

## **CHILD WELFARE CASELAW/LEGISLATIVE UPDATE**

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Current through: March 1, 2019**

### **I. Legislation, Regulations and Policies**

#### **PINS/Educational Neglect: Truancy And School Misbehavior Allegations**

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

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

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

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

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

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

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

Chapter 362 took effect on March 7, 2019.

### **Judicial Notice Of Internet Materials**

Chapter 516 of the Laws of 2018 adds a new subdivision (c) to CPLR Rule 4511 which states that every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented.

The presumption shall be rebutted by credible and reliable evidence that the image, map, location, distance, calculation, or other information does not fairly and accurately portray that which it is being offered to prove.

A party intending to offer such image or information at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection.

Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for the otherwise required objection, the court shall take judicial notice of such image or information.

The legislative Memorandum in Support states:

Google Maps is a tool that can be used by the courts to fairly resolve cases in a timely manner. Allowing a judge to take judicial notice of a satellite image, location, distance, or other information using Google Maps would relieve the parties from having to otherwise prove the information evidenced in the image or map. Such rebuttable presumption of judicial notice will save time in proving points of fact, while preserving the ability of an opposing party to offer credible and reliable evidence otherwise.

Chapter 516 took effect on December 28, 2018.

### **Abuse/Neglect: Reporting Of Abuse In Educational Setting**

Chapter 363 of the Laws of 2018 amends the Education Law in relation to the reporting of abuse in an education setting. Chapter 363 takes effect September 3, 2019.

## **NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION**

### **SUMMARY OF PROVISIONS:**

Section 1 amends section 1125 of the education law to expand the definitions of child, employee,

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

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

Section 3 makes a technical change.

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

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

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

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

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

### **Standby Guardianship**

Chapter 79 of the Laws of 2018 amends Surrogate's Court Procedure Act § 1726 to allow a parent to designate a standby guardian for his/her child in the event of the parent's "administrative separation" from the child. "Administrative separation" means a parent, legal guardian, legal custodian or primary caretaker's arrest, detention, incarceration, removal and/or deportation in connection with a federal immigration matter, or receipt of official communication by federal, state, or local authorities regarding immigration enforcement which gives reasonable notice that care and supervision of the child by the parent, legal guardian, legal custodian, or primary caretaker will be interrupted or cannot be provided.

Chapter 79 took effect on June 27, 2018.

### **Designation of Person In Parental Relation**

Chapter 80 of the Laws of 2018 amends General Obligations Law § 5-1551 to extend the time period a parent or guardian is permitted to name a caregiver as a person in parental relation, who has limited authority under the Education Law and Public Health Law, from six months to twelve months for a designation that is notarized.

The legislative memo states that the statute will now “better reflect the realities of kinship caregiving and also provide another tool for undocumented parents and guardians who may not be able to easily renew designations while detained or outside the United States. As a result of federal policies, parents subject to detention or removal whose children reside in New York State need preparedness options to plan for the emergency care and control of their children in the event of sudden detention or deportation. Parental designation forms, as authorized under the General Obligations Law, provide a mechanism by which parents can make arrangements in advance for a caregiver to be designated without going to court.”

Chapter 80 took effect on June 27, 2018.

### **CPLR: Subpoena Practice**

Chapter 218 of the Laws of 2018 adds a new subdivision (d) to CPLR § 2305 which states as follows:

“Subpoena duces tecum for a trial; service of subpoena and delivery for records. Where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith.”

Chapter 218 took effect on August 24, 2018 and applies to all actions pending on or after that date.

The legislative memo states, inter alia:

“Our Advisory Committee has studied the procedures by which records intended for use at trial are produced pursuant to a subpoena duces tecum; and is of the view that counsel should have the option of having trial material delivered to the attorney or self-represented party at the return address set forth in the subpoena, rather than to the clerk of the court. This is especially true where the materials are in digital format and can be delivered on a disk or through other electronic means.”

Practice Note: Presumably, when a subpoena duces tecum must be authorized by the court - e.g., under CPLR § 2307 (government records), or CPLR § 2302(a) (clinical records maintained pursuant to Mental Hygiene Law § 33.13) - the court will decide where the records should be produced. And, needless to say, when the court needs to conduct an in camera review of confidential records, the parties will not get them until the court rules on the scope of disclosure. In addition, FCA § 1038(a) continues to require that subpoenaed agency records be sent to the court.

### **CPLR: Discovery and Authentication Of Records**

Chapter 219 of the Laws of 2018 adds a new Rule 4540-a to the CPLR, which states as follows:

“Presumption of authenticity based on a party's production of material authored or otherwise created by the party. Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.”

Chapter 219 takes effect on January 1, 2019.

The legislative memo states, inter alia:

“This measure would add a new CPLR 4540-a to eliminate the needless authentication burden often encountered by litigants who seek to introduce into evidence documents or other items authored or otherwise created by an adverse party who produced those materials in the course of pretrial disclosure.”

### **Court-Appointed Special Advocates Program**

Chapter 291 of the Laws of 2018 adds a new Article 21-c to the Judiciary Law, entitled Court-Appointed Special Advocates Program.

Judiciary Law § 849-l states that a person employed by, or volunteering for, a court-appointed special advocate (CASA) program shall not be eligible for appointment by a family court to assist such court unless such program is in compliance with the rules and regulations of the chief administrator of the courts adopted pursuant to (new) Judiciary Law § 212(2)(w), and such program has been approved by the chief administrator. Such person or volunteer so appointed shall only exercise the functions and duties specifically authorized by the court.

Judiciary law § 849-m states that each CASA program shall safeguard the confidentiality of all information and material in accordance with applicable state and federal laws, rules and regulations and, to this end, shall ensure that all of its board members, officers, employees and volunteers are trained in, and comply with, such laws, rules and regulations.

This act took effect on October 1, 2018.

### **FAMILY FIRST PREVENTION SERVICES ACT**

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

The FFPSA makes significant changes to various sections of Titles IV-E and IV-B of the Social Security Act with the intent to keep children safely at home with their families and, when that is not possible, to utilize the least restrictive form of placement appropriate for the needs of the child. The FFPSA reforms federal financing to prioritize family based foster care over residential care by limiting federal reimbursement for certain residential placements. The FFPSA also incentivizes the use of prevention services by authorizing Title IV-E reimbursement for evidence based, time-limited preventive services for a specific population to prevent foster care placement or support the safety, permanency or well-being of the child. In addition, the FFPSA provides

new federal funding opportunities for kin navigator programs. The FFPSA also provides additional support under Title IV-B, including the establishment of an electronic interstate case processing system.

Link to Information Letter:

[https://ocfs.ny.gov/main/policies/external/ocfs\\_2018/INF/18-OCFS-INF-06.pdf](https://ocfs.ny.gov/main/policies/external/ocfs_2018/INF/18-OCFS-INF-06.pdf)

### **Discrimination/Crimes Based On Gender Identity Or Expression**

Chapter 8 of the Laws of 2019 amends the Executive Law, the Civil Rights Law, and the Education Law to prohibit discrimination based on gender identity or expression, defining “gender identity or expression” as “a person’s actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.”

Chapter 8 also amends Penal Law §§ 485.00 and 485.05 (hate crimes), and §§ 240.00 (offenses against public order; definition of terms, including “gender identity or expression”), 240.30 (aggravated harassment in the second degree), and 240.31 (aggravated harassment in the first degree), and Criminal Procedure Law § 200.50 (form of “hate crime” charge in indictment), to include acts motivated by the victim’s gender identity or expression.

The Penal Law and Criminal Procedure Law amendments take effect on November 1, 2019, and the other amendments take effect on February 24, 2019.

### **CRIMINAL AND CIVIL ACTIONS RELATING TO SEXUAL ABUSE OF CHILDREN**

Chapter 11 of the Laws of 2019 amends Criminal Procedure Law § 30.10(3)(f) to provide, in a criminal action alleging a sexual offense against a child under the age of 18, that a statute of limitations shall start to run when the victim turns 23 rather than when the victim turns 18 (the statute continues to provide that the clock starts when the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment).

Chapter 11 amends CPLR § 208 to provide that notwithstanding any statute of limitations or requirement that a timely notice of claim or notice of intention to file a claim be filed, an action may be brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute a specified sexual offense committed when such person was less than 18 years of age, against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of that conduct, until the victim reaches 55 years of age. Chapter 11 also amends related provisions in the General Municipal Law, the Court of Claims Act, and the Education Law.

Chapter 11 adds a new CPLR § 214-g, which allows actions barred by a period of limitations or a notice filing requirement, including actions that were previously dismissed, to be revived within a one year window which commences six months from the effective date of the act.

Chapter 11 amends CPLR Rule 3403(a) to establish a trial preference for cases which have been revived pursuant to CPLR § 214-g. Chapter 11 adds a new Judiciary Law § 219-d to require the Chief Administrator of the courts to promulgate rules concerning the timely adjudication of revived claims.

Chapter 11 amends Judiciary Law § 219-c to require the Office of Court Administration to provide training for judges concerning crimes involving the sexual abuse of minors.

Chapter 11 took effect February 14, 2019, except that Judiciary Law § 219-c generally takes effect on August 14, 2019; training for revived cases shall commence by May 14, 2019; and rules must be promulgated pursuant to Judiciary Law § 219-d by May 14, 2019.

## **II. ABUSE/NEGLECT**

### **Removal/Central Register/Investigation Of Abuse And Neglect**

#### *ABUSE/NEGLECT - Removal - Imminent Risk/Reasonable Efforts*

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

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

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

*Matter of Saad A.*  
(2d Dept., 12/5/18)

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#### *ABUSE/NEGLECT - Removal - Imminent Risk*

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

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

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

Shortly before the filing of a neglect petition against respondent mother, the family court issued temporary orders of supervision and protection upon the mother's consent. Subsequently, petitioner filed a violation petition but, before doing so, asked the court to temporarily remove



the child. The court did so, and commenced a hearing during which it rejected the mother's offer to consent to removal without also admitting that the removal was "necessary to avoid imminent risk to the child's life or health." The court made such a finding at the conclusion of the hearing. Although the mother later agreed to a resolution in which the violation petition was withdrawn, the neglect petition was adjourned in contemplation of dismissal, and the child was returned to her care, on appeal she challenges the family court's ruling rejecting her offer to consent to removal.

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

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

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

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

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

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

The Court grants ACS's motion to modify the dispositional order and places the child directly with the maternal aunt, citing various deficiencies in the care provided by the grandmother. The Court rejects the grandmother's application for a FCA § 1028 hearing at this stage of the

proceeding. *Matter of Elizabeth C.* (156 A.D.3d 193) does not apply. The issue for the Court to consider at this stage of the proceedings is not imminent risk, but rather the child's best interests. The grandmother must seek relief under Part 6 of Article Ten (New Hearing and Reconsideration of Orders), or via a custody proceeding.

*Matter of K.A. v. M.C.*

(Fam. Ct., N.Y. Co., 2/8/19)

[http://nycourts.gov/reporter/3dseries/2019/2019\\_50212.htm](http://nycourts.gov/reporter/3dseries/2019/2019_50212.htm)

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#### *ABUSE/NEGLECT - Removal - Imminent Risk*

The Second Department reverses an order which, after a hearing, granted the mother's application pursuant to FCA § 1028 for the return of the children, seven months and eight years old at the time the petition was filed, to her custody. The family court erred in finding that the mother's condition was mere "temporary drowsiness" resulting from her use of newly prescribed medication.

The mother was the only adult at home when she locked herself in the bathroom for an extended period of time. The child knocked repeatedly on the door, but the mother did not answer, and, when she finally emerged, her speech was slurred, she was unable to hold food in her hands, and she could not maintain her balance. The frightened child called her grandfather, who arrived to find the mother lying face down on the child's bed, and, after waking the mother by calling her name while the child shook her, he called 911. An Emergency Medical Technician testified that he found the mother "lying in her own saliva." The grandfather reported to the EMT that the mother had a history of substance abuse, including "crack cocaine, possibly heroin, [and] turpentine." The mother, who had bloodshot eyes and constricted pupils, told the EMT that she had only taken Motrin. After the mother was transported to the emergency room, she was diagnosed with opiate-induced drug intoxication and narcotic abuse, and not discharged until between 6:00 a.m. and 7:00 a.m. the following morning, when she was sober enough to safely get home. The child reported to the caseworker that, on the date of the incident, she had noticed a full medicine bottle in the kitchen when she got home from school, that the same bottle was only half-full at the time of the EMTs' arrival, and that the mother had told her not to say anything about what happened and to lie about the incident. There was testimony regarding the mother's ongoing attempts to increase the dosages of her prescription medications, including Valium and Percocet.

The safeguard imposed by the family court - requiring daily home visits by petitioner - was insufficient to mitigate the imminent risk to the children.

*Matter of Luna V.*

(2d Dept., 7/11/18)

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### *ABUSE/NEGLECT - Removal/Constitutional Issues*

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

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

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

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

*Mann v. County of San Diego*

2018 WL 5623367 (9th Cir., 10/31/18)

*Practice Note:* Family Court Act § 1027(g) provides: "In all cases involving abuse the court shall order, and in all cases involving neglect the court may order, an examination of the child pursuant to [FCA § 251] or by a physician appointed or designated for the purpose by the court. As part of such examination, the physician shall arrange to have colored photographs taken as soon as practical of the areas of trauma visible on such child and may, if indicated, arrange to have a radiological examination performed on the child. The physician, on the completion of such examination, shall forward the results thereof together with the color photographs to the

court ordering such examination. The court may dispense with such examination in those cases which were commenced on the basis of a physical examination by a physician. Unless colored photographs have already been taken or unless there are no areas of visible trauma, the court shall arrange to have colored photographs taken even if the examination is dispensed with.” Family Court Act § 251 permits the court to direct physical or mental examinations by professionals designated for that purpose by the court for any person within its jurisdiction after the filing of a petition under the Family Court Act.

In certain circumstances, the court cannot, consistent with the child’s Fourth Amendment rights, order an intrusive physical exam when the need for such an exam is insufficiently compelling. *See Matter of Shernise C.*, 91 A.D.3d 26 (2d Dept. 2011) (given conclusive evidence of sexual abuse provided by DNA test results showing that respondent was father of child born to subject child two years earlier, State’s need for highly intrusive physical examination was so diminished as to render search unreasonable under Fourth Amendment; State has extraordinarily weighty interest in protecting children and in protecting due process rights of individual accused of child abuse by discovering and preserving evidence of abuse or ascertaining the absence thereof, but the child, “as the alleged victim, is entitled to no less protection under the Fourth Amendment than her stepfather would enjoy as an accused,” and adolescent vulnerability intensifies intrusiveness of strip search and may result in serious emotional damage).

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#### *ABUSE/NEGLECT - Central Register/Mandated Reporters*

The Washington Supreme Court holds that the State’s mandatory child abuse reporting law did not require that defendant, a teacher usually covered by the law, report the alleged abuse of her own children, who are not her students, by another family member within her own home. Failure to comply with the mandatory reporting duty requires some connection between the individual’s professional identity and the criminal offense.

*Washington v. James-Buhl*

2018 WL 1867150 (Wash., 4/19/18)

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#### *ABUSE/NEGLECT - Civil Liability For Death After CPS Investigation*

Plaintiff seeks damages in connection with an allegedly negligent child protective investigation that allegedly resulted in the wrongful death of a ten-year-old child. Defendants move for summary judgment.

The Court grants defendants’ motion. A governmental entity such as CPS may not be held liable for injuries that result from alleged mistakes made by government employees in the course of their investigation. An exception to this general rule exists when there is a “special relationship” between the municipality and the claimant. The elements of this “special relationship” are: “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that

inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." Here, there are no allegations that justify application of the exception.

The Court also notes that even if it were to find a cause of action against the County, any action or inaction of the caseworker in investigating the report of suspected abuse is discretionary and cannot form the basis for liability, and that, in any event, there was no negligence. There were two calls, and CPS responded to both. In both instances, the mother denied any abuse, and other children in the residence denied any abuse by the step-father. After the second call, the investigator spoke not only with the child, his mother and step-father, and other siblings, but also spoke with the school principal, reviewed the child's medical records, and made an unannounced visit to the child's home. The initial story of an altercation on a school bus was verified and the report was ultimately unfounded.

"If the legislature wishes to confer liability in circumstances such as these, it should do so. The Court cannot right every wrong with its pen. While abetting a desire to address each and every tragedy, to do so does a greater disservice to the law and its purpose."

*Bile v. Erie County Department of Social Services*  
(Sup. Ct., Erie Co., 8/3/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_51474.htm](http://nycourts.gov/reporter/3dseries/2018/2018_51474.htm)

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

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

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

The Court concludes that Suffolk County is a proper venue under CPLR 503 (applies to an action) and CPLR 506 (applies to a special proceeding). Family Court Act § 1015, which provides that "proceedings" under Article Ten may be originated in the county in which the child resides or is domiciled at the time of the filing of the petition, or in which the person having custody of the child resides or is domiciled, applies only to FCA § 1031 petitions and not to pre-

petition applications under § 1034(2). The Legislature could not have thought that a § 1034(2) application should be subject to a transient potential respondent's residential shifting.

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

*Matter of L.R.*

(Fam. Ct., Suffolk Co., 2/14/19)

[http://nycourts.gov/reporter/3dseries/2019/2019\\_29038.htm](http://nycourts.gov/reporter/3dseries/2019/2019_29038.htm)

### **Respondent/Person Legally Responsible**

*ABUSE/NEGLECT - Respondent/Person Legally Responsible*

- *Failure To Protect Child From Abuse*
- *Domestic Violence*
- *Exposing Child To Sexual Activity*

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

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

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

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

*In re Ja'Dore G.*

(1st Dept., 2/21/19)

\* \* \*

*ABUSE/NEGLECT - Respondent/Person Legally Responsible*

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

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

\* \* \*

*ABUSE/NEGLECT - Respondent/Person Legally Responsible*

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

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

\* \* \*

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

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

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

*In re Adam C.*

(1st Dept., 12/13/18)

\* \* \*

*ABUSE/NEGLECT - Respondent/Person Legally Responsible*

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

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

**Discovery**

*ABUSE/NEGLECT - Court-Ordered Mental Health Examination*

The neglect petition alleged that the mother failed to "work cooperatively with the appropriate agencies" to ensure that the child, whom the mother reported to have been sexually abused, "would receive appropriate counseling and services." The petition also alleged that the mother failed "to take any action to ensure that [the child] was being adequately and appropriately cared for by his father," who was alleged to be abusive toward the child. Prior to a fact-finding hearing, the court granted petitioner's request that the mother be directed to submit to a psychological examination.

The Second Department reverses. The record is devoid of any indication that the mother may suffer from a mental illness, nor did the petition contain any allegations which placed the mother's mental health at issue.

*Matter of Tyriek J.*  
(2d Dept., 5/9/18)

\* \* \*

*ABUSE/NEGLECT - Discovery - Mental Health Records*

In this neglect proceeding, the Fourth Department holds that the family court did not err in granting petitioner access to respondent mother's mental health records where the mother had refused to authorize disclosure of the records, which made it impossible to assess whether she was compliant with her prescribed mental health treatment. The paramount issue in this case was the mother's mental health and its alleged impact upon the child.



*Matter of Lyndon S.*  
(4th Dept., 7/6/18)

\* \* \*

*ABUSE/NEGLECT - Discovery Via Compact Disc*

In this Article Ten proceeding, the Second Department concludes that the family court erred in directing DSS to produce paper copies of discovery material rather than a compact disc.

*Matter of Cameron M.*  
(2d Dept., 5/30/18)

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

*ABUSE/NEGLECT - Visiting*

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

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

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

\* \* \*

*ABUSE/NEGLECT - Visitation/Parental Access*

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

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

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

\* \* \*

*ORDERS OF PROTECTION - Subject To Custody/Visitation Order*

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

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

\* \* \*

*CUSTODY - Best Interests*  
*ABUSE/NEGLECT - Investigation Of Relatives*

The Third Department reverses an order dismissing the maternal uncle's custody petition, and awards custody to the uncle with the consent of the mother and father.

In the neglect proceeding brought against the mother, DSS violated FCA § 1017. The uncle testified that he received a single telephone call from DSS personnel approximately four months after the children were placed in DSS custody asking whether he would be a custodial resource if the mother's parental rights were terminated, and that he responded affirmatively. He stated that DSS did not advise him how to become a foster parent or that he could seek custody, and did not contact him again until after he filed this custody petition more than one year after the children were first removed from the mother's home. The statute did not impose a duty on the uncle to affirmatively seek placement based solely upon DSS's inquiry, before he was advised of the procedures by which he could do so. The statute imposed a duty on DSS to immediately conduct an investigation to locate relatives and provide the required information, in writing.

The failure of the family court and DSS to strictly follow the statute created the very harm the statute was intended to prevent - long-term placement in foster care rather than with a suitable relative. When the uncle filed his custody petition, he was treated as an unwelcome interloper by both DSS and the family court. "Such conduct cannot be condoned and we emphasize that the procedures mandated by Family Ct Act § 1017 are to be strictly followed."

With respect to the child's best interests, the Court notes that although the uncle met the child only once prior to her placement in foster care, he has had regular contact with her since he filed the custody petition; that the uncle and his wife are strongly motivated to help the child build and maintain relationships with her family; that the foster parents did not testify and there was no direct evidence regarding their home environment or their relationship with the child; and that the family court relied heavily on a licensed clinical social worker's testimony that it was in the best interests of the child to remain with the foster parents to avoid the necessity of experiencing

another transition, but that testimony addresses only one best interests factor, and the witness's testimony does not establish that she had a sufficient factual foundation on which to base her opinion.

*Matter of Richard HH. v. Saratoga County Department of Social Services*  
(3d Dept., 7/5/18)

\* \* \*

*TERMINATION OF PARENTAL RIGHTS - Disposition/Intervention And Custody Application*  
*By Relatives*  
*CUSTODY/VISITATION - Grandparents*  
*PERMANENCY HEARINGS - Permanency Goal*  
*ABUSE/NEGLECT - Investigation Of And Intervention By Relatives*

The Third Department finds no error where the family court terminated the mother's parental rights based on permanent neglect and dismissed the maternal grandmother's custody and visitation petitions.

The mother's plan was for the grandmother or the mother's cousin to obtain custody until she was released from prison, which was not scheduled until at least 2019. These relatives were either unfit or had failed to seek placement or custody in a timely manner. It is not viable for the child to be in long-term foster care until the mother is released from prison and becomes ready to assume custody.

With respect to custody, the Court notes that the grandmother had a 15-year history of drug abuse and required a substantial amount of effort to maintain sobriety; was on parole after her conviction for selling drugs; relied on temporary assistance as her sole source of income; had known that the mother was smoking marihuana as a teenager but did not address the situation and had an indicated report for inadequate guardianship; and had been re-incarcerated due to a parole violation, and thus could not take custody in any event. The family court should have considered the grandmother's visitation petition in the context of the permanent neglect proceeding, but did not err in denying any visitation for the same reasons the grandmother was not entitled to custody and because the child had found stability with his adoptive foster family.

The Court notes that the family court erred in imposing concurrent and contradictory permanency goals of return the child to parent and free the child for adoption. However, there was no prejudice since the court intended to impose a permanency goal of return to parent, with DSS also engaging in concurrent planning for the child in case he could not be returned to the mother, and proceeded as if the goal was to return the child to the mother.

Although DSS delayed in investigating the grandmother as a resource, no one was prejudiced by the violation of FCA § 1017. When DSS did conduct its investigation, it concluded that the grandmother was not suitable. DSS did not violate § 1017 by not conducting an investigation into the cousin. FCA § 1017 contemplates an investigation when the court determines that the child must be removed from the parent, and does not seem to create a duty for DSS to seek out

relatives in perpetuity while a child remains in foster care. Here, DSS investigated multiple resources identified by the mother. She did not identify her cousin, and it was not until two years after removal, a few days before commencement of the permanent neglect hearing, that the cousin applied for approval. The cousin did not file any motion or petition for custody and, although she was present at the dispositional hearing, did not testify.

*Matter of Timothy GG.*  
(3d Dept., 7/5/18)

*Practice Note:* FCA § 1017(1)(a) states, in pertinent part, that the court must order a § 1017 investigation “[i]n any proceeding under this article, when the court determines that a child must be removed from his or her home, pursuant to part two of this article, or placed, pursuant to [FCA §1055.]”

Thus, although, if the child is removed at the outset of the case, it may well be that the agency has no duty to seek out relatives “in perpetuity” while a child remains in foster care, it is clear that when a placement order would remove the child for the first time, the court must direct that a § 1017 investigation be done.

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

#### *ABUSE/NEGLECT - Defaults*

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

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

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

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

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

\* \* \*

#### *ABUSE/NEGLECT/CUSTODY - Defaults*

The First Department upholds the denial of the mother's motion to vacate orders finding that she violated the terms of a suspended judgment and ending Article Ten supervision, and granting the father's petition for custody and dismissing the mother's custody petition.

The mother's claim that she missed the hearing because she lacked the funds for travel from Georgia to the Bronx was unsubstantiated and thus insufficient as a reasonable excuse. Even if lack of funds were the true reason for her failure to appear, she provided no explanation as to why she did not notify her counsel, the court or the agency of her inability to attend.

The mother's conclusory denial that she violated the order of protection issued against her failed to establish a meritorious defense to the allegation that she violated the suspended judgment.

*In re Tyrone F. v. Mariah O., In re Sayoni S.S.F.*  
(1st Dept., 10/4/18)

\* \* \*

#### *SUPPORT - Defaults*

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

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

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

\* \* \*

*TERMINATION OF PARENTAL RIGHTS - Defaults*

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

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

\* \* \*

*TERMINATION OF PARENTAL RIGHTS - Defaults*

In this termination of parental rights proceeding, the First Department upholds the denial of the mother's motion to vacate her default where she had been aware of the fact-finding hearing date well in advance and the agency sent her a prepaid ticket for an 11:30 p.m. bus so she could travel from Virginia the day before the hearing, but she advised the agency that she had arranged a job interview in Virginia for 9:00 p.m. and could not make the 11:30 p.m. bus, and did not indicate that she had tried to reschedule the interview.

*In re Nehemiah B.*  
(1st Dept., 4/19/18)

\* \* \*

*PATERNITY - Defaults*

In this paternity proceeding in which appellant, who had signed an acknowledgment of paternity, raised an equitable estoppel defense to the petition, the Second Department upholds the denial of appellant's motion to vacate his default at an equitable estoppel hearing.

Although appellant's counsel alleged that appellant had not appeared at the hearing because he had gone to Georgia to obtain the child's birth certificate and, due to a bus delay, arrived late in court after the conclusion of the hearing, which was a reasonable excuse for failing to appear in time for the hearing, appellant failed to demonstrate that he had a potentially meritorious defense of equitable estoppel.

*Matter of Dwayne H. v. Chaniece T.*  
(2d Dept., 4/18/18)

\* \* \*

*FAMILY OFFENSES - Defaults*

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

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

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

\* \* \*

#### *SUPPORT - Defaults*

In this child support proceeding, the Second Department grants the father's motion to vacate his default where he attached an affidavit from his oral surgeon attesting that he had undergone surgery the day before the hearing and was provided with instructions to refrain from normal activities for 24 hours thereafter, and also raised a potentially meritorious defense.

The Court also notes the relative shortness of the delay, the absence of prejudice to the mother, and the public policy in favor of resolving cases on the merits.

*Matter of Makaveyev v. Paliy*  
(2d Dept., 4/18/18)

### **Abandonment**

#### *TERMINATION OF PARENTAL RIGHTS - Abandonment*

The Court of Appeals dismisses an abandonment charge where the caseworker testified that respondent, who was incarcerated, did not visit with the child or communicate with the caseworker or other agency personnel during the relevant time period, but the record is bereft of evidence establishing that respondent failed to communicate with the child, directly or through the child's foster parent, during that time period.

*Matter of Mason H.*  
(Ct. App., 6/14/18)

\* \* \*

### *TERMINATION OF PARENTAL RIGHTS - Abandonment/Insubstantial Contacts*

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

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

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

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

### **Educational Neglect**

#### *ABUSE/NEGLECT - Educational Neglect*

##### *- Leaving Child With Other Caretaker/Failure To Provide Supplies And Care*

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

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

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



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

### **Failure To Supply Care**

#### *ABUSE/NEGLECT - Failure To Provide Care/Leaving Children With Family*

Upon a hearing, the Court dismisses a neglect petition alleging that respondent father left the children, then ages eleven and fourteen, with the paternal grandmother without an agreement or a plan for their support, and failed to support them or plan for their return to his physical care. Even if the father's actions fell below the minimum level of acceptable parenting, they did not result in harm to the children, who were well cared for by their grandfather. Though he did not receive financial support directly from the father, the grandfather did not testify as to any struggles he had to provide for the children on his own.

Petitioner points to the emotional damage to the children from being constantly disappointed in their father, but that is insufficient for a finding of neglect. Petitioner also argues that there was imminent danger to the children because their grandfather, being under no obligation to care for the children, could have stopped doing so at any time. But there is no evidence that a decision to do so was near or impending.

"Sometimes adult children take advantage of their parents' open hearts and goodwill, knowing that their own children will be okay with the grandparents. Such behavior may be wrong in the moral sense, and it may even fall below the minimum standards of parenting under the law. However, if the children are not harmed as a result and not in imminent danger of harm, it is not neglect as defined by law."

*Matter of Justelle R.*  
(Fam. Ct., Kings Co., 7/2/18)  
[http://nycourts.gov/reporter/3dseries/2018/2018\\_51074.htm](http://nycourts.gov/reporter/3dseries/2018/2018_51074.htm)

\* \* \*

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

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

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

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

\* \* \*

*ABUSE/NEGLECT - Failure To Supply Shelter/Necessities*

The neglect petition alleges that the father does not currently have stable housing and is “staying” with his cousin; that he stated that he would not provide ACS with his cousin’s address or county of residence, or his cousin’s name; that when asked what provisions, if any, he had for the newborn child, he said only that he “had a carseat and some stuff”; and that according to the case manager at the father’s prior shelter, he was discharged from the shelter on or about June 18, 2017 for non-compliance with shelter eligibility rules.

The Court grants the father’s motion to dismiss the petition for failure to state a cause of action. Petitioner’s affirmation in opposition merely adds that “the respondent was given multiple opportunities to provide the caseworker with the information but refused,” and supports the father’s position by adding that “he stated to the caseworker that he is working and can care for the child.”

There is no indication that the cousin’s home would pose any danger to the child. Even if the father and the child cannot live with the cousin long-term, the father may be able to find permanent housing or other family or friends they can stay with, or - worst case scenario - can seek emergency shelter through the PATH system. Residing in the shelter system is not a basis for a neglect petition. The father has cited a source of support with which he can purchase the items the child needs, and, if necessary, he can seek financial assistance or donations. Poverty also not a basis for finding neglect.

“Neither our culture nor our laws require adults to prove their ability to parent before they can take their biological child home from the hospital. Our society does not convey a parenting license that one must apply for and/or pass a test to obtain.” If such a requirement were to exist “it would have to be universally and uniformly applied to babies born at private hospitals in the high income, predominantly white sectors of NYC along with the public hospitals in the poorest areas such as East New York and Brownsville. When a baby is born in a private hospital on the Upper East Side, parents are not required to prove that they have an ‘acceptable’ place to live or a prescribed list of baby supplies before they can bring her child home.”

*Matter of Divine W.*

(Fam. Ct., Kings Co., 4/23/18) (posted 7/25/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_28136.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28136.htm)

**Excessive Physical Force**

*ABUSE/NEGLECT - Excessive Use Of Force*

In this Article 78 proceeding, the Third Department upholds a determination by OCFS denying an application to have a Central Register report amended to be unfounded and expunged.

Petitioner, who operated a children’s day-care facility, grabbed an unruly four-year-old child’s

neck and arm while trying to separate him from the other children. The child demonstrated to caseworkers how petitioner grabbed him at his throat and that, afterwards, he could barely breathe. One caseworker observed bruises on the back of the child's arm and on the front of his neck.

*Matter of Michelle U. v. NYS Central Register of Child Abuse and Maltreatment*  
(3d Dept., 7/12/18)

### **Child's Participation In Crime**

#### *ABUSE/NEGLECT - Child's Participation In Parent's Criminal Behavior*

The Court of Appeals concludes that the Administrative Law Judge rationally found sufficient evidence of maltreatment where the five-year-old child was used as a pawn in a shoplifting scheme. There is imminent potential for physical confrontation during a theft from a department store monitored by security. Moreover, teaching a child that such behavior is acceptable must have an immediate impact on the child's emotional and mental well-being, particularly where, as here, the child is young and just learning to differentiate between right and wrong. The ALJ rationally concluded that these actions are reasonably related to employment in the childcare field as a matter of common sense.

A dissenting judge notes that if the child "is in imminent danger of growing up to be a shoplifter, and therefore 'neglected,' what of a child whose parent exceeds the speed limit with the child in the car, or teaches the child to jaywalk? I start to worry that, when watching Disney's Aladdin with my children, or reading them Les Misérables, I had better not opine that theft of bread by a starving person is morally acceptable, lest they be deemed neglected and I placed on the Child Abuse Register." This ruling is fundamentally at odds with *Nicholson v. Scopetta*.

*Matter of Natasha W. v. New York State Office of Children and Family Services*  
(Ct. App., 6/14/18)

### **Domestic Violence/Conflict**

#### *ABUSE/NEGLECT - Domestic Violence/Conflict*

The Second Department upholds a finding of neglect where the father repeatedly slapped the mother in the face while one of the children was present, causing the child to become scared.

However, the Court reverses a finding where the father and the mother argued frequently while the other child was present. The evidence was insufficient to establish that the child's condition was impaired or in imminent danger of impairment. The child's out-of-court statement that he does not feel safe being alone with the father was not corroborated.

*Matter of Malachi M.*  
(2d Dept., 8/22/18)

\* \* \*

*ABUSE/NEGLECT - Domestic Violence*

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

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

\* \* \*

*ABUSE/NEGLECT - Domestic Violence*

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

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

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

\* \* \*

*ABUSE/NEGLECT - Domestic Violence/Risk Of Physical Impairment*

In this domestic violence case, the Second Department reverses an order that dismissed the petition upon a finding that petitioner failed to establish, prima facie, that the father neglected the child, and remits for further fact-finding proceedings.

Petitioner presented, inter alia, a police officer's "hearsay testimony" that the mother described the father throwing an object at her head, choking her, and throwing her to the ground at the side of their bed, causing her to lose consciousness. (Although the Second Department does not mention it, this testimony was admitted under the excited utterance exception.) Hospital records generally corroborated the mother's statements, including her statement that the child, who was then eleven months old, was present throughout the assault.

*Matter of John M.M.*  
(2d Dept., 4/4/18)

\* \* \*

*ABUSE/NEGLECT - Domestic Violence*

The Second Department finds sufficient evidence of neglect where one child's corroborated out-of-court statements indicated that respondent hit the children's mother and pushed the mother on top of the children, that the child was hurt when respondent pushed her mother on top of them, and that the child was fearful that respondent would hit her mother if he were to return to the home.

*Matter of Neleh B.*  
(2d Dept., 6/27/18)

\* \* \*

*ABUSE/NEGLECT - Creating Risk Of Harm/Reckless Driving*  
*- Domestic Conflict*

The First Department upholds an OCFS determination denying the mother's request to amend a report in the Statewide Central Register for Child Abuse from "indicated" to "unfounded" where the mother, during a domestic dispute, drove down the street with her one-year-old child, who was being held by the father, on top of her vehicle's hood. Generally, an evaluation of the reasonableness of a driver's reaction to an emergency situation will be left to the trier of fact.

*In re Anonymous v. Poole*  
(1st Dept., 6/28/18)

**Mental Health Issues**

*ABUSE/NEGLECT - Dismissal - Summary Judgment/Aid Of Court Note Required*  
*- Mental Illness*

In February 2018, in the first proceeding based on mental illness-related allegations, the Court granted the mother's FCA § 1028 application, and returned her daughter to her on condition that she comply with a safety plan that she and the child's grandmother had developed. The mother, who is now diagnosed with schizophrenia, paranoid-type, has since given birth to a son, and ACS has filed a petition as to him, which contains new allegations regarding the mother's mental condition. Prior to giving birth, she had voluntarily been admitted into the hospital and was released, and then returned to the hospital due to her mental condition, arranged for her mother to take care of her daughter, and remained in the hospital until she gave birth. Both children are now residing with a maternal uncle and his wife in Georgia.

In both cases, the Court, after considering only non-hearsay evidence and testimony admitted at the § 1028 hearing or in exhibits attached to the motion papers, grants the mother's motion for summary judgment, and, alternatively, concludes that dismissal is warranted because the aid of the Court is not required.

Standing alone, neither a psychiatric diagnosis, even a serious one, nor a psychiatric hospitalization, proves neglect. The evidence must establish a causal connection between the parent's condition and actual or potential harm to the children. Here, the mother voluntarily admitted herself into the hospital while pregnant, and then made arrangements for family to care for the newborn child until the mother was able to. Petitioner has cited the possibility that the mother could stop taking her medication, but her previous decision to stop was made upon advice given by a nurse practitioner after she learned that the mother was pregnant. Even if the mother's mental health were to deteriorate for any reason, the children would not be at risk because of family support. Petitioner cites no factual issue that remains to be resolved at a fact-finding hearing except for the changeable nature of the mother's condition, but that argument is tantamount to saying that the nature of the diagnosis and condition alone require a neglect finding.

The Court notes that it is rare to see parents suffering from mental illness charged in family court who are not indigent. The presence of family and financial supports is one of likely explanations for why affluent parents do not often get charged. Here, the mother's income level played a role in her lack of easy access to a second opinion when she questioned the nurse practitioner's direction to stop taking her psychotropic medication while pregnant.

The Court concludes that dismissal also is warranted because the aid of the court is not required. Petitioner argues that the Court's aid is needed to ensure the safety of the children and that the safety plan is not enough. However, the mother has shown considerable insight into her mental health condition and a commitment to maintaining her stability, and there is family support if she does not succeed at any point. The children are currently well cared-for in their uncle's home and the grandmother has shown her reliability as a safety net. The mother's actions in connection with her newborn's birth represented precisely what the law would want a mother experiencing mental health instability to do. The Court's involvement only adds unnecessary stress. The mother has proven that she is entitled to move forward without court intervention.

*Matter of Johanna W.*

(Fam. Ct., Kings Co., 8/8/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_51238.htm](http://nycourts.gov/reporter/3dseries/2018/2018_51238.htm)

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*ABUSE/NEGLECT - Mental Illness*  
*- Defaults*

The Fourth Department agrees with respondent mother that she did not default where she appeared at the two-day fact-finding hearing and was present when petitioner rested, and, although she failed to appear on the next hearing date, the court merely issued its fact-finding determination.

However, there was sufficient evidence of neglect based on mental illness. Although the mother voluntarily sought treatment, she missed many follow-up appointments. Because of her delusions and paranoia, she often stayed at home with the shades drawn and refused to let her children go

outside. Her second oldest child did most of the cooking because the mother was too depressed to do so, and she yelled at the children and called them names to keep from hitting them. She admitted being irritable and having a violent past, and continued to exhibit such behavior when she screamed at and threatened a caseworker in front of the children and struck the youngest child during a psychiatric assessment.

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

\* \* \*

*ABUSE/NEGLECT - Imminent Risk/Reasonable Efforts*  
*- Mental Illness*

Upon a FCA § 1028 hearing, the Court concludes that ACS failed to establish imminent risk where the mother has been diagnosed as bipolar and schizophrenic and been hospitalized a number of times, but there is no evidence that the child was harmed or at risk of harm, or that the mother's condition had an impact on her ability to manage day-to-day life and care for the child.

The Court cannot assume that a parent with bi-polar disorder and/or schizophrenia is a risk to his or her child, especially without expert testimony, since illnesses manifest differently in each individual. Even the fact that the parent was hospitalized does not mean the child was at risk since the parent may have entered the hospital to stabilize *before* there was any risk, which seems to have been the case here. As long as a parent has sufficient family support or makes adequate arrangements for child care before entering the hospital - here, the maternal grandmother cared for the child - the child is protected. A parent who seeks help while ensuring that the child is safe should not be punished by the child protective system, as this creates a disincentive to reaching out in the future.

The mother presently lives in a family shelter. The regular contact the child will have with her teachers, shelter staff, child protective caseworkers, and her grandmother, who has been a reliable reporter of her daughter's condition, will provide some insurance. The mother appears to be conscientious about following rules and keeping track of information such as appointment dates, and to know the importance of asking for help when it is needed.

ACS did not use reasonable efforts to avoid the need for removal. Key people who could have provided information about the mother's care of the child, such as the pediatrician, and the long-time camp/after-school provider, were not spoken to. The mother was not referred to any services until the Court ordered it. The emotional pain and harm that removal causes to the child and parent is too great to allow it to happen unnecessarily based on slow, incomplete and ultimately inadequate casework.

The Court observes that, in Brooklyn, it is almost entirely indigent parents of color who have neglect cases brought against them with charges of mental illness. Given that these illnesses cut across race and class lines, it seems likely that the lack of adequate community-based low cost mental health treatment, and the overuse of large public hospitals for treatment, leads to

increased and at times unnecessary involvement by ACS. In middle and upper class families, these illnesses are managed in the privacy of one's home with family members caring for the children and quality mental health practitioners treating the parent without government involvement.

*Matter of Divayah D.*

(Fam. Ct., Kings Co., 8/6/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_51183.htm](http://nycourts.gov/reporter/3dseries/2018/2018_51183.htm)

### **Medical Neglect And Treatment**

#### *ABUSE/NEGLECT - Medical Neglect*

The First Department annuls an OCFS determination which affirmed an ACS determination, after a hearing, that allegations of child maltreatment were "indicated" and that the underlying acts were relevant or reasonably related to child care, employment, adoption of a child, or the provision of foster care.

Petitioners were in compliance with the recommendations of the child's pediatrician, and there is no evidence that their failure to seek regular visits with a hematologist, or to administer a daily dose of penicillin to the child as a prophylaxis, either impaired or risked imminently impairing the child's physical condition. Medical records show that the child's hospitalizations in 2014 and 2015 were the result of a viral infection, which would not have been prevented by his seeing a hematologist regularly or taking penicillin. After the 2015 hospitalization, the child's treating physician ratified a course of treatment that did not include a daily antibiotic. Petitioners' decision not to further vaccinate the child did not violate the pediatrician's directive.

*In re Charles v. Poole*

(1st Dept., 9/25/18)

\* \* \*

#### *ABUSE/NEGLECT - Medical Neglect*

##### *- Leaving Child With Other Caretaker*

Respondent mother left the children in the care of her boyfriend on a Friday morning. During the day, the boyfriend noticed that Sophia, who was almost three years old, had light blue bruising on her buttocks. He notified the mother, but did not seek medical care. When the mother returned home, she examined Sophia and agreed that no medical care was needed. Both children told the mother that the injury was the result of a fall. The mother brought the children to respondent father for a scheduled weekend visit, and alerted him to the bruising so he could monitor Sophia. The father initially agreed that Sophia did not need medical care, but, when the bruising became darker, he and the mother agreed that Sophia should be seen by her pediatrician on Monday. Sophia also complained to the father of pain in her left ankle. On Monday, the mother attempted to contact the pediatrician, but was unsuccessful. On Tuesday morning, because Sophia was also having difficulty putting weight on her left foot, the mother brought Sophia to the hospital,



where medical personnel determined that the pattern of bruises was not consistent with a fall and was instead indicative of spanking.

After a fact-finding hearing, the family court made findings of neglect and derivative neglect. The Second Department reverses. There was no evidence that the mother had prior knowledge of the boyfriend's alleged propensity to mistreat the children or that he had done so on a prior occasion. The parents' failure to recognize the significance of the pattern of bruising cannot be faulted. No treatment was required for the bruising, and the parents promptly sought treatment for the unrelated ankle injury.

*Matter of Alana H.*  
(2d Dept., 10/3/18)

\* \* \*

#### *ABUSE/NEGLECT - Medical Neglect*

The Third Department upholds findings of medical neglect against respondents.

The family court determined that the mother's testimony was credible and found that the child's head injury was not a result of neglect because "accidents can happen with young children." In addition, the child was not ultimately impaired.

However, given the child's premature and underweight status, and the injury to the head and significant presentation of bruising, the child was in immediate danger of becoming impaired. A reasonable and prudent parent would have sought medical treatment, especially when the injury appeared to worsen in size and color.

*Matter of Nathanael E.*  
(3d Dept., 4/5/18)

#### **Severe Abuse/Abuse**

#### *ABUSE/NEGLECT - Severe/Derivative Severe Abuse*

The First Department finds sufficient evidence of severe abuse and derivative severe abuse where expert testimony established by clear and convincing evidence that the then three-year-old child suffered from non-accidental injuries, including life-threatening brain trauma resulting in permanent brain damage, a fractured pelvis, and bruises, burns, and scars on her body. The child's treating physician, a board-certified pediatrician with a certification in child abuse, opined to a reasonable degree of medical certainty that the brain trauma was caused by partial strangulation leading to a loss of blood flow.

Even assuming that the mother's live-in boyfriend alone inflicted these injuries, the mother remains culpable for permitting the abuse to occur since she was or should have been aware of it.

Moreover, she delayed in summoning emergency assistance for almost two hours after the child was found comatose.

*In re Heaven C.E.*  
(1st Dept., 9/27/18)

\* \* \*

*ABUSE/NEGLECT - Fractures/Injuries Constituting Abuse*  
*- Person Legally Responsible*

In an appeal taken by petitioner and the attorney for the children, the Second Department reverses that portion of the family court's order that, after a fact-finding hearing, dismissed abuse and derivative charges against the mother, the father, and the maternal grandmother - the family court made findings of neglect and derivative neglect against those three of the four respondents - and makes findings of abuse and derivative abuse where the four-month old child suffered two rib fractures, fractures of her right and left femurs, and a fracture of the right humerus, within four months after her birth.

The Court rejects the family court's finding that the child did not sustain a serious physical injury as defined in Penal Law § 10.00(10). Although the definition of "abuse" under FCA § 1012 is similar to the definition of "serious physical injury" under the Penal Law, the definitions are not identical. Under the Family Court Act, a child need not sustain a serious injury for a finding of abuse as long as the evidence demonstrates that the parent sufficiently endangered the child by creating a substantial risk of serious injury.

Here, the fracture to the humerus required the child's arm to be immobilized for more than two weeks, which is sufficient to establish a protracted impairment of health. That injury caused the child pain and discomfort, and could take months to heal, and there was a concern that there could be loss of function and loss of growth potential. Respondents failed to rebut the presumption of abuse.

In the grandmother's appeal, the Court concludes that there was sufficient evidence that she was a person legally responsible for the children. The grandmother came to the parents' home every day and slept over regularly, as many as two to three times per week. On the days that she did not sleep over, she would come over in the morning and would stay until the paternal grandmother arrived in the afternoon. The maternal grandmother fed the injured child, changed her diaper and her clothes, and, along with the mother, bathed the child several times a week. She took care of the injured child while the mother played with another child, was alone with the injured child whenever the mother napped or did laundry, and, at least one to two times per week, was the only person caring for the child.

*Matter of Jonah B.*  
(2d Dept., 10/10/18)

**Leaving Child Alone Or Unsupervised Or With Harmful Individual**

*ABUSE/NEGLECT - Leaving Children Alone*  
*- Central Register/Child Protective Investigation*

The Fourth Department upholds a determination denying petitioner's request that an indicated report be amended to unfounded and sealed where petitioner left two infants and a toddler upstairs in her home without supervision while she took the older children for a twenty-five-minute walk around the cul-de-sac and then remained outside with the older children for an additional twenty-five to thirty minutes while the three younger children were inside the house without supervision. Petitioner's testimony that she asked a neighbor to listen to the baby monitor while she was away conflicted with evidence presented by respondent and was not credited.

Even assuming, arguendo, that the delay between the commencement of the investigation into the maltreatment allegations and the date of respondent's determination violated 18 NYCRR § 432.2(b)(3)(iv) (within sixty days after receiving report, child protective service must make determination to "indicate" or "unfound" report), the Court rejects petitioner's contention that expungement of the indicated record is an appropriate remedy for that procedural irregularity.

*Matter of Warren v. New York State Central Register/OCFS*  
(4th Dept., 9/28/18)

\* \* \*

*ABUSE/NEGLECT - Leaving Child With Inappropriate Caretaker*

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

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

\* \* \*

*ABUSE/NEGLECT - Leaving Child Alone*

The Second Department upholds findings of neglect where the father committed acts of domestic violence in the child's presence and thereafter left the child, who was approximately one year old at the time, alone in the apartment for at least thirty minutes.

*Matter of Taylor P.*

(2d Dept., 7/11/18)

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*ABUSE/NEGLECT - Leaving Children Alone Or Unsupervised*

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

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

*Matter of A.M. v. H.M.*

(Fam. Ct., Suffolk Co., 1/17/19)

<https://www.law.com/newyorklawjournal/almID/1548245352NYNN173071/>

(decision available upon request)

**Derivative Abuse/Neglect**

*ABUSE/NEGLECT - Derivative Abuse*

The Second Department dismisses as academic an appeal from the dismissal of sexual abuse allegations regarding two children, including the victim, who have reached the age of majority, but reverses that part of the family court’s order that dismissed allegations that respondent derivatively abused the other children. Respondent’s abuse of one child while the other children were asleep in the same room indicates a fundamental defect in respondent’s understanding of the duties of a person legally responsible for their care.

*Matter of Mayra C.*

(2d Dept., 7/18/18)

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*ABUSE/NEGLECT - Derivative Abuse*

The Second Department upholds a finding that the father derivatively abused his two children where he pled guilty to federal charges of conspiracy to commit sex trafficking, sex trafficking of a child, and promotion of prostitution, and, in his plea, admitted to a course of conduct in the ten-

year period prior to his arrest during which, at various times, he had agreed to have a minor perform sex acts for money, he had arranged for minors to perform sex acts for money, and he and the subject children's mother had operated a prostitution business.

*Matter of Brysen A.*  
(2d Dept., 5/9/18)

*Practice Note:* This case serves as a reminder that so-called "derivative" abuse or neglect charges may be based on acts committed against a child's siblings, or acts committed against children who have no relationship with the respondent.

### **Drug/Alcohol Possession/Abuse**

#### *ABUSE/NEGLECT - Drug Misuse*

The Fourth Department overturns a finding of neglect, noting that evidence that the father tested positive for THC, oxycodone, and opioids on one occasion is insufficient to establish that the father repeatedly misused drugs, and that the father's admission to using marihuana was insufficient without evidence as to the duration, frequency, or repetitiveness of his drug use.

*Matter of Bentley C.*  
(4th Dept., 10/5/18)

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#### *ABUSE/NEGLECT - Drug Misuse*

The Second Department reverses an order that, after a fact-finding hearing, dismissed the neglect petitions, and makes a finding of neglect, where petitioner established that the mother had regularly used marijuana, which she had been advised could worsen her preexisting mental health condition, and the mother failed to establish that she was voluntarily and regularly participating in a drug rehabilitative program.

*Matter of Gabriela T.*  
(2d Dept., 4/25/18)

\* \* \*

#### *ABUSE/NEGLECT - Allowing Neglect* *- Drug Misuse* *- Failure To Comply With Service Plan*

The First Department upholds a finding of neglect where the father knew or should have known that the mother was smoking marijuana while she was pregnant with the child, but failed to take any steps to stop her drug use, and the child had a positive toxicology and a low birth weight, and a one-week stay in the neonatal intensive care unit following his birth.

Furthermore, the father smoked marijuana with the mother while she was pregnant, including the day before the child's birth, failed to comply with his service plan relating to another child, and failed to submit to drug testing.

*In re Thamel J.*  
(1st Dept., 6/14/18)

\* \* \*

*ABUSE/NEGLECT - Drug Misuse/Marijuana*  
*- Failure To Supply Shelter/Care*

The First Department upholds a finding of neglect where the caseworker testified that respondent told her that she was "smoking marijuana eight to 10 times per week to deal with her stress" and respondent testified that she told the caseworker that she had used marijuana because she liked it, and respondent failed to rebut the prima facie case by showing that she was voluntarily and regularly participating in a drug rehabilitation program.

In addition, respondent neglected the child by attempting to leave him at a local fire station with people she did not know, who told her that they do not take children.

*In re Shaun H.*  
(1st Dept., 5/17/18)

\* \* \*

*ABUSE/NEGLECT - Drug Misuse*

The First Department, finding that the mother failed to rebut petitioner's prima facie showing of neglect by showing that she was regularly participating in treatment, notes that her entry into a drug treatment program about sixteen days before the neglect petitions were filed does not outweigh her significant history.

*In re Dior S.*  
(1st Dept., 4/12/18)

### **Summary Judgment/Collateral Estoppel**

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

The Third Department upholds an order granting petitioner's motion for summary judgment adjudicating the child to be abused, rejecting respondent's contention that the family court abused its discretion when it granted petitioner's motion for summary judgment and gave

collateral estoppel effect to respondent's criminal conviction prior to the resolution of his pending appeal. The determinative issue is whether he had a full and fair opportunity to litigate during the course of his criminal trial, not whether he has exhausted every avenue of appeal.

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

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

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

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#### *COLLATERAL ESTOPPEL - Prior Dismissal In Dependency Proceeding*

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

Although criminal charges put at stake an accused's liberty, dependency proceedings affect liberty interests as well - the fundamental right of parents regarding their children's upbringing. The Court rejects the suggestion that the state does not take dependency proceedings as seriously as criminal prosecutions, and will forego dependency proceedings if issue preclusion may apply. If the state cannot prove a dispositive fact under the preponderance standard, it is unlikely to be able to do so, absent new or additional evidence, in a subsequent criminal proceeding. The Court's opinion does not prevent the state from pursuing parallel or successive proceedings; it only prevents the state from re-litigating a factual issue that it had a full and fair opportunity to litigate where the related judgment has become final, i.e. any appeals have been exhausted.

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

Although the State also argues that the issues are not the same because the two proceedings "are governed by different substantive law and different procedures," the precise issue here is whether defendant abused the child by shaking her, causing bleeding in her brain and eyes. This factual issue was adjudicated in the dependency proceeding against the State. The same factual issue is

the basis for the criminal charge. The State has not pointed to any additional evidence it was foreclosed from presenting in the dependency proceeding that would apply in the criminal case, nor has it indicated any changed circumstances that would make re-litigation appropriate.

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

*Practice Note:* In *Nelson v. Dufficy*, 104 A.D.2d 234 (2d Dept. 1984), lv denied 64 N.Y.2d 610, defendant argued that he could not be charged with first degree sexual abuse in a criminal proceeding because, upon a hearing, the family court had made a finding of only third degree sexual abuse in an Article Ten proceeding. The Second Department concluded that collateral estoppel did not apply, citing the fact that different prosecutorial agencies were involved, and the child protective nature of the family court proceeding; defendant had not shown that the issue of his guilt or innocence had necessarily been decided by the family court in his favor.

In *People v. Roselle*, 84 N.Y.2d 350 (1994), the Court of Appeals concluded that collateral estoppel did not apply where defendant's admission in the Article Ten proceeding, and his explanation regarding how the child had been burned, resulted in a neglect finding. The Court noted that the issues in the two proceedings were not the same; the issue in the Article Ten proceeding was defendant's ability to care for his daughter, not his criminal liability. Also, it was the County Attorney, not the District Attorney, who was charged with presenting the Article Ten case, and the presence in family court of a non-attorney District Attorney employee contemplated further development of the facts in any criminal prosecution.

### **Out-of-Court Statements Of Children/Corroboration, And Other Hearsay**

*ABUSE/NEGLECT - Exposure To Sexual Activity*  
- *Failure To Provide Adequate Shelter*  
- *Corroboration*

The First Department upholds neglect findings where respondent and the child's mother frequently exposed the child to adult sexual activity and pornography. The then seven-year-old child's out-of-court statements about her observations of adult sexual activity were corroborated by her age-inappropriate, specific knowledge of sexual activity.

In addition, the child's out-of-court statements describing the home as very dirty and covered in cat urine and feces were corroborated by respondent's admissions and the caseworker's observations that respondent smelled of cat urine and that the child was unkempt and wore dirty, stained clothes

*In re Cerenity F.*  
(1st Dept., 4/19/18)

\* \* \*

*ABUSE/NEGLECT - Person Legally Responsible/Hearsay Evidence*



The Fourth Department upholds an order that granted petitioner's motion for summary judgment and determined that respondent abused, severely abused and neglected the children, concluding that petitioner established that respondent was legally responsible for the children where the children's hearsay statements were corroborated by respondent's admissions.

*Matter of Celeste S.*  
(4th Dept., 9/28/18)

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*ABUSE/NEGLECT - Presumption Of Abuse*  
*- Hearsay Evidence*

In an appeal by the father from an order adjudging that respondents abused their three-month-old child and derivatively abused their two-year-old child where the evidence established that the younger child had a fractured humerus and rib and respondents' explanation for those injuries was inconsistent with the nature and severity of the injuries, the Fourth Department affirms, noting that the father's denial of fault and the mother's attempt to blame the older child for the injuries were insufficient to rebut the prima facie evidence of abuse.

The court did not err in admitting the entire case file, including hearsay, because the court received the file conditionally, subject to the father's hearsay objections.

*Matter of Tyree B.*  
(4th Dept., 4/27/18)

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

The Second Department affirms an order that, after a fact-finding hearing, dismissed neglect and derivative neglect allegations made against the father.

The out-of-court statements by one allegedly victimized child regarding sexual abuse, and the out-of-court statements of another allegedly victimized child regarding excessive corporal punishment, were insufficiently corroborated. With respect to the sexual abuse, other children's statements generally referred to their observations of the child screaming and crying, but failed to provide any detail as to the alleged abuse. With respect to the alleged excessive corporal punishment, other children's statements did not provide any detailed description of the alleged excessive corporal punishment. Thus, there was insufficient cross-corroboration.

*Matter of Ashley G.*  
(2d Dept., 7/25/18)

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### *FAMILY OFFENSES - Hearsay Evidence*

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

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

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

### **Sealed Records**

#### *ABUSE/NEGLECT - Evidence - Sealed Criminal Records SEALING*

In this sex abuse proceeding, the Court denies respondent father's motion to preclude a 911 recording that was entered into evidence before the father was acquitted in the related criminal proceeding and records were sealed.

The Criminal Procedure Law sealing statute applies to criminal matters only, in which the standard of proof is beyond a reasonable doubt. Moreover, a 911 recording is not an official record or paper covered by the sealing statute, and the sealing statute does not apply to a recording legally obtained and entered into evidence before sealing.

The legislative intent was to protect acquitted defendants from stigma, not to permanently bar evidence from related proceedings in family court, and the father's interest in preclusion is outweighed by the children's right to be safe from possible harm.

*Matter of J.R.*  
(Fam. Ct., Bronx Co., 12/3/18)  
(decision available on request)

*Practice Note:* The Court cited, and distinguished, *Matter of Carolina K.*, 55 Misc.3d 352 (Fam. Ct., Kings Co., 2016), where a 911 recording was not admitted into evidence when offered after the respondent had been acquitted in the criminal proceeding. The Court also noted that it was not bound by the decision in *Carolina K.* (in which the court also held that 911 recordings are covered by the sealing statute).

### **Expert Testimony**

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

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

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

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

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

Link to family court decision:

[http://nycourts.gov/reporter/3dseries/2018/2018\\_50126.htm](http://nycourts.gov/reporter/3dseries/2018/2018_50126.htm)

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#### *CUSTODY/ABUSE/NEGLECT - Expert Testimony*

The Fourth Department finds no error in the admission of a nurse's testimony regarding the cause of the child's injuries where the nurse was licensed as a registered nurse and certified as a sexual assault nurse examiner, had performed between 30 and 40 sexual assault examinations on children since receiving her certification, and had been training other nurses to be sexual assault nurse examiners.

*Matter of Valentin v. Mendez*  
(4th Dept., 10/5/18)

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#### *EXPERTS - Basis Of Opinion*

In this medical malpractice action, the Fourth Department finds no error in the denial of defendant's motion to strike the life care planning expert's testimony on the ground that her opinion was principally based upon the inadmissible hearsay statements of plaintiff's treating physician.

Generally, opinion evidence must be based on facts in the record or personally known to the witness, but an expert is permitted to offer opinion testimony based upon facts not in evidence where the material is of a kind accepted in the profession as reliable in forming a professional opinion, and, under the professional reliability exception to the hearsay rule, may rely on otherwise inadmissible hearsay if it is shown to be the type of material commonly relied on in the profession and it does not constitute the sole or principal basis for the expert's opinion.

Here, the expert reviewed legal documents and medical records; interviewed plaintiff about his background, work history, injuries, and treatments, the recommendations of his treatment providers, and his level of independence in light of his injuries; and discussed and reviewed the elements of the life care plan with plaintiff's treating physician. The expert testified that the information upon which she relied was of the type commonly relied on in her profession. Although her discussions with the treating physician provided a basis for several components of plaintiff's future medical needs, and the expert acknowledged the extent of her reliance upon those hearsay statements, the hearsay statements were but a link in the chain of data upon which she relied. She relied on the treating physician's recommendations, material in evidence including medical records, professionally accepted outside sources such as a medical costs database, and her own knowledge and expertise.

*Tornatore v. Cohen*  
(4th Dept., 6/8/18)

### **Presumption Of Abuse/Neglect**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Matter of Greysen G.*

(Fam. Ct., Bronx Co., 10/19/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_51538.htm](http://nycourts.gov/reporter/3dseries/2018/2018_51538.htm)

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*ABUSE/NEGLECT - Presumption Of Abuse/Expert Testimony*

The child was alone with respondent father when she stopped breathing. Respondent and a neighbor who was a retired nurse attempted to resuscitate the child, who was soon transported to a hospital for emergency medical attention, and then airlifted to another hospital, where she was diagnosed with venous sinus thrombosis (clotting in a vein draining blood from the brain), bleeding on the brain and severe retinal hemorrhaging. The child had no bone fractures, bruising or other markings suggestive of abuse, nor was there any direct proof that respondent had behaved inappropriately toward the child. Nevertheless, a pediatrician versed in child abuse could find no explanation aside from non-accidental trauma.

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

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

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

*Matter of Liana HH.*

(3d Dept., 10/18/18)

## **Disposition/Permanency/Court-Ordered Services/Reasonable Efforts/Orders Of Protection**

### *PERMANENCY HEARINGS - Reasonable Efforts/ADA*

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

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

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

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

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### *ABUSE/NEGLECT - Self-Incrimination Issues*

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

services precluded him from returning to the family home and having unsupervised visitation with his children.

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

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

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

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

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

*In re Blakeman*

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

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#### *PERMANENCY HEARINGS - Reasonable Efforts/Americans With Disabilities Act*

The Second Department, noting that the family court may properly look to the Americans With Disabilities Act's standards for guidance, concludes that the family court properly determined at the permanency hearing that reasonable efforts had been made to achieve the permanency goal of reunification of the child and the mother.

Since the completion of the last permanency hearing, petitioner facilitated supervised visitation until it was suspended as a result of the mother's actions, and made reasonable efforts to find services tailored to the mother's specific needs as petitioner understood them to be. Petitioner referred the mother to a parenting class taught in Spanish that could accommodate individuals with cognitive limitations, but the mother failed to attend. There is no evidence in the record that her failure to attend that class was attributable to any cognitive limitations, and, notwithstanding



her alleged disability, she remained responsible for cooperating with and completing recommended services.

Because the exact nature of the mother's diagnoses and her eligibility for certain services for individuals with cognitive disabilities remained unclear, she failed to demonstrate that she was entitled to an order directing petitioner to provide and pay for services specifically tailored to individuals with cognitive limitations. The mother also failed to demonstrate that she required "1:1 supportive counseling" in the form of home-based casework services. To the extent the mother established that she was a qualified individual with a disability under the ADA, she failed to establish that the agency failed to make reasonable accommodations for her disability or disabilities or that she was entitled to future accommodations under the ADA.

*Matter of Michael A.*  
(2d Dept., 7/11/18)

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*PERMANENCY HEARINGS - Permanency Goal/Supervised Independent Living Arrangement*

A California appeals court holds that the juvenile court erred when it terminated dependency jurisdiction with respect to the non-minor child because the court mistakenly believed that the child's former foster parent could not be an appropriate supervised independent living placement. Nothing in the law disqualifies a former caregiver as a SILP.

*In re M.W.*  
2018 WL 4141275 (Cal. Ct. App., 4th Dist., 8/31/18)

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*PERMANENCY HEARINGS - Appeals*  
*- Right To Be Present*

The Second Department holds that where a dispositional order has been issued after a permanency hearing at which a child was erroneously deprived of his or her statutory right to participate in person, the remedy would be to vacate the order and remit the matter for a new permanency hearing at which the child must be permitted to participate in person.

Here, however, the Court is unable to grant such relief because the permanency hearing and resulting order were superseded by later permanency hearings and orders, and it is undisputed that the child was permitted to participate in person at those hearings. Moreover, the order at issue directed the dispositional outcome the child sought and thus she is not aggrieved by that order. The matter does not warrant invoking an exception to the mootness doctrine, and thus the appeal is dismissed.

*Matter of Denise V.E.J.*  
(2d Dept., 7/11/18)

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*ABUSE/NEGLECT - Corroboration/Experts  
- Orders Of Protection*

The Third Department upholds findings of sexual abuse where the children's out-of-court statements were corroborated by an expert's conclusion that the children's conduct was consistent with behavior typically exhibited by victims of sexual abuse.

The Court, addressing an order of protection running until the child's eighteenth birthday that was issued against respondent step-grandfather, who is related to the abused child through his son's marriage to the child's mother, concludes that a step-grandparent is not related to the child by marriage for the purposes of FCA § 1056(4). However, § 1056(4) does prohibit such an order if it is against someone who is related by blood or marriage to a member of the child's household; the matter must be remitted for the purpose of determining whether that is the case here.

*Matter of Makayla I.*  
(3d Dept., 6/7/18)

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

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

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

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

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

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

*Matter of Kenneth R.*

(Fam. Ct., N.Y. Co., 1/28/19)

[http://nycourts.gov/reporter/3dseries/2019/2019\\_29042.htm](http://nycourts.gov/reporter/3dseries/2019/2019_29042.htm)

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

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

*Matter of Jasir M.*

(2d Dept., 12/26/18)

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

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

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

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

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*ABUSE/NEGLECT - Mental Illness*  
*- Disposition*

The Second Department upholds a finding of neglect where, although this Court determined in a prior proceeding that ACS failed to establish a causal connection between the mother's mental illness and actual or potential harm, in this proceeding there was evidence in the record that the mother lacked insight into her mental illness and psychiatric hospitalizations and that her refusal to cooperate with the prescribed treatment placed the children at imminent risk of harm.

The Court also rejects the mother's contention that the family court acted in excess of its jurisdiction or violated her constitutional right to direct her own medical treatment when it directed her to comply with medication management recommended by her mental health service providers, but did not order the forcible administration of medication. However, the Court clarifies the order of disposition by directing the mother to cooperate with medication management as recommended by her mental health service providers.

*Matter of Nialani T.*  
(2d Dept., 9/12/18)

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

In a case involving an allegation that the father neglected the child by subjecting the mother to acts of domestic violence in the child's presence and abusing alcohol, the Second Department affirms an order denying the father's motion to modify an order of disposition, which released the child, upon consent, to the custody of the mother under ACS supervision, so as to grant a suspended judgment, to vacate the neglect fact-finding order entered upon his consent without admission pursuant to FCA § 1051(a), and to dismiss the petition upon the expiration of the supervision period.

Pursuant to FCA § 1061, the Family Court may set aside, modify, or vacate any order issued in the course of a child protective proceeding for good cause shown. Here, the father failed to demonstrate that the requested relief would serve the child's best interests.

*Matter of Jacob P.E.*  
(2d Dept., 6/27/18)

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

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

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

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

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*PERMANENCY HEARINGS - Child's Right To Participate And Waive Participation/Age-Appropriate Consultation*

The Fourth Department, reaching the issue pursuant to the exception to the mootness doctrine, holds that the Family Court had no authority to compel the then fourteen-year-old child to participate in a permanency hearing when the child waived his right to participate following consultation with his attorney (see Family Ct Act § 1090-a[a][2]).

The statutory language is clear and unambiguous. Although the permanency hearing must include "an age appropriate consultation with the child" (FCA § 1090-a[a][1]), that requirement may not "be construed to compel a child who does not wish to participate in his or her permanency hearing to do so" (FCA § 1090-a[g]). The choice belongs to the child.

*Matter of Shawn S.*  
(4th Dept., 6/8/18)

**Special Immigrant Juveniles**

*SPECIAL IMMIGRANT JUVENILES*

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

The Second Department makes the SIJ-related findings, noting, inter alia, that although the father had previously moved unsuccessfully for the issuance of an order, the law of the case doctrine does not bind appellate courts; that the issuance of a SIJ order is not dependent on the child living with either parent; and that the child is in danger of being harmed by gang members if she returned to El Salvador.

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

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*SPECIAL IMMIGRANT JUVENILES - Dependency/Juvenile Delinquency Placement*

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

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

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

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

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

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### *SPECIAL IMMIGRANT JUVENILES*

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

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

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

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

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### *SPECIAL IMMIGRANT JUVENILES*

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

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

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

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*SPECIAL IMMIGRANT JUVENILES*  
*GUARDIANSHIP*  
*JUDGES - Bias*

In this guardianship proceeding in which the mother sought findings that would enable the child to petition for special immigrant juvenile status, the court refused to issue the findings and dismissed the petition.

The Second Department reverses and remands the matter for new determinations before a different judge, noting that in a guardianship proceeding, there is no express statutory fingerprinting requirement or express requirement that documentation pertaining to the Office of Children and Family Services be presented, and that the court erred in dismissing the petition and denying the motion for “failure to prosecute” based on the mother’s failure to submit documentation regarding, inter alia, the child’s enrollment in school.

The court also improperly stated that the child “should be speaking English a lot better” after having been in the United States for two years; that the child should “make some friends who speak English”; that if the child only spoke Spanish, “what are you gonna do, you’re gonna be hanging around just where you are”; and that the child “[c]an’t speak English, doesn’t go to school, it’s wonderful. It’s a great country America.”

*Matter of A. v. P.*  
(2d Dept., 5/23/18)

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*GUARDIANSHIP*  
*SPECIAL IMMIGRANT JUVENILES*

The Second Department grants the guardianship petitions, and the children’s motions for the issuance of an order making the requisite declaration and specific findings that would enable them to petition for Special Immigrant Juvenile status, concluding that the mother was not required to demonstrate that she has “legal status in this country” or had taken steps to obtain such status to qualify as a guardian. An individual’s lack of lawful status in the United States is immaterial to the issue of his or her domicile and, therefore, his or her eligibility to receive letters of guardianship. The record demonstrates the mother’s intent to permanently reside in New York State.

*Matter of Alan S.M.C.*  
(2d Dept., 4/11/18)

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*GUARDIANSHIP - Jurisdiction/SIJS Findings*



In this guardianship proceeding in which there is a request for Special Immigrant Juvenile Status findings, the Family Court holds that it has the same jurisdiction as the Surrogate's Court would have under Surrogate's Court Procedure Act 1702, which provides jurisdiction to appoint a guardian where the infant is a non-domiciliary of the state but has property situated in the county in question.

Here, the child is currently detained in New Mexico, but, although she has no real estate property, substantial assets, or significant amount of money in Kings County, she does have personal property items, including her backpack, clothing, purse, wallet and medicines. That the child's property is de minimis should not stymie her jurisdictional right to pursue her guardianship proceeding.

*Matter of Christian J.C.U. v. Jorge R.C. et al.*

(Fam. Ct., Kings Co., 5/17/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_28159.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28159.htm)

### **Destitute Children**

#### *DESTITUTE CHILDREN - Notice To Parents*

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

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

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

*In re Nitthanean R.*

(1st Dept., 10/16/18)

### **Appeals**

#### *ABUSE/NEGLECT - Adjournment In Contemplation Of Dismissal*

##### *- Appeals/Waiver Of Right To Appeal*

The neglect petition alleging that the father knew or should have known that the mother was taking unprescribed drugs during pregnancy was adjourned in contemplation of dismissal. As part of the ACD agreement, the father made a sworn admission to the factual allegations in the

petition, and the family court issued an ACD order that included a finding that the father had admitted acts that constituted neglect. The court continued placement of the child with the grandparents under petitioner's supervision.

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

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

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

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

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#### *PERMANENCY HEARINGS - Appeal - Mootness*

The Second Department concludes that the appeal is academic insofar as the permanency hearing order continued the foster care placement since two permanency hearings have been held since then and that portion of the order has already expired.

However, the Court, agreeing with the First and Third Departments, concludes that the portions of the order which changed the permanency goal from reunification to placement for adoption, and directed the filing of a petition to terminate the father's parental rights, are not academic. The order altered the objectives to be sought by petitioner in the course of future permanency proceedings, and thus any new orders would be the direct result of the order appealed from, and the issue of whether the order appealed from was proper will continue to affect the father's rights. The Court then affirms.

*Matter of Victoria B.*  
(2d Dept., 8/8/18)

### **III. FOSTER CARE/TERMINATION OF PARENTAL RIGHTS/ADOPTION**

#### **TPR: Unwed Fathers**

##### *TERMINATION OF PARENTAL RIGHTS - Unwed Fathers* *ADOPTION - Consent*

The First Department affirms an order which found that respondent was a notice-only father, and, in the alternative, that he abandoned the child. The agency met its initial burden of going forward, and respondent did not meet his ultimate burden of showing that his consent was required.

The Court rejects respondent's constitutional challenge to the financial support requirement of Domestic Relations Law § 111(1)(d), noting that the Court cannot determine the adequacy of the notice respondent provided to the Attorney General, and that, in any event, respondent has furnished no grounds for finding the statute unconstitutional. Respondent contends that the statute imposes a threshold requirement on unwed fathers but not on unwed mothers, but the Supreme Court has upheld gender-based distinctions in the face of an equal protection claim. Moreover, the statute is not unconstitutional as applied, since the record establishes that respondent failed to maintain substantial and continuing contact with the child since the child entered foster care in 2012, and took no steps to manifest or establish his parental responsibility.

*In re Elijah Manuel V.*  
(1st Dept., 5/29/18)

#### **TPR: Collateral Estoppel**

##### *SEX CRIMES - Sex Offender Registration*

In this Sex Offender Registration Act proceeding, the Court of Appeals rejects defendant's contention that his acquittal of charges at his criminal trial relating to the acts at issue precludes a finding, by clear and convincing evidence, that he engaged in such acts.

Judge Rivera, dissenting, asserts that the People are subject to the high clear and convincing burden because a defendant's liberty interest is at stake and the risk level determination has severe adverse consequences, and thus "the People cannot seek to elide this legislatively imposed demanding burden by arguing it falls some slight measure below the reasonable doubt standard." Moreover, the only reasonable conclusion is that the jury rejected the complainant's version with respect to the penetrative and oral sexual conduct that accounted for the points assessed by the SORA court.

*People v. Quinn Britton*  
(Ct. App., 4/26/18)

*Practice Note:* This decision calls to mind the fact that an acquittal in a criminal proceeding does not have collateral estoppel effect in a termination of parental rights proceeding that is based on the same conduct.

### **TPR: Guardian Ad Litem**

#### *TERMINATION OF PARENTAL RIGHTS - Mental Illness/Guardian Ad Litem*

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

Although the mother's attorney did not move for the appointment of a guardian ad litem, the court may make such an appointment on its own initiative. In any event, the mother's attorney did inform the court that the mother was unable to assist in her own defense and moved to strike the mother's incoherent testimony. The court granted that motion, which was not opposed by petitioner or the attorney for the child. This was sufficient to alert the court to the issue of the mother's competence.

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

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

### **TPR: Hearsay Evidence**

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

In this permanent neglect proceeding, the First Department rejects the mother's objection that the agency relied solely on hearsay progress notes instead of offering the testimony of agency caseworkers with personal knowledge. The progress notes were not the sole evidence supporting the permanent neglect finding, which was also supported by the mother's own testimony. Moreover, the progress notes were properly admitted under the business records exception to the hearsay rule and the agency properly relied on them to meet its burden.

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

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

\* \* \*

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

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

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

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

**TPR: Diligent Efforts**

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

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

While the agency referred the mother to a multitude of services, arranged regular visitation, put a panoply of in-home services in place, gave written notice to the mother of the many appointments her special needs children had with medical, mental health and service providers and provided directions to those appointments, "[w]hat the agency failed to do, however, was to create and implement a service plan that was tailored to [the mother's] specific needs."

In *Matter of Lacey L.* (32 N.Y.3d 219), the Court of Appeals recently examined the intersection of the reasonable efforts requirement at a permanency hearing and the Americans with

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

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

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

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

*Matter of Xavier S. et al.*

(Fam. Ct., Bronx Co., 1/9/19)

[http://nycourts.gov/reporter/3dseries/2019/2019\\_50120.htm](http://nycourts.gov/reporter/3dseries/2019/2019_50120.htm)

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*TERMINATION OF PARENTAL RIGHTS - Reasonable Efforts  
VISITATION*

A California appeals court upholds the termination of the mother's parental rights where the court below, having issued a visitation order, refused to force the 14-year-old child to visit her mother.

When a child refuses visitation, it is the parent's burden to request a specific type of enforcement, or a specific change to the visitation order. Absent a request, it is not the court's burden to sua sponte come up with a solution to the intractable problem. "Trial judges are not mental health experts, nor child behavior experts."

Here, the only enforcement mechanism the mother requested was a visit in a therapeutic setting, which the court expressly permitted. The court also permitted mother to write letters to the child. Those were reasonable efforts.

*In re Sofia M.*

2018 WL 3122024 (Cal. Ct. App., 4th Dist., 6/26/18)

\* \* \*

*TERMINATION OF PARENTAL RIGHTS - Diligent Efforts*

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

*Matter of Shakira M.S.*

(2d Dept., 2/27/19)

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*TERMINATION OF PARENTAL RIGHTS - Diligent Efforts*

After a hearing, the family court found that the mother had neglected the children, Angalee and Nyla, by failing to treat her own mental illness, which resulted in domestic violence against Angalee's father, and an assault against a police officer while visiting Angalee in the hospital. At disposition, the family court placed Angalee in foster care (Nyla now resides with her father) and directed the mother to "continue with her mental health services (counseling) and the anger management component of such counseling until deemed not therapeutically needed." The family court also directed the mother to submit to a psychiatric evaluation and to comply with all recommendations from the evaluation, including medication management.

Upon a hearing, the Court dismisses a permanent neglect petition involving Angalee, finding insufficient proof of diligent efforts by the foster care agency.

The mother, adopted from a troubled home when she was a young child, has a history of trauma that at least contributed to her aggression, her outbursts, her erratic behavior, and her self-defeating actions, and she is a survivor of childhood sexual abuse. The agency should have engaged in a meaningful clinical assessment, and then sought appropriate services to address the problems. Although the agency points out that the Article Ten dispositional order did not direct it to make the referrals recommended in the court clinic's evaluation, "the agency mistakes Family Court's Article 10 dispositional orders to be ceilings instead of floors." The agency remained responsible for conducting its own independent assessment to determine what additional services, if any, were necessary. The individual therapy the mother was receiving was not the kind of intervention recommended by the court clinic.

The foster parents interfered with the mother's bonding with the child during her parenting time at their home. The agency's inexplicable insistence that the visits take place only at the foster home, even after ACS directed otherwise, was an unreasonable obstacle. When the visits eventually were moved to the agency, the mother had many positive visits with both girls together, but the visits became too stressful because the agency seems to have not used a domestic violence protocol to keep the mother separated from Nyla's father. Thus the mother was given no reasonable option other than to request that the visits go back to the foster home. There is no indication in the case record that the agency or ACS completed an investigation of other resources the mother had proposed to supervise visitation, and the agency was never able to get her a visiting coach or a spot in a therapeutic visitation program.

"The story told in these records, and argued by petitioner in this litigation, is that [the mother] has a fatal character flaw: she is a bad person and a bad mother, and there is nothing more the agency could have done to remedy her problems." The mother was "obstinate, hostile, rude, and, at times, scary." She said horrible things to the workers and unacceptable things to her children. According to the court clinic's evaluation, her prognosis, even with recommended treatment, was "guarded." But "[f]utility is not an exception to the diligent efforts requirement."

*Matter of Angalee M.S.*

(Fam. Ct., Kings Co., 6/27/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_51073.htm](http://nycourts.gov/reporter/3dseries/2018/2018_51073.htm)

### **TPR: Failure To Plan**

#### *TERMINATION OF PARENTAL RIGHTS - Failure To Plan*

The Fourth Department concludes that, given the court's finding that the father was incapable of caring for the children based on his mental illness, the court erred in terminating his parental rights on the additional ground of permanent neglect.

The father could not be found to be mentally ill to a degree warranting termination of his parental rights and at the same time be found to have failed to plan for the future of the children although physically and financially able to do so.



*Matter of Norah T.*  
(4th Dept., 10/5/18)

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*TERMINATION OF PARENTAL RIGHTS - Failure To Plan/Denial Of Abuse*  
*PERMANENCY HEARINGS - Permanency Goal*

A Pennsylvania appeals court reverses permanency orders, and goal change/termination of parental rights decrees.

The Court summarizes the case as follows: “The record is replete with attempts by Parents to meet the goals set by the trial judge, however she continued to put up barriers to reunification. As an example, the trial judge stated at the December 8, 2016 [permanency] hearing that she wanted some testimony as to how the injuries happened. However, at every hearing from March 2017 onward, she refused to allow such testimony, stating that the failure of Parents to appeal her earlier decision with regard to the etiology of N.M.’s injuries was final and could no longer be addressed. When the agency stated that Parents had complied with their goals, the court said, ‘I’ll find that [P]arents are compliant. It doesn’t move the needle for me.’ She further stated that ‘I guess the other side of the conversation is if I leave her [in foster care] maybe I get closer to an answer as to what happened instead of moving her to grandmom. . . . So, I’m not going to consider kinship care.’ When the agency determined that kinship placement was available and appropriate, the trial court ruled in May of 2017 that grandparent visitation with N.M. is immediately suspended; it is not in N.M.’s continued best interests to explore placement in kinship care. In short, despite the goals of the Child Protective Services Law, the trial judge seems to have done everything in her power to alienate these parents from their child, appears to have a fixed idea about this matter and, further, she prohibited evidence to be introduced that might have forced her to change her opinion. While this court must take and does take the issue of abuse of a child very seriously, the fact that a trial judge tells parents that unless one of them ‘cops to an admission of what happened to the child they are going to lose their child, flies in the face of not only the CPSL, but of the entire body of case law with regard to best interests of the child and family reunification. We find that the record herein provides example after example of overreaching, failing to be fair and impartial, evidence of a fixed presumptive idea of what took place, and a failure to provide due process to the two parents involved. Finally, the most egregious failure in this matter is the refusal to allow kinship care, despite the paternal grandmother being an available and approved source for same. The punishment effectuated by the trial judge was, at best, neglectful and, at worst, designed to affect the bond between Parents and N.M. so that termination would be the natural outcome of the proceedings. This is an extremely harsh penalty for parents who have complied in every way with the requirements of the CPSL.”

*In re N.M.*  
2018 WL 2076995 (Pa. Super. Ct., 5/4/18)

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### *TERMINATION OF PARENTAL RIGHTS - Denial Of Abuse/Self Incrimination*

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

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

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

*In re C.O.*

2019 WL 405957 (N.H., 2/1/19)

### **Mental Illness**

#### *TERMINATION OF PARENTAL RIGHTS - Mental Illness/Expert Testimony*

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

The mother has amassed a noteworthy skill set to help her manage the symptoms that she regular encounters. She has undertaken steps over the last two to three years to address her serious mental health impairments, and has made some strides in gaining incremental levels of independence. But unfortunately, and arguably most importantly, she continues to lack significant insight into how she would handle the stressors of raising two teenage children with

their own trauma and issues, and younger children who have chosen to have no interaction with her in a year-and-a-half, all while managing her tremendous mental health challenges.

*Matter of the K. Children*

(Fam. Ct., Rockland Co., 1/14/19)

[http://nycourts.gov/reporter/3dseries/2019/2019\\_50117.htm](http://nycourts.gov/reporter/3dseries/2019/2019_50117.htm)

### **TPR: Disposition/Intervention**

#### *TERMINATION OF PARENTAL RIGHTS - Disposition/Violations - Hearing Requirement*

In this permanent neglect proceeding, the Third Department agrees that the mother violated the terms of the suspended judgment, but concludes that the family court erred in failing to make a best interests finding after hearing evidence relating to the child's present circumstances and relationship with respondent, and the effect upon the child of the termination of parental rights and a potential adoption. The matter is remitted for a full dispositional hearing.

*Matter of Cecilia P.*

(3d Dept., 7/5/18)

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#### *TERMINATION OF PARENTAL RIGHTS - Disposition*

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

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

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

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

*Matter of Brielle UU.*

(3d Dept., 12/13/18)

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*CUSTODY - Post-TPR Intervention By Former Foster Parents*  
*TERMINATION OF PARENTAL RIGHTS*

In this custody proceeding filed by the maternal grandmother after the parents executed judicial surrenders, the Court holds that the former foster parents do not have standing to seek to intervene in proceedings pursuant to SSL § 383(3) where two of the children were in the former foster parents' care for some twenty months, and the youngest child was in their care from the time of his birth until he was seventeen months old, but, at the time the motion to intervene was filed, the children were in another foster home and had been out of the former foster parents' home for some two years.

“Where there is more than just a nominal break in the twelve-month period, the bond between the children and the foster parents is broken and the foster parents' legal interest in the children is no more.”

*Matter of Cart v. Madison County DSS*  
(Fam. Ct., Madison Co., 6/15/18)  
[http://nycourts.gov/reporter/3dseries/2018/2018\\_28193.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28193.htm)

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*TERMINATION OF PARENTAL RIGHTS - Disposition - Hearing*  
*- Quality Of Adoptive Home*

In connection with the dispositional hearing in this permanent neglect proceeding, the Department of Social Services has moved to quash a subpoena in which the mother seeks the testimony of a DSS supervisor who is allegedly familiar with the foster home where the children currently reside.

The Court denies the motion, concluding that the testimony is necessary and relevant to a determination as to the children's best interests. Limiting evidence pertaining to the qualifications of a potential adoptive foster parent is appropriate, as the question is whether termination is in the children's best interest, not whether the children are in the best possible foster placement. However, testimony has been elicited from a caseworker regarding potential safety concerns within the foster home, and thus the supervisor's testimony pertaining to other children within the foster home is relevant and material.

Although the Court previously denied access to records pertaining to the foster parents, there is an inherent difference between the release of confidential documents and the testimony of a witness.

*Matter of G.R. and J.R.*  
(Fam. Ct., Onondaga Co., 5/24/18)  
[http://nycourts.gov/reporter/3dseries/2018/2018\\_28156.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28156.htm)

## **TPR: Appeals**

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

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

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

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

## **Indian Child Welfare Act**

### *INDIAN CHILD WELFARE ACT*

From an ABA Journal article:

A Northern Texas federal district court struck down portions of the Indian Child Welfare Act last Thursday, finding that the disputed sections violate the Fifth Amendment's equal protection guarantee by mandating racial preferences.

In *Brackeen v. Zinke*, Judge Reed O'Connor of the court's Fort Worth division ruled that the ICWA categorizes children in the child welfare system according to race, not membership or eligibility for membership in a tribe, making those provisions illegal racial preferences. He also struck down a portion of the ICWA that gives tribes the right to intervene in child welfare proceedings, as well as recently enacted regulatory rules implementing the ICWA.

"No matter how defendants characterize Indian tribes—whether as quasi-sovereigns or domestic dependent nations—the Constitution does not permit Indian tribes to exercise federal legislative or executive regulatory power over nontribal persons on nontribal land," the judge wrote in his opinion.

*Brackeen* was filed not only by three foster families seeking to hold on to children and a birth mother of one of the children but also the states of Texas, Louisiana and Indiana, which say the ICWA usurps the authority of state child welfare agencies and courts. As the ABA Journal reported in October 2016, the ICWA is unpopular among some foster and adoptive families, as well as politically conservative interest groups. One such group, the Goldwater Institute, tried unsuccessfully to overturn the ICWA in a prior lawsuit, *Carter v. Washburn*.

*Brackeen* makes some of the same arguments (and was supported by an amicus brief from the Goldwater Institute). The plaintiffs argue that the ICWA violates equal protection rights by imposing a race-based test for where a child with a Native background should be placed: first

with extended family, then other members of the child's own tribe, then other Native people, and, if none of those options are available, to any other fit placement. Courts may depart from these preferences if they find good cause. This, the plaintiffs argued, is an impermissible race-based preference.

O'Connor agreed, rejecting arguments based on case law saying Indian status is a matter of political affiliation with a tribal government rather than race. Rather, the judge said, the ICWA uses ancestry as a proxy for race, which was forbidden in a 2000 Supreme Court decision, *Rice v. Cayetano*, on Native Hawaiian rights. The judge noted that the ICWA applies to children who are merely eligible for membership in a tribe and have a biological parent who is Native. That's a racial requirement requiring strict scrutiny, the judge said, and the government didn't show the ICWA was narrowly tailored enough to withstand that scrutiny.

The judge also found that the ICWA is an unconstitutional delegation of Congressional power to tribes, an argument made by the three states. The ICWA permits Indian tribes to intervene in state child welfare cases and dictate their preferred placements; the states argued that it therefore violates the Constitution's mandate that all legislative powers are vested in Congress. O'Connor agreed, adding that the ICWA regulates states, not individuals, which is beyond Congress's constitutional powers.

The federal Bureau of Indian Affairs released a brief statement Oct. 8 reiterating its support for the ICWA and opposing "any diminishment of ICWA's protections for Indian children, families and tribes." A joint statement from four Native American groups, including the National Indian Child Welfare Association, said the ruling ignores decades of precedent and the direct government-to-government relationships between tribes and states or the federal government.

The Goldwater Institute and Indian law professor Matthew L.M. Fletcher of the Michigan State University College of Law are expecting an appeal.

*Brackeen v. Zinke*

2018 WL 4927908 (N.D. Tex., 10/4/18)

### **Adoption: Certification Of Adoptive Parent**

#### *FOSTER CARE/CHILD CARE - Employment Bar Due To Conviction*

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

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

The Court notes, *inter alia*, that the conviction is over 30 years old, but the regulations treat petitioner identically to a person who has recently committed multiple acts of child abuse and give no weight to the fact that she was 22 years old at the time of her offense; that psychological and neurological studies show that the parts of the brain involved in behavior control continue to develop well into a person's 20s; that, at the time of the crime, petitioner was addicted to drugs,

in domestic violence relationships, and in and out of homelessness; that because the sole disqualifying conviction occurred long ago under circumstances that no longer exist, it is highly likely that petitioner's permanent disqualification is erroneously arbitrary; that, properly and fairly conducted, an individualized determination will ensure that even if petitioner is ultimately disqualified, it will not be arbitrary but, instead, be based on her character, suitability, and competence to provide child care and early learning services to children; that Washington law provides that a conviction of robbery results in only a five-year disqualification from foster care license eligibility; and that judicial review does not provide sufficient procedural protections given the high risk of erroneous deprivation resulting from the extraordinarily high burden of showing beyond a reasonable doubt that the regulations were unconstitutional.

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

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

#### **IV. CUSTODY/GUARDIANSHIP/VISITATION**

##### **Petition**

##### *VISITATION - Petition/Dismissal With Prejudice*

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

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

##### **Jurisdiction**

##### *CUSTODY - Jurisdiction*

The Fourth Department reverses an order dismissing without prejudice the father's custody petition on the ground that Pennsylvania is the home state of the children and custody matters were pending in Pennsylvania, agreeing with the father that the family court failed to follow the procedures required by the UCCJEA.

The court, inter alia, failed to create a record of its communication with the Pennsylvania court. The summary and explanation of the court's determination following the telephone conference with the Pennsylvania court did not comply with the statutory mandate to make a record of the communication between courts.

*Matter of Beyer v. Hofmann*  
(4th Dept., 5/4/18)

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##### *FAMILY OFFENSES - Jurisdiction/UCCJEA*

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



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

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

### **Standing**

*CUSTODY/VISITATION - Standing*  
- *Equitable Estoppel*  
- *Attorney For The Child*

Petitioner K.G. claims that she is a parent with standing to seek custody of and visitation with the adopted child of respondent C.H., K.G.'s now ex-partner. K.G. is not biologically related to the child, who was born in Ethiopia, nor did she adopt the child. K.G.'s claim is predicated upon *Matter of Brooke S.B. v. Elizabeth A.C.C.* (28 N.Y.3d 1), which expansively defines "parent" under Domestic Relations Law § 70. K.G. claims that in 2007, the parties had an agreement to adopt and raise a child together, while C.H. claims that the 2007 agreement terminated when the parties' romantic relationship ended in 2009, before the child was first identified and offered for adoption to C.H. in March 2011. K.G. also claims that based upon the relationship between her and the child, which developed after he came to New York, she has standing under principles of equitable estoppel, and, alternatively, that the matter should be remanded because the trial court improperly truncated the record on equitable estoppel.

The First Department first notes that although *Brooke* involved children conceived via artificial insemination, the reasoning applies with equal force in this case. However, the purpose of *Brooke* is to protect parental relationships in nontraditional families, not to mechanically confer standing at a time when the parties never intended to co-parent. The requirement that the plan be in effect at the time a child is identified does not add any heightened barrier for same-sex families. It applies equally to non-married, nonadoptive parents, whether in same sex or heterosexual relationships. Here, the trial court properly determined that the parties' mutual intention to raise an adopted child together did not survive the end of their romantic relationship. The Court rejects K.G.'s argument that if parties agree to jointly conceive or adopt and raise children, the agreement provides standing no matter the circumstances. That would result in perpetual standing to seek custody and/or visitation regardless of whether and for how long before the conception and/or adoption the parties went their separate ways, and regardless of what the parties actually intended.

The Court agrees that the record is incomplete with respect to equitable estoppel. And, although the appointment of an attorney for the child is discretionary, it is commonplace and should be the norm where the issue raised is equitable estoppel, which requires a determination of what is the best interests of the child. (In a footnote, the Court observes that "the nature of equitable estoppel in some circumstances may require substituted judgment because the petitioning adult may be a stranger to the child.") Nonetheless, facts about who the child regards as his or her parent may be elicited from the child his or herself. There are alternative means to obtaining this information, including a forensic evaluation or a Lincoln hearing. (The trial court denied repeated requests by

K.G.'s attorney for appointment of an attorney for the child, a forensic evaluation and/or a *Lincoln* hearing.) Here, the child's voice is totally silent in the record.

The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and relevant adult rises to the level of parenthood. Anything less would interfere with the biological or adoptive parent's right to decide with whom his or her child may associate. It may be that in this case the issue of C.H.'s consent becomes a predominant consideration in the ultimate determination of whether equitable estoppel can be established.

*In re K.G. v. C.H.*  
(1st Dept., 6/26/18)

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#### *CUSTODY/VISITATION - Standing*

Three parties - the biological mother, the biological father and the father's husband - agreed to conceive and raise a child in a tri-parent arrangement. The two men alternated the delivery of their sperm day by day to artificially inseminate the mother, and the three parties jointly announced their impending parenthood when she became pregnant. The three parties jointly chose and paid for the midwife, were present when the child was born, and selected names for the child that recognized all three parties. The three parties agreed on a pediatrician and on a health insurance plan, and were all present at the hospital when the child needed hernia surgery at the age of two months. The father and his husband currently enjoy regular parenting time with the child.

The Court, relying on *Matter of Brooke S.B. v. Elizabeth A.C.C.* (28 N.Y.3d 1), concludes that under the circumstances of this case, the father's husband has standing to seek custody and visitation and sets the matter down for a best interest hearing.

If, in the future, a proper application for a declaration of parentage is made and there is a need for a determination of parentage - for instance, to rule on a request for child support - the Court may address that issue. There is not currently any New York statute which grants legal parentage to three parties, nor is there any New York case law precedent for such a determination.

*Matter of David S. v. Samantha G.*  
(Fam. Ct., N.Y. Co., 4/10/18)  
[http://nycourts.gov/reporter/3dseries/2018/2018\\_28110.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28110.htm)

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#### *CUSTODY/VISITATION - Standing/Dismissal For Failure To Establish Prima Facie Case - Right To Counsel/Attorney For Child*

In a proceeding in which petitioner seeks joint custody of, and visitation with, five children who were born to respondent and conceived by the implantation of fertilized eggs, the Fourth

Department finds reversible error where, at the conclusion of petitioner's case at a hearing on the issue of standing to seek custody, the Referee granted respondent's motion pursuant to CPLR 4401 to dismiss the petition.

With respect to a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn. The question of credibility is irrelevant, and should not be considered. Here, the Referee made credibility determinations and weighed the probative value of the evidence in making a determination. The Referee did not err in bifurcating the hearing and limiting the preliminary inquiry to the issue of petitioner's standing to seek custody.

The Referee erred in failing to appoint an attorney for the children under the circumstances of this case.

*Matter of Demarc v. Goodyear*  
(4th Dept., 7/6/18)

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*CUSTODY - Same-Sex Couples/Standing*  
*- Relocation/Interference With Parent-Child Relationship*

Joseph P. and Frank G. were domestic partners who recruited Joseph's sister, Renee P.-F., to execute a surrogacy contract in which she agreed to be impregnated with Frank's sperm and to terminate her parental rights so Joseph could adopt the child or children. Renee gave birth to fraternal twins. During the first four years of the children's lives, Joseph and Frank equally shared the rights and responsibilities of parenthood, although Joseph did not legally adopt. The children regarded Joseph and Frank as their parents, and Renee frequently saw the children. In early 2014, Joseph and Frank separated, and the children continued to reside with Frank. Joseph, acting in a parental role, visited and cared for the children on a daily basis. However, in May 2014, Frank suddenly refused to allow Joseph or Renee to have any access to the children, and, in December 2014, Frank moved to Florida with the children without informing Joseph or Renee, or commencing a custody proceeding.

After Renee petitioned for custody, Joseph petitioned to be appointed guardian, and Frank petitioned for custody and permission to relocate, the family court denied permission to relocate, and, after Joseph withdrew his guardianship petition and filed a petition for custody, the court denied Frank's motion to dismiss and determined that Joseph had standing to seek custody or physical access. Upon Frank's appeal, which was heard after the Court of Appeals' decision in *Matter of Brooke S.B.* (28 N.Y.3d 1), the Second Department determined that Joseph established standing and remitted the matter for a full hearing on the custody petitions. The family court awarded custody to Joseph.

Noting first that the law of the case doctrine bars Frank from raising the standing issue, the Second Department affirms. Frank's refusal to allow Joseph to have any contact with the

children, and relocation without informing Joseph, constitutes willful interference with the relationship between the children and Joseph and raises a strong probability that Frank is unfit.

*Matter of Renee P.-F. v. Frank G.*  
(2d Dept., 5/30/18)

### **Mental Health Evaluations**

#### *VISITATION - Summary Judgment - Mental Health Issues/Reports*

The First Department reverses an order that granted the mother's motion for summary judgment and suspended all visitation and contact of any kind between the father and the parties' child. The court relied solely upon its in camera interview with the child and its review of the motion papers and some portion of the court file.

While the father repeated some claims he had made during previous proceedings, he also made new allegations, denied that the child's current distress was caused solely by his actions, and urged that the full forensic evaluation previously ordered on consent be completed before the court ruled on the petitions. The court improperly considered a previous Mental Health Services report, since it was not referenced in or attached to any motion papers; was neither sworn nor certified and thus not in admissible form, as is required on a motion for summary judgment; contained inadmissible hearsay; and was not subject to cross-examination. Moreover, the MHS report did not state conclusions with a reasonable degree of psychological certainty; was not based on an interview with the child or consultation with the child's therapist; noted that the father acknowledged that his conduct was one factor in the child's anger toward him and that the mother acknowledged that she had not consistently shielded the child from her anger toward the father; and recommended only that the parties continue in family therapy and that the father and child each continue in individual therapy.

The court also improperly considered therapists' unsworn letters, which were not attached to motion papers, and contained inadmissible hearsay. Moreover, the letters failed to establish that there were no material facts in dispute and that the mother was entitled to relief as a matter of law. The therapists' observations were not a substitute for a formal and neutral forensic mental health evaluation, and did not establish that suspension of all contact between the father and child was in the child's best interests.

*In re Kenneth J. v. Lesley B.*  
(1st Dept., 10/4/18)

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#### *CUSTODY - Expert Testimony/Mental Health Issues*

The Third Department concludes that although the child's treating sexual abuse counselor had not conducted a formal custody evaluation, the court did not err when it allowed the counselor,

who was qualified as an expert in sexual abuse treatment, to state an opinion that the child had been sexually abused, and opine upon the respective fitness of each parent as custodians. A court may not delegate its ultimate responsibility to determine what custodial arrangement will best serve a child's best interests to a psychological or psychiatric expert, and the custody recommendations of such experts are not determinative, but such recommendations are worthy of serious consideration when they are based upon evidence in the record.

The counselor had conducted 17 treatment sessions with the child for the purpose of an "extended assessment" to determine whether an injury the child had suffered had been caused by sexual abuse or by an accident. The mother participated in nine of these sessions and the father participated in two sessions. Based upon clinical impressions formed during these sessions, the counselor opined that the child had been sexually abused. She further opined that although she could not determine who had abused the child, the father was not the perpetrator, and the mother had coached the child to claim that the father had abused her. She based her opinion regarding coaching upon statements made by the child, and the child's behavior in the mother's company, including clinginess, a strong unwillingness to separate from the mother, and "bizarre laughter." She opined that she did not believe the mother was an appropriate custodian because of her lack of stability, and that the father was an appropriate custodian; he had permitted the child to come to counseling although the sexual abuse allegations had originally been made against him, had not made disparaging remarks and had "allowed the process to proceed in a healthy manner and ... ha[d] given [the] child the chance to heal."

*Matter of Donald G. v. Hope H.*  
(3d Dept., 4/5/18)

### **Evidence/Witnesses/Lincoln Hearings**

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

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

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

The dissenting judges assert that there is no testimony or evidence revealing the preferences of the older child, or indication that the family court considered the child's wishes, and consideration of a child's wishes is not limited to unusual or disturbing circumstances. The attorney for the children said that the older child was "very articulate" and believed that an interview with her would be "enlightening." The attorney for the child must help the child

articulate his or her position to the court, and obtaining a Lincoln hearing is often the best way to fulfill that obligation, and sometimes is the only way to protect the child's privacy. Such a request ordinarily indicates that the attorney for the child is aware of a need for such a hearing, and thus a hearing should be denied only for sound reasons. The older child had personal knowledge of matters that had given rise to the mother's concerns, and, without input from either the older child or the attorney for the children, the family court significantly expanded the father's parenting time beyond the schedule that was temporarily in effect while the litigation was pending.

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

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#### *CUSTODY - Lincoln Hearings/Child's Wishes*

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

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

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

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#### *CUSTODY - In Camera Interviews*

The First Department affirms an order that awarded the father sole physical and legal custody and modified the mother's visitation, noting that the in camera interview statements by the children (ages 11 and 15) were cross-corroborating with respect to the mother's emotional and physical mistreatment and the children's preferences regarding custody and visitation. The in camera statements were properly obtained in a confidential setting, at which only the children's attorney was present, without implicating the mother's due process rights.

*In re George A. v. Josephine D.*  
(1st Dept., 10/2/18)

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#### *CUSTODY - Hearsay Evidence/Child's Out-of-Court Statements* *- Expert Testimony*

In this custody proceeding, the Third Department concludes that the child's out-of-court statements that the father had told her that the mother was trying to kill her through psychiatric medication the mother was administering - telling this to a young child with mental health issues could constitute neglect - were corroborated by, among other things, the father's statements to multiple service providers that the medication being administered by the mother was dangerous and harming the child; and the child's refusal, at the time she began reporting the father's statement, to take the medication and her lack of cooperation with the psychiatrist who prescribed it.

The family court did not err in precluding the father's proposed expert testimony on parental alienation or parental alienation syndrome. The court determined that it did not need to hear from an expert who had not met any members of the family because the court was familiar with the topic and there was ample testimony from multiple witnesses who had interacted with the parties and the child.

*Matter of Suzanne QQ. v. Ben RR.*  
(3d Dept., 5/3/18)

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#### *CUSTODY - Evidence/Illegal Eavesdropping*

In this custody proceeding, the Court suppresses telephone conversations between the father and the child that were recorded by the mother without the knowledge or consent of either the father or the child in violation of CPLR 4506 and PL § 250.05. The mother is prohibited from introducing the recordings or their transcripts. Neither party shall disclose evidence of the conversations to any expert or other witness, and no witness shall be permitted to give testimony based upon the evidence.

The mother cannot rely on the theory of vicarious consent since she had no good faith, objectively reasonable basis for believing that the child's best interest required recording. The child had had lengthy conversations on the telephone and the mother perceived changes in the child's behavior. The child said she was speaking with two friends, and the mother states that one parent denied knowledge of any conversations but she did not confront her daughter with that denial or inquire of the parents of the other child. Also, no criminal case has been filed, and, although ACS did commence a child protective case, it withdrew it.

The Court also rejects the attorney for the child's argument that the father has waived any objection by disclosing the content of the conversation to a psychiatrist, who filed a report concluding that the conversations contained no inappropriate sexual content. Since conversations were being investigated by two District Attorneys and by ACS, it is not surprising that the father would seek to obtain exculpatory evidence.

The Court denies the father's motion for an order requiring the mother to turn over to him all copies of the recordings. CPLR 4506 is an evidence statute that provides only for exclusion, and

excluded evidence might be used for a non-litigation purpose - in one case, it was shown to a therapist who was not being called as a witness.

*D.K. v. A.K.*

(Fam. Ct., Kings Co., 3/16/16, posted 8/6/18)

[http://nycourts.gov/reporter/3dseries/2016/2016\\_51915.htm](http://nycourts.gov/reporter/3dseries/2016/2016_51915.htm)

## **Domestic Violence**

*VISITATION - Domestic Violence*

*- Supervised/Suspended*

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

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

*Matter of Boisvenue v. Gamboa*

(3d Dept., 11/29/18)

## **Relocation, Travel And Related Issues**

*CUSTODY - Relocation*

Pursuant to a 2015 order, the father had sole legal and primary physical custody of the child and the mother had parenting time once a week. In 2016, the father was the victim of a violent attack and, as a result of safety concerns, relocated with the child to a nearby state. The mother then sought primary physical custody, and the father requested permission to relocate with the child and a reduction of the mother's parenting time to once a month. Upon a fact-finding hearing, the family court, inter alia, granted the father permission to relocate, and reduced the mother's parenting time to every other week.

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



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

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

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#### *CUSTODY - Travel Issues*

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

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

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#### *CUSTODY - Relocation/Violations* *- Hearing Requirement* *VISITATION*

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

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

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

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

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*CUSTODY - Change In Circumstances/Relocation*

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

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

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*CUSTODY - Relocation*

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

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

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

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*CUSTODY - Relocation*

The Third Department upholds a determination granting permission to the mother to relocate with the child a distance of about 47 miles to the Town of Rotterdam in Schenectady County to

reside with her boyfriend.

The mother had worked as a jeweler at her father's jewelry store for more than 20 years, but the father planned to retire and close the store, leaving the mother unemployed and without health insurance, and she had not been able to locate a position with comparable pay and benefits that would enable her to meet the expenses of continuing to own her home. Merging the mother's household and finances with those of her boyfriend would provide her and the child with financial stability, including health insurance. The boyfriend testified that his income was stable and sufficient to cover the child's private school tuition, while also providing the mother with the options of being a stay-at-home parent or of working only part time. The child's first grade and second grade teachers testified that the child had made satisfactory academic progress but had social and behavioral challenges related to his ADD, and the mother testified that the private school had a much better student-to-teacher ratio and additional resources that would better address the child's needs.

*Matter of Hammer v. Hammer*  
(3d Dept., 7/12/18)

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#### *CUSTODY - Relocation*

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

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

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

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

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#### *CUSTODY - Agreements/Stipulations - Relocation* *- Hearing Requirement*

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

Woodbridge, Connecticut, and orders a hearing.

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

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

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

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#### *CUSTODY - Relocation*

The Second Department grants the mother's petition for permission to relocate with the parties' children, now seven and five years old, from Millbrook, New York to Ridgefield, Connecticut, noting that the mother did not wish to relocate solely to ease her fiancé's commute; that she also considered the educational and social opportunities for the children, her fiancé's inability to move the businesses he ran in Norwalk, Connecticut, and the feasibility of frequent physical access for the father following the relocation; that the father's work schedule is flexible, which should afford him the opportunity to participate in the children's activities; and that the mother planned to work, at most, part-time after the move, while she had been working full time in Millbrook, and her increased availability would allow her to better facilitate the children's physical access to the father.

*Matter of Matsen v. Matsen*  
(2d Dept., 5/30/18)

#### **Interference With Parent-Child Relationship/"Parental Alienation"**

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

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

favorable parent and, (4) in fact, results in the children refusing to spend time with the targeted parent either in person, or via other forms of communication.”

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

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

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

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

*J.F. v. D.F.*

(Sup. Ct., Monroe Co., 12/6/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_51829.htm](http://nycourts.gov/reporter/3dseries/2018/2018_51829.htm)

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#### *CUSTODY/VISITATION - Contempt/Violations*

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

*Matter of Richard GG. v. M. Carolyn GG.*

(3d Dept., 2/21/19)

#### **Grandparents, Siblings and Other Relatives/Extraordinary Circumstances**

#### *GUARDIANSHIP/CUSTODY - Extraordinary Circumstances/Grandparents*

### *VISITATION - Improper Delegation Of Court's Authority*

The First Department upholds an award of guardianship to the children's grandfather, finding extraordinary circumstances where the adoptive mother (the great-grandmother) abandoned the children for five days without any adult care after she had an argument with her son, the children's grandfather; after a brief return, she left again and failed to contact the children, provide for them or visit them for almost eleven months; and it was not until the grandfather brought this guardianship proceeding that the great-grandmother came forward to file petitions for custody and a writ of habeas corpus. The grandfather had consistently been the children's primary caregiver while the great-grandmother had little or no contact with them during her absence.

However, the family court erred in conditioning the great-grandmother's visitation on the consent of the children (ages 9 and 11) and the parties' agreement. A court may not delegate its authority to determine visitation to either a parent or a child. The case is remanded for the family court to establish an appropriate supervised access schedule and for the allocation of any other suitable resources to restore their relationship.

*In re Cornell S.J. v. Altemease R.J.*  
(1st Dept., 9/27/18)

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### *CUSTODY - Extraordinary Circumstances/Grandparents/Best Interests* *- Lincoln Hearing*

The Third Department upholds the dismissal of the maternal grandmother's custody petitions, and an award of joint custody to the mother and the younger child's father, with primary physical custody to the younger child's father.

The grandmother met her burden of proving extraordinary circumstances, given the long history of, and continuing treatment for, drug abuse by the mother and the younger child's father, and the fact that the older child's father was absent from that child's life and had no meaningful relationship with her between the time she was an infant and the filing of the petitions.

With respect to the best interests issue, the Court notes that although the mother and both fathers have struggled with substance abuse for years, have been prosecuted for criminal charges relating to their drug abuse and have participated, with varying degrees of success, in inpatient and outpatient rehabilitation programs, the mother and the younger child's father have loving relationships with the children and, by all accounts, are competent parents when they are sober. They have had the love and support of both the maternal and paternal families. There are no allegations that the children have ever been mistreated. Although he and the mother are no longer living together, the younger child's father has indicated his continued willingness to foster the children's relationships with the mother, the maternal grandparents and the older child's father, and all parties agree that it is in the best interests of the children for them to remain together.

The Court finds troubling the October 2014 arrest of the mother and the younger child's father for possession of heroin in a vehicle in which the younger child was present, and the presence of drug paraphernalia in the apartment that they shared with the children, but, according to the record, since such time the parents have actively engaged in treatment and are presently sober. Also, the family court specifically mandated that the younger child's father enroll in a Child Protective Services Preventative Services program and follow any program recommendations, and conditioned the mother's visitation on her maintaining sobriety.

Finally, the Court notes that, in its order, the family court disclosed certain information that the older child shared during a Lincoln hearing. The family court should, in the future, ensure that what transpires during a Lincoln hearing remains confidential.

*Matter of Cramer v. Cramer*  
(3d Dept., 7/5/18)

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#### *CUSTODY - Extraordinary Circumstances/Mental Health Issues*

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

The Court notes that since 2007, when the mother consented to a finding of neglect, the child has resided with the aunt while the mother has had parenting time that was supervised until 2010; that due to the dysfunctional relationship between the mother and the aunt, the years have been incredibly litigious and stressful for the child, the mother and the aunt; that the mother, who has been treated for mental health issues in the past, denied any current need for treatment, and was largely unaware of the nature and purpose of services the child was receiving at school; that the mother works part time, has remarried, had a second child and moved into a new residence where the subject child would have his own room, but the child was "challenging," and the mother often had a difficult time parenting, would terminate parenting time early, attributed much of the blame to the child and his mental health issues, and had little insight into her own responsibility to deescalate situations with the child.

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

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#### *VISITATION - Grandparents/Best Interests*

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

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

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

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

### **Visit Supervision And Scheduling**

*VISITATION - Change In Circumstances*  
*- Supervised*

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

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

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

\* \* \*



*VISITATION - Change In Circumstances*  
*- Supervised*

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

**Appeals**

*CUSTODY/GUARDIANSHIP - Appeal*

After the family court terminated the mother's parental rights, dismissed the maternal great-aunt's guardianship and visitation/custody petitions, and transferred custody and guardianship of the child to the Commissioner of Social Services and the agency, the great-aunt moved to stay adoption proceedings pending hearing and determination of her appeal. The Second Department denied the motion. Subsequently, the child was adopted.

The Court now concludes that the great-aunt's appeal has been rendered academic by the adoption of the child. The Court "do[es] not condone the parties' failure to timely notify this Court about the adoption, given that it was finalized more than two months before the submission date of the appeal."

*Matter of Monica J.T.*  
(2d Dept., 6/20/18)

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*CUSTODY - Extraordinary Circumstances*  
*- Adjournments*  
*- Right To File*

### *VISITATION - Delegation Of Authority*

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

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

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

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

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

## **V. PATERNITY/CHILD SUPPORT**

### *PATERNITY - Equitable Estoppel*

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

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

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

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### *PATERNITY - Defaults/Motion To Vacate* *- Equitable Estoppel* *- Acknowledgment Of Paternity*

In the paternity proceeding, the family court found, upon a hearing at which respondent mother and her husband defaulted, that equitable estoppel did not apply. Subsequently, a Support Magistrate issued an order that, upon an inquest, declared petitioner to be the father and vacated the acknowledgment of paternity by the mother's husband. After the father filed a custody/visitation petition, the attorney for the child, who had appeared in the paternity proceeding, moved to vacate the Support Magistrate's order. The family court granted the motion, reinstated the acknowledgment of paternity, and dismissed the custody/visitation petition as premature.

The First Department reverses. Although an AFC has standing, as the child's advocate, to move to vacate an order of filiation, in this case the AFC chose an improper vehicle by moving to vacate the order even though the AFC fully participated in all aspects of the litigation. The AFC could have appealed.

Moreover, although the family court concluded that, prior to the hearing on equitable estoppel, the husband had not been joined as a necessary party (which would have been a best practice), and that there was no affidavit indicating he was served, he did appear in person and accept service, and was treated as a necessary party by the estoppel court. After his one appearance, he did not appear in person, including for the estoppel hearing and before the Support Magistrate. His assigned counsel was present at the estoppel hearing, and, although the court relieved counsel at the conclusion of that hearing, counsel was not precluded from contacting the husband to notify him of the date of the next appearance.

Since the mother conceded paternity, prompting petitioner to waive DNA testing and trial, the Support Magistrate acted properly in holding an inquest and issuing the order of filiation. Although petitioner was not a signatory to the acknowledgment of paternity, he had standing to attack it, as he had commenced a paternity proceeding. The acknowledgment of paternity was vacated so that the child would not have two legal fathers, and because the Support Magistrate had found that the mother and her husband engaged in fraud in the execution of the acknowledgment of paternity.

The First Department also upholds the denial of the AFC's motion to vacate the estoppel court's order. The AFC never appealed from that order, and neither the mother nor her husband ever sought to vacate their defaults. Even assuming, without deciding, that this Court may afford relief "in the interest of justice" in a family law case, there is no basis for application of equitable estoppel. Petitioner's efforts to establish paternity preclude any finding that he acquiesced in the establishment of a strong parent-child bond between the child and another man. Although the dissent's concerns about petitioner's character and fitness for parenthood are supported by the record, that may properly be addressed in the custody/visitation proceeding.

*In re Michael S. v. Sultana R.*  
(1st Dept., 7/19/18)

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#### *SUPPORT - Adoptive Parents/Adoption Subsidies*

Petitioner in this support proceeding is the child's godmother. The respondent is the child's adoptive mother. The child now lives with petitioner, who obtained guardianship without any objection by the adoptive mother. The adoption subsidy received by respondent was suspended after she advised ACS that the child was no longer living with her and that she wished to stop receiving the subsidy. The Support Magistrate determined that the adoption subsidy is properly treated as a resource of the child, and not as an adoptive parent's income, in determining whether the basic child support obligation is unjust or inappropriate, but found that she could not direct respondent to pay child support in an amount equal to the subsidy since she was no longer receiving it. The Support Magistrate also found that deviating from the basic child support obligation based on the subsidy would be "tantamount to ... forcing the Respondent to seek to reinstate the adoption subsidy," and declined to do so.

The First Department first holds that the attorney for the child had standing to file objections. The record does not support the family court's determination that the AFC was appointed to represent the child solely in connection with issues of constructive emancipation and abandonment. The Support Magistrates appointed the AFC with no limitations on the scope of the representation. The reference in FCA § 439(e) to the filing of objections by a "party or parties" refers to persons or entities who have been served with a copy of the support order, and not just to the petitioner and the respondent. Moreover, under FCA §§ 241 and 249, AFCs are expected to participate fully in proceedings in which they are appointed. And, since the Court must determine whether and how courts should consider adoption subsidies when setting child

support, to prohibit the child's attorney from participating would be absurd and would not aid the Court in carrying out the purposes of the Family Court Act.

The Court then concludes that the family court properly determined that the adoption subsidy should be considered as a resource of the child, but erred in failing to consider respondent's eligibility for the subsidy in determining whether her basic child support obligation was unjust or inappropriate. Respondent's claim that she was no longer eligible to receive the subsidy once the child no longer resided with her is contrary to the applicable statutes and regulations and the required language of the adoption subsidy agreement. The matter is remanded for issuance of a new child support order directing respondent to pay to petitioner no less than the amount of the adoption subsidy for so long as respondent remains eligible to receive it, and for a determination as to whether respondent is entitled to receive the subsidy retroactive to the date of its suspension.

*In re Barbara T. v. Acquinetta M.*  
(1st Dept., 8/9/18)

\* \* \*

*PATERNITY/SUPPORT - Appeal*  
*- Adjournments*

In this child support and paternity proceeding, the mother, who resides in Pennsylvania, failed to appear on a date scheduled for a continued equitable estoppel hearing. Despite the fact that the mother had appeared on all prior court dates, and was in the middle of her testimony at the hearing, the family court denied the child's request for an adjournment, and dismissed the mother's petition for failure to prosecute. The child appeals.

The Second Department reverses, rejecting respondent's contention that the appeal must be dismissed for lack of aggrievement (see CPLR 5511), and concluding that the request for an adjournment was reasonable and there was no indication of intentional default or willful abandonment.

*Matter of Simmons v. Ford*  
(2d Dept., 7/11/18)

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

### *PATERNITY - Equitable Estoppel/Hearing Requirement - Right To Counsel - Child*

In this paternity/support proceeding, the Third Department reverses an order directing a genetic marker test of the child, the mother and respondent to confirm respondent's paternity, concluding that the family court did not possess adequate information regarding the equitable estoppel issue and the child's best interests. From the child's grandmother, the attorney for the child had learned that the child might believe that someone else is his father. However, the record does not indicate that the AFC discussed that belief with the child, and, beyond a few short and scattered statements, there was no evidence or discussion of who has a parent-child relationship and whether, due to equitable estoppel, a genetic marker test would not be in the child's best interests.

Moreover, the child did not receive the effective assistance of counsel from the second AFC. There is no indication that the AFC consulted with the child, who was 4½ to 6 years old during the litigation. Although there was a risk of raising parentage concerns not harbored by the child, "a patient, careful and nuanced inquiry is not only possible, but necessary (citation omitted)." Although the first AFC had asserted equitable estoppel, the second AFC withdrew that argument, which further supports the conclusion that the child did not receive the effective assistance of counsel.

*Matter of Schenectady County Department of Social Services v. Joshua BB.*  
(3d Dept., 1/17/19)

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### *CUSTODY - Right To Counsel/Child*

In 2016, the parents consented to a joint custody order with primary physical custody to the mother and parenting time to the father. In 2017, the mother sought to eliminate the scheduled parenting time and substitute an arrangement that would allow the child to visit his father as he wished. Following a fact-finding hearing, at which the father did not appear, and a Lincoln hearing, the family court dismissed the mother's petition. The attorney for the child appeals.

The Third Department reverses, agreeing with the appellate attorney for the child that the trial AFC provided ineffective assistance of counsel.

The AFC must help the child express his or her wishes to the court, and take an active role in the proceedings. Here, the AFC met the first objective, but, given the mother's limited testimony - the family court understandably characterized the record as "thin" - the AFC should have taken a more active role by presenting witnesses who could speak to the child's concerns and/or by conducting a more thorough cross-examination of the mother. During his brief cross-examination, the AFC child did not attempt to elicit additional information about his client's

behavior and demeanor relative to his visits with the father.

*Matter of Payne v. Montano*  
(3d Dept., 11/21/18)

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*ABUSE/NEGLECT - Role Of Attorney For Child/Guardian Ad Litem*  
*PERMANENCY HEARINGS - Child's Consent To Placement Beyond Eighteenth Birthday*

The child was born in 1998 and was diagnosed with Down syndrome, sensory hearing loss, and other profound disabilities that rendered him nonverbal. In 2010, the family court placed the child with ACS and he has remained in foster care since then. Due to the child's profound disabilities, the attorney for the child has substituted judgment for him during the proceedings and provided medical consent. In 2016, a few days before the child turned eighteen, the court, sua sponte, appointed a guardian ad litem to provide consent for the child to remain in foster care beyond his eighteenth birthday. The child moved to relieve the guardian ad litem, arguing that the appointment was unnecessary because the AFC could provide consent for him to remain in foster care. The court denied the motion.

The Second Department, after concluding that the appeal is not academic since the GAL will either continue to represent the child's interests with respect to whether he remains in foster care or be relieved of his duties, reverses.

Family Court Act §§ 1016, 1087, and 1090(a), and 22 NYCRR 7.2(d)(3), read together, authorize the AFC to substitute judgment and provide consent for the child to remain in foster care, and thus appointment of a GAL is unnecessary.

*Matter of Elliot Z.*  
(2d Dept., 10/3/18)

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*ADOPTION - Consent Of Adoptee*

In this proceeding for the adoption of respondent, a 64-year-old woman with a profound intellectual disability and very limited verbal ability who resides in a family care home, the Surrogate's Court appointed Mental Hygiene Legal Service to represent respondent, and found good cause to appoint a guardian ad litem even though MHLS had objected to the appointment and requested that the court conduct an interview of respondent in the presence of counsel. After a hearing, the Surrogate's Court granted the petition.

The Third Department affirms. When an adoptee is over the age of 14, his or her consent is required, "unless the judge or surrogate in his [or her] discretion dispenses with such consent." DRL § 111(1)(a). This exception avoids categorically prohibiting adoptions of those who are over the age of 14 but are incapable of giving consent, including an entire class of adoptees who

are so severely disabled that they simply lack the ability to communicate consent. The determination as to whether consent should be waived is encompassed within the same best interests analysis that a judge or surrogate must undertake when deciding whether to approve the adoption. The Court observes in a footnote that the court below erred in holding that the guardian ad litem could waive consent, which is a uniquely judicial function that cannot be delegated.

*Matter of Marian T.*  
(3d Dept., 11/21/18)

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#### *JUDGES - Bias*

In this support proceeding in which enforcement of a North Carolina order is sought, the Court denies respondent father's motion for recusal where the father filed both an Article 78 proceeding against the Court and the prosecuting Assistant Corporation Counsel seeking a writ of mandamus, and a civil rights action pro se against the City of New York, the Family Court, this Court, and the ACC alleging various violations of his Federal constitutional rights. Both cases have been dismissed.

There is no statutory basis for disqualification. The Court has no direct, personal, substantial, or pecuniary interest in the outcome of these child support proceedings directly benefitting only the mother, child, and North Carolina. A litigant cannot be allowed to create a sham controversy by suing a judge without justification and then seeking recusal.

*Matter of Christel D.*  
(Fam. Ct., Kings Co., 1/30/19)  
[http://nycourts.gov/reporter/3dseries/2019/2019\\_50135.htm](http://nycourts.gov/reporter/3dseries/2019/2019_50135.htm)

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#### *JUDGES - Bias/Personal Knowledge Of Adjudicatory Facts*

The inquiring judge is presiding in a custody case and has received a neglect petition involving the same family which alleges that one parent falsely reported to Child Protective Services that the other parent, in open court, physically attacked the child during an appearance before the inquiring judge, and that the judge told him/her not to take the child to the hospital. The judge has personal knowledge that no such incident occurred, as do numerous "lawyers, clerks, court officers, and the court reporter."

The Advisory Committee on Judicial Ethics concludes that the judge may preside in both cases, provided he/she can be fair and impartial in each, a matter left to the judge's sole discretion.

The judge has no impermissible personal knowledge of the pertinent allegation in the neglect matter, i.e. whether one parent made the alleged report to Child Protective Services. As for the falsity of the alleged report, a judge may, in legally appropriate circumstances, judicially notice



matters of public record such as whether a child was physically attacked in open court during a proceeding before him/her. In any event, the judge is not likely to be a material witness in the proceeding.

Further, a judge, due to specialized learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination based upon appropriate legal criteria, despite his/her awareness of facts that cannot properly be relied upon in making the decision.

*Opinion: 18-104*

NYLJ, 1/11/19, at 4, col. 4

(6/21/18)

<http://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/18-104.htm>

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*ETHICS - Communication With Represented Person*

*RIGHT TO COUNSEL - Child*

Upon a six-day hearing in this matrimonial action, the Court grants plaintiff father's motion to disqualify defendant mother's counsel for violating Rule 4.2 of the Rules of Professional Conduct by talking to the children, without their attorney's consent, about a private investigator the mother and counsel believed was working with the father and the police to engineer the mother's arrest to influence the outcome of their custody dispute. Counsel violated the children's due process rights.

Counsel's contact with the children was not of a social nature, unrelated to his representation of defendant. According to his own testimony, he drove to defendant's home to rescue her from an unlawful arrest and shield the children from a private investigator they knew was employed by their father. The children are eight and ten years old. They were captive listeners in counsel's vehicle. Despite the absence of credible evidence of the existence of a plot to arrest defendant, counsel chose to play the role of savior. He risked influencing the children to think favorably of counsel and the mother and unfavorably of the father. An attempt to influence the children's opinion of a parent during a custody dispute is adverse to the best interests of the children.

Even if counsel believed that his presence was necessary to thwart the mother's possible arrest, his failure to notify the attorney for the children before or after the events, and his obstinate defense of his conduct and indifference to the attorney-client relationship between the children and their counsel, justify his disqualification to protect the rights of the children.

*Anonymous 2017-1 v. Anonymous 2017-2*

(Sup. Ct., Nassau Co., 10/23/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_28337.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28337.htm)

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*ABUSE/NEGLECT - Intervention By Non-Respondent Parent  
- Role Of Court In Making Record*

The Court, noting that FCA § 1035(d) permits a non-respondent parent to intervene to seek the release of a child under Article Ten or custody under Article Six, concludes at disposition that since the father failed to file an Article Six petition, he intervened for purposes of seeking the release of his children to him.

The Court then releases the children to the father, holding that given a fit parent's constitutional right to raise his or her children, the Court may not place a child without the intervening parent's consent unless the party advocating for placement demonstrates that the intervening parent is unfit to provide proper care or that some other type of extraordinary circumstances exist. Here, the DSS has failed to do so. This Court may not rely on its own historical memory or take judicial notice of events outside of the record. Although the Court may clarify an issue, it may not make the record.

*Matter of Elizabetta C.*  
(Fam. Ct., Clinton Co., 6/19/18)  
[http://nycourts.gov/reporter/3dseries/2018/2018\\_28184.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28184.htm)

Practice Note: In concluding that it could not "make the record," the court cited *Matter of Kyle FF.*, 85 A.D.3d 1463 (3d Dept. 2011), which is a juvenile delinquency case. Historically, Appellate Division decisions have provided judges with more discretion to participate in the making of a record in child protective proceedings than in juvenile delinquency proceedings. Yet the court makes a valid point since it appears that the court would have had to take the lead in pursuing evidence of the father's unfitness, which would be judicial entanglement extending beyond that typically permitted by the Appellate Division. *See, e.g., Matter of Keaghn Y.*, 84 A.D.3d 1478 (3d Dept. 2011) (no error where court became involved in examination of witnesses and issued, on its own accord, subpoena calling for production of child's school records and appointed expert to review the records and advise court on child's educational needs; this type of conduct may, in some circumstances, present legitimate questions regarding court's impartiality, but issue was unpreserved and records were relevant to issues and were sought for "benign" purpose of determining child's educational needs); *Matter of Justin P.*, 50 A.D.3d 802 (2d Dept. 2008) (family court did not act as advocate for ACS when it questioned mother at §1028 hearing); *In re Sara B.*, 41 A.D.3d 170 (1st Dept. 2007) (no error in court's questioning of respondent regarding her history of substance abuse; court has discretion to elicit and clarify testimony, and here the court properly questioned respondent in order to assess her credibility); *Matter of Eshale O.*, 260 A.D.2d 964 (3rd Dept. 1999) (no error where court assisted petitioner in laying foundation for admission of photos).

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*JUDGES - Bias*

In this custody proceeding, the Second Department concludes that the judge's disqualification was not required where a complaint had been filed by the mother in federal court in Georgia

naming the judge, among others, as a defendant. The judge relied in part on the ground that she had not yet been served with process in the federal action.

*Matter of Hunter v. Brown-Ledbetter*  
(2d Dept., 4/25/18)

\* \* \*

*CUSTODY - Service Of Process/Personal Jurisdiction*  
*JUDGES - Bias*

In this custody proceeding, the Second Department holds that, by actively participating in the proceedings through her counsel, the mother waived any claim that the Family Court did not acquire personal jurisdiction over her.

The Court also finds no error where, after the mother's attorney gave the judge a copy of a complaint which named the judge, among others, as a defendant, and asserted that the mother had filed that complaint in federal court in Georgia, the judge declined to recuse herself, in part on the ground that she had not yet been served with that complaint.

*Matter of Wilson v. Brown*  
(2d Dept., 6/27/18)

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*RIGHT TO COUNSEL - AFC Counsel Fees*

In this matrimonial proceeding, the Court finds defendant husband in contempt for failing to comply with an unequivocal court order directing him to pay 100% of the fees for the attorney for the child.

Defendant claims that he should not be responsible for the AFC's fees due to plaintiff's alienating conduct and because of his financial condition. While that is an argument for the Court to consider at the conclusion of this matter on the issue of reallocation of fees, it is not a defense to contempt.

The Court also rejects defendant's argument that the order directing payment to the AFC is equivocal because it is subject to reallocation. To find otherwise would leave an AFC rendering legal services for months, or even years, until the conclusion of a matter without any payment. The needs of the children are of paramount concern in custody litigation and their representation must not be compromised. Although the case law does not directly addresses an AFC's right to "interim fees," appellate courts have repeatedly articulated the importance of awarding interim counsel fees to the parties in contested matrimonial and custody litigation. There is no reason to distinguish between a parent's right to counsel fees and the child's right in the same litigation.

*T.K. v. D.K.*

(Sup. Ct., Nassau Co., 7/31/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_28246.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28246.htm)

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*ABUSE/NEGLECT - Right To Counsel*

*ETHICS - Conflict Of Interest*

The Second Department, upholding a determination that the father inflicted excessive corporal punishment on Walgely on one date and derivatively neglected Oliver, and a determination dismissing another excessive corporal punishment charge where Walgely recanted her allegation at the fact-finding hearing, finds no error where the court failed to appoint separate attorneys for the children during the fact-finding hearing after Walgely requested that she return to the father's home.

*Matter of Oliver A.*

(2d Dept., 12/19/18)

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*CUSTODY - Relocation*

*- Right To Counsel/Role Of The AFC*

In this divorce action, the Court denies plaintiff wife's request for permission to relocate with the children from Brooklyn to Bronxville, New York.

The Court notes, inter alia, that the relocation would negatively impact the quantity and quality of the children's future contact with the father; that aside from the mother's opinion, there is no evidence in the record that the public school in Bronxville is superior to the public school in Brooklyn Heights; that the mother's plan to move the children from the only home they have ever had, in a neighborhood that has been the center of their universe with two loving and cooperative divorced parents, shows a lack of insight into the difficulties involved; and that the Court "is reluctant to judicially assert that a bigger house in Suburbia or a suburban school district is prima facie evidence that would warrant relocation."

The Court indicates that it granted the parties' joint application, which was joined by the attorney for the children, to have no in camera interview of the children, ages 5 and 6. In a footnote, the Court notes that the AFC substituted judgment because the children were not aware of the proposed relocation, and that the AFC ultimately opposed relocation.

*E.M.M. v. W.M.*

62 Misc.3d 1201(A)

(Sup. Ct., Kings Co., 12/5/18)

\* \* \*

*ETHICS - Conflict Of Interest*

*VISITATION/CUSTODY - Right To Counsel/AFC*

The Court denies defendant husband's motion for appointment of a separate attorney for the child to represent one of the parties' two children where the 14- and 16-year-old children have differing parenting time scheduling preferences but both want strong relationships with both parents.

This difference of opinion over scheduling does not create a conflict of interest for the AFC. She can advocate for each child's position without prejudicing the rights of the other child. The cases cited by defendant involve divergent residential preferences based upon each parent's fitness.

Moreover, the AFC has had a relationship with both children since being appointed in October 2017. The children trust her and want her to continue to represent both of them despite their different views of the parenting schedule.

*M.M. v. K.M.*

(Sup. Ct., Nassau Co., 11/16/18)

[http://nycourts.gov/reporter/3dseries/2018/2018\\_28369.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28369.htm)

\* \* \*

*VISITATION/PARENTAL ACCESS - Role Of AFC*

The Second Department upholds an order limiting the father's parental access to letters approved by the attorney for the child.

*Matter of Velasquez v. Kattau*

(2d Dept., 12/19/18)

\* \* \*

*CUSTODY - Defaults*

*- Right To Counsel*

The First Department grants the mother's motion to vacate an order awarding custody to the father upon an inquest and the mother's default, noting that although the mother did not demonstrate a reasonable excuse for her default, she had a meritorious defense. The children have resided primarily with her, and the evidence was insufficient to permit an informed change of circumstances determination. Also, the court failed to sua sponte appoint an attorney for the children, which, given the lack of sufficient evidence, would have been advisable.

Default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously.

*In re Abel A. v. Imanda M.*

(1st Dept., 12/27/18)