation for his failure to communicate that fact to his attorney or the family court so that arrangements could have been made to coordinate production with his new facility.

Matter of Luciano Q.
(2d Dept., 10/27/21)

* * *

ABUSE/NEGLECT - Dismissal/Prima Facie

The Second Department concludes that, after petitioner rested its case subject to the child testifying as the attorney for the child's witness at the conclusion of the case, the court properly denied the father's motion to dismiss for failure to present a prima facie case.

Matter of Alivia F.
(2d Dept., 5/5/21)

* * *

ABUSE/NEGLECT - Failure To Supply Shelter
- Jurisdiction
- Adjournments
CUSTODY - Jurisdiction

ACS filed a neglect petition alleging that the mother and the child were living in terminals in LaGuardia Airport, and that she had refused all offers of help. For the first seven months of the neglect proceeding, the mother refused to divulge any details about the child, including the child's real name, her date of birth, her birth place, or her father's name. At the end of the fact-finding and dispositional hearing, the court finally learned that the father lived in the State of Florida and had been granted a judgment of paternity and visitation schedule. The court also learned that the father had filed an emergency petition seeking physical custody, which resulted in a Florida court issuing an order directing Sheriffs to take custody of the child. Upon learning that the child had previously lived in Florida and that the father had an ongoing custody proceeding there, the court complied with the Uniform Child Custody Jurisdiction and Enforcement Act by setting up communication with the Florida court, during which, the mother was permitted to participate and be heard. The court recognized Florida's exclusive continuing jurisdiction concerning custody, found that the mother neglected the child, and released the child to the custody of the father.

The Second Department affirms. The court did not err when it denied the mother's request for an adjournment on the date when the court scheduled the communication with the Florida court, and on the date when the court held the communication with the Florida court, on the ground that her "lead" attorney was ill and could not attend. At both court dates, the mother was ably represented by the supervising attorney of the organization representing her, who had appeared in court on the mother's behalf several times and was familiar with the case.

Matter of Sage W.
(2d Dept., 4/28/21)

* * *

CUSTODY - Defaults

In this custody proceeding brought by the maternal grandparents, with whom the father allowed the child to stay after the death of the mother, the Third Department grants the father's motion to vacate his default.

The father submitted an affidavit in which he stated, inter alia, that he received notice of the proceeding roughly one month after the mother's death, when he "was still saddened and depressed and unable to think clearly"; that he had recently secured employment working a 12-hour overnight shift and had unsuccessfully sought to reschedule the initial appearance to his day off; that, on the initial appearance date, he arrived home from work around 7:30 a.m. and inadvertently slept through the appearance; and that he "immediately went to the [c]ourthouse" when he awoke and realized he had overslept. Although oversleeping may not ordinarily constitute a reasonable excuse, it is reasonable under the particular circumstances of this case.

The father also established a meritorious defense. The family court failed to conduct an evidentiary hearing and make the requisite extraordinary circumstances and best interests findings prior to awarding the grandparents permanent custody. The Court notes that the father's handwritten note, which was attached to the petition, granted the grandparents the authority to make medical and educational decisions for the child but did not relinquish his authority.

Matter of Melissa F. v. Raymond E.
(3d Dept., 4/1/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Defaults

In this termination of parental rights proceeding, the Second Department concludes that the mother's failure to appear in court on the fourth and final day of the fact-finding hearing constituted a default, where her attorney was present but did not participate in the hearing.

Matter of Zowa D.P.
(2d Dept., 1/13/21)

* * *

CUSTODY - Defaults

The First Department finds no default, and thus the order awarding the maternal grandmother sole legal and physical custody of the child is appealable, notwithstanding the mother's nonappearance and her counsel's nonparticipation on the date the order was issued.

Counsel for petitioner and the attorney for the child had presented their cases and, on that date, rested and gave summations. The mother's cross-examination had concluded, her counsel chose not to call two additional witnesses, and although her redirect examination had not occurred, the court pointed out that redirect was optional. Moreover, the order does not state that it was entered on default.

Matter of Griselda N.G. v. Yvette C.
(1st Dept., 3/25/21)

Smoking

ABUSE/NEGLECT - Allowing Neglect
- Smoking/Possession Of Weapon

The Third Department, while upholding a finding of neglect where the father failed to assist the mother by interceding with the children when she became overwhelmed, dismissed concerns regarding her mental health by maintaining that she needed to increase her medication dosage, and failed to take seriously a report to Child Protective Services that the mother had acted aggressively toward two of the children during a pediatrician appointment and alleged instead that the report was fake, also concludes that the father "made extremely poor parenting decisions of his own, including providing lax supervision to the children, smoking inside of his residence even though the middle child has breathing issues and failing to appropriately secure a hunting knife…."

Matter of Jaxxon WW.
(3d Dept., 12/30/21)

Physical Force/Evidence Of Injury

ABUSE/NEGLECT - Excessive Use Of Force

The First Department upholds a determination denying petitioner's challenge to an indicated report where petitioner pulled her eleven-year-old daughter out of her parked car by the arms, causing the child to fall to the ground near the road and sidewalk. It was rational for OCFS to find the report relevant and reasonably related to childcare work or adoption.

Matter of Renner v. Office of Children and Family Services
(1st Dept., 5/11/21)

* * *

ABUSE/NEGLECT - Credibility Of Child
- Excessive Corporal Punishment

The Second Department, reversing the family court, finds sufficient evidence of sexual abuse, and derivative neglect, noting, inter alia, that inconsistencies in the child Shyla's testimony as to peripheral details, such as timing and the presence of other individuals in the home at the time of the abuse, did not detract from her consistent and credible description of the core conduct constituting the abuse, particularly considering Shyla's age at the time of the events. Shyla's previous, out-of-court recantation was sufficiently explained by the indirect threats she received from her own family members.

The Court also upholds a neglect and derivative neglect findings where, on one occasion, the mother struck Shyla with her hands multiple times and bit her finger, leaving marks and injuries that necessitated medical treatment.

The Court reverses a finding of neglect where there was a single instance in which the mother hit the child Amir's arm with a belt to discipline him after he was caught shoplifting, and ACS failed to prove that marks observed on the child were the result of being hit with the belt by the mother.

Matter of Tarahji N.
(2d Dept., 9/29/21)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Post-Filing Evidence

The Second Department finds sufficient evidence that the mother neglected the child by inflicting excessive corporal punishment, especially in view of the age of the child, who was less than two years old at the time.

Evidence of the mother's conduct after the petition was filed was properly admitted since it was relevant to the issues in the case, including the mother's credibility.

Matter of Princess A.E.
(2d Dept., 4/14/21)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment

After she made fun of another adult in the household, the paternal uncle struck the child on the arm, leaving a bruise. The ACS caseworker observed some bruising on the child's upper arm. No other marks or bruises were observed on the child.

The Second Department reverses findings of neglect and derivative neglect, noting that ACS failed to establish that the paternal uncle intended to hurt the child or exhibited a pattern of excessive corporal punishment, and that there was insufficient evidence that the child suffered the requisite impairment of her physical, mental, or emotional condition.

Matter of Myiasha K.D.
(2d Dept., 4/14/21)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Investigation By Agency/Constitutional Issues

Plaintiffs are fundamentalist Christians who sincerely believe that their religion requires them to use corporal punishment when necessary upon their children. When one of their children came to school with marks on his arms from being hit with a belt, agency social workers, guided by a Kentucky regulation, launched and maintained for several months an investigation for child abuse.

Plaintiffs claim that the substantive Due Process Clause of the Fourteenth Amendment gives them a fundamental right to use corporal punishment that may leave marks on their children, and a concomitant right not to be investigated for having done so; that a court order requiring them to cooperate with the investigation and permit home visits violated their Fourth Amendment rights; that their First Amendment rights were violated when they were retaliated against for insisting on filming the home visits; and that the investigation violated their Free Exercise rights because it interfered with their ability to use corporal punishment.

The Sixth Circuit U.S. Court of Appeals, citing, inter alia, qualified immunity, upholds the district court's dismissal of all these claims. Plaintiffs point to no case law from the Supreme Court or this

circuit demonstrating a clearly established right to use corporal punishment that leaves marks. The district court was correct in finding that the entries into plaintiffs' home were Fourth Amendment violations, but it was not unreasonable for defendants to rely upon a court order. Plaintiffs have not demonstrated that the right to film a social worker during a home visit was clearly established, and, moreover, they have failed to allege facts that would demonstrate that a retaliatory action was taken against them that was motivated by their demand to record the home visits. Plaintiffs do not allege that the Kentucky regulation was enacted with intent to discriminate against religion. Moreover, any challenge would likely survive strict scrutiny since the state has a compelling interest in protecting children from physical abuse, and the regulation explicitly does not prohibit corporal punishment that does not leave marks, bruises, etc., and thus is narrowly tailored.

Clark v. Stone
2021 WL 1997205 (6th Cir., 5/19/21)

Medical/Mental Health Issues

EDUCATION LAW - Immunization Requirement

Public Health Law § 2164 requires children from the ages of two months to eighteen years to be immunized from certain diseases, including measles, in order to attend any public or private school or child care facility. Previously, the law contained two exemptions to this requirement: a medical exemption requiring a physician's certification that a certain vaccination may be detrimental to a child's health, and a non-medical exemption that required a statement by the parent or guardian indicating that he or she objected to vaccination on religious grounds. In 2019, the religious exemption was repealed.

Plaintiffs are parents from throughout the state who, prior to the repeal, were granted religious exemptions from their children's schools due to a myriad of religious beliefs. They commenced this declaratory judgment action seeking to have the repeal declared unconstitutional and the legislation enjoined. The Supreme Court granted defendants' motion to dismiss, finding, among other things, that the repeal was a neutral law of general applicability driven by public health concerns and not tainted by hostility towards religion, and concluding that the complaint failed to plausibly allege free exercise, equal protection or compelled speech claims.

The Third Department affirms.

F.F. v. State of New York et al.
(3d Dept., 3/18/21)

* * *

ABUSE/NEGLECT - Mental Illness

The Fourth Department finds sufficient evidence of neglect resulting from mental illness where the mother went with her children to a counseling meeting at petitioner's office and, during the meeting, expressed suicidal ideation by stating, inter alia, that she wanted to step in front of a

motor vehicle, and also stated that she could not care for the children and wished they had never been born; and the mother was described as loud, pressured in her speech, very upset, and in great distress.

Matter of Faith B.
(4th Dept., 3/26/21)

Leaving Child Alone Or Unsupervised Or With Harmful Individual

ABUSE/NEGLECT - Leaving Children With Inappropriate Caretaker

The Third Department agrees that respondent maternal great aunt failed to exercise a minimum degree of care when she allowed the maternal grandmother to care for the children by herself despite multiple warnings that the maternal grandmother was an inappropriate caregiver, but concludes that respondent did not thereby neglect the children because the children were at risk of, at most, possible harm. Most of the grandmother's neglect history pertained to incidents that occurred over ten years prior to the filing of this petition.

Matter of Aiden LL.
(3d Dept., 2/25/21)

* * *

ABUSE/NEGLECT - Domestic Violence
- Leaving Children Unsupervised

The Court finds that respondent neglected the children where he committed multiple acts of domestic violence against the non-respondent mother, including a severe beating that left her unconscious and injured on the floor. Even if the children were asleep in the next room a few feet away during the severe beating, they were at imminent risk of harm. The violence created a disturbance that caused neighbors to rush into the home in response, making it very likely that the children heard or felt the incident. Moreover, the children were awake for at least part of the incident, when the mother regained consciousness, and saw her with injuries in the aftermath of the incident and in the days after.

Even if the children were asleep for the entire incident and its aftermath, respondent neglected them by fleeing the apartment at 5:00 a.m. or 6:00 a.m. while the mother was unconscious and severely injured on the floor. As of that date, one child was just three years old and the other was less than one. Although one or more neighbors may have entered the apartment, that in no way ensured the children's safety since there is no evidence as to who those people were, their ages or relationship to the family, or their capacity or availability to care for the children at that moment.

Matter of Nevaeh C.
(Fam. Ct., Bronx Co., 12/7/21)
https://nycourts.gov/reporter/3dseries/2021/2021_51212.htm

* * *

ABUSE/NEGLECT - Leaving Children Alone
- Medical Neglect

The Court dismisses a neglect allegation where a police officer found the ten-year-old child Jake home alone with his twin siblings. Jake provided the officer with the mother's cell phone number, and the officer was able to reach her and asked her to return home immediately, and she did so. The mother left the children home alone because she needed to go to the pharmacy to get her medication, and the twins were napping. She testified that Jake knew how to change their diapers, make their bottles, "calm them down," and set up their play area, and was a "nurturing big brother." Leaving the children home alone was not ideal, but there was no evidence presented that the twins were not adequately supervised by Jake, or were harmed or at risk of harm during the relevant time.

The mother also did not neglect the child Ava during an extended unsupervised overnight visit by not seeking medical treatment when Ava, then two, sustained a burn to her leg from a radiator. The mother testified that Ava was initially crying for five to eight minutes, but that once she calmed down, she did not appear to be in pain or exhibit signs of distress. The mother explained that she ran cold water over the burn, applied ice for a long time, and then applied a prescription burn cream to the area three times a day. Another child was burned on the same radiator the prior year, and the mother treated Ava's burn the same way the other child's doctor had treated his burn.

Matter of James S. v. Kimberly S.
(Fam. Ct., Bronx Co., 6/15/21)
https://www.law.com/newyorklawjournal/almID/1625776723NYredacted/

Derivative Abuse/Neglect

ABUSE/NEGLECT - Creating Risk Of Abuse
- Derivative Abuse

The First Department upholds a finding of abuse based on respondents' inaction in response to sexual abuse by the child's grandfather. After the child disclosed the abuse, respondents failed to protect her by removing the grandfather from the home and instead directed the child not to tell anyone about the abuse because it would bring shame upon the family; failed to ascertain why the child was hospitalized on two separate occasions; and failed to obtain help for her, even when notified that she was cutting herself and was clearly decompensating after the grandfather moved back into the home.

The fact that the grandfather did not abuse the child again does not preclude the finding of abuse, since respondents endangered the child by creating a substantial risk of physical injury likely to cause protracted impairment of her physical or emotional health.

However, the Court overturns a finding that respondents derivatively abused their then seventeen-year-old son, who was never abused by the grandfather and became aware of the abuse when the

victim told him about it several years after the fact.

Matter of T. S.
(1st Dept., 12/16/21)

* * *

ABUSE/NEGLECT - Verbal Abuse/Failure To Supply Shelter And Care - Derivative Neglect

The First Department concludes that the finding that the mother neglected her daughter by verbally abusing her and by barring her from the home without making alternative arrangements for her shelter and care supported the court's determination that the mother derivatively neglected her younger, autistic son, who was provided care by the daughter and was present when his sister was verbally disparaged.

Matter of Alethia R.
(1st Dept., 2/25/21)

* * *

ABUSE/NEGLECT - Severe Abuse/Derivative Severe Abuse

The Third Department concludes that although petitioner established by clear and convincing evidence that the father's failure to intervene to stop the brutal beating of the deceased child or thereafter take any action to provide her with life-saving medical care would otherwise establish severe abuse of her and derivative severe abuse of the older daughter and the older son, because he is not the biological father of these children the family court was statutorily precluded from finding severe abuse.

(Subsequently, on February 23, 2021, the Third Department vacated its original decision and substituted a decision recognizing that severe abuse and derivative severe abuse findings could in fact be made against the father as to his non-biological children.)

The Court upholds the finding of severe abuse against the mother, who showed an utter disregard for human life when she brutally beat the deceased child. The Court also upholds findings that the father derivatively severely abused his biological children, who were present in the home when the beating occurred. The father was present in the downstairs of the home, at a time when the mother's yelling and the daughter's screaming could be heard throughout the house, and his failure to intervene or subsequently render medical aid evinced such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care.

The Court also upholds findings that respondents abused the deceased child and derivatively abused and neglected the four surviving children.

Matter of Lazeria F.

(3d Dept., 2/18/21, 2/23/21)

False Allegations Against Other Caretaker

ABUSE/NEGLECT - Respondent's False Allegations Of Sexual Abuse

The Second Department upholds a finding of neglect where the father, knowing the allegations were false and intending to damage the mother's relationship with the child, reported on multiple occasions that the mother was sexually abusing the child; the allegations were made in the presence of the child, and the father encouraged the child to corroborate the false allegations; and the false reports resulted in the child being interviewed by detectives, social workers, and attorneys, and exposed her to the possibility of intrusive physical examinations.

Matter of Isabela P.
(2d Dept., 6/9/21)

Sexual Abuse Or Related Misconduct

ABUSE/NEGLECT - Sexual Abuse/Sexual Gratification
- Exposing Child To Sexual Behavior And Pornography

The Third Department upholds the dismissal of sexual abuse charges where the family court found that respondent mother shaved the child's pubic area, but that she did not do so for the purpose of sexual gratification.

However, the family court erred in dismissing neglect charges. The court found that respondent showed the child (born in 2007) how to use a sexual device for the purpose of intimacy education. According to the child, however, respondent told her to go into respondent's room, respondent was naked, and, while respondent showed her how to use a sexual device, made weird noises. Respondent also told the child to remain while respondent and the stepfather were naked and having sexual intercourse over the bed covers, and were making moaning sounds. The child felt "[v]ery uncomfortable" when she was told to remain. Respondent also showed the child pornographic videos that, according to the child, depicted people "having sex and stuff" with their "intimate parts" exposed, and made the child feel uncomfortable.

Matter of Chloe L.
(3d Dept., 12/9/21)

* * *

ABUSE/NEGLECT - Inappropriate Sexualized Behavior

The Second Department upholds a finding of neglect made after a hearing held upon a petition based on the child's allegation that the father would lay on top of her in bed and rock back and forth making oohing and ahhing sounds.

Matter of Sara P.
(2d Dept., 3/24/21)

* * *

ABUSE/NEGLECT - Sexual Abuse - Corroboration/Expert Testimony
- Respondent/Person Legally Responsible

The First Department concludes that the child's detailed out-of-court statements were sufficiently corroborated by the expert testimony of a licensed clinical social worker with a specialty in child sexual abuse treatment, who directly supervised the child's therapist, that the child suffered from post-traumatic stress disorder related to her sexual abuse and trauma.

The Court also concludes that respondent was a person legally responsible for the two eldest children where he was a frequent visitor in their home, staying overnight multiple times per week, bringing food and taking them to restaurants; the abuse occurred in their home; and one of the children referred to respondent as her stepfather and he is the biological father of two of her siblings.

Matter of Jason Alexander B.
(1st Dept., 6/29/21)

Drug/Alcohol Abuse/Activity

ABUSE/NEGLECT - Drug Misuse

The Fourth Department finds sufficient evidence of neglect where the mother admitted to using cocaine during her pregnancy; hospital records indicated that she tested positive for cocaine during her pregnancy and had a history of polysubstance abuse; she tested positive for cocaine less than three months after the child's birth; and she refused to provide a urine sample on four occasions.

There is no evidence that the mother's participation in a treatment program is voluntary. The Court cites *Matter of Amber DD.* (26 AD3d 689), where it was held that the mother's participation due to her desire to avoid prison could not be considered voluntary under the statute.

Matter of Annastasia P.
(4th Dept., 10/8/21)

* * *

ABUSE/NEGLECT - Drug Misuse
- Failure To Plan

Upon the parents' appeal from fact-finding and dispositional orders, the Fourth Department upholds neglect finding where the mother's use of cocaine during her pregnancy, considered in

conjunction with her prior inability to adequately care for her older children while misusing drugs, provided sufficient evidence that the subject child was in imminent danger of impairment.

The father's continued use of illicit substances, and his failure to comply with a service plan instituted in relation to a proceeding involving his older child, established that the subject child would be at imminent risk of harm if placed in his care. Until he is able to acknowledge and successfully address the circumstances that led to the removal of the other child, the Court cannot conclude that the return of the child to his custody would not present an imminent risk to the child's life or health.

Matter of Faith K.
(4th Dept., 5/7/21)

* * *

ABUSE/NEGLECT - Drug Misuse
- Medical Neglect

The Third Department finds insufficient evidence of neglect, noting, inter alia, that there was no evidence that respondent mother used marihuana in the presence of the children or that her usage had ever rendered her unable to care for the children; that while engaged with preventative services, respondent seemingly understood the potential impact of her husband's drinking and agreed to a safety plan stating that he was not to be left alone to care for the children; that amidst the ongoing unrest in the household, the older child was exhibiting behavioral issues at school, but respondent sought to have the child evaluated, and he was ultimately diagnosed with attention deficit hyperactivity disorder and was prescribed medication for that diagnosis; that respondent did not immediately react when the older child suggested that he may have been experiencing negative side effects from the prescription drug, but respondent did obtain necessary medical care within a reasonable period of time; and that although the younger child tested positive at birth for the presence of THC, she was not born prematurely, underweight or with any other issues requiring intensive care or a prolonged hospital stay.

Matter of Lexie CC.
(3d Dept., 1/21/21)

* * *

ABUSE/NEGLECT - Allowing Neglect/Alcohol Misuse

At the fact-finding hearing, petitioner's caseworker testified that the mother told her that, while the middle and youngest children were with her, she had been drinking heavily; that the mother believed that she may have assaulted one of the children; and that, after respondent took the children for a while, he came back to the mother with some vodka, which she drank.

The Third Department, noting that this testimony was inadmissible hearsay, reverses findings of neglect. The remaining, non-hearsay evidence demonstrated that respondent, who lived in the same

apartment complex as the mother, maintained a presence at the mother's apartment throughout the day.

Matter of Aiden J.
(3d Dept., 8/5/21)

* * *

ABUSE/NEGLECT - Allowing Narcotics Activity In Home

The First Department upholds a finding of neglect where respondent, the mother of one of the children and grandmother of the other, knew or should have known that her adult sons were engaged in narcotics trafficking in the apartment where they were living with her and the children. To the extent respondent was not engaged in the sale of narcotics, she nevertheless placed the children in proximity to accessible narcotics and to narcotics trafficking, thereby creating an imminent danger to their physical, mental, and emotional condition.

Matter of Kamryn D.
(1st Dept., 12/28/21)

Failure To Supply Shelter, Supervision Or Care

ABUSE/NEGLECT - Failure To Supply Food, Shelter And Health Care
CUSTODY - Extraordinary Circumstances

The Fourth Department upholds a finding of neglect where the mother was not properly feeding the child and there was no refrigerator or stove in the mother's apartment; the mother's mental condition impaired her ability to care for the child; the mother missed a medical appointment for the child and the child's immunizations were not up to date; and, despite the availability of child care assistance from DSS, the mother's failure to comply with a work requirement resulted in a reduction to her public assistance benefits covering food, shelter and healthcare for herself and the child.

The Court also upholds a determination, in a related custody proceeding, that the determination of neglect provided extraordinary circumstances, and that it is in the child's best interests to be in the custody of petitioners.

Matter of Adam M.
(4th Dept., 6/17/21)

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

ABUSE/NEGLECT - Sexual Abuse/Corroboration

The First Department upholds a finding of sexual abuse where the child's testimony was consistent with and corroborated by the child's out-of-court statements.

Matter of V.C.
(1st Dept., 3/18/21)

Practice Note: Over many years, appellate courts have examined whether a child's live testimony constituted sufficient corroboration of the child's out-of-court statements under FCA § 1046(a)(vi). This analysis seemed to flow naturally from the corroboration requirement, and the developing caselaw regarding the sufficiency of different types of corroborative evidence.
This myopic focus on the child's hearsay statements as the main evidence never really made logical sense since credible live testimony has far more probative value than the child's hearsay statements. Indeed, the child's sworn *or unsworn* testimony, if subjected to cross-examination by respondent's counsel, can support a finding by itself. *Matter of Aryeh Levi K.*, 134 A.D.2d 428, 429 (2d Dept. 1987); *Matter of Elizabeth D.*, 139 A.D.2d 66, 69 (4th Dept. 1988). Yet even the Court of Appeals succumbed to the tail-wags-dog corroboration analysis in *Matter of Christina F.*, 74 N.Y.2d 532 (1989).
In this case, the First Department appears to have drifted towards the more logical analysis.

* * *

ABUSE/NEGLECT - Corroboration
- Sexual Abuse
- Evidence/Consciousness Of Guilt
- Derivative Abuse

In this sexual abuse proceeding, the Second Department concludes that the family court properly determined that the child's out-of-court statements were sufficiently corroborated.

The child's disclosure to his grandmother, when he was approximately four years old, included age-inappropriate knowledge of sexual matters. The child's accounts of that incident, and descriptions of other abuse, were detailed and consistent. Although the mere repetition of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found in the consistency of the out-of-court repetitions. The child's allegations were further corroborated by certain changes in his behavior observed by his grandmother soon after he stayed with his father, and by the fact that, when the child was interviewed by the ACS caseworker, he said he had been asked to leave a school in upstate New York because he was "touching his private parts … in front of other kids." The father's acquiescence to a Rabbinical Court ruling restricting his contact with the child for nearly a decade was, in essence, indicative of a consciousness of guilt.

The Court also upholds the family court's finding of derivative abuse of three other children, one of whom apparently walked in during one of the sexual abuse episodes.

Matter of Osher W.
(2d Dept., 10/20/21)

* * *

ABUSE/NEGLECT - Domestic Violence/Alcohol Misuse
- Findings Of Fact
- Corroboration

The Third Department concludes that the finding that the children are neglected is not supported by a sound and substantial basis in the record.

With respect to the April 2018 incident, petitioner did not prove the presence of the children during the parents' altercation. During the January 2019 incident, all of the children except the oldest child were asleep during the altercation, and petitioner failed to prove that the oldest child was visibly upset or frightened.

The oldest child's out-of-court statements that the father gave her two to three shots of alcohol were not corroborated, and petitioner's witnesses conceded that such a level of alcohol consumption was not evidenced by their observations of the oldest child's demeanor and her .01 blood alcohol content. There was insufficient evidence that respondents misused alcoholic beverages to the extent that they lost self-control of their actions.

The Court states in a footnote that the family court failed to specify the factual findings supporting its neglect determination, and only indicated that petitioner proved the facts alleged that supported a finding of neglect, this practice. This is not the best practice, but the procedure did apprise respondents of the relevant factual findings, and thus satisfied the statutory requirement in FCA § 1051(a) that the court state the grounds for its neglect finding.

Matter of Josiah P.
(3d Dept., 9/2/21)

* * *

ABUSE/NEGLECT - Respondent/Person Legally Responsible
- Credibility Of Out-of-Court Statements

The Third Department finds that respondent was a "person legally responsible" for the care of his friends' children under FCA § 1012(a) where he moved into the basement of their house and resided there for two or three months; he cared for the children when the parents went out, and, on at least one occasion, cared for the children continually over a full weekend; respondent testified that he and his girlfriend resided in the basement for two or three weeks, that during that time he occasionally babysat the children, and that he moved out after the father accused him of inappropriately touching the children; and the middle child stated that respondent was a family friend who watched them while he was living at their house.

The Court upholds findings of sexual abuse, and derivative abuse and neglect of respondent's own child, noting, inter alia, that although the friends' children stated that they were abused around

2011 or 2012, but respondent did not reside in the household at that time and did so in 2009, the exact date that the abuse occurred is not required in order for petitioner to sustain its burden of proof. The children's ability to recall details of the incidents goes to the weight and credibility of each child's statements.

Matter of Isabella E.
(3d Dept., 6/3/21)

* * *

ABUSE/NEGLECT - Drug Misuse
- Hearsay Evidence/ACS Progress Notes
- Inference From Failure To Testify

The First Department finds sufficient evidence of neglect where the father admitted to being addicted to Percocet; and he was taking the drug in excess of what was prescribed and was purchasing it illegally after his doctor became suspicious and stopped prescribing it. The father failed to rebut ACS's prima facie case by showing that he was regularly participating in treatment.

When the father, while present at the hearing, did not testify, the court properly drew a negative inference and inferred that he implicitly admitted that his out-of-court-statements were true.

The Court finds no error in the admission of ACS's investigative progress notes as business records, and also concludes that although the father was not under a business duty to report his behavior to ACS, his out-of-court statements are admissible as a party admission against interest. Any error in the admission of a statement that the Child Protective Specialist had concerns regarding the father's protective capacity was harmless.

Matter of Adonis H.
(1st Dept., 10/14/21)

* * *

ABUSE/NEGLECT - Compulsory Process/Testimony Of Child
- Derivative Abuse/Neglect

In this sex abuse case, the First Department concludes that the family court properly granted the child's motion to quash respondent's subpoena seeking to compel the child to testify at the fact-finding hearing where the child's social worker opined that testifying would be highly stressful and psychologically harmful to the child, who had been diagnosed with PTSD.

The family court properly determined that respondent derivatively neglected and abused his adoptive children based upon his long-term sexual abuse of his godchild while his children were in the home.

Matter of J.D.

(1st Dept., 7/8/21)

* * *

ABUSE/NEGLECT - Corroboration
- Evidence/CPL Sealing Statute

The First Department upholds a finding that respondent abused his stepdaughter and derivatively neglected his son, noting that the abuse finding was not based on the fact that the child had repeated her hearsay allegations to multiple providers. Rather, the court concluded that the consistency, detail, and specificity of the statements over time enhanced their reliability.

The court properly declined to strike 911 tapes from the record after respondent's acquittal in a criminal proceeding because those records were not official recordings relating to respondent's arrest or prosecution and thus were not subject to the sealing statute.

Matter of Krystal N.
(1st Dept., 4/22/21)

* * *

ABUSE/NEGLECT - Corroboration

The child disclosed to a caseworker and a police investigator that respondent had repeatedly demanded to examine her genitals in order to determine whether she was a virgin, and that respondent had placed his hand on her genitals and used his hands to spread them open, and also once requested to "do more" with his finger. When confronted with those allegations, respondent told the caseworker and the police investigator that he had inadvertently observed the child while she was naked from the waist down and that he was able to tell from ten feet away that her hymen was intact.

The Fourth Department concludes that the partial admission by respondent, together with testimony from the child's mother that was consistent with some details of the child's allegations, including testimony stating that respondent had access to the child at the times of day when the child said that the abuse occurred, was sufficient to corroborate the child's out-of-court statements.

Matter of Crystal S.
(4th Dept., 4/30/21)

* * *

ABUSE/NEGLECT - Evidence/Sealed Criminal Records

Respondent was arrested and charged criminally for the incident alleged in this Article Ten proceeding. His criminal case was dismissed and sealed on January 31, 2020, more than one year prior to the commencement of the fact-finding hearing.

The Administration for Children's Services intended to call a NYPD officer, but counsel for respondent objected and asked for a voir dire of the officer as to what items she had reviewed to prepare for her testimony. During the voir dire, the officer acknowledged having reviewed the police reports and body camera footage of the arrest. Although petitioner concedes that the written police reports related to the arrest are now sealed and cannot be used at this fact-finding hearing, ACS still seeks to use the domestic incident reports and body camera footage, contending that these items are not sealed. Petitioner also will seek to call a different police officer whose memory of the events has not been tainted by a review of sealed documents.

The Court holds that under CPL § 160.50(1)(c), the DIRs and body camera footage are "official records relating to the arrest or prosecution on file with the division of criminal justice services, any court, police agency, or prosecutor's office," and thus are not admissible. The Court cites *Harper v Angiolillo* (89 N.Y.2d 761), *Catterson v Corso* (244 A.D.2d 407), and *Time Warner Cable News NY1 v. New York City Police Dep't* (53 Misc.3d 657), and notes that the NYPD itself views body camera footage as part of the items sealed after dismissal.

Matter of Joshua F.
(Fam. Ct., Kings Co., 6/30/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21205.htm

In another case before the same judge - an Article Ten proceeding alleging domestic violence - respondent was also arrested and charged criminally for the same incident. His criminal case was dismissed and sealed. Counsel for ACS then sent the officer ACS documents to review for his testimony, but not any sealed police reports. However, ACS still seeks to introduce a 911 recording and body camera footage, arguing that these items are not covered by the sealing statute. The Court precludes introduction of the 911 recording and body camera footage, holding that they are covered by the sealing statute.

Matter of Katelyn R.
(Fam. Ct., Kings Co., 7/20/21)
https://nycourts.gov/reporter/3dseries/2021/2021_50749.htm

* * *

ABUSE/NEGLECT - Evidence/Sealed Records

The Court grants respondent's motion to exclude a NYPD Domestic Incident Report, concluding that the report is covered by a sealing order issued pursuant to CPL § 160.50(1)(c). The DIR is an official record used to evaluate whether or not an initial arrest is legally warranted. The DIR memorializes allegations of criminal conduct; physical descriptions and observations made by responding officers; and, in some cases, preliminary investigation details. Although a DIR is the type of business record usually admissible under FCA § 1046(a)(iv), this DIR had already been sealed by the time it was offered into evidence.

Matter of JG

2009 NY Slip Op 33477(U)
(Fam. Ct., Bronx Co., 12/3/09)
https://nycourts.gov/reporter/pdfs/2009/2009_33477.pdf

Presumption Of Abuse/Neglect

ABUSE/NEGLECT - Severe Abuse/Presumption Of Abuse

The Fourth Department upholds a finding of severe abuse by clear and convincing evidence, noting that when the child was seven months old, he was diagnosed with, among other injuries, numerous broken ribs, a fractured skull, and numerous fractures to both of his legs, which had been inflicted over the course of several months; that petitioner offered testimony from the child's pediatrician that some of the fractures were the result of repeated violent shaking and that those types of fractures did not occur for any other reason; and that respondents failed to promptly seek medical attention for the child.

The presumption in FCA § 1046(a)(ii) extends to all three respondents, and does so despite the fact that the child had other caregivers, including individuals who occasionally babysat the child, during the months in which he sustained his injuries. Petitioner was not required to pinpoint the exact time when the injuries occurred and establish which respondent was the culpable caregiver.

Matter of Grayson R.
(4th Dept., 12/23/21)

* * *

ABUSE/NEGLECT - Summary Judgment
- Presumption Of Abuse/Neglect
- Allowing/Creating Risk Of Abuse/Neglect
- Derivative Abuse/Neglect

The Third Department upholds the family court's determination granting summary judgment finding sexual abuse, neglect, and derivative neglect where there was proof of respondent father's paternity with respect to the youngest child, who was born to the oldest child.

The father testified at the FCA § 1028 hearing that he regularly masturbates into socks, that he stores the socks in a cubby in his bedroom, and that the oldest child became pregnant by masturbating with one of those socks. This theory of impregnation is incredible as a matter of law. In a footnote, the Court also states that, in any event, a finding could be based upon the father's creation of a situation in which the oldest child knew of his masturbation habits, had access to his socks, and knew how to use the soiled socks in a manner that could cause pregnancy. This conduct toward the oldest child supports derivative neglect findings as to the five younger children.

However, the family court reverses the family court's summary judgment determination against the mother finding abuse, neglect, and derivative abuse and neglect, concluding that the non-hearsay evidence presented at the § 1028 hearing was insufficient to establish, as a matter of law,

that the mother knew or should have known that the father had sexual intercourse with the oldest child and had impregnated her, or that the mother fostered and/or allowed the children to live in a "sexually charged household."

After the mother learned of the pregnancy, she had daily discussions with the child regarding the parentage of the baby and she believed the child's initial claim that she had been impregnated by a thirteen-year-old boy. Although the mother testified that she was aware of the father's sexual proclivities relating to masturbation and pornography, and that the father would discuss with the oldest child topics that may be considered inappropriate, the mother also testified that the oldest child had an inquisitive nature and would ask questions based upon social media content, and that the mother did not believe the discussions to be inappropriate in context and was present for many of those discussions.

Finally, questions of fact exist with respect to the allegation of medical neglect against the mother. The Court notes that although the mother's testimony changed during the course of the § 1028 hearing. a determination as to which, if any, of her accounts was credible is inappropriate on a motion for summary judgment.

Matter of Kai G.
(3d Dept., 8/12/21)

Disposition/Post-Disposition/Permanency/Court-Ordered Services

PERMANENCY HEARINGS
RIGHT TO COUNSEL

The Second Department, in a 3-2 decision, upholds a permanency hearing order placing the child for adoption with the godmother.

The child's mother was deceased, his father is unknown, and his half-sibling, who resides with the godmother, is the child's only known living relative. The child resided with the foster mother for less than one year beginning when he was only one year old. Placement with the godmother is consistent with the strong public policy of keeping siblings together.

The half-sibling's father would not consent to that child being placed anywhere other than with the godmother, and the children had been bonding during their visits. The desires of the half-sibling's father were relevant, and the court's consideration of those desires did not mean that the subject child's best interests were not globally considered.

The foster mother was not denied her right to counsel when the court declined to adjourn the hearing so she could obtain new counsel. During an earlier court appearance, the foster mother informed the court that she had counsel but he was unable to appear that day. The court denied the adjournment request not only because the foster mother had failed to heed the court's earlier directive to have counsel available, but also because the case had been languishing and awaiting a permanency hearing for several months.

The foster mother's argument that the court erred in failing to sua sponte appoint a separate attorney for the child at the permanency hearing was not raised below and therefore is unpreserved for appellate review.

Matter of Adonnis M.
(2d Dept., 5/26/21)

* * *

ABUSE/NEGLECT - Motion To Terminate Placement
- Dismissal/Aid Of Court Not Required

The First Department affirms an order denying respondent mother's application to terminate the child's foster care placement pursuant to FCA § 1062 and dismiss the neglect petition pursuant to FCA § 1051(c).

The mother's application for the return of the child pursuant to FCA § 1028 was denied where there was proof that she repeatedly sought invasive, unnecessary medical care for the child, despite being advised by doctors that the child was a well child; and, since then, she has refused to engage in any services, has behaved inappropriately and violently during visits, and has expressed her intention to continue to seek invasive and unnecessary medical care for the child if the child were returned to her care.

The motion to dismiss was premature.

Matter of Haoxuan X.
(1st Dept., 10/5/21)

* * *

ABUSE/NEGLECT - Court-Ordered Health Care/COVID-19 Vaccine

Several months after the family court denied respondent mother's FCA § 1028 application, the attorney for the children informed the court that the two oldest children, then thirteen and fifteen years old, wished to receive the COVID-19 vaccine, but respondent did not consent. After receiving the parties' written submissions, the court held that the children had the right to decide whether to receive the COVID-19 vaccine and ordered that they be given the vaccine if they still consent.

The Third Department reverses, noting the general preference toward conducting a hearing in this type of situation.

Even when the state obtains a temporary order of custody due to abuse or neglect, parents retain the right to make certain medical decisions for their children in foster care up until the moment that parental rights are terminated. The applicable state regulation requires the agency to obtain written authorization from the parent for medical care, including for immunizations, and, if such

authorization cannot be obtained, permits the agency to provide consent where authorized by Social Services Law § 383-b. The state has carved out specific situations where parental consent is not required for minors, such as in emergency situations, and for family planning and reproductive services, and courts generally should not expand the rights of minors to make decisions in categories not included in existing statutes or regulations. However, the Court, citing FCA § 233, notes that the family court has wide discretion to order medical or surgical care and treatment. In determining whether to exercise this power, a court must carefully balance the potential benefits to be attained against the risks involved in the treatment and the validity of the parent's objections.

Due process generally requires notice and an opportunity to be heard before medical treatment is imposed upon a patient by court order. Hearings have routinely been required in the context of overriding parents' medical decisions for their children. Here, the factual findings were made without evidence and based solely on hearsay in unsworn letters containing representations by counsel. At the hearing, the court must focus on whether respondent's refusal to authorize vaccination constitutes an acceptable course of medical treatment for her children in light of all the surrounding circumstances, while recognizing that courts cannot assume the role of a surrogate parent. As the Office of Children and Family Services' guidance documents prohibit local agencies from administering a COVID-19 vaccine if the child refuses to consent, the hearing must address whether the children have been fully informed about COVID-19 and the vaccine and whether they have the capacity to consent. The court must carefully balance the risks and benefits of the potential vaccination to decide whether to authorize it.

Matter of Athena Y.
(3d Dept., 12/9/21)

* * *

PERMANENCY HEARINGS

In this Article Ten proceeding, the Second Department upholds a permanency hearing order which continued the child's placement with expanded access for the non-respondent father and his family in Florida, rejecting the father's contention that the family court was required to find the existence of extraordinary circumstances.

The court's determinations following a permanency hearing must made in accordance with the best interests and safety of the child, with consideration of whether the child would be at risk of abuse or neglect if returned to the parent. Here, there had been limited contact between the child and the father in the five years preceding the hearing order, and the child was experiencing anxiety and distress concerning possible transition to a home which does not practice Orthodox Judaism.

Matter of Sabrina M.A.
(2d Dept., 6/9/21)

Practice Note: Upon an application by the father pursuant to FCA § 1055-b or FCA § 1089-a for an FCA Article Six custody or guardianship order, the court would have been required to address the extraordinary circumstances issue.

* * *

PERMANENCY HEARINGS - Release To Non-Respondent Parent

In 2015, FCA §§ 1035(d), 1052(a)(ii), and 1054 were amended to authorize the dispositional alternative of release to a non-respondent parent. FCA Article Ten-A was not similarly amended. The Court first concludes that because permanency hearings are a phase of dispositional proceedings, release to a non-respondent parent must be a valid disposition at a permanency hearing.

The Court, faced with a request for release of the child to the non-respondent father, who has not yet filed for permanent custody under FCA Article Six, concludes that under Article Ten-A, a best interests standard applies. Because the Third Department has not addressed the issue, the Court is bound by *Matter of Sabrina M.A.*, 195 A.D.3d 709 (2d Dept. 2021).

However, *Sabrina M.A.* should be reconsidered. The Court is selecting between the State and a parent. In other circumstances, courts have held that a parent has a claim of custody superior to that of all others unless it is established that he or she is unfit or some other type of extraordinary circumstances exist. Moreover, the only case cited by the Second Department was decided two years before FCA §§ 1035(d), 1052(a)(ii), and 1054 were amended. Also, in both of those cases, the Second Department failed to directly address the non-respondent parent's constitutional rights when the State seeks to intervene in the parent-child relationship.

Matter of John A.
(Fam. Ct., Clinton Co., 12/2/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21326.htm

* * *

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

Upon the father's consent to the entry of a fact-finding order without admission pursuant to FCA § 1051(a), the Family Court found that the father neglected the children, as alleged in the petition, by subjecting the mother to acts of domestic violence in the younger child's presence, abusing alcohol, and failing to comply with medication or therapy for his diagnosed mental illness. The court issued an order of disposition releasing the children to the custody of their mothers under ACS supervision, and directing the father to comply with certain conditions, while under ACS supervision.

After the dispositional order expired, the father moved to modify the order so as to grant a suspended judgment; to vacate the fact-finding order; and to dismiss the petitions. The family court denied the motion.

The Second Department affirms despite the father's successful completion of certain court-ordered programs, noting the serious nature of his conduct and his failure to recognize the need for continued psychiatric supervision.

Matter of Arielle A.D.
(2d Dept., 3/24/21)

* * *

ABUSE/NEGLECT - Disposition/Motion To Vacate

On consent of the mother without admission, the family court entered a finding that the mother neglected the eight-year-old child by inflicting excessive corporal punishment - that is, by scratching the child with her nails, and by beating the child with a phone charger cord and a belt, leaving marks, scratches, large welts and bruises on the child's face, shoulders, abdomen and thighs, in various stages of healing. As a result of the severe beating, the child was diagnosed with Post-Traumatic Stress Syndrome and had an ongoing need for therapy.

The First Department upholds the family court's determination denying the mother's motion to amend the dispositional order to include a suspended judgment and for a consent order vacating the finding of neglect and dismissing the petition. The family court acknowledged that the mother had completed court-ordered services and engaged in therapy, but found that, while she apologized to the child, she failed to acknowledge, specifically, how her behavior affected the child or to show real insight into the behavior that precipitated the incident. The mother also failed to come up with a plan to address the child's resulting issues.

Matter of Tsoede L.
(1st Dept., 10/19/21)

* * *

ABUSE/NEGLECT - Disposition/Violations
- Appeals/Mootness

The family court found that even though respondents were in "technical" compliance with the order of supervision, they willfully violated the order because parents are expected to actually gain insight and modify their behaviors to ensure compliance with a court's order of supervision, and respondents failed to acknowledge the trauma their actions have caused the children, and failed to comprehend the risks associated with openly continuing a relationship with a person who has been ordered to have no contact with the children. The court found that "compliance with an order of supervision pursuant to Family Ct Act §§ 1052 [and] 1055 both require more than mere participation in services allowing a parent to simply check off the term as done, i.e., technical compliance," and that respondents lacked insight into the reasons why the terms and conditions were ordered."

The Third Department concludes that the family court erred in finding that respondents were in "technical" compliance with the order of supervision but were nonetheless in violation of the order. Such a distinction may assist in determining whether reunification is appropriate, or whether the order of supervision needs to be extended to allow the respondents to gain insight into the reasons for the children's removal and to ameliorate those conditions, but the quantum of proof required to establish a willful violation under FCA § 1072 is clear and convincing evidence, which was not presented here.

Although the children have been returned to respondents from foster care, the appeal is not moot inasmuch as a finding of a willful violation may have enduring consequences with regard to future custody and visitation matters.

Matter of Nicholas L.
(3d Dept., 10/21/21)

* * *

ABUSE/NEGLECT - Motion To Vacate

The Second Department affirms an order denying the mother's motion to modify the order of fact-finding and disposition so as to grant her a suspended judgment and vacate the finding of neglect.

The Court notes that the mother struggled with treatment for her mental illness prior to the filing of the neglect petition, and failed to consistently attend counseling sessions ordered as a result of the petition and the finding of neglect.

Matter of Jveya J.
(2d Dept., 5/19/21)

* * *

ABUSE/NEGLECT - Dismissal/Aid Of Court Not Required

Following a fact-finding hearing, the family court found that the mother neglected Elijah P., and derivatively neglected Saamiyah C. Subsequently, the court dismissed the proceeding related to Saamiyah C. pursuant to FCA § 1051(c), finding that the aid of the court was no longer required with regard to that child.

The Second Department agrees that the mother neglected Elijah P. by inflicting excessive corporal punishment, and also upholds the finding of derivative neglect after noting that the § 1051(c) dismissal order did not vacate the neglect finding.

Matter of Elijah P.
(2d Dept., 2/24/21)

* * *

ABUSE/NEGLECT - ACD Violations/Dismissal Because Aid Of Court Not Required

The Court denies ACS's motion seeking either an order finding that respondent mother violated the adjournment in contemplation an order extending the ACD until the end of the school year.

The Court notes, inter alia, that since the mother had been offered a six-month ACD prior to the pandemic, she would likely have completed it long ago had the courthouse not closed down in March 2020; that New York City was engaged in wholesale remote schooling for the first time in history, and the considerable difficulties faced by the Department of Education in creating this system are well known and documented in the media; that the children's imperfect attendance at school, in and of itself, does not establish that the mother did not use her best efforts to facilitate and encourage them to attend; that the mother's affidavit and the case records establish the considerable efforts the mother was making to ensure that her children could participate effectively in remote schooling, and, even if there was a violation, it was not a "substantial" violation since it involved only one of seven conditions and was not related to the reason for filing; and that, in violation of the ACD order, ACS has provided no meaningful assistance to the mother beyond what she is already doing herself to manage remote schooling.

Even if the Court were to restore the matter, there is no current need for court intervention, and thus the matter would be dismissed pursuant to FCA § 1051(c).

Matter of Damaria R.
(Fam. Ct., Kings Co., 4/21/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21115.htm

* * *

ABUSE/NEGLECT - Appeal
- Dismissal/Aid Of Court Not Required

The Second Department concludes that the mother's appeal from the neglect fact-finding was not rendered academic by the family court's dismissal of the petition pursuant to FCA § 1051(c) because the child was over eighteen years old and did not agree to remain in care. The dismissal order did not vacate the finding of neglect.

Matter of Nabil H. A.
(2d Dept., 6/30/21)

* * *

ABUSE/NEGLECT - Dismissal/Aid Of Court Not Required

In this case in which the petition alleges respondent father's alcohol abuse and acts of domestic violence, the Court, having held a FCA § 1028 but not a fact-finding hearing, grants a motion by

respondent - supported by the attorney for the child - to dismiss the petition pursuant to FCA § 1051(c) on the ground that no further aid of the Court is required.

Because § 1051(c) refers to the "record before" the Court, not the record or evidence at a hearing, conducting a fact-finding hearing is not the only way a record sufficient for dismissal can be established. Here, the Court has presided since the petition was filed more than two years ago and has seen this family persevere through the horrific tragedy of losing two children in a fire; has witnessed the commitment of both parents to work through the issues in their relationship to co-parent their son, who was only two when his sisters died; and has been impressed with the care and thought the parents have put into their efforts, which includes attending couples therapy. Respondent has completed all of the services requested by ACS, and has engaged in additional services he sought on his own. There are no ongoing safety concerns, and, although ACS is concerned that respondent might relapse and commit further acts of domestic violence, this possibility always exists for someone in recovery. Respondent has taken ownership of his recovery and demonstrated his commitment to his sobriety and being present for his family. Respondent's memory of his daughters will keep him focused on his goals, and ACS's continued involvement after more than two years is only causing added stress.

In her papers, the AFC stated: "[T]his family has made such tremendous progress even during the COVID-19 pandemic…Additionally...this is a family who has endured the significant trauma of losing their two daughters only weeks after this case was initially filed. No one is a model parent after such a devastating loss, and these parents have had to process their grief all under the eyes of ACS and the assumed fear that M[] too could be removed from their care. This is an enormous burden for a family to bear, yet this family has moved forward and proven their resilience. It would be in the interests of justice to dismiss this case so they can be a family and heal in private."

Matter of MG
(Fam. Ct., Kings Co., 2/9/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50167.htm

Appeals

ABUSE/NEGLECT - Appeal/Mootness
- Discovery/Medical Records

In this neglect proceeding, the Second Department dismisses as academic the child's appeal from an order which, following an in camera review of the child's medical records, denied the child's request for redaction of certain statements she made during the course of therapy.

The neglect proceeding was thereafter resolved prior to the fact-finding hearing with an adjournment in contemplation of dismissal, and was subsequently dismissed. Pursuant to a qualified protective order, the records were to be destroyed at the conclusion of the proceeding.

The exception to the mootness doctrine does not apply. The law regarding this disclosure issue is well established. The court must balance the need of the party for the discovery against any potential harm to the child from the discovery. Here, the court's determination was a fact-specific

determination, and thus unlikely to recur. The peculiar procedural history which led to the order is also unlikely to recur, and the issues raised by the child would not typically evade review on appeal.

Matter of Darcy M.
(2d Dept., 6/9/21)

III. FOSTER CARE/TERMINATION OF PARENTAL RIGHTS/ADOPTION

TPR: Surrenders

TERMINATION OF PARENTAL RIGHTS - Conditional Surrender/Failure Of Condition Designating Adoptive Parent

The First Department, reversing the family court's determination which, after a hearing, found that the child's best interests warranted converting the mother's conditional surrender into an unconditional surrender, holds that when the person designated in a conditional judicial surrender as the adopting parent - a fundamental condition precedent to a surrender - declines to adopt the child, the surrender must be revoked upon the birth parent's application.

Social Services Law § 383-c(6)(c) provides that "[i]n any case in which the authorized agency determines that the persons specified in the surrender will not adopt the child or in any other case of a substantial failure of a material condition prior to the finalization of the adoption of the child, the agency promptly shall notify the parent thereof …." The legislature singled out the adopting party's declination as a stand-alone material condition, signaling an intent to treat declinations as paramount to all other material conditions. Indeed, the Court can discern nothing more fundamental than determining who would be a child's guardian.

Here, the grandmother's declination required that the mother's surrender, upon her prompt application, be revoked. This revocation restores the parties to their original positions before the family court in order to continue and conclude the termination of parental rights proceeding against the mother.

Matter of L.S.
(1st Dept., 4/1/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Surrenders/Revocation

A couple days after the child's birth, the birth mother executed a voluntary placement agreement in which she agreed to place the child in New Hope's foster care program. A week later, after selecting respondents as the prospective adoptive parents, the birth mother signed an extra-judicial surrender, and the child was placed with respondents the following day. After New Hope filed a petition seeking approval of the extra-judicial surrender, the birth mother, in an affidavit received by the Family Court less than 45 days after execution of the surrender, sought to revoke it. She moved for an order pursuant to SSL § 383-c(6)(a) deeming the surrender a nullity and returning the child to the care and custody of the agency. The court denied the motion and instead determined that a best interests hearing was required. Following the hearing, the court, among other things, granted New Hope's petition approving the birth mother's surrender.

The Fourth Department concludes that because the birth mother's revocation was timely, the court erred in refusing to deem the surrender a nullity and granting New Hope's petition seeking

approval of the surrender. The court erroneously determined that the agency adoption was indistinguishable from a private placement adoption. Unlike DRL § 115-b, SSL § 383-c(6) does not provide for a best interests hearing. Because the birth mother voluntarily agreed to place the child in New Hope's foster care program, the child should remain in the care and custody of New Hope, with physical placement of the child remaining with respondents pending further proceedings.

Matter of Tony S.H.
(4th Dept., 11/12/21)

TPR: Petition And Mandatory Filing

TERMINATION OF PARENTAL RIGHTS - Return To Parent Goal As To Other Parent

The Third Department agrees with respondent father that this abandonment proceeding seeking to terminate his parental rights was improperly brought since the permanency plan as to the mother at the time of the hearing was to return the child to the mother. Although respondent did not raise this argument before the family court, this Court has inherent authority to exercise its discretion and correct fundamental errors.

The statutory purpose of an abandonment proceeding is to free the child for adoption. Because this proceeding sought to terminate the rights of one parent in the face of a permanency plan that sought to reunite the child with the other parent, it did not serve that purpose. In circumstances such as this, dismissal of the petition is mandated.

Although petitioner asserts that under *Matter of Latif HH.* (248 A.D.2d 831), it may maintain an abandonment petition against one parent within the context of an over-all endeavor to terminate both parents' rights, in Latif HH. the petitioner was seeking to terminate the father's rights while simultaneously proceeding against the mother for violation of a suspended judgment that had been ordered after a finding of permanent neglect. Here, the end goals of the two concurrent proceedings are contradictory and cannot be reconciled.

Matter of Xavier XX.
(3d Dept., 3/4/21)

Practice Note: The Third Department has long taken this position. *See also Matter of Cherokee C.*, 173 A.D.3d 1573 (3d Dept. 2019) (order terminating father's parental rights and freeing child for adoption upheld where child was being cared for by relatives, and petitioner had compelling reason for not filing against mother because she consented to child being freed and was awaiting outcome of appeal before surrendering parental rights). Outside the Third Department, things are not so clear. *See In re Toussaint Thoreau E.*, 170 A.D.3d 551 (1st Dept. 2019) (court did not err in terminating father's rights due to abandonment while mother received suspended judgment); *In re Jake W.E.*, 132 A.D.3d 990 (2d Dept. 2015), *lv denied* 27 N.Y.3d 906 (dissenting judges note that court did not terminate mother's parental rights, and thus terminating father's parental rights did not foster permanency goals or adoption of child and child was ultimately returned to mother with no legal father).

TPR: Right To Counsel

TERMINATION OF PARENTAL RIGHTS - Right To Counsel/Appeals

When the juvenile court terminated parental rights, the mother promptly directed her court-appointed attorney to appeal. The attorney mistakenly filed the notice of appeal four days late, and the Court of Appeal dismissed the appeal as untimely.

The California Supreme Court concludes that the mother has not irrevocably lost her right to appeal. By statute, every parent facing termination of parental rights is entitled to the assistance of competent counsel, as well as the right to appeal an adverse ruling. When an attorney fails to file a timely appeal in accordance with a client's instructions, the parent may seek relief based on the attorney's failure to provide competent representation. Because time is of the essence in matters affecting children's long-term placement, whether relief is granted will depend on the parent's promptness and diligence in pursuing the appeal.

In re A.R.
2021 WL 1245027 (Cal., 4/5/21)

Practice Note: In *Matter of Ricardo T.*, 172 A.D.3d 732 (2d Dept. 2019), the Second Department reversed an order terminating parental rights, finding ineffective assistance where counsel failed to timely file a notice of appeal, and directed that, upon remittitur, a replacement order of fact-finding and disposition be issued so that the father's time to appeal would run anew.

Hearings/Right To Be Present

TERMINATION OF PARENTAL RIGHTS - Hearing Masters/Due Process

The Nevada Supreme Court holds that having a hearing master preside over the trial in a termination of parental rights proceeding does not satisfy the due process requirements enshrined in the Nevada Constitution. Due process requires that the trial be heard before a district judge in the first instance.

A hearing master is a person appointed by a court to preside over certain matters in place of a judge. A master is usually if not always an attorney. A master must be impartial, and juvenile hearing masters are required to attend a course designed for the training of new judges. The Court has no doubt that masters are typically both competent and careful. But no matter how neutral and qualified a master may be, it remains that he or she is not a judge and does not possess the same powers conferred to a juvenile court judge. Therefore, absent a stipulation of the parties, a master's findings are not binding and are subject to review by the court. While the judge should give serious consideration to the master's findings of fact and recommendation - if not, there would be no point in having a master at all - the judge may not transfer his or her judicial decision-making power to a master. After receiving a master's report, a juvenile court first reviews the evidence and testimony presented to the master. While the judge may rely on the master's findings that are supported by credible evidence and not clearly wrong, the judge may also choose to order de novo

fact-finding. Once the court determines the applicable facts, it must then exercise its independent judgment to determine, based on the facts and the law, the case's proper resolution.

This two-step approach runs afoul of due process analysis. When a trial takes place before a hearing master, a district judge's subsequent review of the trial record is not sufficient to safeguard the rights of the parent and child against the uniquely grave consequence of the permanent loss of parental rights.

Matter of L.L.S.
2021 WL 2173423 (Nev., 5/27/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Virtual Fact-Finding Hearing

In this termination proceeding in which the fact-finding hearing commenced before the COVID-19 pandemic, respondent father objects to the Court's plan to continue the hearing virtually. The Court, citing, inter alia, *People v. Wrotten* (14 N.Y.3d 33) and Judiciary Law § 2-b(3), denies the father's request for an adjournment and will proceed virtually.

New York City family courts have greatly expanded and improved their ability to conduct all types of virtual proceedings. This Court has a year's worth of experience presiding over child protective matters and observing witnesses and making credibility determinations, and is currently engaged in several termination trials in which counsel has not objected to proceeding virtually. The Court has developed procedures for the electronic sharing of proposed exhibits among counsel prior to trial, which allows attorneys to discuss possible objections with their clients and prepare for the hearing in advance, and facilitates the Court's ability to promptly make rulings. People are relying on platforms such as Zoom, Skype for Business and Microsoft Teams to conduct multi-billion-dollar deals, educate students, conduct hearings and save lives, and these platforms are easy to access and they work. The fundamental aspects of due process, including testimony under oath, contemporaneous cross-examination, and the ability of the fact-finder and parties to observe the demeanor of witnesses can be provided in a virtual proceeding.

The Court will ensure that the father has access to necessary audiovisual technology, and can make notes of anything he wants to discuss with his attorney at a break; will require that all witnesses appear by video, not merely audio, and that arrangements are made for any witness who does not have adequate access to the internet and/or technology; will ensure that witnesses are alone in the room where they are testifying and instruct each witness regarding the removal of all physical or electronic documents from the witness's range of vision except when the witness is given an explicit direction to consult a document; will allow frequent breaks for the father to consult privately with counsel prior to the conclusion of any witness examination and at other times when counsel or the father request the opportunity to consult; and will hold the hearing in a virtual courtroom with a court reporter to ensure that an accurate record is maintained.

The Court also notes that there is no timeline for resumption of in-person hearings, and the child has remained in foster care for all of his seven years of life with a family that seeks to provide him with legal permanency.

Matter of Anthony R.
(Fam. Ct., Kings Co., 3/30/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50405.htm

* * *

TERMINATION OF PARENTAL RIGHTS - Virtual Telephonic Hearing/COVID-19

Although the Iowa appeals court affirmed the juvenile court's order terminating parental rights, a dissent concluded that the COVID-19 pandemic had thwarted the mother's efforts to demonstrate that the children could be safely returned to her.

The Iowa Supreme Court affirms. The juvenile court's decision to go forward with a telephonic termination hearing on July 23, 2020 was within its discretion. Although this Court has held that even incarcerated parents have a right to testify and participate by telephone, the Court has never decided that a parent has an absolute right to an in-person hearing regardless of the circumstances. The transcript of the termination hearing indicates that the mother and her counsel were able to present her case forcefully.

The mother had nearly two years to demonstrate her parenting skills, and never progressed past supervised visitation. Her inability to handle the children without help and guidance during the relatively brief supervised visits shows that she would not have been able to parent on her own. During video sessions, as during in-person sessions, the provider frequently had to role-model appropriate parenting.

In re A.B.
2021 WL 935436 (Iowa, 3/12/21)

TPR: Disposition/Intervention

TERMINATION OF PARENTAL RIGHTS - Disposition/Children's Wishes

The Second Department upholds the termination of parental rights on grounds of mental illness and permanent neglect, noting, inter alia, that in camera interviews with the then fourteen- and eight-year-old children demonstrated that they were closely bonded to and wanted to be adopted by the foster mother; and that the foster mother had expressed willingness to honor the children's desire to maintain a relationship with the father.

Matter of William S.L.
(2d Dept., 6/16/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition

In this permanent neglect proceeding, the Second Department concludes that the family court should have entered a suspended judgment, as requested by the mother and the attorney for the child, rather than terminate the mother's parental rights.

Although the child had been in foster care for several years, the mother engaged in regular phone conversations with the child at least once a week. Following a difficult pregnancy with her younger child, which impeded her ability to travel from her apartment in upper Manhattan to the agency in Queens, where visitation occurred, she had been regularly visiting the child. The child continued to refer to the mother as her mother and her foster parent as her auntie. There is a strong bond between the child, and the mother and the mother's younger child. The mother completed a drug treatment program and was drug free, attended a parenting class and intended to attend additional classes, underwent a mental health evaluation, and was receiving therapy and preventive services. Following the child's placement in foster care, the mother, who was twenty years old and living in a group home in foster care at the time she gave birth to the child, obtained an associate's degree and secured an apartment. In a derivative neglect proceeding involving the younger child, the mother was granted a suspended judgment which has expired.

Matter of Grace G.
(2d Dept., 5/5/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Dispositional Hearings
- Suspended Judgment/Violations

The Fourth Department rejects the mother's contention that the court erred in failing to hold a separate dispositional hearing and terminating parental rights after finding that the mother failed to comply with several terms of a suspended judgment.

A hearing on a petition alleging that the terms of a suspended judgment have been violated is part of the dispositional phase of a permanent neglect proceeding. There was no need for an additional hearing since the court conducted a lengthy hearing that addressed both the alleged violations of the suspended judgment and the children's best interests. A parent's noncompliance with the terms of a suspended judgment constitutes strong evidence that termination of parental rights is in a child's best interests.

Matter of James D.
(4th Dept., 11/12/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition

In this abandonment proceeding, the Third Department, in rejecting the mother's contention that the family court should have entered a suspended judgment, notes that a suspended judgment is not a permissible disposition following a finding of abandonment.

Matter of Micah L.
(3d Dept., 3/18/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Disposition/Substance Abuse And Mental Health Issues

The California dependency statutes require the court to hold a hearing at which the court determines whether to terminate parental rights. To ease the court's difficult task in making this important decision, the statute provides a carefully calibrated process. Even if a court finds by clear and convincing evidence that the child is likely to be adopted, the parent may avoid termination of parental rights by establishing at least one of a series of enumerated exceptions. If the parent establishes that an exception applies, the statute sets out additional steps for selecting a permanent plan for the child that preserves parental rights.

In this case, the court found that the parent had established the first of the listed exceptions - the parental benefit exception. This exception applies where the parent has maintained regular visitation and contact with the child, the child would benefit from continuing the relationship, and termination of that relationship would impose a detriment on the child. The Court of Appeal reversed, holding that because the parent continued to struggle with substance abuse and mental health issues and because of the risks of foster care and benefits of the potential adoptive home, no reasonable court could find that the child's relationship with his parent outweighed the benefits of adoption.

The California Supreme Court reverses. The Court of Appeal did not explain how the parent's struggles related to the specific elements of the statutory exception: the importance of the child's relationship with the parent or the detriment of losing that relationship. Instead, the appellate court treated the lack of progress in addressing substance abuse and mental health issues as a categorical bar to establishing the exception. That conclusion was mistaken. Indeed, the parental-benefit exception can apply only when the parent has not made sufficient progress in addressing the problems that led to dependency.

The parent's struggles with issues such as those that led to dependency are relevant only to the extent they inform the specific questions before the court: would the child benefit from continuing the relationship and be harmed, on balance, by losing it? The court cannot determine the fate of the parental relationship by assigning blame, making moral judgments about the fitness of the parent, or rewarding or punishing a parent, nor are a parent's struggles relevant simply because they might conceivably affect the parent's ability to regain custody of the child. If termination of parental rights would, when weighed against the offsetting benefits of an adoptive home, be detrimental to the child, the court should not terminate parental rights, even if the parent has not demonstrated a likelihood that he or she will ever be able to regain custody.

In re Caden C.
2021 WL 2150620 (Cal., 5/27/21)

TPR: Appeals

TERMINATION OF PARENTAL RIGHTS - Appeal/Mootness

The First Department concludes that the mother's appeal from the order of disposition that terminated her parental rights has been rendered moot by the child's subsequent adoption.

Matter of Kayalionna S.C.
(1st Dept., 1/26/21)

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). *Kayalionna S.C.* (and other like decisions) and *Jayden N.* can be reconciled if the state regulatory bar to filing is an issue that must be raised during the adoption process.

If the Appellate Division reverses the underlying TPR fact-finding order, the parent could make a motion to vacate the adoption pursuant to CPLR 5015(a)(5) (motion upon ground of "reversal, modification or vacatur of a prior judgment or order upon which it is based"). Relief under CPLR 5015 is discretionary, and a parent's failure to at least seek a stay of adoption proceedings may well be taken into account by a judge.

Certain states have taken care to ensure that the mootness problem does not arise. For instance, an Illinois statute, IL ST S. Ct. Rule 305 (Automatic Stay Pending Appeal of Termination of Parental Rights), states that "[a]n order terminating the parental rights of any person that is entered in a proceeding initiated under the Juvenile Court Act of 1987 shall be automatically stayed for 60 days after entry of the order of termination. If notice of appeal is filed with respect to the termination order within the 60 days, the automatic stay shall continue until the appeal is complete or the stay is lifted by the reviewing court. If notice of appeal is not filed within the 60 days, the automatic stay shall expire." Rule 305(e)(1). However, "[a] party to the Juvenile Court Act proceeding in which a termination order was entered or a party to an adoption proceeding delayed by the effect of this rule may file a motion with the reviewing court to lift the automatic stay of a termination order. The stay of an order terminating parental rights may be lifted when it is clearly in the best interests of the child on motion or by the court sua sponte." Rule 305(e)(4).

A Michigan statute, M.C.L.A. 710.56 (Entry of order of adoption; conditions, limitations, and requirements), states that "if a petition for rehearing or an appeal as of right from an order terminating parental rights has been filed, the court shall not order an adoption until" relief has been denied in connection with the petition or appeal. M.C.L.A. 710.56(2). If an application for leave to appeal has been filed with the Michigan Supreme Court, the court shall not order an

adoption until relief is denied. M.C.L.A. 710.56(3). *See also In re JK v. Kucharski*, 661 N.W.2d 216, 225 (Mich. 2003) ("Further, to allow such an adoption to occur would be to distort the nature of this Court's review of the termination decision by requiring, as an effective precondition to reversal of the termination order of the trial court, that we be prepared also to undo an adoption that has become a fait accompli. Parents whose rights have been terminated by the trial court are entitled to appellate review of this decision without that review being compromised by the specter of appellate courts having to undo an adoption as a concomitant act to the granting of relief for those parents.").

In *In re Adoption of P.A.C.*, 933 N.E.2d 236 (Ohio 2010), where paternity proceedings were pending at the same time as an adoption proceeding, a Ohio Supreme Court majority held that when an issue concerning the parenting of a minor is pending in the juvenile court, a probate court must refrain from proceeding with the adoption of that child, and the determination of a parent-child relationship in the juvenile court proceeding must be given effect in the stayed adoption proceeding. *See also Matter of Adoption of C.B.M.*, 992 N.E.2d 687, 693-695 (Ind. 2013) (mother was not required to file stay in order to preserve meaningful appellate remedy, and became entitled to relief from adoption when TPR was "reversed or otherwise vacated" on appeal); *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41 (Mo. 2004) (proceeding with adoption while termination is reviewed on appeal compromises parent's right to appellate review by requiring, as effective precondition to reversal, that appellate court be prepared to address separate adoption proceeding).

IV. CUSTODY/GUARDIANSHIP/VISITATION

Jurisdiction/Service Of Process

CUSTODY - Service Of Process/Jurisdiction

The Second Department reverses an order that dismissed the mother's custody petition on the ground that the court lacked jurisdiction over the father because of faulty proof of service.

Service without New York State may be made in the same manner as service is made within the state. Here, the mother submitted an affidavit from a process server that established service upon the father in Honduras. Since the record contains no sworn denial by the father of receipt of service, with specific facts to rebut the statements in the process server's affidavit, no hearing on the validity of service was necessary.

Matter of Reyes v. Munoz
(2d Dept., 11/10/21)

* * *

CUSTODY - Jurisdiction

The First Department concludes that New York lacks jurisdiction over this custody matter, noting that respondent's prior appearances and execution of a stipulation in family court do not constitute a waiver of her subject matter jurisdiction defense. A defect in subject matter jurisdiction may be raised at any time by any party or by the court itself, and subject matter jurisdiction cannot be created through waiver, estoppel, laches, or consent.

Matter of Hook v. Snyder
(1st Dept., 4/22/21)

* * *

FAMILY OFFENSES - Jurisdiction

The Second Department upholds the family court's determination that it did not have subject matter jurisdiction to entertain this family offense petition on the ground that another state had exclusive continuing jurisdiction over the parties' custody and parental access dispute, and the order of protection petitioner was seeking would have necessarily affected respondent's parental access rights.

Family Court Act § 154-e provides petitioner with the ability to enforce in New York an order of protection entered in another state.

Matter of Santana v. Pena
(2d Dept., 7/21/21)

* * *

ABUSE/NEGLECT - Jurisdiction

The Third Department reverses the family court's order declining to accept a transfer of jurisdiction from a Tennessee court for purposes of disposition in a neglect proceeding. New York was the children's home state.

The family court had discretion to decline jurisdiction if it determined, upon consideration of the statutory factors, that it was an inconvenient forum under the circumstances and that a court of another state was a more appropriate forum. But the court did not consider the statutory factors before declining to accept jurisdiction.

The court erroneously relied on CPLR 327(a), which allows for the dismissal of a civil action "[w]hen the court finds that[,] in the interest of substantial justice[,] the action should be heard in another forum," and, in doing so, erroneously relied upon DSS's hearsay statements regarding the alleged findings of an ICPC review.

The record is sufficient to permit this Court to independently consider and weigh the relevant statutory factors, and the Court concludes that the family court is in a better position to efficiently and expeditiously decide the matter, particularly given its prior entry of FCA Article Six orders pertaining to the older child.

Matter of Diana XX. v. Nicole YY.
(3d Dept., 1/21/21)

Standing

VISITATION - Standing

Petitioner in this visitation proceeding was adjudicated the biological father in September 2018, shortly before the mother's parental rights were terminated in December 2018. Custody was transferred to the agency, and the permanency goal was placement for adoption. The attorney for the child moved to dismiss the visitation petition for lack of standing, arguing that the permanency goal was adoption and petitioner was a mere notice father. The agency joined in the AFC's motion, and, upon a hearing, the court determined that petitioner was a notice father only and granted the motion.

The Fourth Department affirms. Inasmuch as petitioner's consent to adoption was not required, petitioner lacked standing.

Matter of Amos v. Erie County Department of Social Services
(4th Dept., 2/11/21)

* * *

VISITATION - Standing/Former Foster Parent

The Court grants the father's request for termination of visitation awarded to the former foster mother following the child's return to the father. The State may not interfere with the father's right to choose those with whom the child associates unless the State shows a compelling State purpose which furthers the child's best interests. No such showing has been made here. A former foster parent may gain standing to petition for custody by proving extraordinary circumstances, but not standing to seek visitation. The rule against non-parents seeking visitation has been relaxed due to evolving concepts about who may be defined as a parent. However, those cases deal with situations where the parties agreed to raise a child together.

The father's decision to sever this relationship is not in the child's best interest, but the Court lacks the authority to prevent that from happening.

Matter of J.W. v. K.M.
(Fam. Ct., Franklin Co., 9/2/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21231.htm

Right To Counsel

CUSTODY - Right To Counsel

In 2015, the family court approved a custody and visitation agreement between the parties - the maternal grandmother, the mother, and the great aunt - under which they agreed to share joint legal custody of the child, with the great aunt having primary legal custody and the mother and the grandmother having "secondary legal custody."

The grandmother filed a modification petition seeking physical custody, as well as an enforcement petition alleging that the great aunt had violated the 2015 order by, among other things, having the child circumcised without notice to the mother or grandmother and without "proof that [it was] medically necessary." The family court denied the grandmother's request for assigned counsel on the ground that she was "not a physical custodian." Subsequently, the mother filed modification and enforcement petitions of her own, seeking sole legal and primary physical custody or, alternatively, placement with the grandmother. At an appearance on the mother's petitions, the court again advised the grandmother that she was not entitled to assigned counsel.

The Third Department holds that the grandmother was not entitled to counsel under FCA § 262 in connection with her petitions, but she was potentially eligible for the assignment of counsel at the appearance on the mother's petitions because she was listed as a respondent (see FCA § 262[a][iii]). The grandmother jointly shared "secondary legal custody" with the mother, and, accordingly, the mother's request for sole legal custody, if granted, had the potential to alter the grandmother's custodial rights. Moreover, the family court treated the matter as dueling requests for custody between the grandmother and the great aunt, and its determination to award the great aunt sole legal and physical custody of the child fundamentally altered the grandmother's rights.

The matter is remitted for a determination as to the grandmother's eligibility for assigned counsel.

Matter of Renee S. v. Heather U.
(3d Dept., 6/10/21)

Medical And Mental Health Issues/Evaluations/Discovery

CUSTODY - Court-Ordered Psychological Evaluations

The Fourth Department reverses an order granting sole custody to the father, agreeing with the mother that the family court erred in making its custody determination before the parties had completed psychological evaluations ordered by the court.

In custody disputes, the value of forensic evaluations of the parents and child has long been recognized. The assistance of psychological experts in custody proceedings may be necessary where the child has exhibited emotional and behavior problems, there is sharply conflicting testimony regarding the conduct of the parties, or a party's mental health is at issue.

The mother's mental and emotional health was the central issue contested in this proceeding. Although a psychological expert testified at the fact-finding hearing on behalf of the father, that expert interviewed the parties and the subject child to assess whether the child had been sexually abused, and therefore he did not provide much information regarding the mother's emotional functioning, the impact her mental health issues had on her ability to parent the child, or the fitness of either parent.

Matter of Pontillo v. Johnson-Kosiorek
(4th Dept., 7/16/21)

* * *

VISITATION - Medical Issues/Refusal To Be Vaccinated Or Tested

In this divorce case involving a three-year-old child, the mother asks the Court to condition the father's supervised access on the father and the supervisor being vaccinated, or submitting to a testing regimen prior to access periods.

The Court grants the mother's request. Children under the age of twelve have not yet been approved to receive COVID-19 vaccines, so they are dependent upon the vaccination and health status of the adults around them. The danger extends beyond this child and includes a risk of serious infection to any person with whom the child comes into contact, including the mother, and the child's classmates and their families. The child's preschool requires that teachers, other staff, and any parent who participates in pick-ups or drop-offs or is otherwise involved in any school activity be vaccinated. It is not necessary to fully address defendant's reasons for not being vaccinated since he was offered an alternative - submit to regular COVID-19 testing - and has thus far rejected it.

C.B. v. D.B.
(Sup. Ct., N.Y. Co., 10/7/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21268.htm

* * *

CUSTODY - Decision-Making Authority/Health Care

The parties share join custody of their daughters - 8 and 10 years old - and have diametrically opposed opinions about whether the children should be vaccinated against COVID-19. The mother states that she and her partner are vaccinated and have received boosters. The father admits that he is unvaccinated.

The Court orders an evidentiary hearing to address the following issues: 1) whether the parties are now unable to communicate without animosity regarding COVID-related medical decision making; and 2) whether the father has cooperated and complied with the April 2020 so-ordered agreement to follow NYC and NYS guidelines. The immediate question presented to this Court is not whether the parties should vaccinate or not vaccinate the children. The immediate question is whether the Court should continue joint custody on the limited issue of COVID health care or must carve out a sphere of influence on this limited issue.

B.S. v. A.S.
(Sup. Ct., Kings Co., 12/21/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21349.htm

* * *

CUSTODY - Health Issues/COVID Vaccination

In this joint custody scenario, the Court concludes that the eleven-year-old child should be vaccinated against the COVID virus where her father, citing a series of factual concerns articulated on published websites, disagrees. The father's objections, while sufficient to raise some substantive concerns, are not sufficient to deter the Court from concluding that the best interests of the child require issuance of an order that the child be vaccinated as soon as possible. A court, faced with a disagreement between the parents over the necessity for a vaccine, can intrude into the family unit and order the child vaccinated.

The child is eligible for the vaccine. She wants to receive the same vaccine as her older sister and her mother. The father is fully vaccinated. The dangers posed by the unvaccinated child are easily forecast. The father wants to wait and see what further research demonstrates regarding the efficacy of the vaccine and the impact of short and long-term side effects. But it could be years before researchers ascertain the short or long-term consequences, and waiting only amplifies the risks to this girl.

J.F. v. D.F.
(Sup. Ct., Monroe Co., 12/3/21)

https://www.nycourts.gov/reporter/3dseries/2021/2021_21327.htm

* * *

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

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

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

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

* * *

VISITATION - Mental Health/Drug/Domestic Violence Issues

The Third Department affirms an order, issued upon a fact-finding hearing, directing that the mother would retain sole legal and primary physical custody, but granted the father unsupervised parenting time on a fixed schedule.

The family court expressly evaluated the allegations against the father, and ordered the father to refrain from loud or confrontational arguments in the child's presence and from using marihuana during his parenting time. The court also addressed the father's behavior during the hearing, where he became argumentative. The father was ordered to attend at least two domestic violence sessions and to follow any recommendations, and the court encouraged him to address any anger management issues for the child's sake.

Matter of Damon B. v. Amanda C.
(3d Dept., 6/3/21)

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

VISITATION - Child's Wishes

The Second Department reverses the family court's determination directing the parties to comply with the terms of a 2014 order with respect to unsupervised parental access between the father and the ten-year-old daughter. A full forensic evaluation of the parties is warranted.

The relationship between the father and the daughter is highly strained and she has refused to participate in visits. Although the mother and the now eighteen-year-old son may have negatively influenced the daughter's views about the father, the court should have considered the daughter's strong feelings against the father and refusal to attend the visits.

Matter of Johnson v. Kelly
(2d Dept., 4/7/21)

* * *

VISITATION - Delegation Of Court's Authority
- Child's Wishes
- Lincoln Hearings

The Third Department concludes that the family court improperly delegated its authority to the younger child when it ordered that the mother's visitation would be only as she and the younger child could agree. The court's rationale - that a teenager cannot be forced to do something he or she does not want to do - falls far short of satisfying its obligation to provide the mother with frequent and regular access to the child and does nothing to support a healthy, meaningful relationship between the two. There is nothing in the record demonstrating that visits would be harmful to the child, and, given his feelings toward the mother at that time, visitation conditioned upon his agreement was untenable.

The error has been amplified by the inherent length of the appellate process. The mother has now gone years without visits with the child, and he is now nearly eighteen years old and likely will reach the age of majority before the court has the opportunity to address its mistake. "This underscores the importance of enabling some form of visitation between a parent and child wherever possible."

Finally, in a footnote, the Court observes that, given the younger child's close relationship with his older brother - who had clashed with the mother long before the commencement of these proceedings and had already been residing with the father for some time - the better practice here would have been to hold separate Lincoln hearings for each child. It is impossible to know what the younger child may have shared if provided a more appropriate, and truly confidential, forum.

Matter of Cecelia BB. v. Frank CC.
(3d Dept., 12/23/21)

* * *

CUSTODY - Defaults
- Evidence/Inference From Failure To Produce Child For Lincoln Hearing
JUDGES - Bias

In this custody matter in which legal and physical custody was awarded to the father, the Third Department rejects the argument made by the father and the attorney for the child that the mother's

appeal must be dismissed because the order was properly entered on the mother's default. The mother made an opening statement; extensively cross-examined the father, whose testimony extended over the first three days of the hearing; partially completed cross-examination of the child's teacher; filed a written summation; made numerous objections during the hearing; and offered several exhibits into evidence. When she failed to appear or alert the court that she would be unable to attend, the court acted within its discretion in closing the proof.

However, the order is affirmed. The court properly drew a negative inference against the mother - specifically, an inference that the child would have confirmed the AFC's assertion that the child wished to return to school and spend more time with his father - for failing to bring the child to a Lincoln hearing. The AFC confirmed that the child was willing to participate.

Recusal was not required where the mother posited that the court would have difficulty remaining impartial due to the mother's vocal advocacy for Family Court reform, which included various writings in which she described the judge in a negative manner; and the mother also noted that she had named the judge as a defendant in a federal lawsuit and claimed that his prior rulings against her demonstrated bias.

Matter of Patrick UU. v. Frances VV.
(3d Dept., 12/2/21)

* * *

CUSTODY - Relocation/Child's Wishes

The Third Department reverses an order awarding the parents joint custody of their son, with primary physical custody to the father, who had relocated to Massachusetts.

The Court notes that the son is strongly bonded to the mother and has lived with her for the last six years since the father moved to Massachusetts, except for short periods of visitation with the father; that the son has had very little visitation with the father since the 2019 holiday season due largely to the COVID-19 pandemic; and that given the son's age (born in 2005), and evidence of how intelligent he is, the family court did not give proper weight to his wishes.

Matter of Daniel G. v. Marie H.
(3d Dept., 7/1/21)

* * *

CUSTODY/CONTEMPT - Lincoln Hearing

In a contempt proceeding brought by the father, which derives from an order that restricted the mother's actions in accordance with a joint custody agreement, the mother requests that a Lincoln hearing be conducted.

The Court denies the request, concluding that conducting a Lincoln hearing in a proceeding in which the only relief sought is contempt is inappropriate. The primary issue is not the best interests of the children; rather, it is the alleged misconduct of the mother, and so the mother's due process rights are paramount.

Although the mother argues that the voice of the children may be a factor in deciding whether the father has been "prejudiced" and asserts that the children would testify that they have no interest in visiting their father, the mother's unremedied violation of a court order that restricts her ability to unilaterally enroll her sons in activities until they visit their father sends a message to her sons that the agreement giving their father visitation is meaningless and cannot be enforced by the courts. Such conduct impairs and impedes the father's bargained-for rights as a joint custodial parent.

Matthew A. v. Jennifer A.
(Sup. Ct., Monroe Co., 5/21/21)
http://nycourts.gov/reporter/3dseries/2021/2021_21166.htm

* * *

ABUSE/NEGLECT - Disposition/Hearing
- Right Of Confrontation/In Camera Testimony Of Child

After a dispositional hearing, the family court continue placement of the child with the paternal great aunt until the completion of the next permanency hearing.

The Second Department, citing *Lincoln v. Lincoln* (24 N.Y.2d 270), concludes that the family court did not deprive the mother of her right to due process at disposition by interviewing the child in camera outside of the presence of the mother and her counsel, while allowing the mother's counsel to submit to the court proposed questions for the interview.

At the fact-finding stage of a child protective proceeding, the due process rights of the respondent must be carefully balanced against the mental and emotional well-being of a child witness. However, at the dispositional hearing, where the court's sole focus is the best interests of the child, the court has the inherent discretionary power to conduct the proceedings so as to avoid placing an unjustifiable emotional burden on the child, while allowing the child to speak freely and candidly.

Matter of Bryce E.W.
(2d Dept., 4/7/21)

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VISITATION - Child's Wishes/Interference With Parent-Child Relationship

So that the children will attend visitation consistent with their parents' agreement, this Court orders both parents to impose the following house rules:

(1) The children will both attend visitation as required by their parent's agreement; and
(2) In the event either child fails to attend visitation as their parent's agreement requires, then each parent shall take the following actions when the non-compliant child is within their household:
(A) no permission for extracurricular activities shall be granted by either parent and any permission for current extracurricular activities shall be immediately revoked;
(B) the child shall not be transported to any extracurricular activity;
(C) the child may not participate or attend any camp, summer program or other activities;
(D) any electronic devises, including but not limited to, computers, cell phones, tablets, watches, play stations or similar electronic devices or other internet communication devises shall be confiscated and removed from the child's use;
(E) the child shall not be permitted to have access to any social media tools, including Facebook, Instagram or any other such devices and the child may not review such social media or participate in any way in such activity;
(F) no friends or peers of the child may enter the child's primary residence and the child may not visit any other peer or friend away from the child's residence;
(G) the child may attend family events but only in their own residence and may not travel to any family member's residence without both parents' permission;
(H) the child may not travel outside Monroe County for any purpose; and
(I) when the child returns to school, the child must return home immediately after the end of school and may not participate in any school-related activities or extracurriculars.

These "house rules" shall be placed in effect by each parent until the child visits in accord with their parent's visitation agreement. Upon the child's compliance with the visitation schedule, the parents may suspend these rules but, if the child fails to comply in the future, each parent must reimpose the rules immediately. These rules bind the parents to take the actions described above if the children fail to follow the agreed best interests plan for visitation set forth by their parents.

The Court notes, inter alia, that a parent who does nothing when a child refuses to follow an agreed visitation plan undercuts the other parent's relationship by denying the child contact with the other parent and eviscerates the couple's determination, enshrined in their agreement, that visitation was in the child's best interest; that in imposing the house rules, the Court is ordering the parents to engage in actions that are designed to put teeth into what they have already agreed will be beneficial to their children; that "the theory is that the Court removes the parent as the party responsible for the discipline and instead, inserts the Court" so that neither parent can be blamed for the disciplinary measures; and that the message to the children is that "if you fail to follow your parent's agreed wishes, you suffer a penalty in the withdrawal of privileges and other options that a child would enjoy."

E.E.C. v. S.S.
(Sup. Ct., Monroe Co., 7/23/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21258.htm

* * *

CUSTODY - Mixed-Race Child
- First Amendment Issues

In this custody proceeding involving the unmarried parents of a mixed race daughter, the Third Department notes that if he mother does not remove by June 1, 2021 the small confederate flag painted on a rock near her driveway, which she has a First Amendment right to display, "its continued presence shall constitute a change in circumstances and Family Court shall factor this into any future best interests analysis."

Matter of Christie BB. v. Isaiah CC.
(3d Dept., 5/6/21)

* * *

CUSTODY - Order Of Protection/Appeal
- Virtual Hearings

In this appeal from an order which granted the father sole legal and physical custody and a final order of protection against the mother, the First Department first concludes that even if the order of protection has expired, the appeal is not moot, given the order's enduring consequences.

The mother has failed to demonstrate that either the order of protection or the custody order should be disturbed. Her contention that technological issues at the virtual hearing precluded her from adequately presenting her case is unpreserved and conclusory. Her counsel objected at one point to being rushed by the court, but the mother failed to show that counsel was prevented from asking questions or otherwise hampered by the court's time constraints, which were imposed in an even-handed manner against all parties and in consideration of the extraordinary circumstances presented by the Covid-19 pandemic.

Matter of Francisco A. v. Amarilis V.
(1st Dept., 10/5/21)

* * *

VISITATION - Right To Testify/Telephonic Testimony

In this grandparent visitation proceeding, the Fourth Department rejects the father's contention that the family court erred by precluding the mother from testifying by telephone. Although a court has inherent authority to grant permission to testify remotely, no excuse was offered for the mother's absence and the court specifically noted that it would be difficult to assess her credibility if she testified remotely.

Matter of Ferguson v. LeClair
(4th Dept., 2/5/21)

* * *

VIRTUAL HEARINGS

In this case in which claimant seeks damages for an alleged wrongful conviction, the Court, citing Judiciary Law § 2-b(3) and *People v. Wrotten* (14 N.Y.3d 33), concludes that it has the authority to order the trial on liability to be conducted remotely; and that the Court should exercise that authority in this case.

There is an exceptional circumstance in this case: the COVID-19 pandemic. All courts confronted with the question during the past year have found it both permissible and advisable to compel a party to participate in virtual proceedings. Defendant's proposed alternative to proceeding remotely - waiting out the pandemic and conducting an in-person proceeding at whatever point it might be safe to do so, and permitted by orders issued by the Chief Administrative Judge - is no alternative at all. Given the progress of the virus in successive waves, the presence of new strains, and the uncertain course of vaccine distribution, no one can say with any assurance when in-court proceedings will again be possible. Merely to avoid the possible delay of minutes or even hours that can result from technical problems, the Court will not choose to delay the entire proceeding for many months.

Improvements in video technology now facilitate transmission of virtual images that are clear and closeup, and allow for sufficient consideration of a witness's demeanor.

Bonilla v. State
2021 WL 318406 (Ct. Claims, 1/22/21)

* * *

CUSTODY - Remote Hearing

In this custody proceeding in which the Court, upon a remote hearing, awards sole legal and physical custody to the mother, the Court begins by asserting that although the COVID-19 pandemic called for flexibility, cooperation and an ability to pivot so that cases can be resolved and courts can do their work, "counsel for both the mother and father in this matter have revealed themselves to be inflexible, disrespectful, and obstructionist."

The Court notes, inter alia, that the exceptional circumstance permitted the Court to conduct a virtual proceeding under its broad powers and discretion pursuant to Judiciary Law 2-b(3); that the parties submitted direct testimony affidavits as required by a pre-trial order, and exchanged exhibits as directed, but failed to submit a statement of undisputed facts as required by the pre-trial order; that counsel have only themselves to blame for their refusal to ask more targeted questions that elicited critical testimony which reached the crux of the issues, and they intended to ask numerous questions of the parties without any limitation and to proceed without regard to the pandemic, the directives of the Court, or the overall needs of the court system; that there was no denial of due process or basic rights and no prejudice to either of the parties caused by the use of affidavits or the Court's limitation of trial time; and that both parties were given an additional opportunity at trial to tell the Court in their own words why they should maintain or be granted custody, and also had an opportunity to cross-examine the other party and to submit written summations.

S.N. v. J.A.
(Fam. Ct., Bronx Co., 4/12/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50304.htm

Relocation, Travel, Incarceration And Related Issues

CUSTODY - Relocation Issues

After several years of sharing custody without a court order, the father, upon relocating to Rochester, filed a petition for sole legal and physical custody of the children. The mother, who lived in Brooklyn, opposed the father's petition. After a hearing, the family court awarded sole legal and physical custody to the mother, with parental access to the father.

The Second Department reverses and awards sole legal and physical custody to the father, noting, inter alia, that the court gave too much weight to the mother's lack of transportation without considering that transportation could be provided by the father.

Matter of Ofori v. St. Louis
(2d Dept., 3/10/21)

* * *

CUSTODY - Relocation

The First Department affirms a determination granting the mother's petition to relocate temporarily to Chicago with the children pending completion of the hearing on custody, visitation, and relocation.

The mother showed that relocation was in the children's best interests, given the father's failure to pay child support, and how the maternal grandparents would provide her and the children with stability, emotional support, and financial support, in the form of a place to live, free childcare, and paid-for private school tuition.

The father's accrual of approximately $40,000 in support arrears, and failure to contribute to the children's educational or other expenses are a stark contrast to the economic and educational benefits to the children to be gained upon relocation, which justify relocation notwithstanding any disruption in frequency of contact between him and the children.

Matter of Jamee G. v. John B.
(1st Dept., 12/2/21)

* * *

CUSTODY - Relocation

The Third Department upholds an order granting the mother's request to relocate to South Carolina with the children and directing that the father could send the children letters four times per year, with such letters subject to the mother's review.

The mother's primary motivation was her desire to be closer to the maternal grandparents, who planned to build an addition on their home to accommodate the mother and the children and offered to purchase the mother and the children a mobile home to live in on their property while the addition was being completed. The mother hoped to save money to eventually purchase a home in South Carolina, where the cost of living is significantly lower than in Broome County. The grandparents also offered to provide free child care. The mother stated that she had reached her maximum earning capacity as a licensed practical nurse in Broome County and would have a greater earning potential were she to become a registered nurse.

The father was serving an extended period of incarceration and there had been little contact between the father and the children following his arrest and conviction. The mother maintains contact with the children's half siblings' mothers and they would coordinate visitation.

Matter of Celinda JJ.
(3d Dept., 10/28/21)

* * *

CUSTODY/VISITATION - Incarcerated Parent/Change In Circumstances

The Third Department upholds dismissal of the father's custody modification petition, but, noting that the family court did not address the issue of change in circumstances, concludes that the father did establish such a change where the prior order was based on the father's incarceration at that time. Although release from incarceration is generally not enough on its own, such release combined with a prior order that bases custody or visitation on a condition no longer in existence may warrant a finding of a change in circumstances.

Matter of Leah V. v. Jose U.
(3d Dept., 6/3/21)

* * *

CUSTODY - Relocation
- Mental Health Counseling

The Fourth Department affirms an order that granted the cross petition of the mother for permission to relocate with the child to Arizona, noting, inter alia, that the court considered, and did not countenance, the mother's decision to remove the child from the jurisdiction without permission, but determined that the mother did not relocate to separate the father from the child and acted in good faith to escape the threat of domestic violence.

The court did not err in conditioning the mother's payment for the child's travel to Monroe County for visitation upon the father's attendance at counseling. If the father refuses to attend counseling, he may exercise visitation by traveling to Arizona or by paying for the child's travel to Monroe County.

Matter of Edwards v. Ferris
(4th Dept., 7/9/21)

* * *

CUSTODY - Relocation/Hearing Requirement

The Court, without appointing an attorney for the child, ordering a forensic evaluation, holding an evidentiary hearing, or conducting any necessary in camera interview with the child, grants plaintiff mother's post-divorce request for permission to relocate with the parties' nine-year-old child to Scarsdale in Westchester County, which is approximately twenty miles from her current residence in Manhattan's Upper West Side, where defendant father lives in the suburbs in Northeastern New Jersey.

The Court notes that the COVID-19 pandemic, as things stand now, cannot be viewed as a factor favoring relocation; that defendant, having chosen the benefits of suburban life, is scarcely in a position to complain that plaintiff wants those benefits for the child and herself; that the proposed move will have little to no impact on the quality or quantity of defendant's parenting time; and that this is one of the rare cases in which a determination may be based on motion papers alone because there are no disputes as to facts essential to the Court's analysis.

H.K. v. R.C.
(Sup. Ct., N.Y. Co., 7/15/21)
https://www.nycourts.gov/reporter/3dseries/2021/2021_21190.htm

* * *

CUSTODY - Relocation

The Second Department agrees with the mother's contention that the family court erred in deciding her motion to enjoin the father's move with the child to New Jersey without considering the factors set forth in *Matter of Tropea v. Tropea*. The 2016 order required the consent of the other parent or a court order if either party wished to "relocate beyond a 25 mile radius," but did not address or automatically permit moves within a 25-mile radius.

Matter of Conroy v. Vaysman
(2d Dept., 2/24/21)

* * *

CUSTODY - Relocation

The Third Department upholds a determination permitting the father to relocate with the children to Florida.

The father has been the children's primary caretaker since approximately 2016. The family would move into the home of the children's paternal grandfather, who owns a four-bedroom, two-bathroom mobile home in Florida. The father was recently added to the deed of the grandfather's residence, providing him with a right of survivorship, and, by selling his home, the father would avoid an approximately $98,000 balloon payment scheduled to come due on a private mortgage, and potential foreclosure. According to the father, relocation would save the family approximately $19,000 per year. His current employer has a branch located near the grandfather's home. Relocation would provide the father and his current wife, a medical assistant, home health aide and certified nursing assistant, the ability to assist in caring for the grandfather, who suffers from various medical issues.

The mother is unemployed and lives in a trailer with her mother, stepfather and nephew, where she sleeps on the couch. The children have not spent the night at the mother's residence in nearly 3½ years. There is a history of domestic violence between the mother and the grandmother, including one incident that occurred while the children were present.

Although the court credited the strides that the mother had made in addressing her substance abuse issues and recognized that relocation would undoubtedly harm the mother's ability to see and continue to develop her relationship with the children, the court took measures to mitigate these detrimental effects.

Matter of Anthony F. v. Kayla E.
(3d Dept., 2/18/21)

* * *

CUSTODY - Relocation
- Interference With Parent-Child Relationship

The Fourth Department, noting that this case involves an initial custody determination and is thus not a relocation case governed by Matter of Tropea v. Tropea, rejects the mother's contention that the court erred in denying her request to relocate with the child to North Carolina.

The child's relationship with the father would be adversely affected because of the distance between Jefferson County and North Carolina. Although the mother had stronger family ties to North Carolina than to New York, her plans for housing, employment, and schooling in North Carolina were not well developed, and the child had shown a marked improvement in behavior after the father's parenting time was increased.

The court erred in award the mother primary physical residence. Both parents were fit and had appropriate residences and financial resources, but the mother had repeatedly attempted to undermine the father's relationship with the child, while the father did not engage in such behavior.

The parties should share joint custody and enjoy equal parenting time on an alternate week schedule, but primary physical residence is awarded to the father.

Matter of Johnson v. Johnson
(4th Dept., 3/26/21)

* * *

CUSTODY - Relocation Issues

In a case involving an agreement that provides that the parents will reside in the same geographic area and enjoy shared custody and equal visitation time, the Court concludes that the father's relocation outside the geographic restriction in the agreement is a change in circumstances that could warrant all the relief sought by the mother, who seeks enforcement of the geographic restriction, "primary full custody" of the children, changes in visitation times, and a recalculation of child support paid by the father.

Some New York appellate courts that have considered breaches of a geographic restriction have held that the best interests of the children required enforcement of the custody arrangement negotiated by the parties. However, that "hold-a-party-to-the-terms-of-their-bargain" preference seems to have faded in the appellate landscape. It seems that the father's undisputed violation of the agreement is, by itself, not a basis for changing custody or visitation but merely a factor to be considered in discerning the best interests of the children under a relocation analysis.

The Court refers the matter for a hearing, and, as a result and specifically in view of the father's breach of the agreement, awards the mother counsel fees.

H.P. v. D.P.
(Sup. Ct., Monroe Co., 12/13/21)
https://nycourts.gov/reporter/3dseries/2021/2021_51188.htm

Joint Custody

CUSTODY - Domestic Violence/Mental Health Issues
- Joint Custody

The Third Department upholds an award of joint legal and shared physical despite a history of domestic violence by the father and the mother's serious mental health issues.

The Court does not seek to diminish the physical, mental and emotional harm inflicted upon the mother by the father. Indeed, joint legal custody is generally inadvisable where there is a history of domestic violence. But both the mother and the father are loving and involved parents and the child is bonded with each parent. Despite their history, the parents have been able to effectively communicate about the child.

Matter of Austin ZZ. v. Aimee A.

(3d Dept., 2/18/21)

Violations/Contempt/Interference With Parent-Child Relationship

CUSTODY/VISITATION - False Allegations Of Sexual Abuse
- Mental Health Issues
- Child's Wishes

The Second Department concludes that the mother should have liberal, unsupervised parental access, noting that the father's allegations that the now ten-year-old child was sexually assaulted by her older sister when the child was two and four years old, during periods when the child was in her mother's care, have been investigated numerous times, by numerous child welfare agencies, and have been repeatedly determined to be unfounded; that although the father and the attorney for the child contend that the mother's parental access was properly restricted due to the emotionally violent responses exhibited by the child during more recent interactions with the mother, the record does not support the conclusion that the child's preferences were the natural and expected result of the mother's conduct, or were otherwise motivated by legitimate, substantiated concerns; and that the child's view of her mother was the result of her father's negative influence. The mother's award of liberal parental access may be exercised, in whole or in part, in the mother's sole discretion and without prejudice to her, in a supervised, therapeutic setting.

The Court rejects the mother's contention that the father's conduct in undermining her relationship with the child justifies a change in custody, noting that the record, including the expert evidence, established that it would be traumatic for the child to have the stability of her home life disrupted after so many years by transferring custody to the mother while the child still deeply mistrusts her.

The Court directs the father to engage the child in weekly reunification therapy or other professional counseling with the goal of rebuilding the relationship between the mother and the child. The family court is directed to arrange and supervise this therapy or counseling.

The Court rejects the father's challenge to the award of joint legal custody.

Matter of Brown v. Simon
(2d Dept., 6/16/21)

* * *

CUSTODY - Interference With Parental Custody/Best Interests

On December 12, 2016, the father decided not to bring the child to Albany and meet the maternal grandfather there as planned and, without informing the mother, kept the child in Brooklyn and filed a custody petition, falsely alleging that he was the child's primary caregiver and that the mother was not communicating with him. He later informed the mother that he was not returning the child as planned and falsely told her that he had been granted temporary custody and that she

would be arrested if she came to Brooklyn to see the child. The mother immediately drove to Brooklyn and attempted to see the child, but the locks to the father's apartment had been changed.

After a hearing held upon the mother's custody petition, the family court awarded the parties joint legal custody, with primary residential custody to the father in Brooklyn. Although the court found that the father's actions evinced a "willingness to make material misrepresentations in his sworn pleading" and "to use deception for advantage," and "were clearly contrary to the child's best interests," the court nevertheless concluded that "there is nothing in the record to show that one party is a better parent than the other" and that both "appear to be equally fit and capable of meeting [the] child's needs."

The Second Department reverses. The child's best interests would be served by awarding the mother residential custody in upstate New York and awarding the father liberal parental access.

Matter of Chaloeicheep v. Hanrahan
(2d Dept., 3/24/21)

Grandparents, Siblings and Other Relatives/Extraordinary Circumstances/Best Interests

GUARDIANSHIP - Foster Parent/Kinship Guardianship
- Extraordinary Circumstances

The First Department affirms an order which, after a hearing, granted the foster mother's petition to be appointed kinship guardian.

In 2008, the biological mother was found to have neglected the child by failing to comply with mental health services and meet the child's special developmental needs. The child was placed with the foster mother when the child was approximately four years old and has remained in her care for over ten years.

Extraordinary circumstances existed as a result of the prolonged separation between the child and the biological mother, who failed to gain insight into or even acknowledge the conditions that led to the child's removal from her home, and, instead, denied any mental health-related issues and maintained that the child remained in foster care because the agency wanted to fraudulently collect foster care payments from the government. Her contact with the child was limited to telephone calls and daytime visits in the community because she refused to allow a caseworker to conduct a home visit. She made minimal progress with her service plan, and, at the time of the hearing, had not been in touch with the agency for approximately six months. Prior to that, she failed to attend the family team meetings and provide the agency with any information about her compliance with mental health services. The favorable disposition of a 2013 petition to terminate parental rights does not preclude the findings in this proceeding.

Note: The JRP appeals brief reveals that the foster mother had been the child's babysitter when the child resided with the mother, and that the termination order was reversed on appeal due to insufficient evidence of the mother's mental illness.

Matter of Nicolas Jude B. (Rosetta B. v. Michelle B.)
(1st Dept., 6/1/21)

* * *

VISITATION - Grandparents

The Second Department affirms an order summarily dismissing, for lack of standing under DRL § 72(1), the petition for grandparent visitation where the petition alleged that the paternal grandmother developed a relationship with the child in her first few years of life before a dispute led the parents to cease contact with the grandmother, but the grandmother undertook no efforts to communicate with the child for approximately two years prior to commencing this proceeding.

Matter of Kelly v. Cairo
(2d Dept., 10/27/21)

Visit Supervision And Scheduling

VISITATION - Supervised
ORDERS OF PROTECTION

The First Department concludes that the father failed to show good cause for an extension of a temporary order of protection issued against the mother on behalf of the child where any risk of the mother abandoning or absconding with the child was sufficiently mitigated by a referee temporarily granting sole custody to the father.

However, the family court erred in permitting the mother to have unsupervised access to the child. The mother endangered the welfare of the child by leaving her alone, and, prior to that incident, the mother threatened to leave the child unsupervised and to take the child to Italy without the father's permission.

Matter of Matthew P. v. Linnea W.
(1st Dept., 9/30/21)

* * *

VISITATION/PARENTAL CONTACTS - Delegation Of Court's Authority

The Third Department holds that by ordering that the mother have such visitation with the children "as the parties can arrange," the family court did not improperly delegate its authority. However, the provision directing that the mother's telephone contact with the children occur at the sole discretion of the father was improper. The Court substitutes the "as the parties can arrange" language.

Matter of Matthew E.
(3d Dept., 3/18/21)

* * *

VISITATION - Delegation Of Court's Authority

The Second Department reverses an order that awarded the mother parental access with the child only "as often as both [the child] and [the mother] agree." A court may not delegate its authority to determine parental access to either a parent or a child. Moreover, the court's order creates the potential for influence upon the child, since the stepmother, with whom he lives, is married to the father, who is opposed to the mother having any parental access.

Matter of Clezidor v. Lexune
(2d Dept., 3/10/21)

First Amendment Issues

CUSTODY/VISITATION - First Amendment Issues
- Supervised Visits

The Court denies the mother's request for an order prohibiting the father from posting, on his website or any other social medium, photographs of the parties' son or other identifying information, or the father's orders to show cause in this proceeding. Such an order would constitute an improper prior restraint inconsistent with the First Amendment and well-settled caselaw.

The mother has failed to meet the heavy burden to demonstrate the necessity of a prior restraint. The mother's contentions that there is a risk of harm to their son, and that he will be able to access information on the internet when he is older, are conclusory and speculative at best.

Although Domestic Relations Law § 235 prohibits any person except the party to a matrimonial proceeding or that party's attorney of record from obtaining specified court-related materials, § 235 places no restriction on the parties with respect to how they use their copies of court papers.

However, the Court will restrain the father pursuant to CPLR § 6301 from recording and posting recordings and transcripts of recordings of court proceedings. The Court notes that 22 NYCRR § 29.1(a) clearly prohibits the recording of any proceeding in the courthouse. The judge's conference call with the parties, which the father recorded and posted, occurred while the judge was in the courthouse. Defendant shall remove any unlawful recording from his website or any other social medium.

The Court also concludes that the father's actions do not create a change of circumstances warranting supervised visitation.

K.C. v. S.J.
(Sup. Ct., Bronx Co., 4/2/21)
https://www.law.com/newyorklawjournal/almID/1622013963NY030184420/

Appeals

CUSTODY - Appeal/Record On Appeal

The Second Department reverses a determination awarding sole legal and physical custody to the father, and remits for further proceedings, where the appellate brief submitted by the attorney for the child raises new developments, including allegations that shortly after the child began living with the father, the child reported that the father told her that the mother was evil, and the child stated that she no longer wanted to see the mother at all. The record on appeal is no longer sufficient.

Matter of Magana v. Delph
(2d Dept., 6/9/21)

V. PATERNITY/CHILD SUPPORT

PATERNITY - Equitable Estoppel

In this paternity proceeding, the Fourth Department rejects a contention by the mother and the attorney for the child that the family court deprived them of a fair hearing by concluding the hearing during the mother's cross-examination where they did not make an offer of proof regarding what additional testimony by the child's teacher or any other witness would have established with respect to the equitable estoppel issue before the court.

The evidence established that the father was in fact the biological father; that there had been regular contact between the child and the father and his family for nine years; and that the interruption in that contact appeared to be precipitated by the introduction of the father's girlfriend, at which point the mother ceased to encourage or facilitate the father-child relationship. Those facts are sufficient to support the court's refusal to apply equitable estoppel against the father.

Matter of Alex H. v. Aspyn L.
(4th Dept., 2/5/21)

* * *

PATERNITY - Equitable Estoppel

The First Department finds no error in the family court's determination that equitable estoppel prevented respondent from challenging paternity via DNA testing where clear and convincing evidence demonstrated that the 18-year-old children viewed respondent as their father for their entire lives and respondent held himself out as such, particularly when the children were young; respondent attended prenatal visits, spent time in the hospital visiting with the children after they were born, and continued to spend time with them three to four times a week when they were toddlers; although the time spent diminished when the children grew older and they have moved out of state, they have maintained telephone contact, albeit infrequently; the children have a familial relationship with respondent's mother and relatives; and respondent has purchased clothes and bookbags for the children in the past.

Even though the relationship was limited, it was in the children's best interests to estop respondent from disputing paternity.

Matter of Corporation Counsel v. Tyrone M.
(1st Dept., 2/4/21)

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

TERMINATION OF PARENTAL RIGHTS - Child's Right To Counsel/Guardian Ad Litem

In this termination of parental rights proceeding, the court appointed an attorney to act as the child's guardian ad litem and legal counsel. The attorney argued that termination was in the child's best interest, but never expressly asked the child for his preferred outcome. Ultimately, the court terminated the father's parental rights.

On appeal, the Superior Court found that the attorney's representation was insufficient, noting that it could not ascertain whether the child's legal and best interests were aligned because the attorney never articulated the child's legal interests or suggested that the child was unable to express his preferred outcome. The Superior Court reversed and remanded for the trial court to re-appoint legal counsel for the child and for counsel to attempt to ascertain the child's preferred outcome. If the child's legal and best interests were consistent, the court was to re-enter its termination order; otherwise, the court was to conduct a new termination hearing to provide the child's legal counsel the opportunity to advocate on behalf of the child's legal interest.

On remand, the attorney consulted with the child, who had been five years old at the initial hearings and was six years old at the remand hearing. The child indicated to the attorney that his preferred outcome was to remain with the mother and step-father; identified the step-father as his father and did not call anyone else "dad" or "daddy"; became upset when told about the prospect of not living with the mother and step-father; did not appear to recall spending any time with the father; and, when asked if he knew anyone by the father's name, recalled only a classmate with the same name. The court reinstated its order terminating the father's parental rights, concluding that there was no conflict between the child's legal and best interests. The Superior Court affirmed.

A divided Pennsylvania Supreme Court affirms. The Court first notes that given the importance of having an individual dedicated to discerning and advocating for the child's legal interests, it is only when a child's best interests and legal interests do not diverge, or where the child's legal interests cannot be ascertained, that a court-appointed attorney may serve in the dual capacity of guardian ad litem and legal counsel. When there exists a conflict, these interests must be represented by separate individuals.

At one end of the spectrum, an older, mature child understands precisely what a termination proceeding entails and articulates in clear, even binary, terms his preferred outcome. By contrast, a very young, less mature child is unable to express any understanding of the proceedings or articulate a preference as to their outcome.

In the middle of this range is a child who understands to some degree what is at stake in the proceedings and is capable of expressing some preference, but is unable to do so in a fully informed and articulate fashion. Where, as here, the child is unaware of certain sensitive facts and could be emotionally harmed if informed of such facts or closely interrogated regarding his preference, caution and reflection is required. This Court will not mandate that an attorney convey highly sensitive, significant, and potentially emotionally damaging information to a child, or engage in a raw inquiry, merely to discern the clearest indication of a child's preference. This would be unfair to the child and the attorney. Attorneys are not child therapists or child psychologists. Achieving

a definitive understanding of the child's preference may simply be too disruptive and hurtful. Significant deference must be accorded to counsel's approach in discerning a child's preferences and to the child's articulation thereof.

Once a child's preference has been articulated, or it is determined that the child cannot articulate a preference, the trial court must determine whether counsel can serve as both legal counsel and guardian ad litem. The court should give due consideration to counsel's position, as counsel has interviewed the child first hand, and has assessed the child's age, maturity, understanding, mental state, and emotional capacity (perhaps with the assistance of a professional in certain situations). An appellate court should give substantial deference to the court's determination, especially where the court has witnessed the parties during numerous proceedings.

Here, the child, in counsel's view, was not mature enough to understand the concept of adoption proceedings, let alone an action for parental termination. Given the child's age, understanding, mental state, and emotional capacity, the attorney reasonably declined to explain to the child that he had a biological father where the child was not aware that the father existed and had already bonded with the step-father and viewed him as his father. The attorney, who obviously was not a family member or otherwise in a close personal relationship with the child, reasonably concluded that explaining these facts to the child would have risked confusion, anxiety, and emotional trauma, potentially resulting in lasting damage to the child's well-being.

The majority notes that the dissenters reasonably favor a different approach and would mandate, to one degree or another, that counsel provide a child with the necessary facts to allow the child to articulate a preference regarding the termination proceedings.

In re P.G.F.
2021 WL 1132845 (Pa., 3/25/21)

* * *

CUSTODY - Change In Circumstances/Hearing Requirement
- Right To Counsel/Child

The Third Department holds that the mother alleged a change in circumstances sufficient to require a hearing on her custody modification petition. The mother alleged that the fourteen-year-old child had a strong desire to relocate with the mother to New Jersey; and that there was a recent breakdown in the child's relationship with the father.

The family court discounted the mother's allegation that the relationship between the father and the child had recently broken down, stating that such "information was not relayed through the child's attorney" and that "[t]he child ha[d] not reported dissatisfaction with living with [the] father." The court failed to adequately take into account the fact that more than four years had passed since the court's denial of the mother's relocation request.

The Court, "[e]ver mindful of the importance that the child's position be heard, under these circumstances," directs that the family court should not reappoint the trial attorney for the child.

Matter of Sarah OO. v. Charles OO.
(3d Dept., 10/21/21)

* * *

TERMINATION OF PARENTAL RIGHTS - Abandonment
- Right To Counsel/Child

In this termination of parental rights proceeding, the Third Department reverses an order terminating the mother's parental rights, finding insufficient evidence of abandonment.

The caseworker testified that, in the relevant period, the mother had only three supervised visits, and did not provide the caseworker with any letters or gifts to give to the child. However, the caseworker observed only two of the visits for a limited period of time, and acknowledged that the mother brought snacks for the child. The mother was precluded from making attempts to contact the child - i.e., telephone calls - outside of scheduled parenting time. She was hospitalized with an injury that required emergency brain surgery, which prevented her from exercising one of her scheduled visits. Although the caseworker initially indicated that she had not had any contact with the mother after a certain date, during cross-examination she indicated that the mother had, in fact, called her one or two times during the relevant time period. Petitioner offered no documentary evidence memorializing any of the attempts made to contact the mother.

Even assuming, without deciding, that petitioner presented a prima facie case, petitioner failed to controvert the mother's testimony that, during visits, she provided the child with shoes, clothing, toys, coloring and educational books and cards; she attended service plan reviews; she notified petitioner of her injury and attempted to reschedule certain missed visitation as a result; and she repeatedly, albeit unsuccessfully, attempted to contact caseworkers in an effort to secure scheduled visits.

The Court also notes that "the attorney for the child provided no opening statement, did not present a case and declined the opportunity to submit a written closing statement following conclusion of the hearing." As a result, the family court "had little, if any, insight into the quality of respondent's visitations with the child, the nature of the relationship/bond between respondent and the child or the preferences of the child — who was eight years old at the time of the hearing — regarding respondent."

Matter of Khavonye FF.
(3d Dept., 10/21/21)

* * *

VISITATION - Right To Counsel/Child
- Standing

The Court concludes that the attorney for the children lacks standing to seek suspension of the father's visitation as set forth in the parents' agreement when there is no evidence of parental unfitness or harm to the children. The attorney for the children's affidavit is stricken to the extent it expresses opinions regarding the conduct of the father. The Court also strikes the 14-year-old child's affidavit, noting, inter alia, that admission of the affidavit would violate the spirit of the Court of Appeals decision in *Lincoln v. Lincoln*.

Noting that the children "are already up to their ears in this dispute," and that the Court "intended to shelter them, as much as possible, from any additional consequences of the perennial squabble between the parents," the Court also directs the attorney for the children not to provide any pleadings or other court documents to the children for their review, or discuss the exact contents with the children, or permit the children to read or copy any of the documents.

Matthew A. v. Jennifer A.
(Sup. Ct., Monroe Co., 2/3/21)
http://nycourts.gov/reporter/3dseries/2021/2021_50253.htm

* * *

PERMANENCY HEARINGS - Placement Beyond Eighteenth Birthday

The Second Department holds that the family court properly extended placement of the twenty-year-old child at a permanency hearing where the child's counsel consented to the continuation of placement on the child's behalf.

Matter of Grace M.
(2d Dept., 2/3/21)

* * *

ABUSE/NEGLECT - Right To Counsel/Child
ETHICS - Conflict Of Interest

In this neglect proceeding that was commenced after an incident which prompted the oldest child to call the police and report that the father was trying to hurt the mother, the Third Department, after reviewing the brief filed by the attorney for the children and the record on appeal, directs that new counsel be assigned to the oldest child because there may be a conflict of interest.

Matter of Josiah P.
(3d Dept., 3/18/21)

* * *

CUSTODY - Right To Counsel/Child
ETHICS - Conflict Of Interest

In this custody proceeding, the Fourth Department rejects the contention of the appellate attorney for the older child that the court erred in allowing the attorney who had jointly represented the children in the parties' divorce proceeding in 2015 to represent the older child, but not the younger child, at the trial in 2019 where the children were entitled to separate counsel due to their differing views.

There was no reasonable probability that the younger child had revealed confidences to the older child's AFC that were relevant to the subject matter of this litigation.

Matter of Labella v. Robertaccio
(4th Dept., 2/11/21)

* * *

CUSTODY - Right To Counsel/Children

The Second Department finds reversible error where the family court failed to appoint an attorney for the children.

The appointment of an attorney for the child in a contested custody matter is the strongly preferred practice. Here, the court erred in light of the ages of the children, ranging from 12 to 16 years old at the time of the hearing; the antagonistic nature of the parties' relationship; and the parties' conflicting assertions regarding each other's conduct.

Matter of Weilert v. Weilert
(2d Dept., 2/10/21)

* * *

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

In this termination of parental rights proceeding, the First Department rejects the mother's contention that the ten-year-old child's ambivalence about whether she wanted to be adopted warranted separate counsel.

Matter of Dre'Shaun W.
(1st Dept., 5/4/21)

* * *

ABUSE/NEGLECT - Right To Counsel/Child
CUSTODY

In 2018, then three-year-old E.M. lived with his grandmother. When his grandmother sought to return to work, there was a custodial tug-of-war between his biological parents, his grandmother,

and the State. After the court placed E.M. in foster care - separating him from his family for the first time - the grandmother quickly retained an attorney for E.M. However, the attorney was unable to meet with E.M. because the Department of Children, Youth, and Families would not provide contact details or arrange a meeting with E.M. Ultimately, the court refused to reconsider the foster care placement because the attorney was not court-appointed and because the representation raised numerous ethical issues.

The Washington Supreme Court reverses. Privately retained attorneys are not required to seek court appointment in dependency proceedings when the child has capacity to consent to the relationship. Here, there was no contact between the attorney and E.M., but implied authority may arise in emergency circumstances when another person acting in good faith on behalf of the intended client has consulted with the lawyer.

A concurring judge writes to "reassert my belief that children are categorically entitled to legal representation at public expense in every dependency proceeding under art. I, § 3 of our state constitution. The discretionary case-by-case approach to the appointment of counsel for children in these cases does not protect the right for a child to state their position and to have that position shared with the court."

Matter of E.M.
2021 WL 1418883 (Wash., 4/15/21)

* * *

RIGHT TO COUNSEL - Assigned Counsel/Negligent State Supervision

Claimant filed this claim against the State pursuant to the Child Victims Act to recover damages for alleged sexual misconduct perpetrated by Jeffrey Bernstein, an attorney assigned by Bronx County Family Court pursuant to County Law article 18-B to represent claimant in a custody proceeding.

Defendant moves pursuant to CPLR 3211(a)(7) to dismiss the Amended Claim on the ground that it fails to state a cause of action upon which relief can be granted. Specifically, defendant contends that the attorney is not an employee or agent of the State and thus the State cannot be held liable for any wrongdoing committed by him. Claimant counters that the State can be held liable based upon theories of negligent supervision and retention, and under a theory of premises liability for permitting the sexual abuse to occur on its premises.

The Court grants the motion to dismiss. The State cannot be held liable for negligence related to failures in hiring, vetting, retaining, or supervising assigned counsel. No theory of premises liability can be liberally construed from the facts alleged in the Amended Claim; the duty as alleged is specifically centered around the State's administration of the assigned counsel program, not the State's duty to provide security measures, as a general matter, to occupants of the courthouse.

Doe v. State of New York
(Court of Claims, 10/28/21)

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RIGHT TO COUNSEL - Child/Attorney Fees

In this divorce action, the attorney for the child moves for an order increasing the hourly rate to $400.00, and directing the parties to each pay an additional retainer of $10,000.00.

The Court increases the hourly rate to $300.00 per hour, and orders an additional retainer in the amount of $10,000.00. The Court notes that "[i]f the court system is going to attract attorney's to be members of our panels or to remain on the panels with the depth and breadth of experience that this Attorney for the Child has, to pay the $75.00 an hour rate that counsel requests on a private pay basis would be detrimental to the role of Attorney for the Child"; and that "[u]nder these unique circumstances where parties are willing to pay hundreds of thousands of dollars for lawyers and experts to protect their interests but are reluctant to pay the attorney for the child, to protect the child's interest, an additional retainer is warranted."

Goldman v. Abramova-Goldman
(Sup. Ct., Kings Co., 11/4/21)
https://nycourts.gov/reporter/3dseries/2021/2021_21303.htm