# THE LEGAL AID SOCIETY
# JUVENILE RIGHTS PRACTICE
# MANUAL FOR CHILDREN'S LAWYERS
# Representing Children In Child Welfare Proceedings, Volume One, Part One Abuse And Neglect Proceedings

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## TABLE OF CONTENTS


I. Purpose Of Abuse And Neglect Proceedings
III. Reporting And Investigation Of Abuse And Neglect
III. Preventive Services
IV. The Parties In Abuse And Neglect Proceedings

- A. The Petitioner
- B. The Respondent
- C. The Child

V. Role Of Counsel In Abuse And Neglect Proceedings

- A. Petitioner's Counsel
- B. Respondent's Counsel
- C. The Child's Lawyer
  - 1. Child's Right To Counsel
  - 2. Basic Obligations Of Child's Lawyer
  - 3. Role Of Child's Lawyer
  - 4. Conflicts Of Interest
    - a. Identifying And Addressing Conflicts
    - b. Anticipating And Avoiding Conflicts
    - c. Waiver
  - 4. Attorney-Client Privilege
    - a. Child's Statements To Attorney
    - b. Child's Statements To Social Worker
- D. Custodian's Right To Counsel
- E. Advocate-Witness Rule

VI. Causes Of Action

- A. Neglect
  - 1. Impairment Of Physical, Mental Or Emotional Condition
  - 2. Failure To Supply Adequate Food, Clothing, Or Shelter
    - a. Generally
    - b. Respondent's Ability To Provide Necessities

3. Failure To Supply Adequate Education
4. Failure To Supply Adequate Health Care

a. Generally
b. Religious Objections

5. Use Of Excessive Corporal Punishment/Inflicting Harm
6. Misuse Of Drugs Or Alcohol

a. Generally
b. Prenatal Substance Abuse
c. HIV/AIDS Confidentiality Law

7. Other Misconduct
8. Abandonment
9. Mental Illness
10. Domestic Violence

B. Physical Abuse

1. Inflicting Physical Injury
2. Proving Physical Abuse
3. Creating A Risk Of Physical Injury
4. Emotional Abuse

C. Sexual Abuse
D. Allowing Abuse Or Neglect
E. Severe Or Repeated Abuse

VII. Jurisdiction And Venue

A. Family Court

1. Generally
2. Referees And Judicial Hearing Officers

a. Generally
b. Referee To Report
c. Referee To Determine

B. Supreme Court
C. Concurrent Criminal Proceedings
D. Diplomatic Immunity

VIII. Preliminary Proceedings

A. Temporary Removal Of Child

1. Removal With Consent
2. Emergency Removal Without Court Order
3. Removal Pursuant To Court Order

a. Generally
b. “Reasonable Efforts” Inquiry
c. Issuance Of Order Of Protection
d. Notice Of Removal
e. Permanency Hearing

4. Family Team Conferences
5. Selection Of Foster Home And School Setting

B. Court-Ordered Investigations

1. Child Protective Investigation
2. Production Of Child
3. Entry Into Home
4. Procedures And Standards
5. Availability Of Family Court
6. Report To Court
7. Probation Investigation

C. Filing Of Petition
D. Issuance And Service Of Process

1. Cases In Which Child Has Been Removed
2. Cases In Which Child Has Not Been Removed
3. Notice In Abuse Cases
4. Out-of-State and International Service
5. Substituted Service

E. Contesting Personal Jurisdiction
F. Warrants

1. Warrant For Respondent
2. Production Of Child

G. Initial Removal Hearing After Filing Of Petition

1. Generally
2. “Reasonable Efforts” Inquiry

3. Issuance Of Order Of Protection
4. Order Of Removal
5. Denial Of Removal Order
6. Stay Pending Appeal
7. Medical Examination Or Treatment
8. Permanency Hearing

H. Initial Appearance

1. Notice Of Allegations And Right To Counsel
2. Notice Of Intent To Seek Clear And Convincing Evidence Finding
3. Application For Return Of Child

I. Hearing Upon Application For Return Of Child

1. Generally
2. “Reasonable Efforts” Inquiry
3. Issuance Of Order Of Protection
4. Stay Pending Appeal

J. Search For And Intervention By Non-Respondent Parents
K. Search For And Intervention By Other Relatives Or Unrelated Persons

1. Court-Ordered Investigation
2. Determination By Court
3. Kinship And Other Foster Care
4. Right To Counsel

L. Criminal History Check Of Foster Parent
M. Court Orders Pending Fact-Finding Hearing

1. Visitation
2. Court-Ordered Services

a. Statutory Authority
b. State Regulations

3. Orders Of Protection
4. Conferencing And Mediation

N. Motion For Order Terminating Reasonable Efforts Requirement

1. Aggravated Circumstances

a. Severe Or Repeated Abuse
b. Post-Placement Abuse Finding
c. Six-Month Post-Removal Failure To Plan And Refusal To Cooperate
d. Abandonment Of Newborn

2. Prior Convictions
3. Prior Involuntary Termination Of Parental Rights
4. Best Interests Exception
5. Standing To Make Motion
6. Filing Of And Effect Of Order In Termination Proceeding
7. Constitutional Issues
8. Permanency Hearing

O. Permanency For Children And Families

IX. Discovery Proceedings

A. Interviews With Represented Persons
B. Subpoena For Hospital And Agency Records

1. Generally
2. Confidentiality Rules

a. Clinical Records
b. Substance Abuse Treatment Records
c. HIPAA

i. Generally
ii. Required Elements of Authorization
iii. Court Orders and So-Ordered Subpoenas
iv. Attorney-Issued Subpoenas and Discovery Requests
v. Unemancipated Minors
vi. Disclosure to Child Protective and Law Enforcement Authorities
vii. Waiver

3. Admissibility of Records

C. Demand For Agency Records
D. Examination Of Respondent
E. Examination Of Child
F. Discovery Under The Civil Practice Law And Rules

1. Generally
2. Expert Witnesses
3. Documents
4. Oral Depositions
5. Bill Of Particulars

G. Work Product And Materials Prepared For Litigation

1. Materials Prepared By Attorney
2. Materials Prepared By Attorney's Agents

H. Subpoena Practice

1. Generally
2. Power To Issue Subpoenas

a. Ordinary Subpoenas
b. Subpoena Duces Tecum

3. Service Of Subpoenas

a. Ordinary Subpoenas
b. Subpoena Duces Tecum

4. Fees
5. Where And When Subpoena May Be Made Returnable
6. Disobedience Of Subpoena
7. Motion To Quash

X. Motion Practice

XI. Dispositions Prior To Fact-Finding Hearing

A. Admission Or Consent To Finding By Respondent

1. Court Inquiry, Or "Allocution"
2. Plea Bargaining

B. Adjournment In Contemplation Of Dismissal
C. Dismissal Prior To Hearing
D. Summary Judgment

XII. Fact-Finding Hearing

A. Confidentiality Of Proceedings

1. Attendance In Court

a. New York Law
b. First Amendment
c. Partial Closure
d. “Gag” Orders
e. Audiovisual Coverage

2. Access To Records

a. New York Law
b. First Amendment Right Of Access

B. Time Of Hearing
C. Presence Of Respondent And Child’s Attorney
D. Presence Of Child
E. Standard Of Proof
F. Role Of The Judge
G. Order Of Proof, Examination Of Witnesses And Right To Present Evidence
H. Self Incrimination
I. Collateral Estoppel And Res Judicata
J. Statutory Rules Of Evidence

1. Admissibility Of Evidence Generally
2. Prior Abuse Or Neglect
3. Presumption Of Abuse Or Neglect
4. Admissibility Of Hospital And Agency Records
5. Admissibility Of Central Register Reports
6. Privileged Communications
7. Out-Of-Court Statements Of Child

K. Validation Evidence

1. Admissibility Of “Syndrome” Evidence
2. Scope Of Expert’s Testimony
3. Qualifications Of Expert
4. Methodology Used By Expert
5. Lay Testimony Concerning Child’s Behavior

L. Expert Testimony As To Respondent’s Mental Condition

1. Profile Evidence
2. Polygraph Evidence

M. Constitutional Suppression Rules
N. Testimony Of Child

1. Competency To Be Sworn, And Admissibility Of Unsworn Testimony
2. Respondent's Right Of Confrontation

a. Exclusion Of Respondent During Testimony
b. In Camera Interview In Absence Of Counsel
c. Rape Shield Law
d. Tactical Considerations For Child's Lawyer
e. Hearsay Evidence

O. Mistrials

XIII. Orders Upon A Fact-Finding Hearing

A. Dismissal Of Petition
B. Abuse Or Neglect Finding
C. Amendment Of Petition
D. Clear And Convincing Evidence Finding
E. Issuance Of Orders
F. Court-Ordered Reports And Investigations
G. Status Of Child Pending Disposition

XIV. Dispositional Proceedings

A. The Dispositional Hearing

1. Generally
2. "Best Interests" Of Child And Family

B. Dispositional Orders

1. Suspended Judgment
2. Release To Non-Respondent Parent Or Legal Custodian Or Guardian
3. Release To And Supervision Of Respondent
4. Placement

a. Generally
b. Inquiry And Determination Regarding Non-Respondent Parents And Relatives And Other Suitable Caretakers
c. Reasonable Efforts Inquiry

d. Sibling Placement And Visitation
e. Order Directing Diligent Efforts
f. Order Directing Institution Of Termination Proceeding
g. Reduction Of Public Assistance
h. Authority To Discharge Child
i. Permanency Hearing

5. Placement Of Abandoned Children
6. Custody Or Guardianship With Parent Or Other Relative Or Suitable Person Pursuant To Article Six
7. Kinship Guardianship Assistance Payments
   a. Initial Eligibility
   b. Initial Application By Prospective Relative Guardian
   c. Agreement With Prospective Relative Guardian
   d. The Appointment
   e. Guardianship Assistance Payments, And Medical And Other Assistance
   f. Successor Guardians
   g. Appeals And Fair Hearings
8. Change In Foster Care Placement
   a. Notice Of Change In Foster Care Placement
   b. Foster Parent's Right To Review
9. Interstate Compact
10. Orders Of Protection
11. Notice To Respondent In Abuse Cases
12. Stay Pending Appeal

XV. Post-Dispositional Proceedings

A. Staying, Modifying, Setting Aside Or Vacating Order, And Habeas Relief
B. Reports By Child Protective Agency
C. Violations Of Dispositional Orders

1. Suspended Judgment Or Order Of Supervision
2. Civil Contempt Motions

D. Continuing Duty Of The Child's Attorney
E. Notice Of Conviction
F. Permanency Hearings

1. Continuing Court Jurisdiction And Calendaring
2. Scheduling Of Initial Permanency Hearing
3. Subsequent Permanency Hearings
4. Notice Of Hearing And Permanency Report

5. Notice To Child And Right To Participate
6. Contents Of Permanency Report
7. Additional Discovery
8. Evidence, Required Court Findings And Orders

a. Determination Of Risk Of Abuse Or Neglect
b. Other Findings And Orders

9. Court-Ordered Services
10. Authority To Discharge Child Before Next Permanency Hearing
11. Orders Of Protection
12. Order Directing Institution Of TPR Proceeding
13. Order Directing Diligent Efforts
14. Independent Living Services And Assistance
15. Progress Reports And Other Notification
16. Additional Orders Where Child Has Been Freed For Adoption
17. Service Of Court Order And Approved Permanency Hearing Report
18. Custody Or Guardianship With Parents, Relatives Or Suitable Persons Pursuant To Article Six
19. Stay Pending Appeal

G. Continuing Appointment Of Counsel

1. Child's Attorney
2. Respondent's Attorney

H. Special Immigrant Juvenile Status

I. Motion To Terminate Placement

J. Re-Entry Into Foster Care By Former Foster Care Youth

XVI. Appeals

A. Statutory Provisions
B. Brief Writing

1. Statement Of Facts
2. Argument

XVII. Destitute Child Proceedings

A. Definitions
B. Filing Of Petition

C. Venue
D. Contents Of Petition
E. Service Of Summons
F. Initial Appearance And Preliminary Proceedings
G. Temporary Care And Court-Ordered Services
H. Scheduling Hearings
I. Reasonable Efforts Determinations
J. Order
K. Request For Return Of Child And Court-Ordered Services
L. Intervention By Interested Adult With Significant Connection
M. Fact Finding Hearing
N. Dispositional Hearing
O. Placement Order
P. Order Granting Custody Or Guardianship
Q. Powers And Duties Of Social Services Officials

## I. Purpose Of Abuse And Neglect Proceedings

The purpose of a proceeding brought pursuant to Article Ten of the Family Court Act is set forth in FCA §1011:

> This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.

Taken at face value, FCA §1011 seems to strike a fair balance between the right of a parent to raise a child in a reasonable manner according to the parent's own values, beliefs and abilities, and the right of the child to grow up in a nurturing home, safe from physical and emotional harm. Although reasonable people can and do debate the fairness of particular standards and procedures set forth in Article Ten, there are few who doubt that, viewed as a whole, Article Ten describes an even-handed method of adjudicating allegations of abuse of neglect.

Yet, because the law is implemented by judges, social services officials and other professionals who do not share the same philosophy, lawyers who practice under Article Ten will confront a child welfare system which often fails to adhere in any consistent manner to the statement of purpose set forth in FCA §1011. Indeed, anomalous results, and a certain measure of unfairness, seem unavoidable. Whenever a caseworker decides to remove a child or allow the child to remain at home, or a judge endorses that decision, personal views concerning child rearing, as well as subjective or biased impressions of the parent, can contaminate the decision-making process. Concededly, the same flaws exist in any bureaucracy or court system. However, given the compelling liberty interests involved in an Article Ten proceeding, the penalties for human error are rarely as severe.

Thus, just as lawyers must be aware of the predilections and prejudices of a jury, lawyers in Article Ten proceedings must take into account the personal views of the other "players" in the system, and determine whether their "purpose" is consistent with the policy described in FCA §1011. Even when the natural parents are not

demonstrably unfit, the caseworker's purpose may be to install the child in a "better" home in which the caseworker's opinions concerning child rearing are shared. Or, a caseworker, or a judge, may believe that the occasional use of a belt is a time-honored method of raising responsible and well-behaved children, and take no action against parents who, according to the law, have engaged in excessive corporal punishment. More importantly, such biases can skew judicial and bureaucratic decision-making, and affect the result of a case, in ways that are difficult to prove when a party appeals or seeks other forms of relief. A caseworker may "give up" on a parent prematurely and make half-hearted or illusory attempts to preserve the family unit. Judges, who are not required to reveal their inner thought processes when rendering a decision, can take refuge in legalese rather than expose a pre-existing point of view. Regrettably, bad decisions are also made because someone fears the negative publicity or adverse career consequences that would flow from the death of a child after a return to the parent.

In sum, although the stated "purpose" of an Article Ten proceeding is to protect children from harm and provide due process to parents who are facing the potential loss of their children, the dynamics involved in a real case are much more complex.

## II. Reporting And Investigation Of Abuse And Neglect

For any Article Ten practitioner, it is important to become familiar with the procedures which govern the reporting and investigation of complaints of child abuse and neglect. Indeed, since the events governed by these procedures occur beyond the watchful eye of a judge, Article Ten contains numerous rules designed to ensure that decisions made by social services officials, and the adequacy of their efforts to help the family, are evaluated by a judge as soon as an Article Ten proceeding commences. A practitioner can utilize these Article Ten rules effectively only if he or she has a full understanding of the legal obligations of social services officials.

Article Six of the Social Services Law, entitled "Child Protective Services," contemplates the existence of county child protective services which are "capable of investigating [abuse and maltreatment] reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment and rehabilitative services for the child or children and parents involved." SSL §411. A local child protective service may "purchase and utilize the services of any appropriate public or voluntary agency including a society for the prevention of cruelty to children." SSL §423(2).

Reports of child abuse or maltreatment are sometimes made directly to the local child protective service. SSL §415. However, reports are usually made to the Central Register of Child Abuse and Maltreatment, which has been established by the State Department of Social Services pursuant to SSL §422. There is a single statewide phone number, which receives calls twenty-four hours a day, seven days a week. SSL §422(2)(a). Although a child protective agency is protected from a Due Process claim which is based upon the agency's failure to protect the child from further abuse at home [DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989)], New York State, by voluntarily assuming a duty to administer the Central Register and monitor the activities of child protective agencies, has created a "special relationship" with children who are the subjects of reports and is liable for a State employee's negligent failure to perform a ministerial act. See Boland v. State of New York, 218 A.D.2d 235, 638 N.Y.S.2d 500 (3rd Dept. 1996) (child protective

specialist at Central Register transmitted report to wrong county and child died from injuries allegedly suffered as a result of delay in investigation); see also Hayes v. State, 963 A.2d 271 (Md. Ct. Spec. App., 2009) (while Department of Social Services has limited statutory duty to investigate reports of child abuse, duty runs to children who are subject of reports and not to parents); Jones v. County of Suffolk, 236 F.Supp.3d 688 (EDNY 2017) (procedural and substantive due process claims dismissed where county failed to remove decedent from mother's custody or take other steps to protect him even though county had previously removed his sister; no protected interest in specific outcome such as removal was created by sister's removal or decedent's injuries in days leading up to death, and State did not create "special relationship" with him by removing sister); Gotlin v. City of New York, 26 Misc.3d 514, 890 N.Y.S.2d 811 (Sup. Ct., Kings Co., 2009) (where it was alleged that infant was killed at home when ACS, which had been ordered to supervise home, "had a mountain of evidence confirming that [the child's] mother repeatedly placed herself and her children in extremely dangerous domestic violence situations," case fell within narrow class of cases in which "special relationship" arises from duty voluntarily undertaken by municipality to injured person).

Anyone may make a report "if such person has reasonable cause to suspect that a child is an abused or maltreated child." SSL §414. In addition, SSL §413 requires certain persons and officials to report or cause a report to be made when they have reasonable cause to suspect that a child is abused or maltreated. These "mandated reporters" include physicians, psychologists, registered nurses, school officials, and police officers. SSL §413(1); but see Washington v. James-Buhl, 415 P.3d 234 (Wash. 2018) (reporting law did not require that defendant, a teacher, report alleged abuse of her own children, who are not her students; there must be connection between individual's professional identity and the offense); Kassey S. v. City of Turlock, 212 Cal.App.4th 1276 (Cal. Ct. App., 5th Dist., 2013) (perpetrator of abuse who is mandated reporter is not required to report own abuse since it would violate privilege against self incrimination). Mandated reporters who make a report of child abuse or maltreatment must comply with a child protective service's request for records that are essential for a full investigation notwithstanding the privileges set forth in CPLR Article Forty-Five, but

disclosure of substance abuse treatment records can be made only according to the standards and procedures for disclosure delineated in federal law. SSL §415. Similarly, HIV confidentiality rules are trumped by the reporting requirement. Public Health Law §2782(7). A mandated reporter who willfully fails to report a case of suspected child abuse or maltreatment is guilty of a class A misdemeanor, SSL §420(1), and is also subject to civil liability for knowingly and willfully failing to report. SSL §420(2). Page v. Monroe, 300 Fed.Appx. 71 (2d Cir. 2008) (summary judgment for defendants upheld where doctor had no duty to report since she did not believe children had been abused, and, even if she had duty, her failure to report was not knowing and willful). A mandated reporter, or any other person who makes a report in good faith, has immunity from civil or criminal liability. SSL §419; see generally Wolf v. Fauquier County, 555 F.3d 311 (4th Cir. 2009) ("There is no conceivable child abuse prevention policy that both gives government the ability to respond to threats in order to prevent harms before they occur yet prevents government from investigating before being certain that a perceived threat is real. Policymakers must choose which of these harms is the greater evil. This case makes concrete the consequences of a false positive. A legal regime that weighed the costs of false positives differently might provide a legal redress for the harm that plaintiffs allege. But because the Commonwealth of Virginia in designing its child abuse reporting scheme and its social services apparatus decided the costs of an occasional mistaken report were far less than the costs of lasting harm to the lives and safety of young children, the judgment must be affirmed").

After receipt of a report which "could reasonably constitute a report of child abuse or maltreatment," the State Department of Social Services must transmit the report immediately to the local child protective service, along with any previous reports to the Central Registry involving the subject of such report or children named in such report, including any previous report containing allegations of child abuse and maltreatment alleged to have occurred in other counties and districts in New York State. SSL §422(2)(a). Like the Central Register, the child protective service must be capable of receiving reports twenty-four hours a day, seven days a week. SSL §424(1).

If Central Register records indicate a previous report concerning the child alleged

to be abused or maltreated, a sibling, other children in the household, a subject of the report, other persons named in the report, or other pertinent information, the appropriate local child protective service shall be immediately notified of the fact except as otherwise provided in the statute. If the report involves either (i) suspected physical injury as described in FCA §1012(e)(i) or sexual abuse of a child or the death of a child or (ii) suspected maltreatment which alleges any physical harm when the report is made by a person required to report pursuant to SSL §413 within six months of any other two reports that were indicated, or may still be pending, involving the same child, sibling, or other children in the household or the subject of the report, the department shall identify the report as such and note any prior reports when transmitting the report to the local child protective services for investigation. SSL §422(2)(a).

Within twenty-four hours after receiving a report, the child protective service must commence, or cause a society for the prevention of cruelty to children to commence, an appropriate investigation, which shall include an evaluation of the home environment, and a determination of the risk to the children and the nature, extent and cause of any condition enumerated in the report. SSL §424(6). Within this initial twenty-four hour period, the child protective service must have face-to-face or telephone contact with the subjects and/or other persons named in the report, or other persons who can provide information about any immediate danger of serious harm to the child. 18 NYCRR §432.2(b)(3)(i).

Upon receipt of a report of abuse or maltreatment and commencement of the appropriate investigation, and where the child protective service is not able to locate the child or has been denied access to the home or denied access to the child named in the report or to any children in the household, and where the child protective investigator has cause to believe a child or children's life or health may be in danger, the child protective service shall immediately advise the parent or person legally responsible for the child`s care or with whom the child is residing that, when denied sufficient access to the child or other children in the home, the child protective investigator may contact the family court to seek an immediate court order to gain access to the home and/or the child named in the report or any children in the

household without further notice and that while such request is being made to such court, law enforcement may be contacted and if contacted shall respond and shall remain where the child or children are or are believed to be present. SSL §424(6-a).

Should the parent or persons legally responsible for the child`s care or with whom the child is residing continue to deny access to the child, children and/or home sufficient to allow the child protective investigator to determine their safety and if a child protective investigator seeks an immediate family court order to gain access to the child, children and/or home, law enforcement may be contacted and if contacted shall respond and shall remain where the child or children are or are believed to be present while the request is being made. SSL §424(6-b).

A child protective service must give telephone notice and forward immediately a copy of reports which involve suspected physical injury as described in FCA §1012(e)(i) or sexual abuse of a child or the death of a child to the appropriate local law enforcement. Investigations shall be conducted by an approved multidisciplinary investigative team, established pursuant to SSL §423(6). In counties without a multidisciplinary investigative team, investigations shall be conducted jointly by local child protective services and local law enforcement. Co-reporting shall not be required when the local social services district has an approved protocol on joint investigations of child abuse and maltreatment between the local district and law enforcement. Such protocol shall be submitted to the OCFS for approval and the OCFS shall approve or disapprove of such protocols within thirty days of submission. Nothing in this subdivision shall prohibit local child protective services from consulting with local law enforcement on any child abuse or maltreatment report. SSL §424(5-a).

A child protective service must make an assessment in a timely manner of each report which involves suspected maltreatment which alleges any physical harm when the report is made by a mandated reporter within six months of any other two reports that were indicated or may still be pending involving the same child, sibling, or other children in the household or the subject of the report, to determine whether it is necessary to give notice of the report to the appropriate local law enforcement entity. If the local child protective services determines that local law enforcement shall be given

notice, they shall give telephone notice and immediately forward a copy of the reports to local law enforcement. If the report is shared with local law enforcement, investigations shall be conducted by an approved multidisciplinary investigative team, established pursuant to SSL §423(6) provided that in counties without a multidisciplinary investigative team investigations shall be conducted jointly by local child protective services and local law enforcement. Co-reporting shall not be required when the local social services district has an approved protocol on joint investigations of child abuse and maltreatment between the local district and law enforcement. Such protocol shall be submitted to the OCFS for approval and the office shall approve or disapprove of such protocols within thirty days of submission. Nothing in this subdivision shall prohibit local child protective services from consulting with local law enforcement on any child abuse or maltreatment report and nothing in this subdivision shall prohibit local child protective services and local law enforcement or a multidisciplinary team from agreeing to co-investigate any child abuse or maltreatment report. SSL §424(5-b).

Within seven days after receipt of the report, the child protective service must send to the Central Register its own preliminary report, SSL §424(3), and, within sixty days, must conduct a full investigation in order to determine whether the Central Register report is "indicated" or "unfounded." An "indicated" report is one regarding which "some credible evidence" is found. SSL §412(12). If "some credible evidence" is not found, the report is "unfounded." SSL §412(11).

During the course of the full investigation, the child protective service must, inter alia, conduct face-to-face interviews with the children and other family members, and contact reporting sources. 18 NYCRR §432.2(b)(3)(ii). See Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360 (1992) (Adoption Assistance and Child Welfare Act, which requires states to provide for prompt investigations, does not create private right of action or enforceable right under 42 USC §1983); Mark G. v. Sabol, 93 N.Y.2d 710, 695 N.Y.S.2d 730 (1999), aff'g 247 A.D.2d 15, 677 N.Y.S.2d 292 (1st Dept. 1998) (court dismisses due process and money damages claim under preventive and protective services provisions, but grants plaintiffs leave to replead due process and common law tort claims); Doe v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996) (same as Suter

with respect to Child Abuse Prevention and Treatment Act); see also Boyd v. Owen, 481 F.3d 520 (7th Cir. 2007) (due process violation found where child welfare investigators indicated plaintiff for abuse after interviewing child but did not attempt to explore alternative explanations or consider past records documenting abuse by others or child's psychiatric condition, and failed to provide plaintiff opportunity to respond); Rivera v. County of Westchester, 31 Misc.3d 985 (Sup. Ct., West. Co., 2011) (no private right of action for money damages where plaintiff alleged that county failed to do proper child protective investigation and that proper investigation may have prevented children's deaths).

Formerly, all unfounded reports were expunged. In 1996, "Elisa's Law" amended the statute to state that all information identifying the subjects and other persons named in the "unfounded" report must be legally *sealed*, and may be unsealed and made available under limited circumstances to, among others, the subject of the report, a child protective service investigating a subsequent report of abuse or maltreatment, or a law enforcement official investigating or prosecuting a false reporting charge. SSL §422(5); Matter of Mary L. v. NYS Dept. Of Social Services, 244 A.D.2d 133, 676 N.Y.S.2d 704 (3rd Dept. 1998) (constitutionality of law upheld); see also Matter of Edick v. Gagnon, 139 A.D.3d 1126 (3rd Dept. 2016) (competent evidence related to incidents underlying unfounded report was admissible); Matter of Nicolette H., 1 A.D.3d 657, 781 N.Y.S.2d 619 (2d Dept. 2004) (family court properly refused to allow caseworker to testify regarding investigations that had led to unfounded reports); D.B. G-D. v. Bedford Central School District, 26 Misc.3d 1239(A), 907 N.Y.S.2d 436 (Sup. Ct., West. Co., 2010) (unfounded reports may not be unsealed and made available to court, and since infant plaintiff was not "the subject of the report," HIPAA-compliant authorizations not sufficient); Matter of A./D. Children, 25 Misc.3d 829, 887 N.Y.S.2d 430 (Fam. Ct., Kings Co., 2009) (while noting that agency lawfully unsealed unfounded report during investigation of subsequent report, court issues CPLR 3103 protective order precluding agency from submitting unfounded report into evidence at FCA §1028 hearing, directs that no further disclosure of report be made, and returns court's copy to agency and directs children's attorney to do the same; however, agency may present testimony

regarding investigation of unfounded report and children's attorney may discuss prior report with child); see also SSL §422(4)(A) (provides generally that reports, and any other information obtained, reports written or photographs taken concerning the report, are confidential but may be made available to, inter alia, a person who is the subject of a report or other persons named in the report, the attorney for the child where the respondent is the subject of or another person named in the report, a criminal justice agency conducting an investigation of a missing child where such agency has reason to suspect such child's parent, guardian or other person legally responsible for such child may be the subject of a report, or such child or such child's sibling may be another person named in a report, and such information is needed to further such investigation, or a court upon a finding that the information is necessary for the determination of an issue before the court); Matter of Maria S., 43 Misc.3d 689 (Fam. Ct., Bronx Co., 2014) (court orders disclosure to respondent of information other than unfounded report itself, noting that, while 18 NYCRR §432.9 purports to require sealing of additional material, regulatory provision conflicts with §422[4]); Matter of Brenda P. v. Patrisha W., 30 Misc.3d 1203(A), 2010 WL 5257642 (Fam. Ct., Clinton Co., 2010) (in custody proceeding in which great aunt alleged that child was born with life threatening condition that requires daily medical care and intense monitoring and that parents were not providing adequate care, court grants motion by child's attorney for disclosure of contents of indicated reports against parents and other information concerning such reports; information regarding domestic violence was necessary for determination of extraordinary circumstances and best interests issues); Matter of B. Children, 23 Misc.3d 1119(A), 886 N.Y.S.2d 70 (Fam. Ct., Kings Co., 2009) (while granting respondent father's mid-hearing motion to compel production, for in camera review, of child's hospital records, court cites §422(4)(A)); Matter of J.H. v. K.H., 7 Misc.3d 1030(A), 801 N.Y.S.2d 235 (Fam. Ct., West. Co., 2005) (court rejects argument that §422(4)(A) applies only to indicated or pending reports, and not to unfounded reports); see also Matter of Mylasia P., 104 A.D.3d 856 (2d Dept. 2013) (petitioner not barred from prosecuting based on same facts contained in report deemed unfounded and sealed).

“Notwithstanding any other provision of law, the office of children and family services may, in its discretion, grant a request to expunge an unfounded report where: (i) the source of the report was convicted of a violation of subdivision three of [Penal Law §240.55] in regard to such report; or (ii) the subject of the report presents clear and convincing evidence that affirmatively refutes the allegation of abuse or maltreatment; provided however, that the absence of credible evidence supporting the allegation of abuse or maltreatment shall not be the sole basis to expunge the report. Nothing in this paragraph shall require the office of children and family services to hold an administrative hearing in deciding whether to expunge a report. Such office shall make its determination upon reviewing the written evidence submitted by the subject of the report and any records or information obtained from the state or local agency which investigated the allegations of abuse or maltreatment.” SSL §422(5)(c). “In all other cases, the record of the report to the statewide central register shall be expunged ten years after the eighteenth birthday of the youngest child named in the report. In the case of a child in residential care as defined in subdivision four of section four hundred twelve-a of this title, the record of the report to the statewide central register shall be expunged ten years after the reported child's eighteenth birthday. In any case and at any time, the commissioner of the office of children and family services may amend any record upon good cause shown and notice to the subjects of the report and other persons named in the report.” SSL §422(6)

When a report is found to be "indicated," the child may be removed pursuant to Article Ten (see FCA §1024) to protect the child from further abuse or maltreatment. SSL §424(9). In other cases involving "indicated" reports, the child protective service must offer appropriate services to the child and/or the family on a voluntary basis. SSL §424(10); see also Smith v. Williams-Ash, 520 F.3d 596 (6th Cir. 2008) (plaintiffs' due process rights not violated when agency, without hearing, removed children upon plaintiffs’ voluntary consent to "safety plan"); Dupuy v. Samuels, 465 F.3d 757 (7th Cir. 2006) (“safety plan” signed by parent under threat of removal involves invasion of parental liberty, and parents are entitled to hearing if parental rights are impaired, but there is no inherent coercion since offer of settlement no more impairs parental rights

than offer to accept guilty plea impairs defendant's right to trial by jury, and agency's consent form merely notifies parents of lawful measures that may ensue from failure to agree to plan or from violating plan). To assist caseworkers in making decisions and establish some uniformity in the system, the New York State Department of Social Services has promulgated regulations governing initial and comprehensive risk assessments, and the preparation of service plans. See 18 NYCRR §§ 428.11-428.13. When an offer of services is refused, the child protective service must initiate Article Ten proceedings and/or refer the case to a District Attorney if the child's best interests require such action. SSL §424(11).

Within ninety days after being notified that a report is “indicated,” the subject may challenge the "indicated" finding and request that the record of the report be amended, and is entitled to an administrative "fair hearing" if such a request is not granted within ninety days after it is made. SSL §422(8)(a)(i), (b)(i). See also Matter of Daniel S. v. Dowling, 256 A.D.2d 1236, 684 N.Y.S.2d 99 (4th Dept. 1998) (child has no Due Process right to review of “unfounded” determination); Matter of Pluta v. New York State Office of Children and Family Services, 17 A.D.3d 1126, 794 N.Y.S.2d 261 (4th Dept. 2005) (hearsay, even double hearsay, may form basis of determination). Although, under the statute, the "some credible evidence" standard applies when the agency first reviews the request, SSL §422(8)(a)(iii), and at the fair hearing, SSL §422(8)(c)(i), the United States Constitution requires that a "fair preponderance" standard be used. See Matter of Lee TT., 87 N.Y.2d 699, 642 N.Y.S.2d 181 (1996); Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994); see also Dupuy v. Samuels, 397 F.3d 493 (7th Cir. 2005) (child care workers and license applicants, students and others pursuing career in child care, have liberty interest when central register is “indicated”); but see Matter of Anonymous v. Peters, 189 Misc.2d 203, 730 N.Y.S.2d 689 (Sup. Ct., Nassau Co., 2001) (no constitutional violation where statute and regulations permit authorities to enter name in State Registry after report is found to be “indicated” but before fair hearing, and fail to provide time limit within which fair hearing must be commenced). Even prior to the decision in Lee TT., the statute already provided that a fair preponderance standard governs after a person has lost or been denied

employment or been deprived of certain other child care-related opportunities because of an indicated report, and the person seeks to preclude the release of information in the future. SSL §424-a(2)(d). Fair hearing decisions are reviewable in a court proceeding brought pursuant to Article Seventy-Eight of the Civil Practice Law and Rules. SSL §22(9)(b).

Any social services district may, upon the authorization of the Office of Children and Family Services, establish a program that implements differential responses to reports of child abuse and maltreatment. Such programs shall create a family assessment and explanation services track as an alternative means of addressing certain matters currently investigated as allegations of child abuse or maltreatment pursuant to this title. Notwithstanding any other provision of law to the contrary, the provisions of this section shall apply only to those cases involving allegations of abuse or maltreatment in family settings expressly included in the family assessment and services track of the differential response program, and only in those social services districts authorized by the office of children and family services to implement a differential response program. Such cases shall not be subject to the requirements otherwise applicable to cases reported to the statewide central register of child abuse and maltreatment pursuant to this title, except as set forth in this section. SSL §427-a(1); see Matter of M and J v. New York State Office of Children and Family Services, 3720/13, NYLJ 1202650732887, at *1 (Sup., WE, Decided April 3, 2014) (administrative review and expungement provisions governing SCR reports not available for record maintained in connection with Family Assessment Response). Any social services district interested in implementing a differential response program shall apply to the Office of Children and Family Services for permission to participate. SSL §427-a(2). The statute goes on to specify in detail how the differential response system must operate. Upon notification from a local social services district, that a report is part of the family assessment and services track pursuant to SSL §427-a(4)(c)(i), the central register shall forthwith identify the report as an assessment track case and legally seal such report. SSL §422(5-a). See also SSL §427-a(5)(c) (records maintained for ten years after report to Central Register); Matter of Corrigan v. New York State Office of

Children and Family Services, 28 N.Y.3d 636 (2017) (no statutory authority exists for early expungement of FAR-related records).

However, the statute does permit some access to otherwise sealed reports assigned to, and records created under, the family assessment and services track and information concerning such reports and records. Such documents and information shall be made available to the subject of the report, or, under specified circumstances, to a court pursuant to a court order or judicial subpoena issued while the family is receiving services provided under the family assessment and services track. SSL §427-a(5)(d); see Matter of Rafael M., 123 A.D.3d 719 (2d Dept. 2014) (§427-a permits disclosure only after notice and opportunity to be heard; mother not provided with notice and opportunity to be heard because motion was never served upon her attorney). Persons given access shall not re-disclose documents and information except as permitted under SSL §427-a(5)(e). For instance, documents and information relevant to a subsequent report of suspected abuse or maltreatment may be unsealed by a child protective service and included in the record of the investigation, and, if an Article Ten proceeding is then filed, made available to the family court and other parties for use in the proceeding. In addition, a subject of the report may, at his or her discretion, present otherwise confidential documents and information in any Article Ten proceeding in which the subject is a respondent, or in any custody or visitation proceeding, or in any other relevant proceeding; however, a court may not order the subject to produce such documents and information.

With regard to the abuse and neglect of children *in residential care*, SSL §424-c(7) provides that within sixty days of receiving a report, the Commissioner must not only determine whether the report is "indicated" or "unfounded," but also determine whether "there is reasonable cause to suspect that the child's parent, or other person legally responsible for the child other than a custodian of the child, abused or maltreated the child," whether "it appears likely that a crime may have been committed against the child," and whether "it appears that a violation of the statutory, regulatory or other requirements of the licensing agency or operating state agency relative to the care and treatment of individuals receiving services has occurred."

A report shall be indicated if the investigation reveals some credible evidence that a child in residential care has been abused or neglected, and a specific custodian is identified as being responsible, whether in whole or in part, for such abuse or neglect of the child, by: (a) committing, promoting or knowingly permitting the commission of any of the acts or committing any of the acts; or (b) causing the physical, mental or emotional injury or impairment of a child or the substantial risk of such injury or impairment by: (i) direct action; (ii) conduct and with knowledge or deliberate indifference allowing any such injury, impairment or risk; (iii) failing to exercise a minimum degree of care; (iv) failing to comply with a rule or regulation involving care, services or supervision of a child promulgated by the state agency operating, certifying or supervising the residential facility or program where it was reasonably foreseeable that such failure would result in the abuse or neglect of the child; or (v) failing to meet a personal duty imposed by an agreed upon plan of prevention and remediation arising from abuse or neglect of a child in residential care pursuant to this chapter, the mental hygiene law, the executive law, or the education law. If the Office of Children and Family Services determines that there is reasonable cause to suspect that the child's parent, or any other person legally responsible for the child other than a custodian of the child, abused or maltreated the child, the OCFS shall make a separate report to the statewide central register for investigation by the applicable local child protective service, unless such a report has already been made. If the OCFS determines that it appears likely that a crime may have been committed against a child, regardless of whether a report is indicated or unfounded, the OCFS shall transmit a report of the allegations and findings to the appropriate law enforcement authority or confirm that such a report has already been transmitted. If the OCFS determines that it appears likely that a crime may have been committed against a child, regardless of whether a report is indicated or unfounded; that a violation of the statutory, regulatory or other requirements of the licensing agency or operating state agency relative to the care and treatment of individuals receiving services has occurred, regardless of whether a report is indicated or unfounded; or that a report is indicated: (a) the OCFS shall report its findings to the director of the facility and to the appropriate licensing or operating state

agency or, within such office, to the appropriate office staff; (b) the OCFS shall recommend to the facility and the licensing state agency that appropriate preventive and remedial actions, if any, which may include enforcement or disciplinary actions authorized under Executive Law §460-d, §503 and §532-e, and Mental Hygiene Law Article Seven, Thirteen, Sixteen, Nineteen, Thirty-One, or Thirty-Two, and/or applicable collective bargaining agreements, be undertaken with respect to a residential care facility and/or the subject of the report of child abuse or neglect; (c) the facility and the licensing state agency shall initiate any necessary and appropriate corrective action within a reasonably prompt period of time; and (d) within a reasonably prompt period of time, the facility shall submit to the appropriate licensing state agency and to the OCFS, and the licensing state agency shall submit, with a copy to the facility, to such office a written report of the actions taken to address such office's findings and such subsequent progress reports as the office may require including any actions to implement a plan of prevention and remediation as required by this chapter, the executive law, the mental hygiene law or the education law; provided, however, that notwithstanding any other provision of this section, whenever it appears likely to the OCFS, the appropriate licensing or operating state agency, or the facility that a crime has been committed against a child, such entity shall immediately notify the appropriate law enforcement agency or confirm that such notification has already been made. SSL §424-d.

With respect to immunity from liability for harm to a foster child, see SSL §383-a (immunity from liability for application of the reasonable and prudent parent standard; caregivers shall apply reasonable and prudent parent standard when deciding whether or not to allow child in foster care to participate in age or developmentally appropriate extracurricular, enrichment, cultural, or social activities, and, when decisions require input or permission of local department of social services or voluntary authorized agency, department or agency shall apply reasonable and prudent parent standard).

## III. Preventive Services

The Federal Adoption Assistance and Child Welfare Act of 1980 (42 USC §§ 670 et seq.) was enacted in an effort to achieve nationwide reform in the child welfare arena. This statute conditions the disbursement of federal foster care and adoption assistance funds on a state's implementation of procedures and efforts designed to strengthen family relationships, limit reliance on foster care, and expedite adoptions. New York's own Child Welfare Reform Act had already added a comprehensive series of amendments to the Social Services Law in 1979 in a similar reform effort. New York's implementing regulations, which became effective in 1982, were designed to comply with both the Child Welfare Reform Act and the federal mandates.

The Child Welfare Reform Act, and the implementing regulations, require the provision of "preventive services" if the child will be placed or continued in foster care if such services are not provided, and it is reasonable to believe that such services will make it possible for the child to remain in or be returned to the home. SSL §409-a(1)(a)(i); 18 NYCRR §430.9(c),(d),(e).

"Preventive services" are "supportive and rehabilitative services provided ... to children and their families for the purpose of: averting an impairment or disruption of a family which will or could result in the placement of a child in foster care; enabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or reducing the likelihood that a child who has been discharged from foster care would return to such care." SSL §409. Preventive services include: (1) case management; (2) case planning that includes, inter alia, referring the child and the family for needed educational counseling and training, vocational diagnosis and training, employment counseling, therapeutic and preventive medical care and treatment, health counseling and health maintenance services, vocational rehabilitation, housing services, speech therapy and legal services; (3) casework contacts that include, inter alia, individual or group face-to-face counseling sessions and individual or group activities that are planned for the purpose of achieving the course of action specified in the family service plan; (4) day care services; (5) homemaker services; (6) housekeeper/chore services; (7) family planning services; (8)

home management services; (9) clinical services provided by a person who has received a master's degree in social work, a licensed psychologist, a licensed psychiatrist or other recognized therapist in human services; (10) parent aide services that are designed to maintain and enhance parental functioning and family/parent role performance; (11) day services to children in a program offering a combination of services including at least social services, psychiatric, psychological, education and/or vocational services and health supervision and also including, as appropriate, recreational and transportation services, for at least three and less than twenty-four hours a day and at least four days per week, excluding holidays; (12) parent training through group instruction in parent skills development and the developmental needs of the child and adolescent; (13) providing or arranging for transportation of the child and/or his family to and/or from services arranged as part of the service plan, but not transportation for visitation of children in foster care with their parents unless transportation cannot be arranged or provided by the child's family; (14) emergency cash, or goods such as food, clothing or other essential items, provided to a child and his family in an emergency or acute problem situation in order to avert foster care placement;(15) providing or arranging for emergency shelter where a child and his family who are in an emergency or acute problem situation reside in a site other than their own home in order to avert foster care placement; (16) housing services for eligible families of children already in foster care, such as rent subsidies, including payment of rent arrears, security deposits, finder's or broker's fees, household moving expenses, exterminator fees, mortgage arrears on client-owned property which place the family at imminent risk of losing their home, and essential repairs of conditions in rental or client owned property which create a substantial health or safety risk; (17) intensive, home-based, family preservation services; (18) outreach activities designed to publicize the existence and availability of preventive services; and (19) respite care and services. 18 NYCRR §423.2(b); see Henry A. v. Willden, 678 F.3d 991 (9th Cir. 2012) (case plan and record provisions of Child Welfare Act create rights enforceable through §1983).

"Mandated preventive services" are preventive services provided to a child and

his family whom the district is required to serve. 18 NYCRR §423.2(d). “Nonmandated preventive services” are preventive services defined in 18 NYCRR §423.2(b)(1)-(15) provided to a child and his/her family who the district may serve. 18 NYCRR §423.2(d),(e).

Children in foster care who otherwise qualify are eligible for mandated preventive services only if they have a goal of discharge to parent or caretaker. 18 NYCRR §423.4(g)(1). Otherwise eligible minor parents in foster care, whose own child or children are residing with them in a foster family home or residential facility, are eligible for mandated preventive services, identified in 18 NYCRR §423.2(b)(1)-(18), that must be provided to the minor parent and his or her child or children for the purpose of keeping the minor parent and his or her child or children together. 18 NYCRR §423.4(g)(2).

Non-mandated preventive services may be provided to an otherwise eligible child in foster care whose goal is return home. 18 NYCRR §423.4(g)(3). For purposes of 18 NYCRR §423.2, “family” is defined as the child who is at risk of foster care, his/her parents, or legal guardians, or other caretakers and siblings; a woman who is pregnant as specified in 18 NYCRR §430.9(c)(6); a child who does not live with his/her parents and needs services to prevent return to foster care; or a minor parent in foster care whose child or children are residing with him or her in a foster family home or residential facility. For the limited purpose of authorizing eligibility for housing services, “family” may only include: a child in foster care whose permanency planning goal is discharge to parent or relative, together with such child's parent, legal guardian or other caretaker, siblings and own child or children, or a child with a goal of independent living who is to be discharged from foster care prior to his or her eighteenth birthday, or who is placed in trial discharge status after his or her eighteenth birthday, and his or her own child or children. 18 NYCRR §423.2(c).

Certain "core services" must be provided by every social services district in New York State. The core services are: day care; homemaker services; parent training or parent aide; transportation; clinical services; respite care and services for families; twenty-four hour access to emergency services; and housing services. 18 NYCRR

§423.4(d)(l). Any other preventive service may be provided by the district according to the needs of the child and his/her family. 18 NYCRR §423.4(d)(2).

Every recipient of preventive services must also be provided with case management, case planning and casework contact. 18 NYCRR §423.4(c). Generally, unless the parent has refused to cooperate or the child's health and safety are seriously threatened, foster care may not be utilized unless preventive services have been provided and proven unsuccessful. 18 NYCRR §§ 430.10(b)(l), 430.10(c)(l). Moreover, the agency must attempt to locate a relative or family friend to assume the care of the child as an alternative to foster care. 18 NYCRR §430.10(b)(2).

A family service plan must be prepared pursuant to SSL §409-e for each child who is in, or is being considered for, foster care. The plan must contain short-term, intermediate and long range goals, and actions planned to achieve each goal and meet the needs of the child and family. SSL §409-e(2)(b). The plan must also identify necessary and appropriate services and assistance, SSL §409-e(2)(c), and set time frames and methods for a periodic reassessment of each child's needs. SSL §409-e(2)(a). The plan must be developed with the participation of any available and willing parent unless such participation would be harmful to the child, and the participation of any child ten years of age or older. SSL §409-e(2). With respect to each child who is being assessed pursuant to SSL §409-e, the social services district must establish and maintain a Uniform Case Record containing, inter alia, the assessment of needs, the family service plan, descriptions of care and services provided, and essential historical data concerning the child and family. SSL §409-f; 18 NYCRR Part 428.

When a child has been removed, within thirty days of removal the local social services district shall perform an assessment of the child and his or her family circumstances, or update any assessment performed when the child was considered for placement. SSL §409-e(1). Not later than thirty days after removal, the local social services district shall establish “or update” and maintain the family service plan based on the required assessment. SSL §409-e(2). The plan shall be reviewed and revised at least within the first ninety days following the date the child was first considered for placement in foster care, and, if the child has been removed from his or her home,

within the first ninety days following the date of removal. The plan shall be further reviewed and revised not later than one hundred twenty days from this initial review and at least every six months thereafter, except that if a sibling or half-sibling of the child has previously been considered for placement or removed from the home, the plan shall be further reviewed and revised on the schedule established for the family based on the earliest of those events. SSL §409-e(3); but see 18 NYCRR §430.12(c)(2)(i) (permanency hearing satisfies requirements for service plan review if permanency hearing is held and completed within six months of previous service plan review). The review and revision of the plan shall be prepared in consultation with the child's parent or guardian, unless such person is unavailable or unwilling to participate, or such participation would be harmful to the child, and with the child if the child is in foster care and is ten years of age or older, and, where appropriate, with the child's siblings. See Matter of Evan E., 114 A.D.3d 149, 978 N.Y.S.2d 381 (3d Dept. 2013), appeal dism'd 23 N.Y.3d 1006 (court erred in directing that CASA volunteer be given notice of and be permitted to attend family service plan review meetings; CASA volunteer provides input regarding permanency plans, but service plan reviews often involve confidential information to which CASA volunteer is not permitted access; family court should have held hearing on notice to all interested persons, and finding should have been made as to necessity for CASA volunteer to attend and adequate safeguards and limitations on attendance should have been crafted to minimize unnecessary disclosure of confidential information).

Consultation shall be done in person, unless such a meeting is impracticable or would be harmful to the child. If it is impracticable to hold the consultation in person, it may be done through the use of technology, including, but not limited to, videoconferencing and teleconference technology. If the parent is incarcerated or residing in a residential drug treatment facility, the plan shall reflect the special circumstances and needs of the child and the family. SSL §409-e(2), (3).

Relevant portions of the assessment of the child and family circumstances, and a complete copy of the family service plan, must be given to the child's parent or guardian, counsel for such parent or guardian, and the child's attorney, if any, within ten

days of preparation of the plan. SSL §409-e(4). The family service plan must include the permanency plan provided to the court. SSL §409-e(5).

A social services district is not required to complete an assessment or service plan for a child who is in the custody of OCFS, unless the child is also in the care and custody or custody and guardianship of the commissioner of the social services district. SSL §409-e(6).

As will be seen later, the judge in an Article Ten proceeding must conduct an ongoing evaluation of the agency's efforts to preserve the family unit and meet the service needs of the family and the children. When appropriate, the court must order the agency to provide necessary services. Given the requirements imposed by the Child Welfare Reform Act, it is clear that many Article Ten cases will have been preceded by a substantial history of contacts between the family and the child protective agency. Through formal discovery and other means, a lawyer in the Article Ten case can acquire useful information concerning the problems that led to the agency's involvement, and the performance of the agency in addressing those problems. The lawyer can then formulate requests for court-ordered services, or reach a reasoned conclusion that certain services would be inappropriate or would accomplish nothing. At the very least, the lawyer will be better able to address legal issues which arise during the course of the proceeding.

## IV. The Parties In Abuse And Neglect Proceedings

From a purely legal standpoint, there are a limited number of "parties" entitled to participate fully at every stage of an Article Ten proceeding. These parties are identified and discussed in the sections which follow.

However, it is important to remember that there is a broader group of individuals who have a right, or are routinely permitted, to intervene at certain stages of a proceeding in order to assert child custody or visitation rights, or provide information and express opinions concerning the best interests of the child. This broader group, which will be discussed later, includes parents who have not been charged with abuse or neglect, grandparents and other relatives, and foster parents. Since one of the critical goals in any Article Ten proceeding is a well-informed and sound decision concerning custody of the child, this group of interested persons also plays a critical role.

### A. The Petitioner

The party who originates an Article Ten proceeding is referred to as the "petitioner." Pursuant to FCA §1032(a), a proceeding may be commenced by a "child protective agency," which is defined in FCA §1012(i) as "the child protective service of the appropriate local department of social services or such other agencies with whom the local department has arranged for the provision of child protective services under the local plan for child protective services." See Matter of the Lawrence Children, 1 Misc.3d 156, 768 N.Y.S.2d 83 (Fam. Ct., Kings Co., 2003) (petitioner had no conflict of interest that precluded it from filing neglect petition against foster child); Matter of Burnett, 112 Misc.2d 318, 447 N.Y.S.2d 101 (Fam. Ct., Dutchess Co., 1982) (school officials had no standing to file where DSS had not arranged with School District for provision of child protection services). Although the local Commissioner of Social Services is the "petitioner" of record, the Commissioner usually appears "by" the child protective service caseworker who investigated the complaint and has knowledge concerning the facts underlying the allegations.

Under FCA §1032(b), a person may originate a proceeding "on the court's direction." Although such a person "shall have access to the court for the purpose of

making an ex parte application" for a direction to file, the court may require that the person first report to a child protective agency. FCA §1033; see also Weber v. Stony Brook Hospital, 60 N.Y.2d 208, 469 N.Y.S.2d 63 (1983), cert denied 464 U.S. 1027, 104 S.Ct. 560 (limitation on individual's ability to file reflects Legislature's concern that judicial proceedings touching family relationship should not be casually initiated); Matter of Gage II., 156 A.D.3d 1208 (3d Dept. 2017) (court erred in disqualifying DSS from prosecuting petition filed by attorney for child because respondent father's sister was supervisor in Child Preventive Services Unit where there was no indication of prejudice or substantial risk of abuse of confidence and DSS took steps to ensure that sister had no supervisory role in case); Matter of Amber A., 108 A.D.3d 664 (2d Dept. 2013) (fact that DSS withdrew petition did not preclude court from directing attorney for child to determine whether child wanted him to file petition); Matter of Katelyn E., 241 A.D.2d 494, 661 N.Y.S.2d 522 (2d Dept. 1997) (agency's refusal to file did not preclude court from directing child's former attorney to file); Matter of Ricky A., 18 Misc.3d 1116(A), 856 N.Y.S.2d 502 (Fam. Ct., Clinton Co., 2008) (while denying respondent's application to substitute PINS finding despite child's attorney's argument that many of respondent's problems are result of lack of support by mother, court authorizes child's attorney to file Article Ten petition).

**B. The Respondent**

A person charged with acts constituting neglect or abuse is denominated the "respondent." "Respondent" is defined in FCA §1012(a) as "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." This definition includes any biological parent, even a noncustodial parent who was not legally responsible for the care of the child at the pertinent time. Matter of Nasir A., 151 A.D.3d 959 (2d Dept. 2017) (biological father whose parental rights had not been terminated was proper respondent without regard to whether he was also person legally responsible for children's care at pertinent time); Matter of Marcus JJ., 135 A.D.3d 1002 (3d Dept. 2016); Matter of Ethan A.H., 126 A.D.3d 699 (2d Dept. 2015). It is not necessary to produce a birth certificate as long as it is otherwise established that the respondent is a parent. Matter of Baby Girl E., 306 A.D.2d 343, 760 N.Y.S.2d 542

(2d Dept. 2003).

A "`Person legally responsible' includes the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time." FCA §1012(g). This can include minors, and minor siblings. Compare In re Giannis F., 156 A.D.3d 446 (1st Dept. 2017) (statutory definition does not exclude minors); Matter of Mary Alice V., 222 A.D.2d 594, 635 N.Y.S.2d 278 (2d Dept. 1995), lv denied 87 N.Y.2d 811, 644 N.Y.S.2d 144 (1996) (seventeen-year-old who sexually abused child while he had responsibility of caring for her was proper respondent) and Matter of Claudia V., 157 Misc.2d 462, 596 N.Y.S.2d 650 (Fam. Ct., Kings Co., 1993) (fourteen-year-old may be respondent) with Matter of Catherine G. v. County of Essex, 3 N.Y.3d 175, 785 N.Y.S.2d 369 (2004) (no evidence that fourteen-year-old took care of sisters; statute generally aimed at non-sibling caretakers, and child could not be “subject” of report) and Matter of Case, 120 Misc.2d 100, 465 N.Y.S.2d 417 (Fam. Ct., Oneida Co., 1983) (nineteen-year-old brother with whom child resided had no parental relationship to child).

Although the seemingly broad language referring to any person "responsible for the child's care at the relevant time" might not include persons who only occasionally assume responsibility for a child outside the home, such as babysitters, the definition can include a person who did not reside in the home at the relevant time but did serve as the functional equivalent of a parent. Compare Matter of Trenasia J., 25 N.Y.3d 1001 (2015) (respondent was “person legally responsible” for niece where child had been staying at respondent’s home for a week prior to incident; during year before incident, child had visited respondent’s home eight or nine times and four were overnight visits; respondent and child interacted at family functions and total contacts were significant; incident occurred in respondent’s home during overnight visit and he was only adult present; mother expected her sister to care for child, but if sister wasn't there respondent was expected to care for child; and, although familial relationship is not dispositive, it is appropriately considered); Matter of Yolanda D., 88 N.Y.2d 790, 651 N.Y.S.2d 1 (1996) (uncle with whom child visited on weekends was proper respondent); In re Christopher W., 299 A.D.2d 268, 751 N.Y.S.2d 2 (1st Dept. 2002) (respondent was related to child and taking care of her overnight in order to braid her hair, and there

was substantial familiarity between child and respondent and respondent's own children); State v. Christie, 939 So.2d 1078 (Fla. Dist. Ct. App., 3rd Dist., 2005), review den'd 929 So.2d 1051 (term "caregiver" includes teachers) and Matter of Brandon G., 41 Misc.3d 1201(A) (Fam. Ct., Kings Co., 2013) (where, in two weeks leading up to date of child's hospitalization, he lived with mother and spent number of days at home of babysitter, babysitter was "person legally responsible") with Matter of Brent HH., 309 A.D.2d 1016, 765 N.Y.S.2d 671 (3rd Dept. 2003), lv denied 1 N.Y.3d 506, 776 N.Y.S.2d 222 (2004) (grandmother's boyfriend not proper respondent where child was regularly present in grandmother's home, but was always accompanied by mother, and, when mother ran errands and left child with grandmother, boyfriend was not present) and Matter of Jessica C., 132 Misc.2d 596, 505 N.Y.S.2d 321 (Fam. Ct., Queens Co., 1986) (baby-sitter caring for child in own home was not functional equivalent of parent).

A "[c]ustodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child." FCA §1012(g). As always, however, it must be shown that the respondent had child care responsibilities.

Compare Matter of Austin JJ., 232 A.D.2d 736, 648 N.Y.S.2d 727 (3rd Dept. 1996) (statement by mother that she and grandmother "took care of" child did not establish grandmother's "parental" role despite fact that grandmother lived in home); Matter of Faith GG., 179 A.D.2d 901, 578 N.Y.S.2d 705 (3rd Dept. 1992), lv denied 80 N.Y.2d 752, 587 N.Y.S.2d 904 (mother's fiancee not proper respondent where he occasionally watched child and stayed overnight once or twice a month) and Matter of Mary AA, 175 A.D.2d 362, 571 N.Y.S.2d 962 (3rd Dept. 1991) (brothers who sexually abused sisters were persons legally responsible, but were properly removed as respondents because it was unnecessary and inappropriate to exercise jurisdiction over them)

with Matter of Devin W., 154 A.D.3d 723 (2d Dept. 2017) (mother's boyfriend was proper respondent where he referred to child in court as his son and testified that he visited mother on regular basis and interacted with child during visits; and ACS caseworker testified that during visit to home, she heard respondent refer to child as his son and observed him caring for child); In re Keniya G., 144 A.D.3d 532 (1st Dept.

2016) (child did not require same hands-on care as younger siblings, but respondent lived in home and contributed to functioning of household and had frequent contact with child); Matter of Isaiah L., 119 A.D.3d 797 (2d Dept. 2014) (respondent properly found to be person legally responsible where child and mother had moved into respondent's apartment about one month prior to filing of petition, but respondent assumed parental responsibilities during that month); In re Jonathan Kevin M., 110 A.D.3d 606 (1st Dept. 2013) (fact that respondent, who was married to child's mother, may have lived with child for just eight days did not preclude liability); In re Jayline R., 110 A.D.3d 419 (1st Dept. 2013) (respondent was person legally responsible where he had resided in household as mother's boyfriend for approximately nine months, picked children up from school and cared for them during day while mother worked, described himself as father figure, and held himself out as babysitter or caregiver so he could stay with family when they lived in shelter); In re Angelo P., 98 A.D.3d 908 (1st Dept. 2012) (respondent was required to seek medical attention for child where he saw child four times a week, and acted as functional equivalent of parent by bathing and feeding child, changing diaper, and acting as father figure); In re Keoni Daquan A., 91 A.D.3d 414 (1st Dept. 2012) (respondent was mother's long-term boyfriend, father of mother's other children, and regular visitor in home, and, at times, watched children, assisted with homework and attended doctors' appointments); Matter of Tyler MM., 82 A.D.3d 1374 (3d Dept. 2011) (mother's paramour was only a few years older than oldest twins, but had daily contact with children since he lived in home for about a year, was often alone with them, cooked, cleaned and helped them prepare for school); Matter of Alexandria X., 80 A.D.3d 1096 (3d Dept. 2011) (respondent was a "person legally responsible" where mother was pregnant with respondent's child when subject child sustained injuries; respondent saw mother and child every day, treated child like a son because child's father was never present, and took child shopping; respondent helped put child to bed the night he sustained eye injury, set up vaporizer in child's room, and put Vick's medicine on machine that purportedly caused injury; respondent called poison control to receive instructions for treating child after injury occurred, helped rinse out child's eye, and drove mother and child to hospital for treatment; and mother left respondent

alone with child while she went to store on night child was injured); Matter of Jamaal NN., 61 A.D.3d 1056, 878 N.Y.S.2d 205 (3rd Dept. 2009), lv denied 12 N.Y.3d 711 (respondent was person legally responsible where he began romantic relationship with mother in May 2006 and visited often until he began regularly spending night with mother and child in July 2006; neighbor stated that she ate dinner every night with mother, child and respondent; in statement to police, respondent called mother's apartment his “home”; and respondent was sometimes left alone with child, and disciplined him on several occasions, even when mother was present); In re Samantha M., 56 A.D.3d 299, 867 N.Y.S.2d 406 (1st Dept. 2008) (paramour was person legally responsible where he had resided in household for approximately three months, was father of subject child’s unborn half sibling, and picked child up from day care and took care of her); Matter of Bianca M., 282 A.D.2d 536, 722 N.Y.S.2d 766 (2d Dept. 2001) (mother’s boyfriend was proper respondent where he was often in apartment and sometimes stayed overnight, and frequently babysat while mother ran errands); Matter of Mikayla “U”, 266 A.D.2d 747, 699 N.Y.S.2d 145 (3rd Dept. 1999) (mother’s boyfriend was proper respondent where he was overnight visitor in household on more than one occasion, frequently tucked children into bed and stayed with them to talk, and had children stay overnight on more than one occasion at his home, sometimes without the mother, and oldest child viewed him like a father); Matter of Nathaniel TT., 265 A.D.2d 611, 696 N.Y.S.2d 274 (3rd Dept. 1999), lv denied 94 N.Y.2d 757, 703 N.Y.S.2d 74 (respondent, who lived across the hall, had relationship with mother and access to her apartment, babysat children on regular basis, and helped care for children even when mother was home); Matter of Department of Social Services v. Waleska M., 195 A.D.2d 507, 600 N.Y.S.2d 464 (2d Dept. 1993), lv denied 82 N.Y.2d 660, 605 N.Y.S.2d 6 (single parents who regularly spent weekends with their children were proper respondents); Matter of Jada S., 49 Misc.3d 1215(A) (Fam. Ct., Kings Co., 2015) (respondent spent one to three nights per week at home and visited every day, children called him “daddy” and he took part in disciplining them, and, during period when child was injured, he spent each night at home and, when mother took child to hospital, he stayed home to watch other child); Matter of Leticia TP, 23 Misc.3d 1111(A), 885

N.Y.S.2d 712 (Fam. Ct., Kings Co., 2008) (maternal grandfather was person legally responsible where mother and the children lived at case address with respondent and other family members for five-six years; mother and the children resided in basement floor of apartment, but at times the whole family cooked and ate meals together; respondent disciplined children when they misbehaved and admonished them to respect mother; and respondent was responsible for transporting subject child to and from his job and for providing her with lunch and supervision throughout the day while she remained at work with him); Matter of Department of Social Services o/b/o Jane H. , 20 Misc.3d 1124(A), 867 N.Y.S.2d 373 (Fam. Ct., Nassau Co., 2008) (respondent, who was living with family, was involved in morning routine, often giving children breakfast and taking them to school, and had taken children to park on at least one occasion and acted as babysitter on numerous occasions, was person legally responsible); Matter of Ingrid R., 18 Misc.3d 1129(A), 859 N.Y.S.2d 895 (Fam. Ct., Queens Co., 2008) (respondent, the mother's long-term romantic partner, was person legally responsible where he met ACS caseworker at home during investigation and opened door with keys he possessed, allowed caseworker to enter and showed her the apartment, including children's bedroom and bedroom he described as one he shared with children's mother; children reported that respondent stayed over in home three to four nights a week and they called him "Daddy"; and respondent purchased school items, clothing, and food and helped with rent) and Matter of Theresa C., 121 Misc.2d 15, 467 N.Y.S.2d 148 (Fam. Ct., Monroe Co., 1983) (mother's boyfriend was continually in household at time of abuse).

In Matter of Carmelo G., 45 Misc.3d 1224(A) (Fam. Ct., Bronx Co., 2014), the court held that, given the infant's age, the court could consider information about the respondent's expressed intention to be a long-term caretaker where respondent was in the process of developing a substantial familiarity with the infant even though he was not the biological father.

In sum, this broad definition of "respondent" provides children with protection, apart from that afforded by the criminal justice system, against paramours, relatives, and other persons who assume the role of a regular caretaker.

When a respondent moves for dismissal while arguing that he or she does not fit the statutory definition of "respondent," the position of the child's lawyer must, of course, be tailored to the facts of the case. When there is no concurrent criminal proceeding, or, if there is, the respondent is not incarcerated, an Article Ten proceeding may be the most effective means of securing an order excluding the respondent from the child's home and/or limiting access to the child. On the other hand, if the respondent is unrelated to the child, the charges are not particularly serious, and the respondent is unlikely to have further contact with the child, it may be unnecessary to include that person in the proceeding.

The child's lawyer should also determine at the outset whether all appropriate "respondents" have been included in the petition. For instance, when one of the natural parents is not charged, and, as a result, might be entitled to custody of the child, the child's lawyer should evaluate the fitness of the non-respondent parent, and, if appropriate, argue that the facts would support a charge against that parent. Similarly, if there is any person in the household who poses a danger to the child, the petitioner's failure to name that person as a respondent should not prevent the child's lawyer from making an independent evaluation. After identifying an appropriate respondent, the child's lawyer should suggest that the petitioner's attorney file an amended petition. If such a suggestion is rejected, the child's lawyer should inform the court and attempt to have the existing petition amended.

**C. The Child**

"Child" is defined in FCA §1012(b) as "any person or persons alleged to have been abused or neglected ...." The child must be less than eighteen years of age at the time the proceedings are initiated, and it appears that the court retains jurisdiction and may proceed to fact-finding after the child turns eighteen, at least when the child desires court intervention. FCA §§ 1012(e), (f), 1013(c); see Matter of Jonathan M., 306 A.D.2d 413, 761 N.Y.S.2d 280 (2d Dept. 2003); see also Matter of Vernice B., 129 A.D.3d 714 (2d Dept. 2015) (court retained jurisdiction after child turned eighteen where child consented to placement); In re Amondie T., 107 A.D.3d 498 (1st Dept. 2013) (court properly denied motion to dismiss petition as to eighteen-year-old where he was

seventeen when petitions were filed and consented to continued placement in foster care); Matter of Sheena B., 83 A.D.3d 1056 (2d Dept. 2011) (court erred in allowing petitioner to discontinue proceeding because child had turned eighteen; although court has discretion under §3217(b), public has interest in matters involving welfare of child, and, in this case, child, who may be placed with her consent, would be prejudiced by discharge from foster care without services to which she would be entitled upon finding of neglect); Matter of Julissa P., 52 Misc.3d 382 (Fam. Ct., Bronx Co., 2016) (court denies ACS motion to withdraw petition, noting that "[i]t is incomprehensible why the presentment agency would commence an action in Family Court when the subject child is 17.9 years of age, and then decide the matter no longer requires the court's aid because the child has turned 18," and that although there are limits to what court can order at disposition, fact-finding hearing could proceed); but see Matter of Thomas B., 139 A.D.3d 1402 (4th Dept. 2016) (new dispositional hearing not required as to child over eighteen who could no longer be considered neglected child); Matter of April D., 300 A.D.2d 657, 751 N.Y.S.2d 783 (2d Dept. 2002) (court dismissed appeal from order dismissing abuse charges because child had turned eighteen).

In Matter of Alijah C., 1 N.Y.3d 375, 774 N.Y.S.2d 483 (2004), the Court of Appeals held that abuse charges may be filed as to a deceased child. The court noted that the Legislature meant to insure that the adjudication of a deceased child as abused or severely abused is determinative in a termination of parental rights proceedings involving the surviving children, and also observed that if the abuse petition is dismissed, there may be no judicial determination as to the facts and circumstances surrounding the child's death. The court did not rule on whether a deceased child may be the subject of a neglect petition or of an abuse petition when there are no surviving children. It has been held that a deceased child cannot be the subject of a neglect petition. Matter of Stephanie WW., 213 A.D.2d 818, 623 N.Y.S.2d 404 (3rd Dept. 1995); Matter of Melanie S., 28 Misc.3d 1204(A), 2010 WL 2635967 (Fam. Ct., Kings Co., 2010).

Several provisions in Article Ten include separate references to the "parties," and to "the child." Although this suggests that the child is not, technically speaking,

viewed as a "party" to the proceeding, in a practical and legal sense the child is very much a full party with attendant rights and privileges, and not merely the alleged victim of abuse or neglect or the passive subject of a dispute over custody.

First of all, the child is represented in the proceeding by an attorney who, in many instances, will be obligated to advocate in a manner consistent with the child's wishes. This ensures that the child's interests and point of view will be considered by the court. Indeed, through counsel, the child has standing to make motions, demand hearings at which the child's custodial status can be challenged, and prevent agreements made by the parties from taking effect by withholding consent.

The child's status as a litigant with substantial rights has been clearly recognized in court decisions. In Matter of Jamie TT., 191 A.D.2d 132, 599 N.Y.S.2d 892 (3rd Dept. 1993), the Third Department held that the subject child in an Article Ten sexual abuse proceeding has a right to counsel, which includes a right to effective assistance, under the Due Process Clauses of the Federal and State Constitutions. The majority opinion put it this way:

> Notably, Jamie had a strong interest in obtaining State intervention to protect her from further abuse and to provide social and psychological services for the eventual rehabilitation of the family unit in an environment safe for her. Furthermore, Jamie's interest in procedural protection was heightened because of the irreconcilably conflicting positions of her and her parents in this litigation [citation omitted].... The appearance of a lawyer to protect Jamie's interests seems clearly necessary to avoid an erroneous outcome unfavorable to Jamie in the proceeding. A fact-finding hearing under Family Court Act article 10 on a sexual abuse charge is a completely adversarial trial with few deviations from the procedures applied in civil and criminal trials. A respondent parent in such a proceeding is afforded the full right to counsel, including assignment of an attorney if indigent [citation omitted]. And, as previously noted, the risk of an erroneous factual determination rejecting Jamie's claim of sexual abuse would be restoration of the custodial rights of the person accused of molesting her....

191 A.D.2d at 136.

Although Jamie TT. involved a child's right to be protected from further sexual

abuse, it is clear that a child's interest in being protected from other types of harm, or in challenging removal from the natural family, or in receiving preventive services and other assistance while residing at home or in foster care, is equally compelling. Indeed, the child has a due process right to maintain a parent-child relationship. Amanda C. v. Case, 749 N.W.2d 429 (Neb. 2008). And, removal of a child from parental custody by social services officials constitutes a seizure for Fourth Amendment purposes. See Michael C. v. Gresbach, 526 F.3d 1008 (7th Cir. 2008), cert den'd 555 U.S. 994 (defendant violated children's Fourth Amendment rights when she conducted warrantless, under-the-clothes examination of children's bodies during separate interviews at their private school while investigating physical abuse allegations; it was not reasonable for defendant to believe that school's consent to interviews included consent to search of children's bodies); Tenenbaum v. City of New York, 193 F.3d 581 (2d Cir. 1999); van Emrik v. Chemung County Department of Social Services, 911 F.2d 863, 867 (2d Cir. 1990); Yuan v. Rivera, 48 F.Supp.2d 335 (S.D.N.Y. 1999); but see Ryan v. Department of Social Services of Albany County, 16 Misc.3d 1134(A), 847 N.Y.S.2d 904 (Sup. Ct., Albany Co., 2007) (no Fourth Amendment "seizure" where DSS allegedly interfered with father's right to custody of child, but DSS had lawful custody pursuant to court order). Thus, in any Article Ten proceeding, not just one involving sexual abuse allegations, the child's interest will be sufficient to warrant de facto full party status. See Matter of New York City Department of Social Services o/b/o Samuel H., 208 A.D.2d 746, 618 N.Y.S.2d 42 (2d Dept. 1994); Standards for Attorneys Representing Children in Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings, Preface (New York State Bar Association, 2015) ("Despite some ongoing confusion regarding the party status of the child in the context of child welfare proceedings, the child will be considered a party and referenced as such throughout these Standards"); see also CPLR §1001(a) (person must be joined as party "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action"); but see Borkowski v. Borkowski, 90 Misc.2d 957, 396 N.Y.S.2d 962 (Sup. Ct., Steuben Co., 1977) (while literal reading of CPLR §1001 suggests that child is party, courts have not

so held, and so assignment of counsel is the means by which child's rights may be protected).

## V. Role Of Counsel In Abuse And Neglect Proceedings

Although the welfare and safety of the child are among the core concerns in an Article Ten proceeding, ethical codes require a lawyer to advocate in a manner consistent with the goals and interests of the client. As in any other proceeding, the lawyers' goals may be in conflict, and certain lawyers may advocate for results that are not consistent with either the child's best interests, or the purpose of an Article Ten proceeding as set forth in FCA §1011. Thus, the child's lawyer must keep in mind the ways in which such ethical obligations can affect the other lawyers' conduct.

### A. Petitioner's Counsel

A petitioning department of social services is represented by a government lawyer; in New York City, by the Administration for Children's Services' Family Court Legal Services office, and in other parts of New York State by the County Attorney. See FCA §254(a), (b) (in abuse cases, Corporation Counsel is necessary "party," and outside New York City the District Attorney is necessary party). Usually, the lawyer will seek a finding of abuse or neglect, and the issuance of an appropriate dispositional order. When the agency wishes to withdraw the charges or negotiate a settlement, the lawyer's obligations change accordingly. As loyal counsel, the lawyer would also refrain from conduct that would undermine the agency's chances of success in the proceeding, or expose the agency to liability. For example, since immunity rules do not shield the agency from civil liability for negligence in selecting or supervising a foster home [see Barnes v. County of Nassau, 108 A.D.2d 50, 487 N.Y.S.2d 827 (2d Dept. 1985)], and contempt sanctions may be imposed if the agency fails to comply with court orders (see, e.g., FCA §1015-a), the lawyer might withhold evidence of negligent behavior or provide less than a full accounting of the agency's efforts to assist the child and the family. Arguably, the lawyer should act much like a public prosecutor in a criminal proceeding, who has an obligation to reveal exculpatory information [Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)] and otherwise seek "justice," rather than as loyal counsel to the agency. See In re S.S., 2002 WL 31230830 (Cal. Ct. App., 3rd Dist., 2002. Notably, the reference in FCA §254(a) to the lawyer's role in "present[ing]" the petition, and the reference in FCA §254(b) to the Corporation Counsel's and the District

Attorney's role as a "party" in abuse proceedings, is suggestive of an obligation to the public.

On the other hand, the lawyer is free to raise questions and provide advice concerning the wisdom and legal propriety of the agency's conduct and objectives. The lawyer should not thoughtlessly carry out policies which would result in a risk of serious harm to the child or the unnecessary removal of a child from the home. Moreover, even if the lawyer is not formally bound by the ethical rules which govern criminal prosecutors, it can be argued that the risk of unfairly stigmatizing a respondent in an Article Ten proceeding imposes upon the government "prosecutor" an obligation to refrain from bringing charges in the absence of a colorable claim.

Finally, the petitioner's lawyer is subject to the same conflict of interest rules that govern other Government lawyers. See, e.g., Matter of Nathalia P., 22 A.D.3d 496, 802 N.Y.S.2d 467 (2d Dept. 2005) (family court erred in disqualifying petitioner's counsel where petitioner's employee would be testifying for respondents; as in the case of a public prosecutor, an appearance of impropriety, standing alone, does not require disqualification of petitioner's counsel); Matter of Stephanie X., 6 A.D.3d 778, 773 N.Y.S.2d 766 (3rd Dept. 2004) (petitioner's legal unit not disqualified in termination of parental rights proceeding where one of its lawyers represented respondent mother in original neglect proceeding, but was shielded from involvement in the termination proceeding).

**B. Respondent's Counsel**

A respondent has no Federal constitutional right to assigned counsel. Lassiter v. Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153 (1981). However, the respondent has a right to appear with retained counsel, and an indigent respondent is entitled to assigned counsel under statutory law. See FCA §262(a)(i); see also County Law §717(2) (regarding public defender representation); In re X. McC., 140 A.D.3d 662 (1st Dept. 2016) (no right to counsel at pre-filing child safety conference); Matter of Pugh v. Pugh, 125 A.D.3d 663 (2d Dept. 2015) (where limited inquiry revealed that mother was receiving $54,000 annually in disability payments, court should have inquired further into financial circumstances, including expenses, to determine whether

mother was eligible for assigned counsel before forcing mother to proceed pro se); Matter of Elijah ZZ., 118 A.D.3d 1172 (3d Dept. 2014) (contention regarding denial of counsel at temporary removal hearing was moot since finding was based solely on evidence elicited at fact-finding hearing); In re Jane Aubrey P., 94 A.D.3d 497 (1st Dept. 2012) (mother not improperly denied assigned counsel where she repeatedly failed to complete financial disclosure form and gave varying accounts of ability to hire counsel, and, when she finally stated that she earned only $1,000 per month, court found she was indigent and provided assigned counsel, who represented her at fact-finding hearing); Matter of Hannah YY., 50 A.D.3d 1201, 854 N.Y.S.2d 797 (3rd Dept. 2008) (reversal of neglect adjudication required where respondent was denied right to counsel at emergency removal hearing held pursuant to FCA §1022; court also notes that testimony by respondents and two other witnesses at removal hearing was relied upon as basis for family court's decision in neglect proceeding); Matter of Isiah FF., 41 A.D.3d 900, 837 N.Y.S.2d 417 (3rd Dept. 2007) (requirement in FCA §262(a) that court advise respondent of right to counsel of own choosing not violated in termination of parental rights proceeding where same assigned attorney who had been appointed to represent respondent in connection with permanent neglect petition continued to represent her in violation proceeding until respondent elected to proceed pro se).

There is also a right to counsel under the State Constitution [see Matter of Ella B., 30 N.Y.2d 352, 334 N.Y.S.2d 133 (1972); Matter of Erin G., 139 A.D.2d 737, 527 N.Y.S.2d 488 (2d Dept. 1988); see also Matter of V.V., 24 N.E.3d 1022 (Mass. 2015) (parent of minor child has constitutional right to counsel where someone other than parent seeks to be appointed as child's guardian); FCA §261 (certain persons, including those facing loss of child's "society," may have constitutional right to counsel)].

The court must grant reasonable adjournments and otherwise insure that counsel has an adequate opportunity to appear. See Matter of Shalom S., 88 A.D.2d 936, 451 N.Y.S.2d 165 (2d Dept. 1982) (court erred when it refused to grant parents a second brief adjournment so counsel could appear); see also Matter of Latonia W., 144 A.D.3d 1692 (4th Dept. 2016), lv denied 28 N.Y.3d 914 (in permanent neglect proceeding, no violation of right to counsel where father, who had assigned counsel,

made mid-hearing request for adjournment to have retained counsel appear; father indicated that he had retained attorney but no attorney appeared or contacted court; and proceeding had been pending for six years and children's status remained unsettled); Matter of Radjpaul v. Patton, 145 A.D.2d 494, 535 N.Y.S.2d 743 (2d Dept. 1988) (in custody proceeding, court erred in permitting cross-examination of mother to continue when counsel failed to appear promptly after ten-minute recess).

The respondent also has a right to the effective assistance of counsel, which, given the drastic potential consequences of a child protective proceeding, is governed by the standard used in criminal proceedings, where a defendant raising a claim of ineffectiveness typically must establish that counsel did not provide meaningful representation and that there was resulting prejudice. Matter of Matthew "C", 227 A.D.2d 679 (3d Dept. 1996); Matter of Erin G., supra, 139 A.D.2d 737; see also Nicholson v. Nicholson, 140 A.D.3d 1689 (4th Dept. 2016 (standard applied in visitation proceeding); Matter of Joey J., 140 A.D.3d 1687 (4th Dept. 2016) (no ineffective assistance in termination proceeding where attorney advised mother to admit allegations); Matter of Dashawn N., 101 A.D.3d 1013 (2d Dept. 2012) (permanency hearing determination reversed where court proceeded in absence of mother and attorney while attorney was in courthouse; denial of due process requires reversal without regard to merits of mother's position); Matter of Jaikob O., 88 A.D.3d 1075 (3d Dept. 2011) (ineffective assistance found where counsel committed multiple errors); Matter of Hailey JJ., 84 A.D.3d 1432 (3d Dept. 2011) (no ineffective assistance where counsel's decision not to present evidence at abuse hearing was reasonable in light of pending criminal proceeding involving same allegations; counsel not obliged to seek adjournment); Matter of Jamaal NN., 61 A.D.3d 1056, 878 N.Y.S.2d 205 (3rd Dept. 2009), lv denied 12 N.Y.3d 711 (no ineffective assistance in termination proceeding where counsel did not contest petitioner's motion for summary judgment and merely requested dispositional hearing; counsel, who represented respondent in criminal case, could reasonably have determined that respondent should not submit affidavit which could harm him in criminal context); Matter of Er-Mei Y., 29 A.D.3d 1013, 816 N.Y.S.2d 539 (2d Dept. 2006) (fundamental error requiring reversal where respondent had no

meaningful opportunity to confer with counsel, using Mandarin interpreter, between initial appearance and hearing); Matter of Joseph DD., 300 A.D.2d 760, 752 N.Y.S.2d 407 (3rd Dept. 2002) (counsel failed to object to delays after removal of child); Matter of Jonathan "LL", 294 A.D.2d 752, 742 N.Y.S.2d 430 (3rd Dept. 2002) (no ineffective assistance where respondent stipulated that court would decide case based on review of hospital records and waived hearing); In re the J. Children, 275 A.D.2d 648, 713 N.Y.S.2d 325 (1st Dept. 2000) (no ineffective assistance claim where respondent stipulated to use of pre-trial hearing minutes in lieu of new evidence at fact-finding hearing); Matter of McNeill v. Ressel, 265 A.D.2d 484, 696 N.Y.S.2d 855 (2d Dept. 1999) (in custody proceeding, no reversal where counsel was absent for about five minutes and father was not prejudiced); In re Ti.B., 762 A.2d 20 (D.C. 2000) (court violated respondent's First and Fifth Amendment rights by barring criminal defense counsel from courtroom and ordering respondent and family court attorney not to consult with criminal defense counsel about asserting father's Fifth Amendment privilege).

Although the court may limit a criminal defendant's right to consult with counsel while the defendant is testifying, such a limitation ordinarily may not extend overnight. People v. Joseph, 84 N.Y.2d 995 (1994). The respondent's right to counsel includes similar protection. See Matter of Turner v. Valdespino, 140 A.D.3d 974 (2d Dept. 2016) (mother denied due process in custody proceeding when court instructed her not to consult with counsel during recesses, which resulted in her being unable to speak to counsel over extended periods of time); Matter of Jaylynn R., 107 A.D.3d 809 (2d Dep't 2013) (mother's due process rights violated when court instructed her not to consult with attorney during two-month adjournment of fact-finding hearing).

While the child's lawyer will often have an interest in ensuring that the respondent receives effective assistance of counsel because the court's determinations will be more reliable, the child's lawyer has no standing to raise a right to counsel claim on behalf of a respondent on appeal. In re Brittni K., 297 A.D.2d 236, 746 N.Y.S.2d 290 (1st Dept. 2002).

When two or more respondents have been charged, it is preferable that each

one be represented by a different lawyer. See Greene v. Greene, 47 N.Y.2d 447, 418 N.Y.S.2d 379 (1979) ("[b]ecause dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained"). If the respondents wish to have one lawyer, the court should, at the very least, conduct an inquiry to determine whether there is an actual or potential conflict of interest, and then, if there is, advise the respondents of the risks. See Matter of Tylena S., 4 A.D.3d 568, 771 N.Y.S.2d 592 (3rd Dept. 2004), appeal dism'd 2 N.Y.3d 759, 778 N.Y.S.2d 776 (best practice is to advise jointly represented parties of potential for conflicts and right to separate representation, but failure to do so not reversible error where respondent failed to show conflict that bore substantial relation to conduct of defense); Matter of Jason C., 268 A.D.2d 587, 702 N.Y.S.2d 613 (2d Dept. 1999) (family court improperly disqualified counsel from simultaneous representation of father and mother without making proper inquiry into whether there was any actual or potential conflict; if court finds an actual or potential conflict, court shall advise respondents of the effect on their rights so they can make a knowing and intelligent decision as to whether dual representation should continue). Cf. People v. Gomberg, 38 N.Y.2d 307, 379 N.Y.S.2d 769 (1975). Of course, when the interests of the respondents conflict the court may also consider ordering severance for purposes of trial. See CPLR §603 ("In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others"); Matter of Nicolette I., 110 A.D.3d 1250 (3d Dept. 2013) (court's refusal to sever hearings did not deprive father of due process where court considered mother's out-of-court statements only against her and proceedings presented common questions of law and fact); cf. Matter of Rita XX., 249 A.D.2d 850, 672 N.Y.S.2d 481 (3rd Dept. 1998) (no ineffective assistance found where counsel for mother failed to move for severance from father's case).

Conflicts of interest other than those caused by joint representation may also arise, and the issue may be whether the respondent was prejudiced by the conflict, or whether the court erred in disqualifying counsel over the respondent's objection.

Compare Matter of Chelsea K., 15 A.D.3d 794, 790 N.Y.S.2d 273 (3rd Dept. 2005), appeal dism'd 4 N.Y.3d 869, 797 N.Y.S.2d 814 (no right to counsel violation where respondent's counsel had represented father of child respondent allegedly abused, but no one planned to call father as witness) with Matter of Brian R., 48 A.D.3d 575 (2d Dept. 2008) (no error in disqualification of father's attorney where attorney communicated with child, and used her as interpreter when speaking with parties, without knowledge and consent of child's lawyer; although party's right to be represented by counsel of own choosing is valued right which should not be abridged, right will not supersede clear showing that disqualification is warranted).

The respondent may waive the right to counsel. The waiver should be a knowing and intelligent one; the court must conduct a searching inquiry designed to insure that the respondent understands the right to counsel and the dangers of self-representation. A deprivation of the right to counsel requires reversal without regard to the merits of the unrepresented party's position. Matter of Kathleen K., 17 N.Y.3d 380 (2011) (assuming, without deciding, that parent in termination of parental rights proceeding has same right of self-representation that criminal defendant has, court finds no showing in record that father made unequivocal and timely applications for self-representation that would have triggered searching inquiry); Matter of Lillian SS., 146 A.D.3d 1088 (3d Dept. 2017), lv denied 29 N.Y.3d 992 (father properly permitted to proceed pro se where, although he did not unequivocally express desire to proceed pro se, he did not wish to go forward with assigned counsel, even in advisory capacity, and when questioned as to desire to proceed pro se, refused to answer directly and insisted that he be given time to obtain counsel; court arguably could have conducted more detailed inquiry, but was faced with recalcitrant parent who refused to accept reasonable options available, and court did apprise father of perils and pitfalls of proceeding pro se); Matter of Stephen Daniel A., 87 A.D.3d 735 (2d Dept. 2011) (new permanency hearing ordered where court allowed mother to proceed pro se and directed appointed counsel to provide assistance in advisory capacity without conducting searching inquiry to ascertain whether mother understood dangers and disadvantages of waiving right to counsel); Matter of Mitchell WW., 74 A.D.3d 1409, 903 N.Y.S.2d 553 (3rd Dept. 2010) (father properly allowed to

represent himself at removal hearing where court, in addition to informing him of right to counsel, questioned him about his education and work experience; stated that proceeding pro se would put him at "significant disadvantage" without training in law and that he would be bound by rules applicable to attorney; explained nature of petition and legal ramifications of finding; and advised him that neither petitioner, attorney for child nor wife's attorney would be representing his interests); Matter of Casey N., 59 A.D.3d 625, 873 N.Y.S.2d 343 (2d Dept. 2009), lv denied 12 N.Y.3d 710 (waiver invalid where court merely asked mother twice whether she wanted counsel to represent her, made statement that generally cautioned mother against self-representation without detailing dangers and disadvantages, and informed her that she would have to follow same legal rules as other parties; court had no authority to delegate to mother's counsel its duty to conduct searching inquiry); Matter of Isiah FF., 41 A.D.3d 900 (in termination of parental rights proceeding, court properly permitted respondent to proceed pro se after questioning her about her education and work experience, taking judicial notice of her "hundreds of court appearances," admonishing her that proceeding pro se was a "misjudgment," and directing her assigned attorney to provide assistance in advisory capacity); Matter of Evan F., 29 A.D.3d 905, 815 N.Y.S.2d 697 (2d Dept. 2006) (no valid waiver where court asked respondent if he was ready to proceed, not whether he wanted to proceed without counsel, and respondent's previous request for adjournment to retain counsel indicated desire for counsel); Matter of David VV., 25 A.D.3d 882, 807 N.Y.S.2d 683 (3rd Dept. 2006) (respondent was never questioned about his decision to forego counsel or advised that counsel would be appointed if he could not afford to retain counsel; reversal required whether or not prejudice is shown); Matter of Anthony K., 11 A.D.3d 748, 783 N.Y.S.2d 418 (3rd Dept. 2004) (respondent who is fit to proceed is competent to waive counsel); Matter of Jazmone S., 307 A.D.2d 320, 762 N.Y.S.2d 811 (2d Dept. 2003), appeal dism'd 1 N.Y.3d 584, 776 N.Y.S.2d 214 (2004); Matter of Samantha L., 291 A.D.2d 918, 736 N.Y.S.2d 560 (4th Dept. 2002), lv denied 98 N.Y.2d 603, 745 N.Y.S.2d 502 (2002) (respondent was not prejudiced, however, since counsel was assigned when family court perceived error after brief deprivation of counsel); Matter of Rachel P., 286 A.D.2d 868, 730 N.Y.S.2d 890 (4th

Dept. 2001); Matter of Meko M., 272 A.D.2d 953, 708 N.Y.S.2d 787 (4th Dept. 2000) (after counsel moved to withdraw and court indicated that an adjournment for substitution of counsel would not be granted, respondent did not waive counsel in termination of rights proceeding by merely stating that she would like to represent herself); Matter of Child Welfare Administration o/b/o John R., 218 A.D.2d 694, 630 N.Y.S.2d 379 (2d Dept. 1995) (respondent knowingly and intelligently waived counsel after first asking that her assigned counsel be dismissed and that a female attorney be assigned).

A constructive waiver (or forfeiture) of the right to counsel may occur when a respondent who does not qualify for assigned counsel and fails to retain counsel within a reasonable period of time. See Matter of Sara KK., 226 A.D.2d 766, 640 N.Y.S.2d 328 (3rd Dept. 1996), lv denied 88 N.Y.2d 808, 647 N.Y.S.2d 165 (no error where court denied sixth adjournment for respondent to obtain counsel); but see Matter of Tarnai v. Buchbinder, 132 A.D.3d 884 (2d Dept. 2015) (in custody proceeding, mother did not waive right to assigned counsel where, after three attorneys successfully sought to be relieved of assignment, court did not determine whether mother was waiving right and record demonstrated that she did not wish to proceed pro se but was forced to do so); Matter of Stephen L., 2 A.D.3d 1229, 770 N.Y.S.2d 207 (3rd Dept. 2003) (family court erred in requiring respondent to go ahead at order of protection violation hearing where there was confusion as to whether respondent had retained attorney who failed to appear).

In addition, the respondent is not guaranteed the right to choose assigned counsel, although, if the respondent can establish a breakdown in the attorney-client relationship, the court may be required to grant a request for new counsel. See, e.g., People v. McCummings, 124 A.D.3d 502 (1st Dept. 2015); but see Matter of Lillian SS., 146 A.D.3d 1088 (court not required to assign new counsel where father waited until fifth day of dispositional hearing to ask for new counsel and expressed only generalized dissatisfaction with manner in which proceedings were progressing, stating that “[t]here [are] just too many problems between us”).

Obviously, the respondent's lawyer is ethically bound to advocate for the results

desired by the respondent. To put it more expansively, just as criminal defense counsel is obligated to zealously defend a guilty client, the respondent's lawyer will often be required to seek a dismissal of the charges, and/or a return of the child to the respondent's custody, even when such a result may well place the child in danger. Although, in many cases, the lawyer will decide that it is best for the client to first cooperate with the agency, and then formally apply for a return of the child only when there is a reasonable chance that the judge will grant the request, the fact remains that the lawyer is not obligated to consider the child's best interests.

It is also important to recognize that there are two distinct elements of an Article Ten proceeding that require attention. Obviously, any "defense" lawyer is obligated to investigate and analyze the charges, prepare to cross-examine adverse witnesses, and, when appropriate, present a case on behalf of the client. The lawyer should also investigate the possibility of settling the case in a manner beneficial to the client. This is particularly important given the lengthy delays typical in child protective proceedings. ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 5 (lawyer should avoid continuances or reduce “empty adjournments” and work to reduce delays unless there is strategic benefit). However, while marshaling a defense may be critical, the respondent's progress in satisfying the demands of the agency and the judge is equally important. Indeed, the respondent's behavior during the pendency of the proceeding may well be decisive at the dispositional stage. Thus, the respondent's lawyer must develop a litigation strategy which will address these additional concerns. If the judge seems inclined to endorse the agency's plan, the lawyer must determine what the respondent is expected to do. Unless those expectations are patently unreasonable, the lawyer should encourage the respondent to comply. ABA Standard 11 (lawyer should, inter alia, counsel client regarding service plan, orders entered against client and potential consequences of failing to obey orders or comply with service plans); ABA Standard 12 (work with client to develop case timeline and tickler system); ABA Standard 40 (post-hearings, lawyer should take reasonable steps to ensure client complies with court orders). The lawyer should also assist the respondent in negotiating with the agency, advise the respondent to take

action which reflects a willingness and ability to provide good parenting, and actively prod a passive or reluctant client. When there is a genuine risk that the respondent will suffer a long-term loss of custody, the lawyer discharges his or her responsibilities only partially by trumpeting faithfully and eloquently the respondent's innocence and virtues, while ignoring the existing obstacles to reunification of the family.

The need for this two-track approach is made even more compelling by the caselaw under Article Ten, which has a decidedly child protective bent. Since an Article Ten proceeding involves the welfare of a child, and, therefore, bears little resemblance to two-party litigation fought out under the supervision of a disinterested judge, the appellate courts have discouraged judges from dismissing charges because of technical violations. Similarly, when the petitioner has failed to elicit evidence of abuse or neglect that is known to be in existence and available, the judge, and often the child's lawyer, will see to it that the evidence is presented. The standard of proof also offers limited protection to the respondent, since the court can make a finding based upon a mere preponderance of the evidence. Finally, when a case reaches the dispositional stage, a judge, focused on the "best interests" of the child, may unconsciously err on the side of safety.

For all these reasons, it is not easy to defend the respondent successfully in an Article Ten proceeding. Usually, the respondent "wins" when the family unit is intact at the end of the case.

### C. The Child's Lawyer

#### 1. Child's Right To Counsel

Under New York law the child has a statutory right to counsel, which includes a right to be represented by chosen counsel. FCA §§ 241, 249(a). See also Matter of Cassandra R., 269 A.D.2d 862, 703 N.Y.S.2d 792 (4th Dept. 2000); Matter of Elianne M., 196 A.D.2d 439, 601 N.Y.S.2d 481 (1st Dept. 1993); 45 CFR §1340.14(g) (in order to qualify for funding, State must insure appointment of guardian ad litem or other individual who fulfills same function). However, a child rarely will have sufficient funds for a retained lawyer, and any lawyer retained by a parent would be faced with an actual or potential conflict of interest. See Matter of La Bier v. La Bier, 291 A.D.2d 730,

738 N.Y.S.2d 132 (3rd Dept. 2002), lv denied 98 N.Y.2d 671, 746 N.Y.S.2d 459 (2002) (trial court properly refused to permit attorney who had been recruited by party to replace child's assigned lawyer); Matter of Linda F. v. Faber, 105 A.D.2d 523, 481 N.Y.S.2d 784 (3rd Dept. 1984) (children can be represented by counsel to whom they are referred by parent, but not by counsel retained by parent); Matter of B.M., 15 Misc.3d 1123(A), 841 N.Y.S.2d 217 (Fam. Ct., Orange Co., 2007) (retained counsel barred from representing child in connection with child's role as witness); McDonald v. Hammons, 936 F.Supp. 86 (E.D.N.Y. 1996) (in suit brought by parents against various agencies and individuals, potential conflict existed where parents' counsel represented children, who may have told counsel that they had been abused).

If independent representation is unavailable, an attorney must be appointed as soon as the court is notified that the child has been removed, an application for removal is made, or a petition is filed, and represent the child throughout the entire Article Ten proceeding until expiration of a dispositional order directing supervision or protection or suspending judgment or an extension of such an order, expiration of an order adjourning a case in contemplation of dismissal or an extension of such an order, or expiration of foster care placement. FCA §§ 249(a), 1016; see also CPLR 304(c) ("filing shall mean the delivery of the . . . petition to the clerk of the court"). As used in the Family Court Act, "attorney for the child" is "an attorney admitted to practice law in the state of New York and designated ... to represent minors pursuant to [FCA §249]." FCA §242.

"In making an appointment of an attorney for a child pursuant to [FCA §249], the court shall, to the extent practicable and appropriate, appoint the same attorney who has previously represented the child." FCA §249(b). See Matter of Kristi L.T. v. Andrew R.V., 48 A.D.3d 1202 (4th Dept. 2008), lv denied 10 N.Y.3d 716.

So that representation for children is available in each county, the New York State Office of Court Administration may contract with a legal aid society or a qualified attorney or group of attorneys, or designate a panel of lawyers. FCA §243.

The court may remove a particular lawyer from an appointment upon application by the lawyer, in which case the court must immediately appoint another lawyer. FCA

§1016. However, although FCA §249-a permits a child to waive counsel under certain limited circumstances in an Article Three juvenile delinquency proceeding or an Article Seven person in need of supervision proceeding, there is no waiver provision applicable to Article Ten proceedings.

The child also has a New York State constitutional Due Process right to counsel, which includes a right to effective assistance. In Matter of Jamie TT., 191 A.D.2d 132, 599 N.Y.S.2d 892 (3rd Dept. 1993), the child's lawyer, who had argued at trial for a finding of sexual abuse, was faulted for his failure to elicit available evidence prior to the family court's dismissal of the charges. Of course, had the lawyer in Jamie TT. been instructed by the client to seek dismissal of the charges, he would have been obligated to do precisely what he did: present no evidence, and allow the petitioner's case to fail. Although, in Jamie TT., the Third Department focused on the compelling interest of a child faced with the possibility of being returned to a sexual abuser, there is no reason to think that the State constitutional right to counsel is limited to sexual abuse cases.

The child's lawyer also has a statutory obligation to communicate the child's wishes to court. FCA §241; Matter of Brittany K., 59 A.D.3d 952, 872 N.Y.S.2d 817 (4th Dept. 2009), lv denied 12 N.Y.3d 709 (any error was harmless where child's attorney did not apprise court of children's wishes at dispositional hearing, but had previously apprised court of children's wishes at fact-finding hearing, and thus court could consider children's best interests); Matter of Alyshia M.R., 53 A.D.3d 1060, 861 N.Y.S.2d 551 (4th Dept. 2008), lv denied 11 N.Y.3d 707 (parents failed to preserve claim that absence of information concerning children's wishes required reversal); Matter of Derick Shea D., 22 A.D.3d 753, 804 N.Y.S.2d 389 (2d Dept. 2005) (orders terminating parental rights reversed, and matter remitted for new dispositional hearing, where child's lawyer expressed opinion that best interests of children, ages ten and fourteen, called for termination of parental rights, and set forth his reasoning, but failed to state that children had expressed desire to be returned to mother).

The problems faced by children's lawyers with excessive caseloads has yielded a clear recognition of the child's right to effective assistance. See Kenny A. v. Perdue, 356 F.Supp.2d 1353 (N.D. Georgia, 2005) (class action plaintiffs allege that inadequate

number of child advocate positions funded by County results in extremely high caseloads and makes effective representation impossible; court denies defendants' motions for summary judgment, noting, inter alia, that National Association of Counsel for Children recommends that no child advocate attorney maintain caseload of over 100 individual clients at one time, and that there is evidence that advocates do not always meet with all clients, review relevant records, ascertain whether clients are receiving necessary services and are safe, or monitor compliance with court orders).

Under FCA §249-b(a): "The chief administrator of the courts, pursuant to [Judiciary Law §212(2)(e)] shall promulgate court rules for attorneys for children. Such court rules shall: 1. prescribe workload standards for attorneys for children, including maximum numbers of children who can be represented at any given time, in order to ensure that children receive effective assistance of counsel comporting with legal and ethical mandates, the complexity of the proceedings affecting each client to which the [lawyer] is assigned, and the nature of the court appearance likely to be required for each individual client." The statute also requires the promulgation of rules providing for the development of training programs, including programs addressing domestic violence. FCA §249-b(a)(2), (3). "Appointments of attorneys for children under [FCA §249] shall be in conformity with the rules." FCA §249-b(b).

The workload rule, 22 NYCRR §127.5, entitled "Workload of the Attorney for the Child," states: "Subject to adjustment based on the factors in subdivision (b), the number of children represented at any given time by an attorney appointed pursuant to section 249 of the Family Court Act shall not exceed 150." §127.5(a). For offices providing representation under an agreement pursuant to FCA §243(a) and (b), §127.5(b) identifies factors upon which an adjustment of the 150-client limit may be based: (1) Differences among categories of cases that comprise the workload of the attorneys' office; (2) The level of activity required at different phases of the proceeding; (3) The weighing of different categories and phases of cases; (4) Availability and use of support staff; (5) The representation of multiple children in a case; (6) Local court practice, including the duration of a case; (7) Other relevant considerations. §127.5(b). "The administrator of offices pursuant to such agreements shall be responsible for

managing resources and for allocating cases among staff attorneys to promote the effective representation of children and to ensure that the average workload of the attorneys for children in the office complies with the standards set forth in [§127.5(a) and (b)]." §127.5(c). "For representation provided by a panel of attorneys for children pursuant to [FCA §243(c)], the Appellate Division may adjust the workload standards of [§127.5(a)] to ensure the effective representation of children." 22 NYCRR §127.5(d). "The Chief Administrator of the Courts, with respect to representation pursuant to [FCA §243(a)], and the Appellate Divisions, with respect to representation pursuant to [FCA §243(b) and (c)], shall annually, at the time of the preparation and submission of the judiciary budget, review the workload of such offices and panels, and shall take action to assure compliance with this rule." §127.5(e). "Not more than two years following enactment of this rule, the Chief Administrator shall, in consultation with the Appellate Division, review the effectiveness of the rule in achieving the objectives of [FCA §249-b], and confirm or modify the standards and procedures provided for in the rule."

**2. Basic Obligations Of Child's Lawyer**

Standard B-1 (Basic Obligations) of The New York State Bar Association's Standards for Attorneys Representing Children in New York Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings states as follows:

> The attorney should ensure that facts in support of the child's position that may be relevant to any stage of the proceeding are presented to the court. To this end, the attorney should:
> (1) Obtain copies of all pleadings and relevant notices and demand ongoing discovery;
> (2) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the role of all participants (e.g., judge, parties and their advocates, case workers, child's attorney), and what to expect in the legal process;
> (3) Determine if a conflict of interest exists and observe ethical rules related to conflicts when the attorney is representing multiple siblings;
> (4) Develop a theory and strategy of the case, including ultimate outcomes and goals to implement at hearings and including factual and legal issues;

(5) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification *prior* to case conferences, changes of placement, child interviews, and any changes of circumstances affecting the child and the child's family;
(6) Participate in depositions, negotiations, discovery, pre-trial conferences and hearings;
(7) Identify (upon consultation with the child) appropriate family and professional resources for the child;
(8) Obtain evaluations and retain expert services if deemed necessary to effectively present the child's position;
(9) Obtain and review all court and agency records concerning the child's placement history and consult with all attorneys who had previously represented the child; and
(10) If the attorney is required, for any reason, to terminate representation of the child, the attorney must insure that the new attorney for the child receives all relevant court papers as well as other documents and information necessary to insure the least possible disruption in the case and/or trauma to the child.

The Commentary to Standard B-1 states:

> The attorney should not be merely a fact-finder but rather should zealously advocate a position on behalf of the child. Delay is endemic to the family court process, but delay is especially harmful to children. The attorney for the child should take the initiative and not wait for child protective services, the foster care agency, or the parents to take action. The attorney for the child should make all appropriate motions and seek any necessary orders in furtherance of the child's position.
>
> Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position. The attorney for the child should actively seek the child's participation and input throughout the legal process and should not undermine the position of the child by volunteering to the court information that contradicts that position.
>
> A situation may arise in which the child does not wish to take a position. In this situation, a child has the right to

> instruct the attorney not to take a position, and such a request must be articulated in court.
>
> If the client is dissatisfied with the representation provided by his or her attorney, the attorney should inform the child of all of the options available to resolve the child's grievances.
>
> The attorney for the child is not an arm of the court and should not engage in ex parte communications with the court.

With respect to the unique legal, technical and practical knowledge and skills the child's lawyer ought to possess, Rule 7.17(d) (Eligibility for Appointment as Counsel for Children) of the Superior Court of California County of Los Angeles Court Rules is instructive:

> In addition to meeting the eligibility requirements for appointment as counsel for adults as provided in subdivision (c) above, an attorney seeking appointment as counsel to a child must be familiar with the following:
>
> (1) Child development stages including a child's cognitive, emotional, and social growth stages, language development, and patterns of child growth related to neglect and non-organic failure to thrive;
> (2) Interviewing techniques for children, including techniques that are age-appropriate and take into consideration the type of abuse the child is alleged to have suffered;
> (3) Child development as it relates to children as witnesses and the impact of the court process on a child;
> (4) The types of placements available to children, and issues related to placement including, but not limited to (i) a working knowledge of licensing requirements for foster care and relative placements, (ii) the impact of multiple placements on the child, and the importance of maintaining sibling groups versus the best interests of each child in the sibling group, and (iii) the effect placement will have on visitation issues and on the delivery of services to children in placement;
> (5) The educational, medical, mental health, dental, and other resources available for children in the dependency court system, the funding therefor, and the means of identifying the need for and the accessing of such resources;
> (6) The emancipation laws, and the resources available to assist the dependent child to emancipate, including, but not

> limited to, DCFS's Independent Living Program, the requirements for and the availability of transitional housing, and the availability of funding to assist emancipating children in living independently[.]

### 3. Role Of Child's Lawyer

For a comprehensive discussion of the role of the child's lawyer, see Practice Manual For Children's Lawyers, Volume One - Representing Children In Child Welfare Proceedings, Part Two: The Role Of The Child's Attorney.

### 4. Conflicts Of Interest

#### a. Identifying And Addressing Conflicts

Generally, "a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rules of Professional Conduct, Rule 1.7(a); see also Commentary to Rules of Professional Conduct, Rule 1.7 ("Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. . . . A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases").

Obviously, a lawyer assigned to represent the children in a child protective proceeding must keep these principles in mind. See Commentary to State Bar Standard B-2 (attorney should not accept assignment for siblings or any other multiple client

group if exercise of independent professional judgment on behalf of one would be or is likely to be adversely affected by attorney's representation of the other OR if so doing would be likely to involve attorney in representing differing interests; if conflict arises during course of representation, attorney may not be able to continue to represent any or all of the siblings).

However, to avoid the expense and inconvenience that would result from assignment of a separate lawyer to each child, the existence of potential conflicts has been tolerated more liberally, at least at the time the lawyer is initially assigned. Compare In re Celine R., 71 P.3d 787 (CA 2003) (ordinarily, court may appoint single attorney to represent siblings, must appoint separate attorneys only if there is actual conflict among siblings, and, if circumstances specific to case make it reasonably likely that actual conflict will arise, should appoint separate counsel at the outset rather than await actual conflict and possible disruption caused by subsequent reappointment) and In re Jasmine S., 153 Cal.App.4th 835 (Cal. Ct. App., 2d Dist., 2007) (attorney representing multiple siblings in dependency proceedings may be disqualified only if siblings have actual conflict of interest, not if there is merely potential conflict; also, separate units of Children's Law Center, which were sufficiently independent to be treated as separate law firms, were representing siblings) with Matter of Chelsea BB., 34 A.D.3d 1085, 825 N.Y.S.2d 551 (3rd Dept. 2006), lv denied 8 N.Y.3d 806 (court should have assigned separate lawyers at outset given complexity of petitions and allegations and conflicting interests among children).

Fact-finding-related conflict problems are the ones most likely to require disqualification. The child's lawyer cannot simultaneously represent two competent teenaged clients when one contends that the alleged acts of abuse or neglect did occur, and the other claims that they did not or that, even if they did occur, he/she does not want to be found to be an abused or neglected child. See, e.g., Matter of Brian S., 141 A.D.3d 1145 (4th Dept. 2016) (where two children maintained that other child was lying in allegations against mother, attorney for children could not advocate zealously children's unharmonious positions). Such a conflict is particularly acute when one or more of the children might be asked to testify on behalf of the respondent. See,

e.g., Matter of H. Children, 160 Misc.2d 298, 608 N.Y.S.2d 784 (Fam. Ct., Kings Co., 1994).

It is true that when there is uncontested evidence that the respondent committed acts of abuse or neglect against one of the children, a lawyer could argue for a finding with respect to that child while at the same time marshaling arguments and case law supporting dismissal of derivative abuse or neglect charges. However, this is possible only in unusual cases in which when there is no legitimate argument for dismissal of the main charge; when such an argument exists, the lawyer is obligated to make it, and an irreconcilable conflict exists.

Conflict problems related to the children's custodial status also can be disabling. First of all, if the respondent contests removal of the children at a preliminary hearing, and the lawyer has one teenaged client who wants to remain out of the home and another who does not, the lawyer may have to challenge the allegations of neglect or abuse on behalf of one client, and endorse the charges on behalf of the other; thus, the conflict becomes one that is fact-finding-related. Even assuming that the lawyer has no hope of contesting the allegations and intends to argue only that one client be returned home and the other kept in foster care, the lawyer may be unable to argue coherently that the respondent poses a threat to certain children but not to others. That lawyer also would be conflicted when deciding whether to raise evidentiary objections that could result in the exclusion of evidence that supports the position of certain clients but not the position of others.

There are cases in which there are compelling reasons why one child should be removed and the others should remain at home. In such cases, a conflict will still arise where the children’s lawyer must take different positions with respect to the allegations in the petition in order to ensure that one client remains in foster care while another remains at home. However, when the lawyer is not in a position to contest the charges, the lawyer may be able to zealously represent several older children without being forced to make arguments on behalf of one child which undermine the position of the others. For instance, when the petitioning agency has asked for removal of the child who has been harmed, but not the other children, because of the singular nature of the

respondent's relationship with the targeted child, the children's lawyer may be able to argue effectively for disparate treatment. Indeed, in many of these cases the respondent is not contesting removal, and the children's lawyer will never need to highlight the imminent risk of harm to one child while also contending that the other children are safe. Similarly, when one child in foster care wants to visit with the respondent while another does not, or the petitioning agency has denied the respondent visits with one child while permitting visits with another, the children's lawyer may be able to make coherent arguments based on the children's strong needs and desires and/or the unique nature of the parent-child relationship.

In Matter of Taylor G., 270 A.D.2d 259, 703 N.Y.S.2d 523 (2d Dept. 2000), the Second Department concluded that the children's lawyer did not have a conflict of interest under the circumstances described in the following excerpt from the lawyer's brief:

> The Family Court announced that it had decided to continue the status quo but to assign a "separate [lawyer]" to represent Taylor because there was "a conflict of interest." The Family Court found that the "quality of the relationship" between Taylor and respondent was "much different" than that between Louis and respondent; that Louis had been a target child while Taylor was not; and that what was at issue with regard to Taylor was a derivative finding, if any. The attachment that Taylor had for Louis, "which would prohibit her emotionally from separating to the point that she might be able otherwise to return to the custody of her father," created an untenable position" for the [lawyer] who had to represent both of the children's interests. The Family Court did not believe that Ms. Baum had been less than zealous in representing the children to that point, but because Taylor had for some time expressed a desire to renew and expand her relationship with her father yet was attached to Louis, "each child needs a separate voice in this courtroom so that [the Family Court] can determine the extent to which each the child feels free to speak without feeling that what that child says will impact upon the result as to the other child." Given the "difference in the nature and quality of the relationship of each child to the parent" and the fact that their interests at disposition might "diverge entirely," it was the Family Court's opinion, that "at this time, in the best interest of each child, it would be prudent for Taylor to have

separate representation."

See also Matter of Barbara ZZ. v. Daniel A., 64 A.D.3d 929, 882 N.Y.S.2d 570 (3rd Dept. 2009) (where children often fought, and one child dominated and often hit other child and was estranged from mother and wished to remain with father, while other child's best interests required that he live with mother, attorney had no potential conflict); In re Ira S., 23 A.D.3d 288, 805 N.Y.S.2d 17 (1st Dept. 2005), appeal dism'd 6 N.Y.3d 841, rearg den'd 7 N.Y.3d 783 (in custody case, no conflict where each child wished to live with different parent); Matter of S.A. v. S.K., 40 Misc.3d 1241(A) (Fam. Ct., Bronx Co., 2013) (adoptive mother's motion to disqualify Legal Aid in grandmother's visitation proceeding denied where attorney was representing child's siblings in permanency and visitation proceedings and supporting those children's visits with grandmother; issues in proceedings were not related and different circumstances of child, who had been adopted, were not equivalent to differing interests; there was no evidence that attorney, who was entitled to form opinion in other proceeding, was biased against adoptive mother; and filing of motion on eve of trial raised question of whether motion was filed as litigation tactic); Matter of Keith M., 181 Misc.2d 1012, 697 N.Y.S.2d 823 (Fam. Ct., Erie Co., 1999) (no disqualification where one child wanted further contact with mother and other child did not); but see Matter of James I., 128 A.D.3d 1285 (3d Dept. 2015) (permanency hearing determination reversed where children had divergent interests with regard to where and with whom they preferred to live and attorney was going to have to take position contrary to that of one child); Corigliano v. Corigliano, 297 A.D.2d 328, 746 N.Y.S.2d 313 (2d Dept. 2002) (separate lawyer was required when eldest child wanted to reside with father rather than with mother and two siblings); Matter of Gary D.B., 281 A.D.2d 969, 722 N.Y.S.2d 323 (4th Dept. 2001) (lawyer should have been permitted to withdraw when children expressed different preferences as to parent with whom they wished to live).

Other types of conflicts can arise as well. If one of the children should be removed because he or she might harm the other children, a conflict may exist, particularly when the assaultive child wants to remain home, or may become the subject of a FCA Article Seven "PINS" proceeding (Proceedings Concerning Whether

A Person Is In Need Of Supervision). A conflict could also arise if there is disagreement among the children with respect to sibling visitation. See Matter of Brooke D., 193 A.D.2d 1100, 598 N.Y.S.2d 633 (4th Dept. 1993).

Even when the children's lawyer can argue effectively for different treatment of different clients, a conflict also may arise when, because of a desire to be with his or her siblings or at least maintain a full relationship with them, one child, whether in foster care or at home, wants the lawyer to advocate that other children reside at the same location, or at least are not adopted. Although it has been argued that one child has no standing to contest the custodial status of another, the fact remains that each child has a liberty interest in his or her sibling relationships, and is entitled to be heard through a non-conflicted lawyer with respect to issues that affect the child's ability to maintain those sibling relationships. If, on the other hand, a child recognizes that it is in a sibling's best interest to reside in another home and does not insist that the lawyer argue otherwise, the potential conflict would not become disabling. Compare Carroll v. Superior Court, 101 Cal.App.4th 1423 (Ct. App., 4th Dist., Div. 1, 2002) (conflict found where lawyer represented seven children who had conflicting permanency goals) with In re Abigail J., 2007 WL 603004 (Cal. Ct. App., 2d Dist., 2007) (no conflict where two children were concerned about maintaining contact with sibling who was about to be adopted, but were happy for sibling and wanted adoption to go through); In re P.X., 2003 WL 21652750 (Ct. App., 3rd Dist., 2003) (no actual conflict where there were no expressions of interest by any of the children in continuing sibling visits, and visits often were not beneficial); In re Va X., 2003 WL 1930300 (Ct. App., 3rd Dist., 2003) (same as P.X.).

When the goals of the children are in conflict, but their lawyer is not obligated to advocate for inconsistent results because certain of the children are too young to make their own decisions, no conflict will exist. See Matter of Shaw v. Bice, 117 A.D.3d 1576 (4th Dept. 2014), lv denied 24 N.Y.3d 902 (separate attorneys not required where son expressed desire to reside with mother and daughter wanted to reside with father, but attorney for children advised court that position of son, who was age nine and wanted to live with mother because at her house "he can stay up late and he doesn't get in

trouble," was "immature and thus not controlling" upon attorney); see also In re J.P.B., 419 N.W.2d 387 (Iowa 1988) (in termination proceeding, there was no conflict where children wanted different outcomes since counsel's role was to advocate the best interests of the children, not their wishes); In re Jeremy T., 2003 WL 21540965 (Ct. App., 3rd Dist., 2003) (although one child wanted to live with sibling while sibling did not, conflict was potential and not actual since counsel could determine that separate placements were appropriate while communicating to court one client's desire to live with her sibling); Matter of Keith M., supra, 181 Misc.2d 1012 (same result as in J.P.B. where one child wanted further contact with parent and other child did not); Matter of Jennifer M., supra, 148 Misc.2d 584 (although thirteen-year-old stepdaughter did not want any visitation with her father and four-year-old natural daughter did, lawyer was free to override the stated position of the four-year-old and argue that the father should have no visitation until psychological examinations were completed).

Upon the discovery of a conflict, or potential conflict, the children's lawyer should ask the court to assign new counsel to one or more of the children. See CPLR §321(b)(2) (attorney of record may withdraw or be changed by court order upon motion with notice to client, other parties' attorneys, any pro se party, and any other person as court may direct). If an actual conflict is identified prior to the lawyer's first appearance and formal assignment in court, he/she should indicate to the judge which children he or she can represent. While, in some cases, another lawyer must be left to sort through remaining conflict issues, the first lawyer should alert the judge when it appears that more than one additional lawyer should be assigned, and, whenever possible, assist the judge in determining which children should be represented by each lawyer.

In some cases, the conflict will appear after the children's lawyer has established confidential relationships with all of the children, and, perhaps, has acquired information from each child that could be used to the disadvantage of other children. Although it could be argued that the lawyer may properly continue to represent one or more of the children and simply make no use of the confidential information acquired from the other children, conflict rules suggest that the lawyer should be disqualified from representing any of the children. See Matter of C. Children, 282 A.D.2d 455, 723 N.Y.S.2d 199 (2d

Dept. 2001) (lawyer improperly relieved from representing five children where lawyer had brief contact with one child in public area before asking to be relieved as to that child); Matter of H. Children, supra, 160 Misc.2d 298 (court disqualifies lawyer entirely based on conflict between two teens); Burda Media, Inc. v. Blumenberg, 1999 WL 1021104 (S.D.N.Y. 1999); Rules of Professional Conduct, Rule 1.9 (except with informed written consent of former client, lawyer who has formerly represented client in matter shall not thereafter represent another person in same or substantially related matter in which that person's interests are materially adverse to interests of former client; lawyer who has formerly represented client in matter or whose firm has formerly represented client in matter shall not thereafter use confidential information of former client to disadvantage of former client except as permitted or required by Rules or when information has become generally known); but see Commentary to Rules of Professional Conduct, Rule 1.9 ("Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c)"); In re T.E., 582 A.2d 160 (Vt. 1990) (no conflict where public defender represented children while their interests coincided, and later, at hearing on motion to modify, represented only child who wanted to be adopted).

While it is usually the children's lawyer who announces the conflict, it is not unusual for a judge to notice the problem, or for a respondent who is unhappy with the lawyer's position to move for disqualification. While the respondent's standing could be questioned, the court arguably has a duty to address a conflict problem. See In re S.A., 182 Cal. App.4th 1128 (Cal. Ct. App., 4th Dist., 2010) (respondent lacked standing to challenge competency of child's counsel); Matter of TM, 19 Misc.3d 1113(A), 859

N.Y.S.2d 907 (Fam. Ct., Kings Co., 2008) (while denying mother's motion to have child's attorney relieved due to inadequate performance and bias against respondent, court notes, inter alia, that while issues regarding quality of representation by child's attorney are not properly raised by parent's attorney, such claims must be considered once they have been made); Raymond v. Raymond, 174 Misc.2d 158, 662 N.Y.S.2d 1016 (Fam. Ct., Albany Co., 1997); see also Murchison v. Murchison, 245 Cal.App.4th 847 (Cal. Ct. App., 2d Dist., 2016) (husband had no standing to move for disqualification of wife's attorney where wife wanted to continue being represented by attorney and husband could not show he would be harmed by continued representation; standing must be based on relationship between moving party and attorney, or at least on showing that party has sufficient personal stake). If the children's lawyer wishes to challenge a disqualification order, the appropriate remedy is an appeal, not a writ of prohibition. See Matter of Ernest H., 49 A.D.2d 907, 374 N.Y.S.2d 28 (2d Dept. 1975), appeal dism'd 38 N.Y.2d 771, 381 N.Y.S.2d 1028.

A conflict may arise when the children's lawyer previously represented an adverse party to the proceeding or an adverse witness, or from other factors. See, e.g., Matter of Catherine A. v. Susan A., 155 A.D.3d 1360 (3d Dept. 2017) (no conflict where attorney represented mother in drug prosecution; matters were not substantially similar, and children's interests were not materially adverse to mother's). While a lawyer must preserve a former client's confidences, there is no duty of loyalty preventing the lawyer from representing a person with adverse interests. Although one lawyer's conflict is imputed to members of the law firm, large law firms have substantial discretion to construct conflict walls. See Rules of Professional Conduct, Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein"); Commentary to Rules of Professional Conduct, Rule 1.10 ("In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter if (i) the information is protected by Rule 1.6 and Rule 1.9(c)

and likely to be significant and material to the current matter, and (ii) the documents or files containing confidential client information are retained in a place or in a form that is accessible to lawyers participating in the current adverse matter. A law firm seeking to avoid disqualification under this Rule should therefore take reasonable steps to ensure that any confidential information relating to the prior representation that is maintained in the firm's hard copy or electronic files is not accessible to any lawyer who is participating in the current adverse representation"); Rules of Professional Conduct, Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing"); Commentary to Rules of Professional Conduct, Rule 1.9 ("Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter"; however, "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related"); Commentary to Rules of Professional Conduct, Rule 1.18 ("In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the

procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d)(2). . . . In order to prevent any other lawyer in the firm from acquiring confidential information about the matter from the disqualified lawyer, it is essential that notification be given and screening procedures implemented promptly. If any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the disqualified lawyer and other lawyers in the firm in a given matter"); Rules of Professional Conduct, Rule 1.0(t) ('Screened' or 'screening' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law"); Commentary to Rules of Professional Conduct, Rule 1.0 ("The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information.. . . In order to be effective, screening

measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening"); NY Eth. Op. 723, 1999 WL 1756274 (NYSBA, 12/12/99) ("The most important factor, however, is whether the moving lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation"); NY Eth. Op. 628, 1992 WL 465630 (NYSBA, 3/19/92) (issue "turns on the scope of the prior representation and the likelihood that the lawyer would obtain confidences and secrets of the former client which may be relevant to the current litigation"); NYCLA Eth. Op. 671(89-5), 1989 WL 572096 (N.Y. Co. Lawyer's Assoc., 5/22/89); MI Eth. Op. RI-46, 1990 WL 504867 (Michigan State Bar, 3/28/90) (matters substantially related if there is likelihood that information obtained in former representation will have relevance to subsequent representation; for example, criminal history of former client may be relevant to subsequent custody matter); People v. Wilkins, 28 N.Y.2d 53, 320 N.Y.S.2d 8 (1971) ("While it is true that for the purpose of disqualification of counsel, knowledge of one member of a law firm will be imputed by inference to all members of that law firm (citation omitted), we do not believe the same rationale should apply to a large public-defense organization such as the Legal Aid Society. The premise upon which disqualification of law partners is based is that there is within the law partnership a free flow of information, so that knowledge of one member of the firm is knowledge to all. Even if we were to treat the Legal Aid Society to be analogous to a law partnership, there is no evidence that information concerning defendants being represented by the society flows freely within the office, or that there was actual knowledge of the dual representation by the society. The New York City Legal Aid Society, a nonprofit membership organization authorized by law to represent indigent persons, consists of four branches and three units, and is undoubtedly the largest legal defense organization in the world. In Criminal Court work alone, the society has approximately 150 lawyers engaged in all of the courts in the city exercising criminal jurisdiction. In view of the nature of the organization and the scope of its activities, we cannot presume that complete and full flow of 'client' information between staff attorneys exists, in order to impute knowledge to each staff attorney within the

office"); Matter of Tina X. v. John X., 138 A.D.3d 1258 (3d Dept. 2016) (in custody proceeding, assignment of attorney for children, who had previously been involved in prosecution of mother on child endangerment charge that was dismissed after adjournment in contemplation of dismissal, was contrary to Rule 1.11(c) because case had been sealed and attorney was in possession of confidential governmental information that could be used to mother's disadvantage, but appearance of impropriety, standing alone, insufficient to warrant reversal and mother failed to show actual prejudice or substantial risk of abused confidence); Matter of Jalicia G., 130 A.D.3d 402 (1st Dept. 2015), aff'g 41 Misc.3d 931 (Fam. Ct., Bronx Co., 2013) (no disqualification of Bronx Legal Aid lawyer where, according to facts stated in family court's decision, Legal Aid represented respondent mother when she was subject child and placed in foster care in Article Ten proceeding in Queens County; although child's+ attorney was advocating position adverse to mother, and present case was substantially related to prior case because Legal Aid attorneys in Queens likely obtained confidential information regarding mother's strengths and weaknesses and history of emotional problems, if any, and attorneys who represented mother in Queens are disqualified, there was a screen erected as soon as this case was filed and no risk shown that Legal Aid personnel working on present case have acquired or could acquire confidential information acquired by Legal Aid personnel in prior case; court also notes that mother has no recollection of meeting or working with Legal Aid attorney, which suggests that relationship she had with Legal Aid was insubstantial from her perspective, and that disqualification of Legal Aid would lead to more delays and greater prejudice to child); In re Nelissa O., 70 A.D.3d 572, 894 N.Y.S.2d 431 (1st Dept. 2010) (child's attorney had no conflict where representation of subject children's sibling in neglect proceeding ceased before commencement of custody proceeding in which sibling was not party); Matter of T'Challa D., 3 A.D.3d 569, 770 N.Y.S.2d 649 (2d Dept. 2004), aff'g 196 Misc.2d 636, 766 N.Y.S.2d 500 (Fam. Ct., Kings Co., 2003) (Legal Aid Society's Juvenile Rights Division, which had represented child since 1998, not disqualified where Criminal Defense Division was representing mother in criminal matter since CDD, upon learning of the dual representation, immediately withdrew, and child's

lawyer alleged that there had been no exchange of information and that Society had constructed conflict wall to prevent disclosure of confidential information); In re Charlisse C., 194 P.3d 330 (Cal. 2008) (juvenile court erred in disqualifying Children's Law Center from representing infant where CLC had represented respondent mother in previous dependency proceeding, but CLC must establish that it had protected, and would continue to protect, mother's confidences through screening and/or structural safeguards); B.A. v. L.A., 196 Misc.2d 86, 761 N.Y.S.2d 805 (Fam. Ct., Rockland Co., 2003) (Legal Aid lawyer disqualified where custody litigant's attorney was President of Legal Aid); Matter of Destiny D., 2002 WL 31663251 (Fam. Ct., Queens Co.) (no disqualification where Legal Aid Society's Juvenile Rights Division had represented children since approximately 1997, and Criminal Defense Division represented father in 2002 and between 1983-1991, where it was not shown that JRD's representation of children would result in disclosure of confidential information, and issues in permanent neglect proceeding and criminal action were dissimilar); see also Matter of Hurlburt v. Behr, 70 A.D.3d 1266, 897 N.Y.S.2d 271 (3rd Dept. 2010) (no conflict where lawyers assigned to represent child and father were Public Defender and Assistant Public Defender; Public Defender and assistants had separate office addresses and there was no showing that client information flowed freely among them); Matter of Susan K. v. Thomas C., 25 Misc.3d 1207(A), 901 N.Y.S.2d 903 (Fam. Ct., Monroe Co., 2009) (mother's attorney not disqualified in custody proceeding where father met previously with partner in mother's attorney's firm; presumption of disqualification rebutted by assurances that other attorney would be kept away from present litigation and that there were no records of meeting between father and other attorney other than billing document, and present litigation was substantially different from matters resolved when father met with other attorney); but see People v. Watson, 25 N.Y.3d 935 (2016) (defense counsel properly relieved despite defendant's offer to waive conflict where counsel's New York County Defender Services colleague had represented potential witness in related case; although there is general rule that knowledge of large public defense organization's clients is not imputed to each attorney employed by organization, counsel became aware of conflict before trial, representation of witness

arose from same incident, counsel's supervisors restricted counsel's ability to call or challenge witness, and, although defendant was willing to waive conflict, he also said that he wanted former client to be called as witness, and in any event court had authority to reject waiver).

**b. Anticipating And Avoiding Conflicts**

The children's lawyer must attempt upon assignment to identify potential conflicts. Early disqualification can prevent disruption to attorney-client relationships, and, in some cases, prevent a mistrial. See Commentary to Rules of Professional Conduct, Rule 1.7 ("Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients' interests can be adequately served by common representation. . . . A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised"). Although adults can waive a conflict [see Rules of Professional Conduct, Rule 1.7(b); People v. Gomberg, 38 N.Y.2d 307, 379 N.Y.S.2d 769 (1975)], it is not clear whether, and under what

circumstances, a child should be permitted to do so. See Matter of H. Children, supra, 160 Misc.2d 298.

The children's lawyer should attempt to identify conflict problems before interviewing the children. The lawyer should examine the petitions carefully for signs of a conflict. Sometimes, it is alleged that one child has abused another; the child charged with misconduct could become the respondent in a juvenile delinquency proceeding, and, in any event, needs a lawyer who has no duty to protect the other children. Sometimes the respondent is charged with abusing a teenaged child, but other teenagers deny that the alleged incidents took place, and/or insist upon remaining in the home. The children's lawyer should speak to the other attorneys, and, with their permission, to the parties and the caseworker, to ascertain what, if anything, the children have said about the allegations and where they want to live. The children's lawyer might learn that a sibling has accused the allegedly victimized child of lying, or that certain children will be called as defense witnesses.

When the lawyer has decided to withhold final judgment regarding a potential conflict until interviewing has begun, the lawyer must schedule and conduct separate interviews of the children in a manner designed to uncover actual conflicts before the lawyer has established a confidential relationship with children who have conflicting interests. There are several ways to accomplish this.

Relying upon available information and reasonable inferences, the lawyer should tentatively divide the children into interest groups, and plan to interview the members of one group before interviewing the others. For example, if it is alleged that the father, with the mother's knowledge and complicity, forcibly raped their teenaged daughter for several years, and that she has two teenaged brothers and two other siblings who are under the age of five, the lawyer reasonably could view the victimized child, and the younger children on whose behalf the lawyer will make best interests determinations, as one interest group, and the teenaged boys as another. If the lawyer begins by interviewing the alleged victim, and she confirms that she was raped and wants to remain in foster care, but also reveals that her brothers do not believe her and want to remain at home, the lawyer would know that another lawyer should be assigned to

represent the boys. The lawyer also could begin by interviewing the teenaged boys. But in the end, what is learned in each interview -- what if the alleged victim disowns the rape charges and instructs the lawyer to advocate for dismissal of the petition, or the first boy interviewed reveals that he witnessed the abuse and does not want to remain at home -- will dictate the lawyer's next move.

Because full disqualification is required only after the lawyer has established a confidential relationship with children who have conflicting interests, the lawyer also should attempt to tease out conflict problems at the very beginning of each interview, before the child discloses any useful information. For instance, if the lawyer in the sexual abuse scenario described above begins by interviewing the alleged victim, who repeats her charges but has no idea what her teenaged brothers will say, the lawyer could open an interview with one of the brothers by asking him whether he believes what his sister has said. If he says no, and the interview is immediately cut short, the lawyer might be able to argue later that, because no useful information regarding the charges was obtained, he or she should be permitted to continue representing the alleged victim. Matter of C. Children, supra, 282 A.D.2d 455 (lawyer was improperly relieved from representation of all five children where lawyer had only brief contact with child in public area before asking to be relieved as to that child); see also Rules of Professional Conduct, Rule 1.18(c) ("A lawyer. . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter"); Rules of Professional Conduct, Rule 1.18(d) ("When the lawyer has received disqualifying information. . . representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current

client; (ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm; (iii) the disqualified lawyer is apportioned no part of the fee therefrom; and (iv) written notice is promptly given to the prospective client; and (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter"); Commentary to Rules of Professional Conduct, Rule 1.18 ("In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client").

**c. Waiver**

"Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." Rules of Professional Conduct Rule 1.7(b). "Informed consent" "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rules of Professional Conduct, Rule 1.0(j). "Confirmed in writing" "denotes (i) a writing from the person to the lawyer confirming that

the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." Rules of Professional Conduct, Rule 1.0(e).

"Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved." "The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent 'informed' be in writing or in any particular form in all cases. *See* Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. . . . " Commentary to Rules of Professional Conduct, Rule 1.7.

### 5. Attorney-Client Privilege

#### a. Child's Statements To Attorney

The child enjoys the protection of the attorney-client privilege. Matter of Angelina "AA", 211 A.D.2d 951, 622 N.Y.S.2d 336 (3rd Dept. 1995) (child's lawyer could not testify where child had not waived privilege, since child had attorney-client relationship with lawyer); see also CPLR §4503 (unless client waives privilege, attorney or his employee, or any person who obtains without knowledge of client evidence of confidential communication made between attorney or his employee and client in course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall client be compelled to disclose such communication, in any action). The communications protected by the privilege include the lawyer's advice. See Richardson on Evidence, §5-207. Of course, a client may consent to disclosure. See Carballeira v. Shumway, 273 A.D.2d 753, 710 N.Y.S.2d 149 (3rd Dept. 2000).

New York State's Rules of Professional Conduct, Rule 1.6 delineates the broader concept of "confidential information":

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
> (1) the client gives informed consent, as defined in Rule 1.0(j);
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
> (3) the disclosure is permitted by paragraph (b).
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime;
> (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
> (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
> (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
> (6) when permitted or required under these Rules or to comply with other law or court order.
> (c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

See also Commentary to Rules of Professional Conduct, Rule 1.6 ("Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process. . . . In some situations. . . a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Implied disclosures are permissible when they (i) advance the best interest of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also

impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. . . . A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order").

The authorization in §7.2 of the Rules of the Chief Judge for attorney decision-making for clients who lack capacity does not expressly include decisions regarding disclosure of confidential information. Under Rules of Professional Conduct, Rule 1.14(b), a lawyer who "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest … may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Although, under Rule 1.14(c), "[i]information relating to the representation of a client with diminished capacity is protected by Rule 1.6," a lawyer who is "taking protective action pursuant to paragraph (b) … is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

Additional guidance is provided by State Bar Standard A-5, which states that "[t]he attorney-client privilege attaches to communications between the child and his or her attorney, including advice given by the attorney. Statements made by the child to a social worker, an investigator, a paralegal, or another person employed by the attorney also are protected by the privilege. Information protected by the attorney-client privilege

may only be disclosed by the child's attorney" when "[t]he child consents to disclosure;" "[t]he attorney is required by law to disclose;" "[t]he attorney has determined pursuant to Standard A-3 that the use of substituted judgment is required, and that disclosure advances the child's legal interests;" or "[t]he attorney has determined that disclosure is necessary to protect the child from an imminent risk of physical abuse or death."

The Commentary to Standard A-5 states:

> The exceptions to confidentiality find support in City Bar Ethics Opinion 1997-2, which concluded that the child's attorney may disclose confidential information concerning abuse or mistreatment if the attorney is required by law to do so or disclosure is necessary to keep the client from being maimed or killed or the client lacks capacity and the attorney believes disclosure is in the client's best interest. See also State Bar Ethics Opinion 486 (1978) (attorney must balance protection of human life against professional standards when deciding whether to reveal client's contemplation of suicide). Support can also be found in NY Rules of Professional Conduct, Rule 1.6(b), which states that disclosure of a confidence is permitted (but not required) when necessary to prevent reasonably certain death or substantial bodily harm. In determining whether to make disclosure, the attorney should always take the child's desires into account and consider the effect disclosure would have on the attorney-client relationship.

It was noted, however, in City Bar Ethics Opinion 1997-2, 1997 WL 1724482 that the lawyer "should not lightly disregard the client's insistence that the lawyer keep his secrets," and that "t]he lawyer will have to take care not to use this exception simply as a pretext for overriding what the lawyer considers to be a client's bad judgment." Also, it is important to bear in mind that the child's lawyer is not on the list of mandated reporters in SSL §413. Although SSL §414 provides that any person may make a report, it does not provide independent authority for the child's lawyer to override the attorney-client privilege.

It has long been clear that in some circumstances, the lawyer may lawfully be compelled by a court to reveal confidential information. See People v. Mitchell, 58 N.Y.2d 368, 461 N.Y.S.2d 267 (1983) (privilege may yield to strong public policy);

Matter of Jacqueline F., 47 N.Y.2d 215, 417 N.Y.S.2d 884 (1979) (attorney for aunt properly directed to reveal whereabouts of client, who had left jurisdiction with child); Matter of Doe, 101 Misc.2d 388, 420 N.Y.S.2d 996 (Sup. Ct., N.Y. Co., 1979) (lawyer could be disciplined for failing to disclose whereabouts of absconding client); Rules of Professional Conduct, Rule 1.6(b)(6) (lawyer may reveal or use confidential information to extent that lawyer reasonably believes necessary when permitted or required by Rules or to comply with other law or court order); but see R.L.R. v. State, 116 So.3d 570 (Fla. Ct. App., 3d Dist., 2013) (court erred in ordering minor's Attorneys Ad Litem to disclose client's whereabouts after minor requested that information not be disclosed; court's concern that minor might be in danger did not fit within exception to attorney-client privilege recognized by the Florida Bar Rule).

Because the possibility exists that the lawyer will choose or be compelled to disclose confidential information in extraordinary circumstances, the lawyer, rather than mislead the child into believing that *all* communications will necessarily be kept confidential, "could appropriately inform minor clients in advance of the representation that, as an exception to the obligation to keep the minor's confidences, the lawyer may report the minor's intent to maim or kill himself or another," or report a risk that the child will become the victim of serious physical abuse. City Bar Ethics Opinion 1997-2, 1997 WL 1724482.

The status of confidentiality in cases involving joint representation of children is addressed in the Commentary to the Rules of Professional Conduct, Rule 1.7: "A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised. . . . As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to

each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients."

Communications which take place in the presence of a third person who is not an employee of the child's lawyer ordinarily are not covered by the privilege. Richardson on Evidence, supra, §5-204. Although it is, of course, appropriate to interview each child separately, the lawyer may occasionally have to conduct a joint interview involving more than one child. However, particularly when the children have a common interest, it does not appear that confidentiality is waived by any child because of the presence of a "third person." See Richardson on Evidence, supra, §5-204; Ambac Assurance Corporation, et al. v. Countrywide Home Loans, Inc., et al., 27 N.Y.3d 616 (2016) (common interest doctrine, under which communication disclosed to third party remains privileged if third party shares common legal interest with client and communication made in furtherance of common legal interest, applies only when communication relates to litigation, either pending or anticipated, and not where clients share common legal interest in commercial transaction or other common problem but do not reasonably anticipate litigation). Nor would the privilege be waived where the presence of a court-appointed interpreter was necessary. Cf. People v. Osorio, 75 N.Y.2d 80, 550 N.Y.S.2d 612 (1989).

The privilege is waived with respect to confidential communications that are revealed by the child to other persons. Richardson on Evidence, supra, §5-209. However, confidentiality is not waived when the child testifies about events discussed with the child's lawyer, but does not reveal the confidential communications themselves.

See People v. Lynch, 23 N.Y.2d 262, 296 N.Y.S.2d 327 (1968); Jakobleff v. Cerrato, 97 A.D.2d 834, 468 N.Y.S.2d 895 (2d Dept. 1983). In those circumstances, the child's attorney cannot be compelled to turn over his or her notes of interviews with the child for use by other counsel on cross-examination. People v. Lynch, 23 N.Y.2d 262, 296 N.Y.S.2d 327 (1968); People v. Marsh, 59 A.D.2d 623, 398 N.Y.S.2d 166 (2d Dept. 1977); Commentary to State Bar Standard A-5. The testimony of a social worker regarding the child's out-of-court statements would result in a waiver of the privilege, and thus the lawyer's or the social worker's notes regarding the child's statements may become discoverable. See Matter of Lenny McN., 183 A.D.2d 627, 584 N.Y.S.2d 17 (1st Dept. 1992).

The child's lawyer should avoid carelessly compromising a child's right to confidentiality. Although lawyers often rely on the "unwritten rule" that nothing they say during negotiations with other attorneys or the judge will be used against their client, even in a criminal case, the revelation of confidential communications in such contexts is unethical nonetheless in the absence of informed consent. See Commentary to State Bar Standard A-5 ("The attorney also should protect a child's right to confidentiality--for instance, during the course of in camera discussions or negotiations or during casual contacts with attorneys and other persons. The child's permission to communicate discrete items of information to other parties or the judge can often be obtained by explaining to the child the importance or relevance of the disclosure to the child's legal interests. However, it is the child who ultimately determines when and if confidentiality can be waived"); see also NYSBA Ethics Opinion 1059, 2015 WL 4592236 (6/12/15) (minor may consent if capable of understanding risks of disclosure and of making reasoned judgment; very young children not capable, children ages twelve and older generally are capable, and unaccompanied minor immigrants who were subject of opinion might be less capable than American children, or more capable given experiences in home country and on accompanied trip to United States); City Bar Ethics Opinion 1997-2, supra (lawyer should consider whether disclosure will facilitate representation, whether consent would be knowing and voluntary, and whether lawyer may make decision on behalf of client because client lacks capacity); Carballeira v.

Shumway, supra, 273 A.D.2d 753 (eleven-year-old child could consent to disclosure).

**b. Child's Statements To Social Worker**

Although the social worker-client privilege is not a ground for excluding otherwise admissible evidence [see FCA §1046[(a)(vii)], statements made by a child to a social worker employed by the child's lawyer are protected by the attorney-client privilege. See CPLR §4503; State Bar Standard A-5; Matter of Renee B., 227 A.D.2d 315, 642 N.Y.S.2d 685 (1st Dept. 1996). It should also be noted that a social worker is the child's "representative" for purposes of CPLR §3101(d)(2), which protects materials "prepared in anticipation of litigation or for trial" by the representative. See Matter of Lenny McN., 183 A.D.2d 627.

Although the child's lawyer is not among the mandated reporters listed in SSL §413, licensed social workers are covered. But, since statements made to the social worker are covered by the attorney-client privilege, it can be argued that §413 does not require disclosure. Maryland Attorney General Opinion 76, 1990 WL 595302 (Md. A.G., 1990) (mental health provider must make report, even if person relating information was referred to provider by an attorney, unless provider is participating in preparation of defense in pending criminal proceeding); Anderson, Barenberg & Tremblay, Lawyers' Ethics in Interdisciplinary Collaboratives: Some Answers to Some Persistent Questions (downloadable at http://ssrn.com/abstract=921590) (authors conclude that social worker is part of legal team and not freestanding for mandated reporting law purposes). Still, if there is a possibility that the social worker will reveal such information -- indeed, there is much controversy with respect to this issue -- the lawyer should not disclose the information to the social worker without the child's consent. Commentary to State Bar Standard A-5 (because "there is substantial controversy with respect to whether § 413 requires a social worker-employee to make disclosure," the social worker "should explain to a child that if the child has any doubt about whether he or she wishes a statement regarding new abuse or neglect allegations to be disclosed to a third party, the child should first discuss the situation with the attorney," and the "social worker and the child's attorney should arrive at a joint decision concerning a social worker's § 413 disclosure obligations before the social worker interviews any child"); City Bar Ethics

Opinion 1997-2, supra ("If the agency employee cannot be relied on to preserve the confidentiality of the client's confidences and secrets, then (subject to any applicable exception), the lawyer may not make disclosure without client consent"); see also Kansas Attorney General Opinion No. 2001-28, 2001 WL 930603 (Kan. A.G., 2001) (opinion adopts reasoning of District of Columbia Bar Opinion 282, and states that licensed social worker should comply with reporting law, and lawyer should inform client of conflicting duties of lawyer and social worker and allow client to decide whether to proceed with use of social worker); District of Columbia Bar Opinion 282 (June 17, 1998),
http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion282.cfm
(provision in ethics rules that permits lawyer to reveal confidences when "required by law" does not authorize social worker to reveal confidences and secrets under law that does not apply to lawyer, and lawyer should inform social worker of duty to protect client confidences and secrets; however, lawyer should not provide legal advice to social worker regarding reporting obligations, and, since lawyers' ethics rules cannot insulate social worker from legal obligation to report, lawyer should not request that social worker ignore reporting law and must inform client that social worker may be obligated to report); DC Code §4-1321.02 (mandated reporters are not required to report "when employed by a lawyer who is providing representation in a criminal, civil, including family law, or delinquency matter and the basis for the suspicion arises solely in the course of that representation").

**D. Custodian's Right To Counsel**

The parent or person legally responsible, foster parent, or other person having physical or legal custody of the child in any proceeding under FCA Article Ten or Ten-A, has a right to counsel. FCA §262(a)(iv).

**E. Advocate-Witness Rule**

Rules of Professional Conduct, Rule 3.7 states as follows:

> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of

> legal services rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

See also Commentary to Rules of Professional Conduct, Rule 3.7 ("Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. . . . Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses").

In Naomi C. v. Russell A., 48 A.D.3d 203, 850 N.Y.S.2d 415 (1st Dept. 2008), the First Department found error where, in connection with its evaluation of the adequacy of a pleading, the court asked the child's lawyer, on the record, to discuss the position of the ten-year-old child regarding how well the current custody arrangement was working. This colloquy made the lawyer an unsworn witness, "a position in which no attorney should be placed." The court did act properly in disallowing "cross-examination" of the lawyer by petitioner's counsel. See also Cobb v. Cobb, 4 A.D.3d 747 (4th Dept. 2004), appeal dism'd 2 N.Y.3d 759 (error to allow attorney for child to testify); Matter of Jamie C., 245 A.D.2d 889, 666 N.Y.S.2d 820 (3rd Dept. 1997) (in custody proceeding, court erred when it allowed child's attorney to be called as a witness, but there was no harm to the children since the testimony was limited to attorney's observations during home visits); Matter of James A., 46 Misc.3d 1207(A) (Fam. Ct., Clinton Co., 2015) (attorney for children not disqualified where he was present in family's home at time of emergency removal and witnessed conditions that

led to removal, but every party indicated no intent to call attorney as witness); but see In re Mohamed Z.G., 129 A.D.3d 516 (1st Dept. 2015) (in visitation proceeding, better practice would have been for Referee to conduct in camera interview with children, ages ten and eleven, but court did not err in allowing attorney for children to state children's preference not to have contact with father).

To be contrasted with what happened in Naomi C. v. Russell A. is informal colloquy during which lawyers voluntarily disclose information that supports their client's position. Indeed, while family court judges are sensitive to advocate witness problems when they arise at a formal hearing -- perhaps the pleading scenario in Naomi C. v. Russell A. is analogous -- at all other court appearances judges permit, indeed encourage, lawyers to disclose factual information that is relevant to critical issues such as removal, visiting, and violations of court orders. It is common for lawyers to pass on to the judge information provided by, e.g., the child (of course, that should be after the child, if competent to make decisions, has waived confidentiality), by caseworkers, by medical professionals, by probation officers, or by parents, foster parents and other custodians. Judges often rely on this information when making these important decisions. In addition, there are some instances in which lawyers report facts that they have personally observed.

Surely, in this context, the lawyer's credibility is at issue. This is true even when the lawyer is passing on hearsay information, since the lawyer is asking the court to believe that the information reported is, in fact, what the informant told the lawyer. Typically, however, neither judges nor lawyers raise advocate witness rule objections when this happens. For judges, perhaps, it would be unthinkable to insist that, rather than pass on information in this way, lawyers bring their sources to court to testify or routinely present affidavits. In addition, the lawyers who engage in this practice want to continue to do so. And, except in unusual circumstances, neither lawyers nor judges are willing to suggest that a lawyer is lying.

But, as Naomi C. v. Russell A. suggests, judges should not be asking lawyers questions that run a risk of eliciting confidential information, or any information that could be prejudicial to the client's interests. Lawyers and their clients should be left free

to volunteer confidential information only when it serves the client's interests. A lawyer who has been asked a question by the judge is placed in an awkward position not only because of the advocate witness rule, but because, in a practice in which the advocate witness rule is selectively ignored, the lawyer often will have to choose between disclosing information that will hurt the client, or declining to answer, which, given the lawyer's volubility in other instances, will have the same effect.

When interviewing a witness whose testimony might have to be impeached with prior inconsistent statements, an attorney should, if possible, secure the presence of a third person in order to avoid the trappings of the rule. In addition, when one attorney in a Legal Aid or Public Defender office must be disqualified, it does not mean that the entire office is disqualified. But see Matter of Janel E., 173 A.D.2d 413, 570 N.Y.S.2d 290 (1st Dept. 1991) (entire prepaid legal services firm should not have been disqualified, since respondent might have been unable to afford other counsel).

## VI. Causes Of Action

Although it is not uncommon for lawyers to think of "neglect" as a less serious form of child maltreatment than "abuse," a careful analysis of the causes of action defined and discussed in the sections which follow should convince anyone that child neglect can be just as insidious as child abuse. While acts constituting child abuse may seem more violent and depraved, child neglect often occurs over a more extended period of time and can have an equal, and sometimes greater, effect on the long-term emotional and physical condition of the child. Indeed, in many instances neglect charges are filed rather than abuse charges merely because the behavior of the parent does not seem to the child protective agency to have been sufficiently reprehensible.

These considerations should be borne in mind by any lawyer tempted to discount the seriousness and potential consequences of child neglect.

### A. Neglect

#### 1. Impairment Of Physical, Mental Or Emotional Condition

The acts and omissions which can lead to a neglect finding are defined in FCA §1012(f). However, it is not enough for the petitioner to prove that certain acts or omissions occurred: a neglect finding cannot be made without proof of an impairment of a child's "physical, mental or emotional condition," or an imminent danger of such impairment. FCA §1012(f)(i); Matter of Natasha W. v. New York State Office of Children and Family Services, _N.Y.3d_, 2018 WL 2974454 (2018) (sufficient evidence of maltreatment where five-year-old child was used as pawn in shoplifting; there was imminent potential for physical confrontation during theft from department store monitored by security, and teaching child that such behavior is acceptable must have immediate impact on child's emotional and mental well-being, particularly where child is young and just learning to differentiate between right and wrong).

"Impairment of emotional health" and "impairment of mental or emotional condition" are defined in FCA §1012(h) as including "a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or

habitual truancy ...." See, e.g., Matter of Caleb “L”, 287 A.D.2d 831, 732 N.Y.S.2d 112 (3rd Dept. 2001) (child whimpered and cried, and was emotionally distraught, during conversations with mother in which she applied pressure to effect a change in custody); Matter of Wilbur O. v. Christina P., 220 A.D.2d 842, 632 N.Y.S.2d 259 (3rd Dept. 1995) (as a result of psychologically unsafe environment, children's "entire perception of reality" was affected and they were under a great deal of emotional stress); Matter of Aaron S., 215 A.D.2d 395, 626 N.Y.S.2d 227 (2d Dept. 1995) (child was stealing, setting fires, and being cruel to animals, and created imaginary twin); Matter of Maria A., 118 A.D.2d 641, 499 N.Y.S.2d 795 (2d Dept. 1986) (child suffered anxiety, had fear of men, expressed oppositional and defiant behavior, seemed content while hospitalized, and became upset when questioned about home); Matter of Keith R., 123 Misc.2d 617, 474 N.Y.S.2d 254 (Fam. Ct., Richmond Co., 1984) (child had extensive vocabulary of obscenity, preoccupation with sexual conduct, and hatred of "everyone and everything").

Mental or emotional impairment can be established through lay testimony by caseworkers, school personnel, relatives, or other persons who have observed the child's condition and behavior. Proof of impairment “may include competent opinion or expert testimony ....” FCA §1046(a)(viii). However, the petitioner must also prove that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired "as a result of" the respondent's neglect. FCA §1012(f)(i). See also FCA §1012(h) (mental or emotional impairment "must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child"); Nicholson v. Scoppetta, 3 N.Y.3d 357, 787 N.Y.S.2d 196 (2004) (there must be link or causal connection between neglect and impairment or imminent danger, and it may be difficult to prove impairment or imminent danger and causal connection without expert testimony), and other cases collected in Domestic Violence section of this volume; Matter of Linda E., 143 A.D.2d 904, 533 N.Y.S.2d 542 (2d Dept. 1988) (child’s emotional disorders not attributable to parenting).

The court may infer that the home environment contributed to impairment suffered before removal when there is "proof that such impairment lessened during a

period when the child was in the care, custody or supervision of a person or agency other than the respondent." FCA §1046(a)(viii). See In re Justin A., 94 A.D.3d 575 (1st Dept. 2012), lv denied 19 N.Y.3d 807 (child's significant weight gain when hospitalized indicated that he was not receiving proper nourishment at home); Matter of Commissioner of Social Services o/b/o Female W., 182 A.D.2d 589, 583 N.Y.S.2d 363 (1st Dept. 1992) (child gained weight and functioned better in hospital). See also Matter of Cecilia "PP", 290 A.D.2d 836, 736 N.Y.S.2d 546 (3rd Dept. 2002) (child's behavior improved after visitation was suspended).

Children may also be brought before the court in a FCA Article Seven "PINS" proceeding ("Proceedings Concerning Whether A Person Is In Need of Supervision"). Like the definition of impairment in FCA §1012(h), the definition of a PINS includes a child who is incorrigible or ungovernable, or truants from school. FCA §712(a). Whether a particular child is charged in a PINS proceeding, or is the subject of an Article Ten proceeding, often turns on the child's age, the seriousness of the child's misconduct, and the subjective views of the child protective services caseworker or a professional who made a report. Because the initial labeling of a child as a PINS may be inappropriate, a neglect petition may be substituted for a PINS petition when it appears that a child's condition is attributable to the neglectful behavior of the parent. FCA §716. Compare Matter of Charlene H., 64 A.D.2d 900, 408 N.Y.S.2d 103 (2d Dept. l978) (court should have designated person to file neglect position) with Matter of Matthew FF., 179 A.D.2d 928, 579 N.Y.S.2d 178 (3rd Dept. 1992) (no substitution ordered). Although, in Matter of Leif Z., 105 Misc.2d 973, 431 N.Y.S.2d 290 (Fam. Ct., Richmond Co., 1980), the court held that it could substitute an adjudication of neglect after a PINS hearing even though the parents had had no opportunity to rebut the new charge, it would appear that a PINS petitioner is, at the very least, entitled to be represented by counsel before a neglect adjudication may be entered. See FCA §262(a)(i); Sobie, Practice Commentary, FCA §716 (discussing Leif Z.).

### 2. Failure To Supply Adequate Food, Clothing, Or Shelter

#### a. Generally

A neglect finding may be made when the respondent has failed to supply

"adequate food, clothing, [or] shelter ... though financially able to do so or offered financial or other reasonable means to do so ...." FCA §1012(f)(i)(A); see New Jersey Division of Youth and Family Services v. P.W.R., 11 A.3d 844 (N.J. 2011) (no evidence that parents, who were temporarily out of work, were financially able but refused to cure heating problem or that agency attempted to assist); In re Kimberly F., 146 A.D.3d 562 (1st Dept. 2017) (finding made where mother stated that child was lying about being raped and refused to take her back into home or discuss services with petitioner; did not matter that mother would have considered voluntary placement, which is appropriate only when parent is unable to care for child); Matter of Ariel R., 118 A.D.3d 1010 (2d Dept. 2014) (neglect could be found based on refusal to assume care even though mother not offered chance to voluntarily place child upon child's discharge from hospital and respite care); Matter of Clayton OO., 101 A.D.3d 1411 (3d Dept. 2012) (neglect found where mother failed to cooperate with efforts to address child's problems, and did not want child living with her and wanted to execute surrender so child could be adopted); Matter of Lamarcus E., 94 A.D.3d 1255 (3d Dept. 2012) (absent actions of agency, which refused to accept voluntary placement where father was not unable to care for child, father would have relocated and effectively abandoned child); Matter of Annastasia C., 78 A.D.3d 1578, 912 N.Y.S.2d 473 (4th Dept. 2010) (finding vacated where no evidence was presented concerning financial status of mother and ability to provide adequate clothing).

Even if the child has not yet been harmed, an imminent risk of harm usually exists when basic necessities are not provided or dangerous conditions exist in the home. See, e.g., In re Cerenity F., 160 A.D.3d 540 (1st Dept. 2018) (finding made where child made statements, and respondent admitted, that home was very dirty and covered in cat urine and feces, and caseworker observed that respondent smelled of cat urine and that child was unkempt and wore dirty, stained clothes); In re Demetrius R., 140 A.D.3d 573 (1st Dept. 2016) (neglect found where mother minimized danger from vegan diet, which resulted in diagnosis of failure to thrive); In re Rakeem M., 139 A.D.3d 622 (1st Dept. 2016) (neglect found where transient lifestyle relegated children to eating junk food for meals); Matter of N. KK., 129 A.D.3d 1245 (3d Dept. 2015)

(respondent and child lived in unfinished one-room structure, with tarps that had to be lifted to open only door, blocked windows except for one or two small openings for ventilation, and caused difficulty in exiting in emergency, smell of urine and feces, live chickens in plastic containers, no water or stove, bucket used as toilet, and waste buried in holes dug outside); In re Alexander L., 99 A.D.3d 599 (1st Dept. 2012), lv denied 20 N.Y.3d 856 (mother repeatedly advised that unstable living situation caused son's deteriorating mental condition, but remained with child in homeless shelter system for nearly five years and unreasonably refused suitable permanent housing); Matter of Draven I., 86 A.D.3d 746 (3d Dept. 2011) (apartment cluttered with dirty dishes, mounds of garbage, and food strewn over floor, and, "of greatest concern," numerous plastic bags that presented danger of asphyxiation to twenty-month-old child); Matter of Joshua UU., 81 A.D.3d 1096 (3d Dept. 2011) (older children left pencils and scissors on floor where younger children crawled, home was "dirty [with] a foul odor," children "were often in dirty clothes and faces were usually somewhat dirty," and there was partially-eaten food on railing and fence outside house); Matter of Regina HH., 79 A.D.3d 1205, 912 N.Y.S.2d 724 (3rd Dept. 2010) (respondent had no cooking gas for more than a month, at one point light bulbs in almost every room were out, and there was no hot water for a month and child was unable to take shower); In re Joshua Hezekiah B., 77 A.D.3d 441, 908 N.Y.S.2d 675 (1st Dept. 2010), lv denied 15 N.Y.3d 716 (because medical evidence could be readily understood by average finder of fact, expert testimony not required for finding that child suffered from failure to thrive caused by improper feeding and denial of adequate medical care and treatment); Matter of Sophia P., 66 A.D.3d 908, 886 N.Y.S.2d 637 (2d Dept. 2009) (neglect found where mother locked children out of home overnight); Matter of Ciara Z., 58 A.D.3d 915, 870 N.Y.S.2d 615 (3rd Dept. 2009) (neglect found where children were emotionally upset and frightened by having to move repeatedly to avoid law enforcement); Matter of Rebecca KK., 51 A.D.3d 1086, 856 N.Y.S.2d 705 (3rd Dept. 2008) (neglect found where child had offensive bodily odor, which included smells of urine and feces and arose due to failure to shower, wash hair, or wear unsoiled clothes to school; there was stench of human waste in respondent's apartment, stains on furniture and child's

mattress; and respondent resisted cleaning apartment or laundering child's clothing); Matter of David II., 49 A.D.3d 1093, 854 N.Y.S.2d 583 (3rd Dept. 2008) (neglect found where child frequently arrived at school in unbathed, disheveled condition, wearing unclean clothes and same clothes for extended length of time, and exhibiting pervasive urine smell; guidance counselor had at least seven or eight discussions with mother about problem over two-year period; child's personal hygiene deficiencies were interfering with ability to maintain friendships, as peers would ridicule him and move desks far away from his; and child testified that he was aware of odor, that there were unsanitary conditions at home and at a farm where he was expected to clean grandmother's numerous cat cages, and that he was embarrassed by odor); Matter of Kayla C., 19 A.D.3d 692, 797 N.Y.S.2d 559 (2d Dept. 2005) (finding made where failure to thrive was shown to be result of respondent's failure to properly feed her; there was remarkable improvement in weight during hospitalization, and, although respondent asserted that baby was frequently spitting up formula, expert testimony established that it was not interfering with ability to gain weight); Matter of Camara "R", 263 A.D.2d 710, 693 N.Y.S.2d 681 (3rd Dept. 1999) (respondents' failure to adequately feed baby was established where the baby was twice within one month diagnosed with nonorganic failure to thrive, steadily gained weight while in the hospital, and lost weight between hospitalizations despite being on medication used to control reflux disease); Matter of Commissioner of Social Services o/b/o Female W., supra, 182 A.D.2d 589 (child was "alarmingly underweight" due to inadequate diet); Matter of Sonja I., 161 A.D.2d 969, 557 N.Y.S.2d 542 (3rd Dept. 1990), lv denied 76 N.Y.2d 710, 563 N.Y.S.2d 62 (child slept on floor where insects crawled over her); Matter of Aaron MM., 152 A.D.2d 817, 544 N.Y.S.2d 29 (3rd Dept. 1989) (home was messy and unsanitary, and had dirty dishes, diapers and laundry, had odor of feces and garbage); Matter of Terry S., 55 A.D.2d 689, 389 N.Y.S.2d 55 (3rd Dept. 1976) (home was without electricity for two months, had no working water supply or plumbing, and had no furnaces or refrigerator); Matter of Nassau County Dept. of Social Services, NYLJ 1202618181925, at *1 (Fam., NA, Decided August 5, 2013) (neglect found where respondents exposed children to high levels of lead in home); Matter of Melanie S., 28 Misc.3d 1204(A), 2010 WL

2635967 (Fam. Ct., Kings Co., 2010) (even with additional assistance to mother, children remained inadequately fed and home was infested with roaches and mice and cluttered with garbage bags, dirty dishes and dirty clothing); Matter of Antoinette S., 2003 WL 21004907 (Fam. Ct., Suffolk Co.) (finding made where parents lack of action resulted in excessive exposure to lead); but see In re Jeffrey M., 102 A.D.3d 608 (1st Dept. 2013) (no neglect where child, who was living with maternal aunt and grandmother, occasionally visited respondent mother at squalid abandoned building where she lived); In re Clydeane C., 74 A.D.3d 486, 902 N.Y.S.2d 80 (1st Dept. 2010) (no neglect where mother and child were in apartment with bags and boxes of legal files belonging to owner of apartment, kitchen was dirty, one bathroom had clogged sink and was dirty but there was no evidence it was bathroom used by child, there were feces in one room but that was not unusual for family with cat, and there was “mild smell” of urine but musty or urine smell was not unusual in apartment where aged and sick man had been living alone for many years); Matter of Alyssa OO., 68 A.D.3d 1158, 889 N.Y.S.2d 752 (3rd Dept. 2009) (no neglect where respondent, required to pay $50 per month in child support pursuant to court order, was in substantial arrears and provided no financial assistance to grandmother for child’s necessities; there was no evidence that child’s needs were not being met or that her welfare was impaired or in imminent danger of becoming impaired); In re Iyanah D., 65 A.D.3d 927, 885 N.Y.S.2d 79 (1st Dept. 2009) (finding reversed where living room was cluttered with plastic bags containing clothes and home appliances, there were unwashed dishes in kitchen, and odor was emanating from dirty cat litter, but case worker did not inspect room in which respondent claimed child slept, child was not removed until more than two weeks after case worker was in apartment, and there was no indication that petitioner attempted to see whether conditions were improving after first visit or confirm respondent’s claim that plastic bags had been packed in preparation for move to new living quarters); In re Devin N., 62 A.D.3d 631, 882 N.Y.S.2d 400 (1st Dept. 2009) (no neglect where the crowded living conditions at respondent grandmother’s apartment -- with clothing-filled garbage bags lining living room wall and kitchen in disarray -- were due to temporary housing of respondent’s daughter and children who had nowhere else to stay); In re

Allison B., 46 A.D.3d 313, 847 N.Y.S.2d 187 (1st Dept. 2007) (neglect finding reversed where petitioner presented evidence that apartment was "messy" and that sixteen-month-old child suffered minor burn on bottom after she sat on edge of bed and touched uncovered steam pipe while she was bouncing and playing on bed with father and sister); Matter of Erik M., 23 A.D.3d 1056, 804 N.Y.S.2d 884 (4th Dept. 2005) (respondent's residence was in state of disarray and generally messy, but there was no evidence of unsanitary or unsafe conditions); Matter of Christopher K., 15 Misc.3d 1142(A), 841 N.Y.S.2d 818 (Fam. Ct., Monroe Co., 2007) (no proof that lack of electricity placed child in imminent danger).

In Matter of Doe, 25 Misc.3d 470, 883 N.Y.S.2d 430 (Fam. Ct., Rensselaer Co., 2009), the court held that respondents' surrender of a newborn in good physical condition to a "Safe Haven" hospital under the Abandoned Infant Protection Act did not constitute neglect.

If impairment or an imminent danger of impairment is found, neglect may be found when, without providing for the child's maintenance, a parent leaves a child with or allows a child to live with a caretaker who has no duty to provide care. Compare In re Elijah J., 105 A.D.3d 449 (1st Dept. 2013) (neglect found where mother left children, ages four and fifteen, with their twenty-one-year-old brother for over a week without sufficient food, shelter, or clothing); Matter of Cody P., 227 A.D.2d 724, 642 N.Y.S.2d 337 (3rd Dept. 1996) (child left with virtual stranger) and Matter of Michael T., 111 A.D.3d 750 (2d Dept. 2013) (neglect found where mother, who had fallen asleep due to drug and alcohol use, failed to pick up five-year-old child from day care and returned for him approximately 18-20 hours after regularly scheduled pick-up time); Matter of Kyesha A., 182 A.D.2d 996, 583 N.Y.S.2d 525 (3rd Dept. 1992), lv denied 81 N.Y.2d 704, 595 N.Y.S.2d 398 (1993) (respondent left child in day care and failed to return) with Matter of Kymani H., 152 A.D.3d 519 (2d Dept. 2017) (no neglect where child voluntarily left home to live with individuals who were not biologically related but had assumed roles of father and grandmother since child was eighteen months old, child's needs were met, and mother spoke with child and caretakers three or four times per week); Matter of Lacey-Sophia T.-R., 125 A.D.3d 1442 (4th Dept. 2015) (no neglect

where mother left one and a half year-old child in care of couple with whom mother and child were living and remained in phone contact each day she was away); Matter of Brandon C., 237 A.D.2d 821, 658 N.Y.S.2d 461 (3rd Dept. 1997) (no neglect where mother left child with grandmother, who provided adequate care with aunt); Matter of Travis XX., 224 A.D.2d 787, 638 N.Y.S.2d 181 (3rd Dept. 1996) (mother told babysitters they could be watching children all weekend, and was not neglectful merely because she did not leave medical authorization) and Matter of Jovann B., 153 A.D.2d 858, 545 N.Y.S.2d 376 (2d Dept. 1989) (no neglect where grandmother provided children with dinner almost every day). See also Matter of Shannen AA., 80 A.D.3d 906, 914 N.Y.S.2d 768 (3d Dept. 2011) (mother sent child to live with aunt and uncle without visiting home or investigating conditions, and, after learning that aunt took child to motel because she did not feel safe living with uncle, did not attempt to find child or call police and instead believed it was child's responsibility to call her; and also permitted child to reside with boyfriend and their baby in unsanitary and inappropriate conditions).

A parent may be found guilty of neglect when he or she excludes a child from the home for, among other reasons, the child's acting-out behavior. Matter of Jacklynn BB., 155 A.D.3d 1363 (3d Dept. 2017) (although child had history of mental health issues and relationship with mother was tumultuous, as evidenced by purported threats to kill either mother or herself, mother neglected child by refusing to allow her back in home); In re Jasmine B., 66 A.D.2d 420, 886 N.Y.S.2d 162 (1st Dept. 2009) (child's misbehavior would not terminate support obligations and permit father to expel child from home without making provisions for food or shelter); Matter of Debraun M., 34 A.D.3d 587, 826 N.Y.S.2d 76 (2d Dept. 2006), appeal dism'd 8 N.Y.3d 955; Matter of Chantel "ZZ", 279 A.D.2d 669, 717 N.Y.S.2d 802 (3rd Dept. 2001); People v. Ladieu, 24 Misc.3d 1246(A), 901 N.Y.S.2d 901 (Sup. Ct., Clinton Co., 2009) (defendant violated probation by committing acts constituting endangering the welfare of a child and child neglect where defendant made thirteen-year-old child stay outside for an hour in forty degree weather, dressed in t-shirt, pajama bottoms and socks, until he apologized); see also In re Kiera R., 99 A.D.3d 565 (1st Dept. 2012) (neglect found where child frequently left home for days and respondent failed to provide alternate living

arrangements, forcing child to live on streets at least part of the time).

Although not, strictly speaking, a failure to supply adequate shelter, a parent's failure to plan for the return of a child in foster care can constitute neglect. See In re Malachi B., 155 A.D.3d 492 (1st Dept. 2017) (father repeatedly indicated desire to have no contact with child, failed to visit child, and failed to plan for child's care, had no permanent home, and failed to provide proof of income); Matter of Dior Z.J., 139 A.D.3d 1065 (2d Dept. 2016) (father failed to provide agency with contact information and to communicate with child).

**b. Respondent's Ability To Provide Necessities**

There appears to be a presumption under Article Ten that the receipt of public assistance and the availability of child protective services enables a parent to provide adequate food, clothing and shelter. See Matter of Antonio U., 19 Misc.3d 1113(A), 859 N.Y.S.2d 900 (Fam. Ct., Kings Co., 2008) (allegations regarding inadequate food in home and lack of reliable means of support, and refusal to accept services, did not seek to penalize mother for poverty); Matter of Amoretta V., 227 A.D.2d 879, 643 N.Y.S.2d 694 (3rd Dept. 1996), appeal dism'd 89 N.Y.2d 935, 654 N.Y.S.2d 713 (1997) (parent on public assistance must present unequivocal proof that amount is inadequate in order to successfully raise defense of financial inability in permanent neglect proceeding); Matter of Kevin J., 162 A.D.2d 1034, 557 N.Y.S.2d 228 (4th Dept. 1990).

However, the law is not blind to the problems faced by families who rely on public assistance. Since a local department of social services is obligated under the law to help prevent or eliminate the need to remove children, evidence of inadequate conditions in the home may fall short of establishing neglect where social service officials have failed to provide adequate financial support or other assistance. See, e.g., Matter of Zachariah W., 149 A.D.3d 853 (2d Dept. 2017) (no neglect where ACS removed child after hospital personnel discovered that mother only had income from public assistance and would not be accepted back into home where maternal grandmother was staying, but no ACS worker provided mother with housing information, including emergency housing information, or any supplies for child); Matter of Roosevelt J., 141 A.D.2d 825, 530 N.Y.S.2d 30 (2d Dept. 1988) (unhealthy

conditions in home not shown to be fault of mother); cf. In re Allen T., 8 Misc.3d 1015(A), 801 N.Y.S.2d 776 (Fam. Ct., Kings Co., 2005) (in permanent neglect proceeding, agency failed to adequately assist mother in her attempt to obtain public housing. However, if the parent does not take advantage of proffered assistance and chooses instead to live with the children under dangerous conditions, a finding may be made. See, e.g., In re Anthony B., 138 A.D.3d 563 (1st Dept. 2016) (neglect found where mother chose to move out of parents' home to live in shelter with then two year-old child and, after shelter discharged her for failure to comply with rules, spent nights with child riding on subway trains and at home of friend whose last name and address mother could not provide, and child looked "pale," not "well taken care of," and "hungry"); Matter of Christian Q., 32 A.D.3d 669, 821 N.Y.S.2d 282 (3rd Dept. 2006) (respondent failed to take advantage of suitable apartment located by petitioner and "workable plan" for payment); Matter of Ayana E., 162 A.D.2d 330, 557 N.Y.S.2d 14 (1st Dept. 1990), lv denied 76 N.Y.2d 708, 560 N.Y.S.2d 990 (1990) (mother's failure to keep welfare appointments resulted in eviction, and she failed to follow through on plans to secure housing).

### 3. Failure To Supply Adequate Education

The definition of a "neglected child" includes a child whose caretaker has failed to supply "education in accordance with the provisions of part one of article sixty-five of the education law ...." FCA §1012(f)(i)(A); see also Education Law §3212(2)(b) ("Every person in parental relation to another individual included by the provisions of part one of this article: . . . Shall cause such individual to attend upon instruction. . . "); Ed. Law §3212(3) ("A person in parental relation to another individual included by the foregoing provisions of this section shall not be subject thereto if it can be shown that he is unable to control such individual"); Ed. Law §3212(5)(a) ("No person shall induce another individual to absent himself from attendance upon required instruction or harbor him while he is absent or aid or abet him in violating any provision of part one of this article").

According to Education Law §3205(1)(a): "In each school district of the state, each minor from six to sixteen years of age shall attend upon full time instruction." A

minor who becomes six years of age on or before December 1st (or, in New York City, December 31st) shall be required to attend school starting on the first day of school in September of that year. Ed. Law §3205(c); Chancellor's Regulation A-101(I)(A). "In each school district, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend upon full time day instruction until the last day of session in the school year in which the student becomes seventeen years of age." Ed. Law §3205(3). New York City has exercised that power. Chancellor's Regulation A-101(I)(A). "The term 'school year' means the period commencing on the first day of July in each year and ending on the thirtieth day of June next following the school year commences on the first day in July of each year and ends on June 30th of the following year." Educ. Law §2(15); Matter of Kiesha B.B., 30 A.D.3d 704, 815 N.Y.S.2d 800 (3rd Dept. 2006) (PINS adjudication upheld even though respondent turned sixteen approximately three weeks prior to commencement of mandatory classes in September).

The statute requires proof that the respondent's failure to act appropriately has resulted in an impairment or an imminent danger of impairment of the child's physical, mental or emotional condition, and thus there must be evidence of an impact on the child's education. Compare Matter of Regina HH., 79 A.D.3d 1205, 912 N.Y.S.2d 724 (3rd Dept. 2010) (impact of absences from school established by evidence that child was failing all classes, and that child would need to attend every school day for rest of year, as well as summer school, in order to be promoted to next grade); In re Annalize P., 78 A.D.3d 413, 911 N.Y.S.2d 291 (1st Dept. 2010) (finding made where child had twenty-four unexcused absences during school year, and court reasonably could have concluded that child was in imminent danger of becoming impaired and court did in fact find that absences adversely affected child's academic performance); In re Danny R., 60 A.D.3d 450, 874 N.Y.S.2d 122 (1st Dept. 2009) (children missed two hundred forty and one hundred fifty-nine days respectively, which markedly compromised their education); Matter of Ashley X., 50 A.D.3d 1194, 854 N.Y.S.2d 794 (3rd Dept. 2008) (finding made where testimony of child's teacher and report card comments indicated that child was behind in several subjects and her learning could improve through

regular attendance); Matter of Shawndalaya II., 31 A.D.3d 823, 818 NY.S.2d 330 (3rd Dept. 2006) (finding made where child missed thirteen out of seventeen days and mother had unfounded disdain for school system); Matter of Aishia "O", 284 A.D.2d 581, 725 N.Y.S.2d 738 (3rd Dept. 2001) (since subject child had special needs, his absences caused more than just a loss of sequential educational information); Matter of Kyle T., 255 A.D.2d 945, 680 N.Y.S.2d 376 (4th Dept. 1998), lv denied 93 N.Y.2d 80, 687 N.Y.S.2d 625 (1999) (educational neglect found where child missed forty-five days during school year); Matter of Ryan J., 255 A.D.2d 999, 679 N.Y.S.2d 495 (3rd Dept. 1998) (child's forty-six absences caused him to fail all his subjects) and Matter of Tammie Z., 105 A.D.2d 463, 480 N.Y.S.2d 786 (3rd Dept. 1984) (neglect found where one child was absent thirteen days and her grade performance was below average, and other child was absent twenty-one days and his grade performance was unsatisfactory) with In re Nashawn Dezmen C., 133 A.D.3d 434 (1st Dept. 2015) (no neglect where children were late to school because it took over an hour to travel from shelter to school, and because shelter's rules prevented mother from leaving shelter before 6 a.m., and after respondent transferred to shelter closer to school, children's attendance improved); Matter of Jalesa P., 75 A.D.3d 730, 904 N.Y.S.2d 564 (3rd Dept. 2010) (no educational neglect where child was often late for school while in mother's care and had large number of unexcused absences that played role in child having to repeat year of elementary school, but child's attendance had improved, especially since child started spending much of school week with new custodian, child was receiving additional help to address academic needs and had performed well during most recent school year, and mother had taken more active role and had become more involved in seeing that child's educational needs were being met); Matter of Natiello v. Carrion, 73 A.D.3d 1070, 905 N.Y.S.2d 605 (2d Dept. 2010) (no neglect where sixteen-year-old had excessive absences while living with father, and there was no proof as to how many absences were attributable to mother or how many were unexcused; when petitioner withdrew child from school on May 11, 2006, child was already failing almost all courses and he completed GED program during summer of 2006 and started to attend college at end of the school year, and thus there was no evidence that his education was

adversely affected by absence at the end of 2005-2006 school year); In re Alexander D., 45 A.D.3d 264, 845 N.Y.S.2d 244 (1st Dept. 2007) (no educational neglect found where ten-year-old autistic child's unexcused absence from school did not, by itself, establish parental misconduct or harm or potential harm, mother was actively engaged in securing appropriate and specific special education placement, and there was no evidence that child's education was adversely affected by absence from school); In re Giancarlo P., 306 A.D.2d 28, 761 N.Y.S.2d 165 (1st Dept. 2003) (no finding despite child's prolonged and unexcused absences where respondent was actively involved with school officials in seeking appropriate special education placement and there was no evidence that child's education was affected from absences); Matter of Shelly Renea K., 79 A.D.2d 1073, 436 N.Y.S.2d 99 (3rd Dept. 1981) (no proof that unexplained absences and unexcused lateness of child had adverse impact upon child's education); Matter of Betthi S., 43 Misc.3d 1226(A) (Fam. Ct., Kings Co., 2014) (no educational neglect found where ACS did not help mother enter child in home-schooling program and mother testified about teaching daughter during period before petition was filed, and child graduated high-school after petition was filed and thus there was no proof that mother's actions impaired child or limited her future options); and Matter of Hickey, 124 Misc.2d 667, 477 N.Y.S.2d 258 (Fam. Ct., Suffolk Co., 1984) (no evidence that child's failure to attend physical education class resulted in impairment, and the possibility that child would not get high school diploma did not constitute risk of impairment).

An impact on education can also result from the parent's refusal to cooperate with school officials in planning for the child. Compare Matter of Melissa R., 162 A.D.2d 754, 557 N.Y.S.2d 668 (3rd Dept. 1990) (respondents failed to recognize that children were not performing up to potential, and refused to let one of the children take alternative programs) and Matter of Baer, 125 Misc.2d 563, 480 N.Y.S.2d 178 (Fam. Ct., Suffolk Co., 1984) (father's dispute with school district placed emotional and mental condition of children in imminent danger) with Matter of Alexander G., 93 A.D.3d 904 (3d Dept. 2012) (child had serious behavioral problems and extensive disciplinary record, and respondents were defensive and rebuffed effort by school officials to obtain counseling for child or otherwise address behavioral issues and suggested that problem

was teachers and school administration, but lack of good parental judgment did not constitute neglect); Matter of Jamie R., 61 A.D.3d 876, 876 N.Y.S.2d 883 (2d Dept. 2009) (no violation of order directing mother to ensure child's attendance where mother cooperated with programs, communicated with school officials about child's fear of attending school, which stemmed from allegedly threatening behavior of other students, and attempted to alleviate child's concerns by arranging for her to eat lunch in school office rather than in cafeteria) and Matter of Jeremy VV., 202 A.D.2d 738, 608 N.Y.S.2d 575 (3rd Dept. 1994) (no neglect where parent ignored requests by school personnel that he attend conferences aimed at improving child's behavior and was belligerent the one time when he did respond, and failed to arrange recommended private tutoring and refused to permit placement in special education program, since parent was not responsible for assisting school authorities in educating child; respondent complied with requirements of Education Law, and "catch-all" in FCA §1012(f)(i)(B) does not require more). See also Matter of Shannen AA., 80 A.D.3d 906, 914 N.Y.S.2d 768 (3d Dept. 2011) (neglect found where respondent, inter alia, let child live out of school district with boyfriend's family after being directed to make child available for schooling).

Even when a parent's failure to send the child to school is the result of a sincerely held belief that the child has not been placed in a suitable program or school, a neglect finding may be appropriate. See, e.g., Matter of Shelley Renea K., supra, 79 A.D.2d 1073. However, a neglect charge might be defeated where the parent had a founded belief that the child was in physical danger at school [compare Matter of Dennis X.G.D.V., 158 A.D.3d 712 (2d Dept. 2017) (Special Immigrant Juvenile-related finding of neglect where child was prevented from attending school by gang members who beat him while he was walking to school, but mother did not arrange for transportation and told him to stay home) with Matter of Jamie R., supra, 61 A.D.3d 876 (no neglect where mother, inter alia, communicated with school officials about child's fear of attending school, which stemmed from allegedly threatening behavior of other students, and attempted to alleviate child's concerns by arranging for her to eat lunch in school office rather than in cafeteria); Matter of Iesha J., 183 A.D.2d 573, 583 N.Y.S.2d 462 (1st Dept. 1992) (mother attempted to find "safe" school and provided home tutor)

and Matter of Baum, 86 Misc.2d 409, 382 N.Y.S.2d 672 (Fam. Ct., Suffolk Co., 1976), aff'd 61 A.D.2d 123, 401 N.Y.S.2d 514 (2d Dept. 1978) (mother's claim that she failed to send child to school because she had been subjected to racist remarks by a teacher was an affirmative defense that mother failed to establish), or where the parent actively sought to enroll the child in an appropriate school but received no cooperation from the Board of Education. See, e.g., In re Shanae F., 61 A.D.3d 403, 874 N.Y.S.2d 911 (1st Dept. 2009) (no educational neglect where respondent sought to address reason for child's absences, which was child's concern about member of school's administration, by having child transferred to different school, and petitioner did not rebut respondent's testimony that efforts to have child transferred were frustrated by school's failure to assist); Matter of Jessica Y., 161 A.D.2d 368, 555 N.Y.S.2d 114 (1st Dept. 1990). In this connection, when a school district or local educational agency wishes to file a petition alleging that a youth is a Person in Need of Supervision, the designated lead agency must review the steps taken to improve the youth's attendance and/or conduct in school and attempt to engage the district or agency in further diversion attempts, if it appears that such attempts will be beneficial to the youth, FCA §735(d)(iii). In addition, where habitual truancy is alleged or the petitioner is a school district or local educational agency, the petition must include the steps taken by the responsible school district or local educational agency to improve the school attendance and/or conduct of the youth. FCA §732.

A child may be withheld from school if the child is provided with home instruction that is "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." Educ. Law §3204(2). See Educ. Law §3210 ("Amount and character of required attendance"); Matter of Franz, 55 A.D.2d 424, 390 N.Y.S.2d 940 (2d Dept. 1977), aff'g 84 Misc.2d 914, 378 N.Y.S.2d 317 (Fam. Ct., Queens Co., 1976) (family court concludes that lack of peer-group association is not relevant to equivalency); Matter of Thomas H., 78 Misc.2d 412, 357 N.Y.S.2d 384 (Fam. Ct., Yates Co., 1974); see also Combs v. Homer-Center School District, 540 F.3d 231 (3rd Cir. 2008) (Pennsylvania's home-schooling law, which requires that parents provide instruction for minimum number of days and

hours in certain subjects and submit portfolio of teaching logs and children's work product for review by local school district, and determination by district as to whether student demonstrates progress in overall program, does not violate plaintiffs' First Amendment right to free exercise of religion or fundamental right as parents under Fourteenth Amendment). The respondent has the burden to prove that "equivalent" home instruction is being provided. In re Dyandria D., 303 A.D.2d 233, 757 N.Y.S.2d 12 (1st Dept. 2003) (although respondent alleged that home schooling plan was approved by Board of Education, respondent failed to show home instruction was comparable to that at public school); Matter of Fatima A., 276 A.D.2d 791, 715 N.Y.S.2d 250 (2d Dept. 2000) (respondent failed to provide court with certified copies of appropriate documentation and certified reports which must be submitted to Board of Education, and offered no evidence to establish that child received required schooling); Matter of Christa H., 127 A.D.2d 997, 513 N.Y.S.2d 65 (4th Dept. 1987); Matter of Andrew TT., 122 A.D.2d 362, 504 N.Y.S.2d 326 (3rd Dept. 1986); Matter of Andrew Chapman, 128 Misc.2d 379, 490 N.Y.S.2d 433 (Fam. Ct., Delaware Co., 1985) (burden was on petitioner to establish nature and quality of instruction provided in public school); Matter of Kilroy, 121 Misc.2d 98, 467 N.Y.S.2d 318 (Fam. Ct., Cayuga Co., 1983) (parents cannot carry burden without allowing on-site evaluation of home schooling).

Although a teenager's truancy and other school problems are often attributable to parental neglect, educational neglect petitions usually involve younger children, perhaps because an older child's defiance is commonly viewed as the result of deliberate resistance to parental direction. The problems of an older child are often addressed in a proceeding concerning whether a person is in need of supervision which has been commenced under Article Seven of the Family Court Act. See In re Chastity O.C., 136 A.D.3d 407 (1st Dept. 2016) (no educational neglect where mother faced formidable obstacles, including language barrier and child’s violent and destructive behavior, that made it difficult to get child to attend school); In re Brianna R., 115 A.D.3d 403 (1st Dept. 2014) (finding reversed where child’s defiance and mental health issues caused failure to attend school, not mother’s inaction); Matter of Kahlil R., 28 Misc.3d 1211(A), 911 N.Y.S.2d 693 (Fam. Ct., Kings Co., 2010) (charges dismissed

upon summary judgment motion where parents previously filed PINS petition and child was adjudicated PINS because of refusal to attend school).

Since attendance is required only until the end of the school year in which a child turns sixteen [Educ. Law §3205(1)(c)], or, in certain cases, seventeen [Educ. Law §3205(3)], it appears that a child who fails to begin a school year after turning sixteen (or seventeen) cannot be the subject of an educational neglect petition. However, after making a finding, the court retains jurisdiction over the child beyond the age limits in Educ. Law §3205. Matter of Shannon ZZ., 169 A.D.2d 945, 564 N.Y.S.2d 880 (3rd Dept. 1991) (court had jurisdiction over PINS respondent until age eighteen).

The child's failure to attend school may be proved by introducing properly certified [see FCA §1046(a)(iv)] school records. A letter from a school official or a summary sheet prepared for trial would be subject to an objection on hearsay grounds. Absence from school may also be proved by the testimony of the child, or of any other person, that the child was at home or at another location during school hours.

### 4. Failure To Supply Adequate Health Care

#### a. Generally

Under FCA §1012(f)(i)(A), a neglect finding may be made when the respondent fails to supply "medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so ...." This responsibility arises as soon as it is, or should be, apparent that the child requires care. See Matter of Nsongurua N., 158 A.D.3d 695 (2d Dept. 2018) (neglect found where father failed to seek medical treatment for child, who suffered from chronic bedwetting for over a year, and instead attempted to manage symptoms by having child sleep on kitchen floor, where he could watch her, and waking her up periodically throughout the night); Matter of Lucien HH., 155 A.D.3d 1347 (3d Dept. 2017) (where father was responsible for multiple fractures, mother did not neglect infant by failing to seek medical care after she observed redness and swelling where child was not crying; mother thought redness and swelling could be reaction to vaccines; she continually monitored child’s condition and, prior to leaving for work, directed father to monitor child’s leg and let her know if it got worse, and then checked in with him on lunch break; and she scheduled appointment

with pediatrician for immediately after work and instructed father to take child to doctor earlier if he determined it could not wait); In re Harper v. New York State Central Register, 136 A.D.3d 519 (1st Dept. 2016) (foster mother neglected thirteen-month-old child by waiting approximately three days to seek medical care after he fell from crib and hit head; child initially appeared to have minor injury but could have incurred internal injury); In re Amir L., 104 A.D.3d 505 (1st Dept. 2013) (no neglect where expert opined that hairline fracture would have caused little or no pain or noticeable swelling or bruising until it progressed into full fracture, and child was up to date with immunizations and had been provided with appropriate and timely medical care); Matter of Alanie H., 69 A.D.3d 722 (2d Dept. 2010) (after child, who had been treated at hospital for meningitis, vomited and still had enlarged head, and doctor stated over phone that parents “should probably” bring child to emergency room, decision to wait until morning to seek medical care was not neglect); Matter of Annastasia C., 78 A.D.3d 1578, 912 N.Y.S.2d 473 (4th Dept. 2010) (although prescription medications for child were low or had not been filled in months, there was insufficient evidence of child’s need for medication or appropriate dosage); In re Samantha M., 56 A.D.3d 299, 867 N.Y.S.2d 406 (1st Dept. 2008) (medical neglect found where respondents admitted that child had been ill for at least two weeks prior to hospital admission, and, even if child vomited "only" four or five times in two weeks prior to admission, that was enough to put ordinarily prudent parent on notice that medical attention was required); Matter of Seamus K., 33 A.D.3d 1030, 822 N.Y.S.2d 168 (3rd Dept. 2006) (neglect found where pediatrician testified that symptoms of shaken baby syndrome would have been apparent, if not immediately, then within a few days of the event that caused them, and another doctor surmised that child would display symptoms within twenty-four to forty-eight hours); Matter of Miranda O., 294 A.D.2d 940, 741 N.Y.S.2d 817 (4th Dept. 2002) (no neglect where mother learned at 4:00 a.m. that child had been burned, and took child to doctor at about 9:00 a.m.); Matter of Samuel W., 52 Misc.3d 1214(A) (Fam. Ct., Kings Co., 2016) (no neglect where there was expert testimony that there would be “very little” in the way of symptoms of femur fracture, that screaming and crying would not be expected, that child would not have been in pain if leg was not moved around,

and that not bringing child to doctor until next morning when he had scheduled appointment would have “no deleterious effect in terms of healing or anything else”); Matter of Asazje H., 45 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2014) (no neglect where child had chronic heart disease, breathing problems, and asthma, and last saw pulmonologist and cardiologist in June 2012, but there was no evidence that child was required to see those doctors after June 2012); Matter of G.C. Children, 23 Misc.3d 1134(A), 889 N.Y.S.2d 882 (Fam. Ct., Kings Co., 2009) (finding made against father, who told mother child cried and he did not know why, later reported that child whined and cried out when he changed her diapers and put on her pajamas, and had numerous opportunities to observe symptoms of fracture when child’s legs were touched and moved); Matter of Saim S. v. Sohail S., 23 Misc.3d 1101(A), 881 N.Y.S.2d 366 (Fam. Ct., Richmond Co., 2009) (no medical neglect where petitioner’s expert testified that parent would not realize medical attention was necessary where, as here, child allegedly manifested only slight nose bleed after fall and immediately resumed regular activities); Matter of Joseph L., 4 Misc.3d 1013(A), 791 N.Y.S.2d 870 (Fam. Ct., Richmond Co.) (neglect found where mother failed to take prompt action after child orally ingested grandmother’s medication).

It is unclear to what extent adequate care includes “well visits.” Compare New Jersey Division of Youth and Family Services v. P.W.R., 11 A.3d 844 (N.J. 2011) (although child was not taken to pediatrician in two years, there was no evidence of impairment or imminent danger of impairment) with In re Alex R., 81 A.D.3d 463 (1st Dept. 2011) (neglect found where respondent failed to take children for medical and dental appointments for at least a year).

Adequate "medical" care includes proper immunizations. Public Health Law §2164(2). See Matter of Kevin J., 162 A.D.2d 1034, 557 N.Y.S.2d 228 (4th Dept. 1990); Matter of Christine M., 1992 WL 465309 (Fam. Ct., N.Y. Co., 1992) (parent's failure to have child immunized against measles in midst of measles epidemic or outbreak clearly places child's physical condition in imminent danger of becoming impaired); Matter of Elwell, 55 Misc.2d 252, 284 N.Y.S.2d 924 (Fam. Ct., Dutchess Co., 1967) (neglect found where parents’ refusal to have children immunized against polio prevented

children from attending school). See also SSL §131(13) (public assistance applicants and recipients with children five years of age or less must be provided with information concerning necessary immunizations).

It also includes necessary psychiatric and psychological counseling or therapy. Compare In re Alexander L., 99 A.D.3d 599 (1st Dept. 2012), lv denied 20 N.Y.3d 856 (abrupt termination of child's weekly psychotherapy sessions after more than three years, with no available replacement at time when his emotional state was fragile, constituted neglect); Matter of Samuel DD., 81 A.D.3d 1120 (3d Dept. 2011) (neglect found where mother failed to address child's mental health problems and dangerous behavior; refusal to administer medication or present evidence of second opinion was unreasonable given that potential side effects would be minor and short-lived); Matter of Krewsean S., 273 A.D.2d 393, 709 N.Y.S.2d 616 (2d Dept. 2000) (mother did not participate in treatment plan for child with attention deficit hyperactivity disorder, respond to repeated phone calls from hospital staff, or attempt to visit child in hospital for three weeks); Matter of Joyce SS., 234 A.D.2d 797, 651 N.Y.S.2d 995 (3rd Dept. 1996); Matter of Junaro C., 145 A.D.2d 558, 536 N.Y.S.2d 109 (2d Dept. 1988) and Matter of Sharnetta N., 120 A.D.2d 276, 509 N.Y.S.2d 7 (1st Dept. 1986) with Matter of Terrence P., 38 A.D.3d 254, 831 N.Y.S.2d 384 (1st Dept. 2007) (given child's other medical conditions, mother demonstrated prudent judgment when she indicated she wanted a second, non-agency opinion and time to speak to child's pediatrician before administration of Attention Deficit Hyperactivity Disorder medication because of her concerns about side effects; although mother missed substantial number of counseling sessions, she was not advised that failure to meet appointments could result in neglect charge and removal of children, and she never refused counseling and did attend some sessions); Matter of Ronnie "XX", 273 A.D.2d 491, 708 N.Y.S.2d 521 (3rd Dept. 2000) (petitioner failed to prove that child's mental or emotional condition was impaired or was in imminent danger of becoming impaired due to mother's refusal to authorize treatment); Matter of Linda E., 143 A.D.2d 904, 533 N.Y.S.2d 542 (2d Dept. 1988) (respondents' objection to hospitalization, and their reluctance to bring child for weekly out-patient care because of difficulty in paying fee, did not establish neglect) and Matter

of Vulon, 56 Misc.2d 19, 288 N.Y.S.2d 203 (Fam. Ct., Bronx Co., 1968) (parents' rejection of psychiatric care could not be neglect where repeated references to episode of child's bleeding in vaginal area had already been detrimental to the children).

In addition, a neglect finding can be made where a parent has unreasonably failed to accept services designed to assist the parent in taking care of a child's special medical needs, thereby creating a risk of impairment. See Matter of Chakeeo B-G., 273 A.D.2d 915, 708 N.Y.S.2d 544 (4th Dept. 2000) (mother failed to complete required training after being notified of obligation to satisfy discharge criteria, including supervised feedings and course in cardiopulmonary resuscitation); Matter of Brittany T., 15 Misc.3d 606, 835 N.Y.S.2d 829 (Fam. Ct., Chemung Co., 2007) (morbidly obese child placed because of parents' failure to cooperate with and participate in programs).

Since the respondent's acts or omissions must result in impairment or a risk of impairment of the child's condition, a parent need not have a child treated for every "trifling affliction" that can be overcome by "simple household nursing," Matter of Hofbauer, 47 N.Y.2d 648, 419 N.Y.S.2d 936 (1979), or provide minor cosmetic surgery. Compare Matter of Seiferth, 309 N.Y. 80 (1955) (harelip and cleft palate did not seem to affect child's emotional well-being) with Matter of Sampson, 37 A.D.2d 668, 323 N.Y.S.2d 253 (3rd Dept. 1971), aff'd 29 N.Y.2d 900, 328 N.Y.S.2d 686 (1972) (child was "virtually illiterate" and was excused from school because of facial disfigurement). See also Matter of Nathanael E., 160 A.D.3d 1075 (3d Dept. 2018) (medical neglect found where child's head injury was accidental and did not ultimately result in physical impairment but, given child's premature and underweight status, and significant bruising, child was in immediate danger of becoming impaired and reasonable and prudent parent would have sought medical treatment, especially when injury appeared to worsen in size and color); Matter of Courtney G., 49 A.D.3d 1327, 854 N.Y.S.2d 268 (4th Dept. 2008) (order dismissing petition as insufficient reversed where petition alleged that respondent failed to provide her fourteen-year-old daughter with adequate supervision and guidance by permitting her to become pregnant on more than one occasion and by failing to ensure that she received appropriate care and guidance after she gave birth); In re Alexander D., 45 A.D.3d 264, 845 N.Y.S.2d 244 (1st Dept. 2007)

(no medical neglect where respondents decided not to seek medical care after child fell down flight of stairs, but they adequately attended to injuries, which were minor, and mother credibly testified that she exaggerated injuries out of fear that ACS would take child away if she admitted that child's absence from school was due to another tantrum); Matter of Miranda O., supra, 294 A.D.2d 940 (no neglect where mother delayed for five hours in taking child for treatment for burn, but there was no proof of extent of injury or that child was further harmed by delay).

Moreover, since competent professionals often disagree, parents do have the right to select any acceptable course of treatment. A professional's approach need not be the most conventional one, as long as it has not been rejected by all responsible medical authority. See, e.g., Matter of Hofbauer, supra, 47 N.Y.2d 648 (parents who arranged for Laetrile cancer therapy were not neglectful, since they sought help from numerous doctors and followed the advice of a licensed doctor); In re Lisa Sombrotto v. Christiana W., 50 A.D.3d 63, 852 N.Y.S.2d 57 (1st Dept. 2008) (while reversing order granting hospital's petition to involuntarily administer psychotropic medications to fourteen-year-old over her and her parents' objections after hearing to which parents were not parties, court notes that while State has right to intervene to ensure that a child's health or welfare is not being seriously jeopardized by parent's fault or omission, great deference must be accorded parent's choice as to mode of medical treatment and physician selected; that hospital did not even make parents parties to this proceeding, chose to ignore fact that ACS declined to file neglect proceeding and fact that parents had sought alternative treatment; and that there was no evidence that child was suffering from life-threatening condition, the recommended course of treatment has possible side effects, and a doctor gave equivocal testimony regarding potential long-term life-enhancing benefit); Matter of Faridah W., 180 A.D.2d 451, 579 N.Y.S.2d 377 (1st Dept. 1992), lv denied 80 N.Y.2d 751, 587 N.Y.S.2d 287; Weber v. Stony Brook Hospital, 95 A.D.2d 587, 467 N.Y.S.2d 685 (2d Dept. 1983), aff'd 60 N.Y.2d 208, 469 N.Y.S.2d 63 (1983), cert denied 464 U.S. 1027, 104 S.Ct. 560 (1983).

When a parent has unreasonably refused to allow treatment "necessary to safeguard the child's life or health," the court may authorize a doctor or hospital to

provide such treatment, including surgery. FCA §1027(e). See, e.g., Matter of Sampson, supra, 37 A.D.2d 668, aff'd 29 N.Y.2d 900. See also FCA §233 (when child within court's jurisdiction appears to need medical care, suitable order may be made); SSL §383-b (Commissioner of Social Services may give effective consent to provision of medical services to children in his or her custody); Matter of Piper S. v. Westchester County Department of Social Services, 159 A.D.3d 911 (2d Dept. 2018) (court had authority to direct father to provide DSS with child's health insurance card); Matter of Matthew V., 59 Misc.3d 288 (Fam. Ct., Kings Co., 2017) (where petition alleged that mother abused thirteen-year-old son by unreasonably refusing to consent to chemotherapy, which was the only indicated treatment, court issues order giving ACS medical decision-making authority for child, who continued to reside with mother, with provisions allowing mother to participate in decision-making).

**b. Religious Objections**

Generally, parents' religious objections to important treatment have not been found to be a legitimate defense. Matter of Sampson, supra, 37 A.D.2d 668, aff'd 29 N.Y.2d 900 (Jehovah's Witness refused to permit blood transfusions necessary to performance of surgery); Cooper v. Wiley, 128 A.D.2d 455, 513 N.Y.S.2d 151 (1st Dept. 1987) (no neglect where Jehovah's Witnesses refused to permit blood transfusion, since there was no proof of threat to child); Matter of Eli H., 22 Misc.3d 965, 871 N.Y.S.2d 846 (Fam. Ct., St. Lawrence Co., 2008) (medical neglect found where respondents, members of the Schwartzentruber Amish community, refused to consent to life-saving heart surgery); see also Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S.Ct. 1211 (2006) (court notes that under Religious Freedom Restoration Act of 1993, Federal Government may not, by statute, substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless there is a compelling governmental interest and imposition of the burden is the least restrictive means of furthering that compelling interest).

In any event, a First Amendment defense must fail if it appears that the real reason for the objection is the parent's personal discomfort with the mode of treatment.

See, e.g., Matter of Elwell, 55 Misc.2d 252, 284 N.Y.S.2d 924 (Fam. Ct., Dutchess Co., 1967) (parents' objections appeared to be personal fears unrelated to free exercise of their religion).

Religious objections are given recognition in §2164(9) of the Public Health Law, which exempts parents from child immunization requirements if they "hold genuine and sincere religious beliefs which are contrary to the practices herein required." See, e.g., In re Freedom R., 142 A.D.3d 922 (1st Dept. 2016) (family court properly granted petitioner's motion for order directing that children receive immunizations where mother, who failed to submit affidavit and relied on affirmation of counsel without supporting evidence, did not demonstrate that opposition to immunization stemmed from religious beliefs and were genuinely and sincerely held); Matter of Nassau County Department Of Social Services o/b/o A.Y., et al., 23 Misc.3d 270, 870 N.Y.S.2d 874 (Fam. Ct., Nassau Co., 2008) (respondent met burden to establish grounds for religious exemption under PHL §2164(9) where she is member of Congregation, El Shaddai Yisrael, which interprets biblical references as forbidding administration of man-made medicines to cure illness and disease because it is the "Almighty, not man, who is the healer of mankind"); Farina v. The Board of Education of the City of New York, 116 F.Supp.2d 503 (E.D.N.Y. 2000) (in §1983 action, court concludes that plaintiffs' objections to immunization are based on personal fears, rather than on genuine and sincerely held religious beliefs); Matter of Shmuel G., 4 Misc.3d 1002(A), 791 N.Y.S.2d 874 (Fam. Ct., Kings Co., 2004) (mother had burden to show by preponderance of evidence that she qualified for exemption; presentation of letter from Department of Health was not sufficient by itself); Brown v. City School District of the City of Corning, 104 Misc.2d 796, 429 N.Y.S.2d 355 (Sup. Ct., Steuben Co., 1980), aff'd 83 A.D.2d 755, 444 N.Y.S.2d 878 (4th Dept. 1981) (parent must establish absence of clear and present danger to public from communicable disease); see also Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015) (New York vaccination requirement found constitutional).

**5. Use Of Excessive Corporal Punishment/Inflicting Harm**

The definition of a neglected child includes a child whose caretaker has failed to

exercise a minimum degree of care "in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment ...." FCA §1012(f)(i)(B). A parent has the right to use only reasonable physical force in order to maintain discipline or promote the child's welfare. Penal Law §35.10(1). See, e.g., New Jersey Division of Youth and Family Services v. P.W.R., 11 A.3d 844 (N.J. 2011) (slap of teenager's face as form of discipline with no resulting bruising or marks does not constitute excessive corporal punishment); Matter of Laequise P., 119 A.D.3d 801 (2d Dept. 2014) (father's open-handed spanking as form of discipline after he heard child curse at adult was reasonable use of force); Matter of Anastasia L.-D., 113 A.D.3d 685 (2d Dept. 2014) (no neglect where father hit fourteen-year-old with belt several times when she refused to give him cell phone, but father testified that he was attempting to discipline child for cutting school by taking away cell phone and hit her with belt when she refused to give him phone and charged at him, and that corporal punishment was not his normal mode of discipline); In re Joseph C., 88 A.D.3d 478 (1st Dept. 2011) (neglect found where respondent punished eleven-year-old stepson by requiring him to hold himself in "push-up" position and kneel on uncooked grains of rice for extended periods of time); Matter of Senande v. Carrion, 83 A.D.3d 851 (2d Dept. 2011) (no neglect where child developed small, dime-sized red mark on upper thigh as result of mother hitting her one or two times with house slipper after child was disobedient); Matter of Crystal S., 74 A.D.3d 823, 902 N.Y.S.2d 623 (2d Dept. 2010) (no neglect where mother's use of physical force was justified in order to stop child from escalating altercation with mother's boyfriend by grabbing knife); In re Christy C., 74 A.D.3d 561, 903 N.Y.S.2d 365 (1st Dept. 2010) (insufficient evidence of excessive corporal punishment where father acknowledged that he "popped" or "tapped" child, but there was no evidence that force was excessive, and child sustained no injury and was laughing and in good spirits after father hit him); In re Syed I., 61 A.D.3d 580, 877 N.Y.S.2d 318 (1st Dept. 2009) (finding made where father punished children by hitting them, making them do knee bends, and threatening to withhold food if they did not memorize written passages); Matter of Mary Kate VV., 59 A.D.3d 873, 873 N.Y.S.2d

375 (3rd Dept. 2009), lv denied 12 N.Y.3d 711 (excessive corporal punishment found where the discipline imposed for minor errors included blows with wooden stick that was eighteen inches by three-quarters of an inch thick, punches in head with closed fist, elbows to face, and pulling hair; children never knew what might trigger punishment and had been so terrified that they avoided going home, and their pervasive fear of respondent contributed to one child's suicidal ideation and another's self-mutilation); Matter of Peter G., 6 A.D.3d 201, 774 N.Y.S.2d 686 (1st Dept. 2004), appeal dismissed 3 N.Y.3d 655, 782 N.Y.S.2d 693 (evidence insufficient where child alleged that he was struck with cane, but did not indicate how hard he was hit or whether he felt pain, and there was no evidence of repeated striking); Matter of Amanda "E", 279 A.D.2d 917, 719 N.Y.S.2d 763 (3rd Dept. 2001) (neglect charges dismissed where, on one occasion, father struck sixteen and a half year-old child after she became physically abusive during altercation); Matter of Rodney C., 91 Misc.2d 677, 398 N.Y.S.2d 511 (Fam. Ct., Onondaga Co., 1977).

Thus, if the punishment was excessive, it is no defense that the parent had a disciplinary "reason" to strike the child. See Matter of Commissioner o/b/o Alena O., 220 A.D.2d 358, 633 N.Y.S.2d 127 (1st Dept. 1995).

The physical "impairment" referred to in FCA §1012(f)(i) involves "a lower threshold of resultant harm" than the serious physical injury required in abuse cases. Matter of Maroney v. Perales, 102 A.D.2d 487, 489, 478 N.Y.S.2d 123 (3rd Dept. 1984). Compare Matter of Nurridin B., 116 A.D.3d 770 (2d Dept. 2014) (finding made where respondent struck child several times with belt, causing raised red marks on her arm and legs); In re Aniya C., 99 A.D.3d 478 (1st Dept. 2012) (finding made where mother beat daughter with belt that left bruises and marks on neck, arms and legs; petitioner was not required to demonstrate that child suffered "significant injury"); Matter of Samuel "Y", 270 A.D.2d 531, 703 N.Y.S.2d 591 (3rd Dept. 2000) (finding made where ten-month-old child suffered "facial contusion" when mother struck her); Matter of Asia B., 266 A.D.2d 537, 699 N.Y.S.2d 88 (2d Dept. 1999) (finding made where child sustained laceration on head requiring stitches); Matter of Marcelina F., 117 A.D.2d 803, 499 N.Y.S.2d 126 (2d Dept. 1986) (finding made where child suffered a bruised

nose, black eyes, a loss of hair, bruised buttocks and an infected finger) and Matter of Cynthia V., 94 A.D.2d 773, 462 N.Y.S.2d 721 (2d Dept. 1983) (child had marks and bruises, and vaginal and rectal penetration) with Matter of Hattie G., 48 A.D.3d 1292, 851 N.Y.S.2d 324 (4th Dept. 2008) (no neglect where mother, after discovering that fourteen-year-old daughter stayed out overnight without permission, confronted her with plastic toy wiffle bat, struck her several times in legs and buttocks, and then accidentally struck her once in head and caused small welt or bruise under right eye); Matter of Coleen P., 148 A.D.2d 782, 538 N.Y.S.2d 361 (3rd Dept. 1989) (no finding where respondent shook the child and caused the child's head to strike the pavement, causing, at most, a bruise or red mark).

The absence of a need for medical attention does not preclude a finding. In re Adam Christopher S., 120 A.D.3d 1110 (1st Dept. 2014) (where respondent slapped child in face and beat child on legs over course of ten hours with belt, lack of need for medical attention did not preclude finding).

Petitioner is not required to prove a course of conduct, and so, depending on the circumstances, a single incident may constitute neglect. Compare Matter of Anastasia L.-D., 113 A.D.3d 685 (2d Dept. 2014) (no neglect where father hit fourteen-year-old with belt several times when she refused to give him cell phone, but father testified that he was attempting to discipline child for cutting school by taking away cell phone and hit her with belt when she refused to give him phone and charged at him, and that corporal punishment was not his normal mode of discipline); In re Pria J.L., 102 A.D.3d 576 (1st Dept. 2013) (no neglect where there was one incident in which respondent mother argued with twelve-year-old daughter, and, after adult brother got involved and was hitting child, mother provided brother with belt with which he hit child; when neglect has been found where legal guardian condoned infliction of corporal punishment by another person, there has been pattern of punishment); Matter of Marie A.P. v. Nassau County Department of Social Services, 100 A.D.3d 1003 (2d Dept. 2012) (no neglect where mother hit daughter on buttocks with child’s belt in attempt to discipline child and caused no injury or substantial risk thereof and there was no prior history of abuse or maltreatment); Matter of Senande v. Carrion, 83 A.D.3d 851 (no neglect where child

developed small, dime-sized red mark on upper thigh as result of mother hitting her one or two times with house slipper after child was disobedient); In re Parker v. Carrion, 80 A.D.3d 458, 914 N.Y.S.2d 150 (1st Dept. 2011) (no neglect where mother, in response to daughter slamming door, crying, and “throwing things around” when asked to look for crayons and pencils to do homework, told daughter she could not act that way, and, when behavior continued, found “child’s belt” and, intending to hit daughter on her behind, accidentally hit her in face with buckle when she grabbed child as she was running away); Matter of Corey Mc., 67 A.D.3d 1015, 889 N.Y.S.2d 647 (2d Dept. 2009) (while noting child’s age and size, the provocation, and the dynamics of the incident, Second Department reverses neglect finding where, during physical confrontation with son, who was fifteen years old and five feet ten inches tall, mother confronted him over what she believed was inconsiderate behavior and then left his room and closed door; attempted several times to withdraw from confrontation after he came out and "directed a stream of profanity-laced invective" at her, but punched or slapped him in face when he continued verbal abuse; got up and hit him on face with heel of shoe, bloodying his nose, after he knocked her down and continued to curse; and called police to seek medical attention for him); Matter of Chanika B., 60 A.D.3d 671, 874 N.Y.S.2d 251 (2d Dept. 2009) (finding reversed where father slapped child in face, causing nose to bleed, because she had disobeyed him, and child testified that father never hit her any other time and never hit her brother); In re Christian O., 51 A.D.3d 402, 856 N.Y.S.2d 612 (1st Dept. 2008) (insufficient evidence of neglect where, when eleven-year-old child arrived home significantly past curfew without explanation, respondent lost temper and kicked mattress upon which child was lying, and, as he did so, child lifted legs and respondent kicked him once in ankle; respondent, who expressed remorse and maintained that kick was accidental, had not previously used corporal punishment when disciplining children); Matter of Hattie G., supra, 48 A.D.3d 1292 (no neglect where mother, after discovering that fourteen-year-old daughter stayed out overnight without permission, confronted her with plastic toy wiffle bat, struck her several times in legs and buttocks, and then accidentally struck her once in head and caused small welt or bruise under right eye); Matter of John O., 42 A.D.3d 687, 839 N.Y.S.2d 605 (3rd Dept.

2007) (no neglect where respondent hit child on hand with wax candle causing bruising); Matter of Jerrica J., 2 A.D.3d 1161, 770 N.Y.S.2d 171 (3rd Dept. 2003) (no neglect where respondent put up her hand and foot and accidentally made contact with child in self defense when child slapped her, and punched child in arm during argument while driving); Matter of Reannie D., 2 A.D.3d 851, 770 N.Y.S.2d 399 (2d Dept. 2003) (no neglect where father bit child on face and arm, leaving severe bruising, but there was no evidence of impairment of physical condition); Matter of Anthony "PP", 291 A.D.2d 687, 737 N.Y.S.2d 430 (3rd Dept. 2002) (no neglect where respondent dragged eleven-year-old child out of car by collar, scraping his neck, and threw him on ground, scraping his knee); In re the P. Children, 272 A.D.2d 211, 707 N.Y.S.2d 453 (1st Dept. 2000) (no neglect where mother hit nine-year-old with buckle end of purse strap after she left him with two-year-old sister in bedroom and returned to find two-year-old alone and trying to climb over window guard at open window); Matter of Luke M., 193 A.D.2d 446, 597 N.Y.S.2d 679 (1st Dept. 1993) (no neglect where respondent and eleven-year-old had fight) and Matter of Coleen P., supra, 148 A.D.2d 782

with Matter of Jakob Z., 156 A.D.3d 1170 (3d Dept. 2017) (finding made where father became angry about a shirt and ripped it off child's body, causing him to cry and suffer injury); Matter of Nurridin B., 116 A.D.3d 770 (finding made where respondent struck child several times with belt, causing raised red marks on her arm and legs); Matter of Chanyae S., 82 A.D.3d 1247 (2d Dept. 2011) (finding made where father choked child in response to dispute over whether child would babysit younger siblings); Matter of Justyce M., 77 A.D.3d 1407, 908 N.Y.S.2d 783 (4th Dept. 2010), lv denied 16 N.Y.3d 710 (neglect found where mother hit six-year-old child in face with belt after child failed to watch younger brother); Matter of Jahyalle F., 66 A.D.3d 1019, 886 N.Y.S.2d 823 (2d Dept. 2009) (finding made where mother put son in hot oven as form of punishment); Matter of Rachel H., 60 A.D.3d 1060, 876 N.Y.S.2d 463 (2d Dept. 2009) (mother inflicted excessive corporal punishment upon four-year-old daughter by throwing can at her); Matter of Castilloux v. New York State Office of Children and Family Services, 16 A.D.3d 1061, 791 N.Y.S.2d 755 (4th Dept. 2005) (neglect found where father struck son, causing lacerations and bruises and emotional harm); Matter of Jonathan "Q", 278

A.D.2d 750, 718 N.Y.S.2d 442 (3rd Dept. 2000) (finding made where child had finger marks on face and was crying, and respondent denied slapping child and stated that he had just “tapped” him); Matter of Samuel “Y”, supra, 270 A.D.2d 531; Matter of Asia B., supra, 266 A.D.2d 537; Matter of Shawn BB., 239 A.D.2d 678, 657 N.Y.S.2d 239 (3rd Dept. 1997) (spanking found excessive); Matter of Maroney v. Perales, supra, 102 A.D.2d 487 (father pushed daughter several times, pulled her hair, slapped her face, kicked her leg, forced her to retreat into closet and threw alarm clock at wall near her) and Matter of Janiyah T., 26 Misc.3d 1208(A), 2010 WL 58323 (Fam. Ct., Kings Co., 2010), aff’d 82 A.D.3d 1108 (2d Dept. 2011) (even if father hit child in face with belt by accident and meant to hit her on hand, force was excessive given risk that three-year-old would move when threatened and sustain bruising on other body part).

Although neglect charges brought pursuant to FCA §1012(f)(i)(B) usually involve corporal punishment, "harm," or a risk of harm, can also result from other forms of discipline or from negligent behavior. Compare Matter of Janan II., 154 A.D.3d 1082 (3d Dept. 2017) (neglect finding where father, after children damaged their clothes while playing with scissors, screamed at and rubbed knuckles against head of each child); In re Ninoshka M., 125 A.D.3d 567 (1st Dept. 2015) (neglect found where mother stored illegal guns in home where children, including two teenagers, had access to them); Matter of Heaven H., 121 A.D.3d 1199 (3d Dept. 2014) (neglect found where respondent engaged in violent dispute with neighbor; respondent’s oldest child intervened to protect mother and sustained blow to mid-section which caused difficulty breathing, and was taken by ambulance to hospital; and all the children were frightened by what they observed); Matter of Draven I., 86 A.D.3d 746 (3d Dept. 2011) (neglect found where respondent operated automobile with children on board when she was not taking medication prescribed to prevent epileptic seizures); Matter of Deshawn D. O., 81 A.D.3d 961 (2d Dept. 2011), appeal dism’d 17 N.Y.3d 773 (respondents, inter alia, punished child by restricting food intake and making him sleep on floor); Matter of Justin CC., 77 A.D.3d 1056, 909 N.Y.S.2d 771 (3rd Dept. 2010), lv denied 16 N.Y.3d 702 (neglect found where punishment included making child “pick cherries,” a painful military exercise during which she stood with arms outstretched and simulated picking

cherries off of a wall); Matter of Jasmine D., 55 A.D.3d 906, 868 N.Y.S.2d 69 (2d Dept. 2008) (neglect found where father, while in homeless shelter, locked himself in barricaded room while he shaved child's head with razor, and was in combative state while he threatened shelter staff member with bodily harm in presence of child); Matter of Aaliyah G., 51 A.D.3d 918, 861 N.Y.S.2d 353 (2d Dept. 2008) (neglect found where father placed child as barricade between himself and police officer); Matter of Tajani B. (two cases), 49 A.D.3d 874 (876), 854 N.Y.S.2d 518 (520) (2d Dept. 2008), lv denied, 11 N.Y.3d 703 (10 N.Y.3d 717) (neglect found where respondents allowed loaded gun to be placed on bed, accessible to mother's three-year-old son and next to their five-month-old daughter who was in a crib); Matter of Evan F., 48 A.D.3d 811, 853 N.Y.S.2d 142 (2d Dept. 2008) (neglect found where father fled from police in car chase while child was passenger); Matter of Lester M., 44 A.D.3d 944, 844 N.Y.S.2d 123 (2d Dept. 2007) (neglect found where mother, whose boyfriend had severely abused child by leaving him unattended in sink where he was burned by scalding water, allowed child's arm to come into contact with curling iron she was using while child was jumping from his bed to her bed); Matter of Andrew S., 43 A.D.3d 1170, 842 N.Y.S.2d 579 (2d Dept. 2007) (neglect found where, following verbal dispute between mother and father, father pushed computer out of second floor window, causing it to land approximately twelve-fifteen feet from vehicle occupied by mother and children); In re Nichelle McF., 23 A.D.3d 209, 808 N.Y.S.2d 2 (1st Dept. 2005) (neglect found where respondent had two violent outbursts in family court, evincing dangerous lack of self-control); In re Pedro C., 1 A.D.3d 267, 767 N.Y.S.2d 578 (1st Dept. 2003) (neglect found where respondent was intoxicated on street late at night with two-year-old child, and became loud and hostile with police and exhibited bizarre behavior); Matter of Ruthanne F., 265 A.D.2d 829, 695 N.Y.S.2d 831 (4th Dept. 1999) (neglect found where respondents routinely confined two-year-old child in straightjacket-like device overnight and did not allow other children to comfort him when he cried); Matter of Barbara S., 244 A.D.2d 556, 664 N.Y.S.2d 475 (2d Dept. 1997) (neglect found where father locked child in overheated and unventilated car in high heat conditions); Matter of King v. Perales, 153 A.D.2d 694, 544 N.Y.S.2d 869 (2d Dept. 1989) (parent neglectful when she poured scalding water in

two-year-old child's bath water, causing child to kick up foot and sustain second degree burn) and Matter of Lester M., 13 Misc.3d 1222(A), 831 N.Y.S.2d 348 (Fam. Ct., Richmond Co., 2006) (finding made where mother used hot curling iron near child at play) with Matter of Alexander J. S., 72 A.D.3d 829, 899 N.Y.S.2d 281 (2d Dept. 2010) (no neglect where father pulled on daughter's shirt when she failed to follow instructions, causing her to fall down onto floor, and then spanked her on buttocks and hit her on arm with open hand; although her wrist was injured due to fall, there was no evidence that father intended to injure her or engaged in pattern of using excessive force to discipline her); In re Allison B., 46 A.D.3d 313, 847 N.Y.S.2d 187 (1st Dept. 2007) (neglect finding reversed where sixteen-month-old child suffered minor burn on bottom after she sat on edge of bed and touched uncovered steam pipe while she was bouncing and playing on bed with father and sister) and Matter of Steven A., 307 A.D.2d 434, 762 N.Y.S.2d 672 (3rd Dept. 2003) (Central Register record expunged where father hid gun and removed ammunition from premises after child broke open safe and removed and fired gun).

### 6. Misuse Of Drugs Or Alcohol

#### a. Generally

A neglect finding may be made when the respondent fails to exercise a minimum degree of care in providing proper supervision or guardianship "by misusing a drug or drugs," or "by misusing alcoholic beverages to the extent that he loses self-control of his actions ...." FCA §1012(f)(i)(B).

"`Drug' means any substance defined as a controlled substance in [§3306] of the public health law." FCA §1012(d). Thus, a respondent's misuse of legal prescription drugs can constitute neglect. See Matter of Giah A., 154 A.D.3d 841 (2d Dept. 2017), lv denied 30 N.Y.3d 908 (father's repeated misuse of prescription drugs, by itself, established prima facie case); Matter of Kaylee D., 154 A.D.3d 1343 (4th Dept. 2017) (neglect found where mother, inter alia, was behaving erratically and had taken excessive amounts of suboxone, which is used to treat opiate dependence, and physician testified that misuse of suboxone can have side effects such as sedation, dysphoria and mood changes, and may affect cognitive abilities); Matter of Sonia I., 161

A.D.2d 969, 557 N.Y.S.2d 542 (3rd Dept. 1990), lv denied 76 N.Y.2d 710, 563 N.Y.S.2d 62.

According to FCA §1046(a)(iii):

> proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child ....

Because FCA §1012(f)(i)(B) refers separately to "misusing a drug or drugs" and "misusing alcoholic beverages to the extent that [the respondent] loses self-control of his actions," it appears that the same distinction applies with respect to the presumption in §1046(a)(iii).

Thus, when misuse of drugs or alcohol substantially impairs a caretaker's ability to function, it is presumed that the children have been, or are at risk of being, impaired. In re Shaun H., 161 A.D.3d 559 (1st Dept. 2018) (neglect found where respondent smoked marijuana eight to ten times per week to deal with her stress); Matter of Gabriela T., 160 A.D.3d 968 (2d Dept. 2018) (neglect found where mother regularly used marijuana, which she had been advised could worsen preexisting mental health condition); Matter of Cody W., 148 A.D.3d 914 (2d Dept. 2017), lv denied 29 N.Y.3d 909 (finding made where children alleged that father smoked “weed” about once per week in presence of children and that seven-year-old found remnants of marijuana in ashtray and tried to smoke it); In re Nyheem E., 134 A.D.3d 517 (1st Dept. 2015) (neglect finding where mother smoked marijuana on weekends and holidays and testified that she would use drug in home while children were asleep); Matter of Alexandria S., 105 A.D.3d 856 (2d Dept. 2013), lv denied 21 N.Y.3d 860 (presumption not rebutted by showing that children were always well kept, clean, well fed and not at risk); In re Elijah J., 105 A.D.3d 449 (1st Dept. 2013) (neglect found where mother regularly misused marijuana); In re Nasiim W., 88 A.D.3d 452 (1st Dept.

2011) (evidence of impaired judgment and loss of self-control caused by excessive drinking was sufficient to trigger presumption even though no evidence was presented concerning impact on child and child was not present during two of three incidents); Matter of Paolo W., 56 A.D.3d 966, 867 N.Y.S.2d 753 (3rd Dept. 2008) (finding made by Third Department where respondent was using between two and six bags of heroin per day, his withdrawals were so bad that he could not function, and he was dismissed from drug treatment program for noncompliance, but family court dismissed the petition while concluding that presumption of neglect was rebutted by testimony indicating that "the children were never in danger and were always well kept, clean, well fed and not at risk"); but see In re Jeffrey M., 102 A.D.3d 608, 959 N.Y.S.2d 59 (1st Dept. 2013) (no neglect where there was no evidence that mother used or was under influence of marijuana and crack cocaine in child's presence or evidence of frequency of drug use); Matter of Anna F., 56 A.D.3d 1197, 868 N.Y.S.2d 442 (4th Dept. 2008) (no finding where father admitted there were occasions during which he drank alcohol or used drugs while caring for children, but children were asleep; family court found that children were placed at risk because it was possible they would wake up or need to be taken to the emergency room in the middle of the night, but "imminent" danger must be near or impending, not merely possible); Matter of Smith Jones Children, 34 Misc.3d 1226(A), 950 N.Y.S.2d 491 (Fam. Ct., Kings Co., 2012) (no neglect where respondent's newborn had positive toxicology for marijuana and respondent admitted to repeated use of marijuana, but petitioner failed to prove quantity or frequency of marijuana use or effect upon respondent or ability to care for children; even if petitioner had established prima facie case, respondent rebutted inference of impairment since children were thriving in mother's care). Given the widely known effects of certain drugs, such as heroin and crack, the use of a drug often constitutes neglect even in the absence of evidence of its effect on the respondent or evidence of what its effect would "ordinarily" be.

Exposing a child to the risk of harm via breastfeeding can constitute neglect. See Matter of Brooklyn S., 150 A.D.3d 1698 (4th Dept. 2017) (finding made where sample of mother's breast milk tested positive for morphine, codeine, and heroin metabolites, and father failed to intervene to prevent her from nursing child); In re Maranda LaP., 23

A.D.3d 221, 804 N.Y.S.2d 300 (1st Dept. 2005) (respondent twice tested positive for high levels of alcohol, and on one occasion was observed breast feeding child just prior to administration of test).

Section 1046(a)(iii) also contains the following caveat:

> ... such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program ....

Section 1012(f)(i)(B) contains a similar pronouncement:

> ... where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired ....

See In re Alexander Z., _A.D.3d_, 2018 WL 4008819 (1st Dept. 2018) (presumption not rebutted where mother participated in rehabilitative programs after neglect petitions were filed; although, in Matter of Iris B., 304 A.D.2d 301, court cited respondent's participation in rehabilitative program at time of fact-finding hearing, record in that case reveals that respondent was resident of rehabilitative facility when petition was filed, and fact-finding hearing occurred within two months of filing, not two years later, as in this case); In re Dior S., 160 A.D.3d 495 (1st Dept. 2018) (mother failed to show she was regularly participating in treatment where she entered program about sixteen days before neglect petitions were filed, which did not outweigh significant history); Matter of Carter B., 154 A.D.3d 1323 (4th Dept. 2017), lv denied 30 N.Y.3d 910 (eighteen positive drug tests and admitted drug use while in program established that mother was not voluntarily and regularly participating); Matter of Brooklyn S., 150 A.D.3d 1698 (finding made where father had voluntarily begun rehabilitative treatment program, but attended only a third of appointments and thus was not regularly participating); In re Keoni Daquan A., 91 A.D.3d 414 (1st Dept. 2012) (although respondent alleged that he was in drug treatment program, he did not identify program and failed to substantiate

assertion with documentation or other evidence); Matter of Sadiq H., 81 A.D.3d 647 (2d Dept. 2011) (repeated misuse of drugs established prima facie case of neglect without proof of impairment or specific risk of impairment); Matter of Amber DD., 26 A.D.3d 689, 809 N.Y.S.2d 657 (3rd Dept. 2006) (respondent's participation in program as a result of involvement in drug court and desire to avoid prison was not voluntary).

Thus, if the respondent is already participating voluntarily in a rehabilitative program, it cannot be presumed that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired: the petitioner must prove it. See, e.g., Matter of Chassidy CC., 84 A.D.3d 1448 (3d Dept. 2011) (as result of use of drugs and alcohol, respondent repeatedly left daughter unsupervised and alone in room family occupied at homeless shelter); Matter of Alfonzo H., 77 A.D.3d 1410, 908 N.Y.S.2d 780 (4th Dept. 2010) (sufficient prima facie proof where police intervention was required on several occasions when father engaged in violence against mother while intoxicated); Matter of Alexandra J., 77 A.D.3d 1299, 907 N.Y.S.2d 763 (4th Dept. 2010) (neglect found where mother attempted suicide by overdosing on prescription medication and lost consciousness for prolonged period of time; she was not conscious when children returned following weekend visit with father and children were unable to wake her when they needed ride to school the next day; although mother eventually awoke later that morning, she did not drive children to school because she was physically unable to drive; and mother was admitted that day to psychiatric ward of hospital where she stayed for five days); Matter of Rae Ann Q., 299 A.D.2d 487, 749 N.Y.S.2d 905 (2d Dept. 2002) (finding made where respondent and children's mother were highly intoxicated in presence of children and domestic disturbance ensued); Matter of Dixon, 53 A.D.2d 1014, 386 N.Y.S.2d 484 (4th Dept. l976) (neglect found where mother was an alcoholic and failed to obtain care for child's respiratory infection); but see In re Devin N., 62 A.D.3d 631, 882 N.Y.S.2d 400 (1st Dept. 2009) (no evidence children were endangered by presence of apparently intoxicated people, or that one child was endangered by being in locked room with person who appeared to be intoxicated and was smoking cigarette).

Obviously, drug or alcohol abuse may be proved by eyewitness or other clear

evidence concerning the respondent's repeated misuse. See, e.g., Matter of Dayyan J.L., 131 A.D.3d 1245 (2d Dept. 2015) (finding made where caseworker testified that on at least two occasions, including supervised visit and court appearance, father “reeked” of alcohol; although father was told that undergoing drug and alcohol evaluation was condition for having child returned to his care, he refused to undergo evaluation; and court drew negative inference from father’s failure to testify); Matter of Whitney H., 19 A.D.3d 491, 798 N.Y.S.2d 451 (2d Dept. 2005) (children alleged that mother drank one to two cans of beer or malt liquor every day); Matter of Joey T., 185 A.D.2d 851, 587 N.Y.S.2d 356 (2d Dept. 1992) (mother's sister testified that mother used drugs when children were present); Matter of William T., 185 A.D.2d 413, 585 N.Y.S.2d 814 (3rd Dept. 1992) (mother testified that father "drank a lot"); Matter of Kevin J., 162 A.D.2d 1034, 557 N.Y.S.2d 228 (4th Dept. 1990) (police observed drug paraphernalia used for free-basing cocaine, and respondent was incoherent); Matter of James P., 150 A.D.2d 240, 541 N.Y.S.2d 410 (1st Dept. 1989) (child told doctor about respondents' drinking, and officer testified to mother's intoxicated appearance).

It is unclear whether, and under what circumstances, a child's allegation that the respondent possessed or used “drugs” can establish the identity of the substance without evidence of drug-induced behavior. See, e.g., Matter of W. Children, 277 A.D.2d 242, 716 N.Y.S.2d 677 (2d Dept. 2000) (neglect found where respondent admitted using drugs and one child had positive toxicology at birth, and children made cross-corroborating out-of-court statements, with one of them stating that respondent “does drugs”).

Although the respondent's mere possession of drugs would not, by itself, prove repeated misuse, it is probative evidence [see Matter of Theresa J., supra, 158 A.D.2d 364], and possession of drugs that are within the children’s reach, or drug-related activity when the children are present, may be neglect. Compare In re Jared M., 99 A.D.3d 474 (1st Dept. 2012) (finding made where police saw marijuana in plain view and recovered large amounts of marijuana located throughout home, including over one hundred thirty individual packages); Matter of Evan E., 95 A.D.3d 1114 (2d Dept. 2012) (neglect found where father was arrested and found in possession of cocaine while

traveling with children to arranged drug transaction); Matter of Paige AA., 85 A.D.3d 1213 (3d Dept. 2011), lv denied 17 N.Y.3d 708 (marihuana and drug-related paraphernalia found within child's reach); In re Eugene L., 83 A.D.3d 490 (1st Dept. 2011) (neglect found where police recovered large quantity of cocaine, empty ziploc bags and $1,451 from respondents' residence while respondents' three-month-old child was present and two undercover buys had taken place in apartment before search, and respondents failed to testify); In re Jaylin E., 81 A.D.3d 451 (1st Dept. 2011) (neglect found where twenty-one month-old child was in apartment with marijuana in bedroom where child was staying and strong odor of marijuana on child's body, hair and clothing, and adults in apartment were selling marijuana); Matter of Mitchell WW., 74 A.D.3d 1409, 903 N.Y.S.2d 553 (3rd Dept. 2010) (father abused prescription medication and threatened mother into sending him Oxycontin pills by packing them with child's belongings); In re Taliya G., 67 A.D.3d 546, 889 N.Y.S.2d 40 (1st Dept. 2009) (finding made where mother knew or should have known of boyfriend's drug business and allowed him to reside in apartment with seven-year-old son, who had access to drugs in dresser in bedroom); In re Andrew DeJ. R., 30 A.D.3d 238, 817 N.Y.S.2d 24 (1st Dept. 2006) (respondent possessed large amounts of cocaine and drug paraphernalia in apartment where he resided with children, and where police executed search warrant using a battering ram); Matter of Paul J., 6 A.D.3d 709, 775 N.Y.S.2d 373 (2d Dept. 2004) (mother possessed large supply of cocaine and sold drugs in presence of children); In re Michael R., 309 A.D.2d 590, 765 N.Y.S.2d 358 (1st Dept. 2003) (respondent hid heroin in children's hamper, packaged narcotics in presence of nine-year-old, and sold drugs from home); Matter of S., 278 A.D.2d 329, 717 N.Y.S.2d 331 (2d Dept. 2000), lv denied 96 N.Y.2d 710, 726 N.Y.S.2d 373 (2001) (abuse finding made where drugs were kept in apartment and mother's boyfriend was involved in possessing and selling drugs); Matter of Myra P., 251 A.D.2d 668, 676 N.Y.S.2d 490 (2d Dept. 1998). In re Charisma D., 67 A.D.3d 404, 889 N.Y.S.2d 13 (1st Dept. 2009) (finding of neglect reversed where officers recovered from apartment a glassine envelope each of heroin and cocaine and digital scale while respondent, one child, respondent's sister, her mother and her mother's boyfriend were present in apartment;

heroin was recovered from cabinet in "dining room kitchenette area," cocaine from respondent's mother's bedroom, and scale from dresser drawer in respondent's bedroom; none of the contraband was in plain view; respondent's mother told police that drugs were hers and respondent told officers that her mother used drugs and that if any were found, they belonged to her mother; and respondent told officer that scale belonged to infant son's father, who was no longer living there); Matter of Shannon ZZ., 8 A.D.3d 699, 778 N.Y.S.2d 205 (3rd Dept. 2004) (marijuana smoking in house by others did not justify finding without evidence that child witnessed smoking or was exposed to contaminated air, or that child was at risk by being in smokers' presence) with Matter of Isaiah D., 29 Misc.3d 1215(A), 2010 WL 4227242 (Fam. Ct., Bronx Co., 2010) (no prima facie case where police found seven zip lock bags of marijuana in closed glass jar inside bathroom cabinet; evidence that child was old enough to walk and able to use hands and could reach contraband established a mere possibility of danger, and petitioner presented no evidence that marijuana belonged to father or that he was aware it was in bathroom); Matter of Peterson Children, 185 Misc.2d 351, 712 N.Y.S.2d 345 (Fam. Ct., Kings Co., 2000) (petitioner's motion for summary judgment denied where respondents were convicted of drug possession but there was no indication as to circumstances of crimes).

A finding also may be made when the respondent's failure to supervise leads to drug possession or use by the child outside the home. See Matter of Dakota CC., 78 A.D.3d 1430, 912 N.Y.S.2d 151 (3rd Dept. 2010) (neglect found where, due to respondent's heavy drinking and lack of supervision, child was free to sneak out of house and acquire drugs).

An admission can establish neglect if it is clear, or can be inferred, that the respondent admitted to repeated misuse. See, e.g., Matter of Lavountae A., 57 A.D.3d 1382, 870 N.Y.S.2d 676 (4th Dept. 2008), aff'd 12 N.Y.3d 832, 880 N.Y.S.2d 914 (neglect found where mother admitted she had smoked marihuana while pregnant and had been discharged from substance abuse treatment program because of failure to complete program successfully; dissenting judges note lack of evidence of frequency of use or effect on mother's mental state, or evidence that marihuana use resulted in

harm or risk of imminent harm); Matter of Theresa J., supra, 158 A.D.2d 364 (prima facie case established where mother admitted to cocaine use "once in a while," including night before giving birth, and expressed willingness to enter treatment program); Matter of Stefanel Tyesha C., 157 A.D.2d 322, 556 N.Y.S.2d 280 (1st Dept. 1990), appeal withdrawn 76 N.Y.2d 983, 563 N.Y.S.2d 771 (allegations facially sufficient where mother admitted using drugs during pregnancy, which suggested repeated use that would continue after birth); Matter of Heidi S., 151 A.D.2d 578, 542 N.Y.S.2d 686 (2d Dept. 1989) (mother told caseworker she and father had "been doing drugs"); but see Matter of Anastasia G., 52 A.D.3d 830, 861 N.Y.S.2d 126 (2d Dept. 2008) (no prima facie case where father admitted using drugs but there was no evidence as to type of drugs used or duration or frequency of use, or whether father was ever under influence of drugs while in presence of child).

Allegations can be too stale. Matter of Xavier G., 19 Misc.3d 1113(A), 859 N.Y.S.2d 907 (Fam. Ct., Kings Co., 2008) (petitioner given opportunity to serve and file amended petition particularizing drug abuse that was contemporaneous with filing where allegations rested upon past deficiencies that pre-dated birth of child).

An attempt to obtain evidence of substance abuse contained in the records of a federally funded treatment program is governed by 42 USC §290ee-3 and §290dd-3, which are confidentiality provisions permitting disclosure on consent, or by court order upon a finding of good cause. Compare Matter of Commissioner of Social Services v. David R.S., 55 N.Y.2d 588, 451 N.Y.S.2d 1 (1982) (no disclosure) and Matter of Stephen F., 118 Misc.2d 655, 460 N.Y.S.2d 856 (Fam. Ct., Queens Co., 1982) with Matter of Lameek L., 226 A.D.2d 464, 640 N.Y.S.2d 600 (2d Dept. 1996) (admission of records in termination of parental rights proceeding did not violate federal or state statutes); Matter of Maximo M., 186 Misc.2d 266, 710 N.Y.S.2d 864 (Fam. Ct., Kings Co., 2000) (disclosure ordered, but court must examine records in camera to determine which portions are relevant and limit disclosure to persons whose need provides basis for disclosure); Susan W. v. Ronald A., 147 Misc.2d 669, 558 N.Y.S.2d 813 (Sup. Ct., Queens Co., 1990) (motion denied with leave to renew upon notice to custodian of records) and Matter of Doe Children, 93 Misc.2d 479, 402 N.Y.S.2d 958 (Fam. Ct.,

Queens Co., 1978). See also Mental Hygiene Law §23.05; Matter of W.H., S.H., 158 Misc.2d 788, 602 N.Y.S.2d 70 (Fam. Ct., Rockland Co., 1993) (MHL §23.05[a] prohibits disclosure at fact-finding stage).

**b. Prenatal Substance Abuse**

If the mother repeatedly misused drugs or alcohol during pregnancy, a finding could be made with respect to any children already residing with her. See Matter of Nassau County Department of Social Services o/b/o Dante M. v. Denise J., 87 N.Y.2d 73, 637 N.Y.S.2d 666 (1995).

However, when there are no other children, evidence of prenatal drug or alcohol abuse does not necessarily establish neglect since it may not be clear that the mother continued to use drugs or alcohol after giving birth, and thereby placed the newborn at risk. An admission would constitute sufficient evidence if it is clear, or can be inferred, that the respondent continued to use drugs after the birth of the child. See, e.g., Matter of Benicio H., 115 A.D.3d 857 (2d Dept. 2014) (prima facie case established "[u]nder the particular circumstances" including mother's use of cocaine during pregnancy and positive drug test within a few months after child's birth); Matter of Theresa J., supra, 158 A.D.2d 364; Matter of Heidi S., supra, 151 A.D.2d 578. Cf. In re Jocelyn S., 30 A.D.3d 273, 817 N.Y.S.2d 43 (1st Dept. 2006); Matter of Stefanel Tyesha C., supra, 157 A.D.2d 322.

Continuing misuse may be established circumstantially. In Matter of John Children, 61 Misc.2d 347, 306 N.Y.S.2d 797 (Fam. Ct., N.Y. Co., 1969), the court found that the respondents were addicted to heroin, and that the "mother must have been regularly using large quantities of heroin ... for considerable time before her confinement." See also In re Yisrael R., 145 A.D.3d 491 (1st Dept. 2016) (neglect found where mother had positive toxicology results for phencyclidine on two dates in last trimester of pregnancy; had prior history of PCP abuse; and failed to successfully complete drug treatment and, after positive tests, maintained that treatment would benefit her because she did not have drug problem); In re Chastity O.C., 136 A.D.3d 407 (1st Dept. 2016) (neglect finding based on drug use during pregnancy and positive test for marijuana at time of birth, and substantial history of drug and alcohol abuse,

including at least one occasion when respondent overdosed and blacked out; participation in therapy with mother was not substitute for drug treatment program); In re Dahan S., 128 A.D.3d 453 (1st Dept. 2015) (neglect found where respondent, who had tested positive for cocaine in 2011 and completed drug treatment program in early 2012, tested positive for marijuana in May 2012 while four months pregnant with subject child); Matter of Keira O., 44 A.D.3d 668, 844 N.Y.S.2d 344 (2d Dept. 2007) (July 2006 petition improperly dismissed where it alleged that mother had been using heroin since she was 14 years old and had admitted using heroin in April 2006 during last trimester of pregnancy; that, on three occasions in May and June 2006, mother, who was enrolled in treatment program, had tested positive for cocaine and opiates; that, in October 2003, family court had found that mother neglected subject child's older sibling based, in part, on mother's drug use; and that order of disposition entered in prior matter directed mother to enter and complete drug treatment program and a proceeding to terminate mother's parental rights to older child was pending). Similarly, evidence of Fetal Alcohol Syndrome and the mother's alcoholism can raise an inference of ongoing alcohol abuse. Matter of Milland, 146 Misc.2d 1, 548 N.Y.S.2d 995 (Fam. Ct., N.Y. Co., 1989) (alcohol abuse throughout pregnancy makes it reasonable to infer continued misuse).

However, without other evidence supporting an inference of continued misuse, evidence that a baby's urine has tested positive for cocaine is not sufficient. See Matter of Nassau County Department of Social Services o/b/o Dante M. v. Denise J., supra, 87 N.Y.2d 73; Matter of Kayla M., 22 A.D.3d 856, 802 N.Y.S.2d 755 (2d Dept. 2005) (neglect found where child tested positive for cocaine at birth and had low birth weight, mother admitted using cocaine during pregnancy and was not taking part in substance abuse program, her parental rights had been terminated, in some cases voluntarily, with respect to six of her seven other children, and she failed to testify); Matter of William N., 40 Misc.3d 602 (Fam. Ct., Kings Co., 2013) (no finding where mother admitted using marijuana while pregnant and tested positive at time of birth, but child tested negative, and, except for slightly elevated bilirubin count which had no connection to marijuana use, was healthy newborn).

The petitioner can also proceed on a theory that the mother's prenatal use of drugs resulted in impairment of the child's physical condition. The petitioner has "the burden of proving such actual impairment by a preponderance of the evidence and may introduce hospital records to show what, if any, detrimental effects were suffered by the children as a result of their mothers' use of drugs during pregnancy." Matter of Stefanel Tyesha G., supra, 157 A.D.2d at 329. See also Matter of John, supra, 61 Misc.2d at 353-356. Thus, evidence that a baby's urine has tested positive for drugs is not enough without evidence linking drug use to physical impairment. Matter of Nassau County Department of Social Services o/b/o Dante M. v. Denise J., supra, 87 N.Y.2d 73; see also In re Omarion T., 128 A.D.3d 583 (1st Dept. 2015) (neglect found where child tested positive for marijuana at birth, and mother admitted she had used marijuana once during pregnancy with child and failed to obtain prenatal care or plan for child's future); Matter of Smith Jones Children, 34 Misc.3d 1226(A), 950 N.Y.S.2d 491 (Fam. Ct., Kings Co., 2012) (no neglect where baby not born prematurely, did not have low birth weight or withdrawal symptoms, and did not require specialized level of care).

Where impairment can be established, another person may be found guilty of neglect for failing to take action to protect the fetus. See Matter of Jamoori L., 116 A.D.3d 1046 (2d Dept. 2014) (father knew mother was abusing marijuana during pregnancy and failed to act); Matter of Stevie R., 97 A.D.3d 906 (3d Dept. 2012) (father lived with mother during pregnancy and knew or should have known about drug use and discontinuance of prenatal care and failed to ensure she did not abuse drugs during pregnancy); Matter of Niviya K., 89 A.D.3d 1027 (2d Dept. 2011) (father knew of drug use and failed to ensure that mother did not abuse drugs); Matter of K. Children, 253 A.D.2d 764, 677 N.Y.S.2d 379 (2d Dept. 1998) (father failed to take action when mother abused drugs).

In Matter of Unborn Child, 179 Misc.2d 1, 683 N.Y.S.2d 366 (Fam. Ct., Suffolk Co., 1998), the court made a derivative neglect finding with respect to an unborn child where the mother's parental rights to four children had been terminated and she had surrendered a fifth child. The court issued a dispositional order which, inter alia, directed agency to provide supervision and services to protect unborn child from

mother's chronic drug use (in Matter of Mitchell, 267 A.D.2d 459, 700 N.Y.S.2d 852 [2d Dept. 1999], the agency's appeal from the dispositional order was dismissed as moot after the child was born). But see In re H., 74 P.3d 494 (Colorado Ct. App., 2003), cert denied 2003 WL 21783235 (under state statute, unborn child cannot be subject of neglect proceeding).

In Matter of V.R., 6 Misc.3d 1003(A), 800 N.Y.S.2d 358 (Fam. Ct., Monroe Co., 2004), the court, noting that the mother was a "homeless, unemployed drug abuser and prostitute" with seven children, by seven different fathers, who had been removed from her custody, ordered the mother to conceive no more children. The court set forth a four-prong test tailored to meet "strict scrutiny" standards, and noted, inter alia, that it was taking "an appropriate, logical step to prevent the harmful consequences of drug abuse for any potential future child," that "[r]estraining orders and injunctions are granted in the law when irreparable harm is to be avoided," and that there is no fundamental right to give birth to children under conditions that require society to raise them. The same court issued a similar order in another case, along with an order directing the father not to father more children. Matter of Bobbijean P., 2 Misc3d 1011(A), 784 N.Y.S.2d 919 (Fam. Ct., Monroe Co., 2004), motion to vacate denied 6 Misc.3d 1012(A), 800 N.Y.S.2d 342. However, the Fourth Department reversed, concluding that the family court had no authority to issue the FCA §1057 supervision order against the mother. Matter of Bobbijean P., 46 A.D.3d 12, 842 N.Y.S.2d 826 (4th Dept. 2007), lv denied, 9 N.Y.3d 816; see also Matter of Steven D., 55 Misc.3d 295 (Fam. Ct., Monroe Co., 2016) (in neglect case brought against "a drug-addicted admitted prostitute, mother of 4 children, none of whom are in her care," court orders agency to direct respondent to listen to birth control counseling county must provide pursuant to SSL § 131-e; see ob-gyn for whatever confidential advice doctor may provide regarding birth control, sexually transmitted diseases, and anything else; see regular medical doctor regarding health generally, including addiction; and take whatever steps she chooses to avoid conceiving another child until she gets subject child safely back in her care).

**c. HIV/AIDS Confidentiality Law**

Disclosure of HIV-related information is governed by Article Twenty-Seven-F of the Public Health Law. Protected information may be disclosed to, among others, “an authorized agency in connection with foster care or adoption of a child," PHL §2782(1)(h), “any person to whom disclosure is ordered by a court ... pursuant to [PHL §2785],” PHL §2782(1)(k), "an attorney appointed to represent a minor pursuant to the social services law or the family court act, with respect to confidential HIV related information relating to the minor and for the purpose of representing the minor." PHL §2782(1)(p).

Re-disclosure is prohibited except as authorized by Article Twenty-Seven-F, but that prohibition does not apply to the protected individual, a person authorized by law to consent to health care for the protected individual, or a caretaker who acquired the information pursuant to SSL §372(8) or §373-a. PHL §2782(3). In addition, the agency may re-disclose pursuant to SSL §372(8) (relative or other legally responsible person assuming care pursuant to FCA §1017 or §1055 entitled to information provided to foster parents) or §373-a (child's "medical histories" must be provided to foster and adoptive parents). PHL §2782(1)(h). The child’s lawyer may re-disclose with the permission of a child who has the capacity to consent, and, when the child lacks capacity, may re-disclose for the purpose of "representing" the child. PHL §2782(1)(p).

When a child is discharged from care, the comprehensive health history of the child must be provided to the parent or guardian, except that HIV-related information may not be disclosed without a written release from the child if he/she has the capacity to consent. 18 NYCRR §357.3(b)(5).

**7. Other Misconduct**

Family Court Act §1012(f)(i)(B), sometimes referred to as the “catch-all” provision [Matter of Lonell J., 242 A.D.2d 58, 673 N.Y.S.2d 116 (1st Dept. 1998)], defines as neglect the respondent’s failure to exercise a minimum degree of care in providing proper supervision or guardianship by committing "any other acts of a similarly serious nature [that is, similar to inflicting or allowing the infliction of harm or the risk of harm, or misusing alcohol or drugs] requiring the aid of the court ...." See In re Michele S., 157 A.D.3d 551 (1st Dept. 2018), lv denied 2018 WL 1957523 (statute not unconstitutionally

vague).

Although not always explicitly, courts have relied on this provision when concluding that a parent has used poor judgment in leaving children alone or unsupervised.

Compare 18 NYCRR §443.3(b)(3) (foster parent must execute agreement stipulating that he/she will "never leave children under the age of [ten] years alone without competent adult supervision, nor children above that age except as might reasonably be done by a prudent parent in the case of his or her own children"); Matter of Taylor P., 163 A.D.3d 678, 76 N.Y.S.3d 838 (2d Dept. 2018) (neglect found where father committed acts of domestic violence in child's presence and then left child, approximately one year old, alone in apartment for at least thirty minutes); Matter of Leah VV., 157 A.D.3d 1066 (3d Dept. 2018), appeal dism'd 2018 WL 1957564 (neglect found where mother left sixteen-month-old child in bath in about four inches of water for one to ten minutes to attend to three-year-old child in kitchen located approximately fifty-five feet away and out of view of bathtub; reasonably prudent person would not leave child unattended in these circumstances for appreciable amount of time); Matter of Dennis X.G.D.V., 158 A.D.3d 712 (2d Dept. 2017) (Special Immigrant Juvenile-related finding of neglect where mother often left eight-year-old child home alone at night in neighborhood where he had encountered gang violence); Matter of Stead v. Joyce, 147 A.D.3d 1317 (4th Dept. 2017) (evidence at fair hearing established that petitioner took children to eat lunch at fast-food restaurant that had play area, one child left play area and remained out of petitioner's sight for several minutes, and petitioner was unaware child had wandered away until restaurant employee returned child); In re Daleena T., 145 A.D.3d 628 (1st Dept. 2016) (neglect found where father left infant in stroller on street unattended for half an hour); In re Star Marie S., 129 A.D.3d 499 (1st Dept. 2015) (finding made where respondent left toddler sleeping in room at homeless shelter and had violent altercation with pregnant neighbor and was arrested); Matter of Cheryl Z., 119 A.D.3d 1109 (3d Dept. 2014) (indicated report upheld where two-year-old grandchild wandered away from front yard near highway when petitioner briefly went inside home and left child alone, and petitioner knew of previous occasion when child

wandered away from supervising adult); Matter of Evelyn R., 117 A.D.3d 957 (2d Dept. 2014) (no meritorious defense in motion to vacate where father did not deny he failed to contact police when fifteen-year-old ran away); Matter of Archer v. Carrion, 117 A.D.3d 733 (2d Dept. 2014) (indicated report upheld where, in daycare center where petitioner worked, gates separating backyard from front yard lacked proper latches and fencing around backyard was partially collapsed and had holes in it, and, due to petitioner's inattentiveness, child wandered onto busy four-lane road); Matter of Raven B., 115 A.D.3d 1276 (4th Dept. 2014) (neglect found where, while mother napped, three and a half year-old left apartment and wandered streets unsupervised until discovered by neighbor; mother knew child could traverse stairway and access porch, and knew, or should have known, that child could open unlocked doors); Matter of Hannah L., 113 A.D.3d 1137 (4th Dept. 2014) (neglect found where respondents routinely allowed ten-year-old to supervise and discipline six younger siblings in respondents' absence); Matter of Bryce S., 105 A.D.3d 746 (2d Dept. 2013) (mother exhibited erratic behavior, which included leaving sixteen-year-old child home alone while she traveled to North Carolina with other child without knowing how long she would be away, without a place to stay, and without sufficient funds to return home); Matter of Kayden H., 104 A.D.3d 764 (2d Dept. 2013) (sufficient evidence of neglect where grandmother left seven-month-old child in kitchen sink with water running, and asked child's mother, who was in living room about ten feet away, to watch child while grandmother went into next room, and, moments later, water temperature spiked - the building had history of fluctuating water temperatures - and child sustained burns); In re Tayshawn S., 95 A.D.3d 468 (1st Dept. 2012) (neglect found where respondent left six-year-old alone in apartment after midnight for two to three hours and lied to police by telling them child was staying with respondent's mother); In re Lah De W., 78 A.D.3d 523, 911 N.Y.S.2d 327 (1st Dept. 2010) (finding made where, on several occasions, mother left children, ages fourteen, eleven, six, five and one, unattended at shelter where family resided and permitted them to ride subway late at night without her); Matter of Serenity P., 74 A.D.3d 1855, 902 N.Y.S.2d 741 (4th Dept. 2010) (neglect found where mother left children, ages one and three, unattended in vehicle for at least fifteen minutes while she went grocery

shopping); Matter of Susan XX., 74 A.D.3d 1543, 902 N.Y.S.2d 245 (3rd Dept. 2010) (mother neglected infants by leaving them in parked, but idling, automobile while she went into nearby store for at least twenty minutes; "[l]eaving two small children alone and unattended for a substantial period of time in a locked car with its engine running is so inherently dangerous that it necessarily carries with it a significant risk that the children might come to some harm"); In re Sasha B., 73 A.D.3d 587, 905 N.Y.S.2d 563 (1st Dept. 2010) (finding made where respondent exited subway train and left child, who was asleep, alone on train; risk of imminent harm established by proof that respondent had left child alone on train twice before and by reasonable inference, based on fact that child returned to school after incident, that she was unable to navigate way home); Matter of Celine O., 68 A.D.3d 1373, 890 N.Y.S.2d 722 (3rd Dept. 2009) (while children were in school, respondent left with boyfriend and drove with him out of state without notifying children or arranging for their care, and children had little food in house); Matter of Febles v. Dutchess County Department of Social Services, 68 A.D.3d 993, 891 N.Y.S.2d 441 (2d Dept. 2009) (mother's request to amend and seal report denied where mother left child alone in running vehicle for approximately 20 minutes while she went into store); Matter of Sophia P., 66 A.D.3d 908, 886 N.Y.S.2d 637 (2d Dept. 2009) (neglect found where mother locked child in room while she left home to go to bank); Matter of Bailee M.-B., 44 A.D.3d 1049, 844 N.Y.S.2d 412 (2d Dept. 2007) (neglect found where mother left children alone in unsafe and unsanitary motel room, with several dangerous instrumentalities exposed, including prescription medication and steak knife, and oldest child, who was fourteen and had substance abuse problems and mental illnesses of which mother was aware, was incapable of providing proper supervision to six siblings); Matter of D.-C., 40 A.D.3d 853, 837 N.Y.S.2d 170 (2d Dept. 2007) (father neglected three-week-old child when he left child unattended on November evening in unheated vehicle for approximately fifteen minutes, even if, as father claimed, he was outside car and baby was completely covered with blanket; "These circumstances depict lack of attention to the special needs of a newborn and, standing alone, constitute neglect"); Matter of Stephen C. v. Johnson, 39 A.D.3d 932, 834 N.Y.S.2d 346 (3rd Dept. 2007) (neglect established

where father left children, ages five and six, alone in unlocked house with no way of communicating with him for at least thirty minutes before caseworkers saw father and contractor walking about fifty yards from house); Matter of Debraun M., 34 A.D.3d 587, 826 N.Y.S.2d 76 (2d Dept. 2006), appeal dism'd 8 N.Y.3d 955 (neglect found where respondent left eight-year-old child alone in airport); Matter of Christian EE., 33 A.D.3d 1106, 822 N.Y.S.2d 666 (3rd Dept. 2006) (neglect found where respondent, inter alia, regularly left eleven-year-old alone for five to six hours in motel); Matter of Antonio NN., 28 A.D.3d 826, 812 N.Y.S.2d 176 (3rd Dept. 2006) (neglect found where mother allowed children, ages two and five, to play outside while mother was in basement doing laundry, and two-year-old ran into street and was struck by vehicle); Brauch v. Johnson, 19 A.D.3d 799, 796 N.Y.S.2d 452 (3rd Dept. 2005) (removal proper where foster parent, inter alia, put children down for naps and went down to basement without activating baby monitors even though one child had hyperactivity disorder and was in "constant motion"); In re Jonathan B., 270 A.D.2d 42, 703 N.Y.S.2d 482 (1st Dept. 2000) (two-year-old developmentally delayed child wandering alone on street); Ribya BB. v. Wing, 243 A.D.2d 1013, 663 N.Y.S.2d 417 (3rd Dept. 1997) (six-year-old autistic child left alone); Matter of James HH., 234 A.D.2d 783, 652 N.Y.S.2d 633 (3rd Dept. 1996), lv denied 89 N.Y.2d 812, 657 N.Y.S.2d 405 (1997) (infant left alone in room with kerosene heater); Matter of Ishmael D., 202 A.D.2d 1030, 610 N.Y.S.2d 115 (4th Dept. 1994) (sick sixteen-month-old and six-month-old children left asleep in overheated and dirty apartment); Matter of Kevin J., 162 A.D.2d 1034, 557 N.Y.S.2d 228 (4th Dept. 1990) (children, ages six, eight and six months, left alone from at least 12:10 a.m. to 12:46 a.m.); Stoops v. Perales, 117 A.D.2d 7, 501 N.Y.S.2d 489 (3rd Dept. 1986) (one-year-old left with six-year-old); Matter of Eric M., 90 A.D.2d 717, 455 N.Y.S.2d 780 (1st Dept. 1982) (children, ages six, four, and four months, left alone with access to matches and started fire two months after similar incident); Matter of E.N., 56 Misc.3d 1209(A) (Fam. Ct., Orange Co., 2017) (neglect found where mother left infant alone in vehicle for over twenty minutes until child was retrieved while mother was inside store; although evidence did not establish exact temperature inside vehicle, it was warm summer day) and Matter of D.M., 1 Misc.3d 903(A), 781 N.Y.S.2d 623 (Fam. Ct.,

Monroe Co., 2003) (children sixteen and younger left alone for a day)
with Matter of Javan W., 124 A.D.3d 1091 (3d Dept. 2015) (no neglect where respondent failed to exercise minimum degree of care when she left thirteen-year-old in charge of children who were nine and three but also gave thirteen-year-old permission to sleep over at friend's house; and police responding to shots fired into respondent's home arrived and found two youngest children alone at approximately 3:00 a.m. and thirteen-year-old returned shortly thereafter, but officer's testimony that children were visibly upset was too vague and it was unclear if children were upset because respondent left them alone or because of shooting); In re Clydeane C., 74 A.D.3d 486, 902 N.Y.S.2d 80 (1st Dept. 2010) (no neglect where respondent may have left eleven-year-old child alone for approximately two hours); Matter of John O., 42 A.D.3d 687, 839 N.Y.S.2d 605 (3rd Dept. 2007) (no neglect where fourteen-year-old child was left home alone with fifteen-year-old child, and grandmother, who lived in apartment upstairs, was home); Matter of Matthew WW. v. Johnson, 20 A.D.3d 669, 779 N.Y.S.2d 594 (3rd Dept. 2005) (no neglect where father allowed four-year-old children to walk to mother's house since he believed their sixteen-year-old half-sister was there); In re the P. Children, supra, 272 A.D.2d 211 (no neglect where mother left nine-year-old with two-year-old and returned to find two-year-old alone and trying to climb over window guard at open window); Matter of Janique Y., 256 A.D.2d 1053, 682 N.Y.S.2d 706 (3rd Dept. 1998) (mother, who suffered from sickle cell anemia and took morphine which made her drowsy, was asleep when children began playing with cigarette lighter and youngest child's shirt caught fire, but had explained dangers of playing with fire and had network of caregivers, including family members in her building, to assist her); Matter of Charles N., 83 A.D.2d 947, 443 N.Y.S.2d 11 (2d Dept. 1981) (no neglect where fifteen-month-old entered bathroom while parents were watching television, climbed into sink, turned on hot water and was burned); Matter of L.B.C., 29 Misc.3d 1205(A), 2010 WL 3835618 (Fam. Ct., Bronx Co., 2010) (no imminent risk where mother left infant alone in bathtub for about ten minutes but was about nine steps away and looked in on child once and kept tabs on her by speaking to her) and Augustine v. Berger, 88 Misc.2d 487, 388 N.Y.S.2d 537 (Sup. Ct., Suffolk Co.,

1976) (no neglect where mother left one-year-old and two-year-old alone for half an hour on one occasion).

Exposing a child to an individual who poses a risk of harm also can lead to a neglect finding against the individual who poses the risk, or against the person who exposed the child to that individual - potentially this also could result in a finding that the respondent “allowed” abuse or neglect - and a finding also is possible when the respondent leaves the child in the custody of an individual whose ability to care for the child is unknown.

Compare Matter of Lillian SS., 146 A.D.3d 1088 (3d Dept. 2017), lv denied 29 N.Y.3d 992 (finding against mother upheld where father denied prior sex offenses and failed to complete sex offender treatment, and mother refused to believe father had committed offenses - see decision below in father’s appeal from fact-finding); In re Cashmere S., 125 A.D.3d 543 (1st Dept. 2015) (although ten years had passed between father’s sex offense conviction and filing of neglect petition, he failed to demonstrate that proclivity for abusing children had changed); Matter of Lillian SS., 118 A.D.3d 1079 (3d Dept. 2014), appeal dism’d 24 N.Y.3d 936 (finding made against father where he did not complete sex offender treatment ordered after first conviction or while in prison for second conviction, and expert concluded that he should not be allowed to be with children unsupervised, including mother's son; given mother’ failure to acknowledge danger posed by father, expert concluded that she was inappropriate supervisor absent willingness to recognize father’s conduct and receive training); In re Lakshmi G., 110 A.D.3d 640 (1st Dept. 2013) (neglect found where father left child in care of mother, who admitted to him that she was experiencing hallucinations and hearing voices for more than a year, and mother later threw seven-week old child to pavement after asserting that she saw a light in the sky and a chariot with a figure, which were signs from God, and that child was “possessed”); In re Nia J., 107 A.D.3d 566 (1st Dept. 2013) (neglect found where respondent failed to promptly pick children up from shelter caseworker who had agreed to watch them, and failed to contact caseworker for approximately three hours to determine whether caseworker could continue caring for them or that their needs were being met); Matter of Darcy Y., 103 A.D.3d 955 (3d Dept.

2013) (neglect found where father knew or should have known mother was intoxicated and allowed children to ride in car operated by mother; although father contended that he spent little time with mother during approximately seven hours they were at wedding reception, did not "directly" see her consume alcohol, did not smell alcohol on her breath and did not see evidence of intoxication, police officer detected "strong odor" of alcohol in mother's vehicle and she admitted she had blood alcohol level of .10%); Matter of Olivia C. v. Scott E., 97 A.D.3d 910 (3d Dept. 2012) (neglect finding against mother where she allowed contact between respondent and children despite awareness of pending criminal charge that respondent sexually abused biological daughter from another relationship); Matter of Makayla L.P., 92 A.D.3d 1248 (4th Dept. 2012), appeal dism'd 19 N.Y.3d 886 (neglect found where father's attempted first degree sodomy conviction and risk level two sex offender designation arose from incident involving abuse of twelve-year-old mentally challenged stepsister, and, following release from prison, father did not voluntarily engage in or complete sex offender treatment, and father had other convictions and orders of protection issued against him); Matter of Destiny EE., 90 A.D.3d 1437 (3d Dept. 2011) (neglect finding upheld where respondent's husband had sexually abused child in his care and there was evidence that he posed actual danger to children and that respondent knew of danger); In re Anastacia L., 90 A.D.3d 452 (1st Dept. 2011) (neglect found where respondent, a level-three sex offender who committed sex offenses against children, failed to complete sex offender treatment even though treatment was recommended in connection with prior neglect proceeding, and saw children without supervision); Matter of Nicholas M., 89 A.D.3d 1087 (2d Dept. 2011) (neglect found where respondent left child alone with child's mother while she was intoxicated and permitted mother to push child in stroller at night while she was intoxicated in area without sidewalks); Matter of Tyler MM., 82 A.D.3d 1374 (3d Dept. 2011) (mother improperly allowed teenage daughter to sleep in same bed with her boyfriend, and rationalized that, since daughter responded in negative when asked whether she was having sex, there was nothing amiss); Matter of Thomas M., 81 A.D.3d 1108 (3d Dept. 2011) (neglect found where mother, who knew father had alcohol problem and had engaged in domestic violence, and had placed

hands around child's throat on more than one occasion, permitted father to be in home); Matter of Shannen AA., 80 A.D.3d 906, 914 N.Y.S.2d 768 (3d Dept. 2011) (mother sent child to live with aunt and uncle without visiting home or investigating living conditions, and when she learned that aunt took child to motel because aunt did not feel safe with uncle, mother did not attempt to find child or call police and believed it was child's responsibility to call her; mother also permitted child to have unsupervised overnight visits with her boyfriend, which resulted in pregnancy); Matter of Mitchell WW., 74 A.D.3d 1409, 903 N.Y.S.2d 553 (3rd Dept. 2010) (finding made where father permitted friend with alcohol addiction to stay at home, often overnight, for purpose of treating his alcohol problem); Matter of Richard S., 72 A.D.3d 1133, 898 N.Y.S.2d 688 (3rd Dept. 2010) (neglect found where respondent, who violated probation by having contact with daughter and son and by having pornography in household, refused to undergo sex offender evaluation after conviction for secretly photographing girls undressing in locker room of high school where he worked); New Jersey DYFS v. I.H.C., 2 A.3d 1138 (N.J. Super. Ct., App. Div., 2010) (evidence of acts of domestic violence committed by father against ex-wife admissible to show he presented risk of harm to children, and evidence of mother's denials regarding father's history of violence established that she presented risk of harm); Matter of Suzanne RR., 48 A.D.3d 920, 852 N.Y.S.2d 414 (3rd Dept. 2008) (neglect found where respondent knew paramour had abused or neglected his four children, who had been freed for adoption, but continued to reside with paramour with intention to raise child with him); Matter of James C., 47 A.D.3d 712, 848 N.Y.S.2d 896 (2d Dept. 2008) (neglect found where father allowed mother to have overnight visits despite awareness of her history of drug and alcohol abuse and despite having been admonished by petitioner that mother was not proper caretaker, and was aware that order of custody and visitation limited mother to only five consecutive hours of supervised visitation); Matter of Paul U., 12 A.D.3d 969, 785 N.Y.S.2d 767 (3rd Dept. 2004) (neglect found where mother tried to place child in custody of violent father); In re Nicole B., 308 A.D.2d 412, 764 N.Y.S.2d 451 (1st Dept. 2003) (mother allowed father into home in violation of order of protection, would allow him to live there unless prohibited by order, and believed father's claims of

innocence rather than child's substantiated sexual abuse allegations); Matter of Christina P., 275 A.D.2d 783, 713 N.Y.S.2d 743 (2d Dept. 2000) (sexual abuse occurred after mother allowed paramour and six-year-old daughter to sleep in bed alone over period of several months while mother slept on couch in living room); Matter of Brittany B., 275 A.D.2d 986, 715 N.Y.S.2d 197 (4th Dept. 2000) (mother refused to believe child's sexual abuse allegations and declined fiancé's offer to leave home); In re Michael S., 265 A.D.2d 161, 695 N.Y.S.2d 566 (1st Dept. 1999) (father left child with his sister without inquiring as to her ability to support child, left no address or phone number, could not be contacted at work, initiated contact with child on few occasions, failed to inform sister or child's mother when he was incarcerated, and contributed only $30 to support of child); Matter of Victor V., 261 A.D.2d 479, 690 N.Y.S.2d 129 (2d Dept. 1999), lv denied 93 N.Y.2d 819, 697 N.Y.S.2d 566 (1999) (mother provided no information about her whereabouts or when she would return, and had never before met or spoken to one of the caretakers); Matter of Kyle T., 255 A.D.2d 945, 680 N.Y.S.2d 376 (4th Dept. 1998), lv denied 93 N.Y.2d 801, 687 N.Y.S.2d 625 (1999) (mother left child at homeless shelter for two weeks without leaving address or phone number); Matter of Colleen CC., 232 A.D.2d 787, 648 N.Y.S.2d 754 (3rd Dept. 1996) (mother left children with father despite report of sex abuse); Matter of Synovia G., 163 A.D.2d 257, 558 N.Y.S.2d 539 (1st Dept. 1990) (children left with mother, who was a crack addict); Matter of Iris C., 46 A.D.2d 910, 363 N.Y.S.2d 7 (2d Dept. 1974) (three-year-old allowed to play outside after dark with teenage children) and Matter of Jerry M., 78 Misc.2d 407, 357 N.Y.S.2d 354 (Fam. Ct., N.Y. Co., 1974) (use of "shady characters and barflies" as babysitters) with

Matter of Afton C., 17 N.Y.3d 1 (2011) (evidence against respondent parents insufficient where father pleaded guilty to sex crimes involving person less than fifteen years of age and was adjudicated level three sex offender under Sex Offender Registration Act, but was never ordered to attend sex offender treatment and returned home to wife and five children ages four to fourteen; where sex offenders are convicted of abusing young relatives or other children in their care, crimes may establish neglect, and court's conclusion might have been different if father had refused sex offender

treatment after being directed to participate in it, or if other evidence showed treatment was necessary); Matter of Abbygail H.M.G., 129 A.D.3d 722 (2d Dept. 2015) (violation of order of protection, standing alone, insufficient to establish neglect without proof of impairment or imminent danger thereof); Matter of Hannah U., 97 A.D.3d 908 (3d Dept. 2012) (insufficient evidence of neglect where respondent father was registered risk level II sex offender who had successfully completed sex offender treatment programs more than two years prior to filing of petition and there was no evidence that he committed sex-related offenses since prior offense); Matter of Christopher T. v. Jessica U., 90 A.D.3d 1092 (3d Dept. 2011) (court erred in precluding contact between two and three-year-old children and mother's boyfriend where conviction for sex with underage teenager was relevant factor, but there was no proof he posed threat to children and no evidence that sex offender treatment was recommended or ordered); In re Dontay B., 81 A.D.3d 539 (1st Dept. 2011) (no neglect by mother where she failed to remove child from home after father struck child in face while mother was at work, and father maintained that he hit child by accident and there was no evidence that father had previously hit child or otherwise physically harmed him; agency implicitly recognized mother's ability to care for child when it agreed to parole him to her care on condition that father not be in home); Matter of Natiello v. Carrion, 73 A.D.3d 1070, 905 N.Y.S.2d 605 (2d Dept. 2010) (no neglect where thirteen-year-old autistic child sustained minor bruises and scratches when mother left him in care of grandmother, who allowed him to roughhouse with younger half-brother, and child had history of minor self-inflicted injuries while under adult supervision) and Matter of Kayla F., 39 A.D.3d 983, 833 N.Y.S.2d 742 (3rd Dept. 2007) (no neglect where mother permitted children to be alone with father, who was on probation in connection with conviction for secretly photographing girls undressing in locker room of high school where he worked; father was allowed to have contact with his own children and mother had to reason to see him as threat).

A finding has been made where the child was allowed to witness sexual activity [Matter of Amber DD., 26 A.D.3d 689, 809 N.Y.S.2d 657 (3rd Dept. 2006) (mother engaged in sexual activity in living room, where children interrupted her); Matter of

Peter C., 278 A.D.2d 911, 718 N.Y.S.2d 551 (4th Dept. 2000)]; where the respondents covered up neglect [Matter of John Z., 13 Misc.3d 1231(A), 831 N.Y.S.2d 353 (Fam. Ct., Monroe Co., 2006)]; where the respondent committed anti-social acts such as harassment, criminal solicitation and public intoxication [Matter of Michael J. M., 61 A.D.2d 1056, 402 N.Y.S.2d 473 (3rd Dept. 1978)]; where the respondent attempted suicide with the children present in the home [Matter of Andrew S., 43 A.D.3d 1170, 842 N.Y.S.2d 579 (2d Dept. 2007]; where the respondent verbally abused a child [In re Michele S., 157 A.D.3d 551 (1st Dept. 2018), lv denied 2018 WL 1957523 (1st Dept. 2018) (neglect found where mother told child she wished child had not been born and that it cost too much money to get child out of foster care); Matter of Lindsey BB., 70 A.D.3d 1205, 896 N.Y.S.2d 186 (3rd Dept. 2010) (father threatened to remove daughter's possessions from her bedroom as punishment, forcing her to hide prized possessions at school out of fear that father would destroy them); Matter of Kathleen K., 66 A.D.3d 683, 886 N.Y.S.2d 497 (2d Dept. 2009), lv denied 13 N.Y.3d 713 (father subjected daughters to repeated and extreme verbal abuse which upset them to point where each expressed desire to run away from home); In re Patrice S., 63 A.D.3d 620, 882 N.Y.S.2d 409 (1st Dept. 2009) (mother stated that she could not handle daughter and suggested, in front of daughter, that others should take her if they thought they could do better job of raising her); Matter of Christina "BB", 291 A.D.2d 738, 738 N.Y.S.2d 135 (3rd Dept. 2002), lv denied 98 N.Y.2d 605, 746 N.Y.S.2d 456 (2002) (respondent barraged children with horrible threats of physical violence); Matter of Evelyn "X", 290 A.D.2d 817, 736 N.Y.S.2d 549 (3rd Dept. 2002), appeal dism'd 98 N.Y.2d 666, 746 N.Y.S.2d 452 (2002) (father repeatedly called child various vulgar names); Matter of Leif Z., 105 Misc.2d 973, 431 N.Y.S.2d 290 (Fam. Ct., Richmond Co., 1980) (stepmother called child's dead mother a "whore")]; and where the respondent repeatedly made false reports of abuse or neglect [Matter of Jessica G., 151 Misc.2d 694, 573 N.Y.S.2d 251 (Fam. Ct., Richmond Co., 1991); but see DRL §240(1)(a) ("if a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to

that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child")].

**8. Abandonment**

Under FCA §1012(f)(ii), a finding of neglect may be made when the child has been "abandoned, in accordance with the definition and other criteria set forth in [Social Services Law §384-b(5)], by his parents or other person legally responsible for his care." Social Services Law §384-b(5) in turn provides that a child is abandoned "if [the] parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency."

Social Services Law §384-b(4)(b), which requires a six-month period of abandonment in termination of parental rights cases, is not cited in FCA §1012(f)(ii), but it does appear that an abandonment of six months is required. Matter of Shaniqua L., 193 A.D.2d 370, 597 N.Y.S.2d 301 (1st Dept. 1993) (six-month period required); but see Matter of Marlon S., 131 Misc.2d 248, 499 N.Y.S.2d 850 (Fam. Ct., Monroe Co., 1986) (where petition sought neglect finding, rather than termination of parental rights, six-month statutory time frame did not apply and "the trier of fact, upon an in-depth and objective critique of the totality of the evidence, must assess respondent's acts in measuring her intent at the applicable times in question"). An "abandonment" of less than six months might support a finding under the "catch-all" provision in §1012(f)(i)(B).

**9. Mental Illness**

A neglect charge may be based upon evidence of a respondent's mental illness. However, proof of mental illness will not support a finding by itself: the evidence must

establish a causal connection between the respondent's condition, and actual or potential harm to the child. Compare Matter of Trina Marie H., 48 N.Y.2d 742, 422 N.Y.S.2d 659 (1979) (mother's mental retardation may affect ability to protect child from husband); Matter of Ruth Joanna O.O., 149 A.D.3d 32 (1st Dept. 2017), aff'd 30 N.Y.3d 985 (finding based on mother's mental illness and failure to comply with medication regimen and follow-up treatment, and impairment of ability to care for infant daughter; neglect may be found where parent lacked insight into effect of untreated mental illness even in absence of actual harm to child); In re Cerenithy Ecksthine B., 92 A.D.3d 417 (1st Dept. 2012) (evaluating psychologist concluded that complex and potentially taxing situations could send respondent into relapse fraught with psychological disorganization and gross lapses in impulse control, which was a scenario that could be very grave for young children who are unable to defend against or report mistreatment); In re Noah Jeremiah J., 81 A.D.3d 37, 914 N.Y.S.2d 105 (1st Dept. 2010) (neglect found where mother gave birth to son who was HIV positive and required antiretroviral medication administered on strict schedule, and mother's mental illness and failure to administer her medication created substantial probability that child would not be adequately cared for and, specifically, would not receive HIV medication); In re Jonathan S., 79 A.D.3d 539, 912 N.Y.S.2d 215 (1st Dept. 2010) (neglect found where mother was diagnosed with major depressive disorder and told hospital personnel she was experiencing increasingly persistent thoughts of killing herself and drowning children in bathtub; expert testimony regarding how mental illness affected ability to care for children was not required); In re Kayla W., 47 A.D.3d 571, 850 N.Y.S.2d 86 (1st Dept. 2008) (in three to two decision, court upholds finding of neglect based on expert testimony regarding mother's volatile and violent behavior on several dates; dissenting judges assert that neither doctor observed respondent for extended period and they met and evaluated her just a week after she had experienced the trauma of a miscarriage, that one doctor initially diagnosed physical exhaustion, that there is lack of proof concerning impact of incident on child, and that respondent testified that if given medication, and if referred to therapy once a week, she would cooperate); Matter of Senator NN., 10 A.D.3d 683, 783 N.Y.S.2d 105 (3rd Dept. 2004) (finding made where child overheard mother's

screaming and boisterous behavior, and adopted her obsession regarding alleged malpractice that ruined child's ears); Matter of Krewsean S., supra, 273 A.D.2d 393 (2d Dept. 2000) (mother suffered from severe depressive disorder which caused her to be unfocused, unable to keep appointments, and incapable of adhering to a regular schedule); Matter of Dakota K., 267 A.D.2d 1054, 701 N.Y.S.2d 573 (4th Dept. 1999) (finding made where mother was diagnosed with personality disorder involving inability to cope with anger and frustration, and, on one occasion, mother became angry and slammed child's carriage, with child in it, into side of house); Matter of Catherine K., 224 A.D.2d 880, 638 N.Y.S.2d 245 (3rd Dept. 1996) (in reaction to delusions, including fear that unknown persons posed sexual threat to child, respondent treated child like a baby and deprived her of contact with other children); Matter of Anna X., 148 A.D.2d 890, 539 N.Y.S.2d 524 (3rd Dept. 1989), lv denied 74 N.Y.2d 608, 545 N.Y.S.2d 104 (respondent with full scale IQ of sixty posed danger to newborn) and Matter of Moises D., 128 A.D.2d 775, 513 N.Y.S.2d 476 (2d Dept. 1987) (schizophrenia might result in psychotic behavior if father is under stress)

with Matter of Joseph A., 91 A.D.3d 638 (2d Dept. 2012) (no causal connection between mother's mental illness and actual or potential harm where children consistently did well in school, had near-perfect attendance records, were up-to-date on immunizations, and were healthy); Matter of Xavier G., 19 Misc.3d 1113(A), 859 N.Y.S.2d 907 (Fam. Ct., Kings Co., 2008) (court conditionally dismissed mental illness allegations, and granted petitioner a period of seven days within which to serve and file amended petition that particularized mental illness that was contemporaneous with filing, where allegations rested upon past deficiencies that pre-dated birth of child); Matter of Erica M., 206 A.D.2d 876, 615 N.Y.S.2d 152 (4th Dept. 1994) (evidence insufficient where respondent was "deteriorating," needed an in-patient examination, and was manic-depressive); Matter of Johanna W., _Misc.3d_, 2018 WL 4016925 (Fam. Ct., Kings Co., 2018) (mother's summary judgment motion granted where neither psychiatric diagnosis, nor prior psychiatric hospitalizations, established connection between her condition and actual or potential harm to children; court notes that mother's family was available to care for children when she was unable to, and that it is

rare to see parents suffering from mental illness charged in family court who are not indigent and have family and financial supports); Matter of Divayah D., 60 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2018) (no imminent risk where mother had been diagnosed as bipolar and schizophrenic and been hospitalized multiple times, but there was no evidence that child was harmed or at risk of harm, or that mother's condition had impact on ability to manage day-to-day life and care for child; court notes that as long as parent has sufficient family support or makes adequate arrangements for child care before entering hospital, child is protected, and that because these illnesses cut across race and class lines, it seems likely that lack of adequate community-based, low cost mental health treatment, and overuse of large public hospitals for treatment, leads to increased and at times unnecessary mental illness charges against indigent parents of color, while middle and upper class families have these illnesses managed in the privacy of their home with family members caring for children and quality mental health practitioners treating parent without government involvement); Matter of G.A.B., 4 Misc.3d 1011(A), 791 N.Y.S.2d 869 (Fam. Ct., Suffolk Co., 2004) (evidence insufficient where mother had not been hospitalized or had any symptoms for more than a year) and Matter of Loraida G., 183 Misc.2d 126, 701 N.Y.S.2d 822 (Fam. Ct., Schenectady Co., 1999) (mild mental retardation insufficient to establish neglect where mother demonstrated ability to provide adequate care, supportive services were in place and no risk to child was shown).

If such a causal connection is established, a finding can be made even when there is no proof that the respondent suffers from a definitive mental illness. Compare Matter of Ashantae H., 146 A.D.3d 453 (1st Dept. 2017) (finding made where mother engaged in pattern of aggressive and uncontrollable behavior in children's presence - repeated arguments with neighbor and anger issues with building staff and tenants, and shelter had to call authorities and warn mother repeatedly - which caused children to be upset and fearful); Matter of Kiemiyah M., 137 A.D.3d 1279 (2d Dept. 2016) (despite lack of official diagnosis, neglect finding made where there was evidence of paranoia and delusions at homeless shelter that resulted in mother going to hospital, and mother failed to obtain treatment); Matter of Bryce S., 105 A.D.3d 746 (2d Dept. 2013) (mother

exhibited erratic behavior, which included telling sixteen-year-old before she left child alone at home that she had to leave because “the government was going to kill her”; stating that people were out to kill her, that her sister-in-law had put out a hit on her, that she was on "the terrorist list," that the CIA was out to get her, and that she was “tired of living this life where people are constantly after her”; and spending money on motels because of fear of neighborhood in which she lived and belief that “someone’s out to get her”); In re Caress S., 250 A.D.2d 490, 673 N.Y.S.2d 123 (1st Dept. 1998) (finding made where respondent’s behavior was bizarre, she had an erratic temperament and she was reluctant to get treatment) and Matter of Barbara S., 244 A.D.2d 556, 664 N.Y.S.2d 475 (2d Dept. 1997) with Matter of Jessica YY., 258 A.D.2d 743, 685 N.Y.S.2d 489 (3rd Dept. 1999) (although there was testimony that mother had a violent temper and a low tolerance for frustration, there was no evidence that she was physically violent with anyone).

If the respondent's condition can be controlled through certain treatment and/or medication, a finding cannot be made unless the respondent fails to accept such treatment or take such medication. Compare Matter of Jesse DD., 223 A.D.2d 929, 636 N.Y.S.2d 925 (3rd Dept. 1996), lv denied 88 N.Y.2d 803, 645 N.Y.S.2d 445 (given respondent's failure to accept treatment, finding was justified despite evidence that she posed no immediate threat to children at time of each mental health evaluation) and Matter of Madeline R., 214 A.D.2d 445, 625 N.Y.S.2d 512 (1st Dept. 1995) with Matter of Nialani T., 125 A.D.3d 672 (2d Dept. 2015) (no neglect where mother stopped taking medication after discharge from hospital but evidence did not establish mother was unable to care for child during that period, doctor’s testimony that “it would be difficult” for the mother to care for others without medication, given that “she was not functioning at optimum,” did not suffice, and there was insufficient evidence that mother’s discontinuance of medication constituted unequivocal refusal to comply with treatment); Matter of the H. Children, 156 A.D.2d 520, 548 N.Y.S.2d 586 (2d Dept. 1989) (no neglect where mother's condition had been properly diagnosed and treated).

In Matter of M.S., 49 Misc.3d 1214(A) (Fam. Ct., Kings Co., 2015), the court dismissed neglect charges while holding that a finding may not be based on the

respondent's intellectual deficits that interfere with the ability to provide adequate care, unless the court considers whether supportive services are available to compensate for the deficiencies.

Even if a child is not in the respondent's custody when a neglect proceeding is commenced, or, for that matter, has never lived with the respondent, charges may be brought when the respondent would pose a risk to the child. See FCA §1013(d) (for purposes of jurisdiction, child need not be in respondent's care at time of filing); FCA §1031(d) (agency may commence proceeding even where child is already in agency's care if return would result in imminent danger of abuse or neglect); Matter of Patrick D., 93 A.D.2d 836, 461 N.Y.S.2d 56 (2d Dept. 1983). Thus, evidence that the respondent's mental illness would result in inadequate care is sufficient even if the respondent has not yet committed any acts which would constitute neglect. See Matter of Aaron MM., 152 A.D.2d 817, 544 N.Y.S.2d 29 (3rd Dept. 1989); Matter of Anna X., supra, 148 A.D.2d 890; Matter of Alfredo HH., 84 A.D.2d 860, 444 N.Y.S.2d 758 (3rd Dept. 1981).

The respondent's mental illness will often be proved by way of expert testimony, but expert testimony is not always required. Matter of Ruth Joanna O.O., 149 A.D.3d 32 (no medical expert needed to determine child had been placed at risk); In re Briana S., 91 A.D.3d 447 (1st Dept. 2012) (expert testimony as to how mother's mental illness affected ability to care for children not required). There is some controversy concerning the use at a fact-finding hearing of an evaluation prepared after charges were brought. Compare Commissioner of Social Services o/b/o Verena E., 163 Misc.2d 464, 621 N.Y.S.2d 436 (Fam. Ct., Kings Co., 1994) with Matter of Emily R., 5 Misc.3d 1020(A), 799 N.Y.S.2d 159 (Fam. Ct., Suffolk Co.) (since mental illness charges placed respondent's condition at issue, examination ordered pursuant to CPLR §3121[a]); Matter of Tyler S., 192 Misc.2d 728, 748 N.Y.S.2d 215 (Fam. Ct., Kings Co., 2002) (examination ordered pursuant to FCA §§ 251 and 1038(d), and CPLR §3121(a)); Matter of M. Children, 171 Misc.2d 838, 656 N.Y.S.2d 119 (Fam. Ct., Kings Co., 1997) and Matter of R./G. Children, 165 Misc.2d 518, 632 N.Y.S.2d 917 (Fam. Ct., Kings Co., 1994) (while expressing no opinion as to whether results of exam would be admissible, court notes that sex abuse respondent's mental condition is in controversy and that

exam could lead to the discovery of admissible evidence).

**10. Domestic Violence**

Also potentially falling within the scope of the "catch-all" provision in FCA §1012(f)(i)(B) which covers "any other acts of a similarly serious nature requiring the aid of the court" is exposure of the child to acts of domestic violence and/or related conduct which causes emotional or mental impairment or the risk thereof. Compare In re Angie G., 111 A.D.3d 404 (1st Dept. 2013) (finding made where father engaged in pattern of domestic violence against mother, given proximity of children's bedroom to incidents in kitchen of shelter where family resided); Matter of Kadyn J., 109 A.D.3d 1158 (4th Dept. 2013) (although children slept through incident, they were traumatized by seeing blood and being forced to clean it up); Matter of Kaleb U., 77 A.D.3d 1097, 908 N.Y.S.2d 773 (3rd Dept. 2010) (intoxicated mother punched fiance in course of argument, causing him to suffer bloody nose and black eye, and, although child did not witness incident, he was aware of it and was frightened) and Matter of Imman H., 49 A.D.3d 879, 854 N.Y.S.2d 517 (2d Dept. 2008) (neglect found where parents made child witness abuse of her uncle and participate in disposal of uncle's dismembered corpse) with Matter of Daniel GG., 17 A.D.3d 722, 792 N.Y.S.2d 710 (3rd Dept. 2005) (child was in another room playing video games or watching television when incident occurred and there was no evidence of any impact, emotional or physical, on child); Matter of Larry O., 13 A.D.3d 633, 787 N.Y.S.2d 119 (2d Dept. 2004) (no finding where child was asleep in bedroom during parents' altercation in kitchen); Matter of Anthony "PP", 291 A.D.2d 687, 737 N.Y.S.2d 430 (3rd Dept. 2002) (screaming and hollering not neglect) and Matter of Emily "PP", 274 A.D.2d 681, 710 N.Y.S.2d 476 (3rd Dept. 2000) (no neglect where child was absent during assault and mother accidentally broke car window when father tried to leave with child).

Such conduct also can lead to a criminal charge of endangering the welfare of a child. See People v. Johnson, 95 N.Y.2d 368, 718 N.Y.S.2d 1 (2000).

In Nicholson v. Scoppetta, 3 N.Y.3d 357, 787 N.Y.S.2d 196 (2004), the Court of Appeals held that although expert testimony is not required, it cannot be presumed that a child exposed to domestic violence is neglected. There "must be a link or causal

connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment," and "it may be difficult for an agency to show, absent expert testimony, that there is imminent risk to a child's emotional state, and that any impairment of emotional health is 'clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.'" Expert testimony arguably would be most important when the child is an infant.

Compare In re Emily S., 146 A.D.3d 599 (1st Dept. 2017) (child's statement that she was "scared" and would hide during incidents established imminent risk); In re Tavene H., 139 A.D.3d 633 (1st Dept. 2016) (imminent risk where autistic daughter cried when she saw stepfather hit mother, and autistic son "did not like it" when mother and stepfather argued); In re Serenity H., 132 A.D.3d 508 (1st Dept. 2015) (child's statement that she was frightened and saddened by altercation proved imminent risk of emotional and physical impairment, and officer's testimony that child "looked like she had been crying" and was "breathing very, very quickly, rapidly" proved that child's emotional well-being had been impaired by witnessing altercation); In re Madison M., 123 A.D.3d 616 (1st Dept. 2014) (observations that children were crying established actual or risk of impairment); In re Krystopher D'A., 121 A.D.3d 484 (1st Dept. 2014) (child's statement that he was frightened demonstrated imminent risk of emotional and physical impairment); In re Nia J., 107 A.D.3d 566 (1st Dept. 2013) (after mother engaged in altercation with man in front of children while she held two knives, security guard's observations that children were sitting on bed and "appeared to be crying," and that one child "was shaking from the situation," established emotional impairment); Matter of Ajay Sumert D., 87 A.D.3d 637 (2d Dept. 2011) (neglect found where father, inter alia, hit mother in face and two and one-half year-old child was present and began crying); Matter of Paige AA., 85 A.D.3d 1213 (3d Dept. 2011), lv denied 17 N.Y.3d 708 (neglect found where father choked mother during physical altercation and stated that he "wanted [her] dead" while child was standing behind him, "[s]creaming [and] crying"); Matter of Kaleb U., 77 A.D.3d 1097 (mother became intoxicated and started hanging out window of moving vehicle, singing and yelling at cars and smacking fiance "really

hard" in face when he tried to pull her back in vehicle, with child present in back seat and upset by mother's behavior; child's health was already compromised, "a special vulnerability to be taken into account in the assessment of the requisite minimum degree of care"); Matter of Shiree G., 74 A.D.3d 1416, 902 N.Y.S.2d 703 (3rd Dept. 2010) (as result of physical altercation during which respondent grabbed mother, who was pregnant, and hurled her into wall while attempting to wrestle cell phone away from her, and mother grabbed knife and held it to respondent's throat, children were visibly terrified, screaming, hysterically crying and reaching for mother); Matter of Lindsey BB., 70 A.D.3d 1205, 896 N.Y.S.2d 186 (3rd Dept. 2010) (child was so disturbed that she called 911 to report incident); Matter of Michael WW., 20 A.D.3d 609, 798 N.Y.S.2d 222 (3rd Dept. 2005) (finding made where children were frightened and upset by incident); Matter of Karissa N.N., supra, 19 A.D.3d 766 (finding made where child cried and shook); In re Taisha R., 14 A.D.3d 410, 788 N.Y.S.2d 357 (1st Dept. 2005) (father's repeated acts of domestic violence caused child to experience fear and distress); Matter of Shaylee R., 13 A.D.3d 1106, 787 N.Y.S.2d 553 (4th Dept. 2004) (five-year-old subject child told investigator that she was scared because her mother and father had been fighting in her presence); Matter of Christine II., 13 A.D.3d 922 (testimony of several witnesses established that conduct caused child extreme emotional distress) and Matter of Richard T., 12 A.D.3d 986, 785 N.Y.S.2d 169 (3rd Dept. 2004) (younger child was visibly crying and shaking, and other child also was visibly upset)

with Matter of S.S., 855 A.2d 8 (NJ Super. Ct., 2004) (no neglect without evidence that infant held by mother during incidents suffered emotional harm; court cannot take judicial notice of causal relationship between witnessing domestic violence and emotional distress, given controversy regarding that issue); Matter of Harper F.-L., 125 A.D.3d 652 (2d Dept. 2015) (incidents occurring when child was five and seven months old and was nearby with aunt were either outside presence of child or did not harm or create imminent danger of harm to child); Matter of Chaim R., 94 A.D.3d 1127 (2d Dept. 2012) (no finding where mother and father engaged in argument that led to physical altercation, but there was no evidence of impairment or risk of impairment to children, ages seven months and two years); In re Eustace B., 76 A.D.3d 428, 906 N.Y.S.2d 229

(1st Dept. 2010) (proof that child felt "scared and nervous" during isolated domestic violence incident was insufficient); Matter of Carolina K., 55 Misc.3d 352 (Fam. Ct., Kings Co., 2016) (child's expression of upset or fear of parent, even for a few days after family dispute, not sufficient); Matter of A.D., 52 Misc.3d 1211(A) (Fam. Ct., Kings Co., 2016) (no neglect found where, on one or more occasions, father yelled at mother and called her names in presence of children, and seven-year-old did not like it and covered her and eighteen-month-old sister's ears to block out yelling); Matter of M.S., 49 Misc.3d 1214(A) (Fam. Ct., Kings Co., 2015) (evidence that children were crying did not justify finding of "substantially diminished psychological or intellectual functioning") and Matter of Bryan L., 149 Misc.2d 899, 565 N.Y.S.2d 969 (Fam. Ct., Rockland Co., 1991) (insufficient evidence of risk of mental or emotional impairment where domestic violence occurred on several occasions in presence of fourteen-month-old child).

Domestic violence also can cause or pose a risk of physical injury to the child, and in that event would not only fit within the "catch-all," but also could constitute a failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship, "by unreasonably inflicting ... harm, or a substantial risk thereof ...." FCA §1012(f)(i)(B). See, e.g., In re Anonymous v. Poole, 162 A.D.3d 598 (1st Dept. 2018) (mother's request to amend Central Register report properly denied where, during domestic dispute, she drove with one-year-old child being held by father on top of vehicle's hood; generally, evaluation of reasonableness of driver's reaction to emergency situation will be left to trier of fact); In re Andru G., 156 A.D.3d 456 (1st Dept. 2017) (one incident during custody exchange involving mother and father pulling on child sufficient for finding); In re Isabella S., 154 A.D.3d 606 (1st Dept. 2017) (finding made where father choked mother a couple of feet away from where four-month-old child was sleeping in crib); In re Madison H., 99 A.D.3d 475 (1st Dept. 2012) (evidence sufficient where father swung child in his arm during argument with mother); In re Sabrina D., 88 A.D.3d 502 (1st Dept. 2011) (neglect found where respondent threw glass vase or fish bowl at child's mother, causing it to shatter near child); Matter of Ajay Sumert D., 87 A.D.3d 637 (neglect found where father, inter alia, punched mother in

stomach while she was holding two and a half year-old child, cursed at her, and threatened to kill her if she did not leave apartment); Matter of Ndeye D., 85 A.D.3d 1026 (2d Dept. 2011) (neglect found where father, while holding child, hit, shoved, and screamed at mother, and father had previously committed acts of domestic violence against mother, some of which also occurred in presence of child); Matter of Kiara C., 85 A.D.3d 1025 (2d Dept. 2011) (neglect found where father slapped mother while she was holding child in arms and there was pattern of domestic violence and intimidation perpetrated by father); Matter of Kaleb U., 77 A.D.3d 1097 (mother and fiance choked each other and child attempted to intervene, telling fiance to "[l]et go of my mommy"); In re Gianna C-E, 77 A.D.3d 408, 907 N.Y.S.2d 754 (1st Dept. 2010) (neglect found where father punched mother repeatedly in face and head while she was three feet away from infant, who was receiving oxygen while lying on bed and connected to heart monitor after being released from hospital); Matter of Briana F., 69 A.D.3d 718, 892 N.Y.S.2d 526 (2d Dept. 2010), lv denied 14 N.Y.3d 707 (neglect found where father demanded that other child get him knife and then held knife to mother's throat in child's presence); Matter of June MM., 62 A.D.3d 1216, 879 N.Y.S.2d 633 (3rd Dept. 2009) (finding upheld where mother admitted she engaged in numerous physical altercations with father, and was arrested for violating orders of protection issued against father and pleaded guilty to violations, while pregnant); In re Elijah C., 49 A.D.3d 340, 852 N.Y.S.2d 764 (1st Dept. 2008) (where "much larger" father abused legally blind mother, no expert or medical testimony required to show impairment or risk thereof); Matter of Karissa N.N., 19 A.D.3d 766, 796 N.Y.S.2d 442 (3rd Dept. 2005) (intoxicated respondent became belligerent, swore loudly, and repeatedly attempted to wrest child from grandmother); Matter of Jason T., 2 A.D.3d 738, 768 N.Y.S.2d 662 (2d Dept. 2003) (neglect found where father threw vase during dispute and accidentally struck child); Matter of Tami G., 209 A.D.2d 869, 619 N.Y.S.2d 222 (3rd Dept. 1994), lv denied 85 N.Y.2d 804, 626 N.Y.S.2d 755 (1995) (child who became involved in fray was placed in imminent and substantial risk of physical impairment); Matter of Shanaye C., 2 Misc.3d 887, 774 N.Y.S.2d 622 (Fam. Ct., Kings Co., 2003) (father created risk of physical abuse and of protracted impairment of emotional health when he strangled to

death the mother and grandmother); but see Matter of Bryan L., 149 Misc.2d 899 (insufficient evidence that acts in presence of fourteen-month-old child were by their very nature so explosive and uncontrollable as to place child at imminent risk of physical impairment).

Conduct designed to alienate the child from another parent or interfere with custody or visitation also may constitute neglect. See Matter of Salvatore M., 104 A.D.3d 769 (2d Dept. 2013), lv denied 21 N.Y.3d 858 (neglect found where mother made repeated unfounded allegations of abuse against father, withheld visitation from him; and "relentlessly" scrutinized child for signs of abuse during supervised visits); In re Lanelis V., 102 A.D.3d 441 (1st Dept. 2013) (neglect found where mother subjected child to multiple, repeated, and intrusive physical and mental health examinations based on her unfounded suspicions that father had sexually abused child); Matter of Kevin M. H., 76 A.D.3d 1015, 908 N.Y.S.2d 109 (2d Dept. 2010), lv denied 15 N.Y.3d 715 (neglect found where father verbally abused mother in presence of children, made numerous unfounded allegations of maltreatment against mother and her boyfriend, and engaged in other obstreperous behavior); Matter of Morgan P., 60 A.D.3d 1362, 875 N.Y.S.2d 401 (4th Dept. 2009) (neglect found where mother "coached" child to make unfounded sexual abuse allegations that resulted in repeated and unnecessary medical examinations and extreme anxiety); Matter of Daniel D., 57 A.D.3d 444, 870 N.Y.S.2d 287 (1st Dept. 2008), appeal dism'd 12 N.Y.3d 906 (neglect found where respondent encouraged children to make false allegations against grandfather that resulted in repeated and distressing interviews and medical examinations, and tried to alienate children from mother); Matter of Christine II., 13 A.D.3d 922, 787 N.Y.S.2d 182 (3rd Dept. 2004) (mother, inter alia, encouraged child to fabricate abuse allegations, prompted child to steal from father, and intimidated child into providing evidence favorable to mother); In re Dyandria D., 303 A.D.2d 233, 757 N.Y.S.2d 12 (1st Dept. 2003) (mother demonized father and fabricated sexual abuse charges); Matter of Caleb L., 287 A.D.2d 831, 732 N.Y.S.2d 112 (3rd Dept. 2001) (mother pressured child to denounce father and live with her); Matter of Catherine "KK", 280 A.D.2d 732, 720 N.Y.S.2d 238 (3rd Dept. 2001) (finding made based on respondent's misconduct during

exchanges of child for purpose of visitation); cf. Heather B. v. Daniel B., 125 A.D.3d 1157 (3d Dept. 2015) (mother confronted son with things he had said to his attorney); but see Matter of Julius G., 28 Misc.3d 1227(A), 2010 WL 3368656 (Fam. Ct., Queens Co., 2010) (despite assertion by petitioner's expert that "psychological abuse" occurs when child is coached to make false allegations, there was insufficient evidence that child's condition had been impaired or was in imminent danger of becoming impaired).

Considerable controversy has been generated by the filing of neglect charges against the victim of domestic violence. In a class action brought on behalf of battered women and their children, a federal court granted a preliminary injunction to ensure that battered mothers do not face prosecution or removal of their children solely because they are battered. Nicholson v. Scoppetta, 203 F.Supp.2d 153 (S.D.N.Y., 2002). The Second Circuit certified three questions to the New York State Court of Appeals (344 F.3d 154), which accepted the certification. Subsequently, in Nicholson v. Scoppetta, 3 N.Y.3d 357, the Court of Appeals set forth the appropriate analysis, asserting that courts must evaluate behavior objectively and consider whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing," a standard that "takes into account the special vulnerabilities of the child, even where general physical health is not implicated"; that the considerations include "risks attendant to leaving, if the batterer has threatened to kill [the mother] if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation"; that the mother must consider the "frequency of the violence, and the resources and options available to her"; that neglect might be found where, for example, "the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet nonetheless allowed him several times to return to her home, and lacked awareness of any impact of the violence on the children," "or where the children were exposed to regular and continuous extremely violent conduct between their parents, several times requiring official intervention, and where caseworkers testified to the fear and distress the

children were experiencing as a result of their long exposure to the violence."

Compare Matter of Elizabeth B., 149 A.D.3d 8 (3d Dept. 2017) (Central Register report amended to be unfounded and expunged where paramour, while driving on high speed road, punched mother in arm and leg while three-week-old child was in backseat, and next day struck mother in back as she held child, causing her to fall, and then choked and threatened her while incident was observed by eldest child; mother delayed in reporting incidents, refused counseling services, and requested modification of order of protection to permit communication with paramour and possible future reunification, but, after gaining access to vehicle, she took two older children to relatives and brought youngest with her to report incidents, and planned strategy to report abuse while protecting own safety and that of children, and possibility of future reunification was mere conjecture and mother would require paramour's completion of court-ordered requirements such as anger management and domestic violence awareness classes); In re Dominique A., 307 A.D.2d 888, 764 N.Y.S.2d 37 (1st Dept. 2003) (no neglect where mother may not have used best judgment in failing to renew protective order or change locks, but she took measures to shield children from witnessing abuse); In re H./R. Children, 302 A.D.2d 288, 756 N.Y.S.2d 166 (1st Dept. 2003) (no finding as to mother where father was abusive in front of child, but details regarding prior incidents were not developed in record);

with Matter of Anthony FF., 105 A.D.3d 1273 (3d Dept. 2013) (although husband instigated incident, mother wielded baseball bat and chased husband and struck him with bat, and, following incident, she minimized husband's conduct, attempted to have charges against him dropped, placed partial blame for incident on children, permitted husband in her residence and around at least one child in violation of court order, and instructed child to keep husband's presence a secret); In re Aaron C., 105 A.D.3d 548 (1st Dept. 2013) (neglect found where, despite evidence of father's mental illness and aggressive and violent behavior towards mother and others, mother refused domestic violence services and allowed father to have primary decision-making responsibility for child's care); Matter of Joseph RR., 86 A.D.3d 723 (3d Dept. 2011) (finding made where, despite her live-in boyfriend's volatile behavior toward her children, mother

declined petitioner's offer to participate in preventative services, and, when questioned as to whether she would choose relationship with children or boyfriend, hesitated, and then responded, "my children, I guess"); Matter of Celine O., 68 A.D.3d 1373, 890 N.Y.S.2d 722 (3rd Dept. 2009) (finding made where abuse occurred outside children's immediate presence, but they could hear "major arguments" and "serious yelling," saw respondent's injuries and feared for her safety; after one incident, respondent promised officer she would take children to shelter, but instead returned home to boyfriend and he again physically assaulted her); Matter of Xavier II., 58 A.D.3d 898, 872 N.Y.S.2d 561 (3rd Dept. 2009) (neglect finding made against mother where her paramour flew into rage in parking lot, grabbed mother by neck, pulled her hair and covered her mouth while she was holding two and a half year-old child, and, when police arrived, yelled and cursed at them, dented police car door and was subdued only by use of pepper spray; paramour asserted that mother had tried to stab him and burned him with iron; petitioner obtained no-contact order of protection for mother and children against paramour but mother had it modified to prohibit only harassment so that she and children could be with him; parents did not avail themselves of domestic violence counseling; mother punched paramour in face while pregnant; they resumed living together; and mother had paramour arrested, but then obtained his release from jail two days later by signing written statement that her written complaint had been false); Matter of Angelique L., 42 A.D.3d 569, 840 N.Y.S.2d 811 (2d Dept. 2007) (neglect found where mother minimized effects of incident, was unaware of impact of violence on children and reluctant to have companion leave home, and children were extremely vulnerable, with one child having just been released from psychiatric facility and other child having been subject of sexual abuse by mother's former boyfriend); Matter of Michael G., 300 A.D.2d 1144, 752 N.Y.S.2d 772 (4th Dept. 2002) (finding against mother where she failed to follow through in obtaining permanent order of protection, did not seek refuge for herself or child, and continued to see father and expose child to him); Matter of James "MM", 294 A.D.2d 630, 740 N.Y.S.2d 730 (3rd Dept. 2002) (finding made against mother where she was abused by paramour on several occasions, the children were aware of the abuse and had reason to be afraid of the

paramour, the mother repeatedly let the paramour return to the home, and the mother denigrated the father in the children's presence); Matter of Carlos M., 293 A.D.2d 617, 741 N.Y.S.2d 82 (2d Dept. 2002) (finding made against mother where there was a twelve-year history of violence which often required the intervention of the children).

Finally, even in the absence of any evidence of emotional harm, the murder of a parent constitutes neglect because it deprives a child of one parent by death and the other by incarceration, and causes emotional scars. See Matter of Scott "JJ", 280 A.D.2d 4, 720 N.Y.S.2d 616 (3rd Dept. 2001).

### B. Physical Abuse

Along with sexual abuse cases, physical abuse cases are among the most complex and hotly-litigated proceedings brought under Article Ten. First of all, since criminal charges are often brought when child abuse has occurred, it is less likely in abuse cases that the respondent will make an admission and cooperate with the child protective agency. And, even putting aside the potential penal consequences of an admission in Family Court, the result of an abuse finding may well be a long-term loss of custody, and even visitation rights.

Quite apart from the stakes involved, many abuse cases involve injuries to infants which occurred behind closed doors and in the absence of any witnesses who are willing and able to testify. In such cases, there will often be a "battle of the experts," with the petitioner offering expert testimony suggesting that the injuries were the result of abuse, and the respondent offering expert testimony in support of an innocent explanation. Thus, it is important for the child's lawyer to be familiar not only with the causes of action discussed in the sections which follow, but also with the medical issues which are often pivotal at trial.

#### 1. Inflicting Physical Injury

The definition of an "Abused child" in FCA §1012(e) includes:

> ... a child less than eighteen years of age whose parent or other person legally responsible for his care (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical ... health or protracted loss or impairment of the function of any bodily

organ ....

This language is virtually identical to that contained in the definition of "[s]erious physical injury" in Penal Law §10.00(10).

Thus, an abuse finding can be made when the respondent intentionally, recklessly, or negligently inflicts an injury upon the child which results in death, or which is permanent or life-threatening. Certain types of injuries, such as burns and fractures, usually rise to the level of abuse. See, e.g., In re Quincy Y., 276 A.D.2d 419, 714 N.Y.S.2d 293 (1st Dept. 2000) (child sustained second degree burn, which became infected due to lack of treatment); Matter of William W., 125 A.D.2d 976, 510 N.Y.S.2d 370 (4th Dept. 1986) (serious burns on the child's hand and wrist); Matter of Marcus S., 123 A.D.2d 702, 507 N.Y.S.2d 68 (2d Dept. 1986) (diastatic skull fracture and bilateral subdural hematoma); but see Matter of Julia BB., 42 A.D.3d 208, 837 N.Y.S.2d 398 (3rd Dept. 2007) (no proof that fractures and other injuries were life-threatening or resulted in protracted impairment of health). Of course, the cumulative effect of individually less serious injuries could support an abuse finding. See In re Nayomi M., 147 A.D.3d 413 (1st Dept. 2017) (abuse found where oldest boy was slammed against wall and choked, and injuries included bruises, scratches, black eyes, and black and blue marks on back of neck and ears indicative of strangulation).

**2. Proving Physical Abuse**

In order to prove that a child's physical injuries come within the statutory definition of abuse, it will often be necessary to present the testimony of an expert medical witness. Although hospital records and other medical reports may adequately describe an injury in terminology understandable to a lay person, in many cases only live testimony can establish the existence of a substantial and long-term physical impairment or a risk to the child's life. The petitioner often has no eyewitness testimony or other direct evidence of abuse, and the respondent will often claim, or merely speculate, that the injuries were accidentally caused. In such cases, an expert may be called to identify the apparent cause of the injury, or to endorse, reject or otherwise comment on a particular explanation offered by a respondent. For instance, burn experts are often called as witnesses to state whether certain injuries appear to have

been caused by a bathing or cooking accident, as alleged by a respondent, or by deliberate immersion in hot water, as alleged by the petitioner. Similarly, an orthopedist might be needed to explain why the apparent cause of a particular fracture was a traumatic blow or a violent twisting motion, or to evaluate a respondent's claim that the injury was the result of an accidental fall.

### 3. Creating A Risk Of Physical Injury

Even when no injury has occurred, or the injury does not satisfy the definition in FCA §1012(e)(i), an abuse finding can be made when the respondent engages in behavior which is so inherently dangerous that it "creates ... a substantial risk of physical injury" that would constitute abuse. FCA §1012(e)(ii). See, e.g., In re Nayomi M., 147 A.D.3d 413 (1st Dept. 2017) (abuse found where respondent hit three oldest children, used pressure points, made them stand on one leg and then kicked leg out, and locked them in room for extended periods without access to bathroom, and two oldest girls witnessed abuse of oldest boy, who was slammed against wall and choked); Matter of Seth G., 50 A.D.3d 1530, 856 N.Y.S.2d 778 (4th Dept. 2008) (abuse found where testimony of physician established that three-year-old child sustained extensive bruising on face and shoulder as result of pressure placed around neck for at least thirty seconds); Matter of Anesia E., 23 A.D.3d 465, 805 N.Y.S.2d 623 (2d Dept. 2005), aff'g 4 Misc.3d 1006(A), 791 N.Y.S.2d 867 (Fam. Ct., Kings Co., 2004) (family court found abuse where infant was victim of Munchausen's Syndrome by Proxy; Second Department affirms, noting that mother brought child to hospital repeatedly claiming child was experiencing seizures, but doctor concluded that child was not suffering from seizures and opined that unnecessary tests and medications were potentially harmful); In re Rashard D., 15 A.D.3d 209, 791 N.Y.S.2d 1 (1st Dept. 2005) (abuse found where, at mother's direction, child robbed bank by handing note to teller who was a party to the robbery); Matter of Marissa "RR", 266 A.D.2d 751, 698 N.Y.S.2d 745 (3rd Dept. 1999) (abuse found where father, who knew child was in apartment, fired shotgun through door in attempt to kill mother); Matter of Asia B., 266 A.D.2d 537, 699 N.Y.S.2d 88 (2d Dept..1999) (abuse found where respondent disciplined child by repeatedly hitting her on head); Matter of Venus S., 228 A.D.2d 314, 644 N.Y.S.2d 223 (1st Dept. 1996)

(abuse found where respondent beat child with belt); Matter of Michael S., 224 A.D.2d 277, 638 N.Y.S.2d 23 (1st Dept. 1996) (abuse found where child had numerous burns and abrasions, at different stages of healing, on various parts of his body); Matter of C. Children, 183 A.D.2d 767, 583 N.Y.S.2d 499 (2d Dept. 1992) (respondent hit child near eye with belt buckle); Matter of Chianti FF., 163 A.D.2d 688, 558 N.Y.S.2d 707 (3rd Dept. l990) (respondent shoved fourteen-month-old child at child's mother); Matter of Sellnow v. Perales, 158 A.D.2d 846, 551 N.Y.S.2d 428 (3rd Dept. 1990) (stepmother struck child on face with long fingernails); Matter of Victoria SS., 108 A.D.2d 989, 485 N.Y.S.2d 384 (3rd Dept. l985) (father held daughter's head under water in bathtub); Matter of Shaniyah W., 11 Misc.3d 1089(A), 2006 WL 1152603 (Fam. Ct., Queens Co., 2006) (child abused where respondents delayed in seeking treatment for injury to small intestine); Matter of Shanaye C., 2 Misc.3d 887, 774 N.Y.S.2d 622 (Fam. Ct., Kings Co., 2004) (father created risk of physical harm when he strangled to death the mother and the grandmother); Matter of Sarah K., 142 Misc.2d 275, 536 N.Y.S.2d 958 (Fam. Ct., Monroe Co., 1989) (mother held one child by the waist outside a window and threatened to drop him, and allowed another child to stand nude and unattended in the snow). But see In re Joshua R., 47 A.D.3d 465, 849 N.Y.S.2d 246 (1st Dept. 2008), lv denied, 11 N.Y.3d 703 (neglect, but not abuse, found where, following nine-year-old child's refusal to eat food, father shoved food into his mouth, causing him to vomit, and slapped him in face with such force as to bloody nose and bruise left eye); Matter of Reannie D., 2 A.D.3d 851, 770 N.Y.S.2d 399 (2d Dept. 2003) (finding of abuse reversed where father bit child on her face and arm, leaving severe bruising, but there was no evidence of impairment of physical condition); Matter of Jason T., 2 A.D.3d 738, 768 N.Y.S.2d 662 (2d Dept. 2003) (no abuse, but there was neglect, where father threw vase during course of dispute with mother and accidentally struck child); Matter of Steven A., 307 A.D.2d 434, 762 N.Y.S.2d 672 (3rd Dept. 2003) (father's request for expungement of Central Register record granted where father immediately hid gun and removed ammunition from premises after child broke open a safe and then removed and fired gun); Matter of Johannah "QQ", 266 A.D.2d 769, 698 N.Y.S.2d 783 (3rd Dept. 1999) (neglect, but no abuse, where father inflicted numerous bruises on seventeen-

year-old daughter by hitting her with belt, and inflicted excessive corporal punishment on an ongoing basis). See also Matter of David T., 155 A.D.2d 327, 547 N.Y.S.2d 297 (1st Dept. 1989) (holding child over garbage can was merely roughhousing).

Moreover, even if the respondent has neither committed a physical assault that could have caused serious harm, nor engaged in dangerous behavior that created a risk of serious harm, an abuse finding may be made when the respondent created a risk of serious injury by failing to act. See, e.g., Matter of Bruce L., 140 Misc.2d 757, 531 N.Y.S.2d 438 (Fam. Ct., Kings Co., 1988) (respondent's failure to provide adequate medical care and follow medical advice placed children at risk of death); Matter of Alyne E., 113 Misc.2d 307, 448 N.Y.S.2d 984 (Fam. Ct., Richmond Co., 1982) (father deliberately withheld psychiatric and psychological care, and thereby created a risk that the child would attempt to commit suicide).

**4. Emotional Abuse**

It is obvious that the ongoing and repeated use of excessive corporal punishment, as well as other types of behavior which result in physical harm, can cause long-term emotional impairment whether or not the actual injury rises to the level of physical abuse. Thus, an abuse finding may result when the respondent has inflicted an injury which "causes or creates a substantial risk of ... protracted impairment of ... emotional health," FCA §1012(e)(i), or when the respondent has created a substantial risk of physical injury "which would be likely to cause ... protracted impairment of ... emotional health ...." FCA §1012(e)(ii). See, e.g., Matter of Shanaye C., supra, 2 Misc.3d 887 (children were at risk for protracted impairment of emotional health after the father strangled to death the mother and the grandmother); Matter of Roy T., 126 Misc.2d 172, 481 N.Y.S.2d 257 (Fam. Ct., Monroe Co., 1984) (cigarette burns created an imminent risk to the child's long-term psychological development) and Matter of Shane T., 115 Misc.2d 161, 453 N.Y.S.2d 590 (Fam. Ct., Richmond Co., 1982) (father's verbal attacks, during which he called his son "fag," "faggot" and "queer," caused child to experience chronic stomach pain which created a substantial risk of protracted impairment of emotional health).

**C. Sexual Abuse**

Under FCA §1012(e)(iii), a finding of sexual abuse may be made when the parent or other person legally responsible for the child's care:

> (A) commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law; (B) allows, permits or encourages such child to engage in any act described in [Penal Law §§ 230.25, 230.30 and 230.32]; (C) commits any of the acts described in [Penal Law §§ 255.25, 255.26 and 255.27]; (D) allows such child to engage in acts or conduct described in [Penal Law Article 263]; or (E) permits or encourages such child to engage in any act or commits or allows to be committed against such child any offense that would render such child either a victim of sex trafficking or a victim of severe forms of trafficking in persons pursuant to 22 U.S.C. 7102 … or any successor federal statute; (F) provided, however, that (1) the corroboration requirements contained in the penal law and (2) the age requirement for the application of [Penal Law Article 263] shall not apply to proceedings under this article.

Penal Law Article One Hundred Thirty contains the sex offenses most often alleged in Article Ten proceedings, to wit: sexual misconduct, rape, sodomy and sexual abuse. Penal Law §§ 230.25, 230.30 and 230.32 define offenses relating to promoting prostitution, and Article Two Hundred Sixty-Three includes offenses related to sexual performance by a child. See Matter of Joseph C., 297 A.D.2d 673, 747 N.Y.S.2d 182 (2d Dept. 2002) (finding made where mother took numerous nude photographs of child, some of which depicted lewd exhibition of child's anus); Matter of CW v. CYR, NN-026283-6/13, NYLJ 1202633380962, at *1 (Sup. NY, Decided September 24, 2013) (insufficient evidence under Penal Law §§ 263.05, 263.10 and 263.11 where photos of children fully or partially naked, including one showing child sleeping with legs spread and vagina visible, were not lewd or obscene and "were merely a loving and attentive mother … over-photographing her children"); Matter of Glenn G., 154 Misc.2d 677, 587 N.Y.S.2d 464 (Fam. Ct., Kings Co., 1992), aff'd 218 A.D.2d 656, 630 N.Y.S.2d (2d Dept. 1995), lv denied 87 N.Y.2d 803, 639 N.Y.S.2d 310 (finding made where photo depicted three-year-old boy lying on his back on a couch while dressed in a shirt and pants, with his underwear and pants pulled down to the knees, and with an erection).

In many cases, sexual abuse is proved by the testimony of the victimized child

[see, e.g., Matter of Rubina A., 308 A.D.2d 537, 764 N.Y.S.2d 851 (2d Dept. 2003) (contradictions in child's testimony could be attributed to familial pressure and natural reluctance to come forward and testify); In re Melissa P., 261 A.D.2d 141, 689 N.Y.S.2d 481 (2d Dept. 1999), appeal dism'd 93 N.Y.2d 1041, 697 N.Y.S.2d 569 (family court erred in dismissing sex abuse charges while placing undue emphasis on minor inconsistencies in child's story); Matter of Department of Social Services v. Manual S., 148 Misc.2d 988, 563 N.Y.S.2d 592 (Fam. Ct., Dutchess Co., 1990); Matter of Dawn B., 114 Misc.2d 834, 452 N.Y.S.2d 817 (Fam. Ct., Queens Co., 1982)], and/or the testimony of other children who witnessed the abuse. However, because of the child's tender years, limited testimonial capacity or unstable emotional condition, or because the family might be further divided, it is often not appropriate for the child to testify. In such cases, the child's out-of-court statements may be used, and, if adequately corroborated, can support a finding. FCA §1046(a)(vi). A finding may also be based upon proof of injuries, such as abrasions in the vaginal area, or a condition, such as a sexually transmitted disease, which would not usually exist in the absence of abuse. See FCA §1046(a)(ii).

When "sexual contact" is an element of the offense charged, it is necessary to show that the respondent intended to gratify the sexual desire of either party. PL §130.00(3). Compare In re Lesli R., 138 A.D.3d 488 (1st Dept. 2016) (intent inferred where respondent continued to touch stepdaughters after being told he was making them uncomfortable); In re Alejandra B., 135 A.D.3d 480 (1st Dept. 2016) (sufficient evidence of sexual contact and sexual gratification purpose where there were two incidents in which respondent asked then ten-year-old child to lock bedroom door, give him massage and straddle him, while he bounced her up and down near his private parts and then kissed her on mouth); In re Karina L., 106 A.D.3d 439 (1st Dept. 2013) (where respondent touched child's breast and kissed her on lips, it was properly inferred that purpose was sexual gratification); In re Jani Faith B., 104 A.D.3d 508 (1st Dept. 2013) (kissing stepdaughter while using tongue established "sexual contact"); Matter of Shannon K., 222 A.D.2d 905, 635 N.Y.S.2d 751 (3rd Dept. 1995) (sexual gratification element could be inferred from fondling of child's vaginal area during

bathing); Matter of Patricia J., 206 A.D.2d 847, 616 N.Y.S.2d 123 (4th Dept. 1994) (it can be inferred that massaging of child's vagina and buttocks was for purpose of sexual gratification despite respondent's claim that it was his way of showing affection) and Matter of Kyanna T., 27 Misc.3d 1210(A), 910 N.Y.S.2d 406 (Fam. Ct., Kings Co., 2010), aff'd 99 A.D.3d 1011 (2d Dept. 2012), lv denied 20 N.Y.3d 856 (evidence that child's father intentionally touched and squeezed her breasts and buttocks and repeatedly kissed her supported inference that actions were for purposes of sexual gratification) with Matter of Jeshaun R., 85 A.D.3d 798 (2d Dept. 2011) (intent to gratify sexual desire could not be inferred from father's touching of child; conduct which constitutes sexual abuse by stranger could be mere expression of affection on part of parent); Matter of Jelani B., 54 A.D.3d 1032, 865 N.Y.S.2d 114 (2d Dept. 2008) (where children and father were lying on bed together watching television when one child fell asleep and awoke later to find father's hand on her buttocks underneath her clothing, but child had earlier reported that father touched her on top of her clothing and on at least one occasion denied that incident had occurred, family court properly declined to make inference of element of intent to obtain sexual gratification); H.G. v. Commissioner of the Administration for Children's Services, 253 A.D.2d 318, 686 N.Y.S.2d 396 (1st Dept. 1999) (evidence failed to establish that father was prompted by desire for sexual gratification when he exposed child to his nude body) and Matter of Michael M., 156 Misc.2d 98, 591 N.Y.S.2d 681 (Fam. Ct., Kings Co., 1992) (no abuse where father grabbed sons' genitals and buttocks when he played with them).

When only neglect is charged, there is no need for proof of the sexual gratification element. Matter of Hadley C., 137 A.D.3d 1524 (3d Dept. 2016).

Since the subject child is usually under seventeen years of age, and, therefore, is legally incapable of consenting to a sexual act [PL §130.05(3)(a)], it is rarely necessary to prove a forcible sexual act. See Matter of Rosaly S., 27 Misc.3d 1210(A), 910 N.Y.S.2d 408 (Fam. Ct., Kings Co., 2010) (sexual abuse finding made where mother allowed child to sleep in her bed, touch her, kiss her on mouth, insert his finger in her anus, insert his finger in her vagina, and have sexual intercourse with her; mother voluntarily engaged in sexual relations with son although she had ability to stop him at

any time).

A child over the age of seventeen is a sexually abused child if the acts alleged constitute either incest (PL §255.25), or one of the other crimes enumerated in FCA §1012(e)(iii). In addition, sexual activity with a child over seventeen might constitute neglect under the "catch-all" in FCA §1012(f)(i)(B) which includes "any other acts of a similarly serious nature requiring the aid of the court ...." And, if the child is physically injured, a neglect finding could be made based upon the respondent's infliction of "harm," as that term is used in FCA §1012(f)(i)(B).

According to FCA §1012(e)(iii), Penal Law corroboration requirements do not apply. Thus, neither evidence tending to establish that an offense was committed, nor evidence connecting the respondent with the commission of the offense (see PL §130.16), is required as a matter of law.

Finally, improperly exposing a child to sexual contact may constitute neglect. See, e.g., Matter of Amber DD., 26 A.D.3d 689, 809 N.Y.S.2d 657 (3rd Dept. 2006) (mother expressed affection with various men in front of children and engaged in sexual activity in living room where children could and did interrupt her); Matter of Khadryah H., 295 A.D.2d 607, 744 N.Y.S.2d 206 (2d Dept. 2002) (parents allowed child to sleep in bed with them and exposed her to sexual behavior, and failed to prevent her from watching videotapes portraying adult sexual behavior); Matter of Peter C., 278 A.D.2d 911, 718 N.Y.S.2d 551 (4th Dept. 2000); Matter of Shyrelle F., 33 Misc.3d 1232(A) (Fam. Ct., Kings Co., 2011) (neglect found where, on one occasion, respondent gave stepdaughter massage on “the outskirts of her groin,” repeatedly touching her pelvic area and the top of her thigh despite her explicit requests that he not do so; child was completely shocked, it made her “really sad,” she cried a lot as a result, she felt betrayed by respondent and was scared to go home, and she continued to express feelings of sadness and confusion during months that followed); but see Matter of T.G., 53 Misc.3d 362 (Fam. Ct., Kings Co., 2016) (no neglect found where mother had sex with boyfriend with child in bed but there was no proof of impairment or imminent danger of impairment).

**D. Allowing Abuse Or Neglect**

Although the criminal law does not punish a person's failure to prevent a crime, the child protective laws impose a higher standard of behavior. Thus, when a parent or other legally responsible person "allows" someone to commit abuse or neglect, a finding may be made. FCA §1012(e)(i) (allowing infliction of physical abuse); §1012(e)(ii) (allowing creation of risk of physical abuse); §1012(e)(iii) (allowing commission of sex offense); §1012(f)(i)(B) (allowing infliction of harm or a substantial risk of harm).

One example is a parent who has witnessed or seen clearcut evidence of, abuse or neglect, or been put on notice by statements made by the victimized child or by other witnesses. In either scenario, the parent can be held responsible for any abuse or neglect if steps were not taken to report the misconduct, deny the responsible party access to the child, or otherwise protect the child.

Compare Matter of Trina Marie H., 48 N.Y.2d 742, 422 N.Y.S.2d 659 (1979) (mother tolerated husband's beating of child); In re Thamel J., 162 A.D.3d 507 (1st Dept. 2018) (finding of neglect where father knew or should have known mother was smoking marijuana while pregnant but failed to take steps to stop her drug use); Matter of Brooklyn S., 150 A.D.3d 1698 (4th Dept. 2017) (finding made where sample of mother's breast milk tested positive for morphine, codeine, and heroin metabolites, and father failed to intervene to prevent her from nursing child); In re Orlando R., 112 A.D.3d 525 (1st Dept. 2013) (although father made efforts to address pregnant mother's drug problem, he placed her in home of friend who he knew was drug user and was visited by others who used alcohol and drugs, and father's intermittent incarceration contributed to failure or inability to insure that mother did not abuse drugs during pregnancy); Matter of Stevie R., 97 A.D.3d 906 (3d Dept. 2012) (neglect found where respondent father lived with mother during her pregnancy and knew or should have known about her drug use and discontinuance of prenatal care and failed to ensure that she did not abuse drugs during pregnancy); Matter of Niviya K., 89 A.D.3d 1027 (2d Dept. 2011) (neglect found where father knew of mother's drug use and failed to exercise minimum degree of care to ensure that she did not abuse drugs during pregnancy); In re Stephanie S., 70 A.D.3d 519, 895 N.Y.S.2d 72 (1st Dept. 2010)

(neglect found where respondent failed to ensure that mother regularly attend court-ordered drug treatment program and remain drug-free and repeatedly allowed children to remain alone with mother when he was at work despite specific directives to contrary); Matter of Andrew B., 49 A.D.3d 638, 854 N.Y.S.2d 157 (2d Dept. 2008), lv denied, 10 N.Y.2d 714, 715 (where mother repeatedly subjected child to unnecessary medical treatment either as result of Munchausen Syndrome by Proxy or for other reasons, father's failure to question her judgment justified finding of neglect); In re Alysha M., 24 A.D.3d 255, 807 N.Y.S.2d 21 (1st Dept. 2005), lv denied 6 N.Y.3d 709 (mother was not in same room when father hit child with belt, but her knowledge of father's excessive use of corporal punishment was circumstantially established by, inter alia, mother's admission that child had been reprimanded repeatedly and claim that she and father do not "maim" their children); In re Ashante M., 19 A.D.3d 249, 797 N.Y.S.2d 68 (1st Dept. 2005) (father failed to ensure that mother completed court-ordered drug treatment program; court rejects father's argument that agency did not advise him of mother's failure and allowed children to reside with her, since father had duty to ensure children's safety); Matter of Heather WW., 300 A.D.2d 940, 753 N.Y.S.2d 183 (3rd Dept. 2002) (after child told mother that boyfriend walked around house naked and left door open while he masturbated in bedroom, mother told him to stop but did not ask him to leave, continued to leave children alone at home with him and made no inquiry to determine whether conduct stopped); Matter if Ivette R., 282 A.D.2d 751, 725 N.Y.S.2d 53 (2d Dept. 2001) (abuse finding against mother where she allowed boyfriend to reside in home after eleven-year-old child told mother that mother's boyfriend was sexually abusing her); Matter of Venus S., supra, 228 A.D.2d 314 (mother allowed return of abuser after child informed her on three occasions that abuser had pulled down child's pants); Matter of Katrina W., 171 A.D.2d 250, 575 N.Y.S.2d 705 (2d Dept. 1991) (abuse finding against mother where she allowed child's brother to sexually abuse her) and Matter of Glenn G., 154 Misc.2d 677, 587 N.Y.S.2d 464 (Fam. Ct., Kings Co., 1992) (court may consider actual ability to protect child; court accepts "battered woman" defense to abuse charge, but finds neglect under strict liability rule)

with In re Jessica L., 93 A.D.3d 522 (1st Dept. 2012) (finding reversed where father knew of mother's past drug use but had no knowledge she was currently using drugs, only suspicion based on observation that she was not working and slept a lot during the day; finding would create "Catch-22" in which father had choice to get ACS involved and risk subjecting himself to neglect proceeding for not having contacted ACS sooner, or fail to get ACS involved to detriment of children) and Matter of Stephanie K., 1 A.D.3d 939, 767 N.Y.S.2d 756 (4th Dept. 2003) (no finding against respondent where she was present during altercation involving her stepdaughter and the father, but there was no showing of a pattern of excessive force by father or that respondent knew child was injured or could have prevented child's injury).

Of course, a parent is also responsible for obtaining adequate medical treatment for any injury that has already been caused.

Similarly, even if the child had not been victimized before, a parent would be responsible for allowing acts of abuse or neglect committed after the parent left, or allowed another caretaker to leave, a child in the care of someone with a known history of violence, sexual abuse, erratic behavior, or mental illness, which put the parent on notice that the child would be at risk of being harmed while in that person's custody. See, e.g., Matter of Anthony Y., 72 A.D.3d 1419, 899 N.Y.S.2d 476 (3rd Dept. 2010) (neglect found where respondents' grandchildren were regularly allowed to be in grandfather's presence without sufficient supervision despite his status as sex offender and failure to complete treatment); Matter of Katlyn GG., 2 A.D.3d 1233, 770 N.Y.S.2d 204 (3rd Dept. 2003) (mother was aware that boyfriend was limited to supervised visitation with his own children and that his ex-wife had order of protection, and mother had seen family court order prohibiting contact between boyfriend and her children); Matter of Lewis Y., 293 A.D.2d 684, 740 N.Y.S.2d 633 (2d Dept. 2002) (finding made against father who failed or was unwilling to recognize danger posed by paranoid schizophrenic mother who reported hearing voices and failed to take medication); Matter of Michael "I", 276 A.D.2d 839, 714 N.Y.S.2d 156 (3rd Dept. 2000), lv denied 96 N.Y.2d 701, 722 N.Y.S.2d 793 (2001) (mother had observed husband verbally abuse children and ignore her request that he stop picking them up by their arms, and mother

had stated that husband hated their crying and yelled and cursed at them, that she was afraid to leave the children alone with him, and that she believed he might harm them); Matter of Kasey C., 182 A.D.2d 1117, 586 N.Y.S.2d 163 (4th Dept. 1992), lv denied 80 N.Y.2d 757, 588 N.Y.S.2d 825 (respondent left children with other respondent, who was a convicted sexual abuser and had denied the prior crime and refused to seek treatment); Matter of Carrie R., 156 A.D.2d 756, 549 N.Y.S.2d 230 (3rd Dept. l989) (respondent father left child with mother in unsupervised setting despite his knowledge that mother had threatened to hit child because she was losing patience and had had previous problems with her children); Matter of Kyanna T., 27 Misc.3d 1210(A), 910 N.Y.S.2d 406 (Fam. Ct., Kings Co., 2010), aff'd 99 A.D.3d 1011 (2d Dept. 2012), lv denied 20 N.Y.3d 856 (passive parent allows abuse when she fails to intervene despite actual knowledge of abuse, and neglects child when she reasonably should have known that abuse was occurring but did not have actual knowledge; finding of neglect made against mother where she refused to believe, or at least investigate, reports of sexual abuse, called child a liar and stated that if she had been sexually abused she was a willing participant, took her to see father's lawyer to recant; and excluded her from home so father could return); Matter of A.H., 15 Misc.3d 677, 831 N.Y.S.2d 892 (Fam. Ct., Richmond Co., 2007) (father left children in car with mother, who, he believed, would attempt suicide by going off cliff); but see In re Israel S., 308 A.D.2d 356, 764 N.Y.S.2d 96 (1st Dept. 2003) (although respondent father was asked to care for children by Administration for Children's Services after respondent mother was incarcerated for excessive corporal punishment of one of the children, and there had been an order of protection issued against the mother, neglect finding against father reversed where mother returned home after release from jail to shower and pick up clothes and saw children briefly in yard with their baby-sitter, and caseworker went to home and found mother in charge after father had been incarcerated for smashing a window in a welfare office; First Department notes that father was not aware of second extension of order of protection, that father had previously supervised children and kept mother from contacting them, and that petitioner failed to prove that father observed or knew of mother's use of excessive corporal punishment prior to incident in question,

which occurred when he was not living with the children).

When the care of a child is entrusted to a person who, according to available information, appears to be an appropriate caretaker, the parent ordinarily will not be held responsible if that person commits acts of abuse or neglect. See, e.g., Matter of Lucien HH., 155 A.D.3d 1347 (3d Dept. 2017) (petitioner failed to prove that mother knew or should have known she was placing child in danger by leaving him with father, who was responsible for multiple fractures suffered by infant, where neither condition of child not behavior of father put mother on notice of danger and mother became upset and cried when she learned of father's admissions; physicians testified that not every fracture results in redness and swelling and that, because infants heal quickly, any pain or discomfort may not have lasted long, and mother took child for well-child visits to pediatrician, who did not observe anything unusual); Matter of Zachary "MM", 276 A.D.2d 876, 714 N.Y.S.2d 557 (3rd Dept. 2000) (while finding adequate basis for family court's conclusion that babysitter was responsible for depressed skull fracture, Third Department also upholds finding that parents were not at fault for failing to discover that child had fifteen other fractures); Matter of Commissioner of the Administration of Children's Services v. Tanya W., 269 A.D.2d 394, 702 N.Y.S.2d 642 (2d Dept. 2000) (neglect not established where children told mother that caretaker had left them alone "many times" on prior occasions, but there was no evidence of the number of instances and the duration of each episode); Matter of Jessica SS., 229 A.D.2d 616, 644 N.Y.S.2d 854 (3rd Dept. 1996) (no neglect where, prior to letting mentally ill father have contact with child, respondent discussed matter with father's counselor and arranged for two other family members to be present in case there were problems); Matter of Robert YY., 199 A.D.2d 690, 605 N.Y.S.2d 418 (3rd Dept. 1993) (gentle "flipping" of child did not put mother on notice that fiance might harm child); Matter of Desiree X., 129 A.D.2d 841, 513 N.Y.S.2d 855 (3rd Dept. 1987) (respondent was unaware that boyfriend had mistreated child).

When the child has been left in the care of a neighbor, an acquaintance, or some other person who is barely known to the respondent, and particularly when there was no reason to believe that the person was capable of providing adequate care in view of

the child's age, behavioral characteristics, or special needs, it could be argued that the respondent, acting with culpable ignorance, "allowed" any resulting abuse or neglect. See Matter of Joseph DD., 214 A.D.2d 794, 624 N.Y.S.2d 476 (3rd Dept. 1995).

Even if the respondent was unaware of previous acts of abuse, and did not otherwise use poor judgment in the first instance in leaving the child with a particular caretaker, the respondent may be held accountable if the child is harmed after the appearance of objective evidence which should have prompted protective action. A suspicious injury, or unusual behavior by the child or the offending caretaker, may be sufficient to require action. See, e.g., Matter of Eric J., 223 A.D.2d 412, 636 N.Y.S.2d 762 (1st Dept. 1996) (mother was aware that child had exhibited a vaginal discharge when she was eight, and that child and older sibling were exhibiting promiscuous behavior toward each other); Matter of Joseph DD., supra, 214 A.D.2d 794 (mother must have known of babysitter's bizarre behavior); Matter of Tania J., 147 A.D.2d 252, 543 N.Y.S.2d 47 (1st Dept. 1989) (mother allowed further contact between child, who had contracted gonorrhea, and respondent, who had been only male with access to children); Matter of Scott G., supra, 124 A.D.2d 928 (mother failed to ask child about sexual abuse despite observing vaginal irritation); Matter of Katherine C., 122 Misc.2d 276, 471 N.Y.S.2d 216 (Fam. Ct., Richmond Co., 1984) ("the test is whether a reasonable and prudent parent would have so acted (or failed to act) under circumstances then and there existing," and law must be extended to include a "parent who should have known about the abuse and did nothing to prevent or stop it").

Even if the respondent does not reside with the child, he or she may be held accountable for a failure to act if there was sufficient contact to put a reasonable person on notice that something was wrong. Compare Matter of Kenneth V., 307 A.D.2d 767, 761 N.Y.S.2d 422 (4th Dept. 2003) (no evidence that father was aware of children's mental health treatment needs) with Matter of the J. Children, 57 A.D.2d 568, 393 N.Y.S.2d 449 (2d Dept. 1977), lv denied 42 N.Y.2d 804, 398 N.Y.S.2d 1025 and Matter of Maureen G., 103 Misc.2d 109, 426 N.Y.S.2d 384 (Fam. Ct., Richmond Co., 1980).

**E. Severe Or Repeated Abuse**

When making a finding of abuse, the court may enter a finding of severe or

repeated abuse, as defined in SSL §384-b(8), provided that a finding of severe or repeated abuse under Article Ten may be made against any "respondent" as defined in FCA §1012(a). FCA §1051(e); see In re Angel P., 155 A.D.3d 569 (1st Dept. 2017), lv denied 30 N.Y.3d 911 (amendment to §1051(e) permitting family court to make severe abuse finding against non-parent may not be retroactively applied). Such a finding shall be based upon clear and convincing evidence. FCA §1051(e).

According to SSL §384-b(8)(a), a child is "severely abused" by the parent if: (1) the child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in Penal Law §10.00(10) [see, e.g., Matter of Dashawn W., 21 N.Y.3d 36 (2013) ("circumstances evincing a depraved indifference to human life" does not mean same thing in severe abuse cases as it does under Penal Law since Penal Law crimes are mutually exclusive due to distinctions between culpable state of mind while child can be found severely abused based on reckless or intentional acts of parent; severe abuse found where respondent applied brute force to baby's chest and shoulder during incidents separated by at least two weeks, respondent had to have been aware of life-threatening risks he created since devastating injuries ensued when he previously brutalized his four-month-old child, and prior abuse reflected respondent's utter disregard for baby's life, health and well-being, and respondent neglected to summon medical aid for baby's fractured ribs even though baby would have displayed continuous pain and distress, and delayed seeking medical care from 11:00 a.m., when he claimed he first noticed baby's suffering, until early evening hours); Matter of Logan C., 154 A.D.3d 1100 (3d Dept. 2017), lv denied 30 N.Y.3d 909 (severe abuse found where father was present for much of time period when child could have received her potentially fatal injuries, and had recklessly permitted caretaker in whose care child had already suffered serious and suspicious injuries, to resume caring for her and should have been aware of extensive bruising suggestive of abuse or neglect); Matter of Mason F., 141 A.D.3d 764 (3d Dept. 2016), lv denied 28 N.Y.3d 905 (severe abuse found where respondent allowed boyfriend she had dated for brief period, and knew went out at night to procure illegal

drugs, to care for children after older child sustained serious bruising she unreasonably attributed to accidental causes and explanations provided by boyfriend, and also failed to seek professional medical treatment for child despite evidence of numerous injuries because of concern that child protective services was actively investigating her); Matter of Amirah L., 118 A.D.3d 792 (2d Dept. 2014) (where rib fractures and jaw fracture may have been inflicted by mother's boyfriend while mother was away from home, derivative severe abuse found where injuries would have caused child to display significant pain and inability to chew, but mother failed to seek medical care; on morning of child's death, mother failed to immediately summon emergency medical assistance despite obviously grave injuries and delayed for about two hours by taking cab to hospital in Manhattan and bypassing several hospitals closer to her in Queens; mother provided false information concerning injuries to medical personnel who were trying to save baby's life, and instructed subject child to lie as well); Matter of Jezekiah R.-A., 78 A.D.3d 1550, 910 N.Y.S.2d 806 (4th Dept. 2010) (no severe abuse finding against father where child was also in care of mother and grandparents during relevant time period and there was no clear and convincing evidence of depraved indifference); Matter of Julia BB., 42 A.D.3d 208, 837 N.Y.S.2d 398 (3rd Dept. 2007) (evidence of severe abuse insufficient where petitioner failed to establish that fractures and other injuries were life-threatening or resulted in protracted impairment of health, or that respondents were responsible for airway obstruction that threatened child's life on one occasion); Matter of Yahmir G., 48 Misc.3d 1224(A) (Fam. Ct., Bronx Co., 2015) (depraved indifference not established where mother burned child's hands with water); Matter of Heaven, 38 Misc.3d 1219(A) (Fam. Ct., Bronx Co., 2013) (evidence of severe abuse sufficient where deceased child was hit, kicked and punched numerous times; suffered injuries including thirty contusions, bruises, abrasions and scars in both acute, healing and healed stages, lacerated intestine and hemorrhages and contusions to bowel, kidney, pancreas and stomach which led to peritonitis, and scars and marks caused by lit cigarette lighter and hot fork; and mother failed over five-day period to seek medical attention as child suffered excruciating pain and discomfort); Matter of Ne-Ashia, 34 Misc.3d 1233(A) (Fam. Ct., Bronx Co., 2012), aff'd 99 A.D.3d 616 (1st

Dept. 2012) (where respondent admitted that she forcefully punched infant numerous times in head, back, and side with closed fist, violently shook him, and covered his mouth and nose, described her frustration with and anger at infant because of his "crying" and "fussing," and was indifferent to his plight when she failed to seek medical care and left him on bed to die, respondent's conduct was reckless and evinced depraved indifference to human life)];

2) the child has been found to be an abused child where the parent has committed or knowingly allowed the commission of a felony sex offense defined in PL §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, or 130.80;

3) the parent has been convicted of committing, attempting to commit, conspiring to commit, or soliciting or facilitating the commission of murder or manslaughter (manslaughter only if the parent acted voluntarily in committing the crime), or committing or attempting to commit second or first degree assault or aggravated assault upon a person less than eleven years old, where the victim or intended victim of the crime was the subject child or another child of the parent for whose care the parent is or has been legally responsible as defined in FCA §1012(g); or

4) the parent has been convicted of one of the above-mentioned homicides or attempted homicides and the victim of the crime was another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide.

See Matter of Jamaal NN., 61 A.D.3d 1056, 878 N.Y.S.2d 205 (3rd Dept. 2009), lv denied 12 N.Y.3d 711 (family court did not err in retroactively applying 2006 amendment to SSL §384-b(8)(a)(iii) to acts committed by respondent before enactment of amendment since amendment was remedial in nature and merely closed loophole that existed in statute).

Convictions from jurisdictions other than New York qualify if the offense includes all the essential elements of the New York crime.

In Matter of Marino S., 100 N.Y.2d 361, 763 N.Y.S.2d 796 (2003), cert denied 540 U.S. 1059, 124 S.Ct. 834, the court held that a derivative finding of severe abuse may be made as to siblings of the child who was actually abused, and those children

may be included in an order terminating the reasonable efforts requirement. The court noted that, without derivative findings, one child would be on a different permanency planning track from his or her sibling. See also Matter of Riley C. P., 157 A.D.3d 957 (2d Dept. 2018) (in termination proceeding, derivative severe abuse could be found where child against whom felony sex offense was committed was not respondent's biological child); In re Jayvon L., 18 A.D.3d 292, 795 N.Y.S.2d 31 (1st Dept. 2005) (findings of derivative severe and repeated abuse made where respondent inflicted fatal traumatic and burn injuries upon sister of subject child); Matter of K.W. v. J.D.M., 8 Misc.3d 1013(A), 801 N.Y.S.2d 778 (Fam. Ct., Suffolk Co., 2005).

Under SSL §384-b(8)(b), a finding that a child has been repeatedly abused can be made when the court finds pursuant to FCA §1012(e)(i) that the parent inflicted or allowed the infliction of abuse, or finds pursuant to FCA §1012(e)(iii) that the parent committed or knowingly allowed the commission of a felony sex offense defined in PL §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, or 130.80, and the child, or another child for whose care the parent is or has been responsible has been previously found, within the five years immediately preceding the initiation of the proceeding in which the repeated abuse is alleged, to be an abused child based upon the parent's commission of the acts of abuse defined above.

## VII. Jurisdiction And Venue

Allegations of child abuse or neglect can arise in various types of judicial proceedings, including proceedings commenced pursuant to Article Ten, Supreme Court matrimonial proceedings, Family Court family offense and custody and visitation proceedings, and criminal proceedings. However, it is only in an Article Ten proceeding that a court is given a full range of authority with which to fashion orders designed to protect a child from harm, secure necessary services, and otherwise further the child's and the family's best interests. Discussed in the sections which follow is the manner in which a court obtains jurisdiction over an Article Ten proceeding.

### A. Family Court

#### 1. Generally

"The family court has exclusive original jurisdiction over proceedings under [Article Ten] alleging the abuse or neglect of a child." FCA §1013(a). Child protective proceedings may be commenced in the county where the child resides or is domiciled at the time the petition is filed, or where the person who has custody of the child resides or is domiciled. FCA §1015(a). See, e.g., Matter of Gabriella UU., 83 A.D.3d 1306 (3d Dept. 2011) (order of fact-finding and disposition reversed where mother and children were residents of Delaware County when petition was filed, and thus Otsego County was not proper venue); see also In re Z.R., 44 N.E.3d 239 (Ohio 2015) (no dismissal, only transfer of case, where wrong venue was selected). Dwelling units and facilities which provide temporary or emergency shelter to homeless persons or families are considered residences for purposes of determining venue. FCA §1015(a). For good cause, the court may transfer a proceeding to the family court in any other county where the proceeding might have been originated, and shall do so when a proceeding is filed in the wrong county. FCA §174.

Sometimes, an Article Ten proceeding is commenced as a result of allegations which come to light during the course of another Family Court Act proceeding and are substantiated during a court-ordered investigation. See FCA §1034(1)(b) (court may order investigation by child protective agency "in order to determine whether a proceeding under this article should be initiated"). In such cases, venue provisions

applicable to the original proceeding, as well as Part Seven of Article One of the Family Court Act, shall apply. FCA §1015(b). For instance, when the court authorizes the substitution of a neglect petition in a proceeding to determine whether a child is in need of supervision (see FCA §716), venue would ordinarily lie in the county where the child's acts allegedly occurred. See FCA §717.

Although Article Ten proceedings were expressly excluded from the dictates of the now-repealed "Uniform Child Custody Jurisdiction Act" [see Matter of Sayeh R., 91 N.Y.2d 306, 670 N.Y.S.2d 377 (1997)], such proceedings *are* governed by DRL Article 5-A, the "Uniform Child Custody Jurisdiction and Enforcement Act." DRL §75-a(4). A New York court has jurisdiction to make an initial child custody determination only if: (a) New York is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state; or (b) a court of another state does not have jurisdiction under (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that New York is the more appropriate forum under DRL §76-f or §76-g, *and* (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence, and (ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships; or (c) all courts having jurisdiction under (a) or (b) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under DRL §76-f or §76-g; or (d) no court of any other state would have jurisdiction under the criteria specified in (a), (b) or (c). DRL §76(1). See, e.g., Matter of Milani X., 149 A.D.3d 1225 (3d Dept. 2017) (where child born in Pennsylvania lacked home state, New York had subject matter jurisdiction because respondent and child's father had significant connections to New York, and child protective officials in New York became involved when child was in Pennsylvania hospital and evidence regarding parents' ability to care for her and her relationship with other relatives was in New York); Matter of Destiny EE., 90 A.D.3d 1437 (3d Dept.

2011) (family court had emergency jurisdiction where proceedings depended primarily on risk posed when respondent permitted younger son to visit husband in New York, which was only jurisdiction with pertinent information about husband's prior abuse of older son and respondent's knowledge of that abuse; prior proceedings had extended over four-year period and resulted in determinations that husband had sodomized child over extended period of time and that respondent knew or should have known of abuse; all three of respondent's children were born in New York, and, except for eighteen-month stay in Wisconsin, resided here throughout their lives; children's previous foster family was still in contact with them and former foster mother had come to court and was available to act as resource; and fathers of older son and daughter resided in New York; both "significant connections" and "substantial evidence" requirements were satisfied); Matter of Najad D., 19 Misc.3d 1113(A), 859 N.Y.S.2d 904 (Fam. Ct., Kings Co., 2008) (court lacked jurisdiction where child was born in Virginia, had resided there continuously with paternal grandmother and had never been to New York, and paternal grandmother was life-long resident of Virginia). DRL §76(1) "is the exclusive jurisdictional basis for making a child custody determination by a court of this state." DRL §76(2). Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. DRL §76(3). "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period. DRL §76-a(7).

Under DRL §76-c, a New York court may assume "temporary emergency jurisdiction" if "the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child, a sibling or parent of the child." DRL §76-c(1). See Matter of Destiny EE., 90 A.D.3d 1437 (family court had emergency jurisdiction where proceedings depended primarily on risk posed when respondent permitted younger son to visit husband in New York, which was only jurisdiction with

pertinent information about husband's prior abuse of older son and respondent's knowledge of that abuse); Matter of Janie C, 31 Misc.3d 1235(A) (Fam. Ct., Bronx Co., 2011) (court finds that it has personal jurisdiction over father and exercises temporary emergency jurisdiction where father allegedly raped eleven-year-old daughter repeatedly in Texas, father lives in Georgia and was most recently in New York in November 2010, mother and child relocated from Texas and have been living in New York since September 2010, child was born in New York, and alleged abuse continued in New York when child, at father's request, sent numerous text messages to him from New York, including pictures of herself in the nude).

If there is no previous custody determination that is entitled to be enforced under the UCCJEA, and a custody proceeding has not been commenced in a court of a state having jurisdiction under DRL §76, 76-a (continuing jurisdiction) or 76-b (jurisdiction to modify determination), a custody determination made under this section remains in effect until an order is obtained from a court of a state having such jurisdiction. Where the child is in imminent risk of harm, the emergency order shall remain in effect until a court of a state having jurisdiction has taken steps to assure the protection of the child. If a custody proceeding has not been or is not commenced in a court of a state having jurisdiction, the emergency order becomes a final determination, if it so provides and this state becomes the home state of the child. DRL §76-c(2). If there is a previous child custody determination that is entitled to be enforced under the UCCJEA, or a custody proceeding has been commenced in a court of a state having jurisdiction, the emergency order must specify a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction. The emergency order remains in effect until an order is obtained from the other state within the period specified or the period expires, but where the child is in imminent risk of harm, the emergency order shall remain in effect until a court of a state having jurisdiction has taken steps to assure the protection of the child. DRL §76-c(3). Matter of Bridget Y., 92 A.D.3d 77 (4th Dept. 2011), appeal dism'd 19 N.Y.3d 845 (family court properly exercised emergency jurisdiction under DRL §76-c[3] since New Mexico court had failed to protect children; even assuming that court exercising temporary

emergency jurisdiction cannot issue final custody determination, placement with DSS is not final or permanent custody order); Matter of Destiny EE., 90 A.D.3d 1437 (family court had emergency jurisdiction where proceedings depended primarily on risk posed when respondent permitted younger son to visit husband in New York, which was only jurisdiction with pertinent information about husband's prior abuse of older son and respondent's knowledge of that abuse; prior proceedings had extended over four-year period and resulted in determinations that husband had sodomized child over extended period of time and that respondent knew or should have known of abuse; all three of respondent's children were born in New York, and, except for eighteen-month stay in Wisconsin, resided here throughout their lives; children's previous foster family was still in contact with them and former foster mother had come to court and was available to act as resource; and fathers of older son and daughter resided in New York; both "significant connections" and "substantial evidence" requirements in DRL § 76(1)(b) were satisfied). Upon being informed that a custody proceeding has been commenced in, or a custody determination has been made by, a court of a state having jurisdiction, the New York court shall immediately communicate with the other court. A New York court exercising jurisdiction pursuant to DRL §76, 76-a or 76-b, upon being informed that a custody proceeding has been commenced in, or a custody determination has been made by, a court of another state under an emergency jurisdiction statute similar to §76-c shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. DRL §76-c(4).

Continuing jurisdiction after a child custody determination has been made in New York is addressed in DRL §76-a, which states that except as otherwise provided in DRL §76-c, a court of this state which has made a custody determination under DRL §76 or 76-b has exclusive, continuing jurisdiction until: (a) a court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or (b) a court of this state or a court of another state determines that the

child, the child's parents, and any person acting as a parent do not presently reside in this state. DRL §76-a(1). A court of this state which has made a custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under DRL §76. DRL §76-a(2). See, e.g., Matter of Kali-Ann E., 27 A.D.3d 796, 810 N.Y.S.2d 251 (3rd Dept. 2006), lv denied 7 N.Y.3d 704 (under UCCJEA, New York had jurisdiction even though acts were committed in Florida by mother and she was not New York resident, since initial custody determination was issued in New York, father resided in New York at all relevant times and child resided in New York except when she was taken to Florida).

Jurisdiction to modify a custody determination is addressed in DRL §76-b, which states that except as otherwise provided in DRL §76-c, a court of this state may not modify a custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under DRL §76(a) or (b), and (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under section DRL §76-a or that a court of this state would be a more convenient forum under DRL §76-f; or (2) a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

If the court otherwise has jurisdiction, "the child need not be currently in the care or custody of the respondent" when a proceeding is commenced. FCA §1013(d). See also FCA §1031(d) (child protective agency may commence proceeding when child is in its care and custody, but must allege facts establishing that return to respondent "would place the child in imminent danger of becoming an abused or neglected child"); In re Erica B., 79 A.D.3d 415, 912 N.Y.S.2d 195 (1st Dept. 2010) (family court had jurisdiction over father where he did not have custody of children and was barred from contact with them by order of protection); Matter of Janice G., 70 A.D.3d 1210, 894 N.Y.S.2d 238 (3rd Dept. 2010) (after PINS placement, mother refused to visit with child, learn about her school problems or participate in child's mental health counseling, and stated that she did not care what happened to child and wanted state to deal with her,

and this conduct contributed to child's depression, suicidal inclinations and admission to residential treatment center); Matter of Aishia "O", 284 A.D.2d 581, 725 N.Y.S.2d 738 (3rd Dept. 2001) (respondent failed to plan for return of voluntarily placed child); Matter of Heidi "CC", 270 A.D.2d 528, 703 N.Y.S.2d 593 (3rd Dept. 2000) (mother could not prevent charges by voluntarily placing child); Matter of Patrick D., 93 A.D.2d 836, 461 N.Y.S.2d 56 (2d Dept. 1983).

To promote the expeditious and effective handling of abuse cases, each family court must have a separate "child abuse part," which has jurisdiction over all abuse proceedings. FCA §117(a). But see Uniform Rules For The Family Court, 22 NYCRR §205.3(c)(6) (proceedings involving members of same family shall be heard by one judge to extent feasible and appropriate); FCA §117(a) (judge who presides or presided over other proceeding involving members of same family or household may hear case).

### 2. Referees And Judicial Hearing Officers

#### a. Generally

CPLR §4001 provides that "[a] court may appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law." In addition, the Judicial Hearing Officer program, which was established by Judiciary Law Article Twenty-Two, may be utilized in the family court. Matter of Heather J., 244 A.D.2d 762, 666 N.Y.S.2d 213 (3rd Dept. 1997); see also Matter of Myndi O. v. Ronald K., 180 Misc.2d 608, 690 N.Y.S.2d 407 (Fam. Ct., Monroe Co., 1999) (Family Court Act does not address use of judicial hearing officers, but authority appears in FCA §165[a], which provides that CPLR governs to extent that it is appropriate). The use of judicial hearing officers and referees has been challenged on constitutional grounds. See People v. Scalza, 76 N.Y.2d 604, 562 N.Y.S.2d 14 (1990) (court upholds constitutionality of use of judicial hearing officers to conduct suppression hearings and file reports pursuant to CPL §255.20; although suppression judge did not personally listen to witnesses' testimony, the judge nevertheless "heard" the motion and, having retained de novo review powers, decided it); Phoenix Leasing Corporation v. Lundborg, 173 Misc.2d 992, 661 N.Y.S.2d 914 (Sup. Ct., Suffolk Co., 1997) (Scalza decision applies to JHOs or

referees appointed pursuant to CPLR §4317); Siegel, New York Practice, §379 (argument that constitutional right to have case tried before duly constituted judge of court will be violated can be made where referee to report is appointed over party's objection).

The family court's order of reference shall direct the referee to determine the entire action or specific issues, report issues, perform particular acts, or receive and report evidence only, and the order may specify or limit the powers of the referee and the time for the filing of the report and may fix the time or place for the hearing. CPLR Rule 4311. See also Uniform Rules for the Trial Courts, 22 NYCRR §202.43(c) ("The proposed order of reference, and the actual order of reference shall indicate whether the reference is one to hear and determine or to hear and report"); CPLR Rule 4212 (order of referral to referee to report shall specify the issues to be submitted); 22 NYCRR §202.43(d) (order of reference must state a date certain for the commencement of trial, or provide that if trial does not commence within 60 days from the date of the order, or on a later date fixed by the referee "upon good cause shown," the order is cancelled and revoked and the matter is returned to the court for trial).

"The proposed order of reference shall be presented in duplicate, and a signed original order shall be delivered to the referee. If such order is not presented for signature within 20 days after the court directs a reference, the application shall be deemed abandoned." 22 NYCRR §202.43(b). Upon entry of an order of reference by the court, the clerk shall send a copy of the order to the referee. Unless the order provides otherwise, the referee shall forthwith notify the parties of a time and place for the hearing, to be held within 20 days after the order. CPLR Rule 4314.

When the parties stipulate to a referral to a referee to determine and file the stipulation with the clerk, the clerk shall forthwith enter an order referring the issue for trial to the referee named; if no referee is named, the court shall designate the referee. CPLR §4317. See Matter of Adam R., 43 A.D.3d 1425, 841 N.Y.S.2d 913 (4th Dept. 2007) (in termination of parental rights proceeding, stipulation signed by respondent's attorney, but not respondent, was effective).

The scope of the referee's appointment, and, therefore, the scope of the inquiry,

is defined and limited by the order of reference. Al Moynee Holdings, Ltd. v. Deutsch, 254 A.D.2d 443, 679 N.Y.S.2d 400 (2d Dept. 1998) (referee had no authority to take testimony regarding respondent's belated claim); L.H. Feder Corp. v. Bozkurtian, 48 A.D.2d 701, 368 N.Y.S.2d 247 (2d Dept. 1975). But see Chalu v. Tov-Le Realty Corp., 220 A.D.2d 552, 632 N.Y.S.2d 806 (2d Dept. 1995), appeal denied 88 N.Y.2d 959, 647 N.Y.S.2d 710 (1996) (JHO's minor rephrasing of issue was appropriate given the evidence and the absence of an objection, and, while JHO's decision and order determined issues not set forth in the order of reference, the parties did litigate those issues; in any event, the JHO's resolution of issues referred to him proved to be dispositive of the controversy).

Unless otherwise stipulated, a transcript of the testimony together with the exhibits or copies thereof of the issue heard before the referee shall be provided to all the parties involved upon payment of appropriate fees. CPLR §4317(c).

**b. Referee To Report**

Upon the motion of any party, or on its own initiative, the court may submit any issue of fact required to be decided by the court to a referee to report in matters of account, or "upon a showing of some exceptional condition requiring it." CPLR Rule 4212. Arguably, the exceptional condition requirement is not met if the issue can be decided by the court "without extraordinary impingement on the regular business of the court." Wilder v. Straus-Duparquet, 5 A.D.2d 1, 168 N.Y.S.2d 1005 (1st Dept. 1957). In any event, if the referral to report is otherwise proper, the parties' consent is not required. Schanback v. Schanback, 130 A.D.2d 332, 519 N.Y.S.2d 819 (2d Dept. 1987).

A referee to inquire and report shall have the power to issue subpoenas, to administer oaths and to direct the parties to engage in and permit such disclosure proceedings as will expedite the disposition of the issue." CPLR §4201. The referee "shall conduct the trial in the same manner as a court trying an issue without a jury." CPLR §4320. It "is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility ...." Kardanis v. Velis, 90 A.D.2d 727, 455 N.Y.S.2d 612 (1st Dept. 1982). See also Matter of Charles F., 242

A.D.2d 297, 660 N.Y.S.2d 594 (2d Dept. 1997) (referee should have conducted hearing on objections which raised factual issues); Matter of Daniel D. v. Linda C., 24 Misc.3d 220, 876 N.Y.S.2d 333 (Fam. Ct., Kings Co., 2009) (same principles which apply to recusal of judge apply to referee, but, since CPLR Rule 4301 provides that "a referee to determine an issue or to perform an act shall have all the powers of a court in performing a like function, but he shall have no power to relieve himself of his duties," courts must decide whether referee's request for recusal should be granted). The referee to report has the power to punish contempt of court where the offense is committed at trial or consists of a witness' non-attendance or refusal to be sworn and testify; the application may be made returnable before the referee or the court. Jud. Law §757.

After hearing the matter, the referee "shall file his report, setting forth findings of fact and conclusions of law, within thirty days after the cause or matter is finally submitted. Unless otherwise stipulated, a transcript of the testimony together with the exhibits or copies thereof shall be filed with the report." CPLR §4320. See Matter of Charles F., supra, 242 A.D.2d 297 (referee directed to submit necessary documentation). The referee should give notice to each party of the filing of the report. 22 NYCRR §202.44(a). Although CPLR §4319 permits the court to grant a new trial if the referee's "decision" is not filed within the required time, it has been held that §4319 is applicable only to referees to determine, and that the new trial remedy is not available when a referee's report is not timely filed. John Hancock Mut. Life Ins. Co. v. 491-499 Seventh Ave. Associates, 169 Misc.2d 493, 644 N.Y.S.2d 953 (Sup. Ct., N.Y. Co., 1996) (court also holds that separate document labeled "report" was not required where the report was contained in the hearing transcript).

Although the referee's conclusions are not binding, and it has been said that the report is "intended only to inform the conscience of the court [citations omitted]," DeFalco v. Doetsch, 208 A.D.2d 1047, 617 N.Y.S.2d 415 (3rd Dept. 1994), it has also been said that courts should not disturb the findings of a referee unless the findings are not supported by the record. Kardanis v. Velis, supra, 90 A.D.2d 727.

After the referee has "duly filed" the report, the transcripts and other documents

and has notified the parties, "the plaintiff shall move on notice to confirm or reject all or part of the report within 15 days after notice of such filing was given. If plaintiff fails to make the motion, the defendant shall so move within 30 days after notice of such filing was given." 22 NYCRR §202.44(a). "If no party moves as specified ... the court, on its own motion, shall issue its determination." 22 NYCRR §202.44(b). See also CPLR Rule 4403 (upon motion of any party within 15 days or on its own initiative, court may confirm or reject, in whole or in part, report of referee); Borenstein v. Rochel Properties, Inc., 216 A.D.2d 34, 627 N.Y.S.2d 676 (1st Dept. 1995).

In addition, the court "may make new findings with or without taking additional testimony; and may order a new trial or hearing." CPLR Rule 4403. See Barrett v. Stone, 236 A.D.2d 323, 653 N.Y.S.2d 598 (1st Dept. 1997) (even without hearing transcript, court could make credibility findings not addressed by referee). If no issues remain to be tried, the court shall render a decision. CPLR Rule 4403.

**c. Referee To Determine**

A referee to determine may be employed when "[t]he parties stipulate that any issue shall be determined by a referee." See Matter of Gale v. Gale, 87 A.D.3d 1011 (2d Dept. 2011) (stipulation executed by parties in prior visitation proceeding expired upon completion of that matter and did not remain in effect for new matter). Without the consent of the parties, a referral to a referee to determine may be made, upon motion of any party or on the court's initiative, only under specified circumstances not relevant to family court proceedings "or where otherwise authorized by law." CPLR §4317. Thus, in the absence of any legal authorization, referees to determine cannot be appointed without the parties' consent. McCormack v. McCormack, 174 A.D.2d 612, 571 N.Y.S.2d 498 (2d Dept. 1991). See also Matter of Owens v. Garner, 63 A.D.3d 585, 881 N.Y.S.2d 251 (4th Dept. 2009) (father's request that Judicial Hearing Officer recuse herself did not constitute withdrawal of consent); Matter of Lynette YY., 299 A.D.2d 753, 751 N.Y.S.2d 119 (3rd Dept. 2002) (PINS respondent's lawyer's consent satisfied statute).

There is some controversy with regard to whether consent may be implied from a party's participation in the proceeding without objection. Compare In re Hui C., v. Jian

Xing Z., 132 A.D.3d 427 (1st Dept. 2015) (implied consent where party actively participated in proceedings, including by testifying, submitting photo exhibits, and cross-examining opposing party, without challenging jurisdiction); In re Carlos G., 96 A.D.3d 632 (1st Dept. 2012) (mother implicitly consented by actively participating before Referee and pursuing two appeals of Referee's rulings, and interests of justice and judicial economy did not favor revocation of reference to permit judge hearing case involving subject's child's siblings to resolve all issues concerning family since this proceeding was procedurally more advanced than siblings' cases and permanency should not be delayed to accommodate later-filed proceedings); Matter of Christy "JJ", 288 A.D.2d 724, 734 N.Y.S.2d 501 (3rd Dept. 2001) (since respondent actively participated in hearing without objecting to assignment of Judicial Hearing Officer, proceeding was not jurisdictionally defective); Matter of Heather J., supra, 244 A.D.2d 762 (parties participated without objection) and Matter of Polina M. v. Robert M., 25 Misc.3d 596, 884 N.Y.S.2d 619 (Fam. Ct., Kings Co., 2009) (mother waived right to revoke consent by litigating multiple supplemental petitions in front of referee) with Matter of McClarin v. Valera, 108 A.D.3d 719 (2d Dept. 2013) (mother did not consent to reference merely by participating in proceeding without expressing desire to have matter tried before judge) and Matter of Gale v. Gale, 87 A.D.3d 1011 (father did not implicitly consent to reference merely by participating in proceeding without expressing desire to have matter tried before judge). See also Roell v. Withrow, 538 U.S. 580, 123 S.Ct. 1696 (2003) (consent to referral to Magistrate may be inferred from party's conduct).

"A referee to determine an issue or to perform an act shall have all the powers of a court in performing a like function; but he shall have no power to relieve himself of his duties, to appoint a successor or to adjudge any person except a witness before him guilty of contempt. For the purposes of this article, the term referee shall be deemed to include judicial hearing officer." CPLR §4301. See Muir v. Cuneo, 267 A.D.2d 439, 700 N.Y.S.2d 495 (2d Dept. 1999) (referee erred in failing to address issues of credibility and in determining that he was without authority to resolve factual disputes); Matter of Polina M. v. Robert M., 25 Misc.3d 596 (referee to determine has authority to entertain

and decide recusal motion). Thus, unlike a referee to report, a referee to determine issues final determinations which do not require review and approval by the court. Indeed, according to CPLR §4319, "[t]he decision of a referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court."

"Unless otherwise specified in the order of reference, the referee shall file his decision within thirty days after the cause or matter is finally submitted. If it is not filed within the required time, upon the motion of a party before it is filed, the court may grant a new trial ...." CPLR §4319.

**B. Supreme Court**

Although FCA §1013(a) explicitly grants exclusive original jurisdiction to the family court, original jurisdiction is actually shared with the supreme court, which has "general original jurisdiction in law and equity." N.Y. Const., Art. 6, §7(a). See also FCA §114 (grant of "exclusive original jurisdiction" in Family Court Act "shall in no way limit or impair the jurisdiction of the supreme court as set forth in [the New York State Constitution]"). Thus, if, for example, allegations of abuse or neglect are made during a matrimonial proceeding, they can be litigated in the supreme court. See, e.g., Paul B.S. v. Pamela J.S., 70 N.Y.2d 739, 519 N.Y.S.2d 962 (1987), aff'g 127 A.D.2d 491, 511 N.Y.S.2d 847 (1st Dept. 1987) (Court of Appeals upholds supreme court's assumption of jurisdiction); Matter of Daniel D., 57 A.D.3d 444, 870 N.Y.S.2d 387 (1st Dept. 2008), appeal dism'd 12 N.Y.3d 906 (court properly consolidated child protective proceeding with divorce/custody action given court's extensive familiarity with common factual and legal issues, and did not violate CPLR 602 by ordering consolidation on own initiative and without motion since court gave parties opportunity to be heard).

Indeed, much controversy has arisen as a result of sexual abuse allegations made by parents and children in contentious matrimonial proceedings, and counterclaims that the child has been encouraged to make false allegations. Article Ten proceedings are often a venue for this type of controversy as well. See, e.g., In re Django K., 149 A.D.3d 405 (1st Dept. 2017) (dismissed allegations could not be separated from custody dispute between parents); Matter of Nassau County Department of Social Services o/b/o Anna H., 176 A.D.2d 881, 575 N.Y.S.2d 518 (2d

Dept. 1991) (dismissal upheld where sex abuse allegations arose during custody dispute between mother and maternal aunt). See also Matter of Sayeh R., supra, 91 N.Y.2d 306 (parent's use of New York courts and law enforcement authorities to enforce judicially-granted custody rights can constitute neglect where parent disregards children's special vulnerabilities).

### C. Concurrent Criminal Proceedings

Particularly when there are allegations of sexual abuse or serious physical injury, it is not uncommon for a district attorney to commence a criminal prosecution when children have been victimized. However, since the criminal courts have no power to issue orders directly controlling the custody and care of a child victim, the family court, "[f]or the protection of children," has jurisdiction over abuse or neglect proceedings even when a criminal case is pending. FCA §1013(b). See also FCA §1014(c). In Article Ten abuse cases brought outside New York City, the district attorney is a necessary party. FCA §254(b); but see Matter of George, 100 Misc.2d 1003, 420 N.Y.S.2d 478 (Fam. Ct., Monroe Co., 1979) (DA no longer necessary party after only neglect was found). The existence of concurrent jurisdiction does not violate double jeopardy rules. See Matter of Commissioner of Social Services o/b/o Denise R., 219 A.D.2d 715, 631 N.Y.S.2d 431 (2d Dept. 1995); People v. Daniels, 194 A.D.2d 420, 598 N.Y.S.2d 790 (1st Dept. 1993), lv denied 82 N.Y.2d 752, 603 N.Y.S.2d 994.

When criminal proceedings have not yet been commenced, the family court may, after a hearing, transfer proceedings to a criminal court or refer the matter to a district attorney "if it concludes, that the processes of the family court are inappropriate or insufficient." FCA §1014(a); see also People v. Easter, 71 A.D.2d 762, 419 N.Y.S.2d 327 (3rd Dept. 1979) (hearing in family court need not comport with requirements of criminal trial or administrative hearing; here, family court considered medical report, statements by social workers and defendant's admissions); Matter of Pauliana T., 116 Misc.2d 180, 455 N.Y.S.2d 221 (Fam. Ct., N.Y. Co., 1982) (court may refer matter to United States Attorney).

If an Article Ten proceeding is "insufficient," but would still be beneficial, the court may retain jurisdiction, and issue preliminary orders designed to protect the child's

interests, after transferring or referring the case. FCA §1014(a). The family court may grant the respondent or potential respondent testimonial immunity in any criminal proceeding with respect to testimony given at a §1014 transfer hearing. FCA §1014(d). Although it has been held that §1014(d) also provides power to grant immunity at a fact-finding hearing [see Matter of Vance A., 105 Misc.2d 254, 432 N.Y.S.2d 137 (Fam. Ct., N.Y. Co., 1980), there is no other support for such a view.

A criminal complaint may be transferred by a criminal court to the family court in the same county, unless the family court has previously transferred the proceeding. FCA §1014(b). Because the term "complaint" is used, it is unclear whether a case may be transferred after an indictment or information has been filed. Compare People v. Leonel A., 160 Misc.2d 669, 610 N.Y.S.2d 451 (Crim. Ct., N.Y. Co., 1994) (conversion of complaint to information does not preclude transfer) and People v. Harrington, 131 Misc.2d 1017, 502 N.Y.S.2d 939 (County Ct., Schoharie Co., 1986) (post-indictment transfer permissible) with People v. Edwards, 101 Misc.2d 747, 422 N.Y.S.2d 324 (Crim. Ct., N.Y. Co., 1979) (transfer not permitted after felony hearing effectively converted complaint to information). When the family court receives transferred charges, the court must hold a hearing to "determine what further action is appropriate." FCA §1014(b). The court may then assume exclusive jurisdiction over the case, or transfer the complaint back to the criminal court and either proceed concurrently or refuse to exercise jurisdiction. If the court determines that a petition should be filed, Article Ten proceedings shall be commenced as soon as practicable. If there is no basis for the complaint, the family court may dismiss the charges. FCA §1014(b).

Notably, CPL §440.65 requires that upon conviction of any person for a crime under PL Article 120, 125, 130, 260 or 263 committed against a child under the age of eighteen by a person legally responsible for such child, as defined in SSL §412(3), the district attorney serving the jurisdiction in which the conviction is entered shall notify the local child protective services agency of such conviction including the name of the defendant, the name of the child, the court case number and the name of the prosecutor who appeared for the People.

**D. Diplomatic Immunity**

Diplomatic immunity may be raised in a motion to dismiss an Article Ten proceeding on the ground that the court lacks personal jurisdiction over the family. See Matter of Terrence K., 135 A.D.2d 857, 522 N.Y.S.2d 949 (2d Dept. 1987), lv denied 70 N.Y.2d 951, 524 N.Y.S.2d 678 (1988).

## VIII. Preliminary Proceedings

Discussed in the sections which follow are the circumstances under which a child may be removed from home by a social services official or by another person authorized to do so. A removal of the child prior to or at the outset of an Article Ten proceeding is an event which has far-reaching consequences for the child and the family. This is not merely because the family will be separated, but because the strains on the family created by that separation, and the tendency of some in the court system to view temporary removal as the prelude to an inevitable placement, may make it difficult to change the course of events even when a wrongful removal has taken place. Thus, the child's lawyer must be extremely vigilant at the early stages of an Article Ten proceeding, and, through aggressive information gathering and courtroom advocacy, attempt to ensure that a wrongful removal, or failure to remove, is remedied as soon as possible.

### A. Temporary Removal Of Child

#### 1. Removal With Consent

Pursuant to FCA §1021, a peace officer acting pursuant to his special duties, or a police officer, or an agent of a duly authorized agency, association, society or institution -- "[d]uly authorized association, agency, society or institution" is defined in FCA §119(a) -- may remove a child suspected to be abused or neglected from the child's residence if the parent or other legally responsible person consents in writing. See, e.g., Matter of Beverly SS., 132 A.D.2d 825, 517 N.Y.S.2d 618 (3rd Dept. 1987) (consent was voluntary).

The officer or social services agent "shall, coincident with consent or removal, give written notice to the parent or other person legally responsible for the child's care of the right to apply to the family court for the return of the child pursuant to [FCA §1028], and of the right to be represented by counsel and the procedures for those who are indigent to obtain counsel in proceedings brought pursuant to this article. Such notice shall also include the name, title, organization, address and telephone number of the person removing the child; the name, address and telephone number of the authorized agency to which the child will be taken, if available; and the telephone

number of the person to be contacted for visits with the child." In addition, "[a] copy of the instrument whereby the parent or legally responsible person has given such consent to such removal," and "notice of the telephone number of the child protective agency to contact to ascertain the date, time and place of the filing of the petition and of the hearing that will be held pursuant to [FCA §1027] shall be given to the parent or legally responsible person." See Matter of Nurayah J., 41 A.D.3d 477, 839 N.Y.S.2d 97 (2d Dept. 2007), lv denied 9 N.Y.3d 907 (nothing in Family Court Act or Social Services Law changes these responsibilities when petitioner cares for offspring of foster child).

Unless the child is returned sooner, a petition shall be filed within three court days from the date of removal, and a hearing shall be held pursuant to FCA §1027 no later than the next court day after the petition is filed and findings shall be made as required. A copy of the consent form must be attached to the petition as part of the permanent court record.

### 2. Emergency Removal Without Court Order

A peace officer acting pursuant to his special duties, a police officer, a law enforcement official, an agent of a society for the prevention of cruelty to children, or a designated employee of a department of social services, must take all necessary measures to protect a child's life or health -- such as taking or keeping a child in protective custody without a court order and in the absence of, and without the consent of, the parent or other legally responsible person -- when such person has reasonable cause to believe that continuation in the child's residence or in the parent's care and custody would present an imminent danger to the child's life or health. FCA §1024(a)(i). See, e.g., Matter of Jose R., 201 A.D.2d 260, 607 N.Y.S.2d 23 (1st Dept. 1994) (officer properly took respondent into custody after repeatedly seeing him alone on street in early morning); Arredondo v. Locklear, 462 F.3d 1292 (10th Cir. 2006) (emergency removal of non-targeted child justified). However, removal is not appropriate when there is sufficient time to apply for court-ordered removal under FCA §1022. FCA §1024(a)(ii).

In its decision in Nicholson v. Scoppetta, 3 N.Y.3d 357, 787 N.Y.S.2d 196 (2004), the Court of Appeals set forth standards to be used by child welfare personnel and courts in determining whether removal is justified. The Court asserted that if the

agency "believes that there is insufficient time to file a petition, the next step on the continuum should not be emergency removal, but ex parte removal by court order" pursuant to FCA §1022, which "ensures that in most urgent situations, there will be judicial oversight in order to prevent well-meaning but misguided removals that may harm the child more than help"; that "emergency removal [without court order] is appropriate where the danger is so immediate, so urgent that the child's life or safety will be at risk before an ex parte order can be obtained," and "[t]he standard obviously is a stringent one"; and that §1024 concerns "only the very grave circumstance of danger to life or health," and, while the Court "cannot say, for all future time, that the possibility can *never* exist, in the case of emotional injury--or, even more remotely, the risk of emotional injury--caused by witnessing domestic violence, it must be a rare circumstance in which the time would be so fleeting and the danger so great that emergency removal would be warranted." 3 N.Y.3d at 379-382.

In Child Safety Alert #14: Safety Planning for Newborns or Newly Discovered Children Whose Siblings Are in Foster Care, issued on June 5, 2008, the New York City Administration for Children's Services declared that when a newborn's siblings are in foster care and thus there has been a determination that the siblings cannot safely be returned home, a call must be made to the State Central Register, and there must be full safety and risk assessments to ensure that the newborn is safe and that appropriate court action will be taken on behalf of the newborn. "If the decision is to seek Court Ordered Supervision (or in exceptional circumstances not to take court action on behalf of the new child), there needs to be clear documentation from the [elevated risk] conference that explains why the older children have not yet been reunified, while it would be safe for a new child, especially when that child is a more dependent and fragile newborn, to remain safely in the home. When a child has siblings in foster care, Children's Services and Family Court have already determined that it is unsafe for older sibling(s) to be in the home. There should be a presumption that the safety factors that required removal and continued placement remain and that appropriate court action needs to be taken to protect the new child. Of course, it is the Family Court's responsibility to weigh the risk of harm of removal against the risk associated with the

child remaining in the home." Because the level of risk required by Nicholson is substantially greater than the risk of harm the court must find before ordering foster care placement at disposition or continued placement thereafter, this suggested presumption favoring removal appears to be legally unsound. Matter of Raymond A., 23 Misc.3d 1101(A), 881 N.Y.S.2d 366 (Fam. Ct., Kings Co., 2009) (ACS Child Safety Alert #14, which mandates safety assessment when case planner learns that mother of children in foster care is pregnant and states that "[w]hen a child has siblings in foster care, Children's Services has already determined that it is unsafe for older siblings to be in the home" and that "[t]here must be a presumption that safety factors exist that require removal and appropriate court action needs to commence to protect the new child," is "a blanket safer course policy, which was rejected by the Court of Appeals in Nicholson").

In addition to these statutory provisions, substantive and procedural due process rights, and the Fourth Amendment, come into play. See, e.g., Minor v. State, 819 N.W.2d 383 (Iowa 2012) (social worker entitled to absolute immunity when functioning in role of prosecutor by, for example, referring case to county attorney for possible initiation of Child in Need of Assistance proceedings, and when functioning in role of ordinary witness, such as when filing affidavit after initiation of CINA proceedings; social worker entitled to qualified immunity when acting in role of complaining witness, such as when social worker files affidavit in support of CINA petition, and for investigatory acts); Kirkpatrick v. County of Washoe, 843 F.3d 784 (9th Cir. 2016) (jury reasonably could find warrantless removal lacked exigent circumstances where mother's methamphetamine use did not pose threat to infant while both were in hospital, where mother was recovering from cesarean section and had demonstrated no resistance to social workers' intervention, nor did mother's unemployment or lack of stable place to live, or unlikely possibility she might unexpectedly abscond from hospital with child, justify removal); Doe ex rel. Doe v. Whelan, 732 F.3d 151 (2d Cir. 2013) (it was objectively reasonable to believe there was immediate threat to safety of children where there was history of domestic violence, father had violated protective order that mother was unwilling or unable to enforce, and it was likely father would return); Siliven

v. Indiana Department of Child Services, 635 F.3d 921 (7th Cir. 2011) (prudent caseworker could have believed child faced immediate threat of abuse where parents made report of maltreatment after mother discovered bruises on two-year-old son's arm a few hours after she picked him up from daycare, and case manager discovered agency file indicating that father had been accused of child abuse by then fifteen-year-old stepdaughter in 2003; court notes that determination of reasonableness is influenced, in large part, by fact that child remained with mother at location outside home); V.S. v. Muhammad, 595 F.3d 426 (2d Cir. 2010) (plaintiff alleged that doctor was known to defendants to have repeatedly misdiagnosed injuries as evidence of child abuse, but "to impose on an ACS caseworker the obligation in such circumstances of assessing the reliability of a qualified doctor's past and present diagnoses would impose a wholly unreasonable burden of the very kind qualified immunity is designed to remove"); Cornejo v. Bell, 592 F.3d 121 (2d Cir. 2010) (lawyer defendants entitled to absolute immunity from §1983 claims, but caseworker defendants functioned more like investigators than prosecutors and were entitled only to qualified immunity; it was reasonable for caseworkers to believe removal was proper where one child suffered violent shaking and fractured rib and there were at least two instances of apparent and unexplained abuse); Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009), vacated in part, 131 S.Ct. 2020 (2011) (exclusion of mother from daughters' physical examinations violated mother's substantive due process right to be present and children's right to have mother present when they faced potentially traumatic events); Burke v. County of Alameda, 586 F.3d 725 (9th Cir. 2009) (father, who shared joint custody, raised triable issue of fact as to whether removing officer's failure to contact him violated constitutional right of familial association; however, if parent without physical custody does not reside nearby, and child is in imminent danger of harm, it is probably reasonable for officer to place child in protective custody without attempting to place child with geographically distant parent); Gates v. Texas Department of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008) (there were no exigent circumstances permitting entry where alleged abuser was not home, only evidence of danger was one-time incident involving disciplining of one child, and agency employees

did not treat interviews as emergency, but, later, exigent circumstances justified removal of children from home and seizure of one child from school where there was evidence of recent physical abuse of multiple children and no evidence that agency was able to gather all the information before state courts closed; court also concludes that before social worker may seize a child from school for interview, the social worker must have reasonable belief that child has been abused and probably will suffer further abuse upon return home at end of school day, and reasonable belief must be based on first-hand observations by agency employees or anonymous report that contains significant indicia of reliability); Rogers v. County of San Joaquin, 487 F.3d 1288 (9th Cir., 2007) (family's Fourth and Fourteenth Amendment rights were violated when children were removed without warrant because of one child's bottle rot, children's malnourishment, and disorderly conditions in home; one need not be a licensed physician to recognize that these conditions would not lead to serious injury within hours before application could be made in court); Kia P. v. MnIntyre, 235 F.3d 749 (2d Cir. 2000), cert denied 534 U.S. 820, 122 S.Ct. 51 (2001) (no due process violation where hospital held child for short time pending agency's decision after child was found to have no methadone in her urine and was medically cleared); Tenenbaum v. City of New York, 193 F.3d 581 (2d Cir. 1999) (Second Circuit upholds findings of liability on certain claims, and reinstates other claims which had been dismissed, in §1983 action seeking damages for Due Process and Fourth Amendment violations in connection with removal and physical examination of child in absence of emergency; court finds no "special needs" and applies probable cause and warrant requirements of Fourth Amendment); Robison v. Via, 821 F.2d 913 (2d Cir. 1987) (emergency removal without court order appropriate where there was ongoing sexual abuse); Phillips v. County of Orange, 894 F.Supp.2d 345 (SDNY 2012) (parents adequately alleged that in-school interview of child constituted seizure under Fourth Amendment); Velez v. Bell, 2006 WL 1738076 (SDNY, 2006) (jury could have reasonably found that threat was sufficiently imminent that there was no time for court order to be obtained where, the night before the children were removed, the father of one of the children punched the mother and she threw a cooking fork at the father, ACS lost track of the family and did not know

whether the children were in a place where they would be safe, and ACS received reports that the boys had been excessively absent from or late to school and that the parents abused drugs); People United For Children, Inc. v. City of New York, 214 F.R.D. 252 (S.D.N.Y. 2003), reconsideration denied 2003 WL 22056930 (court certifies class of African-American or black parents subject to alleged ACS policy of resolving ambiguity in favor of removal of child); Taylor v. Evans, 72 F.Supp.2d 298 (S.D.N.Y. 1999) (court dismisses various claims while finding that it was objectively reasonable to believe that emergency removal was necessary); see also Matter of Alex LL., 60 A.D.3d 199, 872 N.Y.S.2d 569 (3rd Dept. 2009), lv denied 12 N.Y.3d 710 (Fourth Amendment applies to seizure of child by government agency official during civil child abuse or maltreatment investigation, but plaintiff's claim was premised upon continued retention of child in foster care pursuant to court orders); Carter v. Lindgren, 502 F.3d 26 (1st Cir. 2007) (although most cases in other Circuits upholding removal involved abuse, not neglect, caseworkers' emergency removal of child without hearing was objectively reasonable where one plaintiff attempted to commit suicide by swallowing large number of pills and other plaintiff had also threatened suicide); Gomes v. Wood, 451 F.3d 1122 (10th Cir. 2006) (disagreeing with Second Circuit's Tenenbaum decision, court notes that whether officials have time to seek judicial authorization should not be single focus of inquiry, but failure to seek authorization will undermine claim that emergency circumstances existed).

If imminent danger exists, a treating physician shall notify the local department of social services or appropriate police authorities to assume custody of the child, and may keep the child until custody is transferred. FCA §1024(a)(i),(e). If the physician is acting in his or her capacity as a staff member of a hospital or similar institution, he or she must notify the person in charge of the institution or his or her designated agent, who is then responsible for the care of the child pending action by the department of social services or police authorities. FCA §1024(d).

A person who assumes custody of a child pursuant to §1024 must immediately bring the child to a place approved by the local department of social services, unless the person is a treating physician and the child has been or is about to be admitted to a

hospital. FCA §1024(b)(i). The person must also make "every reasonable effort" to inform the parent or other legally responsible person of the facility to which the child has been brought. FCA §1024(b)(ii). At the time of removal, such person must also provide the parent or other person legally responsible with written notice of the right to apply for return of the child pursuant to FCA §1028, the right to be represented by counsel and the procedures for obtaining counsel if indigent, and the following information: the name, title, organization, address and phone number of the person removing the child; if available, the name, address and phone number of the agency in whose custody the child will be; the telephone number of a person to contact to arrange for visitation with the child; and information required by FCA §1023. Notice must be served personally at the child's residence if the parent is present at the removal. If the parent is not present, a copy of the notice must be affixed to the door, and a copy must be mailed to the parent's last known residence within twenty-four hours after removal. FCA §1024(b)(iii). See also SSL §417(3) (if child is removed in parent's absence, notice must be provided to closest police station). If removal is not at the child's residence, personal service must be made forthwith, or a copy must be affixed to the door of the child's residence and mailed to the parent's last known residence within twenty-four hours after removal. An affidavit of service must be filed with the clerk of court within twenty-four hours after service, exclusive of weekends and holidays. Failure to file the affidavit shall not constitute grounds for return of the child. FCA §1024(b)(iii).

As soon as possible, the person who assumes custody must inform the court, and, if it has not already been done, make a report pursuant to Title Six of the Social Services Law. FCA §1024(b)(iv). After receiving notice, the court must appoint a lawyer to represent the child. FCA §1016. After receiving custody from a person who has taken or kept a child, a social services official shall promptly inform the parent or other person legally responsible, and the family court, of such action. FCA §1024(e). See also FCA §1026(a)(i) (after learning of removal, “appropriate person designated by the court or a child protective agency" must "make every reasonable effort to communicate immediately with the child's parent or other person legally responsible for his care ...").

If only neglect is alleged, the agency shall return the child unless it concludes

that an imminent risk to the child's health would result. FCA §1026(a)(ii). If the agency concludes that it is appropriate to file a petition, it may condition return of the child upon the parent's written promise to appear in family court at a specified time and place, and may require the parent to bring the child. FCA §1026(b). If abuse is alleged, the agency must appear in court, and may then recommend that the child be returned or that no petition be filed. FCA §1026(a)(ii). If the child is not returned on the same day that the child is removed, or if the child protective agency decides to file a petition, the agency shall file the petition no later than the next court day after the child was removed. Upon good cause shown, the court may order an extension of the filing deadline, which may be for up to three days after the removal. A hearing must be held no later than the next court day after the petition is filed and findings shall be made as required pursuant to FCA §1027. FCA §1026(c). As soon as the court learns of the removal, it shall appoint a lawyer to represent the child. FCA §1016.

Any person or institution acting in good faith is immune from civil or criminal liability which might otherwise result from the removal or keeping of a child pursuant to FCA §1024. FCA §1024(c). See also SSL §419; Van Emrik v. Chemung County Department of Social Services, 220 A.D.2d 952, 632 N.Y.S.2d 712 (3rd Dept. 1995), appeal dism'd 88 N.Y.2d 874, 645 N.Y.S.2d 448 (1996) (caseworker's failure to inform court of parents' accusations against babysitter does not negate statutory presumption of good faith).

However, since the selection and supervision of foster care placement is governed by a standard of care, negligence in placing a child is fully actionable. Compare Barnes v. County of Nassau, 108 A.D.2d 50, 487 N.Y.S.2d 827 (2d Dept. 1985) and Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906 (2d Dept. 1980) with Jamal P. v. The City of New York, 24 A.D.3d 301, 808 N.Y.S.2d 609 (1st Dept. 2005) (jury finding of negligence overturned where plaintiff was allegedly coerced by other residents into engaging in sexual activity; there was no evidence that defendant was on notice that incidents might occur, and a facility is not required to guard against every impulsive, unanticipated act that might be committed by a resident); Sean M. v. City of New York, 20 A.D.3d 146, 795 N.Y.S.2d 539 (1st Dept.

2005) (no statutory immunity barring claim that City and foster care agency were negligent in supervising foster care) and Blanca C. v. County of Nassau, 103 A.D.2d 524, 480 N.Y.S.2d 747 (2d Dept. 1984), aff'd 65 N.Y.2d 712, 492 N.Y.S.2d 5 (1985) (agency not vicariously liable for injuries caused by foster parents unless negligent in selecting them). See also Henry A. v. Willden, 678 F.3d 991 (9th Cir. 2012) (State defendants could be held liable under "special relationship" rule even though plaintiffs were technically in custody of County where complaint alleged that one State defendant had "responsibility for ensuring the provision of child welfare services throughout the state" and that another State defendant led agency which "must evaluate all child welfare services provided throughout the State and take corrective action against any agency providing child welfare services which is not complying with any applicable laws, regulations, or policies"); Doe ex rel. Johnson v. South Carolina Department of Social Services, 597 F.3d 163 (4th Cir. 2010) (when state involuntarily removes child from home and takes child into custody and care, state has taken affirmative act to restrain child's liberty, triggering protections of Due Process Clause and imposing some responsibility for child's safety and general well-being, including duty not to make foster care placement that is deliberately indifferent to child's right to personal safety and security).

In actions brought pursuant to 42 USC §1983, social service officials who investigate claims and remove children have qualified immunity. They are liable when their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982); Tenenbaum v. City of New York, supra, 193 F.3d 581 (individual defendants given qualified immunity where law regarding emergency removals and physical examinations without court order was not clearly established). See also Phifer v. City of New York, 289 F.3d 49 (2d Cir. 2002) (Rooker-Feldman doctrine barred claims which were essentially determined by family court rulings).

### 3. Removal Pursuant To Court Order

#### a. Generally

The court may order the temporary removal of a child from his or her residence

before a petition is filed if: l) the parent or other person legally responsible is absent from the residence, or, if present, was asked and refused to consent to removal, and was informed of the agency's intent to apply for a removal order and of the information concerning the removal application required by FCA §1023; 2) immediate removal is necessary to avoid imminent danger to the child's life or health; and 3) there is insufficient time to file a petition and hold a removal hearing pursuant to FCA §1027. FCA §1022(a)(i). When a child protective agency applies for removal pursuant to §1022, the court must calendar the matter for that day and shall continue the matter on successive subsequent court days, if necessary, until a decision is made by the court. FCA §1022(a)(ii).

At a hearing held pursuant to FCA §1022 at which the respondent is present, the court shall advise the respondent and any non-respondent parent who is present of the allegations in the application and shall appoint counsel for each in accordance with FCA 262, unless waived. FCA §1022-a; see Matter of Hannah YY., 50 A.D.3d 1201, 854 N.Y.S.2d 797 (3d Dept. 2008) (reversal of neglect adjudication required where respondent was denied right to counsel at emergency removal hearing held pursuant to FCA §1022; court also notes that testimony by respondents and two other witnesses at removal hearing was relied upon as basis for family court's decision in neglect proceeding). In addition, in all cases the court must appoint a lawyer for the child. FCA §1016.

Any written order shall be issued immediately, but in no event later than the next court day following removal. An order directing the temporary removal of a child shall state whether the respondent was represented by counsel, and, if not, whether the respondent waived his or her right to counsel. A removal order also must specify the facility to which the child is to be brought. FCA §1022(b).

Except for good cause shown or where the child is sooner returned to the place he/she was residing, a petition must be filed within three court days of the issuance of a removal order under §1022. The court must hold a hearing pursuant to FCA §1027, no later than the next court day following the filing of the petition, if the respondent was not present for the hearing pursuant to §1022, or was present and unrepresented by

counsel and has not waived his or her right to counsel. FCA §1022(b).

In Nicholson v. Scoppetta, 3 N.Y.3d 357, the Court of Appeals asserted that a court "must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal," and "[t]he term 'safer course' [citations omitted] should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption." 3 N.Y.3d at 380. And, "when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child." 3 N.Y.3d at 382. See also Matter of Rosy S., 54 A.D.3d 377, 863 N.Y.S.2d 65 (2d Dept. 2008) (while reversing order granting mother's application for return of children, court notes, inter alia, that petitioner indicated that father of children was willing to assume custody if they were not returned to mother); Roska v. Sneddon, 437 F.3d 964 (10th Cir. 2006) (while finding that defendants did not comply with state statute and are not entitled to qualified immunity, court notes, inter alia, that defendants had information suggesting that removal might harm child); Matter of G22 v. Melissa R., 23 Misc.3d 1101(A), 881 N.Y.S.2d 366 (Fam. Ct., Kings Co., 2009) (ACS Child Safety Alert #14, which mandates safety assessment when case planner learns that mother of children in foster care is pregnant and states that "[w]hen a child has siblings in foster care, Children's Services has already determined that it is unsafe for older siblings to be in the home" and that "[t]here must be a presumption that safety factors exist that require removal and appropriate court action needs to commence to protect the new child," is "a blanket safer course policy, which was rejected by the Court of Appeals in Nicholson"); Matter of Abraham P., 21 Misc.3d 1144(A), 875 N.Y.S.2d 818 (Fam. Ct., Kings Co., 2008) ("The testimony describing ACS's policy of pursuing cases without regard to conflicting, possibly exculpatory evidence; the concession that some of the evidence was minimized; and ACS's failure to identify any way in which the respondent may have sufficiently rebutted the child's initial accusations, seems evident of an ACS policy adopting the 'safer course' doctrine"); Matter of Adrian J., 119 Misc.2d 900, 464 N.Y.S.2d 631 (Fam. Ct., Onondaga Co., 1983) (no imminent risk where respondent

father struck child and caused bruises to the rim of the child's right eye thirty-two days before petitioner sought order of removal; the sole purpose of removal was to prevent the family from leaving the jurisdiction with the child; and petitioner's delay in seeking order of removal is inconsistent with contention that removal was necessary; and, although the respondent father's behavior was at times odd and his martial arts displays were bizarre, there was insufficient evidence to warrant removal).

**b. "Reasonable Efforts" Inquiry**

To insure that removal is the only adequate means of protecting the child, the court must consider and determine in its order, while making specific written findings, whether continuation in the home would be contrary to the child's best interests, and, where appropriate, whether reasonable efforts were made to prevent or eliminate the need for removal. FCA §1022(a)(iii). See also Uniform Rules For The Family Court, 22 NYCRR §205.81(a) (petitioner shall provide information to aid the court, and court may also consider information provided by respondents, child's lawyer, non-respondent parents, relatives and other suitable persons); 45 C.F.R. §1356.21(b)(1) (if determination is not made within sixty days after removal, Title IV-E foster care maintenance payments are not available for duration of child's stay in foster care). If such efforts were not made, but would have been appropriate under the circumstances, the court is not required to return the child. However, whether or not a return is ordered, the court must order the child protective agency to provide, or arrange for the provision of, appropriate services or assistance to the child and family pursuant to FCA §1015-a or §1022(c). FCA §1022(a)(iv). Under FCA §1015-a, the court may order the provision of any type of service or assistance found in the agency's comprehensive annual services plan. Under FCA §1022(c), the court may authorize the provision of services or assistance found in the comprehensive annual services plan, including the performance of emergency medical or surgical procedures, if necessary to safeguard the child's life or health and there is not enough time to file a petition and hold a hearing pursuant to FCA §1027. An order may be issued under §1022(c) whether or not removal is ordered. FCA §1022(e).

If the court concludes that the agency's lack of efforts was appropriate, it must

include such a finding in the removal order. FCA §1022(a)(iii).

**c. Issuance Of Order Of Protection**

The court must also determine whether the imminent risk would be eliminated by the issuance of a temporary order of protection under FCA §1029 directing the removal of a person or persons from the child's residence. FCA §1022(a)(v). See also Matter of Elizabeth C., 156 A.D.3d 193 (2d Dept. 2017) (order excluding parent from children's household requires showing of imminent risk and parent is entitled to expedited hearing upon request within three court days pursuant to FCA §1028); FCA §1022(f) (permits court to issue temporary order of protection under §1029 as an alternative to, or in conjunction with, any other order issued under §1022). A temporary order of protection issued before the filing of a petition must be vacated if a petition is not filed within ten days. FCA §1029(a).

**d. Notice Of Removal**

The person removing the child must, at the time of removal, give written notice to the parent or other person legally responsible of the following: the right to apply for the return of the child pursuant to FCA §1028; the name, title, organization, address and telephone number of the person removing the child; if available, the name and phone number of the foster care agency to which the child will be taken; the phone number of the person to be contacted to arrange visitation; and information required by FCA §1023. Notice must be personally served, but, if the parent or other person is not present, a copy of the notice shall be affixed to the door and a copy shall be mailed to the person's last known residence within twenty-four hours after removal. If removal does not occur at the child's residence, a copy of the notice must be personally served upon the parent or other person forthwith, or affixed to the door of the child's residence and mailed to the person's last known residence within twenty-four hours after removal. FCA §1022(d). See also SSL §417(3) (agency must provide notice to police station closest to child's home after removing child in absence of parent, guardian or custodian).

**e. Permanency Hearing**

When ordering removal, the court shall set the date certain for an initial

permanency hearing pursuant to FCA §1089(a)(2), advise the parties in court of the date, and include the date certain in the written order issued pursuant to §1022(b). FCA §§ 1089(a)(2); 1022(a)(vii); 22 NYCRR §205.81(a).

A "permanency hearing" is "a hearing held in accordance with [FCA 1089] for the purpose of reviewing the foster care status of the child and the appropriateness of the permanency plan developed by the social services district or agency." FCA §1012(k). If a sibling or half-sibling of the child has previously been removed from the home and has a permanency hearing date certain scheduled within the next eight months, the permanency hearing for each child subsequently removed from the home shall be scheduled on the same date certain set for the first child removed, unless such sibling or half-sibling has been removed from the home pursuant to FCA Article Three or Seven. Orders issued in subsequent court hearings prior to the permanency hearing, including, but not limited to, the order of placement issued pursuant to FCA §1055, shall include the date certain for the permanency hearing. FCA §1089(a)(2).

### 4. Family Team Conferences

(Excerpts from ACS's 2017 Child Welfare Programs' Integrated Family Team Conference Policy)

Families in the New York City child welfare system experience many different types of conferences across the ACS Child Welfare Programs (CWP) continuum, including the Division of Child Protection (DCP), Family Permanency Services (FPS), and the Division of Preventive Services (DPS), in partnership with provider agencies.

A Family Team Conference (FTC) is a decision-making meeting that takes place when a child's safety and well-being have been preliminarily assessed to require removal, legal intervention, preventive services, or later in a case when permanency and other planning decisions must be made. Family team conferencing, now centralized in CWP, streamlines ACS and the provider agencies' ability to best assess safety and risk at critical junctures throughout a family's experience with ACS and, when appropriate, to plan, expedite, and support safety, well-being, and permanency.

ACS must facilitate the following FTCs for all children and families, including Advocate cases, families in Evidence-Based Models (EBMs), and, in limited cases, the

Family Assessment Program (FAP): Initial Child Safety Conference, Follow Up Child Safety Conference, Permanency Planning (12-month), Trial Discharge Conference, Final Discharge Conference, Placement Preservation (placement disruptions), Preventive Service (30 – 45 day), Service Termination [for high-risk cases defined or identified by ACS], and Elevated Risk Conference.

The provider agency must facilitate all other FTCs that are not facilitated by ACS, including Goal Change Conference (other than to Another Planned Permanent Living Arrangement (APPLA)), Placement Preservation Conference (sibling reunification and kinship moves), Permanency Planning Conference (90-day, 6-month, and every 6 months after the 1st year), Preventive Service Planning (every 6 months), and Service Termination.

ACS staff and provider agency staff must coordinate with the ACS CWP Office of Integration of Conferencing regarding FTCs. This includes, but is not limited to oversight by ACS CWP, initiation of conferences by specific triggers, requests for ACS facilitated FTCs to ACS CWP, and more frequent conference facilitation by ACS.

In lieu of ACS CWP, ACS staff and provider agency staff must request and coordinate with ACS FPS' Office of Older Youth Services (OYS) for the following FTCs: Goal Change to APPLA, Placement Preservation Conference for all youth with a goal of APPLA and all active dually-involved youth in care, Trial and Final Discharge Conference for all youth with a goal of APPLA, all active dually-involved youth in care, and all youth in Residential Treatment Centers (RTCs) with a goal of reunification.

ACS staff and provider agency staff must notify the family and the ACS Family Court Legal Services (FCLS) attorney, if assigned, of a FTC as soon as it is scheduled. The FCLS attorney must immediately notify the attorneys for the child(ren) and parent, if any are assigned, of all scheduled FTCs upon receipt of the notice.

ACS staff and provider preventive service agency staff may request a higher level of preventive service for a family during an ACS-facilitated FTC. This request is also known as a "Step-Up" request. If a provider preventive service agency determines that a Step-Up or a higher level of preventive services is needed at any time other than during an FTC, the provider preventive service agency may request a Step-Up directly

from ACS DPS' Office of Preventive Technical Assistance (OPTA).

### 5. Selection Of Foster Home And School Setting

Education Law §3244 contains requirements designed to ensure that the impact of removal on the child's education is kept to a minimum.

Notwithstanding any other provision of law to the contrary, the social services district, in consultation with the appropriate local educational agency or agencies, shall designate either the school district of origin or the school district of residence within which the child shall be entitled to attend in accordance with a best interest determination. Education Law §3244(2)(a). The school district of origin is the district within the state of New York in which the child or youth in foster care was attending a public school or preschool on a tuition-free basis or was entitled to attend when the social services district or OCFS assumed responsibility for the placement, support and maintenance of the child or youth. Education Law §3244(1)(b). The school district of residence is the public school district within the state of New York in which the foster care placement is located. Education Law §3244(1)(c).

The child shall be entitled to attend the school of origin or any school that children and youth who live in the attendance area in which the foster care placement is located are eligible to attend, including a preschool, subject to a best interest determination, for the duration of the child's placement in foster care and until the end of the school year in which such child is no longer in foster care and for one additional year if that year constitutes the child's terminal year in such building. Education Law §3244(2)(a). The same is true where the school district of origin or school of origin is located in New York state and the child's foster care placement is located in a contiguous state, Education Law §3244(2)(b), and where a child is moved from one foster care placement to another, in which case the social services district may designate that the child attend school in the attendance area in which the foster care placement is located. Education Law §3244(2)(c).

Upon notification of the designation made by the social services district, the designated school district of attendance shall immediately: (1) enroll the child or youth even if the child or youth is unable to produce records normally a requirement for

enrollment; (2) treat the child or youth as a resident for all purposes; and (3) make a written request to the school district where the child's records are located for a copy of such records. Education Law §3244(2)(d).

Notwithstanding any other provision of law, any child or youth in foster care who requires transportation in order to attend a school of origin shall be entitled to receive such transportation. The designated school district of attendance shall provide transportation to and from the child's foster care placement location and the school of origin. Education Law §3244(4)(a).

Notwithstanding any other provision of law, where any child or youth attends the school district of residence and not the school of origin, such school district shall provide transportation to the child on the same basis as a resident student. Education Law §3244(4)(b).

Where the child has been placed in foster care in a contiguous state and has designated a school of origin located in the state of New York, the designated school district of attendance in New York state shall collaborate with the social services district to arrange for transportation. Education Law §3244(4)(d).

Each child or youth shall be provided services comparable to services offered to other students in the school selected, including the following: transportation services; educational services for which the child or youth meets the eligibility criteria; educational programs for children with disabilities; educational programs for English learners; programs in career and technical education; programs for gifted and talented students; and school nutrition programs. Education Law §3244(5).

State regulations also contain requirements designed to ensure that the impact of removal on the child’s education and previous life style is kept to a minimum.

Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents, or to which the child will be discharged. It shall be deemed inappropriate to place a child in a setting which conforms with this standard only if the child’s service needs can only be met in another available setting at the same or lesser level of care. The placement of the child into foster care must take

into account the appropriateness of the child's existing educational setting and the proximity of such setting to the child's placement location. When is it in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management responsibility must coordinate with applicable local school authorities where the foster child is placed in order that the foster child is provided with immediate and appropriate enrollment in a new school; and the agency with case management responsibility must coordinate with applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child are provided to the new school. 18 NYCRR §430.11(c)(1)(i).

If the child has been placed in a foster care placement a substantial distance from the home of the parents of the child or in a state different from the state in which the parent's home is located, the uniform case record must contain documentation why such placement is in the best interests of the child and show in the uniform case record that efforts were made to keep the child in his or her current school, or where distance was a factor or the educational setting was inappropriate, that efforts were made to seek immediate enrollment in a new school and to arrange for timely transfer of school records, and, if the child has been placed in foster care outside of the state in which the home of the parents of the child is located, the uniform case record must contain a report prepared every six months by a caseworker employed by the authorized agency with case management and/or case planning responsibility over the child, the state in which the home is or facility is located, or a private agency under contract with either the authorized agency or other state documenting the caseworker's visit to the child's placement within the six-month period. 18 NYCRR §430.11(c)(2)(viii, ix, x).

The placement of the child into foster care must take into account the appropriateness of the child's existing educational setting and the proximity of such

setting to the child's placement location. When is it in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child is placed in order that the foster child is provided with immediate and appropriate enrollment in a new school; and the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child are provided to the new school. 18 NYCRR §430.11(c)(1)(i). The uniform case record shall show that efforts were made to keep the child in his or her current school, or where distance was a factor or the educational setting was inappropriate, that efforts were made to seek immediate enrollment in a new school and to arrange for timely transfer of school records. 18 NYCRR §430.11(c)(2)(ix).

The social services district with care and custody or guardianship and custody of a foster child who has attained the minimum age for compulsory education under the Education Law is responsible for assuring that the foster child is a full-time elementary or secondary school student or has completed secondary education. For the purpose of this paragraph, an elementary or secondary school student means a child who is: (a) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (b) instructed in elementary or secondary education at home, in accordance with the laws in which the foster child's home is located; (c) in an independent study elementary or secondary education program, in accordance with the laws in which the foster child's education program is located, which is administered by the local school or school district; or (d) incapable of attending school on a full-time basis due to the foster child's

medical condition, which incapability is supported by regularly updated information in the child's uniform case record. 18 NYCRR §430.12(c)(4)(i).

The progress notes for each school age child in foster care must reflect either the education program in which the foster child is presently enrolled or is enrolling; or the date the foster child completed his or her compulsory education; or where the child is not capable of attending school on a full-time basis, what the medical condition is and why such condition prevents full-time attendance. The social services district must update the progress notes on an annual basis to reflect why such medical condition continues to prevent the foster child's full-time attendance in an education program. On an annual basis, by the first day of each October, the education module in CONNECTIONS must be updated with education information about each school age foster child in the form and manner as required by the Office. 18 NYCRR §430.12(c)(4)(ii).

### B. Court-Ordered Investigations

#### 1. Child Protective Investigation

The court has the power to order a child protective agency to conduct a child protective investigation as described by the Social Services Law and report the findings to the court during the course of an Article Ten proceeding. FCA §1034(1)(a). The court may also order such an investigation whenever facts suggesting the presence of abuse or neglect come to light in any other Family Court Act proceeding. FCA §1034(1)(b). See, e.g., Matter of Charlene H., 64 A.D.2d 900, 408 N.Y.S.2d 103 (2d Dept. 1978) (family court should have ordered filing of neglect petition, as requested by child's attorney during course of person in need of supervision and juvenile delinquency proceedings). But see Matter of Corrigan v. Orosco, 84 A.D.3d 955 (2d Dept. 2011) (order in custody proceeding improper where there was no indication of abuse, neglect, or maltreatment in petition or proceedings); Matter of Zena O., 212 A.D.2d 712, 622 N.Y.S.2d 601 (2d Dept. 1995) (court had no power to order interviews of children by psychologist or psychiatrist after Commissioner concluded that children were not in danger of sex abuse).

The court's decision to initiate an investigation, by itself, in no way opens the judge to a motion for recusal on grounds of bias. See Opinion: 15-195, 2015 WL 11805786 (Advisory Committee on Judicial Ethics, 10/22/15) (judge need not disqualify him/herself in pending or future proceedings based on decision to order child protection investigation unless judge believes he/she cannot be impartial, which is a matter left solely to the judge's own discretion; statutorily authorized act taken in furtherance of judge's judicial responsibilities toward children involved in family court proceedings cannot form basis for reasonable question about judge's impartiality).

**2. Production Of Child**

Before a petition is filed and where there is reasonable cause to suspect that a child or children`s life or health may be in danger, child protective services may seek a court order based upon: (a) a report of suspected abuse or maltreatment under the Social Services Law as well as any additional information that a child protective investigator has learned in the investigation; and (b) the fact that the investigator has been unable to locate the child named in the report or any other children in the household or has been denied access to the child or children in the household sufficient to determine their safety; and (c) the fact that the investigator has advised the parent or other persons legally responsible for the child or children 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 to the child or children without further notice to the parent or other persons legally responsible. FCA §1034(2)(a)(i); see Matter of Issac C., [Index Number Redacted by Court], NYLJ 1202783197542, at *1 (Fam., BX, Decided March 29, 2017) (order directing production of children for observation and interviews at Child Advocacy Center, in connection with allegation that one child sexually abused sibling, is vacated where report was made almost eight months prior to filing of application; ACS closed out investigation, but kept case open despite observing video of alleged abuse and finding none; ACS observed children on numerous occasions and did not report risk of harm or safety concerns; accused child's attorney raised concerns about possible violation of child's due process rights, and court noted that law enforcement personnel would be present via two-way

mirror and charges could be filed against accused child; and parents should not be forced to cooperate based on untimely application apparently being used as means to force parents and accused child to comply further with ACS).

Where such a court order has been requested, the court may issue an order requiring that the parent or other persons legally responsible for the child or children produce the child or children at a particular location which may include a child advocacy center, or to a particular person for an interview of the child or children, and for observation of the condition of the child, outside of the presence of the parent or other person responsible. FCA §1034(2)(a)(ii).

**3. <u>Entry Into Home</u>**

Before a petition is filed and where there is probable cause to believe that an abused or neglected child may be found on the premises, child protective services may seek a court order based upon: (a) a report of suspected abuse or maltreatment under the Social Services Law as well as any additional information that a child protective investigator has learned in the investigation; and (b) the fact that the investigator has been denied access to the home of the child or children in order to evaluate the home environment; and (c) the fact that the investigator has advised the parent or other person legally responsible for the child or children that, when denied access to the home environment, the child protective investigator may consider seeking an immediate court order to gain access to the home environment without further notice to the parent or other person legally responsible. FCA §1034(2)(b)(i).

Where such a court order has been requested, the court may issue an order authorizing the person conducting the child protective investigation to enter the home in order to determine whether such child or children are present and/or to conduct a home visit and evaluate the home environment of the child or children. FCA §1034(2)(b)(ii).

Family court judges do not have general authority to issue search warrants pursuant to CPL Article 690. However, CPLR §3120(1) states that "[a]fter commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum: * * * (ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the

purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon."

**4. Procedure And Standards**

The procedure for granting a production or entry order shall be the same as for a search warrant under CPL Article 690. FCA §1034(2)(c). See, e.g., Matter of Smith Children, 26 Misc.3d 826, 891 N.Y.S.2d 628 (Fam. Ct., Kings Co., 2009) (anonymous Central Register report not sufficient to establish probable cause where report of domestic violence alleged that mother had received stitches to forehead a few days before report was made, but worker was unable to verify that information when she saw mother a few days after report, and children appeared to be fine; also, application for order permitting worker to enter home between 6:00 a.m. and 9:00 p.m. was overly broad); Matter of Marcario, 119 Misc.2d 404, 462 N.Y.S.2d 1000 (Fam. Ct., Suffolk Co., 1983) (court employs two-pronged Aguilar-Spinelli test used in criminal cases, which requires that informant has basis of knowledge and is reliable). If such an order is issued, the court shall specify which action may be taken and by whom in the order. FCA §1034(2)(c).

In determining if such orders shall be made, the court shall consider all relevant information, including but not limited to: (i) the nature and seriousness of the allegations made in the report; (ii) the age and vulnerability of the child or children; (iii) the potential harm to the child or children if a full investigation is not completed; (iv) the relationship of the source of the report to the family, including the source`s ability to observe that which has been alleged; and (v) the child protective or criminal history, if any, of the family and any other relevant information that the investigation has already obtained. FCA §1034(2)(d). The court shall assess which actions are necessary in light of the child or children`s safety, provided, however, that such actions shall be the least intrusive to the family. FCA §1034(2)(e). Nothing in §1034 shall limit the court's authority to issue any appropriate order in accordance with Article Ten after a petition has been filed. FCA §1034(2)(h).

**5. Availability Of Family Court**

The court shall be available at all hours to hear such requests by the social services district which shall be permitted to make such requests either in writing or orally, pursuant to CPL §690.36, in person to the family court during hours that the court is open and orally by telephone or in person, pursuant to §690.36, to a family court judge when the court is not open. While the request is being made, law enforcement shall remain where the child or children are or are believed to be present if the child protective services investigator has requested law enforcement assistance. Provided, however, that law enforcement may not enter the premises where the child or children are believed to be present without a search warrant or another constitutional basis for such entry. FCA §1034(2)(f).

**6. Report to Court**

Where the court issues an order under §1034, the child protective investigator shall within three business days prepare a report to the court detailing his or her findings and any other actions that have been taken pertaining to the child named in the report and any other children in the household. FCA §1034(2)(g).

**7. Probation Investigation**

The court may also use the services of the probation department in the investigation of abuse or neglect charges. See FCA §252(d).

**C. Filing Of Petition**

A child protective proceeding is commenced by the filing of a petition alleging facts sufficient to establish that the subject child is abused or neglected. FCA §1031(a). In abuse cases the court may, on its own motion at any time in the proceedings, substitute a neglect petition if the facts do not appear sufficient to establish abuse. FCA §1031(c). Allegations of abuse and neglect may be made in the same petition. In addition, allegations concerning more than one child may be made in a single petition. FCA §1031(b).

Allegations often are made upon information and belief and there is no statutory verification requirement. See Sobie, Practice Commentary, FCA §1031; see also Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008) (social workers not entitled to absolute immunity in connection with signing and filing dependency and custody

petitions). Sources of information should be identified, but there is no requirement that the petition indicate which facts derive from which source. Cf. People v. Marshall, 122 A.D.2d 283, 504 N.Y.S.2d 782 (2d Dept. 1986).

A petition should allege specific facts rather than conclusory language. See Matter of Cardinal v. Munyan, 30 A.D.2d 444, 294 N.Y.S.2d 180 (3rd Dept. 1968) (decided under former FCA §331); Matter of Addis C., 43 Misc.3d 1234(A) (Fam. Ct., Kings Co., 2014) (court, citing CPLR §3013, notes that Article Ten petition should state what parents did and claim it met statutory definition, and state specific harm or imminent risk of harm to child); Matter of Sais, 94 Misc.2d 40, 404 N.Y.S.2d 507 (Fam. Ct., Suffolk Co., 1978); CPLR §3013 ("[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense").

Generally, the exact dates of the charged acts are not required in order for the petitioner to allege a cause of action or prove the case at the fact-finding hearing. See Matter of Aleria KK., 127 A.D.3d 1525 (3d Dept. 2015) (child's ability to recall details, including dates and times, goes to credibility and weight of child's disclosures).

When a motion to dismiss for failure to state a cause of action is made pursuant to CPLR 3211(a)(7), the petition should be upheld "so long as, giving the [petitioner] the benefit of every possible favorable inference, a cause of action is stated." Green v. Leibowitz, 118 A.D.2d 756, 500 N.Y.S.2d 146 (2d Dept. 1986). See Matter of Alan FF., 27 A.D.3d 800, 811 N.Y.S.2d 158 (3rd Dept., 2006) (family court improperly dismissed petition alleging father's failure to progress in sex offender treatment and mother's exposure of children to unsupervised visits with father and to domestic violence); Matter of Julianne XX., 13 A.D.3d 1031, 786 N.Y.S.2d 835 (3rd Dept. 2004) (conclusory allegation that respondent abused and/or consumed alcohol in presence of children failed to state a cause of action); Matter of Mercedes R., 300 A.D.2d 664, 751 N.Y.S.2d 788 (2d Dept. 2002) (summary judgment for respondent denied where child's out-of-court statements described sexual abuse); Matter of Stefanel Tyesha C., 157 A.D.2d 322, 556 N.Y.S.2d 280 (1st Dept. 1990), appeal withdrawn 76 N.Y.2d 983, 563

N.Y.S.2d 771; Matter of Baby Girl M., 58 Misc.3d 1223(A) (Fam. Ct., Kings Co., 2018) (petition failed to state cause of action where it alleged that mother tested positive for opiates when she gave birth and was not enrolled in and regularly attending drug treatment program); see also Miglino v. Bally Total Fitness of Greater New York, Inc., 20 N.Y.3d 342, 961 N.Y.S.2d 364 (2013) (plaintiff may not be penalized for failure to make evidentiary showing in support of complaint that states claim on face); Godfrey v. Spano, 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009) (no dismissal where defendant's affidavit did not establish conclusively that plaintiffs had no cause of action). Although the respondent is entitled to reasonable notice as to the date when the acts allegedly occurred, when young children are involved it may not be possible to specify the exact time. Cf. In re Melissa I., 256 A.D.2d 671, 681 N.Y.S.2d 372 (3rd Dept. 1998).

When a child has been removed before the filing of a petition, the petition must state the date and time of removal, the circumstances requiring removal, whether removal occurred pursuant to FCA §1021, §1022 or §1024, and, if removal occurred without a court order issued pursuant to FCA §1022, the reasons why there was not sufficient time to obtain an order. FCA §1031(e).

An abuse petition must contain a notice in conspicuous print that a finding of severe or repeated abuse by clear and convincing evidence could constitute a basis to terminate parental rights. FCA §1031(f). Arguably, absence of notice would render defective any clear and convincing evidence finding [see FCA §1051(e)]. See Matter of Nassau County Department of Social Services o/b/o Jean G., 225 A.D.2d 779, 640 N.Y.S.2d 153 (2d Dept. 1996) (termination of parental rights petition defective due to absence of reference to right to counsel and warning that it could lead to adoption without respondent's consent); cf. In re Jose M., 245 A.D.2d 173, 666 N.Y.S.2d 177 (1st Dept. 1997) (designated felony finding vacated where respondent's copy of petition lacked marking). However, technical defects are often ignored in Article Ten cases, and, arguably, a lack of notice may be cured by amendment, or by in-court notice of petitioner's intent to seek a clear and convincing evidence finding [see FCA §1033-b(1)(e); In re Ne-Ashia R., 99 A.D.3d 616 (1st Dept. 2012), aff'g 34 Misc.3d 1233(A) (Fam. Ct., Bronx Co., 2012) (no error in court's sua sponte amendment of petition to

conform to proof of severe abuse where, approximately two months before mother commenced her case, court advised parties it was considering petition "under a clear and convincing standard … and therefore, under the severe and repeated abuse statute" and mother never requested adjournment or moved to dismiss petition)].

It appears that child welfare officials are protected by absolute immunity from civil liability when initiating and prosecuting an Article Ten proceeding. Matter of Alex LL., 60 A.D.3d 199, 872 N.Y.S.2d 569 (3rd Dept. 2009), lv denied 12 N.Y.3d 710 (agency officials performing certain functions analogous to those of prosecutor, such as defendants who played role in initiating and prosecuting placement and termination of parental rights proceedings, may claim absolute immunity with respect to such acts, and defendants who required plaintiff to complete substance abuse evaluation and psychological assessment were absolutely immune because actions were taken pursuant to facially valid court orders; defendants who required plaintiff to obtain evaluations and participate in preventive service programs, made evidentiary submissions and recommendations to family court, and limited plaintiff's visits with child, were entitled to qualified immunity).

### D. Issuance And Service Of Process

#### 1. Cases In Which Child Has Been Removed

When the child has been removed, the court must, unless a warrant is issued pursuant to FCA §1037, cause a copy of the petition and a summons to be issued the same day the petition is filed, requiring the parent or other person legally responsible for the child's care or with whom the child had been residing to appear within three court days to answer the petition unless a shorter time for a hearing to occur is prescribed in Part Two of Article Ten. FCA §1035(a).

In abuse cases, service of the petition and summons must be made within two court days after issuance. If timely service cannot be made, the court must be advised of such failure and the reasons therefor within three court days after issuance of process. When so advised, the court must issue a warrant, and, except for good cause shown, direct that the child be produced. FCA §1036(a).

Service must be made by personal delivery of true copies of the documents at

least twenty-four hours before the respondent is due to appear in court. FCA §1036(b); see also CPLR 2103(a) ("Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over"); Grid Realty Corp. v. Gialousakis, 129 A.D.2d 768 (2d Dept. 1987) (service of summons by president of plaintiff corporation did not vitiate service). If personal service is not made after a reasonable effort, substituted service may be ordered pursuant to the Civil Practice Law and Rules [see CPLR §§ 308, 312-a, 316]. FCA §1036(d). See also Matter of Commitment of Marilyn S., 233 A.D.2d 155, 649 N.Y.S.2d 671 (1st Dept. 1996) (CPLR §306-b, which mandates dismissal if service is not perfected in one hundred twenty days, not applicable in termination proceeding); Matter of J.T., 53 Misc.3d 888 (Fam. Ct., Onondaga Co., 2016) (in termination of parental rights proceeding, personal service on respondent father, who had been deported to Jordan, found impractical and e-mail service authorized); Baidoo v. Blood Dzraku, 48 Misc.3d 309 (Sup. Ct., N.Y. Co., 2015) (citing CPLR §308(5), court authorizes service of divorce summons via private message to Facebook account, finding that such service was reasonably calculated to provide notice); Matter of Noel v. Maria, F-00787-13/14B, NYLJ 1202670317766, at *1 (Fam., RI, Decided September 12, 2014) (in child support proceeding, court authorizes substituted service via Facebook).

### 2. Cases In Which Child Has Not Been Removed

When the child has not been removed, the court must forthwith cause a copy of the petition and a summons to be issued requiring the respondent to appear within seven court days of the issuance of process. The court may, but is not required to, order production of the child. FCA §1035(c).

In abuse cases, service of the petition and summons must be made within two court days after issuance. If timely service cannot be made, the court must be advised of such failure and the reasons therefor within three court days after issuance of process. When so advised, the court must issue a warrant, and, except for good cause shown, direct that the child be produced. FCA §1036(a).

Service must be made by personal delivery of true copies of the documents at least twenty-four hours before the respondent is due to appear in court. FCA §1036(b);

see also CPLR 2103(a) ("Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over"); Grid Realty Corp. v. Gialousakis, 129 A.D.2d 768 (2d Dept. 1987) (service of summons by president of plaintiff corporation did not vitiate service). If personal service is not made after a reasonable effort, substituted service may be ordered pursuant to the Civil Practice Law and Rules [see CPLR §§ 308, 312-a, 316]. FCA §1036(d). See also Matter of Commitment of Marilyn S., 233 A.D.2d 155, 649 N.Y.S.2d 671 (1st Dept. 1996) (CPLR §306-b, which mandates dismissal if service is not perfected in one hundred twenty days, not applicable in termination proceeding); DLJ Mortgage Capital, Inc. v. Kontogiannis, 2013 WL 327767 (Sup. Ct., N.Y. Co., 2013) (person's last residence prior to imprisonment can be usual place of abode for purposes of service if family members are living there at time of service); Matter of Noel v. Maria, F-00787-13/14B, NYLJ 1202670317766, at *1 (Fam., RI, Decided September 12, 2014) (in child support proceeding, court authorizes substituted service via Facebook).

### 3. Notice In Abuse Cases

If abuse is alleged, the petition and summons must be clearly marked on the face, "Child Abuse Case." FCA §1035(a), (c). The summons must contain a statement in conspicuous print stating that the proceeding may lead to the filing of a petition under the Social Services Law for the termination of parental rights and commitment of guardianship and custody of the child for the purpose of adoption, and that if the child is placed and remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition for termination of parental rights and commitment of guardianship and custody for the purpose of adoption. FCA §1035(b).

### 4. Out-of-State and International Service

The court has power to send process into any New York State county. See FCA §154(a). If the child resides or is domiciled in the state, and the alleged abuse or neglect occurred in the state, the court may send process outside the state and exercise personal jurisdiction over any person subject to the court's jurisdiction under CPLR §301 or §302. FCA §1036(c). See CPLR §302(a) ("Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this

section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or 4. owns, uses or possesses any real property situated within the state"); Matter of Sayeh R., 91 N.Y.2d 306, 670 N.Y.S.2d 377 (1997).

In addition, the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act apply. If a person cannot be served within the state, the court shall require service in a manner reasonably calculated to give actual notice, as follows: (a) by personal delivery outside the state as prescribed by CPLR §313; or (b) by any form of mail requesting a receipt; or (c) in such manner as the court, upon motion, directs, including publication, if service is impracticable under (a) or (b); or (d) in such manner as prescribed by the law of the state in which service is made. Domestic Relations Law §75-g(1); see also DRL §76-i(2) ("If a party to a child custody proceeding whose presence is desired by the court is outside the state, the court may order that a notice given pursuant to [DRL §75-g] include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party"); Matter of Kali-Ann E., 27 A.D.3d 796, 810 N.Y.S.2d 251 (3rd Dept. 2006), lv denied 7 N.Y.3d 704 (personal service in Florida jail satisfied §75-g); Matter of Janie C, 31 Misc.3d 1235(A) (Fam. Ct., Bronx Co., 2011) (out-of-state service on father authorized by DRL § 75-g); Matter of Karen W. v. Roger S., 8 Misc.3d 285, 793 N.Y.S.2d 693 (Fam. Ct., Dutchess Co., 2004) (UCCJEA authorizes exercise of jurisdiction independent of CPLR §302). Proof of service outside the state shall be by

affidavit of the individual who made service, or in the manner prescribed by the order pursuant to which service is made. If service is made by mail, proof may be by a receipt signed by, or other evidence of delivery to, the addressee. Proof of service may also be in the manner prescribed by New York law or the law of the other state. DRL §75-g(2).

Of course, the court's exercise of personal jurisdiction is limited by Federal constitutional requirements that a State court have at least minimal contacts with the person over whom it seeks to exert its power. Matter of Stanley R., 147 A.D.2d 284, 542 N.Y.S.2d 734 (2d Dept. 1989).

In abuse cases, out-of-state service must be made within ten days of issuance of process, and, if service cannot be made within ten days, a time extension may be granted for good cause shown upon application by the child's attorney or any party. Although a warrant ordinarily must be issued when timely service cannot be made in an abuse case, this requirement does not exist when out-of-state service is involved. FCA §1036(a). Should an out-of-state respondent default by failing to appear after being served, the court may, upon its own motion or application by the child's attorney or any party, proceed to a fact-finding hearing. FCA §1036(c).

Under the UCCJEA, a New York court may treat a foreign country as if it were a state of the United States. DRL §75-d(1).

**5. Substituted Service**

If personal service is not made after a reasonable effort, substituted service may be ordered pursuant to the Civil Practice Law and Rules [see CPLR §§ 308, 312-a, 316]. FCA §1036(d). See also Matter of Kaila B., 64 A.D.3d 647, 883 N.Y.S.2d 132 (2d Dept. 2009) (DSS made reasonable effort to serve father, and service by publication was proper, where he was living in Westchester and not at address where he claimed to reside, several attempts were made to personally serve him at Westchester address along with attempt at last known place of business, and he gave instructions not to accept mail sent to him at address in Westchester; however, petition dismissed because by directing that summons be published together with notice of proceeding only once in each of two newspapers, court failed to comply with CPLR 316, which requires publication at least once in each of four successive weeks and is a

jurisdictional requirement); Matter of Commitment of Marilyn S., 233 A.D.2d 155, 649 N.Y.S.2d 671 (1st Dept. 1996) (CPLR §306-b, which mandates dismissal if service is not perfected in one hundred twenty days, not applicable in termination proceeding).

**E. Contesting Personal Jurisdiction**

A respondent who wishes to contest personal jurisdiction on grounds of improper service may request a "traverse" hearing. See Matter of Annata M., 140 A.D.3d 959 (2d Dept. 2016) (bare and unsubstantiated denial of service lacked factual specificity and detail required to rebut prima facie proof of proper service provided by process server's affidavit and necessitate hearing); Matter of Carolyn Z., 53 A.D.3d 875, 862 N.Y.S.2d 620 (3rd Dept. 2008) (respondent's wife made proper service; any failure to provide information proof of service specified in CPLR 306[a] was irregularity and not jurisdictional defect, and wife was not party disqualified from serving other party under CPLR 2103[a]).

An appearance by respondent's counsel on behalf of respondent, in the absence of proper objection, confers personal jurisdiction. In re Taina M., 32 A.D.3d 210, 820 N.Y.S.2d 221 (1st Dept. 2006) (counsel's mere objection to affidavits of service as insufficient to constitute "completed service," unaccompanied by oral motion to dismiss or request for traverse hearing, failed to preserve issue).

**F. Warrants**

**1. Warrant For Respondent**

After the filing of a petition, the court may issue a warrant for the respondent if it appears that: 1) the summons cannot be served; 2) the summoned person has refused to appear; 3) the respondent is likely to leave the jurisdiction; 4) a summons would be ineffectual; 5) the safety of the child is endangered; or 6) the safety of a parent or other person legally responsible for the child's care or with whom the child is residing, or a foster parent or other temporary custodian, is endangered. FCA §1037(a). See Matter of Roselyn S., 82 A.D.3d 1249 (2d Dept. 2011) (court improperly relied on §1037(a) when it directed mother to appear at dispositional hearing since mother had already appeared and accepted service of petition). Rather than issue a warrant, family court judges often give the absent person a final opportunity to avoid arrest by issuing a

"stayed warrant" which directs the person to appear on a date certain. See, e.g., Matter of Martin D., 100 Misc.2d 339, 418 N.Y.S.2d 1003 (Fam. Ct., Kings Co., 1979) (stayed warrant issued in juvenile delinquency proceeding); but see Matter of Sharon H., 83 Misc.2d 55, 371 N.Y.S.2d 335 (Fam. Ct., Bronx Co., 1975) (court finds practice of issuing stayed warrants to be unauthorized, and equivalent to "judicial blackmail").

A warrant may be executed on any day of the week, and at any hour of the day or night. FCA §153-a(a). Unless encountering physical resistance, flight or other factors rendering normal procedure impractical, the police officer must inform the subject that a warrant for his arrest for attendance at the proceeding has been issued. Upon request of the subject, the officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, but in that case must show it to the subject upon request as soon after the arrest as possible. FCA §153-a(b). In order to effect the arrest, the officer may use such physical force as is justifiable pursuant to Penal Law §35.30. FCA §153-a(c). In order to effect the arrest, the officer may enter any premises in which he reasonably believes the subject to be present. Before such entry, the officer must give, or make reasonable effort to give, notice of his authority and purpose to an occupant. FCA §153-a(d). If the officer, after giving such notice, is not admitted, he may enter the premises, and by a breaking if necessary. FCA §153-a(e).

If a warrant is not executed within two court days after it is issued, the court must be so advised within three court days of issuance, and thereafter must be given periodic reports concerning the unexecuted warrant. FCA §1037(c). See also Uniform Rules For The Family Court, 22 NYCRR §205.82; Matter of Markeyta G., 169 Misc.2d 847, 647 N.Y.S.2d 368 (Fam. Ct., Suffolk Co., 1996) (while noting that warrant might not be executed promptly, court directs Commissioner to send respondent mother a notice requiring a “face to face” interview regarding her benefits, since possibility of financial problem might cause her to appear); Matter of Deanna E., 150 Misc.2d 1074, 571 N.Y.S.2d 378 (Fam. Ct., Schenectady Co., 1991) (court dismisses sex abuse petition where department of social services failed to make any attempts to locate respondent for more than two years after issuance of warrant).

The court may set bail when an adult respondent has been arrested pursuant to a warrant. FCA §153. See also FCA §155 (adult respondent must be brought before magistrate if arrested when court is not in session); FCA §155-a (police may take cash bail for respondent's appearance the next morning).

Like the summons and petition, a warrant issued in an abuse case must be clearly marked "Child Abuse Case" and contain the same clearly marked statement concerning the possibility of termination of parental rights. FCA §1037(c), (d).

**2. Production Of Child**

When issuing a warrant, the court may also direct that the child be produced. FCA §1037(b). Matter of Jennifer R., 42 Misc.3d 508 (Fam. Ct., Kings Co., 2013) (§1037(b) does not provide independent basis aside from §1037(a) for issuance of warrant for parent and presupposes that child is in custody and control of parent). However, the statute contains no authority for issuance of a warrant for the arrest of a child who has absconded from the home or from protective custody. Arguably, in some circumstances, such a warrant could be issued pursuant to FCA §153 (court "may issue a subpoena or in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child or any other person whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary"). Sobie, Practice Commentary, FCA §153 ("But can a non-respondent child be dragged into court upon issuance of an arrest warrant? Section 153 seems to say "yes". Common sense and elementary due process principles say otherwise."); Matter of Jennifer R., 42 Misc.3d 508 (FCA §153 not applicable where ACS's stated reason for wanting warrant for absconding child was to make sure she was "safe," not to secure her testimony at hearing or because her presence in court was "necessary"); Matter of J.G., 166 Misc.2d 840, 634 N.Y.S.2d 998 (Fam. Ct., West. Co., 1995) (where child had been freed for adoption and no proceeding was pending, but court had continuing jurisdiction because child was still subject of foster care placement order, court's parens patriae authority, combined with FCA §153, provided basis for issuance of warrant in absence of specific authority). Notably, a child could not be charged as a juvenile delinquent on a charge of resisting arrest or, it appears, obstructing governmental administration, for resisting an

attempt to take the child into custody pursuant to a warrant. Matter of Gabriela A., 23 NY3d 155 (2014).

When a child absconds from a "shelter or holding facility," an authorized representative of the facility must send written notice within forty-eight hours to the clerk of the court. The notice must state, inter alia, what efforts were made to secure the return of the child. The case must appear on the court calendar, for appropriate action by the court, the next court day after receipt of notification that the child has absconded. The petitioner and counsel for the child must be given notice of the date the case will be heard. Uniform Rules For The Family Court, 22 NYCRR §205.80. See also Uniform Rules, §205.85 (notice requirement when child absconds after placement order); FCA §1073 (court may revoke placement order and issue new dispositional order after child runs away); 18 NYCRR §431.8 (procedures in cases of children absent without consent from foster care placement' provides, inter alia, that if child cannot be located after agency conducts required casework contacts, and child remains in custody of local social services commissioner, case manager or case planning supervisor is responsible for ensuring that continuing effort is made to locate child; that within each thirty-day period following child's absence, reasonable efforts must be made to obtain information on child's location as long as child remains in custody or until child is discharged; that local commissioner or authorized representative may petition family court for warrant to return child if child's presence is required at hearing or proceeding and local law enforcement agency requires warrant before acting; that foster child sixteen years of age or older who is absent without consent and cannot be located, or is located and refuses to return after agency has used diligent efforts for sixty consecutive days, must be discharged from care if local commissioner petitions for and family court grants termination of custody, or court order granting custody to commissioner expires, or child becomes twenty-one years old; and that when child is returned or returns voluntarily to foster care after being absent without consent, diligent efforts must be made to provide services to child which will restore child to supportive environment, such as remedial educational services, psychological counseling. medical services, and drug and alcohol abuse treatment where available from a public agency).

If the location of a child is unknown, the parent will usually be ordered to reveal the child's whereabouts. If a parent who is arrested pursuant to a warrant, or who appears at any point in the proceeding, willfully refuses to reveal the child's location or falsely denies knowledge of the child's whereabouts, the parent could be found guilty of contempt pursuant to FCA §156 and Article Nineteen of the Judiciary Law. See Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549, 110 S.Ct. 900 (1990) (contempt adjudication does not violate Fifth Amendment privilege against self-incrimination); Judiciary Law §774 (contains detention review mechanism); In re Administration for Children's Services v. Debra W., 95 A.D.3d 582 (1st Dept. 2012) (mother properly adjudicated in contempt and incarcerated until children were produced in court or at agency office, or for six months, whichever was shorter, where she disobeyed arrest warrant by preventing police from gaining access to apartment and disobeyed orders by failing to produce children or provide names and addresses and other contact information for family and friends who might have had knowledge of children's whereabouts; mother's disobedience prejudiced agency in its ability to proceed, and in interviewing children and ensuring their safety); Sigety v. Abrams, 632 F.2d 969 (2d Cir. 1980) (at review hearing, burden of going forward may shift to contemnor); but see In re Ariel G., 858 A.2d 1007 (Md. 2004) (mother had Fifth Amendment right to refuse to reveal where she was ten months earlier when she had last seen child, and should not have been held in civil contempt, since she had reasonable cause to fear that her answers would implicate her in connection with pending kidnapping charges; while Bouknight involved order to produce child, which was not a testimonial communication, in this case mother was held in contempt for failure to testify, and in Bouknight mother had consented to conditions imposed in connection with her retention of physical custody, while in this case mother did not consent to court's or child welfare agency's jurisdiction and never agreed to terms allowing her to retain lawful custody); Matter of Chelsea BB., 34 A.D.3d 1085, 825 N.Y.S.2d 551 (3rd Dept. 2006), lv denied 8 N.Y.3d 806 (after learning that mother had allowed children to travel to New Jersey for Christmas family gathering, court improperly ordered removal while unreasonably assuming that mother was attempting to avoid

possibility of removal); Matter of David G., 280 A.D.2d 477, 720 N.Y.S.2d 179 (2d Dept. 2001) (mother should have released from custody where she could not produce child because California court had awarded permanent guardianship of child to grandparents). And, as already noted, the court also has the power to "admit to, fix or accept bail" pursuant to FCA §153.

### G. Initial Removal Hearing After Filing Of Petition

#### 1. Generally

In any case in which the child has been removed without a court order or where there has been a hearing pursuant to FCA §1022 at which the respondent was not present, or was not represented by counsel and did not waive his or her right to counsel, the court shall hold a hearing no later than the next court day after filing to determine whether the child's interests require protection, including whether the child should be returned to the parent or other person legally responsible, pending a final order of disposition. FCA §1027(a)(i); see, e.g., Matter of Forrest S.-R., 101 A.D.3d 734 (2d Dept. 2012), lv denied 20 N.Y.3d 1092 (mother was not deprived of notice and opportunity to be heard pursuant to FCA §1027 when child was removed from her custody and transferred to temporary custody of father; due process was afforded via FCA §1028); Matter of Michael Z., 40 A.D.2d 1034, 339 N.Y.S.2d 3 (2d Dept. 1972) (§1027 is constitutional even though it does not require that parent be present; due process is provided by procedure in FCA §1028); Matter of Adrian J., 119 Misc.2d 900, 464 N.Y.S.2d 631 (Fam. Ct., Onondaga Co., 1983) (where §1022 order was null and void due to failure to comply with statute, the court, rather than summarily return child, held a hearing under FCA §1027 to determine whether child required protection). The hearing must continue on successive court days, if necessary, until a decision is made by the court. FCA §1027(a)(i).

In addition, in any case in which the child has been removed after the filing of the petition, the petitioner must and the child’s lawyer may apply for, or the court may on its own motion order, such a hearing. FCA §1027(a)(ii); see also SSL §153-d(1)(h) (petitioner's failure to request "1027" hearing may lead to cut-off of state foster care reimbursement). The hearing must be scheduled for no later than the next court day

after the application for such hearing has been made. FCA §1027(a)(ii).

And, when the child has not been removed, the petitioner and the child's lawyer may apply for, or the court on its own motion may order, a hearing pursuant to FCA §1027 to determine whether the child's interests require protection, including whether the child should be removed, pending a final order of disposition. The hearing must be scheduled for no later than the next court day after the application for such hearing has been made. FCA §1027(a)(iii); see also Matter of Isayah R., 149 A.D.3d 1223 (3d Dept. 2017) (where court initially denied removal under §1027 and later ordered removal due to respondent's violation of conditions, court could consider evidence adduced at initial hearing since both hearings were part of same proceeding).

Evidence at the hearing must be material and relevant, but need not be competent. FCA §1046(c). Matter of Amanda Lynn B., 60 A.D.3d 939, 877 N.Y.S.2d 104 (2d Dept. 2009) (court properly admitted mental health evaluations that constituted hearsay).

Upon the hearing, the court may remove or continue the removal of the child if "removal is necessary to avoid imminent risk to the child's life or health ...." FCA §1027(b)(i). Compare Matter of Luna V., 163 A.D.3d 689 (2d Dept. 2018) (imminent risk found based on mother's abuse of, inter alia, prescription medication while caring for children, who were seven months and eight years old); Matter of Isayah R., 149 A.D.3d 1223 (removal pursuant to FCA §1027 upheld where, on a number of occasions, respondent exhibited signs of intoxication, and respondent admitted she was not taking two prescription medications and, as to third medication, large number of pills were unaccounted for); Matter of Kimberly H., 242 A.D.2d 35, 673 N.Y.S.2d 96 (1st Dept. 1998) (family court improperly returned infant where mother had three other children in foster care and it had been determined that those children needed to remain in care; the family court inappropriately "put ... unbridled trust in the possibilities for redemption offered by intervention services"); In re Kasheena M., 245 A.D.2d 231, 666 N.Y.S.2d 639 (1st Dept. 1997) (child improperly returned to respondent mother with order of protection where there was no proof that she could protect children from respondent father's abusive behavior; the "tragic" choice must be "resolved with the children's

safety as the preeminent decisional determinant"); Matter of Patriarche O., 233 A.D.2d 448, 650 N.Y.S.2d 279 (2d Dept. 1996) (application for return denied where respondent failed to obtain help for four-year-old son who exhibited symptoms of autism and mental retardation) and Matter of Karenae B., 199 A.D.2d 160, 605 N.Y.S.2d 268 (1st Dept. 1993) (child improperly released to father, who had given child to mother who had history of crack use and was living in homeless shelter) with Matter of Baby Boy D., 127 A.D.3d 1079 (2d Dept. 2015) (no imminent risk to subject child where three other children had been removed following serious injury to one child and parents had been found guilty of abuse and derivative abuse, but mother was living apart from father and was willing to enforce order of protection; she had successfully completed course of therapy and therapist had opined that the other children should be returned; and she had consistently attended supervised visits and fully engaged children despite different ages and problems, was attentive and loving, consistently bringing food, despite her limited resources, and nursed subject child while managing to engage the other children; family court's conclusion was based on mere speculation that mother would not enforce order of protection); Matter of David J., 205 A.D.2d 881, 613 N.Y.S.2d 729 (3rd Dept. 1994), appeal dism'd 84 N.Y.2d 905, 621 N.Y.S.2d 522 (respondent's lack of diligence in obtaining glasses and dental treatment did not create imminent risk); Matter of Hiram V., 162 A.D.2d 453, 556 N.Y.S.2d 678 (2d Dept. 1990) (return of children to mother upheld where she denied knowledge of illicit narcotics activities of father, who had been arrested); Matter of Divayah D., 60 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2018) (no imminent risk where mother had been diagnosed as bipolar and schizophrenic and been hospitalized multiple times, but there was no evidence that child was harmed or at risk of harm, or that mother's condition had impact on ability to manage day-to-day life and care for child; court notes that as long as parent has sufficient family support or makes adequate arrangements for child care before entering hospital, child is protected, and that because these illnesses cut across race and class lines, it seems likely that lack of adequate community-based, low cost mental health treatment, and overuse of large public hospitals for treatment, leads to increased and at times unnecessary mental illness charges against indigent parents of color, while

middle and upper class families have these illnesses managed in the privacy of their home with family members caring for children and quality mental health practitioners treating parent without government involvement); Matter of Rihana J.H., 54 Misc.3d 1223(A) (Fam. Ct., Kings Co., 2017) (§1028 application granted as to nine-year-old sibling of infant who suffered head injuries where mother had provided older child with good care and had engaged in recommended services; child was extremely bonded to mother, wanted to return home, and threatened to hurt herself due to removal; and court orders, including those precluding use of corporal punishment, allowing weekly ACS announced and unannounced home visits, and ensuring that mother and child continued to attend therapy, were sufficient to mitigate risk); Matter of Maria S., 43 Misc.3d 1218(A) (Fam. Ct., Kings Co., 2014) (in case involving evidence of infant's fractures, court returns children, noting that they were in non-kinship, stranger foster home and had been in foster care for over fourteen months; that parents had done everything agency asked them to do and cooperated with every court order; that unsupervised visitation had gone without incident or concern for over three months; and that any risk could be ameliorated with continued supervision and temporary order of protection prohibiting parents from using corporal punishment); Matter of Gavin S., 52 Misc.3d 1221(A) (Fam. Ct., Kings Co., 2016) (in absence of proof that mother's mental illness, for which she had hospitalized three times in the space of approximately five months, prevented her from properly caring for child, agency's speculative concern that mother might have be hospitalized again for mental illness did not establish imminent risk) and Matter of L.B.C., 29 Misc.3d 1205(A), 2010 WL 3835618 (Fam. Ct., Bronx Co., 2010) (no imminent risk where ACS relied on bald fact that mother had been hospitalized several times; mother's allegedly erratic behavior at conference was understandable since she had just been served with custody petition filed by father and there was overwhelming evidence that she was cooperative with agency and highly motivated to obtain help in becoming better parent; she left infant alone in bathtub for approximately ten minutes but was about nine steps away and looked in on child once and kept tabs on her by speaking to her; emergency room doctor diagnosed child with fungal infection in vaginal region but mother had tried to purchase diaper rash ointment,

which was sold out, and applied baby oil and powder in attempt to heal rash; and any lingering concerns were being addressed by court-ordered services).

It is odd that these alternatives are included in one statute, since imminent risk to life is a very strict standard, while imminent risk to health is a broad and somewhat vague standard. Of course, in Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004), the Court of Appeals, addressing emergency “imminent danger” removals without a court order under FCA §1024(a), adopted a very strict standard, stating that “emergency removal [without court order] is appropriate where the danger is so immediate, so urgent that the child’s life or safety will be at risk before an ex parte order can be obtained,” and that “[t]he standard obviously is a stringent one” and concerns “only the very grave circumstance of danger to life or health.” 3 N.Y.3d at 381. The court also stated that the risk of emotional injury caused by witnessing domestic violence will rarely justify emergency removal. In other words, the court, presumably keeping in mind the reference to imminent danger to "life," interpreted the term "health" as a reference to serious harm.

On its face, the imminent “risk” standard in FCA §1027(b)(i) does not differ in any meaningful way from the “imminent danger” standard in FCA §1024(a). The Court of Appeals never stated that the standard it applied under §1024 would not apply at hearings under §1027, nor did it state that it would. However, in In re Martha A., 75 A.D.3d 476 (1st Dept. 2010), the First Department, after quoting from Nicholson - it is “sufficient if the officials have persuasive evidence of serious ongoing abuse and, based upon the best investigation reasonably possible under the circumstances, have reason to fear imminent recurrence” (3 N.Y.3d at 381) - asserted in a footnote that although the Court of Appeals made that statement in connection with emergency removals under FCA §1024, it applies to FCA §1028 determinations. It would of course also apply to determinations under FCA §1027.

In Nicholson v. Scoppetta, 3 N.Y.3d 357, the Court of Appeals also declared that a family court “must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal,” and “[t]he term ‘safer course’ [citations omitted] should

not be used to mask a dearth of evidence or as a watered-down, impermissible presumption." 3 N.Y.3d at 380. See Matter of Raymond A. v. Melissa R., 23 Misc.3d 1101(A), 881 N.Y.S.2d 366 (Fam. Ct., Kings Co., 2009) (ACS Child Safety Alert #14, which mandates safety assessment when case planner learns that mother of children in foster care is pregnant and states that "[w]hen a child has siblings in foster care, Children's Services has already determined that it is unsafe for older siblings to be in the home" and that "[t]here must be a presumption that safety factors exist that require removal and appropriate court action needs to commence to protect the new child," is "a blanket safer course policy, which was rejected by the Court of Appeals in Nicholson"); Matter of Abraham P., 21 Misc.3d 1144(A), 875 N.Y.S.2d 818 (Fam. Ct., Kings Co., 2008) ("The testimony describing ACS's policy of pursuing cases without regard to conflicting, possibly exculpatory evidence; the concession that some of the evidence was minimized; and ACS's failure to identify any way in which the respondent may have sufficiently rebutted the child's initial accusations, seems evident of an ACS policy adopting the 'safer course' doctrine").

And, "when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child." 3 N.Y.3d at 382. See Matter of Amanda Lynn B., 60 A.D.3d 939 (no imminent risk which outweighed harm posed by child's removal, and no reasonable efforts made); Matter of Alexander B., 28 A.D.3d 547, 814 N.Y.S.2d 651 (2d Dept. 2006) (mother's failure to comply with order directing her to ensure that children go to school did not justify removal where there was evidence that children would be harmed by removal); Matter of Hannah B., 58 Misc.3d 1203(A) (Fam. Ct., Kings Co., 2017) (mother and child had especially close bond given that they were two-person family with no relatives nearby; child was having difficulty sleeping, and feelings of anxiety and sadness she tried to soothe by keeping picture of mother by her bed; child's education had suffered; and child stated that foster mother treated her biological children better, criticized and warned child about statements she made to her lawyer and the caseworker about conditions in foster home, and complained about having to bring child to see her lawyer for second time);

Matter of Wunika A., 58 Misc.3d 564 (Fam. Ct., Kings Co., 2017) (court notes strong bond between parents and children; that ten-year-old suffered emotional and possibly physical harm in placement; and that younger children were faring better in separate foster home but one-year-old was at critical age for parent-child bonding with implications for ability to form emotional connections throughout life, and four-year-old displayed great love for parents and strong emotional attachment to ten-year-old). Of course, a court may be inclined to discount the risk created by removal when the child will be living with a family member who appears to be a responsible caretaker. See Matter of Rosy S., 54 A.D.3d 377, 863 N.Y.S.2d 65 (2d Dept. 2008) (while reversing order granting mother's application for return of children, court notes, inter alia, that petitioner indicated that father of children was willing to assume custody if they were not returned to mother).

The Court also could take into account the child's age, and ability and willingness to report problems in the home. Matter of Hannah B., 58 Misc.3d 1203(A).

Often, the agency's delay in removing the child is taken as a sign that the risk is not as heightened as the agency claims. See, e.g., Matter of Alan C., 85 A.D.3d 912 (2d Dept. 2011) (no imminent risk where explanation that child incurred bruises while play-fighting with other children was corroborated by testimony of school guidance counselor that child engaged in aggressive play-fighting with peers, and petitioner waited over six weeks after bruises were observed before commencing proceeding and no new injuries were observed in the interim); Matter of Adrian J., supra, 119 Misc.2d 900 (no removal ordered where father struck child and caused bruises to the rim of the child's right eye thirty-two days before petitioner sought order of removal; father's behavior was at times odd and his martial arts displays were bizarre, but there was insufficient evidence of imminent risk; sole purpose of removal was to prevent family from leaving jurisdiction with child; and petitioner's delay in seeking order of removal was inconsistent with contention that removal was necessary).

There is reason to wonder whether the Nicholson standard is, in fact, being applied by the courts. A judge who is unable to find any "grave circumstance of danger to life or health," but is faced with the likelihood of a lengthy delay before the fact-

finding hearing, may be concerned about the harm the child might suffer in the months ahead. In In re Martha A., 75 A.D.3d 476, the First Department also quoted from the Court of Appeals' discussion of removal under §1027, in which the Court of Appeals referred to the family court's "fact-intensive inquiry to determine whether the child's *emotional* health is at risk" (emphasis supplied). Indeed, while the facts in some post-Nicholson appellate decisions seem to satisfy the Nicholson standard, the facts in other cases do not. Compare Matter of Xiomara C., 156 A.D.3d 631 (2d Dept. 2017) (imminent risk found where one child was given responsibility of escorting three siblings to school in Brooklyn from shelter in Bronx, and two children became lost); Matter of Julius C., 155 A.D.3d 623 (2d Dept. 2017), lv denied 30 N.Y.3d 1092 (mother's §1028 application denied where there was evidence regarding children's frequent absences from school, poor hygiene, and lack of proper supervision); Matter of Austin M., 97 A.D.3d 1168 (4th Dept. 2012) (removal justified where father slapped one child in face with open hand with such force that child had marks on face next morning, child had had bruises before and caseworker had seen child cower in father's presence when father became angry and plead with father not to hit him, and father often lost temper with children); In re Leroy R., 84 A.D.3d 485 (1st Dept. 2011) (order granting §1028 application reversed where father had threatened agency personnel, who would put themselves at risk if they came into contact with father when determining whether he had made appropriate arrangements to care for child; father's conduct suggested that release of child to him might pose same imminent risk as return of child to mother, and any doubt concerning father's conduct had to be resolved in favor of protecting child); In re Martha A., 75 A.D.3d 476 (imminent risk found where children were sexually abused in mother's care, mother allowed abuser to sleep over in bedroom with children despite knowledge of abuse, mother failed to report abuse to authorities, and mother continued sexual relationship with abuser); Matter of Alanie H., 69 A.D.3d 722, 894 N.Y.S.2d 442 (2d Dept. 2010) (imminent risk where parents failed to take child to emergency room after pediatrician directed them to do so; child had just spent ten days in hospital with diagnosis of meningitis, and had vomited twice and was crying); Matter of Solomon W., 50 A.D.3d 912, 856 N.Y.S.2d 207 (2d Dept. 2008) (imminent risk found

where one and a half year-old child's feet were burned in bathtub of scalding hot water, and, after mother consented to neglect finding and children were returned, mother threatened sixteenth homemaker sent to home with knife in presence of child, and admitted that she failed to keep appointment with psychiatrist and neglected to take prescribed anti-depressant and anti-psychotic medication for about two weeks); Matter of Xavier J., 47 A.D.3d 815, 849 N.Y.S.2d 648 (2d Dept. 2008) (release of child to mother under ACS supervision improper where mother pleaded guilty to manslaughter in connection with December 2001 death of infant in her care and subsequently failed to acknowledge that her actions in shaking the baby caused the death; mother's responses during §1027 hearing indicate that she did not comprehend seriousness of father's alleged drug abuse and violent behavior towards mother or appreciate risk it posed to child) and Matter of Landon W., 35 A.D.3d 1139, 826 N.Y.S.2d 822 (3rd Dept. 2006) (imminent danger found where there was knife fight at respondent's apartment, person involved in fight was still at apartment, there was break-in at apartment by respondent's "associates," who continued to sleep there, and respondent's relationship with new boyfriend, age nineteen, warranted police intervention for, among other things, underage drinking, domestic violence and disorderly conduct with neighbors) with In re Obed O., 102 A.D.3d 575 (1st Dept. 2013) (removal pursuant to §1027 upheld based on strong evidence of educational neglect and prior findings of educational and medical neglect, and continuation of children's excessive lateness and absence from school despite agency's reasonable efforts); Matter of Forrest S.-R., 101 A.D.3d 734 (2d Dep't 2012), lv denied 20 N.Y.3d 1092 (mother's §1028 application properly denied where she had interfered with father's visitation with false allegations of abuse and subjected child to unnecessary examinations by doctor and by police in effort to sustain false allegations); Matter of Serenity S., 89 A.D.3d 737 (2d Dept. 2011) (imminent risk found where mother had drug use-related neglect adjudications with respect to infant child's four older siblings, all of whom were in foster care, and mother and father were involved in altercation at family shelter where they resided with child) and Matter of Amber Gold J., 59 A.D.3d 719, 874 N.Y.S.2d 189 (2d Dept. 2009) (where mother repeatedly subjected child to medical intervention based on perception that child had symptoms

that were not observed by examining physicians, and believed that child had sexually-transmitted diseases that were not confirmed upon testing and that conspiracy existed among child's doctors against parents, majority notes that dissent would return child upon compliance with various conditions, but ACS and family court already imposed similar conditions with which parents have largely failed to cooperate; dissent notes that prior to §1028 hearing, child was being well cared for by the parents, that hearing went on for some three months after parents requested it with parents having virtually no meaningful visitation, that child has been out of parents' care for one and one-half years and has been in four foster homes, that the neglect proceeding is still pending, and that it is in child's best interest to be reunited with normal, functioning parents).

Moreover, despite the Court of Appeals' rejection of the "safer course doctrine," the Second Department, perhaps signaling a residual inclination to err on the side of caution, has continued to refer to the "safer course" while approving removal. See Matter of Deonna E., 104 A.D.3d 943 (2d Dept. 2013) (no release under §1028 where "children's emotional, mental, and physical health would be at imminent risk" because of mother's use of excessive corporal punishment; record "demonstrates that the safer course is not to return the children to the mother's custody pending a full fact-finding hearing"); Matter of Nathanal C., 78 A.D.3d 939, 910 N.Y.S.2d 677 (2d Dept. 2010) (sufficient evidence found that children's "emotional, mental, and physical health would be at imminent risk" while in respondents' care, and that children should not be returned "until additional facts are adduced at a full fact-finding hearing"); Matter of Iouke H., 50 A.D.3d 904, 854 N.Y.S.2d 669 (2d Dept. 2008) (in light of father's failure to comply with prior court directives to have children evaluated by Child Advocacy Center, safer course is to not return children pending full fact-finding hearing); Matter of Xavier J., 47 A.D.3d 815 (in light of record, "the safer course is not to return the child to the mother's custody pending the full fact-finding hearing and a final determination of the neglect petition"); Matter of Lloyd M., 20 A.D.3d 536, 800 N.Y.S.2d 432 (2d Dept. 2005).

**2. "Reasonable Efforts" Inquiry**

In making its determination regarding removal, the court shall consider and determine in its order whether continuation in the home would be contrary to the child's

best interests, and, where appropriate, whether reasonable efforts were made prior to the hearing to prevent or eliminate the need for removal, and, if the child has already been removed, whether reasonable efforts were made thereafter to make it possible to return the child. FCA §1027(b)(i); see also Uniform Rules For The Family Court, 22 NYCRR §205.81(a) (petitioner shall provide information to aid the court, and court may also consider information provided by respondents, child's lawyer, non-respondent parents, relatives and other suitable persons); 45 C.F.R. §1356.21(b)(1) (if determination is not made within sixty days after removal, Title IV-E foster care maintenance payments are not available for duration of child's stay in foster care); Matter of Austin M., 97 A.D.3d 1168 (agency made reasonable efforts where, with respect to issue of discipline, agency provided intensive family coordinator who met with father for seven hours a week and preventative caseworker who met with him several times a month, and scheduled mental health evaluation for him and provided financial assistance, transportation assistance, emergency food vouchers, and case work counseling); Matter of Divayah D., 60 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2018) (no reasonable efforts in mental illness case where ACS did not contact people who could have provided information about mother's care of child, such as pediatrician and long-time camp/after-school provider, and mother was not referred to services until court ordered it; court notes that emotional pain and harm removal causes to child and parent is too great to allow it to happen unnecessarily based on slow, incomplete and inadequate casework); Matter of Zoe "W.", 29 Misc.3d 1224(A), 2010 WL 4691779 (Fam. Ct., Clinton Co., 2010) (reasonable efforts not found where DSS recommended substance abuse evaluations, mental health evaluations and traumatic brain injury assessments but there were no allegations that neglect was caused by such problems; DSS was required to do more than make referrals it knew were not being followed; and reasonable efforts should have included filing of petition prior to death of one of the children to seek orders compelling parents to participate in appropriate programs); Matter of Jamie C., 26 Misc.3d 580, 889 N.Y.S.2d 437 (Fam. Ct., Kings Co., 2009) (reasonable efforts not found where ACS knew mother had three involuntary psychiatric hospitalizations in span of fourteen months and that eighteen year old son was caring

for two younger siblings, and that since mother locked up child's therapist, child was not receiving services she needed, but did nothing but repeatedly "counsel" mother to take medication; judicial finding that reasonable efforts were made after removal cannot serve as "alternative" to finding of efforts to prevent removal).

If the court determines that such efforts were not made, and would have been appropriate, the statute does not preclude removal. However, the court must order that the child protective agency provide, or arrange for the provision of, appropriate services or assistance for the child and the child's family pursuant to FCA §1015-a or §1022(c). FCA §1027(b)(iii). In addition, when deciding whether there is imminent risk justifying removal, the court must consider whether the commencement or continuation of reasonable efforts would eliminate the risk. See Nicholson v. Scoppetta, 3 N.Y.3d 357; see also Matter of Luna V., 163 A.D.3d 689 (2d Dept. 2018) (safeguard imposed by family court - requiring daily home visits by petitioner - was insufficient to mitigate imminent risk); Matter of Emmanuela B., 147 A.D.3d 935 (2d Dept. 2017) (concerns about, inter alia, adequacy of father's plan to care for child did not establish imminent risk that could not be mitigated by reasonable efforts to avoid removal); Matter of Sara A., 141 A.D.3d 646 (2d Dept. 2016) (denial of §1028 application upheld where court listed areas of concern without analyzing whether concerns could be mitigated by reasonable efforts, but evidence demonstrated that father would not comply with any order issued in attempt to mitigate risk); Matter of Isaiah J., 65 A.D.3d 629, 884 N.Y.S.2d 456 (2d Dept. 2009) (imminent risk would not have been insurmountable had mother received additional services and cooperated with agency); Matter of Lashawn G., supra, 161 A.D.2d 712 (court notes that petitioner did not offer services to respondent as alternative to removal); Matter of David G. v. Blossom B., 29 Misc.3d 1178, 909 N.Y.S.2d 891 (Fam. Ct., Kings Co., 2010) (no imminent risk found where any risk posed by father could be mitigated by issuance of temporary order of protection and order that mother re-enter secure domestic violence shelter and resume domestic violence counseling and participate in other services, petitioner was responsible for ensuring that father was held accountable and for assisting mother in finding shelter, and there was mere possibility that mother would resume relationship

with father and there would be domestic violence that would harm children); but see Matter of Kimberly H., 242 A.D.2d 35, 673 N.Y.S.2d 96 (1st Dept. 1998) (family court inappropriately "put ... unbridled trust in the possibilities for redemption offered by intervention services").

If the failure to make reasonable efforts was appropriate, the court must include such a finding in the order. FCA §1027(b)(ii). If it appears that the court inquired into the issues described above, the court's failure to expressly make the determinations required by the statute may be deemed harmless error. See Matter of Rachel G., 185 A.D.2d 382, 585 N.Y.S.2d 810 (3rd Dept. 1992).

**3. Issuance Of Order Of Protection**

The court must also determine whether the removal of a person or persons from the child's residence by way of a temporary order of protection issued pursuant to FCA §1029 would eliminate the imminent risk. FCA §1027(b)(iv). See Matter of Elizabeth C., 156 A.D.3d 193 (2d Dept. 2017) (order excluding parent from children's household requires showing of imminent risk and parent is entitled to expedited hearing upon request within three court days pursuant to FCA §1028); Matter of David G. v. Blossom B. and Omar G., 29 Misc.3d 1178.

**4. Order Of Removal**

If the court grants the application and orders removal, the court may remand the child to foster care or place the child with a relative or suitable person other than the respondent. FCA §1027(b)(i); see In re Miner, 32 Misc.3d 1211(A) (Fam. Ct., Oswego Co., 2011) (court substitutes word "fit" for word "suitable" when determining whether to release child to non-respondent father; there is presumption of suitability in absence of abuse or neglect, abandonment, or unfitness, or other like extraordinary circumstances). The court must state its findings supporting the necessity of removal, and state whether the respondent was present at the hearing. If the respondent was absent, the court must indicate what notice was provided, and whether there was a pre-petition removal under FCA §1021, §1022 or §1024. FCA §1027(b)(i),(f). If present when the removal order is executed, the parent must be served at that time with a summons and petition unless service has already been made, and, if not present, the

parent must be served in accordance with FCA §1036. FCA §1027(b)(i).

The court, after determining that removal is necessary, “must immediately inquire as to the status of any efforts made by the local social services district to locate relatives of the child, including any non-respondent parent and all of the child`s grandparents, as required pursuant to FCA §1017. The court must also inquire as to whether the child, if over the age of five, has identified any relatives who play or have played a significant positive role in his or her life and whether any respondent parent or any non-respondent parent has identified any suitable relatives. Such inquiry shall include whether any relative who has been located has expressed an interest in becoming a foster parent for the child or in seeking custody or care of the child. Upon completion of such inquiry, the court shall “remand or place the child: (a) with the local commissioner of social services and the court may direct such commissioner to have the child reside with a relative or other suitable person who has indicated a desire to become a foster parent for the child and further direct such commissioner, pursuant to regulations of the office of children and family services, to commence an investigation of the home of such relative within twenty-four hours and thereafter expedite approval or certification of such relative or other suitable person, if qualified, as a foster parent. If such home is found to be unqualified for approval or certification, the local commissioner shall report such fact to the court forthwith so that the court may make a placement determination that is in the best interests of the child; (b) to a place approved for such purpose by the social services district; or (c) in the custody of a relative or suitable person other than the respondent.” FCA §1027(b)(i).

A child must be placed with any siblings or half-siblings who are also being remanded, or have previously been remanded or placed in foster care, unless placement together would be contrary to their best interests. Placement together is presumptively in the children's best interest if it would not be contrary to their health, safety or welfare. FCA §1027-a(a). See, e.g., Banks-Nelson v. Bane, 214 A.D.2d 338, 625 N.Y.S.2d 131 (1st Dept. 1995) (once agency properly removed one sibling from the foster home, the other children had to be moved absent a strong countervailing reason not to); Matter of Peters v. McCaffrey, 173 A.D.2d 934, 569 N.Y.S.2d 797 (3rd Dept.

1991). See also 18 NYCRR §431.10(b) (provides, inter alia, that social services district is responsible for ensuring that diligent efforts are made to secure a foster family boarding home or agency boarding home which is willing and able to accept the siblings together; that factors to be considered in making best interests determination must include, but are not limited to, age differentiation of siblings, health and developmental differences among siblings, emotional relationship of siblings to each other, individual services needs, attachment of individual siblings to separate families/locations, and continuity of environment standards; that foster parents must be informed if any child placed with them has siblings or half-siblings, and if so, the location of siblings or half-siblings; and that agencies are responsible for ensuring that diligent efforts are made to facilitate regular biweekly visitation or communication between minor siblings or half-siblings who have been placed apart, unless such contact would be contrary to health, safety or welfare of one or more of the children or unless lack of geographic proximity precludes visitation); In re Meridian H., 798 N.W.2d 96 (Neb. 2011) (state statutes and regulations which reflect policy favoring preservation of sibling relationship do so within context of best interests determinations, but do not provide siblings with cognizable interest in sibling relationship separate and distinct from that of subject child); Matter of Jamel B., 53 Misc.3d 1206(A) (Fam. Ct., Kings Co., 2016) (court finds ACS in contempt for failing to timely place children together where efforts were made but greater efforts could have been made to obtain responses from foster care agencies, and responsibility for failures by agencies rests with ACS); Matter of Austin M., 37 Misc.3d 1218(A) (Fam. Ct., Monroe Co., 2011), appeal dism'd 96 A.D.2d 1423 (reasonable efforts not found where agency failed to provide adequate sibling visitation and investigate possibility of placing children in same home).

If the agency cannot place the children together at first, it must do so within thirty days. FCA §1027-a. Finally, the child's religion and the religious wishes of the parents must be considered in the selection of a foster care resource. See FCA §116.

**5. Denial Of Removal Order**

If the court denies a remand application, or any other application for a preliminary order authorized by §1027, it must state the grounds for its decision. FCA

§1027(f). For good cause shown, the court may release the child to the parent or other person legally responsible for the child's care, pending a final order of disposition, in accord with FCA §1017(2)(a)(ii). FCA §1027(d).

**6. Stay Pending Appeal**

When the court issues an order which will result in the return of a child previously remanded in the custody of someone other than the respondent, such order shall be stayed until five p.m. of the next business day after the order is issued, unless such stay is waived by all parties by written stipulation or upon the record in court. The judge retains discretion to stay the order for a longer period of time. FCA §1112(b).

In abuse and neglect cases, an appeal may be taken as of right and has a preference over all other matters. FCA §1112(a). See also CPLR §5521. An application for an appellate stay must state the alleged errors of fact or law, and notify the attorney for each party and the child's lawyer of the time and place of the application. The applicant must make "every reasonable effort" to obtain a transcript of the family court proceedings. Except for good cause stated on the record, oral argument must be held in the appellate court if requested by any party. FCA §1114(d). The appellate division must stay an order returning the child if necessary to avoid imminent risk to the child's life or health. FCA §1112(a). If a stay is granted, a schedule must be set for an expedited appeal. FCA §1114(d). See also Matter of Cali L., 61 A.D.3d 1131, 876 N.Y.S.2d 557 (3rd Dept. 2009) (appeal dismissed as moot where petition was dismissed after hearing; any aspersion cast upon mother's parenting by temporary removal would be mitigated, if not eliminated, by court's ultimate finding that there was insufficient evidence to support petition).

**7. Medical Examination Or Treatment**

In addition to determining the remand application, the court "may authorize a physician or hospital to provide medical or surgical procedures if such procedures are necessary to safeguard the child's life or health." FCA §1027(e). In addition, in abuse cases the court shall order, and in neglect cases the court may order, an examination of the child by a physician appointed or designated by the court pursuant to FCA §251. FCA §1027(g); see also FCA §233 (court may order medical, surgical, therapeutic, or

hospital care and treatment); but 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).

In the interests of preserving evidence, any physician so designated "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 must forward the results of a physical examination as well as any photographs to the court. See, e.g., Matter of Anne BB., 202 A.D.2d 806, 609 N.Y.S.2d 111 (3rd Dept. 1994) (court erred in precluding evidence of injuries where slides, not photos, were taken). An examination need not be ordered if the case was initiated as a result of a physical examination by a physician. However, unless photographs have already been taken or there are no areas of visible trauma, the court must still arrange for the taking of colored photographs. FCA §1027(g).

In addition, "[t]he local commissioner of social services or the local commissioner of health may give effective consent for medical, dental, health and hospital services for any child who has been found by the family court to be an abused, neglected or destitute child, or who has been taken into or kept in protective custody or removed from the place where he or she is residing, or who has been placed in the custody of such commissioner, pursuant to ... [FCA §1022, 1024, 1027, 1094 or 1095]." SSL §383-b.

Consent issues related to the administration of psychiatric medication to children in foster care are addressed in Matter of Justin R., 63 A.D.3d 1163, 881 N.Y.S.2d 305

(2d Dept. 2009) (citing Rivers v Katz, 67 N.Y.2d 485 and Mental Hygiene Law § 33.21, Second Department finds no error where family court granted petitioner's motion for order authorizing administration of psychotropic medication risperdal to child over father's objection; court properly determined, following hearing to which child and parents were parties and at which all were represented by counsel, that petitioner demonstrated, by clear and convincing evidence, that treatment was narrowly tailored to give effect to child's liberty interest, taking into consideration all relevant circumstances, including child's best interests, benefits to be gained from treatment, adverse side effects associated with treatment and any less intrusive alternative treatments); see also Matter of Isaiah T. F.-C., 136 A.D.3d 687 (2d Dept. 2016) (court should have granted father full evidentiary hearing on challenge to use of psychotropic drugs in foster care); In re Lyle A., 14 Misc.3d 842, 830 N.Y.S.2d 486 (Fam. Ct., Monroe Co., 2006) (court concludes that parent whose child is in foster care has right to make decision regarding whether or not child will be given psychotropic drugs; that drug may not be given to child until agency has fully informed parent of available information about drug, provided opportunity to discuss medication with prescribing physician, and notified parent that he/she has right to discuss matter with attorney and that attorney will be appointed if he/she does not have one; and that if parent refuses to sign written consent or changes mind after signing, agency must apply to court for legal permission to begin or continue medication, and court would then hold hearing and make determination based upon expert medical evidence and applicable legal principles); In re Martin F., 13 Misc.3d 659, 820 N.Y.S.2d 759 (Fam. Ct., Monroe Co., 2006) (if parent opposes administration of mental health medicine to child in foster care, it cannot lawfully be prescribed unless court determines, after a hearing with counsel, whether proposed treatment is narrowly tailored to give effect to child's liberty interest, taking into consideration, inter alia, child's best interests, benefits to be gained from treatment, adverse side effects, and any less intrusive alternative treatments; broad language of SSL §383-b cannot override parent's or child's constitutional rights, and petitioner bears burden to establish, by clear and convincing evidence, that proposed medication meets these criteria when parent objects).

### 8. Permanency Hearing

If the court orders removal, at the conclusion of the hearing the court shall set a date certain for an initial permanency hearing, advise the parties in court of the date, and include the date in the removal order. FCA §1027(h); see also FCA §1089(a)(2); 22 NYCRR §205.81(a). Because a "removal" has occurred even when the child is temporarily placed in the custody of a non-respondent parent [Matter of Lucinda R., 85 A.D.3d 78 (2d Dept. 2011)], it appears that a permanency hearing must be scheduled in such cases.

A copy of such order must be provided to the parent or other person legally responsible for the child's care. FCA §1027(h). A "permanency hearing" is "a hearing held in accordance with [FCA §1089] for the purpose of reviewing the foster care status of the child and the appropriateness of the permanency plan developed by the social services district or agency." FCA §1012(k). If a sibling or half-sibling of the child has previously been removed from the home and has a permanency hearing date certain scheduled within the next eight months, the permanency hearing for each child subsequently removed from the home shall be scheduled on the same date certain that has been set for the first child removed from the home, unless such sibling or half-sibling has been removed from the home pursuant to FCA Article Three or Seven. Orders issued in subsequent court hearings prior to the permanency hearing, including, but not limited to, the order of placement issued pursuant to FCA §1055, shall include the date certain for the permanency hearing. FCA §1089(a)(2).

## H. Initial Appearance

### 1. Notice Of Allegations And Right To Counsel

Whether the respondent's first appearance occurs on the day the petition is filed or on the return date of process, the proceedings on that day, and on any adjourned date needed to complete the required process, constitute the "initial appearance." FCA §1033-a.

At the initial appearance, the court must advise the respondent of the allegations in the petition and of the right to an adjournment to obtain counsel. FCA §1033-b(1)(b). See Matter of Michael N., 79 A.D.3d 1165, 911 N.Y.S.2d 709 (3rd Dept. 2010) (reversal

not required where allegations in petition were not recited, but court made sure respondent was assigned counsel and had notice of future proceedings, and respondent was permitted to ask questions regarding petition, demonstrating understanding of contents); Matter of Shawndalaya II., 31 A.D.3d 823, 818 N.Y.S.2d 330 (3rd Dept. 2006) (reversal not required where family court failed to advise respondent of allegations, but there was no indication that respondent, aided by counsel, was not fully aware); Matter of Stephanie A., 224 A.D.2d 1027, 637 N.Y.S.2d 904 (4th Dept. 1996), lv denied 88 N.Y.2d 814, 651 N.Y.S.2d 15 (since counsel had reviewed petition with respondent, failure of court to advise respondent of allegations caused no prejudice). When necessary, the court must assign counsel to an indigent respondent pursuant to FCA §262 and Article Eighteen-B of the County Law. FCA §1033-b(1)(c).

The court's recitation of the respondent's rights shall not be waived, but a recitation of the allegations may be waived if respondent's counsel consents to a waiver and states on the record that he or she has explained the allegations to the respondent and has given the respondent a copy of the petition, and the respondent acknowledges receipt of both the petition and counsel's explanation. FCA §1033-b(1)(b). In any event, the respondent must be served with a copy of the petition unless a copy was received at the time of service of process. FCA §154-a. If the child has been removed, the court must inform the respondent of the right to request a hearing under FCA §1028 to seek a return of the child at any time during the proceedings. The court's recitation of this right may not be waived. FCA §1033-b(1)(d).

The court must also appoint counsel to represent the interests of any child named in the petition, unless one has already been appointed, as required, when an emergency or court-ordered removal took place or when the petition was filed. FCA §§ 1016, 1033-b(1)(a).

### 2. Notice Of Intent To Seek Clear And Convincing Evidence Finding

The court must inquire of the petitioner whether it intends to prove severe or repeated abuse by clear and convincing evidence, and, if the agency indicates such

intent, the court must so advise the respondent. FCA §1033-b(1)(e). A clear and convincing finding may well be invalid where the petition does not contain the required notice [see FCA §1031(f)], the court fails to inquire of the petitioner, and the petitioner's intent to seek a clear and convincing evidence finding is not communicated to the respondent in any other way prior to the fact-finding hearing.

Therefore - and this is true even when the petition does contain the required notice -- any lawyer for the child who desires a clear and convincing evidence finding should invite the court to conduct the required inquiry of the petitioner at the initial appearance, or, if the child's lawyer forgets to do that, otherwise insure that timely notice is communicated to the respondent, preferably in open court on the record.

### 3. Application For Return Of Child

Whenever a child has been temporarily removed, the court must hold a hearing to determine whether the child should be returned upon an application by the parent or other person legally responsible for the care of the child, or the child's attorney. See Matter of J. Children, 264 A.D.2d 524, 694 N.Y.S.2d 462 (2d Dept. 1999) (application improperly granted without full evidentiary hearing); but see Matter of Aniyah Mc., 69 A.D.3d 729, 891 N.Y.S.2d 664 (2d Dept. 2010) (mother's application for immediate return of child improperly made during permanency hearing and not pursuant to FCA §1028 or §1061).

It appears that although an individual may qualify as a "person legally responsible" for purposes of being charged in an Article Ten proceeding, he/she does not have standing to demand a §1028 hearing unless he/she has some custodial interest in the child. Compare Matter of Melissa H., 62 A.D.2d 1045, 404 N.Y.S.2d 49 (2d Dept. 1978) ("Section 1028 of the Family Court Act provides that, upon the application of a parent of a child temporarily removed for an order returning the child, the court shall hold a hearing within three court days of the application"); Matter of Alexandria H., 159 Misc.2d 345, 604 N.Y.S.2d 471 (Fam. Ct., Kings Co., 1993) (father with joint custody had right to hearing to seek restoration of visitation rights); Swipies v. Kofka, 419 F.3d 709 (8th Cir. 2005) (non-custodial father entitled to prompt removal hearing) and Gottlieb v. County of Orange, 84 F.3d 511, 521 (2d Cir. 1996) (relies on

Alexandia H., supra) with Matter of T.L., 13 Misc.3d 1179, 827 N.Y.S.2d 576 (Fam. Ct., Queens Co., 2006) (father who was excluded from home in which respondent mother resided with children had no right to hearing) and Matter of Michael A., 149 Misc.2d 595, 565 N.Y.S.2d 949 (Fam. Ct., Bronx Co., 1990) (paramour had no standing where parent did not request hearing).

In Matter of Lucinda R., 85 A.D.3d 78 (2d Dept. 2011), the Second Department held that the family court erred in denying the mother's application for a §1028 hearing because, the family court believed, there was no "removal" within the meaning of §1028 when the children were released to the father's care. The court noted that a survey of statutes within Article Ten shows that the word "removal" or "removed" is used in the context of the State's removal of the child from the home, and the concept of "removal" is not qualified. See also Matter of Forrest S.-R., 101 A.D.3d 734 (2d Dept. 2012), lv denied 20 N.Y.3d 1092 (where child was removed and placed in temporary custody of father, due process was provided to mother via §1028 procedure); but see Matter of Josephine BB., 114 A.D.3d 1096 (3d Dept. 2014) (mother not entitled to hearing where physical custody was changed from mother to father in custody proceeding before neglect proceeding had been commenced, and thus child had not been removed under Article Ten). Whether or not the Second Department read the statute correctly, the end result cuts sharply against the well-settled rules that govern custody proceedings involving two biological parents. In a FCA Article Six custody battle between biological parents, either a best interests standard applies, or the non-custodial parent must prove a change in circumstances to get to a best interests hearing. Needless to say, neither parent would get the benefit of the very exacting Nicholson v. Scoppetta imminent risk standard. So, one might ask, why should a respondent parent get a §1028 hearing, and the benefit of the imminent risk standard, merely because the non-respondent parent is seeking custody in the context of a FCA Article Ten proceeding? Why should the respondent parent regain temporary custody even though the non-respondent parent undoubtedly would prevail easily in an Article Six proceeding? Although, in Lucinda R., the non-respondent father had filed a custody petition, only the family court's ruling regarding the applicability of §1028 was before the Second

Department. The court focused on statutory construction, and did not address the anomaly that results when a respondent parent regains temporary custody even though the non-respondent parent would prevail in an Article Six proceeding. Accordingly, there is no reason to think that a respondent parent's right to a §1028 hearing precludes a non-respondent parent from seeking temporary custody pursuant to FCA Article Six. What if, in Lucinda R., the father had formally requested a temporary custody hearing, and such a hearing had been consolidated with a §1028 hearing. Obviously, if imminent risk had been established, the father would have retained custody. But, even if imminent risk had not been established, he could have argued that because an Article Six petition was also before the court, the no imminent risk determination did not preclude issuance of a temporary custody order pursuant to Article Six. Cf. Matter of Salvatore M., 90 A.D.3d 758 (2d Dept. 2011) (court not required to conduct hearing prior to releasing child into father's custody after petitioner withdrew allegations against father following completion of forensic evaluation and sexual abuse validation report which concluded that allegations against father were unfounded). The persuasiveness of such an argument becomes obvious when one contemplates a case in which a non-respondent parent appears later in the proceeding at a time when the respondent has physical custody of the children, and files an Article Six petition and requests a temporary custody hearing in the Article Six proceeding. In that scenario, §1028 would not even come into play since any order transferring temporary custody to the non-respondent parent under Article Six would not be an ACS or court-ordered "removal." Of course, the respondent parent could still regain custody later in the proceeding at a hearing to determine permanent custody. Matter of Williams v. Dowgiallo, 90 A.D.3d 942 (2d Dept. 2011) (award of temporary custody to father before hearing was only one factor to be considered since permanent award is treated as initial custody determination and court is not required to engage in change of circumstances analysis).

It appears that there is no "good cause" exception to the requirement that a hearing be held upon the parent's application. See Matter of Cory M., 307 A.D.2d 1035, 763 N.Y.S.2d 771 (2d Dept. 2003) (family court had no discretion to deny hearing even though (the following facts are set forth in brief submitted by the child's lawyer) children

had been in foster care placement for previous seven years, father had failed to ask for §1028 hearing during that time, and father was able to invoke §1028 only because child welfare authorities inadvertently allowed placement to lapse and had to file new petition).

However, if there has been a hearing held pursuant to FCA §1027 and the parent was present at the hearing and had the opportunity to be represented by counsel, the court is not required to hold the hearing unless good cause is shown. FCA §1028(a). Presumably, if a parent appears with counsel at a removal application, and, rather than demand a full inquiry pursuant to §1027, asks instead for a hearing under §1028, the hearing should be ordered.

If the parent waives the hearing, the court must advise the parent that, despite the waiver, an application under §1028 can be made at any time during the pendency of the proceedings. FCA §1028(a). See Matter of Prince Mc., 88 A.D.3d 885 (2d Dept. 2011) (respondent may make §1028 application at any time notwithstanding prior waiver); Matter of Cory M., supra, 307 A.D.2d 1035 (hearing may be requested anytime before adjudication of abuse or neglect); Matter of Melissa H., 62 A.D.2d 1045, 404 N.Y.S.2d 49 (2d Dept. 1978); Matter of Toni WW., 52 A.D.2d 108, 383 N.Y.S.2d 98 (3rd Dept. 1976).

In addition, upon a showing of good cause, such as changed circumstances, the parent or the child's lawyer would presumably be entitled pursuant to FCA §1061 to a new §1028 ruling after an initial application was denied. See Matter of Gemiyah T., 111 A.D.3d 644 (2d Dept. 2013) (order denying mother's §1028 application vacated where newly discovered evidence supported mother's contention that court erred in finding that her testimony about her drug use was incredible and petitions were devoid of any allegation that she abused alcohol or drugs and thus there was no reason to present such evidence at the hearing); Matter of Samuel W., 48 Misc.3d 1230(A) (Fam. Ct., Kings Co., 2015) (after commencement of fact-finding hearing in proceeding involving unexplained femur fracture to infant and allegations that mother choked eleven-year-old daughter, court finds good cause for modification of order removing infant and grants mother's application pursuant to FCA § 1061 for release of child to her where no safety

concerns existed).

## I. Hearing Upon Application For Return Of Child

### 1. Generally

Except for good cause shown, the hearing must be held within three court days of the application and shall not be adjourned. FCA §1028(a). See Matter of Joseph DD., 300 A.D.2d 760, 752 N.Y.S.2d 407 (3rd Dept. 2002) (Third Department sharply criticizes denial of respondent's right to prompt hearing); see also In re E.D.L., 105 S.W.3d 679 (Texas Ct. App. 2003) (court did not lose jurisdiction when it failed to conduct timely hearing); but see Matter of Kristina R., 21 A.D.3d 560, 800 N.Y.S.2d 454 (2d Dept. 2005) (no error where family court consolidated §1028 hearing with fact-finding hearing, and as a result §1028 application was not decided for almost fifteen months).

Evidence at the hearing need not be competent, only material and relevant. FCA §1046(c). Thus, hearsay is admissible. The parent has a right to testify, offer evidence and cross-examine witnesses. See Matter of Barbara R., 66 A.D.2d 800, 410 N.Y.S.2d 894 (2d Dept. 1978).

The court must grant the application unless a return of the child would present an imminent risk to the child's life or health. FCA §1028(a). Compare Matter of Luna V., 163 A.D.3d 689 (2d Dept. 2018) (imminent risk found based on mother's abuse of, inter alia, prescription medication while caring for children, who were seven months and eight years old); Matter of Isayah R., 149 A.D.3d 1223 (3d Dept. 2017) (removal pursuant to FCA §1027 upheld where, on a number of occasions, respondent exhibited signs of intoxication, and respondent admitted she was not taking two prescription medications and, as to third medication, large number of pills were unaccounted for); Matter of Kimberly H., 242 A.D.2d 35, 673 N.Y.S.2d 96 (1st Dept. 1998) (family court improperly returned infant where mother had three other children in foster care and it had been determined that those children needed to remain in care; the family court inappropriately "put ... unbridled trust in the possibilities for redemption offered by intervention services"); In re Kasheena M., 245 A.D.2d 231, 666 N.Y.S.2d 639 (1st Dept. 1997) (child improperly returned to respondent mother with order of protection

where there was no proof that she could protect children from respondent father's abusive behavior; the "tragic" choice must be "resolved with the children's safety as the preeminent decisional determinant"); Matter of Patriarche O., 233 A.D.2d 448, 650 N.Y.S.2d 279 (2d Dept. 1996) (application for return denied where respondent failed to obtain help for four-year-old son who exhibited symptoms of autism and mental retardation) and Matter of Karenae B., 199 A.D.2d 160, 605 N.Y.S.2d 268 (1st Dept. 1993) (child improperly released to father, who had given child to mother who had history of crack use and was living in homeless shelter)

with Matter of Matthew W., 125 A.D.3d 677 (2d Dept. 2015) (in case in which parents allegedly abused ten-month-old child, who suffered subdural hematoma, court allows overnight visitation, and thereafter, except for good cause, temporarily release of children to parents, where parents had addressed need for greater vigilance in monitoring children's activities and were otherwise compliant with service plan); Matter of David J., 205 A.D.2d 881, 613 N.Y.S.2d 729 (3rd Dept. 1994), appeal dism'd 84 N.Y.2d 905, 621 N.Y.S.2d 522 (respondent's lack of diligence in obtaining glasses and dental treatment did not create imminent risk); Matter of Hiram V., 162 A.D.2d 453, 556 N.Y.S.2d 678 (2d Dept. 1990) (return of children to mother upheld where she denied knowledge of illicit narcotics activities of father, who had been arrested); Matter of Divayah D., 60 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2018) (no imminent risk where mother had been diagnosed as bipolar and schizophrenic and been hospitalized multiple times, but there was no evidence that child was harmed or at risk of harm, or that mother's condition had impact on ability to manage day-to-day life and care for child; court notes that as long as parent has sufficient family support or makes adequate arrangements for child care before entering hospital, child is protected, and that because these illnesses cut across race and class lines, it seems likely that lack of adequate community-based, low cost mental health treatment, and overuse of large public hospitals for treatment, leads to increased and at times unnecessary mental illness charges against indigent parents of color, while middle and upper class families have these illnesses managed in the privacy of their home with family members caring for children and quality mental health practitioners treating parent without government

involvement); Matter of Rihana J.H., 54 Misc.3d 1223(A) (Fam. Ct., Kings Co., 2017) (§1028 application granted as to nine-year-old sibling of infant who suffered head injuries where mother had provided older child with good care and had engaged in recommended services; child was extremely bonded to mother, wanted to return home, and threatened to hurt herself due to removal; and court orders, including those precluding use of corporal punishment, allowing weekly ACS announced and unannounced home visits, and ensuring that mother and child continued to attend therapy, were sufficient to mitigate risk); Matter of Maria S., 43 Misc.3d 1218(A) (Fam. Ct., Kings Co., 2014) (in case involving evidence of infant's fractures, court returns children, noting that they were in non-kinship, stranger foster home and had been in foster care for over fourteen months; that parents had done everything agency asked them to do and cooperated with every court order; that unsupervised visitation had gone without incident or concern for over three months; and that any risk could be ameliorated with continued supervision and temporary order of protection prohibiting parents from using corporal punishment); Matter of Gavin S., 52 Misc.3d 1221(A) (Fam. Ct., Kings Co., 2016) (in absence of proof that mother's mental illness, for which she had hospitalized three times in the space of approximately five months, prevented her from properly caring for child, agency's speculative concern that mother might have be hospitalized again for mental illness did not establish imminent risk) and Matter of L.B.C., 29 Misc.3d 1205(A), 2010 WL 3835618 (Fam. Ct., Bronx Co., 2010) (no imminent risk where ACS relied on bald fact that mother had been hospitalized several times; mother's allegedly erratic behavior at conference was understandable since she had just been served with custody petition filed by father and there was overwhelming evidence that she was cooperative with agency and highly motivated to obtain help in becoming better parent; she left infant alone in bathtub for approximately ten minutes but was about nine steps away and looked in on child once and kept tabs on her by speaking to her; emergency room doctor diagnosed child with fungal infection in vaginal region but mother had tried to purchase diaper rash ointment, which was sold out, and applied baby oil and powder in attempt to heal rash; and any lingering concerns were being addressed by court-ordered services).

It is odd that these alternatives are included in one statute, since imminent risk to life is a very strict standard, while imminent risk to health is a broad and somewhat vague standard. Of course, in Nicholson v. Scoppetta, 3 N.Y.3d 357 (2004), the Court of Appeals, addressing emergency “imminent danger” removals without a court order under FCA §1024(a), adopted a very strict standard, stating that “emergency removal [without court order] is appropriate where the danger is so immediate, so urgent that the child’s life or safety will be at risk before an ex parte order can be obtained,” and that “[t]he standard obviously is a stringent one” and concerns “only the very grave circumstance of danger to life or health.” 3 N.Y.3d at 381. The court also stated that the risk of emotional injury caused by witnessing domestic violence will rarely justify emergency removal. In other words, the court, presumably keeping in mind the reference to imminent danger to "life," interpreted the term "health" as a reference to serious harm.

On its face, the imminent “risk” standard in FCA §1028(a) does not differ in any meaningful way from the “imminent danger” standard in FCA §1024(a). The Court of Appeals never stated that the standard it applied under §1024 would not apply at hearings under §1028, nor did it state that it would. However, in In re Martha A., 75 A.D.3d 476 (1st Dept. 2010), the First Department, after quoting from Nicholson - it is “sufficient if the officials have persuasive evidence of serious ongoing abuse and, based upon the best investigation reasonably possible under the circumstances, have reason to fear imminent recurrence” (3 N.Y.3d at 381) - asserted in a footnote that although the Court of Appeals made that statement in connection with emergency removals under FCA §1024, it applies to FCA §1028 determinations.

In Nicholson v. Scoppetta, 3 N.Y.3d 357, the Court of Appeals also declared that a family court “must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal,” and “[t]he term ‘safer course’ [citations omitted] should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption.” 3 N.Y.3d at 380. See Matter of Raymond A. v. Melissa R., 23 Misc.3d 1101(A), 881 N.Y.S.2d 366 (Fam. Ct., Kings Co., 2009) (ACS Child Safety Alert #14,

which mandates safety assessment when case planner learns that mother of children in foster care is pregnant and states that "[w]hen a child has siblings in foster care, Children's Services has already determined that it is unsafe for older siblings to be in the home" and that "[t]here must be a presumption that safety factors exist that require removal and appropriate court action needs to commence to protect the new child," is "a blanket safer course policy, which was rejected by the Court of Appeals in Nicholson"); Matter of Abraham P., 21 Misc.3d 1144(A), 875 N.Y.S.2d 818 (Fam. Ct., Kings Co., 2008) ("The testimony describing ACS's policy of pursuing cases without regard to conflicting, possibly exculpatory evidence; the concession that some of the evidence was minimized; and ACS's failure to identify any way in which the respondent may have sufficiently rebutted the child's initial accusations, seems evident of an ACS policy adopting the 'safer course' doctrine").

And, "when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child." 3 N.Y.3d at 382. See Matter of Amanda Lynn B., 60 A.D.3d 939 (no imminent risk which outweighed harm posed by child's removal, and no reasonable efforts made); Matter of Alexander B., 28 A.D.3d 547, 814 N.Y.S.2d 651 (2d Dept. 2006) (mother's failure to comply with order directing her to ensure that children go to school did not justify removal where there was evidence that children would be harmed by removal); Matter of Hannah B., 58 Misc.3d 1203(A) (Fam. Ct., Kings Co., 2017) (mother and child had especially close bond given that they were two-person family with no relatives nearby; child was having difficulty sleeping, and feelings of anxiety and sadness she tried to soothe by keeping picture of mother by her bed; child's education had suffered; and child stated that foster mother treated her biological children better, criticized and warned child about statements she made to her lawyer and the caseworker about conditions in foster home, and complained about having to bring child to see her lawyer for second time); Matter of Wunika A., 58 Misc.3d 564 (Fam. Ct., Kings Co., 2017) (court notes strong bond between parents and children; that ten-year-old suffered emotional and possibly physical harm in placement; and that younger children were faring better in separate

foster home but one-year-old was at critical age for parent-child bonding with implications for ability to form emotional connections throughout life, and four-year-old displayed great love for parents and strong emotional attachment to ten-year-old). Of course, a court may be inclined to discount the risk created by removal when the child will be living with a family member who appears to be a responsible caretaker. See Matter of Rosy S., 54 A.D.3d 377, 863 N.Y.S.2d 65 (2d Dept. 2008) (while reversing order granting mother's application for return of children, court notes, inter alia, that petitioner indicated that father of children was willing to assume custody if they were not returned to mother).

The Court also could take into account the child's age, and ability and willingness to report problems in the home. Matter of Hannah B., 58 Misc3d 1203(A).

Often, the agency's delay in removing the child is taken as a sign that the risk is not as heightened as the agency claims. See, e.g., Matter of Alan C., 85 A.D.3d 912 (2d Dept. 2011) (no imminent risk where explanation that child incurred bruises while play-fighting with other children was corroborated by testimony of school guidance counselor that child engaged in aggressive play-fighting with peers, and petitioner waited over six weeks after bruises were observed before commencing proceeding and no new injuries were observed in the interim); Matter of Adrian J., supra, 119 Misc.2d 900 (no removal ordered where father struck child and caused bruises to the rim of the child's right eye thirty-two days before petitioner sought order of removal; father's behavior was at times odd and his martial arts displays were bizarre, but there was insufficient evidence of imminent risk; sole purpose of removal was to prevent family from leaving jurisdiction with child; and petitioner's delay in seeking order of removal was inconsistent with contention that removal was necessary).

There is reason to wonder whether the Nicholson standard is, in fact, being applied by the courts. A judge who is unable to find any "grave circumstance of danger to life or health," but is faced with the likelihood of a lengthy delay before the fact-finding hearing, may be concerned about the harm the child might suffer in the months ahead. In In re Martha A., 75 A.D.3d 476, the First Department also quoted from the Court of Appeals' discussion of removal under §1027, in which the Court of Appeals

referred to the family court's "fact-intensive inquiry to determine whether the child's *emotional* health is at risk" (emphasis supplied). Indeed, while the facts in some post-Nicholson appellate decisions seem to satisfy the Nicholson standard, the facts in other cases do not. See Matter of Xiomara C., 156 A.D.3d 631 (2d Dept. 2017) (imminent risk found where one child was given responsibility of escorting three siblings to school in Brooklyn from shelter in Bronx, and two children became lost); Matter of Julius C., 155 A.D.3d 623 (2d Dept. 2017), lv denied 30 N.Y.3d 1092 (mother's §1028 application denied where there was evidence regarding children's frequent absences from school, poor hygiene, and lack of proper supervision); Matter of Julissia B., 128 A.D.3d 690 (2d Dept. 2015) (order granting mother's application for return of child reversed where mother had four older children who were removed a year earlier and remained in foster care, and mother had failed to address or acknowledge circumstances that led to removal and was still prone to unpredictable emotional outbursts, even during visits with children, and was easily provoked and agitated); In re Jackie B., 126 A.D.3d 412 (1st Dept. 2015) (imminent risk found where mother locked child's older sister out of home on cold and snowy days, with only light jacket; withheld food as form of punishment; had prior neglect finding based on same conduct directed at child's older brother; and refused to consent to mental health and occupational therapy to improve child's functioning and behavior); In re Obed O., 102 A.D.3d 575 (1st Dept. 2013) (removal pursuant to §1027 upheld based on strong evidence of educational neglect and prior findings of educational and medical neglect, and continuation of children's excessive lateness and absence from school despite agency's reasonable efforts); Matter of Forrest S.-R., 101 A.D.3d 734 (2d Dep't 2012), lv denied 20 N.Y.3d 1092 (§1028 application properly denied where mother interfered with father's visitation via false abuse allegations and subjected child to unnecessary examinations by doctor and police); Matter of Austin M., 97 A.D.3d 1168 (4th Dept. 2012) (removal justified where father slapped child in face with open hand with such force that child had marks on face next morning, child had been bruised before and caseworker saw child cower when father became angry and plead with father not to hit him, and father often lost temper with children); Matter of Serenity S., 89 A.D.3d 737 (2d Dept. 2011) (imminent risk

found where mother had drug use-related neglect adjudications with respect to infant child's four older siblings, who were in foster care, and parents were involved in altercation at shelter where they resided with child); In re Leroy R., 84 A.D.3d 485 (1st Dept. 2011) (order granting §1028 application reversed where father threatened agency personnel, who would put themselves at risk if they came into contact with father when determining whether he had made appropriate arrangements to care for child; conduct suggested that release of child to father might pose same imminent risk as release directly to mother, and any doubt had to be resolved in favor of protecting child); In re Martha A., 75 A.D.3d 476 (imminent risk found where children were sexually abused while in mother's care, mother allowed abuser to sleep over in same bedroom as children despite knowledge of abuse, mother failed to report abuse to authorities, and mother continued sexual relationship with abuser); Matter of Alanie H., 69 A.D.3d 722, 894 N.Y.S.2d 442 (2d Dept. 2010) (imminent risk where parents failed to take child to emergency room after having been directed to do so by child's pediatrician; child, who had just spent ten days in hospital with diagnosis of meningitis, had vomited twice and was crying); Matter of Amber Gold J., 59 A.D.3d 719, 874 N.Y.S.2d 189 (2d Dept. 2009) (where mother repeatedly subjected child to medical intervention based upon perception that child had symptoms that were not observed by examining physicians, and believed that child suffered from sexually-transmitted diseases that were not confirmed upon testing and that conspiracy existed among child's doctors against parents, majority notes that dissent would return child to parents upon compliance with various conditions, but ACS and family court have already imposed similar conditions with which parents have largely failed to cooperate; dissent notes that prior to §1028 hearing, child was being well cared for by the parents, that hearing went on for some three months after parents requested it with parents having virtually no meaningful visitation, that child has been out of parents' care for one and one-half years and has been in four foster homes, that the neglect proceeding is still pending, and that it is in child's best interest to be reunited with normal, functioning parents). Matter of Solomon W., 50 A.D.3d 912, 856 N.Y.S.2d 207 (2d Dept. 2008) (imminent risk found where one and a half year-old child's feet were burned in bathtub

of scalding hot water, and, after mother consented to finding of neglect and children were returned, mother threatened the sixteenth homemaker sent to home with knife in presence of child, and admitted she failed to keep appointment with psychiatrist and neglected to take prescribed anti-depressant and anti-psychotic medication for about two weeks); Matter of Xavier J., 47 A.D.3d 815, 849 N.Y.S.2d 648 (2d Dept. 2008) (order releasing child to mother under supervision reversed where mother pleaded guilty to manslaughter in connection with death of infant in her care and subsequently failed to acknowledge that her actions in shaking baby caused death; mother's responses during §1027 hearing indicated that she did not comprehend seriousness of father's drug abuse and violent behavior towards her or appreciate risk to child) and Matter of Landon W., 35 A.D.3d 1139, 826 N.Y.S.2d 822 (3rd Dept. 2006) (imminent danger found where there was knife fight at respondent's apartment, person involved with knife fight was still at apartment, there was break-in at apartment by respondent's "associates," who continued to sleep there, and respondent's relationship with new boyfriend, age nineteen, warranted police intervention for, among other things, underage drinking, domestic violence and disorderly conduct with neighbors).

Moreover, despite the Court of Appeals' rejection of the "safer course doctrine," the Second Department, perhaps signaling a residual inclination to err on the side of caution, has continued to refer to the "safer course" while approving removal. See Matter of Deonna E., 104 A.D.3d 943 (2d Dept. 2013) (mother's application for return of children pursuant to FCA §1028 denied where "children's emotional, mental, and physical health would be at imminent risk" because of mother's continued use of excessive corporal punishment; record "demonstrates that the safer course is not to return the children to the mother's custody pending a full fact-finding hearing"); Matter of Nathanal C., 78 A.D.3d 939, 910 N.Y.S.2d 677 (2d Dept. 2010) (court finds sufficient evidence that children's "emotional, mental, and physical health would be at imminent risk" while in respondents' care, and that children should not be returned "until additional facts are adduced at a full fact-finding hearing"); Matter of Iouke H., 50 A.D.3d 904, 854 N.Y.S.2d 669 (2d Dept. 2008) (in light of father's failure to comply with prior court directives to have children evaluated by Child Advocacy Center, safer course

is to not return children pending full fact-finding hearing); Matter of Xavier J., 47 A.D.3d 815 (in light of record, “the safer course is not to return the child to the mother's custody pending the full fact-finding hearing and a final determination of the neglect petition”); Matter of Lloyd M., 20 A.D.3d 536, 800 N.Y.S.2d 432 (2d Dept. 2005).

It is ordinarily not improper for the judge who conducted the hearing to preside over the fact-finding hearing. However, when determinations concerning witness credibility were decisive at the hearing, the losing side could argue that recusal would be appropriate. Cf. Matter of Rasha B., 139 A.D.2d 962, 527 N.Y.S.2d 933 (4th Dept. 1988).

**2. "Reasonable Efforts" Inquiry**

As is the case at a hearing under FCA §1022 or §1027, the court must consider and determine in its order whether continuation in the child's home would be contrary to the child's best interests, and, where appropriate, determine whether reasonable efforts have been made to prevent or eliminate the need for removal. FCA §1028(b); see also Uniform Rules For The Family Court, 22 NYCRR §205.81(a) (petitioner shall provide information to aid the court, and court may also consider information provided by respondents, child’s lawyer, non-respondent parents, relatives and other suitable persons); 45 C.F.R. §1356.21(b)(1) (if determination is not made within sixty days after removal, Title IV-E foster care maintenance payments are not available for duration of child’s stay in foster care); T.J. v. The Superior Court of the City and County of San Francisco, 21 Cal.App.5th 1229 (Cal. Ct. App., 1st Dist., 2018) (where reasonable services are not afforded there is substantial risk that court’s finding that child cannot be returned to parent will be erroneous); Matter of Austin M., 97 A.D.3d 1168 (agency made reasonable efforts where, with respect to issue of discipline, agency provided intensive family coordinator who met with father for seven hours a week and preventative caseworker who met with him several times a month, and scheduled mental health evaluation for him and provided financial assistance, transportation assistance, emergency food vouchers, and case work counseling); Matter of Divayah D., 60 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2018) (no reasonable efforts in mental illness case where ACS did not contact people who could have provided information

about mother's care of child, such as pediatrician and long-time camp/after-school provider, and mother was not referred to services until court ordered it; court notes that emotional pain and harm removal causes to child and parent is too great to allow it to happen unnecessarily based on slow, incomplete and inadequate casework); Matter of Zoe "W.", 29 Misc.3d 1224(A), 2010 WL 4691779 (Fam. Ct., Clinton Co., 2010) (reasonable efforts not found where DSS recommended substance abuse evaluations, mental health evaluations and traumatic brain injury assessments but there were no allegations that neglect was caused by such problems; DSS was required to do more than make referrals it knew were not being followed; and reasonable efforts should have included filing of petition prior to death of one of the children to seek orders compelling parents to participate in appropriate programs); Matter of Jamie C., 26 Misc.3d 580, 889 N.Y.S.2d 437 (Fam. Ct., Kings Co., 2009) (reasonable efforts not found where ACS knew mother had three involuntary psychiatric hospitalizations in span of fourteen months and that eighteen year old son was caring for two younger siblings, and that since mother locked up child's therapist, child was not receiving services she needed, but did nothing but repeatedly "counsel" mother to take medication; judicial finding that reasonable efforts were made after removal cannot serve as "alternative" to finding of efforts to prevent removal).

If reasonable efforts were not made but would have been appropriate, the court is not required to return the child. However, in addition to making the reasonable efforts "determination," the court, when deciding whether there is imminent risk, must also consider whether the commencement or continuation of reasonable efforts would immediately eliminate the risk. In any event, if reasonable efforts would be appropriate, the court must order the agency to provide or arrange for the provision of appropriate services or assistance pursuant to FCA §1015-a or §1022(c). FCA §1028(d); see Nicholson v. Scoppetta, supra, 3 N.Y.3d 357; Matter of Luna V., 163 A.D.3d 689 (2d Dept. 2018) (safeguard imposed by family court - requiring daily home visits by petitioner - was insufficient to mitigate imminent risk); Matter of Emmanuela B., 147 A.D.3d 935 (2d Dept. 2017) (concerns about, inter alia, adequacy of father's plan to care for child did not establish imminent risk that could not be mitigated by reasonable

efforts to avoid removal); Matter of Sara A., 141 A.D.3d 646 (2d Dept. 2016) (denial of §1028 application upheld where court listed areas of concern without analyzing whether concerns could be mitigated by reasonable efforts, but evidence demonstrated that father would not comply with any order issued in attempt to mitigate risk); Matter of Isaiah J., 65 A.D.3d 629, 884 N.Y.S.2d 456 (2d Dept. 2009) (imminent risk would not have been insurmountable had mother received additional services and cooperated with agency); Matter of Lashawn G., supra, 161 A.D.2d 712 (court notes that petitioner did not offer services to respondent as alternative to removal); Matter of Jeremiah L., 45 A.D.3d 771, 846 N.Y.S.2d 320 (2d Dept. 2007) (while reversing order denying parents' application for return of children, court notes, inter alia, that family court failed to set forth findings as to whether reasonable efforts were made); Matter of David G. v. Blossom B., 29 Misc.3d 1178, 909 N.Y.S.2d 891 (Fam. Ct., Kings Co., 2010) (no imminent risk found where any risk posed by father could be mitigated by issuance of temporary order of protection and order that mother re-enter secure domestic violence shelter and resume domestic violence counseling and participate in other services, petitioner was responsible for ensuring that father was held accountable and for assisting mother in finding shelter, and there was mere possibility that mother would resume relationship with father and there would be domestic violence that would harm children); but see Matter of Kimberly H., 242 A.D.2d 35, 673 N.Y.S.2d 96 (1st Dept. 1998) (family court inappropriately "put ... unbridled trust in the possibilities for redemption offered by intervention services").

If the court determines that a lack of reasonable efforts was appropriate, the court must include such a finding in its order. FCA §1028(c). However, as long as it appears that the court considered these issues, a failure to expressly make the required findings may be deemed harmless error. See Matter of Rachel G., 185 A.D.2d 382, 585 N.Y.S.2d 810 (3rd Dept. 1992).

Obviously, this inquiry will not be required when the court grants the petitioner's motion for an order terminating the reasonable efforts requirement (see FCA §1039-b), although it is unlikely that such a motion will have been made and decided prior to the hearing.

### 3. Issuance Of Order Of Protection

The Court must determine whether the imminent risk would be eliminated by the issuance of a temporary order of protection pursuant to FCA §1029 directing the removal of a person or persons from the child's residence. FCA §1028(f); see also Matter of Elizabeth C., 156 A.D.3d 193 (2d Dept. 2017) (order excluding parent from children's household requires showing of imminent risk and parent is entitled to expedited hearing upon request within three court days pursuant to FCA §1028). And, as an alternative to or in conjunction with any order issued under §1028, the court may issue any other temporary order of protection authorized by FCA §1029. FCA §1028(e). See Matter of Brunello G., 240 A.D.2d 744, 660 N.Y.S.2d 990 (2d Dept. 1997) (mother prohibited from dressing, undressing or bathing child); Matter of David G. v. Blossom B., 29 Misc.3d 1178.

It is important to confirm that a caretaker know and understands the terms and conditions of the order of protection, and intends to notify the authorities or take other protective measures if the order is violated rather than protect only the excluded parent's interests. See K.D. v. County of Crow Wing, 434 F.3d 1051 (8th Cir. 2005) (agency reasonably refused to place child with grandmother immediately upon removal from mother because of concern that child might be returned to mother).

### 4. Stay Pending Appeal

When the court issues an order which will result in the return of a child previously remanded in the custody of someone other than the respondent, such order shall be stayed until five p.m. of the next business day after the order is issued, unless such stay is waived by all parties by written stipulation or upon the record in court. The judge retains discretion to stay the order for a longer period of time. FCA §1112(b).

In abuse and neglect cases, an appeal may be taken as of right and has a preference over all other matters. FCA §1112(a). See also CPLR §5521. An application for an appellate stay must state the alleged errors of fact or law, and notify the attorney for each party and the child's lawyer of the time and place of the application. The applicant must make "every reasonable effort" to obtain a transcript of the family court proceedings. Except for good cause stated on the record, oral argument must be held

in the appellate court if requested by any party. FCA §1114(d). The appellate division must stay an order returning the child if necessary to avoid imminent risk to the child's life or health. FCA §1112(a). If a stay is granted, a schedule must be set for an expedited appeal. FCA §1114(d). See also Matter of Cali L., 61 A.D.3d 1131, 876 N.Y.S.2d 557 (3rd Dept. 2009) (appeal moot where petition was dismissed after hearing; any aspersion cast upon mother's parenting by temporary removal would be mitigated, if not eliminated, by court's finding that there was insufficient evidence).

### J. Search For And Intervention By Non-Respondent Parents

The statute seeks to insure that when the child would otherwise be in foster care, a non-respondent parent has an opportunity to become involved in a child protective proceeding and seek custody of the child.

When the court determines under Article Ten that a child must be temporarily removed from his or her home or placed pursuant to FCA §1055, the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent parent of the child. The commissioner shall inform them in writing of the pendency of the proceeding and of the opportunity for non-respondent parents to seek temporary release of the child under Article Ten or custody under FCA Article Six. Uniform statewide rules of court shall specify the contents of the notice consistent with the provisions of this section. The commissioner shall report the results of such investigation, or investigations to the court and parties, including the attorney for the child. The commissioner shall also record the results of the investigation or investigations, including, but not limited to, the name, last known address, social security number, employer's address and any other identifying information to the extent known regarding any non-respondent parent, in the uniform case record maintained pursuant to SSL §409-f. A "non-respondent parent" shall include a person entitled to notice of the pendency of the proceeding and of the right to intervene as an interested party pursuant to FCA §1035(d), and a non-custodial parent entitled to notice and the right to enforce visitation rights pursuant to FCA §1035(e). FCA §1017(1)(a); see also FCA §1012(l) ("Parent" means a person who is recognized under the laws of the state of New York to be the child's legal parent).

The court shall also direct the commissioner to conduct an investigation to locate any person who is not recognized to be the child's legal parent and does not have the rights of a legal parent under the laws of the state of New York but who (i) has filed with a putative father registry an instrument acknowledging paternity of the child, or (ii) has a pending paternity petition, or (iii) has been identified as a parent of the child by the child's other parent in a written sworn statement. The commissioner shall report the results of such investigation to the court and parties, including the attorney for the child. FCA §1017(1)(b). The court shall determine: (i) whether there is a non-respondent parent with whom such child may appropriately reside. FCA §1017(1)(c).

Where the court, after a review of the reports of the sex offender registry, reports of the statewide computerized registry of orders of protection, related decisions in court proceedings under Article Ten, and all warrants issued under Article Ten, determines that the child may appropriately reside with a non-respondent parent, the court may either: (i) grant a temporary order of custody or guardianship to such non-respondent parent pursuant to a petition filed under FCA Article Six pending further order of the court, or at disposition grant a final order of custody or guardianship to such non-respondent parent pursuant to Article Six and FCA §1055-b; or (ii) temporarily release the child directly to such non-respondent parent pursuant to Article Ten during the pendency of the proceeding or until further order of the court, whichever is earlier, and conduct such other and further investigations as the court deems necessary. The court may direct the commissioner, pursuant to OCFS regulations, to commence an investigation of the home of such non-respondent parent within twenty-four hours and to report the results to the court and the parties, including the attorney for the child. If the home of a non-respondent parent is found unqualified as appropriate for the temporary release or placement of the child under Article Ten, the commissioner shall report such fact and the reasons therefor to the court and the parties, including the attorney for the child, forthwith. FCA §1017(2)(a); see also FCA §651(e) (in emergency situations, to serve best interest of child, court may issue temporary emergency order in event it is not possible to timely review decisions and reports on registries, and, after

issuing temporary emergency order, court shall review the decisions and reports on registries within twenty-four hours of issuance of temporary emergency order).

An order temporarily releasing a child to a non-respondent parent or parents may not be granted unless the person or persons to whom the child is released submits to the jurisdiction of the court with respect to the child. The order shall set forth the terms and conditions applicable to such person or persons and child protective agency, social services official and duly authorized agency with respect to the child and may include, but may not be limited to, a direction for such person or persons to cooperate in making the child available for court-ordered visitation with respondents, siblings and others and for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency, social services official or duly authorized agency, and for appointments with the child's attorney, clinician or other individual or program providing services to the child during the pendency of the proceeding. The court also may issue a temporary order of protection under FCA §1022(f), §1023 or §1029 and an order directing that services be provided pursuant to FCA §1015-a. FCA §1017(3).

Intervention by a non-respondent parent is separately addressed in FCA §1035. The court must order service of a summons and petition on any non-respondent parent, along with a notice of pendency of the child protective proceeding advising the parent of the right to appear and participate in the proceeding as an interested party intervenor for the purpose of seeking temporary and permanent release of the child under Article Ten or custody of the child under FCA Article Six and participate in all arguments and hearings insofar as they affect the temporary release or custody of the child during fact-finding proceedings, and in all phases of dispositional proceedings." FCA §1035(d); see Matter of Eric W., 97 A.D.3d 833 (2d Dept. 2012) (mother lacked standing to move for order holding agencies in civil contempt for failing to timely complete ICPC paperwork required for transfer of custody to non-relative in Virginia; statute does not give parent right to intervene to argue that third party should be awarded custody); Matter of Holmes, 134 Misc.2d 278, 510 N.Y.S.2d 819 (Fam. Ct., Kings Co., 1986) (although intervenor-father and counsel may attend fact finding hearings and obtain discovery,

they may participate with full party status only in arguments affecting custodial status of child); see also Matter of A.H., 86 P.3d 745 (Utah Ct. App., 2004) (failure to notify father of original petition and subsequent proceedings violated due process, and may have contributed to finding of abandonment); Matter of R.S., 46 Misc.3d 1222(A) (Fam. Ct., Kings Co., 2015) (mother intervening under §1035(d) had no standing to intervene in father's motion for expanded visits); A.C. v. L.H., 195 Misc.2d 342, 757 N.Y.S.2d 694 (Fam. Ct., Rockland Co., 2003) (where custody of child was being addressed in Article Ten proceeding brought against mother, and father did not seek custody in that proceeding, father could not file for modification of prior Article Six custody order).

The notice shall also advise the parent or parents of the right to counsel, including assigned counsel pursuant to FCA §262.

The notice shall also state that upon good cause, the court may order an investigation pursuant to FCA §1034 to determine whether a petition should be filed naming such parent as a respondent; if the court determines that the child must be removed from his or her home, the court may order an investigation to determine whether the non-respondent parent would be a suitable custodian; and if the child is placed and remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition for termination of parental rights and commitment of guardianship and custody of the child for the purposes of adoption, even if the parent was not named as a respondent in the Article Ten proceeding. FCA §1035(d).

When the child has been removed, a non-respondent, non-custodial parent must also be served with notice of the removal and of the right to request temporary and permanent custody and to seek enforcement pursuant to Part Eight of Article Ten of any pre-existing court-ordered visitation rights, and with the name and address of the official to whom temporary custody of the child has been transferred, and, if different, the name and address of the agency or official with whom the child has been temporarily placed. FCA §1035(e); see Matter of Damian D., 126 A.D.3d 12 (3d Dept. 2015) (in case where court sua sponte modified Article Six order by significantly curtailing non-respondent mother's visitation and requiring that visits be supervised, and

mother alleged that notice pursuant to FCA §1035(d) did not advise her that visitation rights could be restricted, Third Department notes that court may not dispense with notice and due process requirements and take affirmative action against non-respondent parent who has not been formally charged with wrongdoing as to affected children); Matter of Telsa Z., 71 A.D.3d 1246, 897 N.Y.S.2d 281 (3rd Dept. 2010) (family court misused statute where non-respondent mother's past behavior became main focus at dispositional hearing and court removed children from mother and placed them with petitioner; this procedure violated mother's right to due process); see also Matter of Keith B., 29 Misc.3d 969, 908 N.Y.S.2d 559 (Fam. Ct., Clinton Co., 2010) (Telsa Z. not binding because in this case child never resided in non-respondent father's home; court also asks Third Department to reconsider holding in Telsa Z., while noting that other Article Ten provisions permit the court to refuse to release child to non-respondent parent); Heaton v. City of New York, 2002 WL 987287 (S.D.N.Y. 2002) (§1983 suit dismissed where evidence supported defendants' claims that they diligently searched for father).

A putative father is not entitled to intervene in the absence of evidence of paternity. See Matter of Tyrone G. v. Fifi N., 189 A.D.2d 8, 594 N.Y.S.2d 224 (1st Dept. 1993) (rule allowing anyone claiming to be parent to intervene as of right "would wreak havoc on child protective proceedings," but court does have discretion to allow intervention when person may have legitimate claim to parenthood); see also Matter of Paige WW., 71 A.D.3d 1200, 895 N.Y.S.2d 603 (3rd Dept. 2010) (although child's attorney argued that respondent was not entitled to rights of biological parent because he was not married to mother and had not been adjudicated to be father, petition identified him as father, both father and mother testified without contradiction that he was father, and before child's removal, father acknowledged paternity by living with her and supporting her); Matter of Jonathan C., 51 Misc.3d 469 (Fam. Ct., Bronx Co., 2015) (motion to intervene denied based on judicial estoppel where putative father had denied paternity in prior proceeding, but he could intervene if he could demonstrate he was biological father; DNA testing ordered).

If a putative father is allowed to intervene, the court may issue an order of

filiation pursuant to FCA §564. Such an order may be issued if both parents are present, the father waives the filing of a paternity petition and a hearing, and the court is satisfied as to paternity given the parents' testimony or sworn statements. FCA §564(b). In the alternative, the court may direct the mother, or another appropriate petitioner (see FCA §522), to file a paternity petition. FCA §564(c). See, e.g., Matter of Elacqua o/b/o Tiffany DD. v. James EE., 203 A.D.2d 688, 610 N.Y.S.2d 354 (3rd Dept. 1994) (child's lawyer may commence proceeding). See also Matter of Anthony "M", 271 A.D.2d 709, 705 N.Y.S.2d 715 (3rd Dept. 2000) (Article Ten petitioner had standing under FCA §522 or CPLR §3121(a) to seek DNA testing to determine paternity in abuse proceeding). Since the child's lawyer has standing to bring a petition [FCA §522; Matter of Elacqua o/b/o Tiffany DD. v. James EE., 203 A.D.2d 688], the lawyer should also have standing to object and request blood tests if the parents consent to an order under FCA §564 but the lawyer has a good faith belief that the individual before the court is not the father. See also Hammack v. Hammack, 291 A.D.2d 718, 737 N.Y.S.2d 702 (3rd Dept. 2002) (child's lawyer had standing to raise equitable estoppel argument on behalf of children). Since pre-existing visitation rights may not be enforced unless an adjudication of paternity has been made or an acknowledgment of paternity has been executed (see FCA §1084), the court properly may be reluctant to release a child to a man who refuses to consent to a filiation order.

In some cases, the court should not even temporarily release a child to an intervenor before an adequate investigation has been conducted. Matter of Cleophus B., 93 A.D.3d 1241 (4th Dept. 2012), lv denied 19 N.Y.3d 807 (court properly denied father's motion for summary judgment vacating placement order and awarding him custody where derivative neglect charges against father had been dismissed, but he failed to allege facts demonstrating present ability to care for child and child had been in foster care for nine months); Matter of Salvatore M., 90 A.D.3d 758 (2d Dept. 2011) (court not required to conduct hearing prior to releasing child into father's custody after petitioner withdrew allegations against father following completion of forensic evaluation and sexual abuse validation report which concluded that allegations against father were unfounded); Matter of Jesse M., 73 A.D.3d 780, 899 N.Y.S.2d 666 (2d Dept. 2010)

(family court erred in awarding temporary custody to father without hearing since there were questions of fact as to whether father was "suitable" temporary custodian); Matter of Donovan C., 65 A.D.3d 1041, 884 N.Y.S.2d 863 (2d Dept. 2009) (family court not required to have full hearing on permanent custody before rendering determination on temporary custody and visitation where court was fully familiar with family); Matter of Acquard v. Acquard, 244 A.D.2d 1010, 666 N.Y.S.2d 57 (4th Dept. 1997) (absent extraordinary circumstances, temporary custody should not be transferred without evidentiary hearing where there are contested allegations); Matter of Baby Girl L., 133 A.D.2d 458, 519 N.Y.S.2d 673 (2d Dept. 1987) (court also notes that evidence of paternity was inconclusive); Ryan v. Department of Social Services of Albany County, 16 Misc.3d 1134(A), 847 N.Y.S.2d 904 (Sup. Ct., Albany Co., 2007) (defendants did not violate plaintiffs' due process by recommending to family court that it ensure that father did not have drug problem before allowing him access to son, a neglected child who had been born with cocaine in his system).

Also, the court has the power, and perhaps a duty in some cases, to order the intervenor to undergo a mental health examination before granting him custody. See FCA §251 (court may "order any person within its jurisdiction and the parent ... to be examined by a physician, psychiatrist or psychologist ... when such an examination will serve the purposes of this act"); Matter of Crystal H., 135 Misc.2d 265, 514 N.Y.S.2d 865 (Fam. Ct., N.Y. Co., 1987). Cf. Melstein v. Melstein, 96 A.D.2d 884, 466 N.Y.S.2d 40 (2d Dept. 1983) (visitation was properly denied where father refused to submit to psychiatric examination).

A criminal court order of protection that bars contact between the parent and the child, but includes a provision stating that the order is "subject to" subsequent family court orders of custody and visitation, permits the family court to release the child to the custody of that parent when the court determines that release would be in the child's best interests. Matter of Rihana J.H., 147 A.D.3d 945 (2d Dept. 2017) (because criminal court's order was not made "subject to" subsequent family court orders, court had no authority to permit "kinship visitation" supervised by maternal grandmother); Matter of Brianna L., 103 A.D.3d 181 (2d Dept. 2012) (court notes that children have counsel in

family court but not in criminal court, that family court is uniquely situated to determine best interests and its authority should not be circumscribed by order which expressly contemplates future amendment by family court); but see Troilo v. Troilo, 0-11722-13/13A, NYLJ 1202643818377, at *1 (Sup., WE, Decided February 7, 2014) (family court may not modify criminal court order of protection for reasons other than custody and visitation, not even if the criminal court intended to confer other decision making authority on family court).

When determining whether to grant a non-respondent parent's application for custody, the court must keep in mind traditional rules governing custody disputes between natural parents and non-parents. Thus, in the absence of extraordinary circumstances, such as unfitness, a non-respondent natural parent will usually have custodial rights superior to those of any other person or agency. See In re M.M., 72 N.E.3d 260 (Ill. 2016) (error to place children in absence of finding of unfitness or finding that mother was unable or unwilling to care for children; even where best interest standard permeates and governs hearing, placement with third party requires prerequisite consideration of parental fitness or else statute would run afoul of Troxel v. Granville, 530 U.S. 57); Matter of Michael B., 80 N.Y.2d 299, 590 N.Y.S.2d 60 (1992); Matter of John KK., 302 A.D.2d 811, 755 N.Y.S.2d 513 (3rd Dept. 2003) (court rejects father's argument that he could not be found unfit in absence of Article Ten charges); In re Dwayne McM., 289 A.D.2d 29, 734 N.Y.S.2d 121 (1st Dept. 2001); Matter of Commissioner of Social Services o/b/o Tyrique P., 216 A.D.2d 387, 629 N.Y.S.2d 47 (2d Dept. 1995); Matter of Alfredo S., 172 A.D.2d 528, 568 N.Y.S.2d 123 (2d Dept. 1991), appeal dism'd 78 N.Y.2d 899, 573 N.Y.S.2d 459 (1991); Matter of Javaya R., NN-26814-11, NYLJ 1202725037639, at *1 (Fam., NY, Decided March 23, 2015) (where non-respondent father sought modification of permanency order to reflect release of child to him, court concludes that it may curtail father's due process rights only upon showing by agency of extraordinary circumstances); In re Miner, 32 Misc.3d 1211(A) (Fam. Ct., Oswego Co., 2011) (court substitutes word "fit" for word "suitable" when determining whether to release child to non-respondent father; there is presumption of suitability in absence of abuse or neglect, abandonment, or unfitness, or

other like extraordinary circumstances); see also Ryan v. Department of Social Services of Albany County, supra, 16 Misc.3d 1134(A) (in civil rights action, plaintiffs adequately pleaded substantive due process claims against individual defendants where reasonable trier of fact could conclude that defendants manifested deliberate indifference to, or reckless disregard of, father's liberty interest in raising child by engaging in five-year cycle of drug assessments, drug screening, drug rehabilitation programs, psychological and mental health evaluations, parenting classes, supervised visitation, and protracted family court litigation in absence of proof of neglect or abuse or unfitness; however, claims are dismissed based on qualified immunity since it would not have clear to reasonable social service workers that their actions violated father's substantive due process rights); but see Matter of Angelina AA., 222 A.D.2d 967, 635 N.Y.S.2d 775 (3rd Dept. 1995) (mother, who had obtained custody in Article Ten proceeding and allegedly failed to cooperate with agency, could be deprived of custody absent evidence of serious misconduct or unfitness).

However, the custodial rights of the respondent parent cannot be disregarded. Compare In re Aliyah B., 87 A.D.3d 943 (1st Dept. 2011) (mother failed to preserve objection to out-of-state relocation of child, and, in any event, release of child to father and relocation to Pennsylvania was proper where father wanted to move to Philadelphia to live in sister's home to improve children's lives, Pennsylvania agency assessed sister's home and found it to be appropriate and safe, and children's preference for remaining in father's care in Pennsylvania was entitled to some weight) with Matter of Tumari W., 65 A.D.3d 1357, 885 N.Y.S.2d 753 (2d Dept. 2009) (court erred when it authorized ACS to release child to non-respondent father over respondent mother's objection, without attorney for child being present, without conditions, and without seeking information about father's home in St. Thomas pursuant to ICPC) and In re Maiea P., 49 A.D.3d 291, 853 N.Y.S.2d 318 (1st Dept. 2008) (order awarding custody to non-respondent father reversed where decision was contrary to wishes of twelve-year-old child and recommendations of child's lawyer, agency caseworkers and mental health experts; agency records showed that mother complied with agency's plan and had warm and loving relationship with child; and there was evidence that father had

interfered with mother's relationship with child and that child's separation from siblings was having harmful effect on her emotional development).

Of course, the custodial rights of a non-respondent natural parent who resides with the children may be compromised by the presence in the home of the allegedly abusive or neglectful parent. See, e.g., In re Maria M., 244 A.D.2d 255, 664 N.Y.S.2d 440 (1st Dept. 1997) (child improperly released to father with order of protection against mother where father refused to live apart from mother and was intimidated by her).

### K. Search For And Intervention By Other Relatives Or Unrelated Persons

#### 1. Court-Ordered Investigation

When the court determines under Article Ten that a child must be temporarily removed from his or her home or placed pursuant to FCA §1055, the court also shall direct the local commissioner of social services to conduct an immediate investigation to locate any relatives of the child, including all of the child's grandparents, all relatives or suitable persons identified by any respondent parent or non-respondent parent, and any relative identified by a child over the age of five as a relative who plays or has played a significant positive role in his or her life. The commissioner shall inform them in writing of the pendency of the proceeding and of the opportunity to seek to become foster parents or to provide free care under this article or to seek custody pursuant to Article Six, or for suitable persons to become foster parents or provide free care under Article Ten to seek guardianship pursuant to Article Six. Uniform statewide rules of court shall specify the contents of the notice consistent with the provisions of this section. The commissioner shall report the results of such investigation, or investigations to the court and parties, including the attorney for the child. The commissioner shall also record the results of the investigation or investigations. FCA §1017(1)(a); see also FCA §1012(m) ("Relative" means any person who is related to the child by blood, marriage or adoption and who is not a parent, putative parent or relative of a putative parent of the child); FCA §1012(n) ("Suitable person" means any person who plays or has played a significant positive role in the child's life or in the life of the child's family); 18 NYCRR §430.11(c)(4) ("Within 30 days after the removal of a

child from the custody of the child's parent or parents, or earlier where directed by the court, or as required by [SSL §384-a], the social services district must exercise due diligence in identifying all of the child's grandparents and other adult relatives, including adult relatives suggested by the child's parent or parents and, with the exception of grandparents and/or other identified relatives with a history of family or domestic violence. The social services district must provide the child's grandparents and other identified relatives with notification that the child has been or is being removed from the child's parents and which explains the options under which the grandparents or other relatives may provide care of the child, either through foster care or direct legal custody or guardianship, and any options that may be lost by the failure to respond to such notification in a timely manner. The identification and notification efforts made in accordance with the paragraph must be recorded in the child's uniform case record…"); Matter of Richard HH. v. Saratoga County Department of Social Services, 163 A.D.3d 1082 (3d Dept. 2018) (court awards custody to uncle, noting that DSS violated FCA §1017 by failing to immediately conduct investigation and provide required information in writing; failure of judge and DSS to strictly follow statute created harm statute was intended to prevent - long-term placement in foster care rather than with suitable relative); Matter of Timothy GG., 163 A.D.3d 1065 (3d Dept. 2018) (statute contemplates investigation when court determines that child must be removed, and does not seem to create duty for DSS to seek out relatives in perpetuity while child remains in foster care; in this case, DSS investigated multiple resources identified by mother and she did not identify her cousin).

**2. Determination By Court**

The court shall determine: (i) whether there is a relative or suitable person with whom such child may appropriately reside; and (ii) whether such individual seeks approval as a foster parent for the purposes of providing care for such child, or wishes to provide free care for the child during the pendency of any orders pursuant to Article Ten. FCA §1017(1)(c).

Where the court, after a review of the reports of the sex offender registry, reports of the statewide computerized registry of orders of protection, related decisions in court

proceedings under Article Ten, and all warrants issued under Article Ten, determines that the child may appropriately reside with a relative or suitable person, the court may either: (i) grant a temporary order of custody or guardianship to such relative or suitable person pursuant to a petition filed under FCA Article Six pending further order of the court, or at disposition grant a final order of custody or guardianship to such relative or suitable person pursuant to Article Six and FCA §1055-b; or

(ii) temporarily place the child with a relative or suitable person pursuant to Article Ten during the pendency of the proceeding or until further order of the court, whichever is earlier, and conduct such other and further investigations as the court deems necessary. The court may direct the commissioner, pursuant to OCFS regulations, to commence an investigation of the home of such relative or suitable person within twenty-four hours and to report the results to the court and the parties, including the attorney for the child. If the home of a relative or suitable person is found unqualified as appropriate for the temporary release or placement of the child under Article Ten, the commissioner shall report such fact and the reasons therefor to the court and the parties, including the attorney for the child, forthwith; or

(iii) remand or place the child, as applicable, with the commissioner and direct such commissioner to have the child reside with such relative or suitable person and further direct such commissioner, pursuant to OCFS regulations, to commence an investigation of the home of such relative or other suitable person within twenty-four hours and thereafter approve such relative or other suitable person, if qualified, as a foster parent. If such home is found to be unqualified for approval, the local commissioner shall report such fact and the reasons thereafter to the court and the parties, including the attorney for the child, forthwith. FCA §1017(2)(a); see also FCA §651(e) (prior to issuance of temporary order of custody where more than month has passed since issuance of previous temporary order, court shall review "related decisions in court proceedings initiated pursuant to [FCA Article Ten]" and "reports of the statewide computerized registry of orders of protection and warrants of arrest established and maintained pursuant to [Executive Law §221-A], and reports of the sex offender registry established and maintained pursuant to [Correction Law §168-B]"; in emergency situations, to serve

best interest of child, court may issue temporary emergency order in event it is not possible to timely review decisions and reports on registries, and, after issuing temporary emergency order, court shall review the decisions and reports on registries within twenty-four hours of issuance of temporary emergency order); 18 NYCRR §443.7(a)(2) (eligible non-relative may be, inter alia, child's godparent, neighbor, family friend, or adult with positive relationship with child); Matter of Donovan C., 65 A.D.3d 1041, 884 N.Y.S.2d 863 (2d Dept. 2009) (family court not required to have full hearing on permanent custody before rendering determination on temporary custody and visitation where court was fully familiar with family); Matter of Acquard v. Acquard, 244 A.D.2d 1010, 666 N.Y.S.2d 57 (4th Dept. 1997) (absent extraordinary circumstances, temporary custody should not be transferred without evidentiary hearing where there are contested allegations); Matter of Deonna W., 32 Misc.3d 425 (Fam. Ct., Clinton Co., 2011) (court fulfills obligation to make determination when it holds hearing upon motions that have been filed; although court may file own motion seeking modification of child's custodial status pursuant to FCA §§ 1061 and 1017, court is not obligated to do so).

An order temporarily placing a child with a relative or relatives or other suitable person or persons, or remanding or placing a child with a local commissioner of social services to reside with a relative or relatives or suitable person or persons as foster parents, may not be granted unless the person or persons to whom the child is remanded or placed submits to the jurisdiction of the court with respect to the child. The order shall set forth the terms and conditions applicable to such person or persons and child protective agency, social services official and duly authorized agency with respect to the child and may include, but may not be limited to, a direction for such person or persons to cooperate in making the child available for court-ordered visitation with respondents, siblings and others and for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency, social services official or duly authorized agency, and for appointments with the child’s attorney, clinician or other individual or program providing services to the child during the pendency of the proceeding. The court also may issue a

temporary order of protection under FCA §1022(f), §1023 or §1029 and an order directing that services be provided pursuant to FCA §1015-a. FCA §1017(3).

The child's attorney should consider the possibility that the custodian would be able to obtain child support from the child's parent. Cf. Labanowski v. Labanowski, 49 A.D.3d 1051, 857 N.Y.S.2d 737 (3rd Dept. 2008) (court finds it "troubling" that child's attorney took no position on support issue).

In its discretion, the court may direct that the child reside in a specific certified foster home upon a determination that it is in the child's best interests. FCA §1017(2)(b). See In re Brandon A., 50 A.D.3d 395, 855 N.Y.S.2d 457 (1st Dept. 2008) (family court had jurisdiction to stay child's return to former foster mother's care pending best interests hearing, and, after hearing, bar return despite fair hearing decision in foster mother's favor); Matter of Joshua Noel A., 40 A.D.3d 749, 836 N.Y.S.2d 628 (2d Dept. 2007) (family court did not err in ordering, at permanency hearing, that child be moved to new foster home where, although children had closely bonded with foster parent, he lacked insight into medical condition of one of the children and failed to properly administer prescribed medicine); Matter of Adrienne M., 201 A.D.2d 938 (4th Dept. 1994) (under §1017, court may order agency not to place child in specified foster home); Matter of Shinice H., 194 A.D.2d 444, 599 N.Y.S.2d 37 (1st Dept. 1993); Matter of Gunner T., 44 Misc.3d 539 (Fam. Ct., Clinton Co., 2014) (court has authority to direct placement in specific foster home pursuant to §1017(2)(b) after permanency hearing; Legislature intended to provide court with such authority throughout time child is in foster care); Matter of Lanaya B., 25 Misc.3d 981, 886 N.Y.S.2d 319 (Fam. Ct., Kings Co., 2009) (contempt finding made based on nine-day delay in placing child in foster care with maternal uncle, as required by order; "For nine days of her infant's life, this mother was not able to hold, feed, parent and bond with [the child], because she was placed in a stranger's home instead of the home of a loving relative that this Court held to be in the best interests of [the child]"); Matter of Damien A., 195 Misc.2d 661, 760 N.Y.S.2d 825 (Fam. Ct., Suffolk Co., 2003) (while directing that mother and child who are both in foster care reside together, court relies on FCA §§ 255, 1015-a and 1055); see also Matter of V.P., 41 Misc.3d 926 (Fam. Ct., Kings Co., 2013) (contract foster

care agency had no standing to move for order authorizing it to place child in home of maternal grandparents and directing ACS to file application for expedited placement under Interstate Compact).

Although it could be argued that the family court should have substantial discretion to transfer a child from one relative to another, particularly where the child did not reside for long with the first relative, it was held in In re Dominick S., 289 A.D.2d 11, 733 N.Y.S.2d 191 (1st Dept. 2001) that, in the absence of a material change of circumstances, the family court should not have transferred the child, who had been with the great grandmother for about five weeks, to the grandmother. See also Matter of Sarah S., 9 Misc.3d 1109(A), 806 N.Y.S.2d 448 (Fam. Ct., Monroe Co., 2005) (even if relative resource is fit, child can be removed from relative's temporary custody where there has been a change of circumstances).

In cases in which the court has not specified a foster home and in all other cases, agencies are bound by the New York State Office of Children and Family Services' Administrative Directive, 10-OCFS-ADM-16, which creates a state-wide requirement that the child's attorney be notified of any change in the child's foster care placement. The child's attorney must be notified by the child's local department of social services or voluntary foster care agency caseworker of a planned placement change at least 10 days in advance of the anticipated change in placement, or as soon as the decision is made, and no later than the next business day after an emergency move occurs. The notification must include the following: child's name, DOB, and case number; reason for the child's change in placement; date and time of change in placement; placement location prior to change; planned or new placement location and contact information; agency and official approving placement change.

It should be noted that, pursuant to FCA §1035(f), a non-respondent adult sibling, grandparent, aunt or uncle may, with the consent of any parent appearing in the proceeding, move to intervene in the proceeding as an interested party intervenor for the purpose of seeking temporary or permanent custody of the child, and, if permitted to intervene, may participate during the fact-finding stage in all arguments and hearings insofar as they affect the temporary custody of the child, and in all phases of

dispositional proceedings. FCA §1035(f); see Matter of Demetria FF., 140 A.D.3d 1388 (3d Dept. 2016) (§1035(f) authorizes intervention at permanency stage). However, given the amendments to FCA §1017 that took effect after enactment of §1035(f), this statute has become somewhat irrelevant. See Matter of Tristram K., 36 A.D.3d 147, 824 N.Y.S.2d 232 (1st Dept. 2006) (consent requirement in §1035[f] remains applicable even though FCA §1017 has expanded role of relatives, but does not affect relative's right to be considered as custodial resource).

### 3. Kinship And Other Foster Care

A relative providing foster care must be within the second or third degree of the parent or step-parent, related through blood or marriage; this includes the child's grandparents; great-grandparents; aunts and uncles, including spouses of aunts or uncles; siblings; great-aunts and great-uncles, including spouses of great-aunts or great-uncles; first cousins, including spouses of first cousins; great-great grandparents; and an unrelated person where placement with such person allows half-siblings to remain together in an approved foster home, and the parents or stepparents of one of the half-siblings is related to such person in the second or third degree. SSL §375; 18 NYCRR §443.1(g), (i); see also Matter of Randi NN., 68 A.D.3d 1458, 891 N.Y.S.2d 521 (3rd Dept. 2009) (although agency was aware of grandmother's existence at early stage, no caseworker asked if she was interested in acting as foster parent or wanted visitation with child, and, although grandmother did not decide to seek custody until after child's removal, she was confused as to options with regard to foster care placement and agency failed in statutory duty to explain options and make clear to grandmother that her inaction could ultimately lead to foster parents obtaining custody of child; because confusion potentially deprived child of placement with suitable relative, grandmother demonstrated prejudice arising from agency's failure to comply with §1017 and good cause for vacatur of placement order); Matter of Seth Z., 45 A.D.3d 1208, 846 N.Y.S.2d 729 (3rd Dept. 2007) (Department of Social Services fulfilled obligation under FCA §1017 by promptly identifying aunt as potential foster parent and/or custodian of child, investigating home she shared with uncle and their children, and submitting report to family court recommending that home was not

suitable for placement); Matter of Debra VV., 26 A.D.3d 714, 811 N.Y.S.2d 457 (3rd Dept. 2006) (agency obligated to provide foster care payments despite lack of actual foster care placement where agency failed to discharge statutory duty to assist relative in becoming certified as foster parent); Matter of Elizabeth YY., 229 A.D.2d 618, 644 N.Y.S.2d 856 (3rd Dept. 1996) (aunt, who was aware infant was in foster care, was not prejudiced by agency's failure to contact her); Matter of Tosto v. Julio F., 2001 WL 1607601 (Fam. Ct., Erie Co., 2001) (DSS criticized for trying to avoid expense and responsibility by asking relatives to file for custody); Matter of Greer v. Bane, 158 Misc.2d 486, 600 N.Y.S.2d 607 (Sup. Ct., N.Y. Co., 1993) (agency must act reasonably on application, and may not use misinformation to coerce relatives to become uncompensated custodians); Rosales v. Thompson, 321 F.3d 835 (9th Cir. 2003) (eligibility for receipt of Aid to Families with Dependent Children Foster Care Program funds for child in foster care with relatives is not dependent on AFDC-eligibility in home where child formally resided at time of removal; eligible child living informally in relative's home when removal petition is filed may receive foster care benefits in relative's home if relative later becomes foster parent).

Procedures for certifying or approving potential emergency foster homes are found in 18 NYCRR §443.7. If the home is found suitable, it will be certified or approved as an emergency foster home or an emergency relative foster home for ninety days from the date of placement of the child in the home. 18 NYCRR §443.7(c). If the emergency foster parent(s) or the relative foster parent(s) fails to meet all requirements for approval within ninety days from the date of placement, the authorized agency must provide notice of that fact no later than twenty days prior to the expiration date of the emergency certification or approval and must identify the particular problem(s) that constitute a barrier to certification or approval. The agency must revoke the certification or approval if requirements for approval are not met within the first ninety days from the date of placement. The agency must remove the child from the home, place the child in a suitable certified foster home or an approved relative foster home, and inform the relative of the right to request a hearing in accordance with SSL §400, upon revocation of the certification or approval or when health and safety risks to the child warrant

removal. 18 NYCRR §443.7(i).

Formal certification and approval of foster homes is addressed in 18 NYCRR §443.3(a), which requires, inter alia, that the home be in good physical condition and be in substantial compliance with applicable laws concerning health and safety; that there be separate bedrooms for children of the opposite sex over seven years of age; that not more than three persons occupy any bedroom where foster children sleep; that no child above the age of three may sleep in the same room with an adult of the opposite sex, and children must not sleep together in the same bed with an adult; that each child must have sleeping space of sufficient size, and suitable bedding adequate to the season, and bunk beds may be used; and that the dwelling must have window barriers, including window screens, guards and/or stoppers, above the first floor.

Certified and approved foster parents must execute an agreement with the agency stating that, if the certificate or letter of approval is granted, the foster parent will, inter alia, never leave children under the age of ten alone without competent adult supervision, nor children above that age except as might reasonably be done by a prudent parent in the case of his or her own children, and, except as permitted by the agency, never use the home to care for more than two infants under two years of age, including the foster parents' own children, except where the foster parents have demonstrated the capacity to do so and a sibling group would otherwise have to be separated. 18 NYCRR §443.3(b)(3), (4); see also 18 NYCRR §443.2(c)(1) (provides, inter alia, that each foster parent must be over age of twenty-one; that each member of household must be in good physical and mental health and free from communicable diseases, but physical handicaps or illness of foster parents or members of household must be a consideration only as they affect ability to provide adequate care or may affect individual child's adjustment to foster family; that employment of foster parent outside home must be permitted when there are suitable plans for care and supervision of child at all times, including after school and during summer; and that marital status of applicant may be factor only as it affects ability to provide adequate care).

The family court does not have authority to override an agency's decision regarding approval or certification of a foster home. Matter of Jermaine H., 79 A.D.3d

1720 (4th Dept. 2010) (family court lacked authority to order agency to certify caregiver as emergency foster care provider, which agency is required to do only upon determining person is qualified; court impermissibly encroached upon powers granted by SSL §398 to agency, and FCA §255 does not provide authority to issue order directing executive agencies to take specific discretionary action); Matter of Tymell Jeanette P., 275 A.D.2d 327, 712 N.Y.S.2d 411 (2d Dept. 2000) (court could not order agency to amend certification); Matter of Hasani B., 195 A.D.2d 404, 600 N.Y.S.2d 694 (1st Dept. 1993) (FCA §255 does not permit court to order agency to grant certification); but see Matter of the W. Children, 167 A.D.2d 478, 562 N.Y.S.2d 151 (2d Dept. 1990), lv denied 78 N.Y.2d 854, 573 N.Y.S.2d 467 (1991) (court could place child in home of grandmother despite Commissioner's claim that mother's presence in home creates funding problems). Instead, the prospective foster parent must pursue administrative remedies and, if necessary, commence a CPLR Article Seventy-Eight proceeding. Matter of Lafvorne B., 44 A.D.3d 653, 841 N.Y.S.2d 882 (2d Dept. 2007) (challenge by cousin who was rejected as foster parent had to be brought pursuant to Article Seventy-Eight); Matter of Jane D. v. Bane, 192 A.D.2d 530, 595 N.Y.S.2d 813 (2d Dept. 1993), lv denied 82 N.Y.2d 702. Obviously, if a relative obtains temporary or permanent custody pursuant to FCA Article Six or Article Ten, the relative will not receive foster care funds.

Exceptions to requirements other than those imposed by statute may be proposed by the agency when the agency determines that an exception is necessary to board a foster child; is in the best interests of the child; and is consistent with the health, safety, and welfare of the child. Any exception is tentative only and subject to review and approval by the social services district. 18 NYCRR §443.3(b).

Upon the application of a relative to become a foster parent of a child in foster care, the court must hold a hearing to determine whether the child should be placed with the relative if: (i) the relative is related within the third degree of consanguinity to either parent; (ii) the child has been temporarily removed, or placed pursuant to FCA §1055, and placed in non-relative foster care; (iii) the relative indicates a willingness to become the foster parent and has not refused previously to be considered as a foster

parent or custodian of the child, provided, however, that an inability to provide immediate care for the child due to a lack of resources or inadequate housing, educational or other arrangements necessary to care appropriately for the child shall not constitute a previous refusal; (iv) the local social services district has refused to place the child with the relative for reasons other than the relative's failure to qualify as a foster parent pursuant to the regulations of the office of children and family services; and (v) the application is brought within six months from the date the relative received notice that the child was being removed from his or her home and no later than twelve months from the date that the child was removed. FCA §1028-a(a). See, e.g., Matter of Kaitlyn B., 84 A.D.3d 1363 (2d Dept. 2011) (application pursuant to FCA § 1028-a denied as untimely where it was filed approximately fourteen months after child removed); Matter of Haylee RR., 47 A.D.3d 1093, 849 N.Y.S.2d 359 (3rd Dept. 2008) (court not required to provide hearing on aunt's application to be foster parent because she did not apply within one year of child's placement in foster care); Matter of Seth Z., 45 A.D.3d 1208, 846 N.Y.S.2d 729 (3rd Dept. 2007) (since DSS indicated it would not place child with aunt and uncle because they would not qualify as foster parents, they were not entitled to hearing under FCA §1028-a; moreover, no child may be placed with relative under §1028-a prior to final approval of relative as foster parent, and aunt and uncle never actually submitted application to become foster parents); Matter of James v. Westchester County Dept. of Social Services, NN-08801-12, NYLJ 1202590380505, at *1 (Fam., WE, Decided February 7, 2013) (putative father's cousin lacked standing for § 1028-a motion where paternity had not been established).

The court must give due consideration to such application and shall make the determination as to whether the child should be placed in foster care with the relative based on the best interests of the child. FCA §1028-a(b). If, upon a hearing, the court determines that placement in foster care with the relative is in the best interests of the child, the court must direct the local commissioner of social services, pursuant to regulations of the office of children and family services, to commence an investigation of the home of the relative within twenty-four hours and thereafter expedite approval or certification of such relative, if qualified, as a foster parent. No child, however, shall be

placed with a relative prior to final approval or certification of such relative as a foster parent. FCA §1028-a(c).

When making an application pursuant to §1028-a, relatives can argue that they have a constitutional liberty interest in the family relationship. See Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982) (half sister, who lived with half brother and sister for several years before entering into foster care agreement with state and acting as surrogate mother, had liberty interest and was entitled, before foster care agreement was terminated, to be provided with timely and adequate notice of reasons for termination; opportunity to retain counsel; pre-removal hearing upon request in the absence of exceptional circumstance; opportunity to confront and cross-examine witnesses and present evidence and arguments; impartial decision-maker; and written statement of decision and summary of evidence supporting decision); A.C. v. Mattingly, 2007 WL 894268 (S.D.N.Y. 2007) (in litigation brought by infants who claim they were removed from kinship foster parents in violation of their constitutional rights, court concludes that plaintiffs have shown that they possess constitutionally-protected liberty interest in integrity of kinship foster family unit, and court will determine what due process must be afforded in connection with removal from the home); Matter of G.B., 7 Misc.3d 1022(A), 801 N.Y.S.2d 233 (Fam. Ct., Monroe Co., 2005) (finding that it is in the best interests of one child to be raised by her great-aunt and in the best interests of the other child to be raised by his grandmother, court dismisses termination petitions and awards custody to relatives; court notes that, as in the case of a biological parent, intrinsic human rights are involved when a blood relative seeks custody, that public policy favors getting children out of foster care and into the homes of extended family members, and that, although a relative does not automatically prevail over a foster family chosen by DSS to adopt a child, a blood relative's constitutionally protected liberty interest in a child might allow a relative to prevail where the standard best interests test would not); Webster v. Ryan, 189 Misc.2d 86, 729 N.Y.S.2d 315 (Fam. Ct., Albany Co., 2001), rev'd on other grounds 292 A.D.2d 92, 740 N.Y.S.2d 162 (3rd Dept. 2002) (child has constitutional right to maintain contact with former foster parent); but see Gause v. Rensselaer Children and Family Services, 2010 WL 4923266 (NDNY

2010) (grandmother had no liberty interest where mother had custody prior to agency intervention).

However, a relative's advantage may dissipate after the child has been residing with a foster family for an extended period of time. See Matter of Matthew E., 41 A.D.3d 1240, 839 N.Y.S.2d 871 (4th Dept. 2007) (grandfather did not have greater right to custody than foster parents where child was placed in foster care when she was approximately three months old after she had suffered fractures to legs, wrists, ribs, and skull and lacerated liver while being cared for by parents, and, at that time, grandfather refused to take custody, had little contact with child thereafter except for one hour per week of supervised visitation, and did not petition for custody until, after five to six months, it became evident that his daughter would not regain custody).

#### 4. Right To Counsel

Any relative or other person who becomes a foster parent for the child, or has physical or legal custody of the child in any proceeding under FCA Article Ten or Ten-A, has a right to counsel. FCA §262(a)(iv).

### L. Criminal History Check Of Foster Parent

In some instances a prospective foster parent must, and in other instances may, be denied certification or approval because the foster parent or a person residing in the home has a criminal conviction.

The agency must perform a criminal history record check with the Division of Criminal Justice Services (DCJS) regarding any prospective foster or adoptive parent who is applying for initial or renewed certification or approval, and any person over eighteen who currently resides in the home, before the applicant is finally certified or approved for the placement of a child. This requirement applies to foster parents certified by the Office of Children and Family Services (OCFS). SSL §378-a(2)(a). To facilitate this record check, the agency must obtain a set of fingerprints from any prospective foster or adoptive parent and from any person over the age of eighteen who resides on the home, and any other information required by OCFS and the Division of Criminal Justice Services (DCJS). See Matter of Paul Y., 182 Misc.2d 65, 696 N.Y.S.2d 796 (Fam. Ct., Queens Co., 1999) (fingerprinting of sixteen-year-old not

authorized). The agency must provide a blank fingerprint card, and a description of how the completed cards will be used.

After receiving the fingerprints, the agency must promptly transmit them to OCFS, which shall then submit the cards to DCJS. SSL §378-a(2)(b). Subsequently, DCJS shall promptly provide to OCFS any existing criminal history record, SSL §378-a(2)(c), and OCFS may request and is entitled to receive any information pertaining to the listed offenses from any state or local law enforcement agency or court in order to determine whether there is a ground for denying certification. SSL §378-a(2)(d). OCFS must then notify the local agency regarding the circumstances under which certification or approval must, or may be denied. SSL §378-a(2)(e); see also SSL § 378-a(2)(m) (limits disclosure of results of the nationwide criminal history record check conducted by the federal bureau of investigation).

Any notification sent by the State Office of Children and Family Services to an agency must include, but not be limited to, a summary of the criminal history record, including the specific crime or crimes for which the prospective foster or adoptive parent or parents or any adults over the age of eighteen living in the home have been charged or convicted, and notify the agency regarding mandatory and discretionary denial of the application due to a criminal history record. SSL §378-a(2)(f). Any criminal history record provided by DCJS to OCFS, and any summary provided by OCFS to the agency, is confidential and shall not be available for public inspection, but may be disclosed by OCFS or the agency in any administrative or judicial proceeding relating to denial or revocation of certification or approval, or relating to removal of the foster child from the home. When there is a pending court case, the authorized agency "shall provide a copy of such summary to the family court or surrogate's court." SSL §378-a(2)(l).

DCJS also is authorized to submit fingerprints to the FBI for the purpose of a nationwide criminal history record check to determine whether the individual has a criminal history in any state or federal jurisdiction. SSL §378-a(2)(a). When responding to an inquiry from a voluntary authorized agency or other non-public agency with respect to the results of a national criminal history check performed by the FBI, the OCFS shall advise the agency of the category or categories of crime or crimes and

shall not provide the agency with the specific crime or crimes absent the written consent of the person for whom the national criminal history check was performed. SSL §378-a(2)(f).

OCFS shall not release the content of the results of the nationwide criminal history record check conducted by the federal bureau of investigation in accordance with this subdivision to an "authorized agency" as defined in SSL §371(10)(a), (c). OCFS shall review and evaluate the results of the nationwide criminal history record check of the prospective foster parent, prospective adoptive parent and any other person over the age of eighteen who resides in the home of such applicant in accordance with the standards set forth in SSL §378-a(2)(e) relating to mandatory disqualifying convictions, hold in abeyance charges or convictions, and discretionary charges and convictions; and, based on the results of the nationwide criminal history record check, inform such authorized agency that the application for certification or approval of the prospective foster parent or the prospective adoptive parent either must be denied or must be held in abeyance pending subsequent notification from OCFS, or that OCFS has no objection, solely based on the nationwide criminal history record check, for the authorized agency to proceed with a determination on such application based on the standards for certification or approval of a prospective foster parent or prospective adoptive parent, as set forth in OCFS regulations. SSL §378-a(2)(m).

An application for certification or approval of a prospective foster or adoptive parent shall be denied where a criminal history record reveals: a felony conviction at any time for child abuse or neglect; "spousal abuse"; a crime against a child, including child pornography; or a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery, or a felony conviction within the past 5 years for physical assault; battery; or a drug-related offense. SSL §378-a(2)(e)(1). "Spousal abuse" does not include cases in which OCFS, upon the applicant's request for relief from mandatory disqualification, finds after a fair hearing that the victim's physical, sexual, or psychological abuse of the applicant was a factor in causing the offense. SSL §378-a(2)(j). (Although, in 2000, the statute was amended to permit the prospective foster or adoptive parent to rebut the presumption of

disqualification, the irrebuttable presumption was restored by legislation that took effect on October 1, 2008, but does not apply to any person certified or approved as a foster parent or adoptive parent prior to October 1, 2008 except with respect to any conviction or arrest occurring on or after October 1, 2008.

The irrebuttable presumption has been found unconstitutional when the child already has a close relationship with the caretaker who has the disqualifying conviction. Matter of the Adoption of Abel, 33 Misc.3d 710 (Fam. Ct., Bronx Co., 2011) (court grants adoption petition filed by maternal cousin and her husband, who had 1992 robbery conviction that disqualified him under statute, where he had rehabilitated himself, removal from home would have devastating impact on child, and to follow strict mandate of statute would deprive child and prospective adoptive parents of constitutional Due Process right to individualized determination of whether adoption is in child's best interest); Matter of Corey, 184 Misc.2d 437, 707 N.Y.S.2d 767 (Fam. Ct., Greene Co., 1999); Matter of Jonee, 181 Misc.2d 822, 695 N.Y.S.2d 920 (Fam. Ct., Kings Co., 1999); but see Matter of I.B., 32 N.E.3d 1164 (Ind. 2015) (statute found constitutional because it is rationally related to legitimate legislative goal of ensuring that children will not be adopted into neglectful home); In re H.K., 217 Cal.App.4th 1422 (Cal. Ct. App., 2d Dist., 2013) (California law prohibiting, without exceptions, placement of child in home of person who has certain type of conviction not unconstitutional as applied to proposed placement with sibling with whom child had no relationship other than biology; New York cases cited by child involved child already living with and closely bonded to person with disqualifying conviction, and, since no fundamental right is involved here, law need only bear rational relationship to legitimate state purpose, and, here, presumption that individual who has qualifying conviction represents danger to children placed in his or her home is logical and rationally related to protection of children).

When a criminal history record reveals an unresolved charge involving a disqualifying crime, or a felony conviction which may be for a disqualifying crime, the agency must, before determining the application, await notification from OCFS regarding the status of the charge or the nature of the conviction. SSL §378-a(2)(e)(2).

An application *may* be denied when a criminal history check as to the applicant reveals a charge or conviction of a crime other than the aforementioned crimes which require denial, or a check reveals that a person over eighteen who resides in the home has been charged with or convicted of any crime. SSL §378-a(2)(e)(3). When a record reveals a charge or conviction of a crime involving the applicant or a person over eighteen, the agency shall perform a safety assessment of the conditions in the home, and thereafter take appropriate steps to protect the child, including, when appropriate, removal from the home. SSL §378-a(2)(h). The agency shall remove the child if it later decides to deny the application or revoke approval or certification. SSL §378-a(2)(h).

Of course, a denial of approval due to a conviction does not preclude a court from permitting a child to live with a relative. Thus, although the existence of the conviction, combined with attendant circumstances, may cause the child's lawyer to oppose the relative's attempt to gain custody, there is room for advocacy here when an older child has a strong wish to remain in the home or the lawyer for an infant believes that, notwithstanding the conviction, the relative should have custody.

Provisions governing criminal history record checks also can be found in 18 NYCRR §443.8.

### M. Court Orders Pending Fact-Finding Hearing

Often, there are lengthy delays between the initial appearance and the fact-finding hearing. Although these delays are beneficial in that they provide ample time to prepare for trial, they provide no benefit to the child or the family if the conditions which led to court intervention are allowed to deteriorate. Thus, these delays should be utilized to address both the problems which led to the filing of charges and the long-term custodial issues the court will have to decide if a fact-finding is made and the case proceeds to the dispositional stage. The Family Court Act provides the court with broad authority to issue orders designed to further the interests of the child and the family during this stage of the proceeding.

#### 1. Visitation

Unless visitation is limited by court order, a respondent has the right to reasonable and regularly scheduled visitation with a child who has been temporarily

remanded. FCA §1030(a). See also Matter of Jessica F., 7 A.D.3d 708, 7777 N.Y.S.2d 198 (2d Dept. 2004) (§1030 applicable prior to entry of dispositional order). According to the New York City Administration for Children's Services' Best Practice Guidelines For Family Visiting Arrangements For Children In Foster Care, it is recommended that such visits should occur on a weekly basis whenever possible and in the best interests of the children, and that the length of a visit be at least two hours.

A criminal court order of protection that bars contact between the parent and the child, but includes a provision stating that the order is "subject to" subsequent family court orders of custody and visitation, permits the family court to release the child to the custody of that parent when the court determines that release would be in the child's best interests. Matter of Brianna L., 103 A.D.3d 181 (2d Dept. 2012) (court notes that children have counsel in family court but not in criminal court, that family court is uniquely situated to determine best interests and its authority should not be circumscribed by order which expressly contemplates future amendment by family court). Needless to say, such a criminal court order would not bar a visitation order in family court.

When the permanency planning goal is discharge to the parents or relatives the agency must plan for and make efforts to facilitate at least bi-weekly visiting between the child and the parents or caretakers to whom the child is to be discharged, unless such visiting is specifically prohibited by court order, or the child is placed in a facility operated or supervised by the Office of Mental Health or Office of Mental Retardation and Developmental Disabilities, or because the placement makes biweekly visitation an impossibility, in which case the agency must, at a minimum except in specified circumstances, plan for and facilitate monthly visits. Efforts to facilitate at least bi-weekly visiting must include the provision of financial assistance, transportation or other necessary assistance; follow-up with the parent or relative when scheduled visits do not occur to ascertain the reasons for the missed visits and to make reasonable efforts to prevent similar problems in future visits; and arranging for visits to occur in a location that assures the privacy, safety and comfort of family members. 18 NYCRR §430.12(d)(1)(i); see also 18 NYCRR §431.9(d) (if it is deemed to be in child's best

interests to deny or limit right of parent to visit, and if parent will not voluntarily agree to limitation or discontinuance of visiting, social services official must seek court approval of decision to limit or deny right to visit provided legal grounds for such action exists under Article Ten); 18 NYCRR §431.14 (visitation shall not be terminated or limited except by court order, and visitation must continue until court order is obtained except in cases of imminent danger); Winston v. Children and Youth Services, 948 F.2d 1380 (3rd Cir. 1991), cert denied 504 U.S. 956 (one-hour bi-weekly visitation policy was constitutional where parent could seek increased visitation, and agency lacked funds and staff); Young v. County of Fulton, 160 F.3d 899 (2d Cir. 1998) (due process satisfied by hearing after suspension of visitation); Fitzgerald v. Williamson, 787 F.2d 403 (8th Cir. 1986) (state provided adequate protection for parents in court).

When denied visitation, the respondent may apply for a court order requiring the local social services official who has temporary custody to permit visitation at stated periods. The application must be made upon notice to the official and the child's attorney, who must be given an opportunity to be heard. FCA §1030(b). See Matter of Attallah N., 65 A.D.3d 1047, 884 N.Y.S.2d 870 (2d Dept. 2009), lv denied 13 N.Y.3d 714 (no error where family court denied visitation to father without a hearing; court was fully familiar with facts from several prior proceedings); Peter R. v. Denise R., 163 A.D.2d 558, 559 N.Y.S.2d 28 (2d Dept. 1990) (visitation improperly denied without hearing); see also Matter of Green v. Bontzolakes, 111 A.D.3d 1282 (4th Dept. 2013) (by ordering that visitation "shall take place through the Catholic Charities Therapeutic Supervised Visitation program," court improperly delegated authority, and also erred in indicating that "access should include the child's siblings, if that can be accommodated by the program"); Matter of Nicolette I., 110 A.D.3d 1250 (3d Dept. 2013) (court improperly delegated discretion to custodial aunt); Matter of Juliane M., 23 A.D.3d 473, 803 N.Y.S.2d 915 (2d Dept. 2005) (court improperly delegated to child's lawyer and agency the authority to determine visitation schedule).

Although legislative history suggests that visitation should be ordered only in favor of biological or adjudicated parents and grandparents, and unrelated individuals usually have no standing to seek visitation [see, e.g., Bank v. White, 40 A.D.3d 790,

837 N.Y.S.2d 181 (2d Dept. 2007) (plaintiff lacked standing to seek visitation with his wife's children), lv denied 9 N.Y.3d 1002], it has been held that visitation under FCA §1030 may be ordered in favor of a respondent step-parent. See Matter of Commissioner of Social Services o/b/o R./S. Children, 168 Misc.2d 11, 637 N.Y.S.2d 607 (Fam. Ct., Kings Co., 1995) (step-father, who would be denied standing in other contexts, was respondent and thus had standing under §1030; court notes that "visiting between the child and those from whom s/he was removed serves the purpose of maintaining continuity of the family unit, preserves the familial relationship between the child and those who cared for him/her prior to the removal, and facilitates the child's psychological and emotional adjustment to foster care," and thus an alternative interpretation of §1030 would produce an unjust result).

Reasonable and regularly scheduled visitation must be ordered unless the court finds that it would endanger the child's life or health. FCA §1030(a). See Matter of Granger v. Misercola, 21 N.Y.3d 86 (2013) (rebuttable presumption that, absent exceptional circumstances, there will be appropriate provision for visitation or other access by non-custodial parent applies when parent is incarcerated; visitation should be denied where it is demonstrated by a preponderance of the evidence, via sworn testimony or documents, that visitation would be harmful to child's welfare or that right to visitation has been forfeited); Matter of Brianna B., 138 A.D.3d 832 (2d Dept. 2016) (visitation properly suspended where, post-neglect finding, mother had completed parenting training and domestic violence counseling but had stopped participating in mental health treatment, persisted in making disparaging comments to one of the children, and engaged in hostile behavior during family therapy session that adversely affected children); Matter of Alisia M., 110 A.D.3d 1186 (3d Dept. 2013) (court improperly delegated authority to make best interests determinations by making recommendation of therapist prerequisite for visitation); Matter of Janae H., 105 A.D.3d 959 (2d Dept. 2013) (court had adequate information for determination, without evidentiary hearing, that it was in best interests of child to continue unsupervised visitation with father on alternate weekends); Matter of Nyla W., 105 A.D.3d 861 (2d Dept. 2013) (after partial FCA §1028 hearing, court did not err in awarding mother

unsupervised visits with child three times per week for up to four hours each visit); Matter of Chavah T. v. Moishe T., 99 A.D.3d 915 (2d Dept. 2012) (father, charged with sexually abusing unrelated teenage boy, denied visitation; record raised concern that mother would not provide proper supervision because she did not believe allegations); Matter of Telsa Z., 84 A.D.3d 1599 (3d Dept. 2011), lv denied 17 N.Y.3d 708 (under the "extreme circumstances," denial of all visitation for mother was proper where father had sexually abused older child repeatedly, mother witnessed it and instructed child not to tell anyone, mother failed to gain insight into abuse and her role in it and still doubted whether child had been sexually abused and had not severed contacts with and dependence on father, there was danger to still-precarious but improving sibling relationship, and child remained in crisis and mother had no real understanding of child's emotional trauma and needs); Matter of Leah S., 61 A.D.3d 1402, 877 N.Y.S.2d 711 (4th Dept. 2009) (family court erred in ordering that visitation "shall occur only if [petitioner] deems it appropriate and as outlined in the companion Article 6 Custody Order," since court improperly delegated to petitioner its authority to determine whether visitation was appropriate); In re Cheyenne S., 11 A.D.3d 362, 782 N.Y.S.2d 746 (1st Dept. 2004) (visits suspended where it was causing children emotional distress); Matter of Samia Z., 297 A.D.2d 385, 746 N.Y.S.2d 598 (2d Dept. 2002) (supervised visits suspended where respondent used visits to denigrate children and father of one of the children, and caused children emotional distress); Matter of Kathleen OO., 232 A.D.2d 784, 649 N.Y.S.2d 193 (3rd Dept. 1996) (no visits where sex abuse victim exhibited symptoms of post-traumatic stress disorder and expressed fear of mother); Matter of Child Protective Services o/b/o Shavon G., 185 A.D.2d 339, 586 N.Y.S.2d 308 (2d Dept. 1992), appeal dism'd 80 N.Y.2d 972, 591 N.Y.S.2d 140 (no jailhouse visits for sex abuse respondent); Matter of Loretta Ann M., 65 A.D.2d 585, 409 N.Y.S.2d 248 (2d Dept. 1978) (no visits where psychiatrist testified that it was in children's best interest not to have any visitation and respondent had not seen children for approximately fifteen months); Matter of Nevaeh N., 56 Misc.3d 1212(A) (Fam. Ct., Kings Co., 2017) (court recognizes no categorical rule denying unsupervised contact in res ipsa abuse case pre-fact-finding); Matter of Jaime S., 9 Misc.3d 1118(A), 808 N.Y.S.2d 918 (Fam.

Ct., Monroe Co., 2005) (visits suspended, but not terminated, where visits supervised by caseworker at agency's office were stressful and harmful to child); see also Matter of Steven M., 88 A.D.3d 1099 (3d Dept. 2011) (court erred at disposition in conditioning right to future visitation upon showing that respondent had made reasonable attempt to engage in various programs and services, and in directing that visitation would be afforded only if child's counselor concluded that it would be in child's best interest; court cannot delegate best interest determination to third party, and, although court may direct party to seek counseling as component of custody or visitation order, it cannot order party to undergo counseling or therapy before visitation will be allowed); Matter of Nicholas J.R., 83 A.D.3d 1490 (4th Dept. 2011) (court improperly delegated to psychologist authority to determine whether contact between mother and child should occur during therapy sessions).

Visitation supervised by a local social services department employee may be ordered if it is in the best interest of the child. FCA §1030(c). Because supervised visitation is not a deprivation of meaningful access, such orders are essentially left to the family court's sound discretion, although it appears that there must be a risk of some type of harm. See Matter of Aaliyah J., 157 A.D.3d 955 (2d Dept. 2018) (family court properly awarded mother supervised overnight visitation with infant to allow mother to breast feed child at night and bond with her, under maternal aunt's supervision, where abuse petition involving older child alleged that then three-month-old child suffered arm and skull fractures; mother undergone mental health evaluation, signed HIPAA release, begun parenting classes, and had appropriate interactions with older child who was residing with another maternal aunt); Matter of Jeanette V., 152 A.D.3d 706 (2d Dept. 2017) (hearing required regarding visitation; court notes that before making children available for unsupervised visits, family court must find that person with history of abuse or neglect has successfully overcome prior inclinations and behavior patterns); In re Daniel O., 141 A.D.3d 434 (1st Dept. 2016) (court improperly awarded unsupervised visits before fact-finding hearing where petitions alleged that child sustained life-threatening head injuries and rib fractures when he was three months old); Matter of Matthew W., 125 A.D.3d 677 (2d Dept. 2015) (in case in which

parents allegedly abused ten-month-old child, who suffered subdural hematoma, court allows overnight visitation, and thereafter, except for good cause, temporarily release of children to parents, where parents had addressed need for greater vigilance in monitoring children's activities and were otherwise compliant with service plan); Matter of Bree W., 98 A.D.3d 522, 949 N.Y.S.2d 185 (2d Dept. 2012) (only supervised visitation for mother permitted where child, less than three months old, sustained multiple rib fractures and left wrist fracture, sustained punctured lung and had fluid in lungs, and contracted pneumonia while mother and father were sole caretakers); Matter of Kobe D., 97 A.D.3d 947 (3d Dept. 2012) (court erred in refusing to grant unsupervised visitation where respondent had planned appropriate activities and provided adequate supervision during supervised visits, had attended children's activities, and had participated in family therapy sessions and worked on rebuilding relationship with children); Matter of Kaleb U., 77 A.D.3d 1097, 908 N.Y.S.2d 773 (3rd Dept. 2010) (no unsupervised visits where mother engaged in violent arguments with fiance in front of children, used marihuana while caring for child and submitted diluted urine sample for drug test); Matter of Mitchell WW., 74 A.D.3d 1409, 903 N.Y.S.2d 553 (3rd Dept. 2010) (father's visitation supervised by petitioner, or agency approved by petitioner, rather than grandparents, to ensure supervisor's ability to deal with someone under influence of medications); Matter of Nyasia J., 41 A.D.3d 478, 838 N.Y.S.2d 138 (2d Dept. 2007) (order granting mother two weekly unsupervised visits of two to three hours each reversed; court notes that before making children available for unsupervised visits, family court must find that person with history of abuse or neglect of children has successfully overcome prior inclinations and behavior patterns, and that "safer course" is to allow only supervised visitation prior to consideration of petition on the merits); Matter of Ramazan U., 303 A.D.2d 516, 756 N.Y.S.2d 442 (2d Dept. 2003); Matter of Simpson v. Simrell, 296 A.D.2d 621, 745 N.Y.S.2d 123 (3rd Dept. 2002) (supervised visits appropriate where respondent was unable to control his anger, and, although there was no direct evidence that respondent had directed his anger at his daughter or had harmed her in any way, she was present during one incident and was frightened); Matter of Ksama G., 289 A.D.2d 491, 734 N.Y.S.2d 644 (2d Dept. 2001) (supervised

visits ordered where therapy with psychiatrist was not acceptable alternative to completion of sex offender program); Matter of Kryvanis v. Kruty, 288 A.D.2d 771, 733 N.Y.S.2d 297 (3rd Dept. 2001) (supervised visits properly ordered where respondent had previously disregarded court visitation orders and disrupted supervised visitation on more than one occasion); In re Yesenia M., 239 A.D.2d 245, 657 N.Y.S.2d 411 (1st Dept. 1997) (no unsupervised visits until respondent completed sex offender treatment); Matter of Licitra v. Licitra, 232 A.D.2d 417, 648 N.Y.S.2d 448 (2d Dept. 1996) (supervised visits appropriate where mother's inappropriate use of visitation time was likely to result in emotional harm to children); Matter of Carl J.B. v. Dorothy T., 186 A.D.2d 736, 589 N.Y.S.2d 53 (2d Dept. 1992); Lightbourne v. Lightbourne, 179 A.D.2d 562, 578 N.Y.S.2d 578 (1st Dept. 1992); Matter of I.R., 47 Misc.3d 1018 (Fam. Ct., Kings Co., 2015) (where infant had sustained four unexplained leg fractures, and ACS argued that unsupervised visits should not be permitted prior to fact-finding hearing, court ordered unsupervised visits for mother, noting that she had completed service plan, visited child consistently, profited from services, and was appropriate with child; parenting skills/individual counseling provider recommended unsupervised visits, even overnight visits; and fact-finding hearing had to be adjourned because ACS had not provided discovery); Matter of M.N., 14 Misc.3d 1238(A), 836 N.Y.S.2d 500 (Fam. Ct., Monroe Co., 2006) (court orders supervised visits with incarcerated mother, noting, inter alia, that while two of the children were initially timid toward mother during visits and pulled her hair and hit her, there was no evidence that this was unusual behavior for infant and toddler in setting in which they were separated from mother by glass partition, and that contact would afford family a relationship, albeit not a traditional relationship).

Children eighteen and older cannot be the subject of a custody or visitation proceeding [Simpson v. Finnegan, 202 A.D.2d 592 (2d Dept. 1994)], and thus the court generally should not issue visitation orders regarding such children. See Matter of Dashawn N., 127 A.D.3d 976 (2d Dept. 2015) (no orders issued where, at time of permanency hearing, one child was over age of eighteen and other child was near eighteenth birthday; children were capable of contacting caseworker or mother to

arrange visits and mother had means to contact children).

The visitation order may be modified for good cause upon application by a party or the child's lawyer with notice to the others, who must have an opportunity to be heard. FCA §1030(d). The order terminates upon entry of an order of disposition. FCA §1030(e).

When a child has been remanded or placed in the custody of a social services official, a non-custodial parent or grandparent with pre-existing visitation rights under a court order or the parents' written agreement has a right to visitation. FCA §1081(1); but see Matter of Jessica F., supra, 7 A.D.3d 708 (great-grandparents not included). If denied visitation, the person may petition for enforcement of the pre-existing rights. FCA §1081(2). The petition must allege, inter alia, that visitation rights exist, and a copy of the order, judgment or agreement must be attached. FCA §1081(3). The petition must be served upon the Article Ten respondent, the social services official who has custody of the child, the child's lawyer, and any grandparent named in the petition as having court-ordered visitation rights. FCA §1081(4). Upon receipt of the petition, the department of social services must determine whether the petitioner is the subject of any indicated central register reports or the respondent in an Article Ten proceeding involving the child with whom visitation is sought. FCA §1082(1)(a). If there is no opposition, the court shall direct that the prior order, judgment or agreement be incorporated into any preliminary visitation order. FCA §1081(5).

The department of social services, the child's lawyer, and the Article Ten respondent have a right to be heard with respect to the petition, and, if the child's lawyer or the department of social services opposes the petition and serves and files an answer, the court must schedule a hearing, and notify the parents, the grandparents, the department of social services and the child's lawyer of the hearing date. FCA §1082(1)(b), (2). Upon such hearing, the court must approve the petition unless it finds upon competent, relevant and material evidence that the enforcement of visitation rights would endanger the child's life or health. FCA §1082(4); cf. Matter of Damian D., 126 A.D.3d 12 (3d Dept. 2015) (where three prior neglect proceedings brought against mother involved other children, and allegations regarding mother's unaddressed mental

health and anger management issues and lack of stable housing were conclusory and unsubstantiated hearsay, evidence did not justify significant curtailment of mother's pre-existing visitation rights). If the petition is approved, the parties may agree in writing to an alternative visitation schedule equivalent to and consistent with the prior order or agreement, if such schedule reflects the parties' changed circumstances and is consistent with the child's best interest. FCA §1082(5)(a). In addition, the court may order an alternative schedule if the court determines that such schedule is necessary to facilitate visitation and to protect the child's best interests. FCA §1082(5)(b). Any order issued by the court upon an application made pursuant to FCA §1081 remains in effect as long as the child is in care pursuant to Article Ten, unless such order is modified for good cause shown. FCA §1083.

No visitation or custody order shall be enforceable in favor of a person who has been convicted of murdering a parent or a legal custodian or guardian of the child, unless: 1) the child is of suitable age to signify assent and assents to visitation, the custodian or guardian of a child who is not of suitable age assents, or the convicted person proves by a preponderance of the evidence that he or she or a household member of either party was a victim of domestic violence committed by the murder victim and the domestic violence was causally related to the murder; and 2) visitation is in the best interests of the child. FCA §1085(1). Pending determination of a petition for visitation or custody, the convicted person shall not visit with the child, or with another person in the child's presence, without the consent of the child's custodian or guardian. FCA §1085(2). The court is not required to review a previous order unless an interested party petitions for relief. FCA §1085(3).

Article Ten also provides for contacts between siblings who are in foster care but are not placed together as per FCA §1027-a(a). In such cases, the social services official shall arrange appropriate and regular contact unless such contact would not be in the child's and the siblings' best interests. FCA §1027-a(b).

If a child is not afforded regular contact with his or her siblings, the child, through his or her attorney or through a parent on his or her behalf, may move for an order regarding placement or contact. The motion shall be served upon: (i) the respondent;

(ii) the local social services official having the care of the child; (iii) other persons having care, custody and control of the child, if any; (iv) the parents or other persons having care, custody and control of the siblings to be visited or with whom contact is sought; (v) any non-respondent parent; (vi) the sibling himself or herself if ten years of age or older; and (vii) the sibling's attorney, if any. For purposes of the statute, “siblings" shall include half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent. The court may order that the child be placed together with or have regular contact with his or her siblings if the court determines it to be in the best interests of the child and his or her siblings. FCA §1027-a(c).

A child remanded or placed in the care of a social services official pursuant to Article Ten, Ten-A or Ten-C has a right to move for visitation and contact with siblings who are not in foster care, and the siblings of that child have the same right to petition the court for visitation and contact. For purposes of this section, "siblings" shall include half-siblings and those who would be deemed siblings or half-siblings but for the termination of parental rights or death of a parent. FCA §1081(2)(b).

A motion by a child remanded or placed in the care of a social services official pursuant to Article Ten, Ten-A or Ten-C, or a petition by a sibling of such child shall allege that visitation and contact would be in the best interests of both the child who has been remanded or placed and the child's sibling. FCA §1081(3)(c).

The petition or motion shall be served upon: (i) the respondent in the Article Ten, Ten-A or Ten-C proceeding; (ii) the local social services official having the care of the child; (iii) other persons having care, custody and control of the child, if any; (iv) the parents or other persons having care, custody and control of the sibling to be visited or with whom contact is sought; (v) any non-respondent parent in the Article Ten, Ten-A or Ten-C proceeding; (vi) such sibling himself or herself if ten years of age or older; and (vii) such sibling's attorney, if any. The petition or motion shall be served in such manner as the court may direct. FCA §1081(4)(b).

Upon receipt of a petition or motion, the court shall determine, after giving notice and an opportunity to be heard to persons served under § 1081(4), whether visitation

and contact would be in the best interests of the child and his or her sibling. The court's determination may be included in the dispositional order issued pursuant to FCA § 1052, §1089, or §1095. FCA §1081(5)(b).

The child's lawyer should actively seek to insure that adequate and appropriate visitation is provided as soon as a child enters foster care. Obviously, visitation must be discussed with the child whenever he or she is able to provide useful information and guidance. Ordinarily, the refusal of an older child to visit should be respected by the child's lawyer. However, unless visitation would, in fact, pose risks to the child's life or health, the lawyer should consider encouraging the child to agree to visitation, especially when family reunification is a viable goal.

When there appears to be a substantial risk that a respondent will attempt to intimidate the child, instill guilt or otherwise cause the child to falsely recant or modify the allegations, or abscond with the child, the child's lawyer should consider requesting that visitation be supervised or denied altogether. Obviously, the greater the potential harm, the more appropriate it is to deny visitation entirely. Contempt sanctions are available if the respondent violates the order. Matter of Justin J., 13 A.D.3d 933, 788 N.Y.S.2d 193 (3rd Dept. 2004).

### 2. Court-Ordered Services

#### a. Statutory Authority

The court "may order a social services official to provide or arrange for the provision of services or assistance to the child and his or her family to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care." FCA §1015-a; see also SSL §2(14). The order may not include services or assistance not found in the agency's comprehensive annual services program plan. See Matter of Angel P., 39 Misc.3d 264 (Fam. Ct., Clinton Co., 2013) (court could order agency to install "SCRAM" device on person of father to monitor alcohol use where plan referred to maintaining "up to 20 SCRAM bracelets" and agency asserted that all twenty were in use; agency cannot avoid obligations by placing arbitrary numerical limitations in comprehensive annual service plan). The plan must provide information on services provided directly or purchased by the social services

district which include, inter alia, preventive services for children; preventive services for adults; child protective services; protective services for adults; adoption services; employment services; housing improvement services; day care; domestic violence services; unmarried parent services; family planning services; health-related services; home management services; homemaker services; housekeeper/chore services; educational services; transportation; and information and referral. 18 NYCRR §407.4. See also In re Brian L., 51 A.D.3d 488, 859 N.Y.S.2d 8 (1st Dept. 2008), lv denied, 11 N.Y.3d 703 (family court had no authority to order Administration for Children's Services to arrange for child to have sex reassignment surgery; §1015-a does not apply because medical services are not part of the effective comprehensive annual services program plan); Matter of Charles M., 278 A.D.2d 877, 717 N.Y.S.2d 814 (4th Dept. 2000) (where family court directed petitioner to transfer child to new placement, case remitted for determination as to whether such services or assistance is authorized or required to be made available); Matter of Wayne M. v. Francis N., 154 A.D.2d 837, 546 N.Y.S.2d 494 (3rd Dept. 1989) (family court had power to order petitioner to request services from another agency); Matter of Andrea D., 25 Misc.3d 503, 883 N.Y.S.2d 696 (Fam. Ct., Monroe Co., 2009) (court orders DSS to provide child with a certified copy of birth certificate, and register her for driver's education class and pay for class, while citing FCA §§ 255 and 1015-a, and 18 NYCRR § 427.3(a), which details allowable expenditures for children in foster care; while DSS's Comprehensive Annual Services Program Plan does not specifically require driver's education for youth, it emphasizes self-sufficiency as one of four major goals); Matter of Lyle A., 14 Misc.3d 842, 830 N.Y.S.2d 486 (Fam. Ct., Monroe Co., 2006) (court establishes guidelines for agency's administration of psychotropic medication without parental consent); Matter of Damien A., 195 Misc.2d 661, 760 N.Y.S.2d 825 (Fam. Ct., Suffolk Co., 2003) (court directs that mother and child who are both in foster care reside together); Matter of Arlene L., 187 Misc.2d 356, 722 N.Y.S.2d 712 (Fam. Ct., Queens Co., 2001) (Commissioner ordered to provide necessary medical treatment, including glass eye, and reimburse foster parents for costs); Matter of Kittridge, 185 Misc.2d 876, 714 N.Y.S.2d 653 (Fam. Ct., Kings Co., 2000) (agency ordered to make efforts to reunite family where parent was

undocumented alien); Matter of Daniel M., 166 Misc.2d 135, 631 N.Y.S.2d 470 (Fam. Ct., N.Y. Co., 1995) (court orders payment for nursing care); see also Matter of D. F. v. Carrion, 43 Misc.3d 746 (Sup. Ct., N.Y. Co., 2014) (in Article 78 proceeding, court annuls as arbitrary and capricious ACS's determination that transgender foster child was not eligible for payment for medical procedures that would address diagnosis of gender dysphoria and allow her to conform her appearance to her female gender identity).

The court may require a social services official to make periodic progress reports to the court concerning implementation of the order, and may punish violations pursuant to §753 of the Judiciary Law. See also FCA §156 (Judiciary Law contempt provisions apply, and a violation of an order is punishable, "unless a specific punishment or other remedy for such violation is provided in this act or any other law").

In addition, FCA §255 permits the court to order any state, county, municipal or school district officer or employee "to render such assistance and cooperation as shall be within his legal authority, as may be required, to further the objects of this act." Although an order may direct that a school district or board of education perform its duties toward a handicapped child, the court may issue such an order only when an adequate administrative remedy is not available, and may not require the provision of a specific special service or program. The court may also order any agency or other institution "to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act," and may seek the cooperation of and use, within the court's authorized appropriation, the services of public and private societies and organizations "which have for their object the protection or aid of children or families, including family counseling services, to the end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare." Being more broadly worded than §1015-a, §255 has frequently required judicial interpretation, See, e.g., Matter of Lorie C., 49 N.Y.2d 161, 424 N.Y.S.2d 395 (1980) (order improperly usurped discretionary authority of department of social

services); Matter of Sing W.C., 83 A.D.3d 84 (2d Dept. 2011) (in guardianship proceeding commenced for purpose of facilitating application for special immigrant juvenile status by person over age of eighteen, court had authority to direct child protective agency to conduct investigation or home study with respect to prospective guardian); In re Brian L., supra, 51 A.D.3d 488 (family court had no authority to order Administration for Children's Services to arrange for child to have sex reassignment surgery; under SSL §398(6)(c), ACS has duty to provide necessary medical and surgical care to children in its care and must, if necessary, pay for care, and children who are eligible for Medicaid are not limited to medical and surgical care covered by that program, but because authority to provide necessary medical and surgical care is conferred in clear and unambiguous language, FCA § 255 “cannot be read as permitting the family court to order ACS to arrange for a child in its care to receive specific medical or surgical care, since such an order would denigrate from ACS' statutory authority); Matter of James A., 50 A.D.3d 787, 856 N.Y.S.2d 192 (2d Dept. 2008) (order directing New York City Department of Education "to provide an Individualized Education Plan for [respondent],” and naming Judge Rotenberg Center as placement and directing DOE to complete forms or paperwork required, reversed because it exceeded court’s authority under FCA §255 and encroached upon powers granted to DOE by Education Law §§ 4402 and 4404); In re Ronald W., 25 A.D.3d 4, 801 N.Y.S.2d 312 (1st Dept. 2005) (family court had no authority to order re-evaluation of child by, and placement of child with, State OMRDD); Matter of Nicole “JJ”, 265 A.D.2d 29, 706 N.Y.S.2d 202 (3rd Dept. 2000), lv denied 95 N.Y.2d 757, 713 N.Y.S.2d 1 (court orders agency to reimburse aunt for children’s day care expenses and pay for future expenses); Matter of Hasani B., 195 A.D.2d 404, 600 N.Y.S.2d 694 (1st Dept., 1993) (court had no authority to order Department of Social Services to certify relative as foster parent); Matter of Andrea D., 25 Misc.3d 503 (court orders DSS to provide child with a certified copy of birth certificate, and register her for driver’s education class and pay for class, while citing FCA §§ 255 and 1015-a, and 18 NYCRR § 427.3(a), which details allowable expenditures for children in foster care; while DSS’s Comprehensive Annual Services Program Plan does not specifically require driver’s

education for youth, it emphasizes self-sufficiency as one of four major goals); Matter of Kevin M., 187 Misc.2d 820, 724 N.Y.S.2d 816 (Fam. Ct., Erie Co., 2001) (court orders school district in which foster child resides to perform duties required by Education Law); cf. In re Samuel G., 174 Cal.App.4th 502 (Cal. Ct. App., 4th Dist., Div. 1, 2009) (court properly ordered agency to pay for travel of dependent child's educational representative to visit him at out-of-county placement; if appropriated funds are reasonably available, separation of powers doctrine poses no barrier to order directing payment of funds, and court is charged with responsibility to provide oversight of agencies and ensure that child's educational needs are met).

Before being ordered pursuant to §255 to take certain action, the person or entity involved must be given notice and an opportunity to be heard on the application for an order. See Matter of James E., 2 A.D.3d 1181, 770 N.Y.S.2d 196 (3rd Dept. 2003); Matter of Jillana C., 309 A.D.2d 1170, 765 N.Y.S.2d 290 (4th Dept. 2003).

**b. State Regulations**

Finally, State regulations provide support for an application by the child's lawyer for a court order directing the agency to make special payments on behalf of a foster child for items, costs, or services that are approved as being necessary for the child but that are not included in establishing rates for board, care and clothing. 18 NYCRR §427.3(c)(1).

Such payments include (i) special attire for proms, religious observances and graduation, and for circumstances or occasions, such as school attendance or scouting activities, in which uniforms are necessary items of clothing; (ii) school expenses such as books, activity fees, costs of field trips, club dues, school jewelry, school pictures, art supplies, and yearbooks; (iii) music, art, and dancing lessons, and the purchase or rental of items needed to take part in such activities; (iv) gifts for birthdays, holidays and other special occasions; (v) extraordinary transportation and communication expenses, including certain expenses necessary for family visits, the costs of public transportation when necessary for school attendance, and extraordinary telephone costs for communication with birth parents and siblings; (vi) day care and baby-sitting services; (vii) special furniture/equipment such as cribs, high chairs, and car seats; (viii) window

guards; (ix) special recreational/hobby expenditures, including travel expenses such as lodging, tools and the costs of transportation, entry or use fees, uniforms and materials, of up to $400 per calendar year per foster child; (x) compensation to a foster parent for the damage to and/or loss of personal property owned by the foster parent that is caused by the foster child in his or her care to the extent not covered by insurance; (xi) day camp or residential summer camp costs, including registration and transportation expenses, for a maximum of two weeks of camp; (xii) nonmedical needs of a handicapped child, including special equipment or clothing that is not covered by medical assistance, which arise from the child's handicap; and (xiii) costs of diapers for a child from birth to the date of the child's fourth birthday. 18 NYCRR §427.3(c)(2); see also 18 NYCRR §427.16 (social services district shall, inter alia, determine clothing needs upon admission to care; authorize allowances to buy necessary clothing; authorize special allowances to cover the costs of additional clothing for religious ceremonies, educational or summer camp activities, special physical conditions and replacement of clothing that is stolen or destroyed; and review and evaluate child's clothing needs with child, when appropriate, and foster parent to ensure that additional clothing is provided for the child as needed, clothing is clean, attractive, and well fitting, child's participation in planning and selection of clothes is consistent with age and maturity, and advance notice is given for special clothing requests).

**3. Orders Of Protection**

For good cause shown, the court may issue a temporary order of protection upon the application of any person who may originate an Article Ten proceeding, or the child's lawyer. FCA §1029(a); see FCA §169 (requires that order of protection or temporary order of protection be translated in writing into appropriate language for party where court has appointed interpreter, and that OCA forms be translated as required by Judiciary Law § 212[2][t] in languages most frequently used in courts of each judicial department; that, upon issuance of order, court shall inquire as to whether translation services are needed and advise party or parties of availability of translation services; that copy of written translation be given to each party, along with original order issued in English, and that copy of written translation be included as part of record of proceeding;

and that court shall read essential terms and conditions of order aloud on record and direct interpreter to interpret the same terms and conditions).

The order may be issued against any person who is before the court and is a parent or other person legally responsible for the child's care, or that person's spouse. See Matter of Maryann NN., 244 A.D.2d 785, 665 N.Y.S.2d 710 (3rd Dept. 1997) (order could be issued against non-respondent mother who appeared was before the court); Matter of Christina I., 226 A.D.2d 789, 640 N.Y.S.2d 310 (3rd Dept. 1996) (court retained jurisdiction over mother, and properly issued order of protection against her, after dismissing neglect charges made against her); Matter of William GG., 222 A.D.2d 752, 635 N.Y.S.2d 711 (3rd Dept. 1995) (court properly issued order of protection against mother after supervision order issued against her had expired but while supervision order was still in effect as to her husband). A hearing on the application should be held on the day the application is made. See FCA §153-c.

The temporary order of protection may include any of the provisions found in FCA §1056. FCA §1029(a). Thus, the order may direct the individual to "stay away from the home, school, business or place of employment of the other spouse, parent or person legally responsible for the child's care or the child, and to stay away from any other specific location designated by the court." FCA §1056(1)(a). Indeed, as already noted, the possibility of an order of protection excluding a respondent from the home must be considered by the court whenever such an order might obviate the need for removal of the children. See FCA §§ 1022(a), 1027(b), 1028(b). See also Matter of Elizabeth C., 156 A.D.3d 193 (2d Dept. 2017) (order excluding parent from children's household requires showing of imminent risk and parent is entitled to expedited hearing upon request within three court days pursuant to FCA §1028).

The order may also require the respondent to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods; refrain from committing a family offense, as defined in FCA §812(1) or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded, or from harassing, intimidating or threatening such persons; permit a designated party to enter the residence during a specified

period of time in order to remove personal belongings not in issue in the proceeding or in any other proceeding or action under Article Ten or the Domestic Relations Law; refrain from acts of commission or omission that create an unreasonable risk to the health, safety and welfare of a child; provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order; and/or refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household. FCA §1056(1)(a). The order may be issued or extended simultaneously with the issuance pursuant to FCA §1037 of a warrant for the respondent's arrest. FCA §1029(c).

In connection with either an application for an order of protection or a violation proceeding, the court may send process without the state pursuant to FCA §154(c). Service of the order is governed by FCA §153-b. See also FCA §168 (copy of order must be issued to petitioner and respondent, and be filed with appropriate police authorities).

Upon the issuance of a temporary order of protection, or a violation of the order, the court shall make an order in accordance with FCA §842-a (suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms). FCA §1056-a.

#### 4. Conferencing and Mediation

The court may, at its discretion, authorize the use of conferencing or mediation at any point in the proceedings to further a plan for the child that fosters the child's health, safety, and wellbeing. Such conferencing or mediation may involve interested relatives or other adults who are significant in the life of the child. FCA §1018.

### N. Motion For Order Terminating Reasonable Efforts Requirement

In conjunction with, or at any time after, the filing of the Article Ten petition, “the social services official” may file a motion, upon notice, requesting a finding that reasonable efforts to return the child home are no longer required. FCA §1039-b(a); Uniform Rules For The Family Court, 22 NYCRR §205.16 (motion shall be filed in

writing on notice to parties, including child's attorney, on form officially promulgated by the Chief Administrator of the Courts and shall contain all information required therein); Matter of Jayden QQ., 105 A.D.3d 1274 (3d Dept. 2013) (§1039-b application may be made against non-respondent parent); Matter of Peter B., 73 A.D.3d 764, 899 N.Y.S.2d 632 (2d Dept. 2010), appeal dism'd 15 N.Y.3d 847 (oral motion and lack of notice excusable where family court had already considered issue when it adjudicated child severely abused and terminated parental rights); Matter of Lindsey BB., 72 A.D.3d 1162, 898 N.Y.S.2d 308 (3rd Dept. 2010) (family court erred in granting application where request was not in writing and issue was not raised prior to permanency/violation hearing); Matter of Terrence C., 24 Misc.3d 1006, 884 N.Y.S.2d 615 (Fam. Ct., Monroe Co., 2009) (motion may be made only by "social services official," and Deputy County Attorney did not qualify); Matter of Jaime S., 9 Misc.3d 1118(A), 808 N.Y.S.2d 918 (Fam. Ct., Monroe Co., 2005) (court finds that Commissioner of Human Services delegated responsibility for filing to the Director of Child and Family Services Division); see also Matter of Cecilia "PP", 290 A.D.2d 836, 736 N.Y.S.2d 546 (3rd Dept. 2002) (order issued where mother found guilty of first degree sexual abuse); Matter of Keith M., 181 Misc.2d 1012, 697 N.Y.S.2d 823 (Fam. Ct., Erie Co., 1999) (motion could be made in proceeding filed before law took effect, and could be made and determined after fact-finding and before disposition). There are six grounds for such a motion.

### 1. Aggravated Circumstances

The court may find that reasonable efforts are not required when the parent has subjected the child to "aggravated circumstances" as defined in FCA §1012(j). FCA §1039-b(b)(1).

#### a. Severe Or Repeated Abuse

"Aggravated circumstances" include "where a child has been either severely or repeatedly abused as defined in [SSL §384-b(8)]."

Under SSL §384-b(8)(a), a finding that a child has been severely abused can be made where the parent: 1) has committed "reckless or intentional acts of the parent ... under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in [Penal Law §10.00(10)]; 2) has

committed or knowingly allowed the commission of a felony sex offense defined in PL §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, or 130.80; 3) has been convicted of committing, attempting to commit, conspiring to commit, or soliciting or facilitating the commission of murder or manslaughter (manslaughter only if the parent acted voluntarily in committing the crime), or committing or attempting to commit second or first degree assault or aggravated assault upon a person less than eleven years old, where the victim or intended victim of the crime was the subject child or another child of the parent for whose care the parent is or has been legally responsible as defined in FCA § 1012(g); or 4) has been convicted of one of the above-mentioned homicides or attempted homicides and the victim of the crime was another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide. See Matter of Terrence C., 24 Misc.3d 1006 (although respondent had been convicted of felony sex offense enumerated in SSL §§384-b(8)(a)(ii), agency did not establish that child had actually been found to be severely abused child); Matter of Meredith DD., 13 Misc.3d 894, 821 N.Y.S.2d 741 (Fam. Ct., Chemung Co., 2006) (non-parent cannot be charged with severe abuse). Convictions from jurisdictions other than New York qualify if the offense includes all the essential elements of the New York crime.

Under SSL §384-b(8)(a)(iv), the agency also has to prove that it has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child, and that such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future. While this element must be satisfied at the fact-finding stage when no §1039-b order has been issued [e.g., Matter of Candace S., 38 A.D.3d 786, 832 N.Y.S.2d 612 (2d Dept. 2007)], it is beside the point when the agency is in the process of seeking a §1039-b order.

In Matter of Marino S., 100 N.Y.2d 361, 763 N.Y.S.2d 796 (2003), cert denied 540 U.S. 1059, 124 S.Ct. 834, the court held that a derivative finding of severe abuse may be made as to siblings of the child who was actually abused, and include those

children in an order terminating the reasonable efforts requirement. The court noted that, without derivative findings, one child would be on a different permanency planning track from his or her sibling. See also In re Jayvon L., 18 A.D.3d 292, 795 N.Y.S.2d 31 (1st Dept. 2005) (findings of derivative severe and repeated abuse made where respondent inflicted fatal traumatic and burn injuries upon sister of subject child).

Under SSL §384-b(8)(b), a finding that a child has been repeatedly abused can be made when the court finds pursuant to FCA §1012(e)(i) that the parent inflicted or allowed the infliction of abuse, or finds pursuant to FCA §1012(e)(iii) that the parent committed or knowingly allowed the commission of a felony sex offense defined in PL §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, or 130.80, and the child, or another child for whose care the parent is or has been responsible has been previously found, within the five years immediately preceding the initiation of the proceeding in which the repeated abuse is alleged, to be an abused child based upon the parent's commission of the acts of abuse defined above.

Since the family court, when finding severe or repeated abuse, must do so by clear and convincing evidence [see FCA §1051(e)], it can be argued that aggravated circumstances which can support an order excusing reasonable efforts are present only when a clear and convincing evidence finding has been made. Some ambiguity is created by the definition of aggravated circumstances, in FCA §1012(j), which refers to severe or repeated abuse "as defined in [SSL §384-b(8)]," but does not refer to the clear and convincing evidence standard in SSL §384-b(3)(g). However, the most sensible interpretation of the statute suggests that reasonable efforts can be excused only after a clear and convincing evidence finding has been made.

Thus, if there is a prior clear and convincing evidence finding of severe or repeated abuse, the petitioner can move at the outset of the proceeding for an order excusing reasonable efforts. However, when there is no prior finding and the petitioner wishes to make a motion based upon the abuse allegations before the court, the motion cannot be made until after the court has made a finding by clear and convincing evidence. Of course, when criminal charges have resulted from the same incident charged in family court, a criminal conviction would have collateral estoppel effect in

family court with respect to an application to terminate reasonable efforts. Matter of Suffolk County Department of Social Services v. James M., 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994) (summary judgment was properly granted where acts of sodomy for which respondent was convicted came within the broad allegations of the abuse petition). But see In re Kody D.V., 548 N.W.2d 837 (Wis. Ct. App. 1996) (conviction may be used only after appeals process has been completed).

**b. Post-Placement Abuse Finding**

"Aggravated circumstances" also include "where a child has subsequently been found to be an abused child, as defined in [FCA §1012(e)(I) or (iii)], within five years after return home following placement in foster care as a result of being found to be a neglected child, as defined in [FCA §1012(f)], provided that the respondent or respondents in each of the foregoing proceedings was the same."

**c. Six-Month Post-Removal Failure To Plan And Refusal To Cooperate**

"Aggravated circumstances" also include "where the court finds by clear and convincing evidence that the parent of a child in foster care has refused and has failed completely, over a period of at least six months from the date of removal, to engage in services necessary to eliminate the risk of abuse or neglect if returned to the parent, and has failed to secure services on his or her own or otherwise adequately prepare for the return home and, after being informed by the court that such an admission could eliminate the requirement that the local department of social services provide reunification services to the parent, the parent has stated in court under oath that he or she intends to continue to refuse such necessary services and is unwilling to secure such services independently or otherwise prepare for the child's return home; provided, however, that if the court finds that adequate justification exists for the failure to engage in or secure such services, including but not limited to a lack of child care, a lack of transportation, and an inability to attend services that conflict with the parent's work schedule, such failure shall not constitute an aggravated circumstance."

**d. Abandonment Of Newborn**

"Aggravated circumstances" also include "where a court has determined a child

five days old or younger was abandoned by a parent with an intent to wholly abandon such child and with the intent that the child be safe from physical injury and cared for in an appropriate manner." See Matter of Doe, 25 Misc.3d 470, 883 N.Y.S.2d 430 (Fam. Ct., Rensselaer Co., 2009).

**2. Prior Convictions**

The court may excuse reasonable efforts when the parent has been convicted for committing, attempting to commit, conspiring to commit, or soliciting or facilitating the commission of murder or manslaughter (manslaughter only if the parent acted voluntarily in committing the crime), or committing or attempting to commit second or first degree assault or aggravated assault upon a person less than eleven years old, where the victim or intended victim of the crime was the subject child or another child of the parent for whose care the parent is or has been responsible. FCA §1039-b(b)(2), (3), (4); see Matter of Justice T., 305 A.D.2d 1076, 758 N.Y.S.2d 732 (4th Dept. 2003) (reasonable efforts no longer required where respondent had 1989 manslaughter conviction for twice slamming infant's head against wall). Convictions from jurisdictions other than New York qualify if the offense includes all the essential elements of the New York crime. FCA §1039-b(b)(5). The use of out-of-state convictions for crimes with elements consistent with New York crimes is similar to the use of such crimes as predicate felonies in criminal proceedings. See, e.g., People v. Gonzalez, 61 N.Y.2d 586, 475 N.Y.S.2d 358 (1984).

Obviously, the existence of one of the delineated convictions could lead to a motion by the petitioner at the outset of the Article Ten proceeding, and, upon submission of the necessary documentary proof of the conviction, the court would be justified in granting the motion on papers unless a request were made for a best interests hearing [see (4) below]. Presumably, past crimes will be brought to light only if the petitioner or the child's lawyer runs a name/date of birth check with the State Division of Criminal Justice Services, or the information is otherwise obtained during contacts with the parents, the children, other family members, or anyone else who happens to have knowledge. Given the legal significance of such information, it seems prudent for the child's lawyer to ask about prior convictions as a matter of course when

conducting interviews.

Needless to say, the potential impact on parental rights is a collateral consequence of a conviction of which criminal defense counsel would want to warn his/her client.

**3. Prior Involuntary Termination Of Parental Rights**

The court may excuse reasonable efforts when the parent's parental rights to a sibling of the subject child - including a half-sibling - have been involuntarily terminated. FCA §1039-b(b)(6), (e). See Matter of Alexandryia M.B., 130 A.D.3d 1022 (2d Dept. 2015) (order granted where mother's parental rights had been terminated with respect to subject child's half sibling); Matter of Jayden QQ., 105 A.D.3d 1274 (3d Dept. 2013) (statute does not unconstitutionally distinguish between individuals whose parental rights were involuntarily terminated and those who voluntarily surrendered rights); Matter of D'Anna KK., 299 A.D.2d 761, 751 N.Y.S.2d 326 (3rd Dept. 2002) (family court properly issued §1039-b order; prior to decision, court gave respondents opportunity to submit, and did consider, their affidavits); Matter of Carl D., 195 Misc.2d 741, 762 N.Y.S.2d 226 (Fam. Ct., Genesee Co., 2003) (respondent's admission that she violated suspended judgment order did not transform proceeding into "voluntary" termination); Matter of Sarah B., 2003 WL 1923540 (Fam. Ct., Kings Co.); Matter of Jasbin H., 184 Misc.2d 23, 705 N.Y.S.2d 886 (Fam. Ct., Oneida Co., 2000) (termination upon admission of abandonment was not "involuntary").

The existence of a prior order terminating parental rights could lead to a motion by the petitioner at the outset of the Article Ten proceeding, and, upon submission of the necessary documentary proof, the court would be justified in granting the motion on papers unless a request were made for a best interests hearing [see (4) below].

The potential for a future order excusing reasonable efforts could result in bargaining in termination proceedings between parents faced with a difficult-to-beat cause of action, and petitioners who might be willing to allow the parent to execute a surrender instead. On the other hand, an agency has a strong incentive to proceed in court, even when adoption is not likely, in order to get the predicate for a future order lifting the reasonable efforts requirement with respect to other children. Also, the

agency's bargaining position when it has a very weak case is improved, since the parent may want to surrender nevertheless in order to avoid the harsh consequences of an involuntary termination.

**4. Best Interests Exception**

When one of the above-described grounds for an order excusing reasonable efforts exists, the court may issue an order pursuant to FCA §1039-b "unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and child in the foreseeable future." FCA §1039-b(b). The burden is on the respondent to establish the applicability of this exception. Matter of Angela N.L., 153 A.D.3d 1408 (2d Dept. 2017); Matter of Keishaun P., 140 A.D.3d 1171 (2d Dept. 2016); see also Matter of Liliana G., 91 A.D.3d 1325 (4th Dept. 2012) (constitutional due process rights of respondent require hearing when genuine issues of fact are created by answering papers); Matter of Carlos R., 63 A.D.3d 1243, 879 N.Y.S.2d 829 (3rd Dept. 2009), lv denied 13 N.Y.3d 704 (evidentiary hearing on motion required only when genuine issues of fact are created by answering papers; in this case, mother was in long-term substance rehabilitation program, but past history of substance abuse and failed attempts at rehabilitation and other failings provided court with sound basis for decision); Matter of Damion D., 42 A.D.3d 715, 839 N.Y.S.2d 852 (3rd Dept. 2007) (order terminating reasonable efforts requirement reversed where petitioner made no written motion and petitioner's indication early in proceeding that it might seek ruling was not substitute for compliance with statute, and, although statute does not specifically require evidentiary hearing, due process requires such a hearing when genuine issues of fact are created by answering papers); Matter of William S., 15 Misc.3d 669, 832 N.Y.S.2d 783 (Fam. Ct., Kings Co., 2007) (petitioner's motion for order without hearing denied where mother had been making progress and raised material issues for hearing); Matter of Jaime S., supra, 9 Misc.3d 1118(A) (motion denied where petitioner had failed to help respondent and child, and there were no parental behaviors establishing that problems could not be ameliorated by appropriate services); Matter of AS, 9 Misc.3d 1036, 800 N.Y.S.2d 838 (Fam. Ct., West. Co.) (no

statutory exception where respondent's murder conviction was on appeal); Matter of Edwin L., 3 Misc.3d 1108(A), 787 N.Y.S.2d 676 (Fam. Ct., Kings Co., 2004) (motion granted where, despite having been engaged in services since 2001, mother intentionally caused serious physical injury to infant in 2003, and failed to follow through with services, make meaningful progress in psychiatric treatment, and take antidepressant and anticonvulsant medications regularly). The court shall state the necessary findings in its order. FCA §1039-b(b).

Obviously, this exception provides opportunities for aggressive advocacy in those cases in which the child's lawyer does not share the petitioner's desire to start down the road towards termination of parental rights. In such cases, the lawyer should file an answering affirmation setting forth the "best interests" grounds for opposition, and requesting a hearing. This exception also provides parents' counsel with the same opportunity for advocacy. Indeed, the prospect of a protracted hearing to determine whether the best interests exception should be applied - it is not hard to imagine a procession of witnesses prepared to testify as to why the agency should be required to work with the parent - is a potential bargaining chip for use in an attempt to discourage the agency from seeking an order in the first instance. While many judges like to save time by conducting perfunctory inquiries into best interests and permanency-related issues, the interest at stake here, even if not of constitutional magnitude, is sufficiently critical that a "real" hearing will have to be held before the agency can be excused from making reasonable efforts.

**5. Standing To Make Motion**

The law does not expressly provide the child's lawyer with standing to make the motion. Although it might seem awkward for the lawyer to attempt to force the agency to terminate reasonable efforts when the agency believes such efforts are likely to succeed, the agency could still choose to make efforts even if the child's lawyer succeeded, since the court is empowered only to excuse reasonable efforts, not forbid the agency from providing them. In any event, because a court determination that reasonable efforts are not required will have force and effect in a termination of parental rights proceeding case even if the agency continues to make reasonable efforts, the

child's lawyer should make a motion when appropriate and argue for standing, and, in the alternative, that the court has inherent authority to consider the issue. Such authority is consistent with and supportive of the court's express statutory authority to make reasonable efforts-related determinations when removal or placement is at issue, and to determine, in an Article Ten or Ten-A or a termination proceeding, that reasonable (or diligent) efforts would not have been appropriate. It is also consistent with the court's power to modify the agency's child services plan at a permanency hearing [see FCA §1089(d)(2)(i)] and the court's general power to issue orders affecting the agency's activities at any stage of an Article Ten or Ten-A proceeding, Notably, the §1039-b procedure actually protects the respondent from being surprised by an adverse ruling later on.

Of course, the lawyer always has the option of attempting to persuade the petitioner to make the motion.

**6. Filing Of And Effect Of Order In Termination Proceeding**

If the court determines that reasonable efforts are not required based on a finding of severe abuse, the agency may immediately file a termination of parental rights petition alleging severe abuse. FCA §1039-b(b); SSL §384-b(4)(e).

A court finding upon such a motion will have the effect of lifting, in a termination of parental rights proceeding brought pursuant to SSL §384-b, the requirement that the agency prove the exercise of diligent efforts. SSL §384-b(7)(a), (8)(a), (8)(b). A respondent's consent to the cessation of reasonable efforts has the same effect. Matter of Sarah "TT", 294 A.D.2d 627, 741 N.Y.S.2d 33 (3rd Dept. 2002), lv denied 98 N.Y.2d 611, 749 N.Y.S.2d 3.

In Matter of Marino S., supra, 100 N.Y.2d 361, the Court of Appeals held that a §1039-b order has retroactive effect and excuses the agency from proving that diligent efforts were made during the period prior to issuance of the order.

**7. Constitutional Issues**

In Matter of Sarah B., supra, 2003 WL 1923540, the court held that, given the clear and convincing evidence requirement in termination proceedings [see Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982)], the agency must meet that standard in

proving the basis for a §1039-b order. See also Matter of Sasha M., 43 A.D.3d 1401, 845 N.Y.S.2d 206 (4th Dept. 2007) (while upholding §1039-b order, court notes that agency established prior termination of parental rights by clear and convincing evidence); Matter of Jaime S., 9 Misc.3d 460, 798 N.Y.S.2d 667 (agency must prove by clear and convincing evidence that parental rights of respondent to sibling have been involuntarily terminated). It is possible that imposition of a clear and convincing evidence requirement under §1039-b is consistent with the Legislature's intent. However, it appears that diligent efforts are not a constitutional requirement. See, e.g., Renee J. v. Superior Court of Orange County, 28 P.3d 876 (CA, 2001); In re N.R., 967 P.2d 951, 955 (Utah Ct. App. 1998); In re Heller, 669 A.2d 25 (Del, 1995); In re Daniel C., 480 A.2d 766 (ME, 1984). Thus, it can be argued that, because the statute merely relieves the agency of the burden to prove an element imposed by state law, a preponderance standard would not be unconstitutional. In re Jamara R., 870 A.2d 112 (ME, 2005) (although clear and convincing standard is required at final stage of termination, preponderance standard may be used at this earlier stage).

It is possible that there will be Equal Protection and Due Process challenges to the statute. In particular, it might be argued that a prior termination of parental rights as to one child is not a legitimate basis for the termination of reasonable efforts with respect to another child. However, if reasonable efforts are not constitutionally required, and a particular ground for denying them does not create a suspect class, in answer to an Equal Protection challenge the State will only need to demonstrate that the law bears a rational relation to a legitimate legislative purpose. In re N.R., 967 P.2d 951, 955 (denial of services to parents suffering from mental illness did not create suspect class). Thus far, Due Process challenges have failed as well. See Florida Department of Children and Families v. F.L., 880 So.2d 602 (Florida 2004) (state statute authorizing filing of termination of parental rights petition "when the parental rights of the parent to a sibling have been terminated involuntarily" is not unconstitutional, but to be constitutional statute must be read to permit termination only if state proves both a substantial risk of significant harm to the child and that termination is the least restrictive means of protecting child from harm); State ex rel. Children, Youth & Families

Department v. Amy B., 61 P.3d 845 (N.M. Ct. App., 2002); In re Heather C., 751 A.2d 448 (Maine, 2000); In re Baby Boy H., 63 Cal.App.4th 470, 478 (Ct. App., 5th Dist. 1998).

It does not appear that retroactive application of the statute -- by way of an order excusing reasonable efforts where the aggravated circumstances, the conviction, or the order terminating parental rights resulted from acts committed before the effective date of the law -- would be unconstitutional. See Matter of G.B., 754 N.E.2d 1027 (Indiana Ct. App., 2001), appeal denied 761 N.E.2d 425 (2002) (prior termination); D.P. v. Limestone County Dep't of Human Services, 28 So.3d 759 (Ala. Ct. Civ. App., 2009) (while rejecting father's challenge to retroactive application of statutory expansion of criminal offenses which excuse state from making reasonable efforts, court notes that constitutional prohibition against ex post facto laws applies only to criminal cases); Matter of B.L.A., 753 A.2d 770 (N.J. Super. Ct., 2000) (prior termination and prior conviction); In re Sheneal W., 728 A.2d 544 (Conn.Super., 1999) (prior assault against other child); In re Joshua M., 66 Cal.App.4th 458 (Ct. App., 4th Dist. 1998); In re Amanda A., 534 N.W.2d 907 (Ct. App. 1995), app denied 537 N.W.2d 574; but see In re R.T., 778 A.2d 670 (Pa. Super. Ct., 2001), appeal denied 792 A.2d 1254 (2001) (prior termination cannot be given retroactive effect). See also In re Shaw, 966 S.W.2d 174 (Tex. Ct. App. 1998) (State Constitution's ex post facto prohibition applied to termination proceeding; trial court violated ex post facto prohibition in terminating mother's parental rights on grounds of abandonment, where court measured requisite statutory period of constructive abandonment from date nearly a year before effective date of statute); In re S.M., 1996 WL 140410 (Tenn. Ct. App. 1996) (ex post facto clause not applicable in termination proceeding); Matter of Aronauer, 106 Misc.2d 227, 430 N.Y.S.2d 977 (Sup. Ct., Rockland Co., 1980) (ex post facto clause applicable only to criminal proceedings).

It should also be noted that, in criminal cases, a defendant can challenge sentence enhancement based on a prior conviction on the ground that the prior conviction was unconstitutionally obtained. See People v. Catalanotte, 72 N.Y.2d 641, 536 N.Y.S.2d 16 (1988). It remains to be seen whether such an attack can be made in

a civil Article 10 proceeding.

**8. Permanency Hearing**

If the court determines that reasonable efforts are not required, a permanency hearing must be held within thirty days after the court's determination. FCA §1039-b(c). See Matter of Keith M., supra, 181 Misc.2d 1012 (court conducts permanency hearing on same day as dispositional hearing). A "permanency hearing" is "a hearing held in accordance with [FCA 1089] for the purpose of reviewing the foster care status of the child and the appropriateness of the permanency plan developed by the social services district or agency." FCA §1012(k). The petition for a permanency hearing shall be filed and served on an expedited basis as directed by the court. If a permanency hearing was previously scheduled for a date certain upon removal of the child, that date shall be cancelled. 22 NYCRR §205.17(b)(3).

"The foster parent caring for the child or any pre-adoptive parent or relative providing care for the child shall be provided with notice of any permanency hearing held pursuant to this article by the social services official. Such foster parent, pre-adoptive parent or relative shall have the right to be heard at any such hearing; provided, however, no such foster parent, pre-adoptive parent or relative shall be construed to be a party to the hearing solely on the basis of such notice and right to be heard. The failure of the foster parent, pre-adoptive parent, or relative caring for the child to appear at a permanency hearing shall constitute a waiver of the right to be heard and such failure to appear shall not cause a delay of the permanency hearing nor shall such failure to appear be a ground for the invalidation of any order issued by the court pursuant to this section." FCA §1040.

"At the permanency hearing, the court shall determine the appropriateness of the permanency plan prepared by the social services official which shall include whether or when the child: (i) will be returned to the parent; (ii) should be placed for adoption with the social services official filing a petition for termination of parental rights; (iii) should be referred for legal guardianship; (iv) should be placed permanently with a fit and willing relative; or (v) should be placed in another planned permanent living arrangement "(v) should be placed in another planned permanent living arrangement

with a significant connection to an adult willing to be a permanency resource for the child if the child is age sixteen or older and if the requirements of [FCA §1089(d)(2)(i)(E)] have been met. The social services official shall thereafter make reasonable efforts to place the child in a timely manner, including consideration of appropriate in-state and out-of-state placements, and to complete whatever steps are necessary to finalize the permanent placement of the child as set forth in the permanency plan approved by the court. If reasonable efforts are determined by the court not to be required because of one of the grounds set forth in this paragraph, the social services official may file a petition for termination of parental rights in accordance with [SSL §384-b]." FCA §1039-b(c). "For the purpose of this section, in determining reasonable effort to be made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern," FCA §1039-b(d), and "a sibling shall include a half-sibling. FCA §1039-b(e).

From the standpoint of judicial economy, it would make sense for the thirty-day permanency hearing to merge with the dispositional hearing. While this may be impossible when there was an early application for termination of efforts based on a prior order terminating parental rights or a conviction, it might be convenient when the application for termination of reasonable efforts was made after fact-finding. Obviously, when there has been a hearing within the previous thirty days because the child's attorney and/or the parent raised a best interests challenge to the application to terminate reasonable efforts, the permanency hearing may be somewhat abbreviated.

### O. Permanency For Children And Families

The Child Welfare Reform Act, its implementing regulations and related Article Ten provisions, New York's 1999 legislation implementing the Federal Adoption and Safe Families Act, and the 2005 legislation revamping permanency hearings, are designed to secure permanent and stable homes for children who are in foster care or are at risk of entering the foster care system. When family relationships cannot be sustained and strengthened, the law is usually designed to facilitate a termination of parental rights, and adoption.

When it appears that a child can be returned home safely after certain services

are in place or have been provided, a lawyer advocating for that result should be relentless in attempting to obtain, and seeking to enforce, court orders designed to motivate a sometimes lethargic bureaucracy. When family reunification appears to be a distant or remote prospect, the child's lawyer should insist upon an appropriate placement, and thereby minimize the possibility that the child will be shifted from one location to another before, finally, the child is returned to the parent, is placed in a loving and stable foster home, or, as occurs in some cases, is released as an adult to independent living.

In service of these goals, regulations require that a child be placed in the "least restrictive," or most homelike, setting consistent with the child's safety, and service needs. SSL §398(6)(g)(1); 18 NYCRR §430.11(d)(1). See Matter of K.O., 49 Misc.3d 806 (Fam. Ct., Kings Co., 2015) (court lacks authority to determine level of care - i.e., whether the child should be placed in a family home, an agency boarding home, a group home or an institution - since determination is within discretionary authority of Commissioner; level of care decisions are subject to review in Article 78 proceeding under abuse of discretion standard).

Whenever possible, a child should be placed in a setting which permits the child to remain in contact with persons, groups and institutions with which the child had contact while at home, or to which the child will be discharged. 18 NYCRR §430.11(c)(l)(i). The level of placement, whether it be a foster family or agency boarding home, a group home or residence, or an institutional setting, must be chosen according to the child's age and other specified factors. 18 NYCRR §430.11(d).

## IX. Discovery Proceedings

As a result of the child protective focus of an Article Ten proceeding, and the relationships often formed by institutional lawyers who practice together on a regular basis, much information is exchanged on an informal basis during conversations and interviews. Indeed, because, in many cases, the crucial issue is whether the family can be reunited, not whether abuse or neglect can be established at trial, formal discovery concerning the allegations is not as critical as in other litigation settings.

Nevertheless, there will be cases in which the allegations are hotly contested, and, particularly in those cases, it is important that the child's lawyer be familiar with the formal discovery rules applicable in an Article Ten proceeding. Although the involvement of infant witnesses will often result in limitations on the scope of discovery, the fact remains that a fairly broad range of discovery devices is available.

### A. Interviews With Represented And Unrepresented Persons

Rule 4.2(a) of the New York State Rules of Professional Conduct provides that in representing a client, "a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." However, an entity cannot claim blanket protection from ex parte interviews by stating that house counsel is responsible for all future legal matters affecting the entity. See Schmidt v. State, supra, 279 A.D.2d 62 (Attorney General did not commence representation of the Department of Transportation when claimants filed notice of intention to file a claim); see also State Bar Opinion 652, 1993 WL 555952.

Under Lawyer Conduct Rule 4.2(b), "[n]otwithstanding the prohibitions of [Rule 4.2(a)], and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." See also Commentary to Rules of Professional Conduct, Rule 4.2 ("Persons represented in a matter may communicate

directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel. . . . A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4"); State Bar Ethics Opinion 768, 2003 WL 22379946 (lawyer may silently attend meeting involving client and represented party if lawyer gives reasonable advance notice to opposing counsel); City Bar Ethics Opinion 2002-3, 2002 WL 1040177.

These ethical rules must be kept in mind when a lawyer is attempting to interview witnesses and gather information during the course of an Article Ten proceeding. It is clear that neither the child's lawyer nor the petitioner's lawyer may speak to a represented respondent concerning "the subject of the representation" without the consent of the respondent's lawyer. Compare Commentary to Rules of Professional Conduct, Rule 4.2 ("Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement

proceedings”). However, representation of the respondent by counsel does not result in attachment of the indelible State constitutional right to counsel and preclude police interrogation of the respondent during a related criminal investigation. See People v. Alicia Lewie, 17 N.Y.3d 348 (2011) (indelible right to counsel cannot attach by virtue of attorney-client relationship in family court or other civil proceeding); People v. Smith, 62 N.Y.2d 306, 476 N.Y.S.2d 797 (1984); People v. Kent, 240 A.D.2d 772, 658 N.Y.S.2d 530 (3rd Dept. 1997), lv denied 91 N.Y.2d 875, 668 N.Y.S.2d 573; People v. Snyder, 221 A.D.2d 870, 634 N.Y.S.2d 557 (3rd Dept. 1995), lv denied 88 N.Y.2d 885, 645 N.Y.S.2d 460 (1996).

For purposes of Rule 4.2(a), the child is considered a "party," and thus neither the respondent's lawyer nor the petitioner's lawyer may communicate with the child without the consent of the child’s lawyer. See State Bar Ethics Opinion 656, 1993 WL 555956. See also Matter of Awan v. Awan, 75 A.D.3d 597, 906 N.Y.S.2d 70 (2d Dept. 2010) (in custody/visitation proceeding, no error where family court struck testimony of father’s expert and precluded further testimony by expert because father’s attorney violated Rule 4.2 of Rules of Professional Conduct by allowing retained physician to interview and examine child regarding pending dispute and prepare report without knowledge or consent of attorney for child); Matter of Brian R., 48 A.D.3d 575, 853 N.Y.S.2d 565 (2d Dept. 2008) (attorney for father disqualified where he communicated with one of the subject children, and used her as interpreter when speaking with parties, without knowledge and consent of child’s lawyer); Matter of Marvin Q., 45 A.D.3d 852, 846 N.Y.S.2d 356 (2d Dept. 2007), appeal dism’d, 10 N.Y.3d 927 (respondent’s attorney properly disqualified where attorney violated rule by allowing members of firm to interview child, and by procuring affidavit from child regarding pending proceedings, without consent of child’s lawyer, and violated child’s due process rights; family court also properly precluded use of child's affidavit); Campolongo v. Campolongo, 2 A.D.3d 476, 768 N.Y.S.2d 498 (2d Dept. 2003) (where, in matrimonial action, defendant’s counsel caused defendant to retain psychiatrist to interview child and prepare report without knowledge of child’s lawyer, counsel was properly disqualified and psychiatrist’s report and testimony were properly precluded); Matter of Thea T., 174 Misc.2d 227, 663

N.Y.S.2d 502 (Fam. Ct., Suffolk Co., 1997) (County Attorney denied permission to interview child where child had already been interviewed repeatedly); but see Matter of Madris v. Oliviera, 97 A.D.3d 823 (2d Dept. 2012) (since disqualification implicates party's right to be represented by counsel of his/her own choosing and any restrictions must be carefully scrutinized, party seeking disqualification has burden to make clear showing that disqualification is warranted and conclusory assertions of conduct violating disciplinary rule will not suffice).

Non-lawyer agency employees are not bound by Rule 4.2, but it can be argued that because such employees are part of the litigation team, they act as agents for the agency's attorney when they interview the child about litigation-related matters, and that such interviewing should not take place without the permission of the child's attorney. But see Matter of Daughtry A., 94 A.D.3d 878 (2d Dept. 2012) (no due process violation where caseworker testified regarding admissions mother made after petition was filed regarding events which occurred prior to filing); Matter of Cristella B., 77 A.D.3d 654, 909 N.Y.S.2d 109 (2d Dept. 2010) (child's attorney not entitled to order directing Department of Social Services to refrain from interviewing children concerning issues beyond those related to safety without forty-eight hours notice to attorney; Rule 4.2 of Rules of Professional Conduct protects child's right to counsel, but applies only to attorneys and does not prohibit caseworker from interviewing child entrusted to agency's care, or justify significant restriction on agency's access to child via a requirement that caseworker notify attorney before interviewing child on issues unrelated to safety, where agency has obligations which distinguish role of caseworker from that of attorney representing a party); Matter of Tiajianna M., 55 A.D.3d 1321, 867 N.Y.S.2d 287 (4th Dept. 2008) (petitioner not required to notify child's attorney prior to interviewing child, since disciplinary rule applies only to attorneys; also, child's attorney had agreed to ACD condition permitting caseworker to examine and interview children, and family court restricted petitioner's scope of questioning to matters involving safety of child and, if it was appropriate, would have precluded any statements made by child that might be against her interest).

There is authority for application of the rule to represented non-parties involved

in the litigation. New York State Bar Ethics Opinion 656, 1993 WL 555956.

The issues are somewhat more complex when the child's lawyer or the respondent's lawyer wishes to communicate with employees of the petitioning department of social services. In Niesig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990), the Court of Appeals held that when a corporate "party" is involved, the rule limits contacts with corporate employees "whose acts or omissions in the matter under inquiry are binding on the corporation ... or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." 76 N.Y.2d at 374. See also Commentary to Rules of Professional Conduct, Rule 4.2 ("In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former unrepresented constituent"); Muriel Siebert & Co., Inc. v. Intuit Inc., 8 N.Y.3d 506 (2007) (disqualification of defendant's attorneys not warranted by ex parte interview with plaintiff's former chief operating officer, who at one time was privy to privileged and confidential information, where attorneys advised COO of their representation and interest in litigation, directed COO not to disclose privileged or confidential information or answer questions that would lead to such disclosure, and COO stated that he understood admonitions and no such information was disclosed; so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of opposing party's former employee, which is not barred by any rule); Schmidt v. State, 279 A.D.2d 62, 722 N.Y.S.2d 623 (4th Dept. 2000) (employees of State Department of Transportation were "parties" under Niesig test).

Since the caseworker who has investigated the charges and signed the petition is acting on behalf of the department of social services, it can be argued that rule requires that the child's lawyer and the respondent's lawyer obtain the permission of the petitioner's lawyer before communicating with the caseworker with respect to the

charges in the petition.

However, since it is critical that the child's lawyer and the respondent's lawyer be able to advocate on behalf of their clients with respect to the agency's custodial arrangements and provision of services, it may well be that contacts with the caseworker and other department of social services employees constitute protected First Amendment activity. See Commentary to Rules of Professional Conduct, Rule 4.2 ("Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government"); State Bar Opinion 652, 1993 WL 555952 (where adverse party is government, "questions arise as to the proper scope of the prohibition contained in rule, including issues raised by legal principles such as the constitutional right of citizens to petition their government"); City Bar Ethics Opinion 1991-4, 1991 WL 639878. Indeed, since department of social services employees are making critical decisions affecting the fundamental rights of the child and parents, it seems inappropriate to apply rule rigidly in such a context. See Matter of Madris v. Oliviera, 97 A.D.3d 823 (blanket protection from ex parte interviews arising from entity's claim that house counsel is responsible for all legal matters would inhibit free exchange of information between public and government); In re Michael C., 2002 WL 1399115 (Calif. Ct. App., 4th Dist., 2002) (court expresses disapproval of any policy prohibiting communication between party and his/her attorney and county social worker); State ex rel. Children, Youth and Families Dept. v. George F., 964 P.2d 158 (N.M. App. 1998), cert denied 964 P.2d 818 (1998) (guardian ad litem assigned to represent child in civil damages suit brought against DSS should not be deemed to be acting as traditional lawyer, and therefore could communicate freely with DSS social workers); see also Commentary to Rules of Professional Conduct, Rule 4.2 ("This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter").

The Administration for Children's Services has issued "Guidelines for Working with Attorneys Representing Parents and Children." This protocol "is intended to provide guidance to Children's Services child protective specialists and provider agency case planners to enhance communication with attorneys for parents and children." According to the protocol, at the initial court appearance the FCLA attorney "should introduce the CPS and foster care agency case planners to the parent's and child(ren)'s attorneys to clarify and facilitate anticipated communication outside of court, including a discussion about the appropriate parameters of the communication...."

The protocol cites "Examples of appropriate communication," which include: pick up and drop off times, schedules and locations for family visits, as opposed to discussion regarding quality of the visits; information regarding programs with family involvement; relatives' contact information as visiting or caretaking resources; discussion of court-ordered services without interpreting orders; dates, times and locations of Family Team Conferences or other meetings; request for copies of service plans; information regarding a child's medical and educational progress (e.g. report cards, medical updates), notice of doctors' appointments and school meetings that the parent can attend; update on changes in the child's placement or other service plan issues; information on programs that could assist the parent and inquiries about the status of pending referrals; clothing allowances, enrollment of a child in school, establishing Medicaid and housing programs; communication of parents' requests for letters for public housing, public assistance (e.g., to request visiting allowance) or for other social service programs.

"Inappropriate Communication" - that is, subjects that Child Protective Service and provider agency case planners shall not discuss with an attorney representing the child or a parent - include: interpretations of court orders; allegations of abuse or neglect; a position regarding the outcome of the court case including modifications in visitation; requests for orders against Children's Services. "If a Children's Services caseworkewr or provider agency case planner is asked about any of the items listed above, then he/she should ask the parent's or child(ren)'s attorneys to contact the FCLS attorney directly. In addition, any and all reports prepared in anticipation of a

court appearance must be provided to the FCLS attorney and have FCLS approval to distribute before they are provided to any other parties."

"The children's attorney on a neglect or voluntary placement case has a right and obligation to meet with the child privately at his/her office and/or foster care placement, and to communicate about how to best make these arrangements." "If a child has been brought to court, the Children's Services caseworker or provider agency case planner should inform the child's attorney as soon as possible."

While expert witnesses are not represented by counsel, some courts have attempted to restrict ex parte communications between attorneys and experts, particularly court-appointed experts who are expected to be neutral evaluators. See, e.g., Kenneth C. v. Delonda R., 10 Misc.3d 1070(A), 814 N.Y.S.2d 562 (Fam. Ct., Kings Co., 2006); Board of Managers of the Bay Club Condominium v. Bay Club of Long Beach Inc., 15 Misc.3d 282, 827 N.Y.S.2d 855 (Sup. Ct., Nassau Co., 2007).

Finally, attorneys should be familiar with the ethical standards governing contacts with unrepresented persons involved in the case. Under Lawyer Conduct Rule 4.3, a lawyer, "[i]n communicating on behalf of a client with a person who is not represented by counsel … shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." See also Commentary to Rules of Professional Conduct, Rule 4.3 ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.… The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client

and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations"); Opinion 843, 2010 WL 3961381 (New York State Bar Association, 9/10/10) (lawyer who represents client in pending litigation, and has access to Facebook or MySpace network used by another party, may access and review public social network pages of party to search for potential impeachment material as long as lawyer does not "friend" other party or direct third person to do so); Formal Opinion 2010-2, 2010 WL 8265845 (Ass'n of the Bar of the City of New York, Sept. 2010) (lawyer may not use deception to access information from social networking webpage, and Rules are violated whenever attorney "friends" an individual under false pretenses to obtain evidence even if lawyer employs agent, such as investigator, to engage in ruse; however, lawyers can and should seek such information by availing themselves of informal discovery, such as truthful "friending" of unrepresented parties, or formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on individual's social networking page); NYC Bar Association Formal Opinion 2009-2: Ethical Duties Concerning Self-Represented Persons (Ass'n of the Bar of the City of New York, February 2009) (lawyer may advise self-represented party to retain counsel and identify legal issues that could be usefully addressed by counsel, and may be obligated to do so when it would advance interests of layer's own client; may provide certain incontrovertible factual or legal information, such as client's own position in

negotiations, or existence of legal right such as right against self-incrimination; may direct a self-represented adversary to available court facilities designed to aid those litigants; should avoid misleading self-represented party; should be ready to clarify when necessary that lawyer does not and cannot represent the self-represented person, represents another party who may or does have interests adverse to the self-represented person, and cannot give any advice other than to secure counsel or consult available court facility designed to assist self-represented persons, and lawyer must provide this clarification whenever lawyer knows or has reason to know self-represented person misapprehends lawyer's role; and should determine whether explanation should be in writing).

### B. Subpoena For Hospital And Agency Records

#### 1. Generally

In response to a subpoena of the court or counsel, hospitals and other public or private agencies must forward to the court any records, photographs or other evidence relating to abuse or neglect. FCA §1038(a); Matter of Sumaria D., 121 A.D.3d 1203 (3d Dept. 2014) (court should not have considered mother's hospital records, which petitioner improperly obtained without mother's authorization or subpoena).

Service of a subpoena on a hospital may be made by certified mail, return receipt requested, to the hospital director. The child's lawyer should serve a copy of the subpoena, in the manner set forth in CPLR §2103, on each party who has appeared so that it is received promptly after service on the witness and before production of the documents. See CPLR §2303(a). The court must establish procedures for the receipt and safeguarding of such records. FCA §1038(a). See People v. Natal, 75 N.Y.2d 379, 553 N.Y.S.2d 650 (1990) (assistant district attorney could not make subpoena returnable to himself).

#### 2. Confidentiality Rules

Disclosure of certain records is limited by confidentiality rules which protect from disclosure, and re-disclosure, medical/mental health and substance abuse treatment records. Accordingly, when such records are sought, the child's lawyer should proceed

by way of a motion, on notice to appropriate parties, requesting issuance of a court-ordered subpoena.

**a. Clinical Records**

The Mental Hygiene Law contains provisions protecting from disclosure a patient's "clinical record." See MHL §33.16(a)(1) ("'Clinical record' means any information concerning or relating to the examination or treatment of an identifiable patient or client maintained or possessed by a facility which has treated or is treating such patient or client, except data disclosed to a practitioner in confidence by other persons on the basis of an express condition that such data would never be disclosed to the patient or client or other persons, provided that such data has never been disclosed by the practitioner or a facility to any other person. If at any time such data is disclosed, it shall be considered clinical records for the purposes of this section"); MHL §33.16(f) ("Whenever federal law or applicable federal regulations restrict, or as a condition for the receipt of federal aid require, that the release of clinical records or information be more restrictive than is provided under this section, the provisions of federal law or federal regulation shall be controlling"); MHL §33.13(c) (clinical record for each patient or client at each facility licensed or operated by Office of Mental Health or Office of Mental Retardation and Developmental Disabilities "shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices except as follows: 1. pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality..."); MHL §33.13(e) ("Clinical information tending to identify patients or clients and clinical records maintained at a facility not operated by the offices, shall not be a public record and shall not be released to any person or agency outside such facility except pursuant to subdivisions (b), (c) and (d) of this section"); MHL §33.13(f) ("Any disclosure made pursuant to this section shall be limited to that information necessary in light of the reason for disclosure. Information so disclosed shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party"); Matter of Lyndon S., 163 A.D.3d 1432 (4th Dept. 2018) (petitioner properly granted access to respondent

mother's mental health records where her refusal to authorize disclosure made it impossible to assess whether she was compliant with treatment, and paramount issue was her mental health); In re Dean T., 117 A.D.3d 492 (1st Dept. 2014) (court erred in refusing to conduct in camera review of child's mental health treatment records to determine whether there was information supporting respondent father's claims regarding mother coaching child and mental issues affecting his truth-telling capacity, and to decide whether potential harm from discovery outweighed respondent's need for records; court notes that record contains no physical evidence of abuse and case rested almost entirely on credibility of child's testimony, and that mental health records could be necessary to respondent's defense), appeal decided 124 A.D.3d 548 (disclosure denied); Matter of Evan E., 114 A.D.3d 149 (3d Dept. 2013) (family court lacked authority to direct petitioner to provide CASA volunteer with children's mental health information that was confidential under Mental Hygiene Law §33.13[c], which prohibits release of mental health records contained in foster care records except in limited circumstances, and also erred in directing that petitioner not discourage mental health or other service providers from speaking to CASA volunteer about children); Matter of Imman H., 49 A.D.3d 879, 854 N.Y.S.2d 517 (2d Dept. 2008) (after in camera inspection, court properly denied mother's motions for production of child's psychiatric and social work treatment records from various institutions because mother failed to demonstrate that records were needed for preparation of case); Matter of Jonathan C., 51 Misc.3d 469 (Fam. Ct., Bronx Co., 2015) (mother's mental health providers compelled to testify at disposition, and mental health records also subject to disclosure for in camera review for relevance); Matter of Xavier G., 19 Misc.3d 1113(A), 859 N.Y.S.2d 907 (Fam. Ct., Kings Co., 2008) (ACS not entitled to disclosure of father's psychiatric records where ACS did not yet have current evidence of mental illness and could not obtain discovery for purpose of determining whether cause of action exists; also under HIPAA, and Mental Hygiene Law, interests of justice did not significantly outweigh need for confidentiality); Matter of W.H., S.H., 158 Misc.2d 788, 602 N.Y.S.2d 70 (Fam. Ct., Rockland Co., 1993) (MHL §33.13[c] authorizes disclosure of psychiatric records in the interests of justice); see also Matter of Silvia S., 18 Misc.3d 326, 852

N.Y.S.2d 627 (Fam. Ct., Queens Co., 2007) (court denies ACS's application for order requiring production of respondent's psychological, psychiatric and medical records, noting, inter alia, that no neglect or abuse petition has been filed, that order permitting pre-action disclosure is appropriate only where applicant can show facts demonstrating that cause of action exists and that information sought is material and necessary, and that CPLR §3102(c) may not be used to determine whether there is a cause of action); Matter of Sonya M., 115 Misc.2d 207, 453 N.Y.S.2d 986 (Fam. Ct., Nassau Co., 1982) (court quashes subpoena for records of runaway and homeless youth program where respondent was engaged in "fishing expedition").

**b. Substance Abuse Treatment Records**

The Mental Hygiene Law, and federal statutes and regulations, contain provisions protecting from disclosure records of the patients/clients of substance abuse treatment facilities. See MHL §22.05(a) (after admission of patient to chemical dependence program or treatment facility, information from the patient's record "shall be accessible only in the manner set forth in sections 33.13 and 33.16 of this chapter"); MHL §22.05(b) ("All records of identity, diagnosis, prognosis, or treatment in connection with a person's receipt of chemical dependence services shall be confidential and shall be released only in accordance with applicable provisions of the public health law, any other state law, federal law and duly executed court orders"); 42 C.F.R. §2.61 (patient information protected under 42 USC §§ 290ee-3 and 290dd-3 may not be released unless person holding records receives authorizing court order and a subpoena or similar legal mandate); 42 C.F.R. §2.64 (provides, inter alia, that application for order may be made by any person having legally recognized interest in disclosure; that application must use a fictitious name, such as John Doe, to refer to the patient and may not contain or otherwise disclose patient identifying information unless patient is the applicant or has given written consent to disclosure or court has ordered record of proceeding sealed from public scrutiny; that notice of the application, in a manner which will not disclose patient identifying information to other persons, must be given to the patient and the person holding the records, who must be given an opportunity to file a written response or appear in person for limited purpose of providing evidence on the

statutory and regulatory criteria for issuance of the court order; that any oral argument, review of evidence, or hearing must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient consents to an open hearing; that an order may be entered only if the court determines that there is "good cause," i.e., that other ways of obtaining the information are not available or would not be effective, and the public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services; and that an order authorizing a disclosure must limit disclosure to those parts of the record which are essential to fulfill the objective of the order, limit disclosure to those persons whose need for information is the basis for the order, and include other measures, such as sealing, as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services); Matter of Havyn-Leiy A., 30 Misc.3d 1217(A), 2011 WL 294293 (Fam. Ct., Clinton Co., 2011) (in permanent neglect proceeding, court orders disclosure of portions of records of drug treatment programs after concluding that public interest and need for disclosure outweigh potential injury to physician-patient relationship and treatment services; potential injury was de minimis because mother no longer received services at programs); Matter of Maximo M., 186 Misc.2d 266, 710 N.Y.S.2d 864 (Fam. Ct., Kings Co., 2000) (court orders disclosure of respondent's drug treatment records, and must examine records in camera to determine which portions are relevant and limit disclosure to persons whose need provides the basis for disclosure); Matter of W.H., S.H., 158 Misc.2d 788, 602 N.Y.S.2d 70 (Fam. Ct., Rockland Co., 1993) (court denies disclosure of substance abuse treatment records).

**c. HIPAA**

When seeking discovery of medical and other health care records, the child's attorney also must take into account not only the physician-patient privilege [Matter of B. Children, 23 Misc.3d 1119(A), 886 N.Y.S.2d 70 (Fam. Ct., Kings Co., 2009)], but also the Health Insurance Portability and Accountability Act ("HIPAA"), a federal privacy law.

**i. Generally**

Generally speaking, under HIPAA a “health care provider who transmits any health information in electronic form in connection with a transaction covered by” HIPAA may not use or disclose “individually identifiable health information” except as HIPAA permits, or upon execution of a written release by the protected individual or his/her personal representative. See 45 C.F.R. §§ 160.102, 160.103, 160.502(a), (g)(1). Unless otherwise provided in HIPAA, “[w]hen using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.” 45 C.F.R. §164.502(b). Unless otherwise provided in HIPAA -- e.g., a provision of State law that is more stringent may still apply -- New York State laws that are “contrary to”HIPAA are preempted. See 45 C.F.R. §§ 160.202, 160.203(b).

**ii. <u>Required Elements of Authorization</u>**

Under 45 C.F.R. §164.508(c)(1), “[a] valid authorization ... must contain at least the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.

(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.

(iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.

(iv) A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.

(v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

(vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided."

In addition to these "core" elements, "the authorization must contain statements adequate to place the individual on notice of the following:

"(i) The individual's right to revoke the authorization in writing, and either:

(A) The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or

(B) To the extent that the information in paragraph (c)(2)(i)(A) of this section is included in the notice required by § 164.520, a reference to the covered entity's notice.

(ii) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization, by stating either:

(A) The covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorizations in paragraph (b)(4) of this section applies; or

(B) The consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization.

(iii) The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart." 45 C.F.R. §164.508(c)(2).

The authorization must be written in plain language. §164.508(c)(3). If a covered entity seeks an authorization from an individual for a use or disclosure of protected health information, the covered entity must provide the individual with a copy of the signed authorization. §164.508(c)(4).

### iii. <u>Court Orders and So-Ordered Subpoenas</u>

Under 45 C.F.R. §164.512(e)(1), "[a] covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered

entity discloses only the protected health information expressly authorized by such order." See, e.g., Matter of B. Children, 23 Misc.3d 1119(A) (in sex abuse case, court, while noting that HIPAA provisions are procedural and do not create new privileges, grants respondent father's mid-hearing motion to compel production, for in camera review, of hospital records of child where child testified regarding rape allegations, father adamantly denied allegations, it was undisputed that hospital records contained no physical evidence of sexual abuse, and there was no evidence that disclosure would traumatize child; court issues protective order prohibiting parties from using or disclosing child's hospital records for purpose other than litigation, and requiring that parties and attorneys return copies of records at end of proceeding); Matter of Xavier G., 19 Misc.3d 1113(A), 859 N.Y.S.2d 907 (Fam. Ct., Kings Co., 2008) (ACS not entitled to disclosure of father's psychiatric records where ACS did not yet have current evidence of mental illness and could not obtain discovery for purpose of determining whether cause of action exists; also under HIPAA, and Mental Hygiene Law, interests of justice did not significantly outweigh need for confidentiality); see also CPLR 3122(a)(2) (medical provider served with subpoena duces tecum, other than one issued by court, need not respond or object if subpoena is not accompanied by patient's written authorization).

#### iv. Attorney-Issued Subpoenas and Discovery Requests

"A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: ... In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: (A) The covered entity receives satisfactory assurance, as described in [45 C.F.R. §164.512(e)(1)(iii)], from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request." 45 C.F.R. §164.512(e)(1)(ii).

Under 45 C.F.R. §164.512(e)(1)(iii), "a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation

demonstrating that: (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address); (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and: (1) No objections were filed; or (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution."

"A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: ... In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: ... (B) The covered entity receives satisfactory assurance, as described in [§164.512(e)(1)(iv)], from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of [§164.512(e)(1)(v)]." 45 C.F.R. §164.512(e)(1)(ii).

Under 45 C.F.R. §164.512(e)(1)(iv), "a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal. Under 45 C.F.R. §164.512(e)(1)(v), "a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that: (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) Requires the return to the covered entity or destruction of the

protected health information (including all copies made) at the end of the litigation or proceeding."

In addition, "a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section. 45 C.F.R. §164.512(e)(1)(vi).

### v. Unemancipated Minors

"If under applicable law a parent, guardian, or other person acting in loco parentis has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation, except that such person may not be a personal representative of an unemancipated minor, and the minor has the authority to act as an individual, with respect to protected health information pertaining to a health care service, if: (A) The minor consents to such health care service; no other consent to such health care service is required by law, regardless of whether the consent of another person has also been obtained; and the minor has not requested that such person be treated as the personal representative; (B) The minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting in loco parentis, and the minor, a court, or another person authorized by law consents to such health care service; or (C) A parent, guardian, or other person acting in loco parentis assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service." 45 C.F.R. §164.502(g)(3)(i).

"If, and to the extent, permitted or required by an applicable provision of State or other law, including applicable case law, a covered entity may disclose, or provide access in accordance with § 164.524 to, protected health information about an

unemancipated minor to a parent, guardian, or other person acting in loco parentis." 45 C.F.R. §164.502(g)(3)(ii)(A).

"If, and to the extent, prohibited by an applicable provision of State or other law, including applicable case law, a covered entity may not disclose, or provide access in accordance with § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in loco parentis." 45 C.F.R. §164.502(g)(3)(ii)(B).

"Where the parent, guardian, or other person acting in loco parentis, is not the personal representative ... and where there is no applicable access provision under State or other law, including case law, a covered entity may provide or deny access under § 164.524 to a parent, guardian, or other person acting in loco parentis, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment." 45 C.F.R. §164.502(g)(3)(ii)(C).

**vi. <u>Disclosure to Child Protective and Law Enforcement Authorities</u>**

Neither the making of a report concerning child abuse or maltreatment to the State Central Register, nor the legally required or authorized disclosure of related information to a child protective agency, violates the Health Insurance Portability and Accountability Act ("HIPAA"). 45 C.F.R. §164.512(b)(1)(ii) ("covered entity may disclose protected health information for the public health activities and purposes described in this paragraph" to a "public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect"); 45 C.F.R. §164.512(c)(1)(i) (to the extent required by law or authorized by statute or regulation, or if victim consents, "covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence").

Permitted disclosures for "law enforcement purposes" are set forth in 45 C.F.R.

§164.512(f), which refers to, inter alia, laws that require the reporting of certain types of wounds or other physical injuries; a court order, court-ordered warrant, and subpoena or summons issued by a judicial officer; and a grand jury subpoena; requests for information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person; requests for information about an individual who is or is suspected to be a victim of a crime; and information about an individual who has died if the covered entity has a suspicion that such death may have resulted from criminal conduct.

**vii. Waiver**

In Holzle v. Healthcare Services Group Inc., 7 Misc.3d 1027(A), 801 N.Y.S.2d 234 (Sup. Ct., Niagra Co., 2005), the court, relying on the rule established in Koump v. Smith (25 N.Y.2d 287), held that by bringing or defending a personal injury action while affirmatively raising his/her mental or physical condition, a party waives any rights or remedies under HIPAA as to the mental or physical conditions asserted. The Court noted that HIPAA did not create a federal physician-patient privilege and the privacy rule is procedural in nature; that even if it were proper to conclude that HIPAA creates rights or remedies for plaintiffs in state litigation, it is proper to apply the Koump waiver rule; and that finding a HIPAA waiver under these circumstances protects defense counsel and treating physicians who participate in post-note of issue interviews without an authorization executed by the plaintiff.

**3. Admissibility of Records**

Pursuant to FCA §1046(a)(iv), records sent in response to the subpoena are admissible in evidence if the business record foundation is set forth in a certification either by the head of the agency, or, if a photocopy of a delegation of authority is presented, by a responsible employee. See Matter of Kadyn J., 109 A.D.3d 1158 (4th Dept. 2013) (family court erred in admitting police records without photocopy of delegation of authority; statute requirement is mandatory). Although §1046(a)(iv) does not expressly make admissible a photostatic copy of a record, existing CPLR provisions appear to cover most situations. See CPLR §2307 (allows introduction of copies of government agency records); §2306(a) (allows introduction of a copy of any hospital

record relating to the condition or treatment of a patient); §4539 (allows introduction of copies made in the regular course of business).

### C. Demand For Agency Records

Upon service of a demand pursuant to CPLR §3120, the petitioner or a social services official shall provide to the respondent or the child's lawyer, for purposes of inspection and photocopying, any records, photographs or other evidence relevant to the proceeding. FCA §1038(b); see also Matter of Cameron M., 161 A.D.3d 1156 (3d 504 (2d Dept. 2018) (court erred in directing DSS to produce paper copies of discovery material rather than compact disc).

The petitioner or official may delete the name of any person who filed a central register report, unless the report will be offered into evidence at a hearing. FCA §1038(b); see also SSL §422(4)(A)(d) (report may be made available to subject of or other person named in report); SSL §422(4)(A)(e) (report may be made available to court upon finding that information is necessary for determination of issue before court); Matter of Gloria DD., 99 A.D.3d 1044 (3d Dept. 2012) (no finding that information was necessary for determination of issue, but circumstances were relevant to whether respondent knew allegations were false); Catherine C. v. Albany Department of Social Services, 38 A.D.3d 959, 832 N.Y.S.2d 99 (3rd Dept. 2007) (records improperly disclosed without finding of necessity); Matter of Sarah FF., 18 A.D.3d 1072, 797 N.Y.S.2d 571 (3rd Dept. 2005) (SSL §422(4)(A)(e) did not permit disclosure to CASA volunteer). The petitioner or official may also seek a protective order precluding discovery of records, photographs or evidence which will not be offered into evidence where disclosure is likely to endanger the child's life or health. Unfounded prior reports are legally sealed pursuant to SSL §422(5)(A); see also Matter of Maria S., 43 Misc.3d 689 (Fam. Ct., Bronx Co., 2014) (court orders disclosure of other information related to unfounded report, noting that, while 18 NYCRR §432.9 purports to require sealing of additional material, regulatory provision conflicts with §422[4]).

Although foster care records are made confidential in SSL §372, §1038(b) and other statutes and regulations provide access to such records. See SSL §372(3) (records confidential, but subject to provisions of CPLR Article Thirty-One, and to

disclosure by supreme court order when no action is pending); 18 NYCRR 428.8 (upon submission of written request, former foster child entitled to receive any items except confidential HIV-related information concerning person other than former foster child; agency may choose to provide access via summary statement containing requested information, or copy of entire record, or copy of portions of record containing requested information, or personal review of applicable records by former foster child within agency facility, when mutually convenient to agency and former foster child, or any combination of above); K.B. v. SCO Family of Service, 159 A.D.3d 416 (1st Dept. 2018) (plaintiff claiming negligent certification of foster parent and failure to properly supervise foster home was entitled to foster care records without redaction except to remove names of any other foster children and their families, and of ACS investigative file if it was in agency's possession, since former foster child seeking own records to assist in suit against agency is presumptively entitled to records and only powerfully compelling showing would justify restricting access; in this case, court properly conducted in camera review to ensure that no non-party private information would be disclosed, but erred in determining that identities of ACS caseworkers, mental health professionals and other professionals should be redacted); Llorente v. City of New York, 38 A.D.3d 617, 833 N.Y.S.2d 123 (2d Dept. 2007) (court erred in failing to conduct in camera review and instead directing agency to disclose unredacted case file without allowing agency to seek protective order); Catherine C. v. Albany Department of Social Services, supra, 38 A.D.3d 959 (eighteen-year-old foster child entitled to notice and opportunity to be heard before foster care records disclosed to plaintiff, his former foster mother); Matter of Michelle H.H., 18 A.D.3d 1075, 797 N.Y.S.2d 567 (3rd Dept. 2005) (petitioner's records not records of court proceeding, and, in any event, FCA §166 cannot override SSL §372); Wheeler v. Commissioner of Social Services of the City of New York, 233 A.D.2d 4, 662 N.Y.S.2d 550 (2d Dept. 1997); Sam v. Sanders, 80 A.D.2d 758, 436 N.Y.S.2d 301 (1st Dept. 1981), aff'd 55 N.Y.2d 1008, 449 N.Y.S.2d 474 (1982) (child implicitly has right to obtain own records under SSL §372[3]); see also Matter of Evan E., 114 A.D.3d 149 (3d Dept. 2013) (court did not err in ordering petitioner to cease directing foster parents not to speak to CASA volunteer, but foster

parents did have duty to maintain confidentiality where required by law).

Relevant portions of the child protective agency's assessment of the child and family circumstances, and a complete copy of the family service plan, must be given to the child's parent or guardian, counsel for such parent or guardian, and the child's lawyer, if any, within ten days of preparation of the plan. SSL §409-e(4).

Quite a bit of controversy has arisen regarding the disclosure of agency records to an attorney who is representing the respondent in a related criminal case, in which a defendant ordinarily would have to make a motion for an in camera inspection of such records by the judge. After a series of family court decisions issuing protective orders barring such disclosure and disclosure of other confidential records [see, e.g., Matter of G., 50 Misc.3d 1221(A) (Fam. Ct., Bronx Co., 2015); Matter of W. and V. Children, 50 Misc.3d 1220(A) (Fam. Ct., Bronx Co., 2014); Matter of Kayla S., 46 Misc.3d 747 (Fam. Ct., Bronx Co., 2014)], the First Department held in In re Sean M., 151 A.D.3d 636 (1st Dept. 2017) that the respondents could share Administration for Children's Services progress notes with defense counsel in related criminal proceedings, concluding that the restrictions in SSL §422(4)(A) did not bar the sharing of lawfully obtained records and that any other result would violate respondents' First and Sixth Amendment rights. See also Matter of Kaden J.M., 152 A.D.3d 604 (2d Dept. 2017) (court rejects mother's challenge to discovery-related directive stating that "[r]ecords, reports, photographs or other documents provided pursuant to this order, shall not be disclosed to counsel not assigned to this matter" and that "[f]ailure to comply with this Order may result in the imposition of sanctions;" although mother asserts that order violates right to counsel by compromising ability to obtain informed advice from attorney in related criminal prosecution, she has offered no reason why seeking in camera review of materials and leave of court to disclose them would be inadequate to protect her rights, and claim that order may impinge on right to counsel in criminal proceeding also is hypothetical and not properly before court in this proceeding).

**D. Examination Of Respondent**

Upon a motion by the petitioner or the child's attorney, the court may order a respondent to provide non-testimonial evidence, such as blood, urine or hair samples, if

the court finds "probable cause that the evidence is reasonably related to establishing the allegations in a petition...." FCA §1038-a. See, e.g., Matter of Department of Social Services v. Janice T., 137 A.D.2d 527, 524 N.Y.S.2d 267 (2d Dept. 1988) (AIDS test improperly ordered after respondent bit court officer; test not related to allegations and there was no evidence respondent might have AIDS); Matter of Pederson, 187 Misc.2d 486, 723 N.Y.S.2d 344 (Fam. Ct., Kings Co., 2001) (citing CPLR §3121, court orders respondents to provide dental impressions where child had bite marks). Although §1038-a resembles Criminal Procedure Law §240.40(2)(v), an Article Ten proceeding is civil, and thus the exclusionary rule [see Matter of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6 (1982)] does not apply when §1038-a is violated. Cf. Burgel v. Burgel, 141 A.D.2d 215, 533 N.Y.S.2d 735 (2d Dept. 1988); Matter of Diane P., 110 A.D.2d 354, 494 N.Y.S.2d 881 (2d Dept. 1985). But §1038-a allows discovery only "in a manner not involving an unreasonable intrusion or risk of serious physical injury to the respondent."

Since sexual abuse usually is not reported immediately after the abuse occurs, it is unlikely that semen, hairs, or other types of physical evidence will be recovered at the scene. Indeed, it would do little good to prove that the father left a fingerprint or a hair sample in the child's room, let alone elsewhere in a home in which the father resides or regularly appears. However, if, consistent with the confidentiality provisions in Article 27-F of the Public Health Law [see, e.g., Matter of R. Children, 216 A.D.2d 6, 627 N.Y.S.2d 376 (1st Dept. 1995) (discovery of child's HIV status denied)], it is revealed that the child in a sexual abuse case is HIV-positive, the court could order that the alleged abuser be tested. Cf. Matter of Michael WW, 203 A.D.2d 763, 611 N.Y.S.2d 47 (3rd Dept. 1994), appeal dism'd 83 N.Y.2d 1000, 616 N.Y.S.2d 480 (child's positive test results may provide probable cause). Or, a respondent's hair could be subjected to a radio immunoassay test to determine whether the respondent has used drugs. Compare Matter of Maria C., 118 A.D.3d 874 (2d Dept. 2014) (respondent directed to submit to hair follicle drug test pursuant to FCA §251) and Burgel v. Burgel, supra, 141 A.D.2d 215 and Matter of Baby Boy L., 157 Misc.2d 353, 596 N.Y.S.2d 997 (Fam. Ct., Suffolk Co., 1993) with Garvin v. Garvin, 162 A.D.2d 497, 556 N.Y.S.2d 699 (2d Dept. 1990) (insufficient reason to believe mother was using drugs). See also Matter of

Nassau County Department of Social Services o/b/o C. R. and L. H., 21 Misc.3d 1126(A), 873 N.Y.S.2d 513 (Fam. Ct., Nassau Co., 2008) (court grants petitioner's motion for order requiring respondent to submit buccal swab specimen for DNA analysis and testing where it is alleged that respondent placed condom on finger and inserted finger into child's rectum; that respondent mother retrieved condom and reported incident to police; that condom was turned over to police to test for presence of DNA; that testing revealed that child "cannot be excluded as a source of the genetic mixture found on the condom" and found presence of identical male genetic material on inside and outside of condom but not presence of semen; and respondent denied abusing child but admitted using condom to pleasure himself).

Section 1038-a does not include court-ordered mental health examinations, but it can be argued that FCA §251 and CPLR §3121(a) provide such authority when the respondent's mental condition is at issue. Compare Matter of Alexander "EE", 267 A.D.2d 723, 701 N.Y.S.2d 133 (3rd Dept. 1999) (no exam ordered in sex abuse case where psychologist alleged that it would be important to know whether mother's brain tumor could have caused her to violate child's personal boundaries in way she never would have in past, but three treating physicians stated that tumor would have no effect on parenting) and Commissioner of Social Services o/b/o Verena E., 163 Misc.2d 464, 621 N.Y.S.2d 436 (Fam. Ct., Kings Co., 1994) with Matter of CPS o/b/o Emily R., 5 Misc.3d 1020(A), 799 N.Y.S.2d 159 (Fam. Ct., Suffolk Co., 2005) (since mental illness charges placed respondent's condition at issue, examination ordered pursuant to CPLR §3121[a]); Matter of Tyler S., 192 Misc.2d 728, 748 N.Y.S.2d 215 (Fam. Ct., Kings Co., 2002) (examination ordered pursuant to FCA §§ 251 and 1038(d), and CPLR §3121(a)); Matter of M. Children, 171 Misc.2d 838, 656 N.Y.S.2d 119 (Fam. Ct., Kings Co., 1997) and Matter of R./G. Children, 165 Misc.2d 518, 632 N.Y.S.2d 917 (Fam. Ct., Kings Co., 1994) (while expressing no opinion as to whether results of exam would be admissible, court notes that sex abuse respondent's mental condition is in controversy and exam could lead to the discovery of admissible evidence). See also In re Trevor McK., 120 A.D.3d 416 (1st Dept. 2014) (attorney for child's application for mental health evaluation of mother properly denied where it was made during hearing without

explanation for delay); In re C.S., 376 Ill.App.3d 114 (Ill. Ct. App., 3rd Dist., 2007) (when State asserts, as sole ground for finding of neglect, that parent is mentally disabled or suffers from psychological problems, trial court shall grant parent's request for mental examination; examination will provide court with clearer understanding of parent's capabilities and of best available avenues along which to proceed, and reduce risk that parent's rights will be erroneously terminated); In re G.D., 870 So.2d 235 (Fla. Ct. App., 2d Dist., 2004) (trial court erred in ordering mental health examination of parents in shaken baby syndrome case since their mental state was not at issue).

**E. Examination Of Child**

The parties may agree to the examination of a subject child by a physician, psychologist or social worker. In addition, the respondent or the child's lawyer may move for a court order directing that a child who is a subject of the proceeding be made available for examination by a physician, psychologist or social worker selected by the movant. When deciding the motion, the court must consider the movant's need for the examination to assist in the preparation of the case, and the potential harm to the child from the examination. FCA §1038(c). See Matter of Jessica R., 78 N.Y.2d 1031, 576 N.Y.S.2d 77 (1991).

While §1038(c) does not provide for discovery at the petitioner's request, the court may also order an examination by a physician, psychiatrist or psychologist "appointed or designated" by the court. FCA §251; see Matter of Michelle A., 140 A.D.2d 604, 528 N.Y.S.2d 652 (2d Dept. 1988) (§251 examiner is not selected by party); see also Matter of Alexander G., 93 A.D.3d 904 (3d Dept. 2012) (petitioner's request that child undergo mental health assessment properly denied; request was opposed by respondents "and, notably, the attorney for the child"); CPLR §3121 ("After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written

authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination").

In sexual abuse cases, FCA §1038(c) has resulted in court orders directing that a sexual abuse expert chosen by the respondent or the child's lawyer be permitted to interview the child to determine whether the child's statements and behavioral symptoms are consistent with a recognized child sexual abuse syndrome. Since there is substantial controversy concerning both the scientific reliability of such opinion evidence and the qualifications of and methodology employed by certain "experts," courts have been willing to order discovery when the petitioner will be presenting such evidence. See, e.g., In re Fatima M., 16 A.D.3d 263, 793 N.Y.S.2d 329 (1st Dept. 2005) (family court erred in denying father's request to have his own expert examine child where both petitioner and child's lawyer had own experts); Matter of Kaitlyn S., 148 Misc.2d 276, 560 N.Y.S.2d 88 (Fam. Ct., Rockland Co., 1990); Matter of Tiffany M., 145 Misc.2d 642, 547 N.Y.S.2d 972 (Fam. Ct., Queens Co., 1989).

The need for discovery may not be very compelling when the petitioner is offering no expert testimony. See In re Enrique B., 267 A.D.2d 75, 699 N.Y.S.2d 384 (1st Dept. 1999), lv denied 94 N.Y.2d 762, 708 N.Y.S.2d 51 (2000) (in corporal punishment case, no error in court's denial of application to have child subjected to psychological examination); Matter of D.T., 9 Misc.3d 1118(A), 808 N.Y.S.2d 917 (Fam. Ct., Rockland Co., 2005) (noting that respondent's expert would have no duty to disclose evidence of abuse, court orders examination by neutral expert appointed by court). In addition, the need for discovery is often outweighed by the risk of trauma to the child. See, e.g., Matter of Keith "JJ", 295 A.D.2d 644, 743 N.Y.S.2d 202 (3rd Dept. 2002) (examination denied where child had already been subjected to extensive questioning and endured invasive physical examination, and information was available

from numerous sources); Matter of Commissioner of Social Services o/b/o/ Joanne W., 210 A.D.2d 328, 620 N.Y.S.2d 402 (2d Dept. 1994) (application denied where child suffered from post-traumatic stress disorder). Moreover, the respondent's need for an examination by his/her own expert is less compelling when the expert who will be testifying for the petitioner or the child's lawyer was consulted by the respondent before charges were brought, or was selected by the court pursuant to FCA §251. See, e.g., Matter of Ean L.L., 148 Misc.2d 636, 561 N.Y.S.2d 342 (Fam. Ct., Queens Co., 1990); Matter of Nicole, 146 Misc.2d 610, 551 N.Y.S.2d 749 (Fam. Ct., Rockland Co., 1990). Finally, additional examinations may be deemed unnecessary when physical evidence, and/or other factors, make it clear that the child was sexually abused by someone. See, e.g., Matter of Danielle YY., 188 A.D.2d 894, 591 N.Y.S.2d 636 (3rd Dept. 1992), lv denied 81 N.Y.2d 706, 597 N.Y.S.2d 936 (1993); Matter of Laura W., supra, 160 A.D.2d 585.

Because the results of physical examinations are less likely to be affected by the philosophy or methodology of the examiner, and because, particularly in sexual abuse cases, such examinations may be extremely intrusive, the courts have been reluctant to order physical examinations under FCA §1038(c). See, e.g., Matter of Ameillia RR., 112 A.D.3d 1083 (3d Dept. 2013) (mother's request for physical examination of child properly denied where testing for host of possible medical conditions presumably would involve at least drawing blood and child may have been subjected to pain, application was speculative and conclusory, and mother failed to obtain child's medical records before making application); Matter of Erick R., 166 A.D.2d 161, 564 N.Y.S.2d 76 (1st Dept. 1990), lv denied 77 N.Y.2d 802, 567 N.Y.S.2d 643 (1991); Matter of Jessica R., 163 A.D.2d 543, 558 N.Y.S.2d 608 (2d Dept. 1990), rev'd on other grounds 78 N.Y.2d 1031, 576 N.Y.S.2d 77 (1991).

Other than a physical examination, any examination or interview of a subject child done for the purpose of offering expert testimony regarding sexual abuse may, in the court's discretion, be video-recorded in its entirety. The court may order the video-recording of interviews conducted for therapeutic purposes, not only those conducted for the purpose of evaluating the child's claim. See Matter of Michael J., 211 A.D.2d

155, 627 N.Y.S.2d 103 (3rd Dept. 1995). When deciding whether to authorize recording, "the court shall consider the effect of the [recording] on the reliability of the examination, the effect of the [recording] on the child and the needs of the parties, including the [child's lawyer], for the [recording]." Access to any recording must be provided to the court, the child's lawyer and the parties. FCA §1038(c). To facilitate access, the attorney for the party who requested recording, or the party if unrepresented, must secure a duplicate recording which has been certified as a complete and unaltered copy, and deposit the original with the Family Court Clerk. Upon request, the copy must be turned over to the attorney for a party, or to an unrepresented party, for a reasonable period of time for viewing. The recording may be viewed by the attorneys, the parties, or prospective expert witnesses. Uniform Rules For The Family Court, 22 NYCRR §205.86. Before a recording may be admitted into evidence, the person who examined the child, or the person who operated the camera, must submit a verified statement to the court confirming that the recording is a "complete and unaltered videographic record" of the examination, and the proponent must establish that the probative value of the recording substantially outweighs the potential prejudicial effect. FCA §1038(c).

A failure to comply with a recording order could give rise to court-ordered sanctions. Cf. In re Fatima M., 16 A.D.3d 263 (given failure to comply with videotaping directive, court had discretion to refuse to consider resulting opinion testimony offered to prove that child had been abused or to corroborate child's statements); Matter of Abraham P., 21 Misc.3d 1144(A), 875 N.Y.S.2d 818 (Fam. Ct., Kings Co., 2008) (where ACS failed to comply with order directing that child undergo videotaped evaluation by qualified child sex abuse evaluator, agency denied court and parties opportunity to thoroughly examine evidence).

### F. Discovery Under The Civil Practice Law And Rules

#### 1. Generally

Rules found in the Civil Practice Law and Rules are applicable when "appropriate to the proceedings involved." FCA §165(a). In the context of discovery, however, the CPLR is clearly brought into play: unless an Article Ten provision is in conflict, "the

provisions and limitations" of CPLR Article Thirty-One apply. FCA §1038(d). Thus, discovery devices such as party discovery notices and non-party subpoenas duces tecum (CPLR 3120), demands for expert witness discovery (§3101[d][1][i]), oral depositions (CPLR 3107), written depositions (CPLR 3108), interrogatories (CPLR 3130), requests for admission (CPLR 3123), demands for the address of a party (CPLR 3118), full disclosure of films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof (CPLR 3101[i]), and demands for a copy of a party's own statement (CPLR 3101[e]), are available. But see Matter of Commissioner of Social Services o/b/o R./S. Children, 170 Misc.2d 126, 647 N.Y.S.2d 361 (Fam. Ct., Kings Co., 1996) (since Article Ten proceedings are "special proceedings" governed by CPLR Article Four, CPLR 408 requires leave of court for disclosure under CPLR).
Regarding discovery of social media records, see Forman v. Henkin, 30 N.Y.3d 656 (2018) (Facebook discovery under CPLR 3101 does not turn on whether account holder has chosen to share on public portion of account, which would allow account holder to unilaterally obstruct disclosure by manipulating "privacy" settings or curating public materials); Spearin v. Linmar, L.P., et al., 129 A.D.3d 528 (1st Dept. 2015) (order directing plaintiff to provide authorization for access to Facebook account records from date of accident to present was overbroad; matter remanded for in camera review of post-accident Facebook postings for information relevant to plaintiff's alleged injuries).

The court must set a schedule for discovery to avoid unnecessary delay. Protective orders may be sought pursuant to CPLR §3103. When ruling on a motion for a protective order, the court must "consider the need of the party for the discovery to assist in the preparation of the case and any potential harm to the child from the discovery." FCA §1038(d); see Matter of David E., 176 Misc.2d 363, 672 N.Y.S.2d 659 (Fam. Ct., Orange Co., 1998) (court grants respondents protective order as to portions of Notice to Admit calling for admissions as to material issues or ultimate or conclusory facts, and denies protective order as to Demand for Interrogatories).

**2. Expert Witnesses**

Also, "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the

subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." CPLR §3101(d)(1)(i); see also 22 NYCRR §202.16(g)(2) (in matrimonial proceeding: “Each expert witness whom a party expects to call at the trial shall file with the court a written report, which shall be exchanged and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR 3101(d)(1)(i). In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case”).

Other CPLR Article 31 disclosure, such as an oral deposition, concerning the expected testimony of an expert may be obtained by court order upon a showing of special circumstances, subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. See Brooklyn Floor Maintenance Co. v. Providence Washington Ins. Co., 296 A.D.2d 520 (2d Dept. 2002) (disclosure may be justified where information cannot be obtained from other sources); Hallahan v. Ashland Chem. Co., 237 A.D.2d 697 (3d Dept. 1997) (special circumstances exist where, after being examined by one party’s expert, material physical evidence underlying a claim is lost or destroyed or otherwise becomes unavailable, or there is other unique factual situation). However, a party, without court order, may take the testimony (via oral deposition) of a person authorized to practice medicine, dentistry or podiatry who is the party's own treating or retained expert, in which event any other party shall be entitled to the full disclosure authorized by CPLR

Article 31 with respect to that expert without court order. CPLR §3101(d)(1)(iii).

It appears that lawyers' ethics rules do not prevent a lawyer from engaging in ex parte contacts with another party's expert, or a court-appointed expert for that matter. However, a judge may well disapprove of such contacts, particularly when other parties' lawyers are not advised of the substance of the contacts. See Matter of Kenneth C. v. Delonda R., 10 Misc.3d 1070(A), 814 N.Y.S.2d 562 (Fam. Ct., Kings Co., 2006); see also Matter of Olivia S., NYLJ 1202736340865, at *1 (Fam., RO, Decided August 17, 2015) (court denies agency's motion to preclude respondents from calling as witness doctor retained by agency; generally, party cannot compel other party's expert to testify, but that is not true when expert's opinion already has been communicated to parties, and, in this case, expert's opinion factored into agency's decision to seek removal of child and court could benefit from testimony in determining issues).

**3. Documents**

Documentary discovery of materials not available by way of a subpoena issued pursuant to FCA §1038(a) or a demand served pursuant to §1038(b), including records of a criminal proceeding, may be sought under CPLR §3120(1)(i) upon service of a demand upon a party or a subpoena duces tecum upon a non-party. See, e.g., Matter of B. Children, 23 Misc.3d 1119(A), 886 N.Y.S.2d 70 (Fam. Ct., Kings Co., 2009) (ACS could subpoena father's criminal records after he denied existence of certain convictions on cross-examination; CPLR §4513 has been interpreted to permit broad use of convictions of "crimes" to impeach); Matter of John H., 60 A.D.3d 1168, 876 N.Y.S.2d 169 (3rd Dept. 2009) (in permanency proceeding, Third Department sets different dollar amount but otherwise upholds order sanctioning agency for failing to comply with order directing agency to, inter alia, produce documents demanded by child's attorney); Matter of Brian S., 278 A.D.2d 421, 718 N.Y.S.2d 632 (2d Dept. 2000) (petitioner directed to disclose police materials); Matter of Brittini F., 193 A.D.2d 846, 597 N.Y.S.2d 528 (3rd Dept. 1993) (District Attorney failed to show that items in CPL §240.20 are not discoverable under CPLR); Matter of Ruth L., 126 Misc.2d 1053, 484 N.Y.S.2d 767 (Fam. Ct., Monroe Co., 1985) (out of "right sense of justice," court orders production of Grand Jury transcript containing witnesses' prior testimony for in camera

inspection); see also Matter of Jaiden J., 98 A.D.3d 668, 949 N.Y.S.2d 757 (2d Dept. 2012) (reversible error where child did not testify and his accounts were admitted via hearsay, and court refused to admit child's grand jury testimony from criminal proceeding; respondent had no other means of showing that child had given arguably inconsistent accounts); Michael P. v. Superior Court, 92 Cal.App.4th 1036 (Ct. App., 4th Dist., 2001) (given fundamental liberty interest in custody of daughter, father had right to have court conduct in camera review of law enforcement records); but see Matter of Dashawn Q., 112 A.D.3d 1250 (3d Dept. 2013) (Third Department discounts testimony of psychologist who reviewed sealed materials since "there is no meaningful way to gauge the impact of those materials upon the opinion he ultimately rendered"); People v. Metropolitan Police Conference of N.Y., 231 A.D.2d 445, 647 N.Y.S.2d 11 (1st Dept. 1996) (witness' prior statements not discoverable under CPLR); Matter of Carolina K., 55 Misc.3d 352 (Fam. Ct., Kings Co., 2016) (recording of 911 call inadmissible, covered by sealing statute); Matter of Samantha R., 55 Misc.3d 338 (Fam. Ct., Kings Co., 2016) (photographs from sealed criminal record inadmissible, but officer's review of sealed records did not prevent her from testifying where testimony established that she had independent memory of events; this was unusual case in which witness could go back in time and recreate memory after refreshing event); Matter of T.P., 51 Misc.3d 738 (Fam. Ct., Kings Co., 2016) (court strikes testimony of officer who, before testifying, reviewed records of dismissed criminal proceeding that were covered by sealing statute); Matter of M. Children, 154 Misc.2d 746, 585 N.Y.S.2d 1006 (Fam. Ct., Kings Co., 1992) (respondent's confidential pre-sentence report not obtainable); CPLR §3122(a)(2) (medical provider need not respond or object to subpoena for patient's medical records if subpoena is not accompanied by patient's written authorization, but court may issue subpoena or otherwise direct production of records without the authorization).

Under CPLR Rule 3122-a, business records produced pursuant to a Rule 3120 subpoena can be authenticated and will be admissible via presentation of a sworn certification, which satisfies the requirements in Rule 3122-a(a), executed by the custodian of the records or another qualified witness with responsibility for maintaining

the records. This is also true with respect to business records produced by non-parties, whether or not pursuant to a subpoena issued under Rule 3120, if the custodian or other qualified witness attests to the facts required by Rule 3122-a(a)(1), (2) and (4).

**4. Oral Depositions**

Generally, the courts have not been quick to endorse the use of oral depositions to obtain the statements of young children, since that particular discovery process can be extremely stressful and intrusive. Compare Matter of Crystal "AA", 271 A.D.2d 771, 706 N.Y.S.2d 208 (3rd Dept. 2000) (after noting that child's deposition is governed by CPLR §3101(a)(4) since the child is the subject and not a party in an Article Ten proceeding, court concludes that order was unjustified where there was no indication that family court properly found "special circumstances" or balanced need for deposition and potential harm to child); Matter of Commissioner of Social Services o/b/o R./S. Children, supra, 170 Misc.2d 126 (while holding that children, who are not parties, may be deposed only if there are "adequate special circumstances," court refuses to permit deposing of children, aged eleven and thirteen); Matter of Trisha M., 150 Misc.2d 290, 568 N.Y.S.2d 288 (Fam. Ct., Rockland Co., 1991) (court grants discovery by written interrogatories, but denies motion for oral deposition) and Matter of Maria F., 104 Misc.2d 319, 428 N.Y.S.2d 425 (Fam. Ct., Bronx Co., 1980) (court denied respondents' motion for an examination before trial of the twelve-year-old subject child) with Matter of Tricia K., 160 Misc.2d 935, 611 N.Y.S.2d 978 (Fam. Ct., Kings Co., 1994) (depositions of 15 and 16-year-old ordered) and Matter of Diane B., 96 Misc.2d 798, 409 N.Y.S.2d 648 (Fam. Ct., Monroe Co., 1978) (court orders EBT of three children between the ages of sixteen and eighteen).

It would seem that the taking of oral depositions from respondents, agency caseworkers, experts and other witnesses should be more liberally permitted. However, while upholding the denial of the respondent father's motion for pre-trial depositions of one of the child's therapists and the mother, the Fourth Department has noted that, absent special circumstances, such depositions are not appropriate in child protective proceedings. Matter of Vanessa R., 148 A.D.2d 989, 539 N.Y.S.2d 224 (4th Dept. 1989). See also Matter of John H., 60 A.D.3d 1168, 876 N.Y.S.2d 169 (3rd Dept. 2009)

(in permanency proceeding, Third Department modifies to set different dollar amount but otherwise upholds order sanctioning agency for failing to comply with previous order directing agency to, inter alia, produce caseworker for oral deposition upon demand by child's attorney); Matter of Eva B., 160 A.D.2d 457, 553 N.Y.S.2d 770 (1st Dept. 1990) (family court properly imposed conditions and limitations upon depositions of medical personnel); Matter of Merrick T., 11 Misc.3d 1090(A), 819 N.Y.S.2d 849 (Fam. Ct., Seneca Co., 2006) (although depositions are not commonly allowed, case law raises concerns about child, not respondent; petitioner could have demanded EBT). It should be noted that the decision in Vanessa R. predates the amendment to FCA §1038 which incorporated CPLR Article Thirty-One. When deciding whether to oppose the respondent's attempt to depose the child, the child's lawyer must consider the age of the child, the child's emotional condition, and the nature of the charges. And, in all cases, the lawyer should consider requesting that the examination be supervised by a judge or referee (see CPLR §3104), or, if the examination is noticed to take place at the office of the respondent's attorney, applying for a change of location. When seeking a protective order, the lawyer should obtain the affidavit of any expert who has concluded, or whose opinion tends to suggest, that the child would be at risk if forced to appear. If necessary, the lawyer should present the expert's live testimony at a hearing upon the motion for a protective order.

It should be noted that oral depositions in actions and proceedings in the Supreme Court and County Court may be videotaped. Uniform Civil Rules For The Supreme Court And The County Court, 22 NYCRR §202.15.

**5. Bill Of Particulars**

A CPLR discovery device which clearly lends itself to use in an Article Ten proceeding is the bill of particulars. See CPLR §3041. Although §3041 has not been incorporated by reference in Article Ten, a bill of particulars would be obtainable when it is "appropriate to the proceedings involved." See FCA §165(a).

However, given the child protective nature of the proceeding, preclusion and dismissal are not appropriate remedies for the petitioner's failure to provide a bill of particulars. See Matter of Lisa G., 146 Misc.2d 588, 551 N.Y.S.2d 730 (Fam. Ct.,

Nassau Co., 1990). Indeed, while preclusion is a not uncommon remedy for discovery violations in custody proceedings, such drastic remedies would rarely be appropriate as a sanction for any Article Ten discovery violation. Compare Matter of Mayes v. Laplatney, 125 A.D.3d 1488 (4th Dept. 2015) (error where court refused to allow maternal grandmother to testify as fact witness in custody proceeding because mother failed to include her on witness list fourteen days prior to trial as directed by court, but father was not prejudiced because he was informed five days prior to trial of mother's request to call witness and there was no indication that mother's failure was willful, contumacious or motivated by bad faith); Kumar v. Kumar, 63 A.D.3d 1246, 881 N.Y.S.2d 518 (3rd Dept. 2009) (in divorce proceeding, order precluding wife from offering evidence at trial due to discovery violations reversed; remedy of preclusion is reserved for instances where offending party's lack of cooperation was willful, deliberate, and contumacious) and Matter of the F. B. Children, 161 A.D.2d 459, 556 N.Y.S.2d 32 (1st Dept. 1990) (preclusion was inappropriate sanction for failure to provide witness lists and offers of proof) with Matter of Jesse E. v. Lucia F., 145 A.D.3d 1373 (3d Dept. 2016), lv denied 29 N.Y.3d 905 (no error where court precluded witnesses from testifying after mother failed to comply with order requiring her to provide witness list one week before trial date).

### G. Work Product And Materials Prepared For Litigation

#### 1. Materials Prepared By Attorney

"The work product of an attorney shall not be obtainable." CPLR §3101(c). The work product privilege is most commonly seen as protecting an attorney's mental impressions, opinions, strategies, and the like, and it also extends to facts and observations disclosed by attorney to an expert who is assisting in analyzing or preparing a case. See CPLR §3101(d)(2) (court may not direct "disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney"); Beach v. Touradji Capital Management, LP, et al., 99 A.D.3d 167, 949 N.Y.S.2d 666 (1st Dept. 2012).

The privilege may also protect notes made by an attorney regarding a witness interview and other types of factual investigation undertaken by the attorney. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947); Sandra T.E. v. South Berwyn School

District, 600 F.3d 612 (7th Cir. 2010) (work product doctrine designed to protect attorney's thought processes and mental impressions and limit circumstances in which attorneys may piggyback on fact-finding investigation of counterparts, and, although in limited situations work product is discoverable if party can establish substantial need and cannot obtain equivalent materials without undue hardship, disclosure of witness interviews and related documents is particularly discouraged); In re Grand Jury Subpoena dated October 22, 2001, 282 F.3d 156 (2d Cir. 2002); Lichtenberg v. Zinn, 243 A.D.2d 1045, 663 N.Y.S.2d 452 (3rd Dept. 1997) (attorney's "interviews" were protected work product); People v. Marin, 86 A.D.2d 40, 448 N.Y.S.2d 748 (2d Dept. 1982); US Bank National Association v. PHL Variable Insurance Company, 2013 WL 5495542 (SDNY 2013).

In addition, materials not covered by the work product privilege may be protected from disclosure by CPLR 3101(d)(2), which applies to materials "prepared in anticipation of litigation or for trial." The requesting party can compel discovery of such material by showing that he/she "has substantial need of the materials in the preparation of the case," and that he/she is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."

The work product doctrine does not protect from disclosure documents that were acquired by the attorney from third parties and were prepared in the ordinary course of business and would have been created in essentially similar form irrespective of any litigation. However, the doctrine may apply when disclosure of third-party documents is sought for the purpose of ascertaining opposing counsel's thinking or strategy. In re Grand Jury Subpoenas Dates March 19, 2002 and August 2, 2002, 318 F.3d 379 (2d Cir. 2003); Matter of Lisa W. v. Seine W., 9 Misc.3d 1125(A), 862 N.Y.S.2d 809 (Fam. Ct., Kings Co., 2005).

**2. Materials Prepared By Attorney's Agents**

The court may not direct "disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney *or other representative of a party* concerning the litigation" (emphasis added). CPLR §3101(d)(2). See Matter of Lenny McN., 183 A.D.2d 627, 584 N.Y.S.2d 17 (1st Dept. 1992) (rule protects social worker working with

child's lawyer); Matter of Lisa W. v. Seine W., supra, 9 Misc.3d 1125(A) (in custody proceeding, court quashes subpoena for records and reports of psychologist retained by father; court rejects argument by mother that an expert retained pursuant to the County Law automatically sacrifices statutory protections).

However, there are mixed signals regarding whether the traditional work product privilege protects the fact-based products of an investigation conducted by an attorney's agents. Compare United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160 (1975) ("attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself"); In re Grand Jury Subpoena dated October 22, 2001, 282 F.3d 156 (if attorney *or investigator* hired for the client undertakes factual investigation, there is no reason why work product objection would not properly lie if Government called attorney *or investigator* before grand jury to testify about facts discovered in investigation); Binke v. Goodyear Tire and Rubber Co., 55 A.D.2d 632, 390 N.Y.S.2d 163 (2d Dept. 1976) (report prepared by plaintiffs' expert was protected work product); People by Lefkowitz v. Volkswagon Of America, 41 A.D.2d 827, 342 N.Y.S.2d 749 (1st Dept. 1973) (names and addresses of persons who might have suffered injury were work product); Warren v. New York City Transit Authority, 34 A.D.2d 749, 310 N.Y.S.2d 277 (1st Dept. 1970) (witness interviews by claim examiner protected as attorney work product) and United States v. Stewart, 2003 WL 23024461 (S.D.N.Y. 2003) (e-mail forwarded by litigant to non-lawyer family member who had personal interest in litigation was protected work product) with Salzer v. Farm Family Life Insurance Co., 280 A.D.2d 844, 721 N.Y.S.2d 409 (3rd Dept. 2001) (witness statements, and other materials that could have been prepared by a layperson, not protected) and Lamitie v. Emerson Electric Company-White Rodgers Division, 208 A.D.2d 1081, 617 N.Y.S.2d 924 (3rd Dept. 1994) (investigation by plaintiffs' private investigator not covered by privilege).

Whatever the scope of the work product privilege may be, added protection is provided by CPLR 3101(d)(2), which applies not only to materials "prepared in anticipation of litigation or for trial" by an attorney, but also to materials prepared by any

"representative" of a party. See People v. Kozlowski, 11 N.Y.3d 223, 869 N.Y.S.2d 848 (2008) (attorney work-product is not obtainable, while trial preparation materials may be disclosed only upon showing that party seeking discovery has substantial need of materials in preparation of case and is unable without undue hardship to obtain substantial equivalent of materials by other means; disclosure properly denied where defendants failed to explain why defense could not have sought to conduct interviews of witnesses at earlier time, and previous disclosure of historical privileged documents to Grand Jury did not waive privilege); Matter of Lenny McN., 183 A.D.2d 627 (child's attorney's social worker covered by provision); J.R. Stevenson Corp. v. Dormitory Auth. of State of N.Y., 112 A.D.2d 113, 492 N.Y.S.2d 385 (1st Dept. 1985) (consultant's report was privileged as material prepared for litigation); Goldstein v. New York Daily News, 106 A.D.2d 323, 482 N.Y.S.2d 768 (1st Dept. 1984) (accident report was exempt from discovery). Although, in other civil cases, notes used by a witness for the purpose of refreshing recollection prior to testifying are discoverable at trial [Doxtator v. Swarthout, 38 A.D.2d 782, 328 N.Y.S.2d 150 (4th Dept. 1972)], and the aforementioned CPLR protections ordinarily are waived [Beach v. Touradji Capital Management, LP, et al., 99 A.D.3d 167, 949 N.Y.S.2d 666 (conditional privilege for material prepared for litigation waived when used to refresh witness's recollection prior to testimony, but privilege still protected portion of expert's reports that was attorney work product); Rouse v. Greene County, 115 A.D.2d 162, 495 N.Y.S.2d 496 (3rd Dept. 1985)], "the confidentiality and sensitivity of Family Court custodial litigation clearly call for stricter limitations." Matter of Lenny McN., 183 A.D.2d at 628; but see Matter of Daniel XX., 140 A.D.3d 1229 (3d Dept. 2016) (court erred in denying respondent opportunity to inspect notes child's therapist reviewed to refresh memory prior to testifying).

### H. Subpoena Practice

#### 1. Generally

FCA §165(a) makes CPLR provisions applicable "to the extent that they are appropriate to the proceedings involved." It is common practice for courts to apply CPLR rules governing subpoena practice in family court proceedings.

An ordinary "subpoena" (or subpoena ad testificandum) requires a person to appear in court to give testimony. A "subpoena duces tecum" requires the production of "books, papers and other things." CPLR §2301. If both testimony and the production of documents is sought, the subpoena should contain testimonial and duces tecum clauses, or two subpoenas should be served.

A subpoena directs a person to appear on a specified date for purposes of a trial, hearing or examination, and may require the person to attend on any adjourned date. A new subpoena need not be served to compel subsequent appearances as long as the person receives "reasonable notice" of the new date. CPLR §2305(a). For instance, the party who issued the subpoena could ask the judge to direct the witness to reappear. A subpoena duces tecum "should be sufficiently clear to inform the witness exactly what is being sought ...." People v. Doe, 39 A.D.2d 869, 333 N.Y.S.2d 876 (1st Dept. 1972). A person may comply with a subpoena duces tecum by having the materials delivered by a person who is "able to identify them and testify respecting their origin, purpose and custody." CPLR §2305(b). Because the CPLR makes it unnecessary to elicit foundation testimony for the admission of certain types of records, compliance with a subpoena duces tecum can be effected by mailing the requested materials. Any subpoena or subpoena duces tecum issued in connection with a court proceeding, whether by a judge, a court clerk or an attorney, is called a "judicial" subpoena. "Non-judicial" subpoenas are those issued in connection with administrative and other out-of-court proceedings. See Siegel, New York Practice, §385.

### 2. Power To Issue Subpoenas

#### a. Ordinary Subpoenas

A subpoena compelling the appearance of a person in court may be issued by, among others, a judge, the clerk of the court, or an attorney of record for a party. CPLR §2302(a). However, a subpoena for production of a person confined in a penitentiary or jail may only be issued by a judge. Unless the court orders otherwise, a motion must be made on at least one day's notice to the prisoner's custodian. CPLR §2302(b).

A family court judge also has broad power under FCA §153 to issue a subpoena for "an adult respondent or child or any other person whose testimony or presence at a

hearing or proceeding is deemed by the court to be necessary ...." The court may release the witness during the proceedings or "admit to, fix or accept bail ...."

**b. Subpoena Duces Tecum**

Ordinarily, a subpoena duces tecum for the records of "a department or bureau of a municipal corporation or of the state, or an officer thereof" must be issued by a judge. CPLR §2307. Unless the court orders otherwise, a motion for a "so-ordered" subpoena must be made on at least one day's notice to the governmental entity or agency which has custody of the record, and the adverse party. Except in the case of an emergency, the subpoena must be served at least twenty-four hours before the time fixed for production. CPLR §2307. Unless the judge orders otherwise, a "full-sized legible reproduction" of the records may be produced, and is admissible in evidence if accompanied by a certification or authentication by the head of the agency, or an authorized employee, which states that the reproduction is complete and accurate and sets forth the necessary business record foundation. CPLR §§ 2307, 4518(c). See People v. Mertz, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986). In an Article Ten proceeding, of course, FCA §1038(a) allows the attorney for any party or the child's lawyer to subpoena, without judicial authorization, the records of a "hospital and any other public or private agency having custody of any records, photographs or other evidence relating to abuse or neglect ...."

In addition, any records which do not fall within CPLR §2307 may be subpoenaed by an attorney without judicial authorization, except that a subpoena for a patient's clinical record maintained pursuant to Mental Hygiene Law §33.13 must be accompanied by a court order. CPLR §2302(a). However, if production of the original record is desired despite the fact that a photostatic copy would be admissible, the subpoena may, unless the court orders otherwise, be issued only upon a motion made on at least one day's notice to the record's custodian. CPLR §2302(b). See also Matter of Kapon v. Koch, 23 N.Y.3d 32 (2014) (subpoenaing party's notice obligation under CPLR §3101[a][4] is to sufficiently state "circumstances or reasons" underlying subpoena either on face of subpoena or in notice accompanying it; witness, in moving to quash, must establish either that discovery sought is "utterly irrelevant" to action or

that “futility of the process to uncover anything legitimate is inevitable or obvious,” and, should witness meet burden, subpoenaing party must establish that discovery sought is “material and necessary” - i.e., relevant - to prosecution or defense of action).

A trial subpoena duces tecum must state on its face that all papers or other items delivered to the court shall be accompanied by a copy of the subpoena. CPLR §2301.

### 3. Service Of Subpoenas

#### a. Ordinary Subpoenas

A subpoena ordinarily must be served in the same manner as a summons. CPLR §2303. Under CPLR §308(1) and (2), "personal service" may be made upon a "natural person" by delivering process directly to the person, or by delivering process to a person of suitable age and discretion at the home or place of business of the person to be served and mailing process to the person's last known residence or the person's place of business. If such service cannot be made with due diligence, "nail and mail" service may be made under §308(4). Personal service may also be made by mail pursuant to CPLR §312-a. And, if service under §308(1), (2) and (4) is impracticable, a court may direct that service be made in any manner. CPLR §308(5).

“Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with [Rule 2103(b)] to the party's attorney of record." CPLR §2303-a.

Service upon an "infant" witness under the age of eighteen must be made by personal service upon the parent if the child is under fourteen, or by personal service upon the parent and the child if the child is fourteen or older. CPLR §§ 309(a), 105(j).

Unless the witness is imprisoned, the CPLR does not prescribe any time limits for service of a subpoena ad testificandum. Obviously, if the party issuing the subpoena plans to ask for sanctions upon the witness' failure to appear, or for an adjournment, it would be wise to provide reasonable notice.

#### b. Subpoena Duces Tecum

Service of a subpoena duces tecum is also governed by CPLR §2303, and, therefore, by CPLR Article Three as well. Ordinarily, the subpoena should be addressed

to and served upon the person who has custody of the records.

Proper service upon the City of New York is made by delivering process to the corporation counsel or a designated agent. CPLR §311(a)(2). Section 311 does not mention government agencies, only corporations, cities, counties, towns and villages, and school, park, sewage and other districts. It appears that individual city agencies should ordinarily be viewed as distinct entities for purposes of service, and, therefore, should be served with subpoenas for their records. See Gold v. City of New York, 80 A.D.2d 138, 437 N.Y.S.2d 973 (1st Dept. 1981); Santiago v. Board of Education, 41 A.D.2d 616, 340 N.Y.S.2d 491 (1st Dept. 1973).

It is not entirely clear what should be done when the subpoena is for the records of a large entity which has both a central office, and many branches at which subpoenaed records will ordinarily be located. In Matter of Bott, 125 Misc.2d 1029, 481 N.Y.S.2d 266 (County Ct., Monroe Co., 1984), the court noted that, although Article Three of the CPLR does not clearly provide for service on government agencies, it does "set up a scheme where a summons will be served upon [an official or counsel at] a centralized office." 125 Misc.2d at 1031. Nevertheless, the court held that the State Police could be served by delivering a subpoena to the Superintendent or his counsel at Division headquarters, or to any responsible employee at a State Police facility. See also Siegel, New York Practice, supra, §383. While service of a summons upon a central office is appropriate when the government is being sued, such service is arguably less critical when records are being subpoenaed in other types of litigation. Thus, in the absence of law to the contrary, many judges might be willing to follow Matter of Bott, supra, 125 Misc.2d 1029 if faced with a motion to quash. Still, it appears that the safer and better course is to make service upon a central authority unless it is impracticable.

In some cases, there are specific rules governing service with which attorneys must be familiar. For instance, a school district may be served by delivering process to a "school officer," as that term is defined in Education Law §2(13). CPLR §311(a)(7). See Matter of Franz v. Board of Education of the Elwood Union Free School District, 112 A.D.2d 934, 492 N.Y.S.2d 452 (2d Dept. 1985), app denied 67 N.Y.2d 603, 499

N.Y.S.2d 1029 (1986) (courts require "strict compliance" with rules governing service on governmental subdivisions).

Service upon the Health and Hospitals Corporation, which is a public benefit corporation independent of the City of New York, must be made pursuant to CPLR §311(a)(1) ("to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service"). See Henderson v. City of New York, 143 A.D.2d 884, 533 N.Y.S.2d 547 (2d Dept. 1988). Service of a subpoena on a hospital pursuant to FCA §1038(a) may be made by certified mail, return receipt requested, to the hospital director.

A copy of any subpoena duces tecum shall be served, in the manner set forth in CPLR §2103, on each party who has appeared so that it is received promptly after service on the witness and before production of the documents. CPLR §2303(a). Similarly, when issuing a subpoena duces tecum against a non-party pursuant to CPLR §3120(1), a party must also serve a copy of the subpoena upon all other parties, and, within five days of compliance with the subpoena in whole or in part, must give each party notice that the items produced are available for inspection and copying and specify a time and place. CPLR §3120(3). See also CPLR 3122(a) (§3120 subpoena served on "[a] medical provider ... requesting the production of a patient's medical records ... need not [be complied with or objected to] if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient").

**4. Fees**

Any person subpoenaed to appear is entitled to $15 for each day of attendance. Although 23 cents per mile must also be paid as travel expenses, no such mileage fee exists when travel is "wholly within a city." CPLR §8001(a). The witness is entitled to the payment of fees in advance. CPLR §2303.

"Whenever the preparation of a transcript of records is required in order to comply with a subpoena, the person subpoenaed shall receive an additional fee of ten

cents per folio upon demand." CPLR §8001(c). In addition, under Public Health Law §18(2)(e), a health care provider generally "may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider," although "the reasonable charge for paper copies shall not exceed seventy-five cents per page. A qualified person shall not be denied access to patient information solely because of inability to pay." Under PHL §18(1)(g), a "Qualified person" includes, inter alia, "any properly identified subject; or a guardian appointed under article eighty-one of the mental hygiene law; or a parent of an infant; or a guardian of an infant appointed under article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record under paragraph (c) of subdivision two of this section ...." See also Hayes v. County of Nassau, 127 A.D.2d 742, 512 N.Y.S.2d 134 (2d Dept. 1987) (plaintiff must pay reproduction cost to hospital or do her own photocopying).

There is no provision in Article Ten relieving an indigent party of the obligation to pay fees or costs. However, under CPLR §1102(d), a person who has been permitted by the court to proceed as a poor person "shall not be liable for the payment of any costs or fees" unless he later recovers a sum of money in the proceeding out of which the court orders the payment of costs or fees. Also, a poor person may be furnished with a stenographic transcript without fee by order of the court in proceedings other than appeal, the fee therefor to be paid by the county, or the city of New York, or by the state, as the case may be. CPLR §1102(b). "Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization, all fees and costs relating to the filing and service shall be waived without the necessity of a motion … provided that a determination has been made by such society, organization or attorney that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that an attorney's certification that such determination has been made is filed with the clerk of the court…." CPLR §1101(e).

In addition, it certainly can be argued that, under FCA §165(a), it is not "appropriate" to require that indigent parents, let alone the subject child, pay witness fees. And, presumably, a litigant is not required to pay a fee to any witness who appears pursuant to a subpoena issued by a judge under FCA §153.

**5. Where And When Subpoena May Be Made Returnable**

Certain subpoenas are returnable outside of court, such as a subpoena compelling a witness' appearance at a deposition [see CPLR 3106(b)] or in conjunction with an administrative hearing [see CPLR 2302(a)]. However, when subpoenaed to testify in connection with an Article Ten proceeding, a witness may only be required to appear in court, see People v. Hamlin, 58 A.D.2d 631, 395 N.Y.S.2d 679 (2d Dept. 1977); People v. Arocho, 85 Misc.2d 116, 379 N.Y.S.2d 366 (Sup. Ct., N.Y. Co., 1976), to testify on a date on which the case has been scheduled.

In addition, it appears that a judicial subpoena duces tecum, whether issued by a court or by an attorney, is a mandate of the court and must be made returnable in a court. See FCA §1038(a) (court “shall establish procedures for the receipt and safeguarding of [subpoenaed] records”); cf. CPL §610.25(1) (court or grand jury has right to possess subpoenaed evidence); People v. Natal, 75 N.Y.2d 379, 553 N.Y.S.2d 650 (1990) (ADA improperly made subpoena returnable to himself); People v. Jackson, 103 A.D.2d 849, 478 N.Y.S.2d 367 (2d Dept. 1984) (defense counsel, to whom school officials gave records, should have turned records over to court).

There is nothing in the CPLR which precludes the issuance of a subpoena duces tecum which is returnable prior to the adjourned date of the proceeding. Cf. CPL §610.25(2) ("Nothing in this article shall be deemed to prohibit the designation of a return date for a subpoena duces tecum prior to trial").

**6. Disobedience Of Subpoena**

Failure to comply with a judicial subpoena is punishable as a contempt of court. In addition, the court may issue a warrant for the arrest of a witness who has failed to appear, and, if the witness refuses to testify or produce subpoenaed materials, the court may imprison the witness until he or she complies or is released pursuant to law. A disobedient witness is also liable to the party on whose behalf the subpoena was

issued for a penalty of up to one hundred fifty dollars and damages caused by the witness' failure to comply. CPLR §2308.

### 7. Motion To Quash

"A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable." CPLR §2304. A motion to quash is the sole means of challenging a subpoena. Matter of Brunswick Hospital, Inc. v. Hynes, 52 N.Y.2d 333, 438 N.Y.S.2d 253 (1981).

The movant must have standing to challenge the subpoena. For instance, when a subpoena seeks records which may contain information protected by a confidential privilege, the custodian of the records and the alleged privilege holder have standing. See 38-14 Realty Corp. v. New York City Dept. of Consumer Affairs, 103 A.D.2d 804, 477 N.Y.S.2d 999 (2d Dept. 1984); People v. Owens, 188 Misc.2d 200, 727 N.Y.S.2d 266 (Sup. Ct., Monroe Co., 2001) (subpoena may be challenged by person to whom it is directed or whose property rights or privileges may be violated). However, when subpoenaed to give oral testimony, the witness must appear and testify, and may raise a confidential privilege only in response to specific questions. See, e.g., People v. Gonzalez, 120 Misc.2d 62, 465 N.Y.S.2d 471 (Sup. Ct., Kings Co., 1983).

## X. Motion Practice

Article Ten contains no procedures governing motion practice. However, some guidelines appear in the Family Court Rule (22 NYCRR §205.11), and, since the applicable CPLR provisions are "appropriate" for use in child protective cases, FCA §165(a) incorporates the rules and procedures in CPLR Article Twenty-Two.

The assigned judge may determine that any or all motions shall be orally argued, and may direct that moving and responding papers be filed with the court prior to the time of argument. 22 NYCRR §205.11(c). Unless oral argument has been requested by a party and permitted by the court, or directed by the court, motion papers received by the clerk of the court on or before the return date shall be deemed submitted as of the return date. A party requesting oral argument shall set forth such request in its notice of motion or on the first page of the answering papers, as the case may be. A party requesting oral argument on a motion brought on by an order to show cause shall do so as soon as practicable before the time the motion is to be heard. NYCRR §205.11(d). Hearings on motions shall be held when required by statute or ordered by the assigned judge in the judge's discretion. NYCRR §205.11(e).

The court may direct that the motion be made returnable at a particular hour. 22 NYCRR §205.11(a). Otherwise, a notice of motion and supporting affidavits must be served at least eight days before the return date, and answering affidavits must be served at least two days before the return date. If notice of at least twelve days is provided, answering affidavits must be served at least seven days before the return date if the notice of motion so demands, and any reply affidavits must be served at least one day prior to the return date. CPLR 2214(b); see also 22 NYCRR §205.11(b) (unless otherwise directed by court, answering and reply affidavits and other required papers must be filed no later than time of argument or submission of motion). Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law. 22 NYCRR §205.11(b). If the motion is served by mail, five days must be added to each of the time periods described above. CPLR 2103(b)(2). Simon v. Usher, 17 N.Y.3d 625 (2011) (five-day extension not limited to response papers and applied to

fifteen-day time period prescribed for motions for change of venue).

A motion is "mailed" when it has been enclosed in a first class postpaid wrapper and deposited in a post office or official depository of the United States Postal Service within the state. CPLR 2103(f)(1).

If more timely relief is sought, the court may grant an order to show cause, which specifies the time and manner of service. When the order to show cause is directed at a state body or officer, that body or officer <u>and the attorney-general</u> must be served. CPLR 2214(d). The Practice Commentary to §2214 notes that "[u]nlike an ordinary notice of motion, which can sometimes proceed without any affidavit in support, *see* Practice Commentary C2214:22 ("Papers Used on Motion"), above, an order to show cause should always have at least one affidavit to support it. The affidavit is often necessary to establish to the court's satisfaction the elements that justify invoking the order to show cause procedure. *See* Practice Commentary C2214:25 ("What Is a 'Proper Case'?"), above. Moreover, an affidavit is indispensable because, since the first step of the order to show cause procedure is ex parte, the applicant must submit an affidavit stating whether such an application was ever made before, and its result. *See* CPLR 2217(b); Practice Commentary CPLR 2217, C2217:5 ("Indispensable Affidavit on Ex-Parte Motion")."

Service on a party may be made through the party's attorney by delivering the papers to the attorney personally; mailing the papers to the address designated by the attorney (in which case five days must be added to any legally prescribed period of time measured from service); leaving the papers with a person in charge or in a conspicuous place in the attorney's office if it is open; depositing the papers, enclosed in a sealed wrapper directed to the attorney, in the letter drop or box if the office is closed; faxing the papers if a number has been designated by the attorney; sending the papers by overnight delivery service to the address designated by the attorney for that purpose, or, if no designated address exists, to the attorney's last known address (in which case one day must be added to any legally prescribed period of time measured from service); or, if service at the attorney's office cannot be made, leaving the papers with a

person of suitable age and discretion at the attorney's residence within the state. CPLR 2103(b). Service on an unrepresented party, or a party whose attorney cannot be served, may be made by any of the above-described methods, except, of course, leaving the papers at an attorney's office. CPLR 2103(c); see Matter of Ramirez v. Palacios, 136 A.D.3d 666 (2d Dept. 2016) (mother appropriately served motion by mail at father's last known address). Ordinarily, each motion served on any party should be served on every other party who has appeared. CPLR 2103(e).

Since Article Ten contains no provisions governing the time within which motions can be brought, and the CPLR rules are framed in language that does not clearly cover the types of motions that are common in child protective cases, the timeliness of a motion in an Article Ten case is largely a matter of judicial discretion. See CPLR §2004 ("Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just, and upon good cause shown, whether the application for such extension is made before or after the expiration of the time period"); Judith S. v. Howard S., 46 A.D.3d 318, 847 N.Y.S.2d 529 (1st Dept. 2007) (§2004 applies to procedural time limitations but not substantive time limitations that are prescribed by other statutes).

## XI. Dispositions Prior To Fact-Finding Hearing

Discussed in the sections which follow are the ways in which cases can be settled prior to a fact-finding hearing. Given the relatively liberal rules of evidence and standard of proof, many respondents ultimately do agree to a negotiated fact-finding order, and seek instead to "win" the case at the dispositional stage by securing a release of the child, or some other desired disposition. However, it is important to remember that the court's obligation to protect the child's best interests may prevent the court from making the type of promise to a respondent that a criminal court judge might make to a plea-bargaining defendant, and the ethical obligations of the other lawyers may preclude them from consenting to a particular disposition.

### A. Admission Or Consent To Finding By Respondent

#### 1. Court Inquiry, Or "Allocution"

The court may enter an order finding abuse or neglect "if all parties and the [child's lawyer] consent ...." FCA §1051(a). There is no mention in §1051(a) of admissions, but, because it is unlikely that the Legislature intended that a respondent may make an admission to neglect in an abuse proceeding without the petitioner's consent, it appears that the requirement in §1051(a) that all parties and the child's lawyer consent ordinarily should carry over to admissions. See Matter of Valerie Leonice T., 107 A.D.2d 327, 487 N.Y.S.2d 10 (1st Dept. 1985) (family court accepted admission over objection of petitioner and child's lawyer; appellate division finds abuse of discretion); see also Matter of Figueroa v. Lopez, 48 A.D.3d 906, 851 N.Y.S.2d 689 (3rd Dept. 2008) (in custody proceeding, court erred when, in response to refusal of child's lawyer to consent to stipulation because of concerns about possible domestic violence by father, court refused to allow lawyer to explain and stated that it did not care; having appointed lawyer, court could not relegate lawyer to meaningless role). The court cannot make a finding upon an admission, or upon consent, without first ensuring through an inquiry, or "allocution," that the respondent is voluntarily and intelligently waiving his or her right to a hearing. See, e.g., Matter of Joseph E.K., 118 A.D.3d 1324 (4th Dept. 2014) (admission not involuntary where respondent stated that she would do or say anything to get child back, but, before accepting admission, court

made clear that it did not want her to admit to something that was not true); Matter of Jennifer O., 281 A.D.2d 937, 722 N.Y.S.2d 206 (4th Dept. 2001) (motion to vacate was properly denied where respondent alleged that he had been emotionally upset and did not understand court's questions during colloquy, and was forced to make decisions too quickly during settlement discussions); Matter of Andresha G., 251 A.D.2d 1005, 674 N.Y.S.2d 226 (4th Dept. 1998) (no evidence that respondent consented to neglect finding under duress, and, in any event, her remedy was to move in family court to vacate the order); Matter of William D., 178 A.D.2d 475, 577 N.Y.S.2d 135 (2d Dept. 1991), appeal dism'd 79 N.Y.2d 1040, 584 N.Y.S.2d 448 (1992) (although respondent did not make admission because she "wanted to," she said she had not been coerced or promised anything). Under FCA §1051(f), the court is required to conduct a detailed inquiry:

> Prior to accepting an admission to an allegation or permitting a respondent to consent to a finding of neglect or abuse, the court shall inform the respondent that such an admission or consent will result in the court making a fact-finding order of neglect or abuse, as the case may be, and shall further inform the respondent of the potential consequences of such order, including but not limited to the following:
>
> (i) that the court will have the power to make an order of disposition, which may include an order placing the subject child or children in foster care until completion of the initial permanency hearing scheduled pursuant to [FCA §1089] and subject to successive extensions of placement at any subsequent permanency hearings;
>
> (ii) that the placement of the children in foster care may, if the parent fails to maintain contact with or plan for the future of the child, lead to proceedings for the termination of parental rights and to the possibility of adoption of the child [and that] if the child remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate parental rights;
>
> (iii) that the report made to the state central register of child abuse and maltreatment upon which the petition is based will remain on file until ten years after the eighteenth birthday of the youngest child named in such report, that the respondent will be unable to obtain expungement of such report, and that the existence of such report may be made known to employers seeking to screen

> employee applicants in the field of child care, and to child care agencies if the respondent applies to become a foster parent or adoptive parent.
>
> Any finding upon such an admission or consent made without such notice being given by the court shall be vacated upon motion of any party. In no event shall a person other than the respondent, either in person or in writing, make an admission or consent to a finding of neglect or abuse.

The provisions of §1051(f) do not apply in termination of parental proceedings. Matter of Atiba Andrew B., 275 A.D.2d 320, 712 N.Y.S.2d 560 (2d Dept. 2000).

A respondent's claim that the allocution was inadequate must be raised in the first instance in family court. Matter of Alexus M., 91 A.D.3d 648 (2d Dept. 2012) (mother could not raise claim that consent to finding was not properly obtained where she did not request that relief in family court); Matter of Julia R., 52 A.D.2d 1310, 860 N.Y.S.2d 362 (4th Dept. 2008) (since mother did not move to withdraw consent, she was precluded from challenging court's acceptance of consent on ground that court failed to give required warnings); Matter of Cheyenne QQ., 37 A.D.3d 977, 830 N.Y.S.2d 600 (3rd Dept. 2007) (challenge rejected on appeal; respondent should have made motion to vacate); In re Carmella J., 254 A.D.2d 70, 678 N.Y.S.2d 329 (1st Dept. 1998) (proper means of raising claim that statutorily prescribed procedure was not followed is motion in family court).

When the respondent is making an admission, the court usually asks the respondent to describe what he or she did or failed to do, or the respondent merely admits the truth of certain allegations in the petition as recited by the judge. In contrast, a respondent may "consent" to a finding that he or she committed certain acts alleged in the petition without admitting the truth of the allegations. Matter of June MM., 62 A.D.3d 1216, 879 N.Y.S.2d 633 (3rd Dept. 2009), lv denied 13 N.Y.3d 704 (no error where father consented to finding without making specific admissions). However, FCA §1051(a) requires that the court "state the grounds for the finding," and so the court must be satisfied that the allegations underlying the "consent" finding, or, for that matter, allegations which the respondent admits are true, would, if true, constitute abuse or neglect. See Matter of Leo UU., 288 A.D.2d 711, 732 N.Y.S.2d 480 (3rd Dept.

2001). While alluding to the procedural safeguards surrounding consent findings, one court has held that such a finding may provide the basis for a subsequent “derivative” neglect finding with respect to another child. Matter of Bobbie Jo M. v. Joseph M., 177 Misc.2d 521, 676 N.Y.S.2d 824 (Fam. Ct., Suffolk Co., 1998) (summary judgment ordered); see also Matter of Jeremiah I. W., 115 A.D.3d 967 (2d Dept. 2014) (summary judgment upheld where father consented to finding that he neglected two other children by perpetrating acts of domestic violence against the mother in presence of children and also pleaded guilty to attempted assault while admitting that he attempted to assault mother with intent to cause physical injury); but see Matter of Christopher H., 54 A.D.3d 373, 863 N.Y.S.2d 67 (2d Dept. 2008) (where father entered into “Alford” plea by consenting, without admission, to order finding that he sexually abused one daughter and derivatively neglected other daughter, father was entitled to hearing on visitation application where he alleged, inter alia, that therapist arranged for polygraph examination, examiner’s opinion was that father’s denials were truthful, and expert concluded that father was thus not appropriate candidate for sex offender treatment).

**2. Plea Bargaining**

Not surprisingly, an Article Ten version of "plea bargaining" has developed. For instance, a respondent faced with the petitioner’s motion for an order terminating the reasonable efforts requirement may want to offer an admission in exchange for the agency’s agreement to withdraw the motion. Similarly, the agency can attempt to use the threat of proceeding upon such a motion as leverage in order to obtain an admission.

In addition, the potentially dire consequences of a clear and convincing evidence finding of abuse allow the petitioner to use its declaration of intent to seek such a finding to coax from the parent an admission or consent to a finding when the evidence is weak. Conversely, when the evidence is strong, the parent has an incentive to offer an admission, or consent to a finding, in order to avoid a finding by clear and convincing evidence. Of course, since the court, upon an express admission of guilt, would be entitled to determine that the finding is based on clear and convincing evidence, a parent who is admitting to abuse will have to secure from the court a promise that it will

not make a clear and convincing evidence finding. In contrast, it does not appear that the court could make a clear and convincing evidence finding when the respondent merely consents to a finding without conceding guilt.

Aside from the potential termination of parental rights-related consequences, in an abuse case the respondent may simply wish to avoid the stigma of an abuse finding by admitting the commission of less serious acts of neglect. See Matter of James HH., 234 A.D.2d 783, 652 N.Y.S.2d 633 (3rd Dept. 1996), lv denied 89 N.Y.2d 812, 657 N.Y.S.2d 405 (1997) (no ineffective assistance of counsel where respondent admitted to failure to supervise one of the children; counsel's strategy may have been to avoid focusing on more serious allegations involving another child and thereby obtain leniency); see also Matter of Joey J., 140 A.D.3d 1687 (4th Dept. 2016) (no ineffective assistance in termination proceeding where attorney advised mother to admit allegations). And, when there is a concurrent criminal proceeding pending, the respondent may want to make an admission to allegations unrelated to the criminal charges, and thereby avoid a hearing in family court at which the respondent might give testimony that could be used as impeachment at a criminal trial.

The respondent may also wish to secure a promise concerning the disposition of the case. However, given the child protective nature of the proceeding, such a promise should be given only when the parties are reasonably certain that the promised result will be in the child's best interest. Cf. Matter of Caroline C., 164 Misc.2d 787, 626 N.Y.S.2d 355 (Fam. Ct., Kings Co., 1995) (court enforces stipulated settlement over petitioner's objection); Matter of David L., 119 Misc.2d 477, 463 N.Y.S.2d 377 (Fam. Ct., Queens Co., 1983) (admissions vacated where dispositional plan conflicted with pre-admission "understanding" among counsel). It should be noted that a criminal court has no power to bind the Family Court by making promises concerning an Article Ten proceeding when accepting a plea. See Matter of Rosie B., 154 A.D.2d 900, 546 N.Y.S.2d 56 (4th Dept. 1989), lv denied 75 N.Y.2d 702, 551 N.Y.S.2d 906; see also In re Joshua S., 973 N.E.2d 1046 (Ill. App. Ct., 2d Dist., 2012), appeal den'd 979 N.E.2d 878 (provision of plea agreement, under which State agreed not to seek to terminate mother's parental rights based on events that led to plea, was against public policy

and thus unenforceable). Of course, a respondent faced with an unwinnable case might offer an admission in the hope that the court will give the respondent the benefit of the doubt at disposition. However, given the court's duty to reach a result that poses no undue risk to the child, it is unlikely that a court would substantially change its dispositional order merely to reward the respondent for making an admission.

From the point of view of the petitioner and the child's lawyer, there are problems associated with a "consent" finding or a plea-bargained admission to a lesser charge. First of all, a proposed bargain may involve the loss of an opportunity to obtain a clear and convincing evidence finding of severe or repeated abuse for purposes of a future termination of parental rights proceeding. In addition, the respondent will later be free to deny guilt with respect to the more serious misconduct alleged. Although many judges treat a negotiated finding as a legal device, and, at disposition, will consider evidence concerning the more serious charges that were dismissed, other judges may choose to view those charges as "out of the case." For instance, it may be difficult to convince such a judge to order that a respondent receive rehabilitative sexual offender services if there is no sexual abuse finding. But see Matter of Charlene TT., 217 A.D.2d 274, 634 N.Y.S.2d 807 (3rd Dept. 1995) (no abuse of discretion where Family Court required father to follow recommendations of sex offender program despite dismissal of sex abuse charges); see also State v. Herndon, 742 S.E.2d 375 (S.C. 2013) (defendant subject to sanctions for failure to comply with probation condition requiring him to accept responsibility for crime); Matter of Silmon v. Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2000) (Parole Board could consider inmate's refusal to accept responsibility even though he had entered Alford plea). Thus, when deciding whether to agree to a plea bargain, the petitioner and the child's lawyer must consider, among other factors, the respondent's culpability, the seriousness of the harm caused to the child, the availability of proof, the desirability of avoiding a hearing at which a vulnerable child might have to testify, the impact a negotiated finding might have on the chances for an appropriate dispositional order, and the likelihood and desirability of obtaining a clear and convincing evidence finding.

### B. Adjournment In Contemplation Of Dismissal

Prior to or upon a fact-finding hearing, the court may order that the proceeding be "adjourned in contemplation of dismissal" for a period not to exceed one year "with a view to ultimate dismissal of the petition in furtherance of justice." FCA §1039(a),(b). The order may be issued upon the court's own motion with the consent of the petitioner, the respondent and the child's lawyer, or upon the petitioner's motion with the consent of the respondent and the child's lawyer. FCA §1039(a). An objection by any of the three necessary parties, including the child's lawyer, precludes the granting of an order. See Matter of Sheila "PP", 209 A.D.2d 859, 620 N.Y.S.2d 1016 (3rd Dept. 1994); Matter of Regina X., 132 A.D.2d 666, 518 N.Y.S.2d 157 (2d Dept. 1987); Matter of Gary B., 101 A.D.2d 1026, 476 N.Y.S.2d 695 (4th Dept. 1984). The court cannot order a party to consent. And, before issuing the order, the court must apprise the respondent of the provisions of §1039 and satisfy itself that the respondent understands them. FCA §1039(a).

The adjournment in contemplation of dismissal (or "ACD") may be extended upon the consent of all parties and the child's lawyer "for such time and upon such conditions as may be agreeable to the parties." FCA §1039(b). See Matter of Figueroa v. Lopez, 48 A.D.3d 906, 851 N.Y.S.2d 689 (3rd Dept. 2008) (in custody proceeding, court erred when, in response to child's lawyer's refusal to consent to stipulation because of concerns about possible domestic violence by father, court refused to allow lawyer to explain and stated that it did not care; having appointed lawyer, court could not relegate lawyer to meaningless role); Matter of Marquita W., 30 Misc.3d 1225(A) (Fam. Ct., Kings Co., 2011) (since §1039(b) does not explain how to file for extension and contains no provisions regarding tolling, court had no authority to temporarily extend ACD period pending further proceedings absent consent of all counsel). The order may include any terms and conditions agreed to by the parties and the court, and must include a condition that the child and the respondent be under the supervision of a child protective agency during the adjournment period. FCA §1039(c); see also Matter of Makynli N., 17 Misc.3d 1127(a), 851 N.Y.S.2d 70 (Fam. Ct., Monroe Co., 2007) (child may be placed under ACD order only if there is "imminent risk" to child's life or health). If the agency fails substantially to provide the respondent with adequate supervision or

comply with any other conditions, the court may, upon its own motion or an application made by the respondent, the petitioner, or the child's lawyer, direct the agency to provide adequate supervision and to observe other specified terms and conditions, or make any order authorized by FCA §255. FCA §1039(d).

The adjournment of a case in contemplation of dismissal does not constitute a decision on the merits and thus the underlying allegations may be proven in another court proceeding. See Matter of Delilah D., 155 A.D.3d 723 (2d Dept. 2017) (derivative finding could not be based on ACD, which left issue of neglect unresolved); Matter of Selliah v. Penamente, 107 A.D.3d 1004 (2d Dept. 2013) (court in custody proceeding could consider underlying allegations).

Upon its own motion, or an application by the petitioner or the child's lawyer, the court may restore the case to the calendar at any time during the duration of the order if it finds upon a hearing that the respondent has "failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency." FCA §1039(e). See Matter of James S., 90 A.D.3d 1099 (3d Dept. 2011) (compliance with certain ACD provisions no defense where violations showed unpredictable, irrational and unstable behavior); Matter of Madani T., 54 Misc.3d 1215(A) (Fam. Ct., Bronx Co., 2017) (Order to Show Cause granting interim relief by temporarily extending supervision beyond expiration date tolled running of ACD period); Matter of Jonathan W., 256 A.D.2d 1174, 682 N.Y.S.2d 500 (4th Dept. 1998) (after finding violation, court had no authority to deny reinstatement on ground that aid of court was not required); Matter of Gabriel M., 128 Misc.2d 313, 488 N.Y.S.2d 1007 (Fam. Ct., Kings Co., 1985) (it would be a "manifest absurdity" to require hearing in order to restore case to calendar). Evidence at a violation hearing does not have to be competent, FCA §1046(c), but must establish a prima facie case. See Matter of Jonathan W., supra, 256 A.D.2d 1174 (caseworker testimony that school officials informed her they had been told by storeowner that children were in store when they should have been in school adequately corroborated children's statements). While an application to restore the case is pending, the court may remand the child pursuant to FCA §1027. FCA §1039(g).

If a violation is found and the case is restored to the calendar, a fact-finding hearing must be held unless a consent finding is entered pursuant to FCA §1051(a) or the petition is dismissed with the petitioner's consent. Unless an extension of time is granted upon good cause shown, the fact-finding hearing must commence no later than sixty days after the application for restoration. FCA §1039(e). If the proceeding is not restored, it is deemed to have been dismissed in furtherance of justice at the end of the adjournment period. However, the case will remain active beyond the adjournment period if an application for restoration is pending. FCA §1039(f). See Matter of Jonathan W., supra, 256 A.D.2d 1174.

So that problems with the order do not go unnoticed, the agency must be directed to make a progress report to the court, the parties and the child's lawyer on the implementation of the order no later than ninety days after the order is issued, and provide any further reports the court may require. The ninety-day report may be excused by the court if the facts and circumstances make the report unnecessary. FCA §1039(c). In addition, while the initial order, or any extension thereof, remains in effect, the agency must notify the child's lawyer if there are any "indicated" state central register reports in which the respondent is either a "subject" or another person "named in the report" as those terms are defined in SSL §412. FCA §1039-a. See also SSL §422(4)(A)(t) (permits disclosure of central register report to child's lawyer). Upon receipt of such a report, the child's lawyer must determine whether there is reasonable cause to suspect the child is at risk of further abuse or neglect or that there has been a substantive violation of the order, and, if such reasonable cause exists, must apply for appropriate relief pursuant to FCA §1061. FCA §1075. Arguably, "appropriate relief" would not include a request made in violation of attorney-client confidentiality rules. Under §1061, the court on its own motion, or on motion of one of the parties or the child's lawyer, may stay, set aside, modify or vacate an order.

Finally, the agency must report to the court and the child's lawyer no later than sixty days prior to the expiration date of an order issued under FCA §1039 concerning the status and location of the child and family, and any actions taken or contemplated by the agency with respect to the child and family. When the court deems it appropriate,

the court may then request additional information and make further orders. A report is not required when alleged violations are before the court. FCA §1058.

Generally, a pre-fact-finding §1039 order is a desirable result for the respondent, who avoids a finding and is usually permitted to retain custody of the child. However, although the adjournment in contemplation of dismissal will sometimes be an appropriate resolution of the charges, it poses certain risks for the petitioner and the child's lawyer. First of all, if a violation occurs and the prosecution of the original charges is renewed, the case may be more difficult to prove due to the loss or deterioration of physical evidence, or the unavailability or memory loss of witnesses. This risk is particularly acute in sexual abuse cases, in which in-court and out-of-court admissions are rarely made by the alleged abuser, and children may, after residing in the home during the period of the order, recant the original allegations or be unwilling to testify and disrupt the family again at a time long after the abuse occurred. In addition, the order is usually issued in the absence of a mental health evaluation of the alleged abuser or the child, or any other informed guidance concerning the needs of the parties. Again, there are special risks in sexual abuse cases, which often involve mental health problems which defy easy solution. Also, an overburdened child protective agency may not pay strict attention to orders directing it to supervise in a case deemed not to be serious enough to require an adjudication. Given all of these concerns, the use of pre-fact-finding §1039 orders in Article Ten proceedings has been reserved for cases in which the charges are not particularly serious, and it appears that minimal court intervention is required to ensure that the children will be protected.

### C. Dismissal Prior To Hearing

There appears to be no appellate case law specifically holding that a motion to dismiss for failure to state a cause of action [CPLR §3211(a)(7)] is an appropriate mechanism by which the respondent or child may obtain dismissal of an Article Ten petition. While appellate courts may sometimes be reluctant to allow a petition to be dismissed in this manner without exploration of the facts [see, e.g., Matter of Commissioner of Social Services o/b/o Clara DeJ., 186 A.D.2d 33, 587 N.Y.S.2d 336 (1st Dept. 1992)], they have ruled on such motions without suggesting that they are

barred. Matter of Amanda K., 13 A.D.3d 193, 786 N.Y.S.2d 171 (3rd Dept. 2004); Matter of Stefanel Tyesha C., 157 A.D.2d 322, 556 N.Y.S.2d 280 (1st Dept. 1990); see also Matter of Julianne XX., 13 A.D.3d 1031, 786 N.Y.S.2d 835 (3rd Dept. 2004) (Third Department notes that family court converted dismissal motion to one for summary judgment).

What is clear is that if the proceeding is not disposed of by motion, the court may not refuse to hold a full fact-finding hearing and dismiss abuse or neglect charges when the petitioner is ready and willing to proceed. Matter of Rhonda T., 99 A.D.2d 758, 471 N.Y.S.2d 676 (2d Dept. 1984). In addition, since the safety and welfare of children are involved, a petition should not be dismissed merely because the petitioner is unable to proceed due to the failure of lawyers or witnesses to appear on time or because of delays in the receipt of subpoenaed records. See Matter of Latanya C., 37 A.D.3d 716, 830 N.Y.S.2d 746 (2d Dept. 2007) (family court erred in dismissing sexual abuse charges without completing fact-finding hearing, and in concluding that child was not credible before she finished testifying); In re Ismael M., 2 A.D.3d 312, 770 N.Y.S.2d 31 (1st Dept. 2003) (dismissal improper where petitioner made reasonable and first request for adjournment to secure material witness, and there was prior testimony by detective regarding acts of neglect); In re Jasmine S., 1 A.D.3d 257, 768 N.Y.S.2d 194 (1st Dept. 2003) (dismissal improper where petitioner's counsel was ill and counsel's colleague indicated she was not prepared to proceed); Matter of Melissa B., 225 A.D.2d 452, 639 N.Y.S.2d 348 (1st Dept. 1996) (dismissal was error where petitioner's attorney appeared at 10:30 a.m., but arrived late after case was called again at 10:50); Matter of the L. Children, 183 A.D.2d 624, 585 N.Y.S.2d 4 (1st Dept. 1992) (dismissal was error where caseworker failed to appear during vacation); Matter of Commissioner of Social Services o/b/o Forrest G., 180 A.D.2d 550, 580 N.Y.S.2d 277 (1st Dept. 1992) (no dismissal where caseworker was ill on date marked "final"); In re Shevon C., 163 A.D.2d 14, 558 N.Y.S.2d 10 (1st Dept. 1990) (court notes potential consequences of dismissals); Matter of Kristina GG., 116 A.D.2d 857, 498 N.Y.S.2d 179 (3rd Dept. 1986) (petition alleging violation of adjournment in contemplation of dismissal improperly dismissed when petitioner's attorney arrived twelve minutes late); Matter of Tanya G.,

79 A.D.2d 881, 434 N.Y.S.2d 536 (4th Dept. 1980); but see Matter of Justin D., 143 A.D.2d 346, 532 N.Y.S.2d 296 (2d Dept. 1988) (family court did not err in denying adjournment for appearance of officer where he had been unavailable on prior date and court had marked matter final against petitioner, no reasonable explanation was provided as to why none of the other officers involved could appear, and there was no prejudice since the police report was admitted).

Of course, a fact-finding hearing will not take place if the petitioner withdraws the petition. The court could consider ordering pursuant to FCA §255 that the petitioner proceed, but there is substantial controversy with respect to whether a court has the power to do so, or to order the petitioner to file in the first instance. In Matter of Tiffany A., 183 Misc.2d 391, 703 N.Y.S.2d 381 (Fam. Ct., Queens Co., 2000), the court denied the child's lawyer's motion for an order directing the agency to file a de novo neglect petition after the agency had allowed the foster care placement to lapse. The court concluded that the agency was not a "person" within the meaning of FCA §1032(b), that the court had no power to determine the outcome of the agency's investigation, that FCA §255 does not permit the court to substitute its own conclusions when official conduct and decision-making involves the exercise of judgment and discretion, and that, under separation of powers principles, the court cannot lay out specific action within an area of executive power. See also Matter of Anne P.C. v. Steven P., 17 Misc.3d 1107(A), 851 N.Y.S.2d 56 (Fam. Ct., Monroe Co., 2007) (in custody proceeding, court refuses to order filing, concluding that reference to "person" in FCA §1032 does not include agency; that power of court to initiate neglect case is delineated in FCA §1034(1)(b), which only permits court to order an investigation and report; that mandating that agency file after it has determined that such action is not justified would usurp agency's decision-making authority and could compel it to commence proceeding when there is not enough evidence; and that FCA §255 does not provide authority).

Arguably, while the Tiffany A. court appears to have overvalued the utility of separation of powers analysis in the context of Article Ten litigation -- in which judges have broad power to protect children and facilitate family reunification by ordering child protective agencies to take specific action and by supervising and evaluating an

agency's performance [see Matter of Nicole A., 40 Misc.3d 254 (Fam. Ct., Bronx Co., 2013) ("unlike other areas of law in which administrative agencies have statutorily granted discretion that cannot be reached by the courts on anything other than an abuse-of-discretion review standard, the Family Court Act vests enormous power in the courts to robustly oversee the day-to-day work of social service agencies")] -- the refusal of the courts in Tiffany A. and Anne P.C. to find authority in either §1032(b) or FCA §255 may well make good sense when forcing an agency to file would require the petitioner to swear that the child is neglected or abused when he/she does not believe that to be the case or require the agency's attorney to violate ethics rules by prosecuting a cause of action he/she believes is without merit. Moreover, from a purely practical point of view, it would be unwise to appoint an unwilling petitioner who will not zealously prosecute the case. See also Matter of Joseph G., 24 A.D.3d 900, 807 N.Y.S.2d 149 (3rd Dept. 2005) (even if statute compelled agency to file termination of parental rights petition or "join" child's lawyer's petition, child's lawyer "cannot force DSS to lobby for the termination of respondent's parental rights if, in its judgment, such action is not in [the child's] best interest"); Matter of Mary AA, 175 A.D.2d 362, 571 N.Y.S.2d 962 (3rd Dept. 1991) (court improperly amended petition to include two additional children over petitioner's objection).

On the other hand, there is some authority for a contrary reading of §255, and it may well be appropriate for the court to order the agency to file when there is clear and undisputed evidence justifying a filing. In Matter of Johnson v. Johnson, 279 A.D.2d 814, 718 N.Y.S.2d 741 (3rd Dept. 2001), lv denied 96 N.Y.2d 715, the Third Department held that the family court did not abuse its discretion when, upon the child's lawyer's request, it ordered the Department of Social Services to file a neglect petition against the parties after the court had completed an evidentiary hearing in a custody proceeding. There were "unique circumstances," and the court indicated that "the recommended and the usual course in a custody proceeding would have been to order an investigation pursuant to Family Court Act § 1034 (1). . . ." In Ruskin v. Rockland County Department of Social Services, 162 Misc.2d 707, 618 N.Y.S.2d 956 (Fam. Ct., Rockland Co., 1994), the child's lawyer requested an order staying DSS from

discharging the child after DSS had allowed the placement to lapse. While noting that the agency could not assert a lack of jurisdiction where the placement had lapsed only because the agency had failed to file either an extension petition or the report required by FCA §1058, the court, relying on FCA §255, ordered the agency to file an extension of placement petition. See also In re Najasha B., 972 A.2d 845 (Md. 2009) (given rights of child as party to proceeding and inherent role of court in protecting rights of minors, juvenile court erred in dismissing petition on ground that agency petitioner had unilateral right to withdraw petition; child has right to demand hearing, and, unlike typical civil plaintiff, agency initiates action to advance child's welfare and is not seeking relief for itself); In re M.C., 199 Cal.App.4th 784 (Cal. Ct. App., 1st Dist., 2011) (given absence of anything in state Constitution or statutory dependency scheme that would classify initiation of dependency proceedings as “core” or “essential” executive function, statute permitting court to order agency to file dependency petition did not violate separation of powers doctrine; given state’s strong parens patriae interest in preserving and promoting welfare of child, it is understandable that Legislature would choose to give court authority to review decision not to initiate dependency proceedings, and “[t]he statutory scheme simply provides some additional measure of protection to ensure an abused or neglected child does not slip through the cracks”); Matter of R.B., 176 Misc.2d 530, 672 N.Y.S.2d 992 (Fam. Ct., West. Co., 1998); Matter of Commissioner of Social Services o/b/o Peter R., 171 Misc.2d 278, 654 N.Y.S.2d 235 (Fam. Ct., Queens Co., 1996). In support of this position, the child’s lawyer could argue that it will not always be practicable for a “person” to file a petition, and that the Legislature must want family court judges to have some means of protecting the child when the agency unreasonably refuses to file. When ethical problems exist because the agency does not believe there is a cause of action, but the court believes otherwise, the court could direct the agency to file the petition, and then marshal the evidence on its own or with the assistance of the child’s lawyer.

Also relevant in this context is CPLR 3217(a)(1), which freely permits the withdrawal of a petition within twenty days after filing, and 3217(b), which requires a court order after that time. See, e.g., Matter of Sheena B., 83 A.D.3d 1056 (2d Dept.

2011) (court erred in allowing petitioner to discontinue proceeding because child had turned eighteen; although court has discretion under §3217(b), public has interest in matters involving welfare of child, and, in this case, child, who may be placed with her consent, would be prejudiced by discharge from foster care without services to which she would be entitled upon finding of neglect); In re Malik S., 141 A.D.3d 428 (1st Dept. 2016), lv denied 28 N.Y.3d 904 (court properly refused to allow ACS to withdraw petition charging respondent with educational neglect and allowing fifteen-year-old subject child to live outside home without knowledge of circumstances); Matter of Rafael P., 185 Misc.2d 169, 712 N.Y.S.2d 714 (Fam. Ct., Erie Co., 2000) (court denies application to withdraw petition pursuant to CPLR 3217[b]).

In any event, a judge can effectively overrule the agency's decision not to proceed by substituting a new petitioner, or directing a person to file a new petition, pursuant to FCA §1032(b). See, e.g., Matter of Zena O., 212 A.D.2d 712, 622 N.Y.S.2d 601 (2d Dept. 1995); Matter of Mary AA., supra, 175 A.D.2d 362. Such a person -- the child's lawyer, for instance -- would be entitled to subpoena witnesses and obtain pre-trial discovery, and thereby force even a reluctant agency to produce evidence and participate in the proceeding. See also CPLR §1018 (provides for transfer of interest to other litigant who may continue action unless court directs that litigant be substituted or joined in action).

**D. Summary Judgment**

The use of summary judgment in Article Ten cases was endorsed by the Court of Appeals in Matter of Suffolk County Department of Social Services v. James M., 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994). In that case, summary judgment was granted where the acts of sodomy for which the respondent was convicted fell within the broad allegations in the abuse petition.

Compare Matter of Blima M., 150 A.D.3d 1006 (2d Dept. 2017) (finding of neglect made where father pleaded guilty to endangering welfare of child and admitted during plea allocution that he "knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of [the child]"); Matter of Brandie B., 109 A.D.3d 987 (2d Dept. 2013) (neglect finding made via summary judgment reversed where petitioner included

evidence submitted at FCA §1028 hearing, but, at hearing, father testified and submitted other evidence on his behalf that raised questions of fact); Matter of Miranda F., 91 A.D.3d 1303 (4th Dept. 2012) (summary judgment properly granted where petitioner did not establish with non-hearsay evidence that respondent had been convicted of rape alleged in family court, but judge had also presided over criminal trial and was able to take judicial notice of basis for conviction); Matter of Majerae T., 74 A.D.3d 1784, 902 N.Y.S.2d 758 (4th Dept. 2010) (neglect found as to younger child via summary judgment where mother's parental rights to older child had been terminated on ground of mental illness; mother's statement to social worker during neglect investigation that she was seeing mental health provider was unsubstantiated and insufficient to raise triable issue of fact); Matter of Christopher Anthony M., 46 A.D.3d 896, 848 N.Y.S.2d 711 (2d Dept. 2007) (summary judgment granted in favor of respondent father where family court's conclusions in his favor at FCA §1028 hearing were not dispositive of fact-finding issues but father's motion was supported by sworn testimony of witnesses at §1028 hearing and findings of fact by family court; although presumption in FCA §1046(a)(ii) was activated by a physician's testimony at 1028 hearing that burn on child's face appeared to be consistent with "hot liquid … falling from above and landing on his head" or "being poured" from over the child's head and "running down" his face, father's credible testimony at hearing, considered together with corroborative evidence submitted in support of motion, was sufficient to rebut presumption by establishing that injury could have occurred accidentally and that father was not with child when child was injured in kitchen, and shift burden back to petitioner to demonstrate existence of triable issue of fact, which petitioner failed to do); Matter of Johanna W., _Misc.3d_, 2018 WL 4016925 (Fam. Ct., Kings Co., 2018) (mother's summary judgment motion granted where neither psychiatric diagnosis, nor prior psychiatric hospitalizations, established connection between her condition and actual or potential harm to children; court notes that mother's family was available to care for children when she was unable to, and that it is rare to see parents suffering from mental illness charged in family court who are not indigent and have family and financial supports); Matter of Schwartz, NA-10897-12, NYLJ 1202729028010, at *1 (Fam., KI,

Decided May 21, 2015) (upon proof of respondent's plea of guilty to criminal charge of endangering welfare of child, court granted summary judgment on allegations of neglect and derivative neglect, but not on charge of abuse, where it was apparent from indictment that crime involved touching child's hand with penis, but respondent neither pleaded guilty to, nor admitted during allocution, commission of crime defined in Penal Law Article 130); Matter of the N. Children, 27 Misc.3d 1220(A), 910 N.Y.S.2d 763 (Fam. Ct., Kings Co., 2010) (motion granted after FCA §1028 imminent risk finding based on mother's mental illness); Matter of Donna J., 26 Misc.3d 1206(A), 906 N.Y.S.2d 779 (Fam. Ct., Kings Co., 2010) (derivative neglect found where children were born four months after dispositional/permanency hearing finding that mother failed to complete services due to severe mental and emotional limitations; findings also made against grandfather and father for allowing mother to care for children); Matter of P./R. Children, 14 Misc.3d 1232(A), 836 N.Y.S.2d 494 (Fam. Ct., Kings Co., 2007) (finding of sexual abuse where father pleaded guilty only to attempted sexual abuse and endangering welfare of child, but criminal charges arose out of same incident and plea minutes revealed that father admitted touching penis to child's vagina); Matter of Brittany B., 13 Misc.3d 1225(A), 831 N.Y.S.2d 346 (Fam. Ct., Kings Co., 2006) (finding of rape made where father was convicted of endangering welfare of child and petitioner presented certificate of disposition and plea minutes containing admission to placing penis inside child's vagina); Matter of Angel S., 12 Misc.3d 1154(A), 819 N.Y.S.2d 208 (Fam. Ct., Kings Co., 2006) (abuse found where mother improperly allowed other respondent to care for child despite evidence that other respondent had injured child before); Matter of Jasmine R., 8 Misc.3d 904, 800 N.Y.S.2d 307 (Fam. Ct., Queens Co., 2005) (summary judgment granted based upon order terminating parental rights on mental illness grounds) and Matter of Lindsey H., 178 Misc.2d 566, 679 N.Y.S.2d 802 (Fam. Ct., Orange Co., 1998) (summary judgment granted where child's deposition alleged sexual abuse and respondent had made sworn, written admission to police)
with Matter of Terrence G., 98 A.D.3d 1294 (4th Dept. 2012) (summary judgment improperly awarded where petitioner presented petition and psychological assessment of mother from termination of parental rights proceeding involving other child without

evidence of outcome of proceeding); Matter of Ethan Z., 93 A.D.3d 733 (2d Dept. 2012) (no summary judgment for petitioner based on hearsay evidence presented at FCA §1028 hearing which was not admissible at fact-finding hearing); Matter of Nicholas W., 90 A.D.3d 1614 (4th Dept. 2012) (order granting summary judgment reversed where father's guilty plea to assault included no allocution concerning respondent's conduct and petitioner failed to establish that father intended to hurt son or that there was pattern of excessive corporal punishment); Matter of N. Children, 86 A.D.3d 572 (2d Dept. 2011) (evidence previously presented at FCA §1028 hearing did not establish neglect, and included hearsay evidence that was not admissible at fact-finding hearing and thus could not be basis for granting summary judgment to petitioner; however, summary judgment for mother was properly denied because §1028 hearing occurs prior to discovery and parties did not have opportunity to prepare cases); Matter of Xavier C., 303 A.D.2d 583, 756 N.Y.S.2d 474 (2d Dept. 2003) (summary judgment improperly awarded in absence of evidence that father's acts of violence against mother, which he admitted during plea colloquy, took place in children's presence); Matter of Tali W., 299 A.D.2d 413, 750 N.Y.S.2d 104 (2d Dept. 2002) (summary judgment improperly ordered where respondent admitted to one act of domestic violence in criminal proceeding, but there was no admission that children were present or other evidence establishing element of impairment or risk of impairment to children); In re Galeann F., 280 A.D.2d 363, 721 N.Y.S.2d 31 (1st Dept. 2001) (in permanent neglect case, court reverses order granting summary judgment for petitioner where respondent raised factual issues); Matter of Elizeo C., 19 Misc.3d 1112(A), 859 N.Y.S.2d 902 (Fam. Ct., Kings Co., 2007) (summary judgment denied where mother pled guilty to endangering welfare of child while admitting that, on one occasion, she hit child in face with open hand and caused bruise or black eye, but actions did not result in actual injury to child); Matter of Peterson Children, 185 Misc.2d 351, 712 N.Y.S.2d 345 (Fam. Ct., Kings Co., 2000) (summary judgment denied where respondents were convicted of drug possession and one respondent was convicted of weapon possession, but crimes were not committed against children and circumstances were not set forth).

As is made clear by some of the cases cited above, proof of a respondent's guilty plea is not the only means of obtaining summary judgment. For instance, in a sex abuse case, the agency could submit papers containing affidavits with detailed allegations that, if true, would clearly establish the respondent's commission of one or more sex crimes defined in Penal Law Article 130. The respondent's failure to respond by raising triable issues of fact would permit the court to grant a summary judgment motion. Needless to say, in the absence of a conviction, or a clear-cut confession, the respondent is likely to raise triable issues of fact. Thus, it would do the agency no good to make summary judgment motions routinely, and, in the process, provide the respondent with sworn allegations that could be used to impeach witnesses at trial. But when affidavits are backed up by a guilty plea, the respondent's ability to raise triable issues of fact may be severely impaired is not completely negated, even when the plea did not cover all the offenses alleged in family court.

Summary judgment has become a common method of adjudicating charges of derivative neglect. Compare Matter of Alexander TT., 141 A.D.3d 762 (3d Dept. 2016) (derivative neglect found where criminal proceeding plea colloquy established that respondent admitted to orally sodomizing twelve-year-old stepdaughter and pressuring her to recant); In re Phoenix J., 129 A.D.3d 603 (1st Dept. 2015) (finding via summary judgment where three prior neglect findings as to three older children, issued over five-year period between September 2005 and September 2010, showed that mother, by reason of untreated mental health issues, was unable to care for any child, and there were orders terminating parental rights to all five of mother's older children in October 2011 based on findings that mother had permanently neglected children by failing to, among other things, consistently visit them, complete parenting skills and anger management programs, and comply with mental health service referrals, and mother presented no evidence that circumstances had changed); Matter of Jayann B., 85 A.D.3d 911 (2d Dept. 2011) (order dismissing petition reversed where it was alleged that 2004 "indicated" report stated that respondent allegedly committed acts of sexual abuse and sodomy against eight-year-old nephew, and that respondent had never attended or completed treatment program related to sex crimes); Matter of Tradale CC.,

52 A.D.3d 900, 859 N.Y.S.2d 288 (3rd Dept. 2008) (finding of derivative neglect affirmed where respondent merely filed attorney's affirmation denying some allegations and alleging recent cooperation and attempts to engage in services after subject infant was born, but there was no proof from respondent herself or anyone with firsthand knowledge, and thus she failed to present admissible proof sufficient to raise issues of fact); Matter of Hannah UU., 300 A.D.2d 942, 753 N.Y.S.2d 168 (3rd Dept. 2002), lv denied 99 N.Y.2d 509, 760 N.Y.S.2d 100 (2003) (derivative neglect finding made as to newborn where finding had recently been made based on respondent's mental condition); Matter of William S., 12 Misc.3d 1157(A), 819 N.Y.S.2d 214 (Fam. Ct., Kings Co., 2006) (court makes finding of derivative severe abuse); Matter of Angel S., supra, 12 Misc.3d 1154(A) (court makes findings of derivative neglect); Matter of Bobbie Jo M. v. Joseph M., 177 Misc.2d 521, 676 N.Y.S.2d 824 (Fam. Ct., Suffolk Co., 1998) (summary judgment based on consent finding of abuse) and Matter of Baby Girl S., 174 Misc.2d 682, 665 N.Y.S.2d 809 (Fam. Ct., Bronx Co., 1997)

with Matter of Miranda F., 91 A.D.3d 1303 (4th Dept. 2012) (summary judgment finding derivative abuse as to respondent's biological daughters based on rape of stepdaughter reversed, since sexual abuse of one child, standing alone, does not necessarily establish derivative abuse or neglect as to other children); Matter of Elijah O., 83 A.D.3d 1076 (2d Dept. 2011) (summary judgment improperly granted to petitioner where child was born over three years after respondent committed act of abuse against child's half-brother); Matter of Suzanne RR., 35 A.D.3d 1012, 826 N.Y.S.2d 785 (3rd Dept. 2006) (Third Department vacates finding as to newborn, made upon summary judgment, where, nine months earlier, mother failed to protect children from her previous paramour's excessive corporal punishment and acts of domestic violence; court could not conclude, as a matter of law, that conditions had not changed); Matter of Ivan S., 43 Misc.3d 1228(A) (Fam. Ct., Franklin Co., 2014) (no summary judgment in derivative neglect proceeding where mother alleged that deplorable home conditions had been rectified; she engaged in domestic violence counseling; and she actively participated in visitation with two children in preparation for trial discharge and made frequent trips to visit with other child in placement); Matter of Emani, 31 Misc.3d 1232()A) (Fam. Ct.,

Bronx Co., 2011) (summary judgment denied where court found that, about one year prior to filing of petition involving newborn, respondent left children, ages eleven months and two years, unsupervised in close proximity to curling iron plugged into outlet above bathroom sink and ran water for children's bath; nature and duration of prior neglect did not demonstrate fundamental defect or flaw or sufficiently impaired judgment, and mother's receipt of services did not establish as matter of law that the conditions had not changed); Matter of Mikayla B., 180 Misc.2d 554, 690 N.Y.S.2d 397 (Fam. Ct., Kings Co., 1999) (petitioner's motion for summary judgment denied where respondent, who pleaded guilty in 1995 to recklessly endangering seven-month-old child by shaking her, raised triable issue of fact by alleging that psychotherapy and parenting skills classes have corrected her parental deficiencies).

Appropriate use of the summary judgment procedure does not implicate the respondent's right to be present at a hearing pursuant to FCA §1041(a). In re P., F., and R. Children, 276 A.D.2d 428, 716 N.Y.S.2d 559 (1st Dept. 2000); see also Matter of Assatta N. P., 92 A.D.3d 945 (2d Dept. 2012) (no due process violation where court entertained petitioner's summary judgment motion in father's absence).

A summary judgment motion must be timely made prior to trial. Matter of Giovanni S., 98 A.D.3d 1054 (2d Dept. 2012) (court erred in awarding summary judgment to ACS upon untimely motion brought after ACS presented its case and prior to mother presenting or resting her case; this was not proper motion for judgment during trial, which must be made pursuant to CPLR 4401 "after the close of the evidence presented by an opposing party with respect to [the subject] cause of action or issue").

The motion must include factual allegations by someone with person knowledge. An attorney's information and belief affirmation will not be sufficient. Matter of Vivien V., 119 A.D.3d 596 (2d Dept. 2014) (submission of only attorney's affirmation in opposition to motion insufficient to raise triable issue of fact). See also Zuckerman v City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

## XII. Fact-Finding Hearings

A "fact-finding hearing" is "a hearing to determine whether the child is an abused or neglected child as defined by [Article Ten]." FCA §1044. Although the preliminary stages of an Article Ten proceeding, during which the court must make critical decisions concerning the safety and welfare of the child, are marked by a free flow of information in court, the fact-finding stage marks a return to more traditional rules of trial. Indeed, given that a fact-finding order can result in a long-term denial of parental custody, and, from the child's perspective, an unwanted separation from the family or a return to a dangerous environment, it is natural that the litigants' right to a fair trial should become a more critical concern. In the sections which follow, it will become clear that, at the fact-finding stage, traditional lawyering skills and knowledge of the law can have more of an impact on the client's chances for success than at any other stage of the proceeding.

### A. Confidentiality Of Proceedings

#### 1. Attendance In Court

##### a. New York Law

Generally, a right to a public trial applies in civil proceedings. Judiciary Law §4; Fiorenti v. Central Emergency Physicians PLLC, 39 A.D.3d 804, 835 N.Y.S.2d 345 (2d Dept. 2007) (right to public trial not violated where attendees needed to go through security on first and second floors of courthouse, and then be buzzed by security personnel through to the courtroom).

Family Court Act §1043 permits the court to exclude the general public from the fact-finding hearing, or any other Article Ten hearing, and admit only those persons, and representatives of authorized agencies, who have an interest in the case. In 1997, the Uniform Rules For The Family Court, 22 NYCRR §205.4, were amended and now provide as follows:

> (a) The Family Court is open to the public. Members of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of the Family Court otherwise open to individuals having business before the court.

(b) The general public or any person may be excluded from a courtroom only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case. In exercising this inherent and statutory discretion, the judge may consider, among other factors, whether:

(1) the person is causing or is likely to cause a disruption in the proceedings;

(2) the presence of the person is objected to by one of the parties, including the attorney for the child, for a compelling reason;

(3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm requires that some or all observers be excluded from the courtroom;

(4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case.

Whenever the judge exercises discretion to exclude any person or the general public from a proceeding or part of a proceeding in Family Court, the judge shall make findings prior to ordering exclusion.

(c) When necessary to preserve the decorum of the proceedings, the judge shall instruct representatives of the news media and others regarding the permissible use of the courtroom and other facilities of the court, the assignment of seats to representatives of the news media on an equitable basis, and any other matters that may affect the conduct of the proceedings and the well-being and safety of the litigants therein.

(d) Audio-visual coverage of Family Court facilities and proceedings shall be governed by Part 29 of the Rules of the Chief Judge and Part 131 of the Rules of the Chief Administrator.

(e) Nothing in this section shall limit the responsibility and authority of the Chief Administrator of the Courts, or the

> administrative judges with the approval of the Chief Administrator of the Courts, to formulate and effectuate such reasonable rules and procedures consistent with this section as may be necessary and proper to ensure that the access by the public, including the press, to proceedings in the Family Court shall comport with the security needs of the courthouse, the safety of persons having business before the court and the proper conduct of court business.

The party seeking to exclude the public should be prepared to present supporting evidence, such as affidavits from mental health professionals concerning potential harm to the children, or allegations regarding the likelihood that new and sensitive details will be disclosed in court. See Matter of Andrea B., 66 A.D.3d 770, 887 N.Y.S.2d 213 (2d Dept. 2009), lv denied 13 N.Y.3d 716 (in termination of parental rights proceeding, court did not abuse discretion in closing courtroom to public during part of fact-finding hearing after prior disruptions of proceedings by family member); Matter of Ruben R., 219 A.D.2d 117, 641 N.Y.S.2d 621 (1st Dept. 1996), lv denied 88 N.Y.2d 806, 646 N.Y.S.2d 986 (child's lawyer presented affidavits regarding a negative impact on the children; court excludes press "[i]n light of the extraordinarily sensitive and personal nature of the information ... coupled with the strong evidence presented that publication of this information would be harmful to the children and the impossibility of protecting the children's right to privacy due to the previous disclosure of the children's identities ..."); Matter of Katherine B., 189 A.D.2d 443, 596 N.Y.S.2d 847 (2d Dept. 1993) (affidavit provided by psychologist); S.B. v. U.B., 38 Misc.3d 487 (Sup. Ct., Kings Co., 2012) (closure denied where children's aunt would be testifying about children's father's alleged sexual abuse of her, but there was no contention that proceedings would be subject to high media scrutiny, and mother provided no specific information regarding potential harm to children, and, although it is difficult to testify about sexual abuse, individuals are often called upon to testify to difficult and deeply personal matters); Matter of A.H., 16 Misc.3d 1124(A), 847 N.Y.S.2d 900 (Fam. Ct., Richmond Co., 2007) (in case in which court found that the father neglected children when he drove them to Bear Mountain to witness what he believed would be an attempted suicide by their mother, court ordered full closure and denies press access to next permanency

hearing, while noting, inter alia, that child's lawyer had submitted expert evidence indicating that children have been diagnosed with Post-Traumatic Stress Disorder, that children barely spoke after media appeared outside the home where they were staying but became less fearful when media left them alone, and that there has been no information publicly disseminated regarding the children); Matter of S./B./B./R. Children., 12 Misc.3d 1172(A), 820 N.Y.S.2d 845 (Fam. Ct., Kings Co., 2006) (psychologists' affidavits, and testimony of Legal Aid social worker, established risk to children). See also Judiciary Law §4 ("The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."); In re T.R., 556 N.E.2d 439 (Ohio 1990), cert denied 498 U.S. 958 (social worker asserted that continued publicity would increase risk of harm); People v. Homan, 237 A.D.2d 987 (4th Dept. 1997) (court did not abuse discretion when it partially excluded public during testimony of complainant, who prosecutor said was nervous and embarrassed to testify about sexual acts committed upon her by defendant, her grandfather); People v. Vredenburg, 200 A.D.2d 797 (3d Dept. 1994) (court did not abuse discretion when it closed courtroom during testimony of defendant's stepdaughter where charges involved sordid, demeaning acts and required embarrassing testimony).

The courts have recognized that the child's lawyer is placed in an awkward position when the court admits the media. In In re T.R., supra, 556 N.E.2d 439, the court noted that "the presence of the media would place [the child's counsel] in 'an untenable position' when deciding what evidence to present," and would force counsel to "weigh the psychological harm to [the child] posed by the disclosure of evidence against the value of evidence needed to support her case." Similarly, in order to ensure that the parties may freely argue the closure issue without being concerned about publicity, the court must also consider the extent to which the press will be given access to oral argument and to the papers submitted.

**b. First Amendment**

The United States Supreme Court has not yet ruled as to whether there is a First Amendment presumption of openness in civil proceedings. The Second Circuit has held that there is. Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16 (2d Cir. 1984); see also Newsday v. County of Nassau, 730 F.3d 156 (2d Cir. 2013) (in contempt proceedings arising out of civil rights action, court concludes that First Amendment's presumptive right of access applies in civil contempt proceedings).

However, particularly in light of the absence of any long tradition of openness, it appears that there is no First Amendment right of access to abuse and neglect proceedings. Matter of Katherine B., supra, 189 A.D.2d 443. See also Matter of Ruben R., supra, 219 A.D.2d 117; In re T.R., supra, 556 N.E.2d 439 (while upholding closure and concluding that there is no qualified right of public access to abuse/neglect proceedings, court refuses to adopt a presumption for or against access; the court must weigh the competing interests); but see In re M.B., 819 A.2d 59 (Pa. Super. Ct., 2003) (State constitutional presumption of openness found).

However, when media representatives are admitted, the Supreme Court's decisions limit the availability of court-ordered restraints on disclosure and of sanctions for unauthorized disclosure. In Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 97 S.Ct. 1045 (1977), the media attended a juvenile delinquency detention hearing with the knowledge of counsel and the court and without objection. The media learned the eleven-year-old juvenile's name, and also photographed him as he left the courthouse. The court later enjoined the media from disclosing the juvenile's name or his photo. The Supreme Court held that the court's order constituted a prior restraint which violated the First Amendment. Similarly, in Smith v. Daily Mail Publishing, 443 U.S. 97, 99 S.Ct. 2667 (1979), the Supreme Court held that the media could not be punished for disclosing a name which was lawfully obtained from a source such as the police, the prosecutor, or a witness. The Supreme Court also expressed the hope that, if the courts make their purposes and methods clear, the media will police themselves when deciding whether to release information. 443 U.S. at 105, n. 3. See also Florida Star v. B.J.F., 491 U.S. 524, 109 S.Ct. 2603 (1989) (First Amendment violated where damages

were imposed on newspaper which published name of rape victim, which had been obtained from publically released police report; although it was unlawful for officials to disclose report, it was not unlawful for newspaper to receive it); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975) (First Amendment violated where civil damages award was entered against television station for broadcasting name of rape-murder victim, which was obtained from courthouse records).

On the other hand, there is some doubt as to whether these rules apply in the context of a child protective proceeding and preclude the court from punishing violation of a direct order, or a condition of entry, requiring the media not to disclose certain information acquired in court. In In re a Minor, 595 N.E.2d 1052 (Ill. 1992), the Illinois Supreme Court, while noting that Oklahoma Publishing did not involve a closed proceeding, upheld a prior restraint on the disclosure of the identities of the child victims in a neglect proceeding. Similarly, in Matter of S. Children, 140 Misc.2d 980, 532 N.Y.S.2d 192 (Fam. Ct., Orange Co., 1988), the court, while noting that opening the family court will help the public understand the seriousness of the system's problems, decided to admit the press. At the same time, the court directed the press not to publish certain information until the parent could attempt to obtain a stay of the court's order admitting the press, but the press published information anyway. Although the press cited the Supreme Court's First Amendment prior restraint cases, the court held that it could set, and punish the violation of, conditions; the court noted that the Supreme Court decisions did not involve conditions imposed by a court sitting in a closed proceeding, and stated that "[i]t is clear that this court which is obligated to restrict public access, including the press, can set conditions and restrictions when permitting access to its proceeding [citation omitted]." 140 Misc.2d at 986. See also Matter of Jane, 163 Misc.2d 373, 621 N.Y.S.2d 428 (Fam. Ct., Ulster Co., 1993) (court admits reporter and directs that he be given transcripts, but precludes disclosure of name, residence and other identifying information other than age, sex and interrelationships of parties and witnesses, and disclosure of names of people who reported possible abuse or neglect to the hotline or in confidence, and also precludes coverage *outside* the Family Court building of persons whose identities are confidential; court specifically

notes that it has a duty under the Civil Rights Law to restrict the use of the name of an alleged child sex abuse victim, and orders that the child's name not be published even if the reporter has independent knowledge of the child's identity).

Moreover, the First Amendment might not act as a bar to prior restraint or to post-disclosure punishment where there has been some impropriety in the acquisition of information. In the Florida Star case, the Supreme Court did not reach the question of whether unlawful acquisition of information and subsequent disclosure may be punished consistent with the First Amendment. Compare Hays v. Marano, 114 A.D.2d 387, 493 N.Y.S.2d 904 (2d Dept. 1985) (reporter could not be precluded from publishing information gleaned from public court file in which Grand Jury testimony had inadvertently been placed) with Natoli v. Sullivan, 159 Misc.2d 681, 606 N.Y.S.2d 504 (Sup. Ct., Oswego Co., 1993) (media could be held liable for publishing information from illegal wiretap which was given to media by private individuals who made the recording).

**c. Partial Closure**

Under the Supreme Court cases, and 22 NYCRR §205.4(b)(4), the court is required to consider less restrictive measures than complete closure.

A possible solution when the court wishes to admit media representatives, but is concerned about disclosure of the information acquired, is to close the courtroom during those portions of the proceeding during which sensitive information will be aired. Compare Matter of S./B./B./R. Children., supra, 12 Misc.3d 1172(A) (court grants motion to exclude media from courtroom discussions of the children's current service needs) with Matter of Ruben R., supra, 219 A.D.2d 117 (partial closure procedure rejected because it would cause too much disruption and there was no way to know in advance when it would be necessary; court also notes that presence of press can cause party to alter presentation).

**d. "Gag" Orders**

The court also has some authority to issue a "gag" order which directs the parties and counsel not to communicate information to the media, but First Amendment arguments may be raised. Compare In re T.R., supra, 556 N.E.2d 439 (trial court did

not abuse discretion in imposing gag order in consolidated custody and abuse/neglect litigation, but the order, which enjoined the adult parties and their counsel from communicating any information about the child or the custody litigation, was overbroad since, taken literally, it prohibited parties and their counsel from discussing the case with one another) and In re J.S., 640 N.E.2d 1379 (Ill. App. Ct., 2d Dist., 1994) (gag order prohibiting parties and attorneys from discussing facts of underlying custody and dependency actions with members of news media was not unconstitutionally overbroad) with In re R.J.M.B., 133 So.3d 335 (Miss. 2013) (court overturns "gag order" issued by youth court when it returned infant to mother after separation caused by misinterpretation of statements mother made in native language; mother's fundamental First Amendment right to publicly criticize government action should be restrained only under compelling circumstances); Matter of Sepulveda v. Perez, 90 A.D.3d 1057 (2d Dept. 2011) (in visitation proceeding, court erred in prohibiting mother from engaging in communications with media and from providing personal information relating to child to any website or Internet location); Anonymous v. Anonymous, 203 A.D.2d 283, 612 N.Y.S.2d 887 (2d Dept. 1994) (insufficient evidence to justify gag order which prohibited father or any person acting in his behalf from discussing his petition to impose certain conditions on mother's custody of child) and Crocker C. v. Anne R., 52 Misc.3d 1205(A) (Sup. Ct., Kings Co., 2016) (denying request for non-dissemination order, court notes that parents retain First Amendment rights during custody dispute).

**e. Audiovisual Coverage**

At present, audiovisual coverage of courtroom proceedings is prohibited by Civil Rights Law §52. See Courtroom Television Network LLC v. State of New York, 5 N.Y.3d 222, 800 N.Y.S.2d 522 (2005) (§52 does not violate Federal or State Constitution); Matter of ACS v. Erica A., 37 Misc.3d 639, 946 N.Y.S.2d 455 (Fam. Ct., Bronx Co., 2012) (§52 did not bar filming at court session scheduled for purposes of reviewing mother's compliance with visitation order and question of trial discharge, where no compelled testimony would be given).

**2. Access To Records**

**a. New York Law**

"The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records." FCA §166; Matter of Demesyeux, 39 Misc.3d 1209(A) (Surrogate's Ct., Nassau Co., 2013) (application under §166, which does not render family court records confidential and merely provides that they are not open to indiscriminate public inspection, must be made in family court). Compare Matter of Sarah FF., 18 A.D.3d 1072, 797 N.Y.S.2d 571 (3rd Dept. 2005) (FCA §166 did not authorize release to CASA volunteer of petitioner's confidential records, which were not records of a court proceeding) and Hover v. Shear, 232 A.D.2d 749, 648 N.Y.S.2d 718 (3rd Dept. 1996), lv denied 89 N.Y.2d 964, 655 N.Y.S.2d 883 (1997) (father not entitled, in custody proceeding, to gain access to court records of custody proceedings regarding mother's children from prior marriage) with Matter of G.R., 59 Misc.3d 1101 (Fam. Ct., Onondaga Co., 2018) (in termination of parental rights dispositional proceeding, court denied mother's request for access to Family Court records pertaining to pre-adoptive foster parents; "utmost scrutiny" applied since foster parents were not parties and overriding concern was that disclosure may result in intentional or inadvertent breaches of confidentiality) and Matter of Jane, supra, 163 Misc.2d 373 (press shall be permitted to review Family Court files and records, court calendar, DSS records, Mental Health records, and other professional reports, except that reports from counseling programs which are subject to federal confidentiality requirements may not be inspected without specific court authority).

Subject to limitations and procedures set by statute and case law (see, e.g., Civil Rights Law §50-b, which restricts the release by a public officer or employee of reports or other material which identifies the victim of a sex offense), the following individuals/entities shall be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, subject to the provisions of CPLR 8002, transcribed minutes of any hearing held in the proceeding: (1) the petitioner, presentment agency and adult respondent and their attorneys; (2) when a child is a party to, or the child's custody may be affected by, the proceedings, the parents or persons legally responsible and their attorneys; the guardian, guardian ad

litem and attorney for the child; an authorized representative of the child protective agency involved in the proceeding or the probation service; an agency to which custody has been granted by court order and its attorney; and an authorized employee or volunteer of a Court Appointed Special Advocate program appointed by the Family Court to assist in the child's case in accordance with Part 43 of the Rules of the Chief Judge; and (3) when a temporary or final order of protection has been issued in a support, paternity, custody/visitation or family offense proceeding, a prosecutor where a related criminal action may be commenced; and, when a criminal action has been commenced, the prosecutor or defense attorney in accordance with Criminal Procedure Law procedures. 22 NYCRR §205.5(a), (b), (d). Such information may also be made available to "another court when necessary for a pending proceeding involving one or more parties or children who are or were the parties in, or subjects of, a proceeding in the Family Court pursuant to Articles 4, 5, 6, 8, or 10 of the Family Court Act." But, "[o]nly certified copies of pleadings and orders in, as well as information regarding the status of, such Family Court proceeding may be transmitted without court order pursuant to this section," and "[a]ny information or records disclosed pursuant to this paragraph may not be re-disclosed except as necessary to the pending proceeding." 22 NYCRR §205.5(e). Rule 205.5 also provides that, when the family court has directed that the address of a party or child be kept confidential pursuant to FCA §154-b(2), any record or document disclosed shall have such address redacted or otherwise safeguarded.

There is nothing in Rule 205.5 indicating whether or not an individual or an entity may re-disclose documents acquired lawfully. In Matter of Jane, supra, 163 Misc.2d 373, the court held that, in the absence of a statute or rule preventing it, the respondent mother in a neglect proceeding was entitled to turn over transcripts and pleadings to a reporter, and the court refused to restrain publication of information contained in the documents. Moreover, in the absence of a legally imposed "gag" order, parties are free to engage in oral communications with the media and other members of the public with respect to the litigation. See, e.g., Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998) (court upholds First Amendment challenge by City employees, and concludes

that City failed to justify rule limiting right of employees to communicate with media). On the other hand, even if §205.5 does not itself preclude re-disclosure, it appears that the court does have some power to prohibit the dissemination of information in certain circumstances. In Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199 (1984), the court upheld a protective order which prohibited the defendant in a defamation case from disclosing certain information obtained during the discovery process, concluding that a litigant's freedom to disseminate information obtained during discovery is not absolute under the First Amendment, and that an order prohibiting dissemination before trial is not the type of prior restraint that requires exacting First Amendment scrutiny.

**b. First Amendment Right Of Access**

Although there is a qualified First Amendment right of access to the records of a criminal proceeding [see, e.g., People v. Burton, 189 A.D.2d 532, 597 N.Y.S.2d 488 (3rd Dept. 1993)] and a common-law presumption in favor of access to court records [Nixon v. Warner Communications, 435 U.S. 589, 98 S.Ct. 1306 (1978)], there does not appear to be any First Amendment right of access in child protective proceedings. See Matter of Katherine B., supra, 189 A.D.2d 443.

**B. Time Of Hearing**

There are states that have statutory time frames within which a fact-finding hearing must be held. See In re S.G., 677 N.E.2d 920 (Ill. 1997) (statute required that adjudicatory hearing ordinarily be completed, not merely commenced, within ninety days, and statutory remedy for violation of statute was dismissal without prejudice); D.D. v. Department of Children & Families, 849 So.2d 473 (Fla. Ct. App., 4th Dist., 2003) (thirty-day time limitation not jurisdictional); In re E.N., 114 Wash.App. 1051 (Wash. Ct. App., Div. 3, 2002) (mother failed to object to certain adjournments to dates beyond seventy-five-day deadline, and while court abused discretion in ordering adjournment to which mother did object, she was not prejudiced, and her home was still unsafe, and thus dismissal not appropriate).

When scheduling the fact-finding hearing, or any other Article Ten hearing, the court must give priority to abuse cases, and to any case in which a child has been removed. FCA §1049. Adjournments in such cases should be as short as is practicable.

FCA §1049. Moreover, when attorneys have conflicting engagements in the same court or in different courts, child protective proceedings take priority over all other proceedings. Uniform Rules for the New York State Trial Courts, 22 NYCRR §125.1(c). However, the respondent cannot be forced to proceed to a fact-finding hearing sooner than three days after service of the summons and petition, "unless emergency medical or surgical procedures are necessary to safeguard the life or health of the child." FCA §1048(a). The court may adjourn the hearing for good cause shown on its own motion, or a motion by the petitioner, the government prosecutor, the child's attorney, or the respondent. FCA §1048(a). See, e.g., Matter of Sanaia L., 75 A.D.3d 554, 903 N.Y.S.2d 916 (2d Dept. 2010) (no error in denial of adjournment where father's attorney made vague and unsubstantiated claim that father could not appear due to emergency); Matter of Westchester County Department of Social Services o/b/o Ashanti R., 215 A.D.2d 671, 628 N.Y.S.2d 133 (2d Dept. 1995), lv denied 86 N.Y.2d 708, 634 N.Y.S.2d 442 (family court did not err in denying an adjournment where respondent's counsel could have subpoenaed witnesses earlier); Matter of the G. Children, 170 A.D.2d 605, 566 N.Y.S.2d 874 (2d Dept. 1991) (denial of adjournment request made by respondent's newly-assigned counsel upheld where fact-finding was based, in part, on criminal conviction); see also In re A.R., 170 Cal.App.4th 733 (Cal. Ct. App., 4th Dist., Div. 1, 2009) (federal Servicemembers Civil Relief Act, which required that juvenile court stay for ninety days dependency proceedings filed against father who was on active duty on ship deployed to Middle East, overrode California law).

There is neither a specified time period within which the hearing must be held or completed, nor any counterpart to the constitutional speedy trial requirement applicable in criminal proceedings. See Matter of Chelsea BB., 34 A.D.3d 1085, 825 N.Y.S.2d 551 (3rd Dept. 2006) (finding upheld with respect to incident that occurred approximately twenty-three months prior to filing of petition); Matter of Kristina R., 21 A.D.3d 560, 800 N.Y.S.2d 454 (2d Dept., 2005) (no error where family court combined FCA §1028 hearing and fact-finding hearing, which caused determination of father's §1028 application to be protracted over almost fifteen months); Matter of Charles DD., 163 A.D.2d 744, 558 N.Y.S.2d 720 (3rd Dept. 1990) (eight-year delay in filing did not violate

constitution); but see Matter of Joseph A., 91 A.D.3d 638 (2d Dept. 2012) (court criticizes long delays where issues were not complicated and hearing was not lengthy, children were removed in June 2008, hearing commenced in November 2009 and was completed in March 2011, and children remained in non-kinship foster care at location that made it extremely difficult for family to maintain relationship); Matter of Dustin H., 40 A.D.3d 995, 837 N.Y.S.2d 190 (2d Dept. 2007) (in termination of parental rights proceeding, reversal ordered in part because it took over one year to begin fact-finding hearing, four years to complete fact-finding hearing, and another nine months to reach disposition); Matter of Jacob P., 37 A.D.3d 836, 831 N.Y.S.2d 252 (2d Dept. 2007) (upon reversal of order returning children pursuant to FCA §1028, Second Department orders that abuse matter be set down for immediate fact-finding hearing); Matter of Joseph DD., 300 A.D.2d 760, 752 N.Y.S.2d 407 (3rd Dept. 2002) (Third Department sharply criticizes delays prior to fact-finding hearing); In re Tanese M., 269 A.D.2d 190, 703 N.Y.S.2d 710 (1st Dept. 2000) (while reversing order granting grandmother's application for return of child pursuant to FCA §1028, court directs that fact-finding hearing commence forthwith and in no event later than twenty days from date of order, and continue day to day until completion); Matter of Dutchess County Department of Social Services o/b/o Cody M., 196 A.D.2d 196, 608 N.Y.S.2d 493 (2d Dept. 1994) (court criticizes practice of conducting hearings piecemeal over several weeks or months); Uniform Rules For The Family Court, 22 NYCRR §205.14 (once hearing or trial in custody or visitation proceeding is commenced, it shall be concluded within ninety days).

However, dismissal after a hearing may be warranted in neglect cases when allegations are so "stale" that court action is not required. See FCA §1051(c); Matter of Austin D., 63 A.D.3d 1215, 880 N.Y.S.2d 217 (3rd Dept. 2009) (no finding where there was five-year-old incident involving mother's discontinuation of child's medicine for ADHD without consulting child's pediatrician); Matter of Nina A. M, 189 A.D.2d 1010, 593 N.Y.S.2d 89 (3rd Dept. 1993); Matter of T.C., 128 Misc.2d 156, 488 N.Y.S.2d 604 (Fam. Ct., N.Y. Co., 1985). See also Matter of Urdianyk, 27 A.D.2d 122, 276 N.Y.S.2d 386 (4th Dept. 1967) (former FCA §349 violated where hearing commenced nine

months after removal).

### C. Presence Of Respondent And Child's Attorney

No fact-finding hearing may commence under Article Ten unless the court has entered a finding that the parent or other person legally responsible for the child's care is present at the hearing and has been served with a copy of the petition. FCA §1041(a); see Matter of Alex A.C., 83 A.D.3d 1537 (4th Dept. 2011) (no violation of statute where mother was served with violation of order of protection petition after commencement of combined neglect/violation hearing but prior issuance of findings of fact).

The court may proceed in the respondent's absence if the respondent fails to appear after "every reasonable effort" has been made to serve the respondent by utilizing the methods prescribed in FCA §1036, or by executing a warrant. FCA §1041(b). See Matter of Cassandra M., 260 A.D.2d 961, 689 N.Y.S.2d 279 (3rd Dept. 1999) (court must hold hearing and require petitioner to present proof of efforts); see also Matter of Jaydalee P., 156 A.D.3d 1477 (4th Dept. 2017) (no error in refusal to allow mother to participate by telephone under DRL §75-j(2) where mother relocated to Michigan less than one month before trial without notifying petitioner); In re Neamiah Harry-Ray M., 127 A.D.3d 409 (1st Dept. 2015) (in termination proceeding, no error where court properly determined that mother's credibility would be difficult to determine via telephone, provided mother with two-month adjournment to enable her to obtain bus fare to attend proceedings, and indicated willingness to consider letting mother testify via video conferencing from local library or other location, and mother was permitted to listen to proceedings by telephone and was represented by counsel, who actively participated); In re Lizette Patricia M., 100 A.D.3d 408 (1st Dept. 2012) (respondent defaulted in termination proceeding where she appeared and testified on first day of fact-finding hearing, but failed to appear on next date to complete testimony, which was stricken by court, and was not present at dispositional hearing which immediately followed); Matter of Jack P., 80 A.D.3d 710, 914 N.Y.S.2d 406 (3d Dept. 2011), lv denied 16 N.Y.3d 710 (where mother had previously failed to appear and disregarded court directives, no error where family court proceeded on third day of four-day hearing

when mother alleged she was unable to attend because of back pain, and court subsequently re-opened proceeding to allow mother to testify); Matter of Eileen R., 79 A.D.3d 1482, 912 N.Y.S.2d 350 (3d Dept. 2010) (incarcerated father's counsel ineffective, and his right to due process violated, where he was prevented from participating in termination hearing and court had blanket policy barring respondent from testifying via telephone, counsel did not request that respondent be permitted to present evidence or his own testimony or request adjournments so he could review transcripts with respondent prior to cross-examining witnesses); In re Tristram K., 25 A.D.3d 222, 804 N.Y.S.2d 83 (1st Dept. 2005) (court erred in proceeding in mother's absence where she was incarcerated in Westchester County, but court made no effort to have her produced, citing budgetary constraints, nor was any effort made to explore reasonable alternatives, such as arranging for her to participate in a telephone conference); Matter of Trebor "UU", 279 A.D.2d 735, 718 N.Y.S.2d 474 (3rd Dept. 2001) (no error where respondent could not appear because of detention on other court-related matter); Matter of Kimberly A., 23 Misc.3d 1136(A), 889 N.Y.S.2d 505 (Fam. Ct., Queens Co., 2009) (while noting that father has due process right to participate and that new courthouses have technological means to permit individual to participate through video technology, court calls upon Chief Judge to reach agreement with Attorney General of United States so that New York Family Courts may secure production of federal prisoners); Matter of Neithan "AA", 18 Misc.3d 1116(A), 856 N.Y.S.2d 499 (Fam. Ct., Clinton Co., 2007) (§1041 not violated where petitioner failed to take certain steps, but caseworker spoke directly to respondent on phone and advised him of pending proceeding and asked for his address in order to effectuate service, but he expressly refused to provide address; in any event, remedy for violation of §1041 would be adjournment of fact-finding hearing, not dismissal); cf. Matter of Curtis "N", 288 A.D.2d 774, 733 N.Y.S.2d 747 (3rd Dept. 2001), lv denied 97 N.Y.2d 610, 740 N.Y.S.2d 694 (2002) (no error where court proceeded at permanency/extension hearing in absence of incarcerated respondent where respondent's counsel was permitted to submit, and court considered, letter attesting to respondent's successful discharge from sex offender program).

However, the court may not proceed in the absence of respondent's counsel, or a decision by counsel not to participate because of an inability to consult with the respondent. See In re Joshua K., 272 A.D.2d 160, 710 N.Y.S.2d 319 (2d Dept. 2000) (court rejects respondent's due process claim where respondent defaulted in termination proceeding, and new counsel was not appointed after respondent's counsel was disqualified because of conflict; even if new counsel had been appointed after original attorney was disqualified, there was no showing that respondent would have cooperated or been available for consultation); Dunkley v. Shoemate, 515 S.E.2d 442 (NC, 1999) (lawyer cannot properly represent a client with whom the lawyer has had no contact); Utah State Bar Opinion Number 04-01A (2004) (same as Dunkley); ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 16 (lawyer should take diligent steps to locate and communicate with missing client).

The parent or other person legally responsible for the child's care must be served with a copy of the order of disposition, with written notice of its entry, pursuant to FCA §1036. Within one year of such service or substituted service, the parent or other person legally responsible for the child's care may move to vacate the order of disposition and schedule a rehearing. The motion shall be granted if the parent or other person submits an affidavit showing his/her relationship to the child and a meritorious defense to the petition. See Matter of Camellia R.W., 134 A.D.3d 848 (2d Dept. 2015) (conclusory affidavit in which mother denied diagnosed mental illness and failure to comply with medication and treatment did not establish potentially meritorious defense); Matter of Mark W., 107 A.D.3d 816 (2d Dept. 2013) (fact-finding hearing re-opened where father failed to appear at scheduled time of 9:30 a.m. to complete his testimony, and moved to vacate fact-finding order while alleging that he mistakenly believed hearing was scheduled for 10:30 a.m., and denied misuse of alcohol to extent that he lost control of actions and denied physical contact with mother during alleged incident); Matter of Tahanie S., 97 A.D.3d 751 (2d Dept. 2012) (motion to vacate granted where respondent demonstrated potentially meritorious defense by submitting his affidavit based on person knowledge that controverted evidence against him and supported his

version of events; respondent was not required to conclusively disprove allegations or otherwise establish as matter of law that proceeding must be resolved in his favor, only that he had position on merits which was potentially meritorious); In re Shavenon N., 71 A.D.3d 401, 895 N.Y.S.2d 409 (1st Dept. 2010) (mother's conclusory assertion of partial compliance with dispositional order in neglect proceedings involving other children, and bald claim that compliance with other aspects of that order was no longer necessary, were insufficient to establish meritorious defense).

However, if the court finds that the parent or other person willfully refused to appear at the hearing, the court may deny the motion. FCA §1042. Compare Matter of Cameron B., 149 A.D.3d 1502 (4th Dept. 2017) (court erred in proceeding where mother contacted her attorney and petitioner to report her illness, proceedings had not been protracted, and she had appeared at all prior proceedings and request for adjournment was her first); Matter of Williams v. Williams, 148 A.D.3d 917 (2d Dept. 2017) (order of protection in family offense proceeding vacated where respondent was minimally tardy to hearing and tardiness might have been due in part to crowded conditions at courthouse; attended prior court appearances, engaged in motion practice through attorney, and participated in multiple preparatory conferences with attorney; and moved to vacate soon after order issued); Matter of Tahanie S., 97 A.D.3d 751 (motion to vacate granted where respondent had appeared on several occasions during fact-finding hearing and missed only one date because he incorrectly thought hearing was adjourned until next day and appeared at family court and had adjournment slip for that day); Matter of Charity W., 79 A.D.3d 1722, 914 N.Y.S.2d 841 (4th Dept. 2010) (in termination of parental rights proceeding, mother not deprived of effective assistance of counsel because attorney failed to do more to ensure that she knew when to appear in court for continuation of fact-finding hearing; mother and attorney were notified of date); In re Eustace B., 76 A.D.3d 428, 906 N.Y.S.2d 229 (1st Dept. 2010) (family court erred in denying counsel's request for second call where court had scheduled case for 4:00 p.m. to accommodate mother's work schedule and counsel informed court that she was "on her way," and respondent had appear on previous court dates); In re Josarah Gloria C., 41 A.D.3d 139, 837 N.Y.S.2d 123 (1st Dept. 2007) (termination of parental rights

respondent's failure to appear was direct result of attorney's error and not part of pattern of dilatory behavior); In re Taina M., 32 A.D.3d 210, 820 N.Y.S.2d 221 (1st Dept. 2006) (no willful refusal where respondent, whose attorney did appear and challenged adequacy of service, alleged that he was not personally served with petition, and that failure to appear was inadvertent as he did not know appearance was required); Matter of Precyse T., 13 A.D.3d 1113, 788 N.Y.S.2d 542 (4th Dept. 2004) (vacatur granted; rule governing defaults in civil actions is not to be applied as rigorously in proceedings involving custody, care and support of children); In re Mursol B., 266 A.D.2d 76, 698 N.Y.S.2d 467 (1st Dept. 1999) (vacatur required where respondent appeared numerous times prior to default); Matter of Dutchess County Department of Social Services o/b/o Cody M., supra, 196 A.D.2d 196 (vacatur ordered where father was not produced from military prison); Matter of Commissioner of Social Services v. Rafael B., 186 A.D.2d 253, 588 N.Y.S.2d 579 (2d Dept. 1992) (default vacated where respondent arrived during hearing but was denied entry) and Matter of Laticia B., 156 A.D.2d 681, 549 N.Y.S.2d 444 (2d Dept. 1990) (vacatur required where respondent thought hearing would start later and arrived late while hearing was in progress)

with Matter of Deyquan M.B., 124 A.D.3d 644 (2d Dept. 2015) (in termination proceeding, default upheld where mother's failure to appear on second day of hearing due to incarceration was not reasonable excuse because she did not explain why she failed to notify her attorney or the court); Matter of Joshua E.R., 123 A.D.3d 723 (2d Dept. 2014) (no vacatur in termination proceeding where mother failed to present detailed information or documentation substantiating claimed delay in transportation and did not explain failure to contact attorney); Matter of Stephen Daniel A., 122 A.D.3d 837 (2d Dept. 2014), lv denied 24 N.Y.3d 916 (in termination proceeding, motion denied where door to courtroom may have been inadvertently locked when mother first arrived, but she was advised by legal representative that door was unlocked and that she should come back for hearing, court granted mother brief recess to appear, and she failed to appear); In re Ruth R., 115 A.D.3d 531 (1st Dept. 2014) (motion denied where respondent submitted documentation showing she was in hospital on hearing date but

provided no details regarding alleged inability to communicate during that time, and vague assertion that she visited to best of her physical and mental ability based on availability of visitation lacked detail sufficient to raise defense to abandonment); In re Nasir Levon L., 110 A.D.3d 565 (1st Dept. 2013), appeal dism'd 22 N.Y.3d 1099 (in termination of parental rights proceeding, denial of motion to vacate upheld where mother's delay in obtaining mental health treatment discharge report until court date, and alleged public transportation difficulties, did not establish reasonable excuse for failure to appear, especially as respondent did not claim she was unfamiliar with public transportation system or had not previously used it to travel to court); In re Mariah A., 109 A.D.3d 751 (1st Dept. 2013), appeal dism'd 22 N.Y.3d 994 (vacatur denied where respondent alleged that he went to Part 43 in reliance on permanency hearing notice for 10:30 a.m. but was in court when fact-finding hearing was scheduled for 2:00 p.m. in Part 1, and respondent had failed to appear at two of five prior hearings without explanation; respondent's assertion that he visited children when "in the neighborhood and called, at a minimum, on holidays and birthdays" was insufficient to counter abandonment charge); In re Diamond Lee P., 99 A.D.3d 451 (1st Dept. 2012), appeal dism'd 20 N.Y.3d 1002 (vacatur denied where, even if respondent was unable to attend dispositional hearing due to delay at methadone clinic, she failed to explain why she could not notify her counsel, the court, or the agency about alleged inability to appear); In re Tyieyanna L., 94 A.D.3d 494 (1st Dept. 2012) (no reasonable excuse where mother submitted affidavit explaining that she had severe toothache on day of hearing and letter from dentist stating that she was in his office that day and was referred to oral surgeon, but mother failed to notify counsel, court, or agency in advance that she would not appear); In re Lisa Marie Ann L., 91 A.D.3d 524 (1st Dept. 2012) (motion to vacate denied in termination of parental rights proceeding where mother's allegation that she had fair hearing concerning public assistance benefits that conflicted with family court appearance failed to explain why, even though she was aware of family court date before time for fair hearing was set, she made no effort to re-schedule fair hearing); In re Chelsea Antoinette A., 88 A.D.3d 627, 931 N.Y.S.2d 503 (1st Dept. 2011) (in termination of parental rights proceeding, no reasonable excuse where mother failed to

substantiate claim that train was late by submitting affidavit by someone with personal knowledge or official documentation of delay in public transportation); In re Amirah Nicole A., 73 A.D.3d 428, 901 N.Y.S.2d 178 (1st Dept. 2010), appeal dism'd 15 N.Y.3d 766 (in termination of parental rights proceeding, denial of motion to vacate upheld where mother submitted affidavit explaining that she had been ill and provided medical documentation showing that she was seen by medical doctors on date in question, but never indicated that illness actually prevented her from attending and documentation was silent as to medical condition on date of hearings, and she failed to apprise her counsel of nonappearance prior to hearings or explain reason for failure; whether it was mother's first failure to appear, and whether petitioners had been granted several adjournments, was irrelevant to mother's burden); In re Shavenon N., 71 A.D.3d 401 (motion to vacate denied where mother purportedly relied on adjourn slip for wrong date but had appeared in court when date was selected and confirmed and should have clarified confusion, and mother had used same excuse in connection with earlier failure to appear); Matter of Christian T., 12 A.D.3d 613, 785 N.Y.S.2d 93 (2d Dept. 2004) (no vacatur where respondent claimed he lost date slip, but had given that excuse before and failed to establish effort to determine date); Matter of Baby Boy P., 287 A.D.2d 458, 730 N.Y.S.2d 879 (2d Dept. 2001) (no vacatur where respondent stated that she had herpes and submitted doctor's note); Matter of Tara O., 213 A.D.2d 753, 622 N.Y.S.2d 1009 (3rd Dept. 1995) (no vacatur where respondent failed to appear due to "hangover"). See also In re Vanessa B., 23 A.D.3d 273, 808 N.Y.S.2d 10 (1st Dept. 2005) (credibility finding regarding affidavit not entitled to deference on appeal).

Both the First and Second Department have issued similar rulings finding no reasonable excuse for a default where the respondent was clearly incapable of appearing, but did not notify his or her attorney or the court of the problem. Thus, it appears that when these courts refer to a "reasonable excuse," they are not simply referring to the reason the respondent did not appear, but also to whether the respondent acted diligently in attempting to head off the default by notifying someone of the problem. Perhaps the courts are refusing to provide relief to a respondent who, presumably, would have obtained an adjournment had he or she provided notification of

the problem (not always a reasonable presumption), and thus should not be permitted to compel the court to re-litigate the case. Whether it is fair and reasonable to impose this burden on the respondent, and leave in place an order terminating parental rights when the respondent could not possibly have appeared, certainly is debatable. Notably, in an analogous context, the law favors a resolution on the merits in child custody proceedings, and the general rule on defaults is not to be rigorously applied. Matter of Brice v. Lee, 134 A.D.3d 1106 (2d Dept. 2015).

It appears that the allegations in the respondent's motion to vacate must be based on personal knowledge. In re Chelsea Antoinette A., 88 A.D.3d 627 (1st Dept. 2011).

Arguably, even when the respondent has not met the two-prong test, the court may grant the motion in the interests of justice. Matter of Sims v. Boykin, 130 A.D.3d 835 (2d Dept. 2015) (default in custody proceeding vacated in interests of justice where court did not discharge responsibility to make record and ensure that award of custody was predicated on child's best interests).

Even after willfully failing to appear, the respondent can obtain vacatur under FCA §1061 upon a showing of good cause. See, e.g., Matter of Josephine G.P., 126 A.D.3d 906 (2d Dept. 2015) (§1061 does not include time limit); Matter of Commissioner of Social Services o/b/o Anna B., 223 A.D.2d 703, 637 N.Y.S.2d 182 (2d Dept. 1996) (fact-finding and dispositional orders vacated where father presented medical records indicating absence of signs of sexual or physical abuse). The respondent must make a motion to vacate in order to preserve the issue, and may appeal from the denial of such a motion. See People ex rel. Karen FF. v. Ulster County Department of Social Services, 79 A.D.3d 1187, 911 N.Y.S.2d 679 (3rd Dept. 2010) (proper procedure to challenge consent order finding neglect and placing children was motion to vacate, and there were no extraordinary circumstances warranting departure from traditional orderly procedure); Matter of Conhita J. v. Scopetta, 273 A.D.2d 238, 709 N.Y.S.2d 834 (2d Dept. 2000) (writ of habeas corpus was not proper procedure to seek review of fact-finding).

A "default" may not result, and the respondent's remedy would be an appeal, if

counsel for the respondent assumes an active role in the proceeding. Compare In re Trey C., 110 A.D.3d 575 (1st Dept. 2013) (default orders improper where counsel was present, stated that she wished to proceed, and affirmed that she had respondent's authorization to do so); Matter of Bradley M.M., 98 A.D.3d 1257 (4th Dept. 2012) (no default where attorney advised court he was authorized to proceed in father's absence and objected to default order); Matter of Abigail P., 275 A.D.2d 927, 714 N.Y.S.2d 181 (4th Dept. 2000) (no default where attorney participated in initial phase of hearing) and Matter of Konard M., 257 A.D.2d 919, 684 N.Y.S.2d 347 (3rd Dept. 1999) (no default where counsel appeared at termination of parental rights hearing and presented active defense) with Matter of Devon W., 127 A.D.3d 1098 (2d Dept. 2015) (mother defaulted where attorney appeared at hearing but did not actively represent the mother by presenting proof, making objections, or conducting cross-examination); Matter of Carolyn Z., 53 A.D.3d 875, 862 N.Y.S.2d 620 (3rd Dept. 2008), appeal dism'd, 11 N.Y.3d 807 (default found where attorney was initially present only because court contemplated assigning counsel, was not in contact with respondent, did not explain respondent's absence, and took no part in hearing after being excused by court once respondent's absence was confirmed) and Matter of Semonae YY., 239 A.D.2d 716, 657 N.Y.S.2d 488 (3rd Dept. 1997) (default found where counsel was present but made no motions and voiced no objection to default finding).

When the court finds a default but circumstances suggest that the respondent will appear that day or sometime in the near future and successfully move to vacate, the child's attorney could ask the court to recall the case later in the day, or adjourn the case, rather than proceed, but this is less of a concern when the caseworker is the only necessary witness. If the court does proceed and a finding is desired, the child's lawyer should insure that enough competent evidence is elicited. Although hearsay will be admitted since the respondent has effectively waived any objection, a finding based upon patently unreliable evidence could be vulnerable on appeal.

A late appearance by the respondent while a hearing is in progress raises separate issues. See, e.g., In re Tequan R., 43 A.D.3d 673, 841 N.Y.S.2d 535 (1st Dept. 2007) (respondent deprived of due process when family court continued fact-

finding hearing in her absence and struck her direct testimony from the records since cross-examination of respondent, which had commenced the previous court date, could have been continued when she did appear and appropriate sanction short of striking testimony could have been imposed; family court abused discretion by refusing to reinstate respondent's testimony after she and attorney appeared later the same day and court permitted attorney to call additional witnesses).

When the respondent does appear, the court may consider appointment of a guardian ad litem when it appears that the respondent is incapable of understanding the proceedings, defending his or her rights, or assisting his or her counsel. See, e.g., Matter of Shawndalaya II., 31 A.D.3d 823, 818 N.Y.S.2d 330 (3rd Dept. 2006).

Before the court proceeds, the child's attorney, or a guardian ad litem, must also be present. FCA §1042. See In re Chad D., 261 A.D.2d 322, 692 N.Y.S.2d 18 (1st Dept. 1999) (despite presence of stand-in lawyer, court erred in dismissing extension of placement petition in absence of child's attorney of record); Matter of New York City Department of Social Services o/b/o Samuel H., 208 A.D.2d 746, 618 N.Y.S.2d 42 (2d Dept. 1994) (new hearing required due to child's attorney's absence for portion of hearing); Matter of Audrey PP., 144 A.D.2d 723, 535 N.Y.S.2d 136 (3rd Dept. 1993) (where no attorney was appointed, reversal ordered despite presence in record of "more than adequate" support for fact-finding); Matter of Karl S., 118 A.D.2d 1002, 500 N.Y.S.2d 209 (3rd Dept. 1986) (continuation of fact-finding hearing in child's attorney's absence violated child's Due Process rights); see also People v. Jones, 15 A.D.3d 208, 789 N.Y.S.2d 476 (1st Dept. 2005) (right to counsel violation where, at sentencing, court refused to grant adjournment so defendant could be represented by attorney of record).

Since FCA §§ 249 and 1016 require that the child be represented by counsel, and there is no provision permitting a child to waive counsel in an Article Ten proceeding, it is unclear when the presence of a guardian ad litem would be sufficient.

**D. Presence Of Child**

Increasingly, child welfare professionals have recognized that an appearance by the subject child in the courtroom is, at least in some circumstances, appropriate. See,

e.g., Standard D-5 of The New York State Bar Association's Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings states that "[t]he attorney shall determine whether the child wishes to be, or in the case of a child who lacks capacity, whether the child should be present during courtroom proceedings. When the attorney determines that the child wishes to or should be present, the attorney shall make necessary applications to the court and otherwise attempt to enforce the child's right to be present."

The Commentary to Standard D-5 states:

> New York State has not yet enacted legislation nor recognized a constitutional right for children to be present during court proceedings. However, the ABA has opined that a child has the right to meaningful participation in the proceeding, which right includes the opportunity to be present at significant court hearings. Moreover, recent federal legislation mandates that states receiving federal funding require the court to "consult" with the child regarding the permanency plan. Children and Families Services Improvement Act of 2006 (Public Law 109-248). Arguably, the federal law requires an in-court appearance by the child.
>
> When the attorney has determined pursuant to Standard A-3 that the child has the capacity to decide whether to appear in court, the attorney may first provide counseling and advice to the child, but, in the end, must assert the child's right to appear in court insofar as the child directs. The attorney should raise and discuss with the child the emotional impact of the child's presence in court or exposure to inflammatory facts, and, with the child's consent, waive the child's appearance for discrete portions of the proceeding. When the attorney has determined pursuant to Standard A-3 that the child lacks capacity, the attorney, after taking into account the child's expressed wishes, may decide whether to assert the child's right to be present in court. In making such determinations, the attorney should, with due regard to rules governing disclosure of confidential information, consult with mental health professionals, caretakers, and any other persons who are knowledgeable about the child's emotional condition and possible reaction to the court proceedings. The attorney should keep in mind that even a child who is too young to sit through the hearing, or too developmentally delayed to direct the attorney with regard to the outcome of the case, may

> benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making decisions. The lawyer should attempt to ensure that the child's experience in court is as comfortable and stress-free as possible. To that end, the attorney should press the state custodian to meet its obligation to transport the child to and from the hearing; arrange for the child to wait in an appropriate setting in the courthouse; and explain to the child, before and after the hearing, what is likely to occur and what has occurred.

See also ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings, § 9 (child has right to attend and fully participate in hearings and shall receive notice from child welfare agency worker and child's lawyer of right to attend, and, if child is not present, court shall determine whether child was properly notified of right to attend, whether child wished to attend, whether child had means (transportation) to attend, and reasons for non-appearance; child's presence shall be excused only after lawyer for child has consulted with child and child has made informed waiver of right to attend, and, if child wished to attend and was not transported to court, matter shall be continued).

Given the 2016 legislation establishing a broad right of participation for children at permanency hearings, the child can argue for the same broad right during all stages of an Article Ten proceeding, raising not only due process arguments, but also equal protection arguments based on the existence of a right at permanency hearings.

Arguably, children who are capable of understanding the court proceeding and assisting their attorney have a constitutional due process right to be present in court during proceedings that could affect their liberty interests. This includes, at the very least, FCA §1027 hearings; FCA §1028 hearings; FCA Article Ten fact-finding and dispositional hearings; FCA Article Ten-A permanency hearings; evidentiary hearings and other critical stages of proceedings conducted upon the filing of a motion to return to foster care placement pursuant to FCA Article 10-B; fact-finding and dispositional hearings in termination of parental rights proceedings filed pursuant to SSL §384-b; evidentiary hearings and other critical stages of proceedings conducted upon the filing of a petition to restore parental rights pursuant to FCA §635; fact-finding and

dispositional hearings held in connection with a petition to have a minor declared "destitute" pursuant to FCA Article Ten-C; evidentiary hearings and other critical stages of proceedings conducted upon the filing of a FCA Article Six custody, visitation or guardianship petition; evidentiary hearings and other critical stages of proceedings conducted upon the filing of a petition seeking approval of a voluntary placement pursuant to SSL §358-a; and any other proceedings that may result in an order substantially affecting the child's custodial situation or right to visit with family members.

This right is not limited to formal hearings. In any type of proceeding, there could be legal arguments, or informal hearings or colloquy, that substantially affect the child's liberty interests.

Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332 (1976). "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' (citation omitted). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' (citations omitted)." Id. at 333.

"'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). Due process "is flexible and calls for such procedural protections as the particular situation demands." Morissey v. Brewer, 408 U.S. 471, 481 (1972). A determination as to whether procedures are constitutionally sufficient requires analysis of the governmental and private interests that are affected. The analysis focuses on three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. at 335.

Applying these principles under the State Constitution's Due Process Clause, New York courts have held that the respondent parent has a constitutional right to the effective assistance of counsel in abuse/neglect, termination of parental rights, and permanency proceedings. Matter of Ella B., 30 N.Y.2d 352, 356-57 (1972); Matter of Stephen Daniel A., 87 A.D.3d 735 (2d Dept. 2011); Matter of Jamaal NN., 61 A.D.3d 1056, 1057-58 (3rd Dept. 2009), lv denied 12 N.Y.3d 711; Matter of Erin G., 139 A.D.2d 737, 739 (2d Dept. 1988). This constitutional right to the effective assistance of counsel exists in custody proceedings as well. See Matter of Dingman v. Purdy, 221 A.D.2d 817 (3rd Dept. 1995).

More broadly, FCA §261 states that "[p]ersons involved in certain family court proceedings may face the infringement of fundamental interests and rights, including the loss of a child's 'society' and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings. Counsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition. The purpose of this part is to provide a means for implementing the right to assigned counsel for indigent persons in proceedings under this act."

In addition to the statutory (see FCA §262) and constitutional right to counsel, which by itself provides a substantial degree of due process protection, a parent has a due process right to be physically present in court in proceedings in which the parent's custodial rights may be compromised, unless there are exceptional circumstances or the parent has waived the right to appear. Matter of Aaron D., 49 N.Y.2d 788, 791 (1980); Matter of Eileen R., 79 A.D.3d 1482, 1482-83 (3d Dept. 2010); Matter of Tristram K., 25 A.D.3d 222, 226-227 (2d Dept. 2005); Matter of Radjpaul v. Patton, 145 A.D.2d 494, 497-98 (2d Dept. 1988); Matter of Kendra M., 175 A.D.2d 657, 658 (4th Dept. 1991). Among the exceptional circumstances that may justify excluding the respondent, or at least denying the respondent an opportunity to confront the child face-to-face in court, is the need to protect a vulnerable child who is testifying. See, e.g., In re Giannis F., 95 A.D.3d 618 (1st Dept. 2012).

Although New York appellate courts have not yet ruled on the question of whether a child has the same State constitutional due process right to be present in court that is afforded to the parent, there are no reasonable grounds for different treatment, and thus there is no reason to believe that New York appellate courts would hold that the child has no such right. First of all, the child also has a statutory right to counsel and a constitutional right to the effective assistance of counsel. FCA §249]; Matter of Jamie TT., 191 A.D.2d 132, 136-137 (3d Dept. 1993). A child who is present in court is in a position to monitor and enforce his or her right to counsel, and can be consulted by and assist counsel as events are transpiring in court, at a time when counsel can most effectively protect the child's interests. Undoubtedly, there are even some cases in which the child's attorney literally cannot provide effective assistance of counsel without having the child present to assist the attorney in addressing testimony or other factual presentations about which the child has first-hand knowledge.

Moreover, like a parent, the child has a constitutional right to be free from unreasonable governmental interference with the integrity of the family unit, and the child has an independent Fourth Amendment right to be free from an unlawful seizure/removal by government officials. See Tenenbaum v. City of New York, 193 F.3d 581, 605 (2d Cir. 1999). The Family Court proceeding will determine where the child will live in the immediate future and may well have a substantial impact on the child's custodial circumstances and life circumstances for many years to come. Thus, the child's liberty interest could not be more compelling. See Matter of Pedro M., 21 Misc.3d 645, 650 (Fam. Ct., Albany Co., 2008) (while addressing age-appropriate consultation requirement in FCA §1089[d], court adopted presumption that child seven years of age or older should be produced in court).

There is also ample support in the case law for a broad due process right to be present in court during any proceeding, including those that do not involve a formal hearing, when the parent or child is in a position to provide meaningful input with respect to an issue affecting his or her liberty interests. See Kentucky v. Stincer, 482 U.S. 730, 745-747 (1987) (a defendant "has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the

fullness of his opportunity to defend against the charge' [citation omitted]," and "is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure"); People v. DePallo, 96 N.Y.2d 437 (2001) (although right does not extend to circumstances involving matters of law or procedure that have no potential for meaningful input from defendant, there is constitutional and statutory right to be present at all material stages of trial, and at ancillary proceedings, when defendant may have something valuable to contribute or when presence would have substantial effect on defendant's ability to defend against charges).

Like the parent's right to be present in court, the child's right should not be compromised except when the child makes a knowing and intelligent waiver of that right, or there are exceptional circumstances, such as the proven need to protect the child from serious emotional harm. Moreover, if the court does exclude the child from the courtroom over his or her objection, the court must provide alternative protections that satisfy due process. See In re Tristram K., 25 A.D.3d 222, 226-27 (1st Dept. 2005) (court erred in proceeding in mother's absence where she was incarcerated in Westchester County, but court made no effort to have her produced, citing budgetary constraints, nor was any effort made to explore reasonable alternatives, such as arranging for her to participate in a telephone conference); Matter of Robert "U", 283 A.D.2d 689, 690-91 (3rd Dept. 2001) (court erred in excluding respondent without balancing competing interests and abdicating responsibility to child's attorneys, who simply asserted that conversations with children led them to conclude that there would be risk of trauma); Matter of James Carton K., 245 A.D.2d 374, 376-78 (2d Dept. 1997) (no violation of due process where portions of termination of parental rights proceeding were conducted in absence of father, a Federal prison inmate whose physical presence was unobtainable, but he was provided with transcripts and given opportunity to participate via telephone conference calls).

Arguably, when there is a court appearance at which the child's attorney cannot provide effective assistance of counsel unless the attorney can consult with the child on the spot -- e.g., if the respondent were testifying about the alleged sexual abuse and

only the child could provide the lawyer with necessary facts -- the child has a right to be present. Alternatively, the attorney could be provided with an opportunity to consult with the child outside of court before proceeding. See In re Hadja B., 302 A.D.2d 226, 753 N.Y.S.2d 721 (1st Dept. 2003).

**E. Standard Of Proof**

An abuse or neglect finding must be based on a preponderance of the evidence. FCA §1046(b)(i). Although it was held in Santosky v. Kramer 455 U.S. 745, 102 S.Ct. 1388 (1982) that fact-findings in termination of parental rights proceedings require clear and convincing proof [see also SSL §384-b(3)(g)], the constitutionality of Article Ten's preponderance standard has since been upheld. Matter of Tammie Z., 66 N.Y.2d 1, 494 N.Y.S.2d 686 (1985); Matter of Katrina W., 171 A.D.2d 250, 575 N.Y.S.2d 705 (2d Dept. 1991), appeal dism'd 79 N.Y.2d 976, 583 N.Y.S.2d 194 (1992) (preponderance standard permissible in abuse cases). See also Matter of Department of Social Services v. Oscar C., 192 A.D.2d 280, 600 N.Y.S.2d 957 (2d Dept. 1993), lv denied 82 N.Y.2d 660, 605 N.Y.S.2d 6 (preponderance standard is not in conflict with Indian Child Welfare Act). However, when an abuse finding could form the predicate for a termination of parental rights proceeding [see SSL §384-b(8)], a judge who has found that there is clear and convincing evidence of abuse will sometimes include such a finding in the fact-finding order to forestall any objection to use of the finding as a predicate for a termination of parental rights on the ground that the finding was made under a lower standard of proof.

**F. Role Of The Judge**

Given that one of the overriding purposes of an Article Ten proceeding is the protection of the child from harm, the judge in such a proceeding is expected to do more than merely "sit on the sidelines" and observe as the respective parties attempt to prevail. While the judge in a proceeding involving the competing interests of two or more private parties will rarely intercede to ensure that the result of the litigation is consistent with the public interest, the judge in an Article Ten proceeding should seek out all relevant information so that the "right" result is attained, particularly when the life or health of the child may well be endangered. See Matter of Keaghn Y., 84 A.D.3d

1478, 921 N.Y.S.2d 737 (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, 856 N.Y.S.2d 177 (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, 838 N.Y.S.2d 49 (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, 689 N.Y.S.2d 277 (3rd Dept. 1999) (no error where court assisted petitioner in laying foundation for admission of photos); Matter of Tanya G., 79 A.D.2d 881, 434 N.Y.S.2d 536 (4th Dept. 1980); Matter of Gale, 135 Misc.2d 225, 514 N.Y.S.2d 860 (Fam. Ct., Kings Co., 1987); but see Matter of Elizabetta C., 60 Misc.3d 603 (Fam. Ct., Clinton Co., 2018) (court had no authority to make record regarding intervening father's fitness/unfitness).

Indeed, by routinely choosing to remit cases for further proceedings, rather than order dismissal, when there are deficiencies in the proof, the appellate courts have made clear their desire for a full exploration of the facts in the Family Court. See, e.g., Matter of J., 274 A.D.2d 482, 710 N.Y.S.2d 647 (2d Dept. 2000) (where doctor testified that he based diagnosis of sexual abuse on hospital records, family court should have determined whether records existed); Matter of Elizabeth R., 155 A.D.2d 666, 548 N.Y.S.2d 55 (2d Dept. 1989); Matter of Dana F., 113 A.D.2d 939, 493 N.Y.S.2d 837 (2d Dept. 1985). The judge has broad authority to compel the attendance of witnesses who have not been subpoenaed by any of the parties or who are reluctant to appear. See FCA §153 ("[t]he family court may issue a subpoena or in a proper case a warrant or other process to secure the attendance of an adult respondent or child or any other person whose testimony or presence at a hearing or proceeding is deemed by the court

to be necessary, and to admit to, fix or accept bail, or parole him pending the completion of the hearing or proceeding").

As in any bench trial, a judge generally is not disqualified because he or she heard evidence at a previous proceeding which will not be admitted at the fact-finding hearing, see People v. Brown, 24 N.Y.2d 168, 299 N.Y.S.2d 190 (1969); Matter of Christopher D.S., 136 A.D.3d 1285 (4th Dept. 2016) (in termination of parental rights proceeding, no error where court had presided over related prosecution of father for sexual abuse), or because of excessive interference in the hearing or the introduction of inflammatory evidence. See Matter of C.H. v. F.M., 130 A.D.3d 1028, 14 N.Y.S.3d 482 (2d Dept. 2015) (court's challenges to mother's credibility were inappropriate but did not deprive mother of fair trial; courts must strictly avoid taking on function or appearance of advocate); Matter of Emily A., 129 A.D.3d 1473, 11 N.Y.S.3d 751 (4th Dept. 2015) (court did not exceed authority to question witnesses, and acting in best interests of child is not denial of due process to parent); Adoption of Norbert, 986 N.E.2d 886 (Mass. Ct. App., 2013), review den'd 990 N.E.2d 562 (mother's due process rights not violated by extensive questioning of witnesses by judge, who asked over 1000 questions; questioning went beyond clarification, but judge did not limit questioning by mother's attorney or elicit inadmissible evidence; also recusal not required after judge complained at status hearing about agency's decision to remove one child but not the other); Matter of Eshale O., supra, 260 A.D.2d 964 (no error where allegedly inflammatory photos were introduced and court assisted petitioner in laying foundation; "the cases relied upon by respondent have no reasonable application in the context of a nonjury trial); Matter of Amber L., 260 A.D.2d 673, 687 N.Y.S.2d 488 (3rd Dept. 1999) (petitioner's counsel misstated testimony but did not engage in pervasive pattern of misconduct). But see Matter of Baby Girl Z., 140 A.D.3d 893 (2d Dept. 2016) (reversing order that granted request that children be immunized over mother's objection; judge had predetermined outcome in mind, took adversarial stance, aggressively cross-examined mother, continually interrupted her testimony, and mocked her beliefs, and generally demonstrated bias); Matter of Washington v. Edwards, 137 A.D.3d 1378 (3d Dept. 2016) (Support Magistrate erred in providing evidence to mother and using

questions to ensure that she introduced evidence); Matter of Harriet "II" v. Alex "LL", 292 A.D.2d 92, 740 N.Y.S.2d 162 (3rd Dept. 2002) (court had no authority to raise alleged violation of rights belonging to child where court's strong opinions put it at odds with child's attorney).

### G. Order Of Proof, Examination Of Witnesses And Right To Present Evidence

The petitioner, with the burden of proof, presents a case first. Upon a motion for dismissal at the conclusion of the petitioner's case on the ground that a prima facie case has not been established, the court must view the evidence in the light most favorable to the petitioner. Matter of Lisa M., 222 A.D.2d 1088, 635 N.Y.S.2d 843 (4th Dept.,1995); Matter of Isaiah D., 29 Misc.3d 1215(A), 2010 WL 4227242 (Fam. Ct., Bronx Co., 2010) (court cites CPLR §4401). When the child's lawyer wishes to present evidence in support of the petition, a respondent's dismissal motion cannot be granted until the child's lawyer is given an opportunity to present evidence. See Matter of Jamie EE., 249 A.D.2d 603 (3rd Dept. 1998). In such instances, the respondent's lawyer may ask the court to direct the child's lawyer to proceed first. But see Matter of Aniya L., 124 A.D.3d 1001 (3d Dept. 2015), lv denied 25 N.Y.3d 904 (in termination proceeding, no error in denial of mother's request to require attorney for children to cross-examine petitioner's witnesses before respondent's cross-examination, and preclude AFC from asking leading questions during cross-examination; petitioner's witnesses did not effectively become witnesses for attorney for children); see also In re Alexis W., 159 A.D.3d 547 (1st Dept. 2018) (although attorney for stepdaughter was permitted to ask leading questions when cross-examining her after she was called as petitioner's witness, respondent's counsel was offered, but declined, opportunity to resume cross-examination).

The respondent has a due process right to cross-examine other parties' witnesses, and call witnesses and present evidence in his or her defense. See Matter of Herbert F., 56 A.D.2d 601, 391 N.Y.S.2d 654 (2d Dept. 1977).

The respondent's right to compel the child to testify can be limited when testifying would expose the child to a risk of emotional trauma. Compare In re Lesli R.,

138 A.D.3d 488 (1st Dept. 2016) (subpoena quashed where letter from psychotherapist and affidavit from social worker established potential psychological harm); Matter of Imman H., 49 A.D.3d 879 (2d Dept. 2008) (where parents allegedly made child witness abuse of uncle and participate in disposal of uncle's dismembered corpse, mother's subpoena to compel child to testify properly quashed); Matter of Ian H., 42 A.D.3d 701 (3rd Dept. 2007), lv denied 9 N.Y.3d 814 (respondent could not call seven-year-old child due to child's age and court's concerns about her mental and emotional well-being); Matter of Nora M., 300 A.D.2d 922 (3rd Dept. 2002) (child who had recanted not required to testify where respondent had made admissions); Matter of Jennifer G., 261 A.D.2d 823 (4th Dept. 1999) (child not compelled to testify where therapist testified that child became suicidal after discussing abuse and that mother's disbelief concerning the allegations contributed to child's depression); Matter of Commissioner of Social Services o/b/o Woodley B., 207 A.D.2d 885 (2d Dept. 1994) (children not compelled to testify) and Matter of A.V., 173 Misc.2d 104 (Fam. Ct., Orange Co., 1997) (respondent precluded from calling seven-year-old subject child) with In re Tamara G., 295 A.D.2d 194 (1st Dept. 2002) (court should have granted respondent's request that child testify where there were numerous inconsistencies). See also Matter of McGrath v. Collins, 202 A.D.2d 719 (3rd Dept. 1994) (in custody proceeding, court did not err in failing to conduct in camera interview of child under five years of age after weighing possible harm against benefit of child's input).

Without an opportunity to interview the child, the respondent would be taking a risk in calling the child. Since the child is the respondent's own witness, the respondent's attorney would be conducting a direct examination and could not ask leading questions, and could not ask the child about prior inconsistent statements that were not made in writing or under oath, or otherwise impeach the child. Richardson on Evidence, §6-419; CPLR 4514 ("In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath"). However, a certain amount of leading is permitted when needed to elicit the testimony of a young child. See, e.g., In re

Christopher T., 71 A.D.3d 464 (1st Dept. 2010) (given age of victim and sexual nature of charges, prosecutor needed to use leading questions); People v. Cuttler, 270 A.D.2d 654 (3rd Dept. 2000) (prosecutor allowed to lead child sexual abuse victim). In addition, the respondent could ask that the child be declared a hostile witness. A witness's legally cognizable "hostility," which permits the use of leading questions and impeachment of the witness, may arise out of a witness' interest in the case or demonstrated reluctance to testify on the stand. See, e.g., People v. Dann, 14 A.D.3d 795 (3d Dept. 2005) (defendant's girlfriend declared hostile where she attempted to evade questions, could not recall facts she had testified to on prior occasions, and was uncooperative). The attorney for the child could argue that a child who, given a familial connection to the respondent, would be expected to possess a natural reluctance to disclose abuse or neglect, cannot be deemed a hostile witness.

The child's lawyer is entitled to cross-examine witnesses and present a case. See Matter of Jamie TT. 191 A.D.2d 132 (3rd Dept. 1993). When the child's lawyer is "cross-examining" witnesses presented by a party whose position the lawyer supports, the court may allow the lawyer to use leading questions. See Matter of Aniya L., 124 A.D.3d 1001. Moreover, given appellate courts' desire for a full development of the record, and the possibility of amending the pleadings to conform to the proof under FCA §1051(b), the child's lawyer can explore subjects that were neglected by the other lawyers without being limited by rules governing the scope of cross-examination.

Like other witnesses, the respondent may be impeached with prior inconsistent statements (see CPLR §4514), and cross-examined regarding prior convictions or bad acts bearing on the respondent's credibility. See CPLR §4513; Matter of Jessica "Y", 206 A.D.2d 598 (3rd Dept. 1994) (respondent properly questioned regarding acts charged in case that was adjourned in contemplation of dismissal); but see Matter of Dakota CC., 78 A.D.3d 1430 (3rd Dept. 2010) (court erred in taking judicial notice of respondent's criminal history without affording opportunity to challenge its relevancy or accuracy). Unlike a criminal defendant, the respondent is not entitled to obtain a pretrial ruling (see People v. Sandoval, 34 N.Y.2d 371 (1974)) regarding the limits of such cross-examination. Matter of Linda O., 95 Misc.2d 744 (Fam. Ct., Queens Co., 1978).

The court may strike the testimony of a witness who does not return to court and thus cannot be fully cross-examined. In re David L., 118 A.D.3d 468 (1st Dept. 2014) (court did not err in striking child's testimony after she failed to return to complete it). Arguably, when the absent witness is a child whose out-of-court statements would be admissible, the partial testimony should not be stricken and could be assigned the same weight as out-of-court statements or an in camera interview.

It has been said that, in general, post-petition evidence should not be considered. See Matter of Elijah NN., 66 A.D.3d 1157 (3rd Dept. 2009), lv denied 13 N.Y.3d 715. But that is not the case. An admission made by a respondent after the date of filing would be admissible. Post-filing evidence may be admitted when the respondent "opens the door" [In re Virginia C., 88 A.D.3d 514 (1st Dept. 2011) (no error in admission of respondent's testimony on cross regarding post-filing cocaine use since respondent opened door by testifying that, pre-filing, she had left several drug treatment programs and had not tested positive for drugs, and falsely testifying that she had never used drugs after completing a program)], or for impeachment purposes when the respondent is given sufficient notice to avoid surprise or prejudice. Matter of Elijah NN., 66 A.D.3d 1157. Such evidence may be admissible if it bears on an allegation in the petition. See Matter of Annette B., 4 N.Y.3d 509 (2005) (in termination of parental rights proceeding, post-petition conduct not determinative since alleged abandonment was for six months before filing, but court could infer that if respondent had received notice of prior proceedings, it would no more have prompted him to get in touch with child than post-filing notice he received); In re Jamoneisha M., 84 A.D.3d 650 (1st Dept. 2011), lv denied 17 N.Y.3d 709 (court properly admitted hospital records that post-dated filing by a few days but were relevant to respondent's mental health history and failure to seek treatment pre-filing).

Post-filing evidence is admissible when offered in connection with a motion to amend the pleadings to conform to the proof. Matter of Ruth Joanna O.O., 149 A.D.3d 32 (1st Dept. 2017) (no error where court sua sponte made motion apparently designed to justify consideration of events occurring after petition filing date, and mother was afforded due process because she was able to contest evidence and cross-examine

witnesses); Matter of Ariel C.W.-H., 89 A.D.3d 1438 (4th Dept. 2011) (no error where court conformed pleadings to proof and considered post-filing events); Matter of Sara X., 122 A.D.2d 795 (2d Dept. 1986).

The judge has considerable discretion in determining the order of proof, and may reopen the hearing in appropriate circumstances - e.g., when evidence belatedly comes to light or a party wishes to cure a minor, inadvertent defect in the evidence. See CPLR Rule 4011 ("The court may determine the sequence in which the issues will be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matter at issue in a setting of proper decorum"); Matter of Jewelisbeth JJ., 97 A.D.3d 887 (3d Dept. 2012) (after petitioner rested in reliance on collateral estoppel, but certificate of disposition did not establish factual connection between conviction and allegations in petitions, court erred in refusing to consider certified transcript of plea allocution, which was attached to petitioner's papers opposing respondent's motion to dismiss; although petitioner did not make separate motion to reopen proceedings, it made offer of proof by articulating contents of transcript and linking admissions to allegations in petitions); Matter of Julia BB., 42 A.D.3d 208 (3rd Dept. 2007) (court erred by refusing to re-open for testimony from physicians who had examined child where respondents moved to re-open within days of summations, offered cogent explanation of delay, and specified who would be testifying, what proof would be and how it related to central dispute, and case involved complex and contested medical issues); Kay Foundation v. S & F Towing Service of Staten Island, Inc., 31 A.D.3d 499 (2d Dept. 2006) (court erred in refusing to reopen to permit submission of crucial evidence); Matter of Dutchess County Department of Social Services o/b/o Sabrina T., 266 A.D.2d 459 (2d Dept. 1999) (court should have re-opened to allow petitioner to present evidence that child was under eighteen years of age); Matter of Sabrina F.G., 37 Misc.3d 1219(A) (Fam. Ct., Kings Co., 2012) (where child's testimony deemed equivalent of out-of-court statements after child absconded and was not available to complete cross-examination, court denied agency's application for continuance to bring her back to court since court had already ruled regarding testimony and "to allow ACS to start it over would be gaming the system"); Matter of the

Allen Children, 30 Misc.3d 634 (Fam. Ct., Oswego Co., 2010) (court must consider whether there is a sufficient offer of proof; whether there would be significant delay if the motion to re-open is granted; whether the respondent will be prejudiced; how the offer of proof relates to the central issue or will add to the existing record; and whether there is a cogent explanation as to why the evidence was not presented earlier).

As always, the court also has considerable discretion in determining when to allow the use of leading questions on direct examination of an allegedly adverse and hostile witness. See Jackson v. Montefiore Medical Center, 109 A.D.3d 762 (1st Dept. 2013); Ostrander v. Ostrander, 280 A.D.2d 793 (3d Dept. 2001).

Finally, the court has authority to order separate trials. See CPLR §603 ("In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue"); Matter of Nicolette I., 110 A.D.3d 1250 (3d Dept. 2013) (court's refusal to sever hearings did not deprive father of due process where court considered mother's out-of-court statements only against her and proceedings presented common questions of law and fact).

**H. Self Incrimination**

Although a respondent cannot refuse to take the stand if called by another party, the Fifth Amendment privilege against self-incrimination can be invoked by a respondent who does not wish to answer certain questions. See Steinbrecher v. Wapnick, 24 N.Y.2d 354, 300 N.Y.S.2d 555 (1969); Matter of Gladys H., 235 A.D.2d 841, 653 N.Y.S.2d 392 (3rd Dept. 1997). On the other hand, the existence, or even the possibility of a concurrent criminal proceeding obviously presents potential self-incrimination problems for a respondent who wishes to testify in the Article Ten proceeding.

The family court is permitted to grant a respondent, or a potential respondent, testimonial immunity in any criminal proceeding with respect to testimony given at a §1014 transfer hearing. FCA §1014(d). Although it has been held that §1014(d) also provides power to grant immunity at a fact-finding hearing [see Matter of Vance A., 105 Misc.2d 254, 432 N.Y.S.2d 137 (Fam. Ct., N.Y. Co., 1980)], that view has not prevailed. See, e.g., Sobie, Practice Commentary, FCA §1014.

Thus, a respondent who wishes to testify at a fact-finding hearing faces a difficult choice between foregoing the presentation of a complete defense, or testifying and risking the use of such testimony at a criminal proceeding. See In re Ti.B., 762 A.2d 20 (D.C. 2000) (trial court violated First and Fifth Amendment rights of respondent father by barring father's criminal defense attorney from courtroom and ordering father and neglect attorney not to consult with criminal defense attorney about asserting father's Fifth Amendment privilege). This problem is particularly acute when evidence of abuse or neglect activates the statutory presumption in FCA §1046(a)(ii), which then requires the respondent to provide an adequate explanation for the child's injuries or condition. As a result, it has been argued that the respondent's Fifth Amendment privilege against self-incrimination is violated if the family court proceeds to trial before the criminal court. Thus far, these arguments have been rejected. Matter of Emily I., 50 A.D.3d 1181, 854 N.Y.S.2d 792 (3rd Dept. 2008), lv denied, 10 N.Y.3d 712 (no abuse of discretion where family court allowed abuse proceeding to go forward despite pendency of criminal action against respondent and chilling effect criminal action may have on respondent's decision whether to testify in abuse proceeding; there is general policy in favor of resolving abuse proceeding expeditiously, and family court did not draw negative inference from respondent's decision not to testify); Matter of Derra G., 232 A.D.2d 211, 647 N.Y.S.2d 946 (1st Dept. 1996) (no error, particularly since court drew no negative inference from respondent's failure to testify); Matter of New York City Commissioner of Social Services v. Elminia E., 134 A.D.2d 501, 521 N.Y.S.2d 283 (2d Dept. 1987), appeal withdrawn 72 N.Y.2d 1042, 534 N.Y.S.2d 941 (1988); Matter of Germaine B., 86 A.D.2d 847, 447 N.Y.S.2d 448 (1st Dept. 1982). See also Matter of Hailey JJ., 84 A.D.3d 1432 (3d Dept. 2011) (no ineffective assistance where counsel's decision not to present evidence at abuse hearing was reasonable in light of pending criminal proceeding involving same allegations; counsel was not obliged to seek adjournment); In re J.W. and D.S.G., 113 S.W.3d 605 (Texas Ct. App., 2003), cert denied 543 U.S. 965, 125 S.Ct. 419 (2004) (statute which precludes court from proceeding to trial in termination of parental rights proceeding while related criminal charges are pending did

not apply where child endangerment charges were not directly related to the termination proceeding).

On the other hand, a family court may, in its discretion, stay Article Ten proceedings, or sever the criminally accused respondent's case (see CPLR §§ 603, 2201), pending the resolution of a criminal case. Matter of Beverly SS., 132 A.D.2d 825, 517 N.Y.S.2d 618 (3rd Dept. 1987). Finally, it should not be forgotten that proceeding first in Family Court can provide benefits to the respondent. See, e.g., Matter of Donna EE., 228 A.D.2d 977, 644 N.Y.S.2d 838 (3rd Dept. 1996) (no denial of effective assistance where counsel failed to move for adjournment so Family Court hearing could be held after criminal trial; court notes that respondent obtained discovery benefits).

Since Article Ten proceedings are civil in nature, the court may draw an adverse inference from the respondent's failure to testify, or refusal to answer questions on self-incrimination grounds. See In re Jani Faith B., 104 A.D.3d 508 (1st Dept. 2013) (court properly drew negative inference with respect to whether respondent's actions were for purpose of gratifying sexual desire); Matter of Keara MM., 84 A.D.3d 1442 (3d Dept. 2011) (court did not err in drawing negative inference against mother where her sentencing was pending in related criminal action; while pending criminal action has impact on respondent's decision whether to testify in related abuse proceeding, there is strong policy in favor of expeditiously resolving abuse proceedings); In re Leah M., 81 A.D.3d 434 (1st Dept. 2011) (negative inference drawn from respondent's failure to testify did not violate Fifth Amendment rights in pending criminal case); Matter of Cantina B., 26 A.D.3d 327, 809 N.Y.S.2d 539 (2d Dept. 2006) (dismissal order vacated and finding made where father stated to caseworker that he did not know of mother's drug use during pregnancy, but his failure to appear and testify warranted strongest inference that opposing evidence permitted); Matter of Themika V., 205 A.D.2d 787, 613 N.Y.S.2d 708 (2d Dept. 1994) (court may draw "strongest inference" permitted by evidence); Matter of Breann B., 185 A.D.2d 711, 586 N.Y.S.2d 71 (4th Dept. 1992); Matter of Imanie S., 43 Misc.3d 1230(A) (Fam. Ct., Bronx Co., 2014) (where father charged with domestic violence blamed mother for perpetrating violence against him, court draws negative inference that father's actions were not of defensive nature); see

also People v. Paylor, 70 N.Y.2d 146, 518 N.Y.S.2d 102, 103 (1987) (when witness under respondent's control is not called, is knowledgeable about material issue, and might be expected to give favorable evidence, court may "infer that the missing witness would not have supported or corroborated [the respondent's] evidence," but "may not speculate about what the witness would have said," or "assume that the witness could have provided positive evidence corroborating or filling gaps in the [prosecution's] proof"); People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796 (1986) (court may infer that missing prosecution witness' testimony would have been unfavorable); Matter of Adam K. v. Iverson, 110 A.D.3d 168 (2d Dept. 2013) (rule permits strongest possible adverse inference as to evidence missing party or witness would be in position to controvert, but no inferences beyond that); but see Matter of Danner v. Nepage, 100 A.D.3d 1405 (4th Dept. 2012) (no adverse inference where father testified at custody hearing but was not questioned concerning allegations of sexual abuse); Matter of Raymond D., 45 A.D.3d 1415, 845 N.Y.S.2d 583 (4th Dept. 2007) (family court erred in drawing negative inference from mother's failure to appear for several days of testimony at fact-finding hearing; she did testify notwithstanding occasional absences); In re Samantha A., 847 A.2d 883 (Conn. 2004) (permanent loss of custody is substantial "penalty," and thus termination of parental rights respondents arguably might have had right to be free from adverse inferences had they asserted right not to testify under Fifth Amendment, but they did not do so).

The court does not have to warn the respondent that it will draw a negative inference if the respondent does not testify. See In re Joseph P., 112 A.D.3d 553 (1st Dept. 2013) (although court did not state that it was drawing negative inference, it was entitled to do so).

The court may also draw such a "missing witness" inference against other parties. Marine Midland Bank v. John E. Russo Produce Co., 50 N.Y.2d 31, 427 N.Y.S.2d 961 (1980), and compare Matter of Abraham P., 21 Misc.3d 1144(A), 875 N.Y.S.2d 818 (Fam. Ct., Kings Co., 2008) (court draws strongest adverse inference against ACS for failing to call expert with whom ACS consulted and detective who conducted forensic interview of child and had stated to witnesses that she did not

believe child was sexually assaulted) and Matter of Toni D., 179 A.D.2d 910, 579 N.Y.S.2d 181 (3d Dept. 1992) (caseworker failed to testify) with Matter of Michael U., 110 A.D.3d 821 (2d Dept. 2013) (no error in refusal to draw negative inference against child or petitioner when child exercised privilege against self-incrimination) and Matter of Child Protective Services o/b/o Darnell Mc., 230 A.D.2d 733, 645 N.Y.S.2d 881 (2d Dept. 1996) (missing witness inference should not have been made where petitioner failed to call mother, who could have incriminated herself).

**I. Collateral Estoppel And Res Judicata**

The final determination of an issue common to concurrent criminal and Article Ten proceedings may lead to application of the collateral estoppel doctrine. For instance, because there is a higher standard of proof in criminal proceedings, a criminal conviction can have collateral estoppel effect as long as it is established that the conviction involves the same charges that have been made in family court.

Compare Matter of Suffolk County Department of Social Services v. James M., 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994) (summary judgment properly granted where acts of sodomy underlying conviction came within broad allegations of abuse petition); Matter of Khalil L., 128 A.D.3d 698 (2d Dept. 2015), lv denied 26 N.Y.3d 904 (derivative abuse finding made where father had been convicted of manslaughter in connection with death of his child; it was immaterial that he had taken appeal from conviction, since determinative issue was whether he had full and fair opportunity to litigate at criminal trial); Matter of Jewelisbeth JJ., 97 A.D.3d 887 (3d Dept. 2012) (after petitioner rested in reliance on collateral estoppel, but certificate of disposition did not establish factual connection between criminal conviction and conduct alleged in petitions, court erred in dismissing petitions without considering certified transcript of respondent's plea allocution, which was attached to petitioner's papers in opposition to respondent's motion to dismiss; although petitioner did not make separate motion to reopen proceedings, it made offer of proof by articulating substance of transcript and linking pleas and admissions to allegations in petitions); Matter of Miranda F., 91 A.D.3d 1303 (4th Dept. 2012) (summary judgment properly granted where petitioner did not establish with non-hearsay evidence that respondent had been convicted of rape alleged in

family court, but judge had also presided over criminal trial and was able to take judicial notice of basis for conviction); Robin BB. v. Kotzen, 62 A.D.3d 1187, 880 N.Y.S.2d 713 (3rd Dept. 2009) (in civil damages action, plaintiffs properly awarded summary judgment where defendant pleaded guilty to criminal charges that were based on same series of sexual assaults on children but plea only referenced limited time period and did not constitute full admission, since defendant did not refute any of plaintiffs' claims and admissions made during plea allocution, when considered with other materials submitted by plaintiffs, provided sound basis for court's conclusion that no legitimate factual issues existed); Matter of Kaia H., 38 Misc.3d 1202(A) (Fam. Ct., Kings Co., 2012) (conviction was final despite pending motion for leave to appeal to Court of Appeals, and, in any event, sole basis for vacatur of conviction was denial of right to public trial, not lack of proof); Matter of P./R. Children, 14 Misc.3d 1232(A), 836 N.Y.S.2d 494 (Fam. Ct., Kings Co., 2007) (summary judgment finding made as to sexual abuse charge where father pleaded guilty to attempted sexual abuse and endangering welfare of child, but acts he admitted arose out of incident alleged in petition and plea minutes reveal that he admitted touching his penis to child's vagina, and father failed to raise triable issue of fact) and Matter of Commissioner of Social Services v. Arthur B., 2002 WL 237033 (Fam. Ct., Queens Co.) (admission underlying Youthful Offender adjudication could be used in summary judgment determination, and, although respondent pled guilty to endangering the welfare of a child, his admission that he "inappropriately touched" child established that he committed first degree sexual abuse)

with Matter of Nicholas W., 90 A.D.3d 1614 (4th Dept. 2012) (order granting summary judgment reversed where father's guilty plea to assault included no allocution concerning respondent's conduct and petitioner failed to establish that father intended to hurt son or that there was pattern of excessive corporal punishment); Matter of Tali W., 299 A.D.2d 413, 750 N.Y.S.2d 104 (2d Dept. 2002) (summary judgment improperly ordered where respondent admitted to one act of domestic violence in criminal proceeding, but did not admit children were present or otherwise establish element of impairment or risk of impairment); In re the Allen Children, 30 Misc.3d 634, 913

N.Y.S.2d 487 (Fam. Ct., Oswego Co., 2010) (conviction for endangering welfare of child did not establish that child suffered harm or that there was imminent risk of harm; also, "[i]t is doubtful that the doctrine of collateral estoppel can be applied where the Family Court trial was completed before the criminal case even started since the doctrine by its very nature precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party") and Matter of Lambert, 119 Misc.2d 326, 462 N.Y.S.2d 791 (Fam. Ct., Suffolk County, 1983) (summary judgment denied where papers failed to establish that plea involved allegation contained in petition). See also Matter of Vincent M., 133 A.D.3d 662 (2d Dept. 2015) (court lacked authority to make finding upon taking judicial notice at conference of certificate of disposition evidencing conviction on related criminal charges); Matter of Doe v. Francis TT., 47 A.D.3d 283, 848 N.Y.S.2d 407 (3rd Dept. 2007) (court rejects respondent's argument that he did not have full and fair opportunity to litigate in criminal proceeding because evidence was excluded under rape shield law where respondent alleged in conclusory fashion that evidence excluded would have created reasonable doubt, and respondent's underlying supposition that rape shield law does not apply in Article Ten proceeding runs counter to existing authority); Matter of Denise GG., 254 A.D.2d 582, 678 N.Y.S.2d 821 (3rd Dept. 1998) (summary judgment based upon respondent's criminal court plea of guilty upheld, since judgment of conviction was ultimately entered).

Notably, CPL §440.65 requires that upon conviction of any person for a crime under PL Article 120, 125, 130, 260 or 263 committed against a child under the age of eighteen by a person legally responsible for such child, as defined in SSL §412(3), the district attorney serving the jurisdiction in which the conviction is entered shall notify the local child protective services agency of such conviction including the name of the defendant, the name of the child, the court case number and the name of the prosecutor who appeared for the People.

Although a guilty plea that is withdrawn may not be used for any purpose in a criminal proceeding, it is admissible in an Article Ten proceeding. See Cohens v. Hess, 92 N.Y.2d 511, 683 N.Y.S.2d 161 (1998). And, although it does not involve an actual

admission of guilt, an Alford plea may have collateral estoppel effect and be used as proof in another proceeding. Merchants Mutual Insurance Company v. Arzillo, 98 A.D.2d 495, 472 N.Y.S.2d 97 (2d Dept. 1984); see also Kuriansky v. Professional Care, Inc., 158 A.D.2d 897, 551 N.Y.S.2d 695 (3rd Dept. 1990). Similarly, a consent finding under FCA §1051(a) may be utilized as proof even though the respondent has not expressly admitted responsibility. See Matter of William N., 118 A.D.3d 703 (2d Dept. 2014) (in derivative neglect proceeding, prior consent finding of neglect was admissible since finding may not be made without factual basis, even upon consent); Matter of Aaron H., 72 A.D.3d 1602, 898 N.Y.S.2d 901 (4th Dept. 2010), lv denied 15 N.Y.3d 704 (dismissal order vacated where, after dismissal, respondent mother entered Alford plea with respect to sexual abuse); Matter of Bobbie Jo M. v. Joseph M., 177 Misc.2d 521, 676 N.Y.S.2d 824 (Fam. Ct., Suffolk Co., 1998); see also Matter of Jeremiah I.W., 115 A.D.3d 967 (2d Dept. 2014) (summary judgment upheld where father consented to finding that he neglected two other children by perpetrating acts of domestic violence against the mother in presence of children and also pleaded guilty to attempted assault while admitting that he attempted to assault mother with intent to cause physical injury); In re Joshua S., 973 N.E.2d 1046 (Ill. App. Ct., 2d Dist., 2012), appeal denied 979 N.E.2d 878 (provision of plea agreement, under which State agreed not to seek to terminate mother's parental rights based on events that led to plea, was against public policy and thus unenforceable).

Similarly, collateral estoppel can arise from a prior order in an Article Ten or termination of parental rights proceeding. In re Darren S., 133 A.D.3d 534 (1st Dept. 2015) (fact-finding in neglect proceeding had collateral estoppel effect in family offense proceeding); Matter of Stephiana UU., 66 A.D.3d 1160, 887 N.Y.S.2d 699 (3rd Dept. 2009) (while refusing to apply collateral estoppel where Dutchess County family court previously dismissed sexual abuse allegations, Third Department notes that while Columbia County DSS is in privity with Dutchess County DSS, respondents failed to establish that allegations were actually considered and decided in prior proceedings); Matter of Kaden B., 53 Misc.3d 1219(A) (Fam. Ct., Kings Co., 2016) (court not bound by more than seven-month-old FCA §1027 decision in which judge questioned reliability

of three-year-old child's out-of-court statements); Matter of Jasmine R., 8 Misc.3d 904, 800 N.Y.S.2d 307 (Fam. Ct., Queens Co., 2005) (summary judgment premised on previous finding of mental illness).

It is also possible for a ruling by an administrative tribunal to have collateral estoppel effect. B&B Hardware, Inc. v. Hargis Industries, Inc., 135 S.Ct. 1293 (2015) (where Congress has authorized agencies to resolve disputes, courts may apply principle of issue preclusion except when statutory purpose to contrary is evident).

Although not as a matter of collateral estoppel, the court may take judicial notice of a prior judicial credibility determination if it is relevant to a party's credibility. Matter of Spooner-Boyke v. Charles, 126 A.D.3d 907 (2d Dept. 2015) (in family offense proceeding, court should have taken judicial notice of determination in parties' prior custody proceeding in same court that father had made false allegations, which was relevant to father's credibility).

Given the higher standard of proof in a criminal proceeding, an acquittal is not binding in Family Court. See Matter of Katherine B., 126 Misc.2d 1085, 484 N.Y.S.2d 788 (Fam. Ct., Onondaga County, 1985); but see Matter of Kristen David, 136 Misc.2d 863, 519 N.Y.S.2d 502 (Fam. Ct., Monroe Co., 1987) (court takes judicial notice of Grand Jury "no true bill" and assign to it the appropriate weight). However, since an Article Ten proceeding and a concurrent criminal proceeding are usually prosecuted by different agencies, see Nelson v. Dufficy, 104 A.D.2d 234, 482 N.Y.S.2d 511 (2d Dept. 1984), lv denied 64 N.Y.2d 610, 490 N.Y.S.2d 1023 (1985), and because the legal issues are different, see People v. Roselle, 84 N.Y.2d 350, 618 N.Y.S.2d 753 (1994) (Family Court determined defendant's ability to care for child, not his criminal responsibility), a dismissal of Article Ten charges will not have collateral estoppel effect in a criminal proceeding.

The petitioner is not barred from maintaining an Article Ten proceeding based on facts contained in an "unfounded" and sealed report. Matter of Mylasia P., 104 A.D.3d 856 (2d Dept. 2013); see also Matter of Edick v. Gagnon, 139 A.D.3d 1126 (3rd Dept. 2016) (competent evidence related to incidents underlying unfounded report was admissible); Cookson v. Schwartz, 556 F.3d 647 (7th Cir. 2009) (conclusion by child

protective authorities that allegation is “unfounded” does not establish it is false, only that investigator did not locate credible evidence establishing allegation's veracity prior to completion of investigation).

Finally, the related res judicata doctrine may preclude the filing of charges that were or could have been filed in a previous proceeding. In re Autumn P., 121 A.D.3d 454 (1st Dept. 2014) (prior petition alleging domestic violence was dismissed after domestic violence incidents alleged in new petition, but agency was not required to amend prior petition to include new incidents); Matter of Alfonzo T., 79 A.D.3d 1724, 914 N.Y.S.2d 488 (4th Dept. 2010) (court properly refused to admit evidence of incidents that were raised or could have been raised in separate petition previously filed; “To hold otherwise under the circumstances of this case would allow government agencies such as petitioner to bring successive proceedings alleging the same theory of neglect until the desired result was obtained, with the status of the child remaining undetermined throughout”); Matter of Antonio U., 19 Misc.3d 1113(A), 859 N.Y.S.2d 900 (Fam. Ct., Kings Co., 2008) (court dismisses allegations regarding incidents that took place prior to date first proceeding was dismissed with prejudice as barred by res judicata where those allegations were put in issue in prior action or might have been; however, educational neglect during period before dismissal of prior proceeding may be charged since ACS may not have known of child's attendance in time to file motion to amend first petition); Matter of Yan Ping Z., 190 Misc.2d 151, 737 N.Y.S.2d 239 (Fam. Ct., Kings Co., 2001) (principles regarding issue preclusion and mandatory joinder precluded petitioner from prosecuting charges which could have been included by amendment in initial neglect petition); see O’Brien v. City of Syracuse, 54 N.Y.2d 353, 445 N.Y.S.2d 687 (1981); Kinsman v. Turetsky, 21 A.D.3d 1246, 804 N.Y.S.2d 430 (3rd Dept. 2005), lv denied 6 N.Y.3d 702; Fifty CPW Tenants Corp. v. Epstein, 16 A.D.3d 292, 792 N.Y.S.2d 58 (1st Dept. 2005); Fogel v, Oelmann, 7 A.D.3d 485, 776 N.Y.S.2d 76 (2d Dept. 2004); Ellis v. Abbey & Ellis, 294 A.D.2d 168, 742 N.Y.S.2d 225 (1st Dept. 2002), lv denied 98 N.Y.2d 612; Marinelli Associates v. Helmsley-Noyes, 265 A.D.2d 1, 705 N.Y.S.2d 571 (1st Dept. 2000); see also Matter of Tekiara F., 116 A.D.3d 852 (2d Dept. 2014) (no res judicata where court previously dismissed petition “for failure to

state a cause of action"); Matter of Stephiana UU., 66 A.D.3d 1160 (evidence of excessive corporal punishment that predated, but was not raised in, prior proceeding was admissible to help court evaluate environment in which additional acts of excessive corporal punishment were inflicted).

### J. Statutory Rules Of Evidence

In an Article Ten proceeding, as in any other type of proceeding, the practitioner must be familiar with the unique statutory and common law rules which govern the conduct of trial. Although, unlike preliminary hearings, fact-finding hearings are not governed by an across-the-board hearsay exception capable of shocking the uninformed practitioner, the rules governing fact-finding hearings are designed to insure that, consistent with due process concerns, a broad range of evidence is admitted so that the court can ascertain the facts and reach the correct result. Thus, a lawyer who is used to traditional rules of evidence will need to undertake a substantial amount of re-education.

#### 1. Admissibility Of Evidence Generally

While evidence must be material and relevant in any Article Ten or Article Ten-A proceeding, evidence at a fact-finding hearing must also be competent. FCA §1046(c). Thus, hearsay is inadmissible unless it comes within a recognized exception to the hearsay rule. See Matter of Imani B., 27 A.D.3d 645, 811 N.Y.S.2d 447 (2d Dept. 2006) (mother's statement not admissible as excited utterance where that theory was not advanced at trial and father had not opportunity to counter argument).

For instance, the admissibility of hearsay testimony given at a previous hearing would be governed by CPLR §4517, which was amended in 2000 to permit the introduction of prior testimony under certain circumstances even when the witness is not "unavailable." Notably, §4517(a)(2) states that "the prior trial testimony of a party or any person who was a party when the testimony was given or by any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party, may be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence." Thus, assuming that a hearing held pursuant to FCA §1027 or 1028 would be considered a "trial" for

purposes of this rule, the petitioner would be able to introduce into evidence at the fact-finding hearing testimony given by a respondent at a §1027 or §1028 hearing, and a respondent would be able to introduce testimony given by the petitioner's caseworker. Forcing a respondent to make this choice -- between testifying at a §1027 or §1028 hearing in an effort to protect his/her fundamental right to custody of the child, and assuming the risk that such testimony will be used at fact-finding proceedings -- presents no constitutional problem. See McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454 (1971); see also Matter of Dillon S., 249 A.D.2d 984, 672 N.Y.S.2d 209 (4th Dept. 1998) (family court erred in incorporating into fact-finding hearing testimony adduced at §1028 hearing without first determining that witnesses were unavailable; also, evidentiary standard in fact-finding hearing is higher than that in §1028 hearing, and focus of §1028 hearing is narrow); Matter of Christina A., 216 A.D.2d 928, 629 N.Y.S.2d 553 (4th Dept. 1995) (court erred in taking judicial notice at trial of testimony given at hearing held pursuant to FCA §1028 without finding pursuant to CPLR 4517 that witnesses were unavailable); Domestic Relations Law §75-j (procedure for taking testimony in another state); but see In re the J. Children, 275 A.D.2d 648, 713 N.Y.S.2d 325 (1st Dept. 2000) (no error in admission of §1028 hearing transcript where parties stipulated to procedure); In re Leona T., 642 A.2d 166 (ME 1994) (in termination of parental rights proceeding, court properly admitted testimony from prior proceeding given the statutory child protective scheme and the unitary nature of the proceedings).

It is not clear that the doctrine of judicial notice permits a court to incorporate testimony from a prior hearing in the absence of a transcript or other evidence establishing irrefutably what the testimony was. Matter of Esther II., 249 A.D.2d 848, 672 N.Y.S.2d 483 (3rd Dept. 1998) (family court properly took judicial notice of its prior determinations, but was uncertain as to propriety of taking judicial notice of testimony). Although it is not a judicial notice issue, a judge may not consider its own out-of-court observations as evidence at a fact-finding hearing. Matter of Saletta v. Vecere, 137 A.D.3d 1685 (4th Dept. 2016) (court erred in referencing in decision its own out-of-court observations of mother).

Because expert testimony plays such a prominent role in Article Ten

proceedings, practitioners also need to be familiar with rules governing the admissibility of expert opinions that are based in part on out-of-court hearsay information, and the admissibility of the hearsay upon which the expert relied. See Matter of Anthony WW. v. Michael WW., 86 A.D.3d 654 (3d Dept. 2011) (order terminating parental rights on mental illness grounds reversed where experts who testified were never asked whether certain hearsay evidence upon which they relied was normally relied on within profession or asked what impact the evidence had in formulation of final opinion); In re Anahys V., 68 A.D.3d 485, 891 N.Y.S.2d 34 (1st Dep't 2009), lv denied 14 N.Y.3d 705 (court properly admitted expert's report without redacting statements of foster mother since statements were admitted not for truth but to show information on which expert relied); Lisa W. v. Seine W., 9 Misc. 3d 1125(A), 2005 WL 2882454 (Fam. Ct., Kings Co., 2005) (expert may rely on material not in evidence if it is of a kind accepted in profession as appropriate factor in forming opinion, material is accompanied by evidence establishing its reliability, and expert's use of hearsay sources will not preclude admission of opinion evidence where hearsay does not form principal basis of opinion on crucial issue and is merely link in chain of data upon which expert relied; however, information from collateral sources does not necessarily satisfy reliability requirement, defective information will cause report and opinions it contains to become defective as well, and expert reports cannot function as conduit for inadmissible hearsay); see also Matter of Floyd Y., 22 N.Y.3d 95 (2013) (in Mental Hygiene Law Article 10 Sex Offender Management and Treatment Act proceeding, court applies Due Process Clauses and Mathews v. Eldridge balancing test, and holds that hearsay basis of expert's opinion is admissible if proponent demonstrates that hearsay is reliable and court determines that probative value in helping fact-finder evaluate expert's opinion substantially outweighs prejudicial effect of hearsay; court notes that rule excluding all basis hearsay would undermine truth-seeking function by keeping foundation for expert’s opinion hidden, that to extent fact-finder’s assessment might turn on acceptance of basis evidence as true, respondent has opportunity to present competing view of basis evidence through respondent’s expert and court can instruct jury about proper consideration of basis evidence, and criminal charges that resulted in

acquittal are more prejudicial than probative and charges that resulted in neither acquittal nor conviction require close scrutiny); People v. Goldstein, 6 N.Y.3d 119, 810 N.Y.S.2d 100, cert denied, 547 U.S. 1159 (2006); People v. Sugden, 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974); Tornatore v. Cohen, 162 A.D.3d 1503 (4th Dept. 2018) (expert may rely on hearsay if it is commonly relied on in profession and does not constitute sole or principal basis for opinion; although expert's discussions with treating physician provided basis for several components of plaintiff's future medical needs, and expert acknowledged extent of reliance on those hearsay statements, they were only link in chain of data upon which expert relied).

To the extent that they are appropriate to the proceedings, the provisions of the Civil Practice Law and Rules governing judicial notice, and the authentication and proof of records, are applicable unless Article Ten provides otherwise. FCA §164. Moreover, when methods of procedure are not addressed in Article Ten, provisions of the Civil Practice Law and Rules shall apply to the extent that they are appropriate to the proceedings. FCA §165(a). See also CPLR §101 (CPLR applies in civil judicial proceeding unless inconsistent with governing statute).

**2. Prior Abuse Or Neglect**

Family Court Act §1046(a)(i) provides that "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent ...." But see Matter of Demetrius B., 28 A.D.3d 1249, 813 N.Y.S.2d 611 (4th Dept. 2006) (evidence of prior "complaints" improperly admitted). A finding of abuse or neglect based upon this statutory rule is often called a "derivative" finding.

There is no presumption created by the statute. See Matter of Madison J.S., 136 A.D.3d 1404 (4th Dept. 2016). Evidence of the abuse or neglect of another child may, by itself, be sufficient to constitute a prima facie case, but the prior misconduct must provide a sound basis for a finding that the subject child is in imminent danger of abuse or neglect. The issue is whether the respondent's previous misconduct was sufficiently serious and proximate in time to establish a fundamental defect in parenting that continues to create a substantial risk of harm to any child in the respondent's care.

Matter of Paige WW., 71 A.D.3d 1200, 895 N.Y.S.2d 603 (3rd Dept. 2010); Matter of Kole HH., 61 A.D.3d 1049, 876 N.Y.S.2d 199 (3rd Dept. 2009), appeal dism'd 12 N.Y.3d 898; Matter of Cruz, 121 A.D.2d 901, 503 N.Y.S.2d 798 (1st Dept. 1986) (determinative factor is whether prior conduct "is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists").

The repetition of misconduct, the number of victims, the proximity of the other children to the misconduct, and differences in gender and parentage between a child who has been directly abused or neglected and those alleged to be derivatively abused or neglected, can be relevant factors. Matter of Cadejah AA., 33 A.D.3d 1155, 823 N.Y.S.2d 278 (3rd Dept. 2006) (no derivative neglect of son where father merely admitted to single act of voyeurism with regard to teenage stepdaughter).

A strict reading of the statute would preclude a derivative finding based on the abuse or neglect of a child who is not the child "of, or the legal responsibility of," the respondent. In re Anjanne J., 44 A.D.3d 407, 843 N.Y.S.2d 248 (1st Dept., 2007) (since respondent was not person legally responsible for abused child's care and thus abuse finding as to that child could not be made, finding of neglect as to subject child reversed).

However, some courts have recognized that under a broader view of derivative abuse and neglect, a cause of action may be established even when the child abused or neglected by the respondent on a previous occasion was not the respondent's own child or a child for whom the respondent was legally responsible. See Matter of Jamel T., 120 A.D.3d 504 (2d Dept. 2014) (in case involving allegation of inappropriate sexual contact, court rejects respondent's contention that abuse or neglect of child who was not subject of proceedings could not form basis of derivative neglect finding); Matter of Kole HH., 61 A.D.3d 1049 (father's sexual abuse of nine-year-old daughter of mother's cousin provided legal basis for finding of derivative neglect of father's own children even though he was not legally responsible for victim).

Sexual abuse often is the basis for a finding of derivative abuse or neglect, although, when making a finding of abuse, courts do not typically explain why other children, such as the brothers of a girl who has been sexually abused by the

respondent, or infants, are at risk of being abused rather than neglected.

Compare Matter of Trenasia J., 25 N.Y.3d 1001 (2015) (derivative neglect found where respondent sexually abused niece while his own children, ages eleven, ten, and two, were in home and one was within earshot); In re Markeith G., 152 A.D.3d 424 (1st Dept. 2017) (derivative abuse found where male children were sleeping in same bedroom where sexual abuse of female child occurred); In re Karime R., 147 A.D.3d 439 (1st Dept. 2017) (where respondent committed sexual abuse by touching child's breasts and vagina, derivative abuse findings not undermined by fact that, at time of abuse, youngest child had not yet been born and middle child was only an infant); In re Essence J., 144 A.D.3d 593 (1st Dept. 2016) (derivative neglect finding based on respondent's failure to complete sexual rehabilitation program in violation of court orders issued in connection with finding that he sexually abused ten-year-old child approximately thirteen years before petitions were filed); Matter of Alexander TT., 141 A.D.3d 762 (3d Dept. 2016) (derivative neglect found where plea colloquy from criminal proceeding established that respondent admitted to orally sodomizing his twelve-year-old stepdaughter and pressuring her to recant); Matter of Ilonni I., 119 A.D.3d 997 (3d Dept. 2014), lv denied 24 N.Y.3d 914 (derivative neglect properly found via summary judgment with respect to child born in 2012 where, in 2010, court determined that respondent had neglected, abused and severely abused daughter of former cohabitant based on finding that he had sexual intercourse with child several times and that respondent's six biological children and one stepchild were derivatively neglected, abused and severely abused; caseworker alleged, among other things, that respondent failed to complete preventive services, including sex offender treatment); In re Jani Faith B., 104 A.D.3d 508 (1st Dept. 2013) (respondent derivatively abused son, who walked into room during sexual abuse of stepdaughter); Matter of Kyanna T., 99 A.D.3d 1011 (2d Dept. 2012), lv denied 20 N.Y.3d 856 (respondent's sexual abuse of one child in presence of another child, and respondent mother's failure to protect abused child, justified derivative abuse and neglect findings); In re Kylani R., 93 A.D.3d 556 (1st Dept. 2012) (derivative abuse and neglect findings made as to respondent's biological children where he sexually abused and neglected stepdaughter even though, at time of

sexual abuse, one of his children was an infant and the other had not yet been born); Matter of Christopher C., 73 A.D.3d 1349, 900 N.Y.S.2d 795 (3rd Dept. 2010) (finding made where respondent was convicted of sexual abuse and risk level III sex offender status for inappropriately touching young female relative in 1997, touched another young female relative over course of three years ending in 1997 and engaged in sexual intercourse with her two or three times, and was convicted for endangering the welfare of a child in connection with allegations that he had sexually abused eight-year-old boy in 1998; before and after birth of subject child, respondent failed to complete sex offender treatment); In re Nyjaiah M., 72 A.D.3d 567, 899 N.Y.S.2d 53 (1st Dept. 2010) (derivative neglect found where there was 2004 finding that father had over course of four years sexually abused daughter; fact that finding was over five years old was "of no moment" since abuse took place continually over four-year period, there was no evidence supporting reasonable belief that proclivity for sexually abusing children had changed, and there was evidence of father's sexual abuse of subject children); Matter of Paige WW., 71 A.D.3d 1200, 895 N.Y.S.2d 603 (3rd Dept. 2010) (in proceeding commenced in April 2008, finding of derivative neglect made where there was 2005 determination that three other children were sexually abused and neglected and two others were derivatively neglected; respondent at least acquiesced in sexual abuse by allowing sex offenders to have contact with children and did not comply when ordered to participate in sex offender programming; and prior determination was sufficiently proximate in time even though acts took place six years or more before current proceedings were filed); Matter of Michelle M., 52 A.D.3d 1284, 861 N.Y.S.2d 542 (4th Dept. 2008) (findings of derivative neglect made with respect to father's biological children where, over period of approximately one year, father sexually abused stepdaughter by repeatedly pressing himself against her while she was in bed, for his sexual gratification, repeatedly making sexual comments to her, and, on one occasion, attempting to kiss her and place his tongue in her mouth); Matter of Blaize F., 50 A.D.3d 1182, 855 N.Y.S.2d 284 (3rd Dept. 2008) (sexual abuse of eleven-year-old while younger children were in house and came to closed bedroom door inquiring about location of sister justified derivative neglect findings); Matter of Ahmad H., 46 A.D.3d

1357, 849 N.Y.S.2d 140 (4th Dept. 2007) (derivative neglect found where respondent father had 1989 adjudication of neglect based on sexual abuse, and there was no reason to believe father's proclivity for sexually abusing children had changed or any indication he had addressed issues that led to prior adjudication); In re Vincent L., 46 A.D.3d 395, 848 N.Y.S.2d 622 (1st Dept. 2007), lv denied, 10 N.Y.3d 706 (derivative findings of abuse and neglect properly based upon respondent's admitted sexual abuse of four other children under age of fourteen between 1996 and 1999, and respondent, carrying knife, also threatened to kill himself, children's mother and the children, took youngest child from mother and transported him to another borough, and assaulted mother in open court); Matter of Jewle I., 44 A.D.3d 1105, 844 N.Y.S.2d 145 (3rd Dept. 2007) (derivative neglect found as to Jewle where respondent drank alcohol and smoked marihuana with Yasmine and made sexually suggestive comments to her, exposed his penis to Yasmine twice while Jewle was in adjoining room, and fondled Yasmine while Jewle was in house and later paid Jewle to go to a store); Matter of Abigail S., 21 A.D.3d 380, 800 N.Y.S.2d 39 (2d Dept. 2005) (finding of sexual abuse, standing alone, does not establish that other children have been derivatively neglected, but in this case the abuse supported derivative neglect findings; however, sexual abuse finding did not support derivative abuse findings); Matter of Anndrena A., 13 A.D.3d 1164, 787 N.Y.S.2d 766 (4th Dept. 2004) (neglect finding made where respondent was present in home with girlfriend’s fifteen-year-old daughter, had prior convictions involving child sex abuse, and denied commission of crimes of which he was convicted); Matter of A.R., 309 A.D.2d 1153, 764 N.Y.S.2d 746 (4th Dept. 2003) (derivative abuse findings made where respondent boyfriend sexually abused oldest child over period of four years and middle child reported incident in which boyfriend entered her bedroom at night and stroked her back and stomach, and oldest child stated that boyfriend told her he was going into middle child's bedroom to try to engage middle child in sexual activity and instructed oldest child to wait outside door as lookout, and, after brief period, boyfriend left bedroom and commented to oldest child that "it didn't go well"); Matter of Colleen S., 242 A.D.2d 877, 662 N.Y.S.2d 673 (4th Dept. 1997) (sex abuse which occurred about three years earlier could be considered by

court as evidence of continuing conduct or behavior patterns); Matter of Jeremy H., 193 A.D.2d 799, 598 N.Y.S.2d 277 (2d Dept. 1993) (four-year-old sex abuse finding justified new finding where respondent had still not addressed problem); Matter of Alan G., 185 A.D.2d 319, 586 N.Y.S.2d 297 (2d Dept. 1992), lv denied 81 N.Y.2d 703, 595 N.Y.S.2d 398 (1993) (derivative abuse finding made where mother allowed abuse to occur in front of other children and later denied it); Matter of Rasheda S., 183 A.D.2d 770, 586 N.Y.S.2d 522 (2d Dept. 1992) (abuse of stepdaughter supports neglect finding as to eleven-year-old daughter) and Matter of Lynelle W., 177 A.D.2d 1008, 578 N.Y.S.2d 313 (4th Dept. 1991) (respondent's abuse of stepdaughter supported neglect finding as to his son)

with In re Demetrius C., 156 A.D.3d 521 (1st Dept. 2017), appeal dism'd 31 N.Y.3d 926 (no derivative neglect of son where father sexually abused daughter six years earlier); Matter of D.S., 147 A.D.3d 856 (2d Dept. 2017) (where respondent committed sexual abuse by grabbing child's buttocks, no derivative abuse or neglect as to respondent's biological son, who was born shortly after incident at issue); Matter of Monica C.M., 107 A.D.3d 996 (2d Dept. 2013) (no derivative neglect given limited duration and nature of sexual abuse of stepdaughter, and time gap of more than four years between abuse and birth of respondent's biological son); Matter of Miranda F., 91 A.D.3d 1303 (4th Dept. 2012) (summary judgment finding derivative abuse as to respondent's biological daughters based on rape of stepdaughter reversed, since sexual abuse of one child, standing alone, does not necessarily establish derivative abuse or neglect as to other children); Matter of Starr H., 156 A.D.2d 1025, 550 N.Y.S.2d 766 (4th Dept. 1989) (sexual abuse did not support derivative findings of abuse); Matter of Cindy JJ., 105 A.D.2d 189, 484 N.Y.S.2d 249 (3rd Dept. 1984) (father's sexual abuse of daughters did not establish abuse of sons); Matter of B.D., 36 Misc.3d 1219(A) (Fam. Ct., Bronx Co., 2012) (although egregious nature of crimes that led to respondent's 2001 conviction for raping two half-sisters and short time between release from prison and birth of respondent's daughters and initiation of proceedings in 2010 establishes "time proximity" that supports finding, conviction, by itself, was insufficient to establish continuing risk, and respondent had engaged in and completed sex offender treatment

program, made progress in overcoming conditions that led to crimes, and complied with conditions of post-release supervision) and Matter of Shyrelle F., 33 Misc.3d 1232(A) (Fam. Ct., Kings Co., 2011) (neglect found, but no derivative neglect as to respondent's biological sons where, on one occasion, respondent gave stepdaughter massage on "the outskirts of her groin," repeatedly touching her pelvic area and the top of her thigh despite her explicit requests that he not do so).

Serious injuries caused by intentional or reckless behavior often lead to a finding of derivative abuse or neglect, and certain types of violent behavior can support a finding years later. Courts do measure the degree of violence in determining whether there should be a finding at all, and whether an abuse finding rather than only a neglect finding is warranted.

Compare Matter of Nyair J., 155 A.D.3d 730 (2d Dept. 2017) (derivative neglect, but not derivative abuse, where infant suffered shaking-related head injuries and family court reasoned that three-year-old was beyond age where father could cause him those types of injuries by shaking him); In re Nayomi M., 147 A.D.3d 413 (1st Dept. 2017) (derivative neglect, but not derivative abuse, where there was no evidence that baby was directly exposed to abuse, and, although other child was locked in room with children when they were abused, he was only two years old and not subjected to more severe forms of abuse); Matter of Harmony M.E., 121 A.D.3d 677 (2d Dept. 2014) (derivative abuse found where father had pleaded guilty to endangering welfare of child in connection with smothering death of son in 2003, and pleaded guilty to assault for attempting in 1993 to strangle three-month-old child); In re Joseph P., 112 A.D.3d 553 (1st Dept. 2013) (derivative abuse and neglect found where respondent severely and repeatedly abused children's older sibling five years earlier when neither child had yet been born; although respondent took anger management and parenting classes while incarcerated, she never acknowledged what she did to other child and that her actions left that child brain damaged, and her failure to testify at fact-finding hearing gave rise to inference that she had never acknowledged abuse); In re Brianna R., 78 A.D.3d 437, 910 N.Y.S.2d 71 (1st Dept. 2010) (derivative neglect found where prior finding involved mother leaving nine-month old infant in bathtub with running water without adequate

supervision, resulting in infant's death, and that incident occurred less than two years before filing of new petition); In re Abraham P., 69 A.D.3d 492, 893 N.Y.S.2d 52 (1st Dept. 2010) (derivative abuse found where respondent's four-month-old son died of asphyxiation when coin lodged in airway and infant was too young to pick up coin himself, and infant had suffered at least one previous anoxic event, and respondent took no action to assist infant on either occasion); In re Joshua R., 47 A.D.3d 465, 849 N.Y.S.2d 246 (1st Dept. 2008), lv denied, 11 N.Y.3d 703 (derivative neglect found where, following nine-year-old child's refusal to eat food, father shoved food in his mouth, causing him to vomit, and slapped him in face and bloodied nose and bruised eye); In re Portret M., 47 A.D.3d 424, 849 N.Y.S.2d 239 (1st Dept. 2008), lv denied, 10 N.Y.3d 714 (derivative finding where, on one occasion, respondent hit older child on extremities with stick and choked her, causing visible bruises on neck, arms and legs and requiring police intervention that led to arrest); Matter of Justice T., 305 A.D.2d 1076, 758 N.Y.S.2d 732 (4th Dept. 2003) (1989 manslaughter conviction for twice slamming infant's head against wall justified derivative finding); In re Christopher W., 299 A.D.2d 268, 751 N.Y.S.2d 2 (1st Dept. 2002) (abuse findings made as to subject children given "nature and severity" of abuse of other child, who died after bathtub scalding); Matter of Christina Maria C., 89 A.D.2d 855, 453 N.Y.S.2d 33 (2d Dept. 1982) (one-year-old found to be neglected child based upon physical abuse of seven-year-old half-brother); Matter of Melanie S., 28 Misc.3d 1204(A), 2010 WL 2635967 (Fam. Ct., Kings Co., 2010) (derivative neglect findings made as to siblings of deceased infant who had been removed by respondents from home late at night in January while he was recovering from cold and brought to abandoned building without heat or electricity, where he slept in stroller for six hours without supervision with bottle propped into mouth by tee-shirt); Matter of Janiyah T., 26 Misc.3d 1208(A), 906 N.Y.S.2d 780 (Fam. Ct., Kings Co., 2010), aff'd 82 A.D.3d 1108 (2d Dept. 2011) (while finding derivative neglect where excessive corporal punishment was serious, in response to minor infractions, and part of pattern father believed was justified, court notes that when evaluating derivative neglect charge, it must consider: whether underlying neglect was based on single incident or course of conduct; seriousness of underlying acts and role

respondent played; whether conditions leading to underlying finding have changed and whether respondent has completed recommended services; and whether there is direct evidence that other children were actually harmed or placed at imminent risk of harm) and Matter of Damaris Makiela O., 3 Misc.3d 1108(A), 787 N.Y.S.2d 676 (Fam. Ct., Kings Co., 2005) (severe abuse committed against infant seven months earlier supported derivative severe abuse finding as to newborn)

with Matter of Benjamin VV., 92 A.D.3d 1107 (3d Dept. 2012 (no derivative neglect of younger children where respondent struck child in eye during altercation, child had history of conflict with respondent but there was no such evidence regarding younger children, and there was no evidence of longstanding pattern of neglect of older child); Matter of Padmine M., 84 A.D.3d 806 (2d Dept. 2011) (no derivative neglect where father hit fifteen-year-old daughter several times with pole); Matter of Elijah O., 83 A.D.3d 1076 (2d Dept. 2011) (summary judgment improperly granted to petitioner where child was born over three years after respondent committed act of abuse against child's half-brother); Matter of Andrew B.-L., 43 A.D.3d 1046, 844 N.Y.S.2d 337 (2d Dept. 2007) (no derivative neglect in absence of evidence that mother used excessive corporal punishment against other children); Matter of Julia BB., 42 A.D.3d 208, 837 N.Y.S.2d 398 (3rd Dept. 2007) (even if child who suffered from fractures and other injuries, and was gravely ill on one occasion due to an airway obstruction, was abused by parents, there was no evidence that other children were harmed or at risk; indeed, record reflected that they thrived in respondents' care); Matter of Suzanne RR., 35 A.D.3d 1012, 826 N.Y.S.2d 785 (3rd Dept. 2006) (summary judgment finding as to newborn reversed where, nine months earlier, mother failed to protect children from previous paramour's excessive corporal punishment and acts of domestic violence); Matter of Justin O., 28 A.D.3d 877, 813 N.Y.S.2d 800 (3rd Dept. 2006) (mother's failure to protect one child from excessive corporal punishment did not establish that other child was neglected); Matter of Samuel "Y", 270 A.D.2d 531, 703 N.Y.S.2d 591 (3rd Dept. 2000) (no finding as to two-year-old where ten-month-old suffered "facial contusion" when mother struck her) and Matter of the New York City Department of Social Services o/b/o Amanda R., 209 A.D.2d 702, 619 N.Y.S.2d 675 (2d Dept. 1994)

(one abuse incident did not justify derivative neglect finding).

Where the prior case involved serious injuries but it was and remains unclear what acts were committed by a particular respondent, a derivative finding may be less justifiable. See In re Kadiatou B., 52 A.D.3d 388, 861 N.Y.S.2d 20 (1st Dept. 2008) (2006 dismissal of derivative neglect charge upheld where 2002 "res ipsa loquitur" finding of abuse based on 1999 death of respondents' three-month-old baby and severe injury to twin sister was too remote in time given lack of proof of respondents' conduct; there was no evidence that child was with either respondent when she suffered fatal injuries; respondents had complied with service plan and obtained services on their own; and respondents' interactions with children had been positive and agency discharged twin from foster care to respondents' custody without court permission).

A derivative neglect finding may be based on a respondent's history of failing to provide adequate day-to-day care due to, inter alia, mental health problems, and, similarly, failing to plan for the return of children in placement.
Compare In re Phoenix J., 129 A.D.3d 603 (1st Dept. 2015) (finding via summary judgment where three prior neglect findings as to three older children, issued over five-year period between September 2005 and September 2010, showed that mother, by reason of untreated mental health issues, was unable to care for any child, and there were orders terminating parental rights to all five of mother's older children in October 2011 based on findings that mother had permanently neglected children by failing to, among other things, consistently visit them, complete parenting skills and anger management programs, and comply with mental health service referrals, and mother presented no evidence that circumstances had changed); In re Niya Kaylee S., 110 A.D.3d 460 (1st Dept. 2013) (derivative neglect found less than one year after neglect findings and placement of respondent's two other children where mother was no longer in abusive relationship and was living temporarily with grandmother until she could obtain public assistance and move to shelter, but lack of income source, medical care, and stable housing were still problems); Matter of Jamarra S., 85 A.D.3d 803 (2d Dept. 2011) (derivative neglect found where child born prematurely and with serious medical

complications approximately eight months after finding of permanent neglect against mother that was based, in part, upon failure to comply with court-mandated directives to facilitate return of other child and failure to visit with child); Matter of Jonathan S., 53 A.D.3d 1089, 861 N.Y.S.2d 556 (4th Dept. 2008) (derivative neglect found where, after mother's oldest son was determined to be neglected child and placed, mother completed parenting class but was not active participant and it was difficult to determine whether she was comprehending or retaining what was being taught; caseworker had to prompt mother during supervised visits with respect to proper parenting methods, and mother's parenting skills did not improve even with coaching; and mother surrendered parental rights five months before birth of subject child); Matter of Vashaun P., 53 A.D.3d 712, 861 N.Y.S.2d 453 (3rd Dept. 2008) (derivative finding made where respondent failed to obtain proper shelter for children who were in foster care, refused to recognize need to participate in programs that would enhance her relationship with the children and provide her with the tools required for their care and well-being, and failed to keep agency informed of numerous changes in her address and maintained sporadic contact with children during that time); Matter of Wisdom M., 32 A.D.3d 396, 820 N.Y.S.2d 605 (2d Dept. 2006) (finding made where respondent failed to follow plan for return of children previously found to be neglected); Matter of Evelyn B., 30 A.D.3d 913, 819 N.Y.S.2d 573 (3rd Dept. 2006) (derivative neglect finding made as to newborn where respondent had extensive history over course of nearly two decades of abuse and neglect findings resulting in removal of eight other children and termination of parental rights to four eldest children; termination of parental rights between 1988 and 1998 is not too remote for consideration, since neglect determinations concerning eldest children would necessarily long predate those concerning the youngest, and prior proceedings involved respondent's inability to establish acceptable home environment and unwillingness to cooperate with child protective agencies and her exposure of children to known sexual abuser); Matter of Amber VV., 19 A.D.3d 767, 797 N.Y.S.2d 144 (3rd Dept. 2005) (derivative finding where mother furnished marijuana to child and smoked it with her several times a week, and other child was vulnerable due to cerebral palsy and mental retardation); Matter of Daequan FF., 243 A.D.2d 922, 663 N.Y.S.2d

400 (3rd Dept. 1997) (finding made where most recent neglect, which included letting toddlers run outside unsupervised, failing to feed the children and failing to attend to their medical needs, occurred three months earlier); Matter of Donna J., 26 Misc.3d 1206(A), 906 N.Y.S.2d 779 (Fam. Ct., Kings Co., 2010) (derivative findings of neglect made against mother via summary judgment where subject children were born only four months after court found at dispositional/permanency hearing that mother had failed to complete required services due to severe mental and emotional limitations) and Matter of Baby Girl S., 174 Misc.2d 682, 665 N.Y.S.2d 809 (Fam. Ct., Bronx Co., 1997) (court makes derivative finding of neglect as to newborn based on prior finding that mother had failed to take prescribed psychotropic medication and evidence that mother was still not taking the medication)

with Matter of Dana T., 71 A.D.3d 1376, 896 N.Y.S.2d 545 (4th Dept. 2010) (no derivative neglect where mother consented to prior adjudication based on, inter alia, condition of home and failure to obtain medical treatment, and, five years later, subject child was born and petitioner commenced proceeding; prior adjudication was too remote in time, petitioner's witnesses had either no or very limited contact with mother prior to birth the child, and mother presented evidence that her home was clean, that she had attended all prenatal appointments, and that she was equipped with skills necessary to be good parent); In re Alexis R., 62 A.D.3d 497, 879 N.Y.S.2d 413 (1st Dept. 2009) (no derivative neglect of child born in 2005 where respondent's parental rights had been terminated upon finding of permanent neglect of two sons who were voluntarily placed in foster care in 1998; respondent had been drug free since she stopped smoking marijuana after discovering she was pregnant; prior findings were based not on drug use, but on mother's failure to keep medical appointments regarding son's surgery, address other son's behavioral problems, and properly manage financial affairs; and although respondent left residential treatment program, child protective supervisor had told respondent that because she was not required to be in in-patient program, she did not have to stay there and that plan to reside with aunt and attend outpatient program was "fine"); In re Tequan R., 43 A.D.3d 673, 841 N.Y.S.2d 535 (1st Dept. 2007) (derivative neglect finding reversed where it was alleged that mother

missed numerous appointments related to subject child's siblings' therapy, nutritional services and school issues, failed to send one sibling to school on regular basis, maintained home in dirty condition, and failed to engage in therapy for herself, and that subject child was wandering the streets alone; aside from controverted testimony regarding child wandering the streets alone, there was no evidence pertaining to respondent's care of the child or any evidence that her failures with respect to the siblings resulted in or created risk of harm to subject child); In re Summer Y.-T., 32 A.D.3d 212, 819 N.Y.S.2d 743 (1st Dept. 2006) (no derivative finding where previous finding was in 2002, respondents were participating in services and were otherwise preparing for subject child's birth, and respondents had raised three other children from infancy without state intervention); Matter of Natasha RR., 27 A.D.3d 788, 811 N.Y.S.2d 463 (3rd Dept. 2006) (1997 finding by adoption court that respondent was currently unfit as parent for other child insufficient to support neglect finding, even considered together with allegation that respondent drove car on one occasion with child sitting between his legs) and Matter of K.I., 48 Misc.3d 1221(A) (Fam. Ct., Kings Co., 2015) (no finding where, in prior neglect cases, mother consented to finding without admitting wrongdoing and there was no evidence of nature of prior alleged misconduct, and prior orders terminating parental rights on grounds of abandonment and permanent neglect did not establish risk to different child).

A prior finding based on domestic violence can support a derivative finding. Compare Matter of Neveah AA., 124 A.D.3d 938 (3d Dept. 2015) (derivative neglect found where, inter alia, father had neglect finding from 2009 involving domestic violence in child's presence and had not addressed his problems, and intervention was required when parents argued during visits with subject child); Matter of Xiomara D., 96 A.D.3d 1239 (3d Dept. 2012) (2010 derivative neglect finding made via summary judgment upheld where respondents were twice found to have neglected other children in 2008 based upon domestic violence and respondents had not yet adequately addressed their problems); Matter of Michael N., 79 A.D.3d 1165, 911 N.Y.S.2d 709 (3rd Dept. 2010) (2008 finding of derivative neglect based on prior adjudications from 2000-2004 emanating from successive turbulent relationships with different women) and Matter of

Briana F., 69 A.D.3d 718, 892 N.Y.S.2d 526 (2d Dept. 2010), lv denied 14 N.Y.3d 707 (derivative neglect found where father demanded that other child get him knife and then held knife to mother's throat in that child's presence)

with Matter of Ronald M., 254 A.D.2d 838, 677 N.Y.S.2d 839 (4th Dept. 1998) (no finding where parents had engaged in domestic violence in presence of older child about sixteen months earlier); Matter of N.H., 52 Misc.3d 209 (Fam. Ct., Onondaga Co., 2017) (motion for summary judgment finding of derivative neglect denied where child was born approximately one month after neglect adjudication against mother but it had been over a year since incident of domestic violence had been alleged, and mother raised triable issues of fact as to whether or not conditions leading to prior finding had been ameliorated) and Matter of Janiyah T., 26 Misc.3d 1208(A), 906 N.Y.S.2d 780 (Fam. Ct., Kings Co., 2010), aff'd 82 A.D.3d 1108 (2d Dept. 2011) (no derivative neglect finding against mother where underlying finding that she allowed father to engage in excessive corporal punishment did not involve course of conduct; she had separated from father; children had been well cared for and there had been no further incidents; she had cooperated with services, including twelve-week parenting skills program and twelve-week anger management program; and after father came to home in violation of order, she contacted police and sought order of protection).

Prior medical neglect can support a neglect finding. Compare Matter of Neveah AA., 124 A.D.3d 938 (3d Dept. 2015) (findings upheld where mother had neglect finding from 2008 involving, inter alia, repeated refusal to seek medical treatment for child) with Matter of Shawndel M., 33 A.D.3d 1006, 824 N.Y.S.2d 335 (2d Dept. 2006) (no derivative finding where mother neglected other child's diabetic condition) and Matter of Daniella HH., 236 A.D.2d 715, 654 N.Y.S.2d 200 (3rd Dept. 1997) (neglect of infant, who had health problems from birth and was admitted to hospital for failure to thrive, did not justify derivative finding).

The educational neglect of a school-age child may warrant finding of derivative neglect with respect to child younger than school age. Compare In re Danny R., 60 A.D.3d 450, 874 N.Y.S.2d 122 (1st Dept. 2009) (derivative finding made with respect to pre-school-age child where older children missed two hundred forty and one hundred

fifty-nine days respectively) with Matter of Ricky S., 139 A.D.3d 959 (2d Dept. 2016) (truancy of teenaged child who resisted going to school did not establish derivative neglect of child not of school age) and In re Jessica J., 57 A.D.3d 271, 871 N.Y.S.2d 7 (1st Dept. 2008) (no derivative neglect with respect to younger child where there was no evidence that child had excessive absences from school or that her basic educational needs went unmet).

In Child Safety Alert #14: Safety Planning for Newborns or Newly Discovered Children Whose Siblings Are in Foster Care, issued on June 5, 2008, the New York City Administration for Children's Services declared that when a newborn's siblings are in foster care and thus there has been a determination that the siblings cannot safely be returned home, a call must be made to the State Central Register, and there must be full safety and risk assessments to ensure that the newborn is safe and that appropriate court action will be taken on behalf of the newborn. "If the decision is to seek Court Ordered Supervision (or in exceptional circumstances not to take court action on behalf of the new child), there needs to be clear documentation from the [elevated risk] conference that explains why the older children have not yet been reunified, while it would be safe for a new child, especially when that child is a more dependent and fragile newborn, to remain safely in the home. When a child has siblings in foster care, Children's Services and Family Court have already determined that it is unsafe for older sibling(s) to be in the home. There should be a presumption that the safety factors that required removal and continued placement remain and that appropriate court action needs to be taken to protect the new child. Of course, it is the Family Court's responsibility to weigh the risk of harm of removal against the risk associated with the child remaining in the home." Even when ACS decides not to remove the child, "it will generally be necessary to file an Article 10 Family Court case on behalf of the newborn or discovered child, so that Court Ordered Supervision may be sought. The cause of action for the new child would be similar to the cause of action filed as to the siblings, since the new child is presumptively at risk due to the abuse or neglect of the siblings."

Prior findings of abuse or neglect and criminal convictions can be established via the submission of court records and transcripts, or, as appropriate, the court may take

judicial notice. See Fisch on New York Evidence, §1065; Matter of Esther II., 249 A.D.2d 848, 672 N.Y.S.2d 483 (3d Dept. 1998); Matter of Justin EE., 153 A.D.2d 772, 544 N.Y.S.2d 892 (3rd Dept. 1989).

### 3. Presumption Of Abuse Or Neglect

Relying upon the logic which underlies the "res ipsa loquitur" rule in the law of negligence, FCA §1046(a)(ii) declares that "proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible ...." The presumption does not shift the overall burden of proof from the petitioner to the respondent. However, when evidence sufficient to activate the presumption has been presented, a finding can be made unless the respondent satisfies the burden of coming forward with an adequate explanation. See Matter of Philip M., 82 N.Y.2d 238, 604 N.Y.S.2d 40 (1993). The logic underlying this rule has also been recognized in criminal cases. See People v. Henson, 33 N.Y.2d 63, 349 N.Y.S.2d 657 (1973) (expert testimony that victim is "battered child," coupled with proof that child was in custody of parents when injuries occurred, permits a jury to infer parents' guilt).

The evidentiary presumption commonly comes into play when expert testimony establishes that an injury or condition is not attributable to an accidental cause, but is instead the result of intentional or negligent conduct. Burns, fractures, injuries consistent with "Shaken Baby Syndrome" [see, e.g., Matter of Westchester County Department of Social Services o/b/o Ashanti R., 215 A.D.2d 671, 628 N.Y.S.2d 133 (2d Dept. 1995), lv denied 86 N.Y.2d 708, 634 N.Y.S.2d 442], malnutrition [see, e.g., Matter of Lorelei M., 67 A.D.3d 1383, 889 N.Y.S.2d 784 (4th Dept. 2009) (failure to thrive due to undernourishment activated presumption)], and, perhaps, a telling pattern of belt marks or other serious bruises [Matter of Ameillia RR., 112 A.D.3d 1083 (3d Dept. 2013) (presumption applied where child suffered bruises to hands, feet, legs, ears, eye, forehead and back and cut to lip, and physician testified that at least some injuries were likely caused by intentional misconduct due to number, sizes, locations and different

stages of healing of bruises); In re Joel O., 93 A.D.3d 491 (1st Dept. 2012) (presumption applied where injuries included multiple bruises on child's body and bruised lip, and were not accidental and could not have been caused by adults trying to lift him off ground, as mother's boyfriend claimed)], are likely to activate the presumption, whereas minor injuries commonly experienced by children are not. Obviously, live expert testimony is most persuasive. See Matter of Shawna "K", 277 A.D.2d 747, 716 N.Y.S.2d 139 (3rd Dept. 2000) (charges dismissed where caseworker testified regarding statements made by nurse practitioner and unnamed physician, and record lacked documentary and testimonial evidence which was readily available).

The presumption of sexual abuse can arise when an injury or condition, such as an injury to the genital area or the contraction of a sexually transmitted disease, would not ordinarily occur in the absence of abuse. Compare Matter of Shade B., 99 A.D.3d 1001, 953 N.Y.S.2d 126 (2d Dept. 2012), appeal dism'd 20 N.Y.3d 1005 (presumption applied where four and one-half year-old child contracted gonorrhea while under care and supervision of parents); In re Magnolia A., 272 A.D.2d 115, 707 N.Y.S.2d 176 (1st Dept. 2000), lv denied 95 N.Y.2d 902, 716 N.Y.S.2d 642 (presumption activated by unexplained diagnosis of gonorrhea); Matter of Najam M., 232 A.D.2d 281, 648 N.Y.S.2d 559 (1st Dept. 1996) (physical abnormalities, including irregular hymenal opening and redness of hymen and surrounding tissue, activated presumption); Matter of Julissa II., 217 A.D.2d 743, 629 N.Y.S.2d 334 (3rd Dept. 1995) (injuries activated presumption) and Matter of Tania J., 147 A.D.2d 252, 543 N.Y.S.2d 47 (1st Dept. 1989) (presumption activated where child had gonorrhea and physical trauma) with Albany County Department for Children, Youth & Families v. Ana P., 13 Misc.3d 855, 827 N.Y.S.2d 525 (Fam. Ct., Albany Co., 2006) (presumption not applicable to mother of child infected with gonorrhea where evidence established that mother did not infect child; presumption cannot be extended to allegations of facilitation, accessorial conduct or a failure to protect); Matter of Nassau County Department of Social Services o/b/o Anna H., 176 A.D.2d 881, 575 N.Y.S.2d 518 (2d Dept. 1991) (superficial vaginal injuries were consistent with abuse, but also with other explanations). In Matter of Keith R., 123 Misc.2d 617, 474 N.Y.S.2d 254 (Fam. Ct., Richmond Co., 1984), the presumption was

activated by evidence of the child's emotional impairment.

The identity of the person(s) responsible for the injuries or condition need not be established. In other words, a prima facie case can be established with respect to any legally responsible person who was caring for the child during the time period within which the injuries or condition arose. So, it appears that the presumption is that the respondent is personally responsible for the abuse or neglect or else allowed it to occur. See Matter of Philip M., supra, 82 N.Y.2d 238 ("It is sometimes said that once a prima facie case is established a 'presumption' of parental responsibility for child sexual abuse arises…. While the fact finder may find respondents accountable for sexually abusing a child or allowing sexual abuse to occur after a prima facie case is established, it is never required to do so"); In re Nyheem E., 134 A.D.3d 517 (1st Dept. 2015) (findings of severe and derivative abuse against mother where mother and father were only caretakers who had access to child when injuries were sustained, and petitioner was not required to establish who inflicted injuries); In re Nabel C., 134 A.D.3d 504 (1st Dept. 2015), lv denied 27 N.Y.3d 902 (abuse findings made against mother and father based on exposure of child to morphine, heroin and codeine where child lived with mother and grandmother and father visited frequently, and forensic toxicologist opined that precise time of exposure could not be identified and neither parent proved that exposure had to have occurred when he/she was not with child or explained how exposure occurred); In re Radames S., 112 A.D.3d 433 (1st Dept. 2013) (abuse found where child sustained three separate fractures and respondent and her mother were child's only caretakers); In re Matthew O., 103 A.D.3d 67, 956 N.Y.S.2d 31 (1st Dept. 2012) (abuse findings made against parents and nanny of baby who suffered seven fractures of arms, legs and skull before reaching age of five months; court rejects respondents' contention that evidence must pinpoint time when injuries occurred and thus establish which caregiver was in control of child at relevant time since that "would automatically immunize entire households where multiple caregivers share responsibility for child care," and court notes that presumption extends to all caregivers, especially when they are few and well defined, and although respondents may rebut presumption by showing they were not caregivers at time of injuries, respondents here

denied culpability but did not establish that child was not in their care at relevant times, and court also distinguishes Veronica C. v. Carrion (see below) by stating that if allegations are brought against one of multiple caregivers, evidence must establish that only accused caregiver was in control of child at time of injury, but Radames S. undercut this dictum); Matter of Kayden E., 88 A.D.3d 1205 (3d Dept. 2011), lv denied 18 N.Y.3d 803 (severe abuse found where only respondent and child's mother had contact with child in relevant time period); Matter of Keara MM., 84 A.D.3d 1442 (3d Dept. 2011) (while mother's parents and friend lived in home during relevant time period, evidence showed they provided limited care and did not cause injuries, which could not have occurred without affirmative act of abuse by at least one of the parents); Matter of Fantaysia L., 36 A.D.3d 813, 828 N.Y.S.2d 497 (2d Dept. 2007) (where three and a half year-old child contracted gonorrhea, prima facie case established against mother and stepfather, with whom child resided, and father and paternal grandmother, with whom child visited); Matter of Seamus K., 33 A.D.3d 1030, 822 N.Y.S.2d 168 (3rd Dept. 2006) (majority upholds abuse finding where other members of extended family were with child during relevant period, but there was no proof that injuries occurred during time when neither respondent was with child and family court made credibility findings against respondents; dissenters would not invoke presumption where, as here, four adults had access to child during relevant period and injuries could have been inflicted by any one of them); Matter of Ashley RR., 30 A.D.3d 699, 816 N.Y.S.2d 580 (3rd Dept. 2006) (presumption operated against parents who did not have legal custody, but had periods of visitation during which they were responsible for the children); Matter of Tyeasia C., 227 A.D.2d 165, 641 N.Y.S.2d 673 (1st Dept. 1996) (mother and child spent sufficient time in father's home to establish status of father as caretaker along with mother); Matter of Ruth McI., 140 A.D.2d 255, 528 N.Y.S.2d 385 (1st Dept. 1988); Matter of Brandon G., 41 Misc.3d 1201(A) (Fam. Ct., Kings Co., 2013) (in case involving death of three-month-old child, abuse findings made with respect to mother and babysitter where, in two weeks leading up to date of child's hospitalization, he lived with mother and spent number of days at home of babysitter); Matter of T.A., 34 Misc.3d 1236(A) (Fam. Ct., N.Y. Co., 2012) (had allegations against nanny not been

dismissed because it was more probable than not that fracture occurred after she left child, when parents had exclusive access to child, there would have been significant question as to whether court should apply presumption against all three respondents; where parents are only individuals with access to child at time of injury, presumption is appropriate); Matter of Child v. SH, 25 Misc.3d 745, 890 N.Y.S.2d 760 (Fam. Ct., Washington Co., 2008) (presumption applied even if time frame extended back to period within which respondent, her boyfriend, boyfriend's sisters and mother, respondent's father, and Head Start workers had contact with child, since there was no evidence that any of the others caused the injury); Matter of Ulster County DSS o/b/o Corah A., 1995 WL 519189 (Fam. Ct., Ulster Co., 1995) (applying presumption against both parents works hardship on an innocent parent, but "the legislature believed the risk of returning a child to an abusive parent outweighed the burden on the innocent parent"); but see In re Veronica C. v. Carrion, 55 A.D.3d 411, 866 N.Y.S.2d 49 (1st Dept. 2008) (determination of child maltreatment annulled where there was no evidence to demonstrate how or when injury occurred and it could not be determined who child's caretaker was at time of injury; since evidence established that child's parents and petitioner acted as caretakers within twenty four hours preceding discovery of multiple lacerations to child's hands, ACS failed to establish prima facie case against anyone in particular, and petitioner testified that she never noticed injury to child's hands and that when she released child to his father he was uninjured); Matter of Tony B., 41 A.D.3d 1242, 841 N.Y.S.2d 419 (4th Dept. 2007) (petition dismissed where respondents, among others, acted as caretakers within 48 hours preceding diagnosis of fractured skull, and evidence did not establish prima facie case of abuse against particular person or persons); Matter of G.C. Children, 23 Misc.3d 1134(A), 889 N.Y.S.2d 882 (Fam. Ct., Kings Co., 2009) (no finding where child was not in exclusive care of respondents when injury most likely occurred).

On the other hand, evidence tending to show that the child was not in the respondent's custody when the abuse or neglect occurred may rebut (or perhaps defeat application of) the presumption. See Matter of Philip M., supra, 82 N.Y.2d 238; Matter of Jaiden T. G., 89 A.D.3d 1021 (2d Dept. 2011) (presumption rebutted where mother

proved child was solely in the care of paramour at time of injury); Matter of Christopher Anthony M., 46 A.D.3d 896, 848 N.Y.S.2d 711 (2d Dept. 2007) (although presumption was activated by physician's testimony that burn on child's face appeared to be consistent with "hot liquid … falling from above and landing on his head" or "being poured" from over the child's head and "running down" his face, father's credible testimony at FCA §1028 hearing, considered together with corroborative evidence submitted in support of motion for summary judgment, was sufficient to rebut presumption by establishing that injury could have occurred accidentally and that father was not with child when child was injured in kitchen); Matter of Ashley RR., supra, 30 A.D.3d 699 (presumption rebutted where about forty different adults cared for children during relevant period and evidence pointed to someone other than parents); In re Keone J., 309 A.D.2d 684, 766 N.Y.S.2d 192 (1st Dept. 2003) (multiple fractures occurred while father, not respondents, was caring for child); In re Kristen B., 283 A.D.2d 195, 724 N.Y.S.2d 303 (1st Dept. 2001) (court notes that babysitter did not testify); Matter of Vincent M., 193 A.D.2d 398, 597 N.Y.S.2d 309 (1st Dept. 1993) (abuse charge dismissed where, among other factors, mother was not caring for child when incident occurred); but see Matter of Brayden UU., 116 A.D.3d 1179 (3d Dept. 2014) (although other mother's mother and other respondent's mother provided occasional care during weeks before injuries, court credited their testimony that they did nothing to harm child and did not know how injuries occurred; mother's mother testified that another relative was often present in her home when children were there and she had seen that relative behave violently toward his own young child, but that relative had been alone with subject child only once for ten-minute period, after which child showed no signs of distress, and child had been injured on more than one occasion); Matter of Damien S. 45 A.D.3d 1384, 844 N.Y.S.2d 790 (4th Dept. 2007), lv denied, 10 N.Y.3d 701 (abuse finding based on evidence of shaken baby syndrome upheld; although father attempted to rebut prima facie case by presenting evidence that other persons were present in household when child's injury occurred, court found that none of those persons was responsible, and court's finding was based primarily on resolution of credibility issues). Often, expert testimony will establish the approximate age of the

injury, or at least narrow the time period during which the injury must have occurred, and thereby identify the responsible custodian.

Obviously, a credible explanation for the injury also can rebut the presumption. See, e.g., In re Isaac C., 158 A.D.3d 556 (1st Dept. 2018), aff'g 54 Misc.3d 710 (Fam. Ct., N.Y. Co., 2016) (respondents rebutted presumption by demonstrating that five-month-old non-ambulatory child's symptoms were consistent with bone fragility due to rickets and severe Vitamin D deficiency); Matter of David T.-C., 110 A.D.3d 1084, 974 N.Y.S.2d 506 (2d Dept. 2013) (charges dismissed where two-month-old child died while in mother's care after sustaining head injury, but mother rebutted prima facie case by presenting expert testimony that child sustained brain injury a few days to one week prior to death, and petitioner did not establish that child was exclusively in mother's care for period of time greater than twenty-four hours before death and expert could not determine whether child died from blunt force trauma to head or by accidental asphyxiation caused when she was wrapped in blanket on mother's futon)l; In re Amir L., 104 A.D.3d 505, 961 N.Y.S.2d 386 (1st Dept. 2013) (respondents rebutted presumption by showing that infant's fractured femur could have occurred accidentally when father went to dispose of diaper and child, for first time in life, rolled over and fell off couch); In re Jose Luis T., 81 A.D.3d 406 (1st Dept. 2011) (presumption activated by evidence showing non-displaced oblique fine-line fracture of femur, but was rebutted by evidence that injury could have occurred accidentally when mother bent down to pick up garbage while child was secured against her chest in "snuggly" and could have been exacerbated during procedure performed by child's pediatrician); Matter of Alanie H., 69 A.D.3d 722, 894 N.Y.S.2d 442 (2d Dept. 2010) (parents rebutted presumption with testimony from doctors that injuries were caused not by head trauma, but by form of meningitis, its sequelae, and treatment for the disease; court also notes that aside from one instance that was basis for finding of medical neglect, parents repeatedly obtained necessary medical treatment for child); Matter of Desmond LL., 61 A.D.3d 1309, 879 N.Y.S.2d 590 (3rd Dept. 2009) (no neglect where petitioner presented medical testimony indicating that injuries to child's feet were consistent with cigarette burns, but respondent provided alternate explanation which was supported by testimony of

dermatologist, and child's behavior that respondent claimed was likely cause of injuries was witnessed by agency social worker); Matter of Matter of Brandyn "P", 278 A.D.2d 533, 716 N.Y.S.2d 830 (3rd Dept. 2000) (doctor testified that spiral fracture results from twisting type motion, is not a common fracture for a one-year-old child, and is "highly suspicious for potential abuse," but respondent established that child's leg got caught in couch); Matter of Anthony R.C., 173 A.D.2d 623, 570 N.Y.S.2d 205 (2d Dept. 1991) (rib fracture was adequately explained); Matter of Eric G., 99 A.D.2d 835, 472 N.Y.S.2d 434 (2d Dept. 1984) (fracture could have been accidental); Matter of Nicole C., 39 Misc.3d 1241(A), 972 N.Y.S.2d 144 (Fam. Ct., Kings Co., 2013) (abuse charges dismissed where respondents rebutted prima facie case by proving that infant's fractures were result of infantile Rickets or vitamin D deficient bone disease which led to impairment of child's skeletal health and left her vulnerable to fractures caused by minimal force); Matter of Nyla W., 39 Misc.3d 1241(A), 972 N.Y.S.2d 145 (Fam. Ct., Kings Co., 2013) (court releases infant after FCA §1028 hearing despite four unexplained fractures where mother presented expert testimony establishing that tibia fracture could have been result of child getting foot caught in slats of crib and turning or rolling, causing leg to bend and bone to break, and mother also made credible claim that rib fractures could have been caused during her labor and delivery or while child was being resuscitated right after birth; court notes that "prima facie case of abuse cannot be supported by simply counting the injuries"); Matter of Myriam L., 17 Misc.3d 1125(A), 851 N.Y.S.2d 71 (Fam. Ct., Kings Co., 2007) (respondent mother's motion for summary judgment granted where child suffered depressed skull fracture, but mother reported that child fell off bed and onto hardwood floor, mother's expert stated that her version of events was consistent with injury and seven other physicians corroborated that opinion, agency failed to file affidavits refuting mother's evidence, and there were no other reports or signs of trauma); but see Matter of Maddesyn K., 63 A.D.3d 1199, 879 N.Y.S.2d 846 (3rd Dept. 2009) (although single incident might plausibly be explained as unlikely result of typical accident, extent and number of injuries rendered it far more probable than not that at least some injuries were not caused by accidents described by respondents).

A parent's false explanation of injuries in an attempt to avoid child protective

intervention can itself be considered some evidence of neglect. In re Nazere McK., 146 A.D.3d 487 (1st Dept. 2016) (failure to tell truth about child's injuries because mother was afraid he would be removed from her care was evidence of neglect).

Even when there is neither an actual explanation nor proof that the respondent was not caring for the child at the relevant time(s), the respondent arguably can rebut the presumption by giving testimony, specifically found to be credible by the court, denying responsibility and shifting the focus, if not blame, to another person who cared for the child during the relevant period. Matter of Lisa A., 57 Misc.3d 948, 62 N.Y.S.3d 739 (Fam. Ct., Bronx Co., 2017) (court credits respondents' testimony maintaining that they did not know how injuries occurred, noting that many individuals were around child in five days leading up to admission into hospital, and mother testified that during those five days, child was in care of babysitter for twelve hours on each of two days); Matter of Jason D., NYLJ 1202759445045, at *1 (Fam., BX, Decided January 11, 2016) (made consistent statements and gave credible testimony shifting suspicion to babysitter; ACS failed to discredit claim).

However, where the respondent is the sole caretaker, it is generally not enough for the respondent to merely deny responsibility or any knowledge of how the injury occurred, since the respondent has not thereby "explained" the injury. See Matter of Philip M., supra, 82 N.Y.2d 238; Matter of Infinite G., 11 A.D.3d 688, 783 N.Y.S.2d 656 (2d Dept. 2004) (respondents testified and claimed that they did not know how child was injured and that they were the sole caretakers).

In many cases, the court must resolve a conflict between an expert's opinion and a respondent's explanation. For example, in Matter of James P., 137 A.D.2d 461, 525 N.Y.S.2d 38 (1st Dept. 1988), a nineteen-month-old child was admitted to the hospital, and later died, due to second and third degree burns suffered when the child was left alone in the bathtub with a five-year-old sibling. In light of expert testimony that, given the pattern of burns, the child must have been placed in scalding water, the respondent's claim that the injuries were caused by changing temperatures in the bathtub water was rejected. See also Matter of Jaiden T. G., 89 A.D.3d 1021 (abuse found where four-month-old child suffered greenstick fracture that child of that age and

physical ability would not normally sustain accidentally, and mother's explanation - that child may have suffered injury due to fall from bed - was inconsistent with injury); Matter of Chaquill R., 55 A.D.3d 975, 865 N.Y.S.2d 716 (3rd Dept. 2008) (finding made where respondent asserted that burn occurred accidentally due to defective water heater and relied on testimony from investigators and plumber's report indicating that water from bathtub faucet became excessively hot within very short time, but evidence did not suggest that bathtub faucet was incapable of mixing in cold water or that water heater caused injury, and physician's letter indicated that injuries were consistent with child being held under running water); Matter of Kortney C., 3 A.D.3d 532, 770 N.Y.S.2d 758 (2d Dept. 2004) (explanation did not fit either accidental cause of fracture cited by expert); In re Damen M., 309 A.D.2d 569, 765 N.Y.S.2d 347 (1st Dept. 2003) (finding made where parents claimed that child's scalding was caused by sudden flow of hot water caused by defect in apartment's shut-off valve, but building engineer's testimony undermined explanation); Matter of Eric CC., 237 A.D.2d 655, 653 N.Y.S.2d 983 (3rd Dept. 1997) (claim that child suffered from "temporary brittle bone disease" rejected); Matter of Commissioner of Social Services o/b/o Jullian L., 210 A.D.2d 329, 619 N.Y.S.2d 762 (2d Dept. 1994) (claim that child turned on hot water in sink was inconsistent with location of burns and absence of splash marks); Matter of New York City Department of Social Services o/b/o H. and J., 209 A.D.2d 525, 619 N.Y.S.2d 65 (2d Dept. 1994) (claim that spiral fracture was result of accident rejected where other injuries were present); Matter of Kevin R., 193 A.D.2d 351, 596 N.Y.S.2d 813 (1st Dept. 1993) (unlikely that two and a half year-old could fracture brother's arm); Matter of William W., 125 A.D.2d 976, 510 N.Y.S.2d 370 (4th Dept. 1986) (claim that child burned himself while preparing tea fails where wrist injury was "classic for a rope burn").

Of course, in many cases there will also be a conflict in the expert testimony presented by competing parties, requiring the court to carefully evaluate the expertise and credibility of the witnesses. See, e.g., Matter of Natalie AA., 130 A.D.3d 50 (3d Dept. 2015) (findings reversed where testifying experts disagreed as to whether child had been shaken); In re Samantha M., 56 A.D.3d 299, 867 N.Y.S.2d 406 (1st Dept. 2008) (family court entitled to disregard testimony of respondents' experts, especially

since neither expert actually examined child); Matter of Julia BB., 42 A.D.3d 208, 837 N.Y.S.2d 398 (3rd Dept. 2007) (although two witnesses testified that fractures were product of abuse, there were deficiencies in their testimony that were related to limited training or experience in diagnosing and/or treating patients with osteogenesis imperfecta, and, in the case of one witness, personal animus toward respondents, and respondents called expert witnesses, including renowned authority on OI); Matter of Peter R., 8 A.D.3d 576, 779 N.Y.S.2d 137 (2d Dept. 2004) (in dismissing charges, family court placed undue weight on testimony of court-appointed independent expert, who had no personal contact with family, did not review parents' testimony, and reached conclusion without considering relevant factors such as height and velocity of reported falls and force used); Matter of Kevin C., 58 Misc.3d 1205(A) (Fam. Ct., Kings Co., 2017) (at FCA §1028 hearing involving head trauma, court credits mother's expert, who had thirty years of experience as pediatric neurologist and spent hours reviewing scans and came come up with plausible explanation for injuries); Matter of Nicole C., 39 Misc.3d 1241(A), 972 N.Y.S.2d 144 (Fam. Ct., Kings Co., 2013) (respondents' experts had far more experience than ACS's experts with Rickets and vitamin D deficient bone disease and conducted far more careful, detailed and comprehensive evaluations of child's skeletal health than ACS's experts); Matter of G.C. Children, supra, 23 Misc.3d 1134(A) (presumption did not compel finding where petitioner's expert testified that eight-year-old child's femur fracture "could [have] be[en]" caused by an act of child maltreatment, while respondent's expert, a highly qualified medical expert with many years of relevant experience whose opinion was consistent with medical literature, testified that the injury was "more likely than not" caused by accidental means and that that children with cerebral palsy frequently suffer from low bone density and consequently are more likely to sustain fractures, and none of respondents' seven other children had any injuries or bruises); Matter of Saim S. v. Sohail S., 23 Misc.3d 1101(A), 881 N.Y.S.2d 366 (Fam. Ct., Richmond Co., 2009) (while crediting petitioner's experts, court notes that mother's experts did not examine child upon his arrival at hospital when injuries were most serious, and, unlike petitioner's experts, were not qualified as experts in pediatric trauma or child abuse); Matter of Seaver, 12 Misc.3d

1171(A), 820 N.Y.S.2d 846 (Fam. Ct., Saratoga Co., 2005) (court rejects respondents' expert testimony regarding temporary "brittle bone disease" as possible cause of fractures); Matter of Mathew D., 168 Misc.2d 997, 641 N.Y.S.2d 526 (Fam. Ct., Queens Co., 1996) (where child suffered numerous fractures, court rejects testimony of parents' expert, who opined that child suffers from "mild" form of "brittle bone disease" which was in remission while child was in foster care for ten months and suffered no new fractures).

Evidence that a parent acted responsibly immediately after realizing that the child required medical attention, evidence of cooperation with the authorities, or evidence of a history of responsible parenting, may be offered by the respondent as rebuttal evidence. Matter of Philip M., supra, 82 N.Y.2d 238 ("In weighing the caretaker's explanation, the court may consider the inferences reasonably drawn from his or her actions upon learning of the injury"); see Matter of Jordan T.R., 113 A.D.3d 861 (2d Dept. 2014) (mother sought medical assistance when she returned to other respondent's apartment and found child limp and pale); Matter of Tyler S., 103 A.D.3d 731, 960 N.Y.S.2d 438 (2d Dept. 2013) (testimony of mother's expert and other evidence rebutted petitioner's expert testimony and prima facie case of abuse; mother was forthcoming and cooperative with medical professionals and petitioner's caseworkers and was loving and caring parent and had no other history with child protective agencies); Matter of Julia BB., supra, 42 A.D.3d 208 (in order to find that respondents attempted to smother child, court "must accept not only that, after three months of relative peace, and knowing full well that their care of Julia was subject to daily scrutiny, they suddenly decided to harm their child but, further, that they did so in concert and while another adult was present in the home all of which, the record reveals, is entirely at odds with the evidence of respondents' devotion and skills as parents"; court notes that, at dispositional hearing, court-appointed clinical and forensic psychologist opined that respondents were warm, affectionate, loving, strong and supportive individuals in whom she saw no evidence of mental illness or emotional instability, that no "red flags" were raised and there was no need for respondents to attend anger management classes, and that respondents evidenced "an extraordinarily

high level of sophistication of parenting"); Matter of Eric G., 99 A.D.2d 835, 472 N.Y.S.2d 434 (2d Dept. 1984) (respondents had no prior history of child abuse and were described as caring parents); Matter of Jason D., NYLJ 1202759445045, at *1 (Fam., BX, Decided January 11, 2016) (mother was caring, appropriate, and even hyper-vigilant); Matter of Nicole C., 39 Misc.3d 1241(A), 972 N.Y.S.2d 144 (Fam. Ct., Kings Co., 2013) (abuse finding would be inconsistent with respondents' lack of history of misconduct and caring behavior and relationship with child); Matter of Nyla W., 39 Misc.3d 1241(A), 972 N.Y.S.2d 145 (Fam. Ct., Kings Co., 2013) (respondents were found to be devoted caretakers and had no prior ACS or criminal history, and neither one was mentally ill, substance abuser, victim or perpetrator of domestic violence, or subject to stresses often associated with child abuse); but see Matter of Jada S., 49 Misc.3d 1215(A) (Fam. Ct., Kings Co., 2015) (although there was evidence that mother was caring and appropriate parent during agency supervised visits, she knew she was being watched and evaluated).

It is unclear whether the presumption carries the same force in a severe abuse case when clear and convincing evidence is required. See Matter of Jezekiah R.-A., 78 A.D.3d 1550, 910 N.Y.S.2d 806 (4th Dept. 2010) (no finding against father where child was also in care of mother and grandparents during relevant time period and there was no clear and convincing evidence of depraved indifference); Matter of Amirah L., 37 Misc.3d 1003 (Fam. Ct., Queens Co., 2012) (cases involving presumption do not lend themselves to severe abuse findings since there is no way to prove whose acts caused injuries and nature of those acts); Matter of Child v. SH, 25 Misc.3d 745, 890 N.Y.S.2d 760 (Fam. Ct., Washington Co., 2008) (preponderance standard met, but not clear and convincing standard, where physicians testified that injury could have occurred within period of one week, which expanded number of caretakers and made determining culpability more difficult).

### 4. Admissibility Of Hospital And Agency Records

As noted earlier, upon service of a subpoena, a hospital or other public or private agency must send records, photographs, or other pertinent evidence in its possession. FCA §1038(a). Pursuant to FCA §1046(a)(iv) [see also CPLR §4518(a)], such a

"writing, record, or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding" is admissible to prove such condition, act, transaction, occurrence or event if the court finds that the writing, record or photograph was made in the regular course of business of the hospital or agency, and that it was in the regular course of business of the hospital or agency to make it at the time of the act, transaction, occurrence or event or within a reasonable time thereafter. See In re Demitrus M.T., 2011 WL 863288 (Tenn. Ct. App., 2011) (case records completed on November 4, 2004, which reflected events that occurred on September 13, 2004 and September 15, 2004, not admissible; "in the absence of proof that [the maker of the record] had some phenomenal memory, or interim notes that captured the events and allowed him to record them later, or some other explanation of why the documents were accurate despite the lapse of over a month, the State, as the proponent of the evidence failed to make the required showing that they were made 'at or near the time' of the occurrence"); Matter of Dustin H., 40 A.D.3d 995, 837 N.Y.S.2d 190 (2d Dept. 2007) (in termination of parental rights proceeding, court erred in permitting caseworker to testify concerning other person's progress notes in absence of proof that entries were contemporaneously made; brief filed by child's attorney indicates that progress notes covered February 6, 1998 to July 29, 1998, but witness had not begun working at agency until August 1998).

The required evidentiary foundation may be established by a written certification by the head of the hospital or agency, or by a responsible employee if there is a photocopy of a delegation of authority signed by both the head of the hospital or agency and the employee. Matter of John QQ., 19 A.D.3d 754, 796 N.Y.S.2d 432 (3rd Dept. 2005) (medical records improperly admitted without delegation of authority form); but see In re Taliya G., 67 A.D.3d 546, 889 N.Y.S.2d 40 (1st Dept. 2009) (no need for delegation of authority because laboratory report was not hospital or private agency record "relating to a child"). The certification must also state that the writing, record or photograph is a full and complete record. It appears that such certification is required before a record may be admitted at any type of Article Ten hearing despite the fact that

evidence must be "competent" only at a fact-finding hearing. See Matter of Lakiya S., 222 A.D.2d 628, 636 N.Y.S.2d 65 (2d Dept. 1996).

Records frequently contain the statements of identified persons other than the maker, as well as facts derived from unidentified sources. Addressing this issue, FCA §1046(a)(iv) provides that other circumstances of the making of the memorandum, record or photograph, including the maker's lack of personal knowledge, may be proved to affect the weight, but not the admissibility of, the evidence. However, records offered in Article Ten proceedings are subject to the rule announced in Johnson v. Lutz, 253 N.Y. 124 (1930). In that case, the Court of Appeals held that a business record may be introduced in the absence of testimony by all persons connected with the "business" who had a part in making it, but is not exempt from other rules of evidence. Thus, entries in such a record are admissible if they were made pursuant to the business duty of the maker, and are based upon personal knowledge or upon information provided by third persons pursuant to a business duty. See, e.g., Matter of Grayson J., 119 A.D.3d 575 (2d Dept. 2014) (police officer had business duty to report to caseworker, and progress notes containing statements by foster parents relevant to child's motive to lie were admissible since foster parents are under business duty to record and report to foster care agency matters concerning physical, mental, and emotional condition of children in their care); In re Samantha M., 112 A.D.3d 421 (1st Dept. 2013) (in termination proceeding, no error in admission of case record where certification stated that document "was within the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted" and that each participant in chain producing record was acting within course of regular business conduct); In re Imani O., 91 A.D.3d 466 (1st Dept. 2012) (oral report transmittal did not identify source of officer's statement, and thus it was not known whether officer obtained information from someone under duty to report); In re Jaden C., 90 A.D.3d 485 (1st Dept. 2011) (court improperly relied on notation in caseworker's notes containing information provided by non-testifying doctor whose source was unknown); Matter of Department of Social Services v. Waleska M., 195 A.D.2d 507, 600 N.Y.S.2d 464 (2d Dept. 1993), lv denied 82 N.Y.2d 660, 605 N.Y.S.2d 6 (caseworkers and foster mothers had business

duty to report); Matter of Nicole A., 39 Misc.3d 1224(A) (Fam. Ct., Bronx Co., 2013) (in ruling on respondent's objections to admission of portions of agency's written exhibits, court notes: oral statements made by someone other than maker of record are admissible if informant was under business duty to report fact in question; mere filing of documents received from other entities does not qualify documents as business records, and, before they may be admitted, it must be established that document in question is business record, that agency relies on such documents in ordinary course of business, and that agency did rely on documents, but agency need not produce witness from entity that created document; some statements may be admitted not for truth, but to "set the stage" for agency actions and establish caseworker's state of mind in making diligent efforts; participants in case conferences are under business duty to provide accurate information about parent's compliance with service plan, it is in regular course of agency's business to accurately record summary of case conferences; foster parents are, as a matter of law, under business duty to accurately report information about children to agency; that when biological parent is permitted to visit children at foster home, without supervision by only foster parent, foster parent becomes, temporarily, agent of agency, and is under business duty to accurately report to agency statements made by biological parent concerning inability to attend visit, as well as foster parent's observations and impressions of biological parent based on visits; caseworker's entry regarding mailing and content of letter is admissible under best evidence rule as competent secondary evidence); but see Matter of Cynthia C., 234 A.D.2d 929, 651 N.Y.S.2d 836 (4th Dept. 1996) (letters and reports written to petitioner's staff members, not by them, admitted in absence of proper business record foundation).

In addition, entries are admissible despite the maker's lack of personal knowledge if they are derived from statements to the maker that would be admissible under an exception to the hearsay rule. See, e.g., Matter of Leon RR., 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979); Kelly v. Wasserman, 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959) (defendant's statements were admissions); In re Alexis Marie P., 45 A.D.3d 458, 846 N.Y.S.2d 149 (1st Dept. 2007), lv denied, 10 N.Y.3d 705 (child's statements in hospital records admissible under FCA §1046[a][vi]); Matter of Commissioner of Social Services

o/b/o Alex K., 207 A.D.2d 488, 615 N.Y.S.2d 923 (2d Dept. 1994) (child's statements in hospital record were relevant to mother's diagnosis and treatment and admissible under §1046[a][vi]); Matter of Frances Charles W., 126 A.D.2d 936, 511 N.Y.S.2d 710 (4th Dept. 1987), aff'd 71 N.Y.2d 112, 524 N.Y.S.2d 19 (investigator's affidavits containing children's statements admissible under §1046(a)(iv), and statements were admissible under §1046[a][vi]); Matter of Shawniece E., 110 A.D.2d 900, 488 N.Y.S.2d 733 (2d Dept. 1985) (statements by respondent contained in hospital record were admissible).

Needless to say, the scope of the hearsay exception for statements made for purposes of diagnosis and treatment often will be at issue. Compare Matter of Christopher D.B., 157 A.D.3d 944 (2d Dept. 2018) (statements by mother of infant as to how child fell were relevant to diagnosis and treatment of injuries and likely were relied upon by hospital personnel in developing discharge plan to ensure child's safety); People v. Skeen, 139 A.D.3d 1179 (3d Dept. 2016), lv denied 27 N.Y.3d 1155 (statements by victim's mother and grandmother were germane to diagnosis and treatment); Matter of A.M., 44 Misc.3d 514 (Fam. Ct., Bronx Co., 2014) (statements made by third person providing health-related information for purpose of treatment are intrinsically reliable and may fall within exception) and In re Dolan, 35 Misc.3d 781 (Sup. Ct., Nassau Co., 2012) (exception may be applied to statements made by persons other than patient, such as relatives or law enforcement personnel) with People v. Matthews, 148 A.D.2d 272 (4th Dept. 1989) (statements by defendant's mother inadmissible, because they were not relied upon by doctor in making diagnosis).

Inconsistent statements contained in a record, which are not being offered for the truth, also may be admitted. People v. Mullings, 83 A.D.3d 871 (2d Dept. 2011) (police report should be admitted where it indicates that source of information was complaining witness, and information is inconsistent with testimony of the complaining witness).

The mere filing of papers received from other entities, even if retained in the regular course of business, is insufficient to qualify the papers as business records. People v. Cratsley, 86 N.Y.2d 81, 629 N.Y.S.2d 992 (1995); see also In re Dontay B., 81 A.D.3d 539 (1st Dept. 2011) (domestic incident reports contained unsworn hearsay

allegations); People v. Burdick, 72 A.D.3d 1399, 900 N.Y.S.2d 195 (3rd Dept. 2010) (mere filing of documents received from other entities, even if retained in regular course of business, does not qualify documents as business records, and witness did not have knowledge of business practices and record-keeping procedures of entity that produced records).

The possible existence of objectionable material in otherwise admissible records forces attorneys to carefully examine records, and prepare appropriate objections, well before they are offered into evidence. In Matter of Leon RR., supra, 48 N.Y.2d 117, a termination of parental rights proceeding in which an entire foster care agency record was introduced into evidence, the Court of Appeals noted that many of the entries "consisted of statements, reports and even rumors made by persons under no business duty to report to the agency. To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy -- cross-examination and impeachment of the declarant." 48 N.Y.2d at 123. The Court of Appeals also noted that, given the size and complexity of the record, the agency should have given the respondents notice and an opportunity to examine the record before trial. See also Matter of Tyree B., 160 A.D.3d 1389 (4th Dept. 2018) (court did not err in admitting entire case file, including hearsay, because court received file conditionally, subject to father's hearsay objections); In re Christy C., 74 A.D.3d 561, 903 N.Y.S.2d 365 (1st Dept. 2010) (court erred in relying on hearsay statements by respondents in police domestic incident reports since information came from witnesses not engaged in police business); Matter of Tiffany S., 302 A.D.2d 758, 755 N.Y.S.2d 745 (3rd Dept. 2003), lv denied 100 N.Y.2d 503, 761 N.Y.S.2d 595 (2003) (family court erred when it admitted records in termination proceeding while respondent's counsel agreed that court would redact those portions that constituted inadmissible hearsay; such a procedure fails to protect respondents' rights and violates Leon RR.).

In Article Ten proceedings, this problem can be avoided through prompt acquisition of hospital and agency records pursuant to CPLR §3120 and FCA §1038(b).

See also CPLR §3122-a (sets up procedure under which business records produced pursuant to subpoena duces tecum issued under CPLR §3120 or produced by non-parties, if accompanied by certification containing required declarations, are admissible if party intending to offer them gives notice of intent at least thirty days before hearing and specifies place where records may be inspected at reasonable times; no later than ten days before hearing, other parties may state objections, and objections may be raised at hearing based upon evidence which could not have been discovered by exercise of due diligence prior to deadline for objections).

It appears that, generally, expert opinions which appear in a business record are admissible even in the absence of a description of the basis for the opinion or an indication of the expert's qualifications, although the Court of Appeals has suggested that the facts underlying the opinion must appear in the record. People v. Kohlmeyer, 284 N.Y. 366 (1961) ("It is always competent for physicians to state their scientific opinions as to the nature of illnesses, their causes and probable results, founded upon the facts disclosed in the evidence…. We fail to see why the recorded conclusions of the hospital physicians on scientific matters should be deemed objectionable on any ground when they would not be objectionable were the physician whose diagnosis is contained in the record called personally to the witness stand"); see also In re Imani G., 130 A.D.3d 456 (1st Dept. 2015) (evidence included medical records stating that child had symptoms of depression, anxiety and post-traumatic stress disorder); In re Anthony C., 59 A.D.3d 166, 873 N.Y.S.2d 33 (1st Dept. 2009) (no error where court admitted psychiatric reports containing doctors' opinions and expert proof); Matter of Harvey U., 116 A.D.2d 351, 501 N.Y.S.2d 920 (3rd Dept. 1986), rev'd on other grounds 68 N.Y.2d 624, 505 N.Y.S.2d 70 (prevailing weight of authority supports admissibility of hospital records containing diagnoses and assessments of patient's mental or physical condition by apparently qualified professionals when records otherwise meet requirements of business entry rule); Carter v. Rivera, 24 Misc.3d 920 (Sup. Ct., Kings Co., 2009) (court observes that First Department has not allowed admission of opinions contained in private doctor's records, as opposed to hospital records); but see Matter of E.T., 808 N.E.2d 639 (Indiana, 2004) (opinions in medical or hospital records admissible only if

expertise of opinion giver established); Matter of M.S., 49 Misc.3d 1214(A) (Fam. Ct., Kings Co., 2015) (opinions from doctor and social worker about mother's cognitive abilities not admissible since professionals were not qualified as experts). However, although the record maker's appearance is not required in order to establish the admissibility of the record, FCA §1046(a)(iv) does not limit the right of a party to demand that the maker of the record appear for cross-examination. Matter of Shirley D., 63 Misc.2d 1012, 314 N.Y.S.2d 230 (Fam. Ct., Kings Co., 1970).

Finally, the child's lawyer should never assume that documentary evidence will suffice at a fact-finding hearing as a substitute for live testimony. Cf. Matter of Little Flower Children's Services v. Selena Maria W., 253 A.D.2d 556, 677 N.Y.S.2d 169 (2d Dept. 1998) (at termination of parental rights fact-finding hearing, caseworker had little or no independent recollection of relevant events and relied heavily on records, which were inaccurate and incomplete).

**5. Admissibility Of Central Register Reports**

A report filed with the statewide central register of child abuse and maltreatment by a mandated reporter (see SSL §413) is also admissible. FCA §1046(a)(v); Matter of Lauryn H., 73 A.D.3d 1175, 900 N.Y.S.2d 764 (2d Dept. 2010) (court properly considered report filed by school guidance counselor). Such reports often contain speculative conclusions, rumors, inadmissible hearsay, and/or allegations which are raised neither in the petition nor at trial. Consequently, they are usually admitted at hearings held pursuant to FCA §1027 and §1028, at which evidence need not be competent. At fact-finding hearings, such reports usually are not admitted, or are admitted not to prove the truth of their contents, but merely to explain how the charges came to light. Nevertheless, since a mandated reporter has a "business" duty to report, it could be argued in an appropriate case that statements which are based on the reporter's personal knowledge should be admitted for their truth. See Matter of Aaliyah Q., 55 A.D.3d 969, 865 N.Y.S.2d 714 (3rd Dept. 2008) (child's out-of-court statements corroborated by, inter alia, indicated State Central Register report); In re Nicole H., 12 A.D.3d 182, 783 N.Y.S.2d 575 (1st Dept. 2004) ("Oral Report Transmission" made by mandated reporter properly admitted where statements in it were corroborated by

evidence supporting their reliability).

It should be noted that, in what has become known as "Elisa's Law," the Legislature, while limiting the expungement of "unfounded" reports, also amended SSL §422(5) to provide that unfounded reports are inadmissible under Article Ten. See also FCA §651-a (report not admissible in custody or visitation proceeding unless an investigation determined that there was credible evidence, the subject was notified that the report was indicated, and the report has not been amended or expunged).

**6. Privileged Communications**

Since testimony concerning child abuse and neglect often must come from medical doctors and mental health professionals whose communications with their patients and clients would ordinarily be privileged, it is obvious that the operation of evidentiary rules restricting the disclosure of privileged communications must be limited in Article Ten proceedings. Thus, the husband-wife privilege (see CPLR §4502), the physician-patient and related privileges (see CPLR §4504), the psychologist-client privilege (see CPLR §4507), the social worker-client privilege (see CPLR §4508), and the rape crisis counselor-client privilege (see CPLR §4510), "shall [not] be a ground for excluding evidence which otherwise would be admissible." FCA §1046(a)(vii). See also Matter of Sumaria D., 121 A.D.3d 1203 (3d Dept. 2014) (court should not have considered mother's hospital records, which petitioner improperly obtained without mother's authorization or subpoena); Matter of S. Children, 238 A.D.2d 364, 656 N.Y.S.2d 308 (2d Dept. 1997) (medical records of possible custodian not privileged in extension of placement proceeding); Matter of Rockland County Department of Social Services v. Brian McM., 193 A.D.2d 121, 602 N.Y.S.2d 416 (2d Dept. 1993) (family court properly denied motion to quash father's subpoena for non-respondent mother's former psychologist and his records and records of mother's social worker; §1046(a)(vii) applies to privileged communications of non-parties, and protection from "fishing expeditions" is provided by requirement that evidence at fact-finding hearing be relevant and court can assess relevancy of evidence before turning it over); Matter of Jonathan C., 51 Misc.3d 469 (Fam. Ct., Bronx Co., 2015) (mother's mental health providers

compelled to testify at disposition, and mental health records also subject to disclosure for in camera review for relevance).

A similar exception, which omits the reference to rape crisis counselors, applies in termination of parental rights proceedings based on mental illness or retardation. SSL §384-b(3)(h). No such exception applies in custody/visitation proceedings. Matter of Ascolillo v. Ascolillo, 43 A.D.3d 1160, 844 N.Y.S.2d 339 (2d Dept. 2007) (family court properly refused to permit mother to call child's therapist as witness, since child's attorney did not consent to disclosure of confidential communications and this was not child protective proceeding).

It can be argued that, having already revealed confidential communications as required by SSL §413, a mandated reporter is free to disclose those communications thereafter. However, although it is clear that privileged communications may be disclosed when a witness testifies in court, and a court may be more inclined than usual to require production of protected information for in camera review during discovery proceedings [Matter of B. Children, 23 Misc.3d 1119(A), 886 N.Y.S.2d 70 (Fam. Ct., Kings Co., 2009) (while granting respondent father's mid-hearing motion to compel production, for in camera review, of child's hospital records, court notes that under §1046(a)(vii), physician-patient privilege has been lifted as potential bar to introduction of evidence)], the statute does not expressly permit disclosure outside the context of a courtroom presentation; for instance, during an interview. See Matter of Sumaria D., 121 A.D.3d 1203 (court should not have considered mother's hospital records, which petitioner improperly obtained without mother's authorization or subpoena); In re Dean T., 117 A.D.3d 492 (1st Dept. 2014) (court erred in refusing to conduct in camera review of child's mental health treatment records to determine whether there was information supporting respondent father's claims; however, child did not place mental state in issue and waive psychologist-patient privilege by stating that abuse caused him to feel depressed; although child's mental health status may have been relevant to assessment of whether abuse occurred, his mental health was not in controversy), appeal decided 124 A.D.3d 548 (disclosure denied); City Bar Opinion 1999-7, 1999 WL 1845766 ("It does not follow, however, that because a claim of privilege would not be

sustained, and the lawyer therefore would be required to testify to the confidences ... the attorney also would be obligated to disclose “secrets” ... *outside* the litigation context”).

Obviously, a privilege may be waived. See Arons v. Jutkowitz, 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007) (attorney may interview adverse party's treating physician privately when adverse party has affirmatively placed medical condition in controversy and thus waived physician-patient privilege; however, while HIPAA does not prevent this informal discovery, it requires that attorney first obtain valid HIPAA authorization or court or administrative order, or issue subpoena, discovery request or other lawful process).

While a custodial parent usually has authority to waive certain privileges on behalf of his or her minor child, it appears that a respondent parent has no such authority in an Article Ten proceeding. See In re Lawrence C. v. Anthea P., 148 A.D.3d 598 (1st Dept. 2017) (harmless error found where court permitted children’s treating psychologist to testify as to confidential matters in absence of knowing waiver from children);Matter of Rutland v. O.Brien, 143 A.D.3d 1060 (3d Dept. 2016) (court erred in permitting father to call daughter’s counselor to testify about confidential, privileged matters in absence of knowing waiver from daughter, notwithstanding absence of objection by attorney for children); In re L.A.N., 292 P.3d 942 (Colo. 2013) (guardian ad litem, not parent, court, or agency, is in best position to waive psychotherapist-patient privilege in dependency/neglect proceeding); In re Berg, 886 A.2d 980 (N.H. 2005) (parent who has legal custody may claim or waive privilege on behalf of child, but when parents are engaged in custody fight, interests of parents become potentially, if not actually, adverse to child’s interests and thus court has authority and discretion to determine whether assertion or waiver of privilege is in child’s interest); In re Cole C., 174 Cal.App.4th 900 (Cal. Ct. App., 4th Dist., 2009) (counsel for child who lacks capacity to invoke psychotherapist-patient privilege is holder of privilege; although parents sometimes may assert privilege on behalf of children, in dependency proceedings counsel for child should hold privilege because of potential parental conflicts of interest); Matter of Oscar S. v. Gale B., V0522-23/11/11A, NYLJ 1202610472764, at *1 (Fam., NY, Decided June 27, 2013) (in custody proceeding,

court denied father's motion to add children's therapist to witness list; child had therapist-client privilege and had not waived it, and court should not void it unless there is critical and pressing need); Liberatore v. Liberatore, 37 Misc.3d 1034 (Sup. Ct., Monroe Co., 2012) (communications between unemancipated minor and therapist may not be disclosed to parties or counsel in absence of court review; in context of custody dispute, custodial parent has conflict of interest in acting on behalf of child in asserting or waiving privilege, and HIPAA access rules do not override state law).

The attorney-client privilege (see CPLR §4503) remains in effect. In addition to statements made to the attorney, the privilege covers communications made by the client to social workers or other professionals employed by the attorney. See CPLR §4503(a) (communication made to attorney "or his employee" in the course of professional employment shall not be disclosed). It should be noted that a social worker is the child's "representative" for purposes of CPLR §3101(d)(2), which protects materials "prepared in anticipation of litigation or for trial" by the representative. See Matter of Lenny McN., 183 A.D.2d 627, 584 N.Y.S.2d 17 (1st Dept. 1992).

Also still in effect is the clergyman-penitent privilege. See CPLR §4505; Matter of the N. and G. Children, 176 A.D.2d 504, 574 N.Y.S.2d 696 (1st Dept. 1991) (communications not privileged where respondent was not seeking spiritual advice).

**7. Out-Of-Court Statements Of Child**

In order to protect particularly vulnerable children and ensure that "[t]he testimony of the child shall not be necessary to make a fact-finding of abuse or neglect," FCA §1046(a)(vi) provides that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence ...." Matter of Karen Patricia G., 44 A.D.3d 658, 843 N.Y.S.2d 360 (2d Dept. 2007) (while family court indicated that determination as to credibility of child's allegations could not be made without in camera interview, child's testimony was not required); but see Matter of Blaize F., 50 A.D.3d 1182, 855 N.Y.S.2d 284 (3rd Dept. 2008) (no error in family court's refusal to allow state trooper to testify that child lied to trooper during investigation of unrelated matter, since that was collateral matter pertaining solely to witness's credibility). This includes statements made by the child after the filing of the

petition. Matter of Marshall R., 73 A.D.2d 988, 423 N.Y.S.2d 564 (3rd Dept. 1980). Arguably, the statute permits the use of "double hearsay." Matter of Department of Social Services o/b/o Michael A., 12 Misc.3d 1168(A), 820 N.Y.S.2d 842 (Fam. Ct., Nassau Co., 2006) (court admits testimony of witnesses to whom another person repeated child's statements).

Due to similar concerns, this rule has been applied when abuse or neglect allegations are made in custody and visitation proceedings. In re Khaliah T., 99 A.D.3d 537 (1st Dept. 2012), lv denied 20 N.Y.3d 854 (no error where court sustained hearsay objection since there was no offer of proof as to how statements would be corroborated); Matter of Rosario WW. v. Ellen WW., 309 A.D.2d 984, 765 N.Y.S.2d 710 (3rd Dept. 2003); Matter of Linda P., 240 A.D.2d 583, 659 N.Y.S.2d 55 (2d Dept. 1997); Matter of Daniel R. v. Noel R., 195 A.D.2d 704, 600 N.Y.S.2d 314 (3rd Dept. 1993); In re Albert G., 181 A.D.2d 732, 580 N.Y.S.2d 478 (2d Dept. 1992). But see Matter of Lane v. Lane, 68 A.D.3d 995, 892 N.Y.S.2d 130 (2d Dept. 2009) (statements inadmissible where they were largely uncorroborated); Peter S. v. Cheryl A. S., 190 A.D.2d 1038, 593 N.Y.S.2d 656 (4th Dept. 1993). In Matter of Columbia County Department of Social Services v. Kristin M., 92 A.D.3d 1101 (3d Dept. 2012), the rule was applied at a proceeding in which a violation of an Article Ten order of protection was alleged. Other cases have held that the statute is not applicable in a family offense proceeding. In re Dhanmatie G., 146 A.D.3d 495 (1st Dept. 2017); Matter of Khan-Soleil v. Rashad, 108 A.D.3d 544 (2d Dept. 2013); but see Matter of FM, _Misc.3d_, 2018 WL 3748527 (Fam. Ct., Otsego Co., 2018) (court opines that although Third Department has not yet carved out hearsay exception, it has "seemed to indicate" that child's statements regarding abuse may be admissible if corroborated).

While the court stated in In re Benjamin L., 9 A.D.3d 153, 780 N.Y.S.2d 8 (1st Dept. 2004) that a child's statements were not admissible because he was not a "victim" within the meaning of §1046(a)(vi), it does not appear the court meant that out-of-court statements by a subject child who is alleged to be derivatively abused or neglected, but is not the "victim" in the usual sense, are not admissible. In the First Department's own decision in In re Peter G., 6 A.D.3d 201, 777 N.Y.S.2d 686 (1st Dept. 2004), appeal

dism'd 3 N.Y.3d 655, 782 N.Y.S.2d 693, a three-judge majority scrutinized the non-victimized subject children's out-of-court statements and found them too vague and contradictory to provide sufficient corroboration, but never suggested they were inadmissible.

In addition, out-of-court statements made by a child who is not named in the petition are admissible if the child allegedly was neglected or abused under FCA Article Ten. Matter of Cory S., 70 A.D.3d 1321, 897 N.Y.S.2d 322 (4th Dept. 2010); Matter of Ian H., 42 A.D.3d 701, 840 N.Y.S.2d 202 (3rd Dept. 2007), lv denied 10 N.Y.3d 814. This means that the statements are not admissible unless the respondent is a parent or other person legally responsible for the child's care who could be charged with abuse or neglect. Matter of Kaliia F., 148 A.D.3d 805 (2d Dept. 2017); Matter of Destiny P., 48 Misc.3d 435 (Fam. Ct., Kings Co., 2015).

Although a child's hearsay statement is inadmissible in a criminal proceeding if it appears that the child would not be competent to testify [People v. Wright, 81 A.D.3d 1161, 918 N.Y.S.2d 598 (3d Dept. 2011) (statements admissible where trial court determined after in camera examination that child would be competent to testify as unsworn witness); People v. Sullivan, 117 A.D.2d 476, 504 N.Y.S.2d 788 (3rd Dept. 1986)], no such rule has arisen under Article Ten. See Matter of Tyler K., 261 A.D.2d 834, 689 N.Y.S.2d 571 (4th Dept. 1999) (three and a half year-old child's statements admitted); Matter of Heather P., 233 A.D.2d 912, 649 N.Y.S.2d 551 (4th Dept. 1996) (two and a half-year-old child's statements were "highly credible"); Matter of Department of Social Services o/b/o Carol Ann D., 195 A.D.2d 460, 600 N.Y.S.2d 132 (2d Dept. 1993) (two and a half-year-old child's statements admitted); see also Matter of Cindy L., 947 P.2d 1340 (CA, 1997) (child's lack of competence is factor in determining reliability of hearsay, but is not controlling). In Matter of Harmony M. E., 121 A.D.3d 677 (2d Dept. 2014), the Second Department specifically rejected an argument that the family court erred in basing its findings on the cross-corroborating statements of a four-year-old and a six-year-old.

Although the admissibility of testimony given at a previous hearing usually is governed by CPLR §4517, there is no reason to believe that a child's prior testimony

given, e.g., at a FCA §1028 hearing or at a fact-finding hearing that resulted in a mistrial, would not be admissible under §1046(a)(vi). Cf. Matter of Jaiden J., 98 A.D.3d 667 (2d Dept. 2012) (reversible error where child did not testify and his accounts were admitted via hearsay testimony, and court refused to admit child's grand jury testimony from companion criminal proceeding; respondent had no other means of showing that child had given arguably inconsistent accounts).

If a child's prior statements qualify for admission under CPLR §4517, or under any other traditional hearsay exception, those statements, standing alone, can support a finding. Matter of Lydia K., 112 A.D.2d 306, 491 N.Y.S.2d 752 (2d Dept. 1985), aff'd 67 N.Y.2d 681, 499 N.Y.S.2d 684 (1986) (seven-year-old child's statement admitted as spontaneous declaration); but see In re Sophie, 865 N.E.2d 789 (Mass. 2007) (where children joined father in opposing agency's application for temporary custody, children's statements to caseworker regarding father's abuse and neglect were admissible against children as party admissions, but, because statements were not admissible against father, they were improperly admitted at temporary custody hearing).

Perhaps because the Legislature recognized the due process implications of this blanket hearsay exception [see In re D.W., 2008 WL 946229 (Cal. Ct. App., 1st Dist., 2008) (due process problems are inherent when court relies too heavily on hearsay without sufficient indicia of reliability)], statements admitted only because they qualify under §1046(a)(vi) cannot support a finding unless they are corroborated by "[a]ny other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in [FCA §1046(a)] ...." See also Matter of Cobane v. Cobane, 57 A.D.3d 1320, 870 N.Y.S.2d 569 (3rd Dept. 2008), lv denied 12 N.Y.3d 706 (although some statements may not have been sufficiently corroborated, overall the statements fell within §1046[a][vi] and could be considered); Matter of Jessica P., 46 A.D.3d 1142, 848 N.Y.S.2d 412 (3rd Dept. 2007) (where petitioner alleged that mother failed to keep child away from step-grandfather despite allegations of sexual abuse, corroboration requirement was not implicated).

The corroborative evidence must be independent of the out-of-court statements. See Matter of Jada K. E., 96 A.D.3d 744 (2d Dept. 2012) (drawing that was arguably a

visual representation of out-of-court statement was made at same time child made lone accusation of abuse and was made at request of interviewing detective, and thus was mere repetition of accusation and not corroboration). Thus, although the consistency of statements made to different persons on separate occasions may be considered, In re Ninoshka M., 125 A.D.3d 567 (1st Dept. 2015); Matter of Richard SS., 29 A.D.3d 1118, 815 N.Y.S.2d 282 (3rd Dept. 2006); Matter of Starr H., 156 A.D.2d 1025, 550 N.Y.S.2d 766 (4th Dept. 1989), one child's statements to different persons cannot not cross-corroborate each other as a matter of law. Matter of Frances Charles W., 71 N.Y.2d 112, 524 N.Y.S.2d 19 (1988); Matter of Douglas "NN", 277 A.D.2d 749, 716 N.Y.S.2d 156 (3rd Dept. 2000). In addition, a sworn, written out-of-court statement by the child does not suffice. Matter of Sasha R., 24 A.D.3d 902, 805 N.Y.S.2d 476 (3rd Dept. 2005). Consistent statements to different people, combined with some additional evidence, may be sufficient; there is controversy with respect to whether the negative inference flowing from a respondent's failure to testify is sufficient. Compare Matter of Hannah L., 113 A.D.3d 1137 (4th Dept. 2014) (neither repetition by each child of account, nor strong inference drawn against parents for failing to testify, could supply adequate corroboration where it otherwise did not exist) with Matter of Charlie S., 82 A.D.3d 1248 (2d Dept. 2011), lv denied 17 N.Y.3d 704 (out-of-court statements corroborated by testimony from case worker and high school principal who stated that child related same allegations to them, and negative inference drawn from father's failure to testify). In contrast, it is clear that the negative inference, by itself, cannot supply missing proof. Matter of Iyonte G., 82 A.D.3d 765 (2d Dept. 2011) (strong inference against stepfather for failing to testify could not establish corroboration where it otherwise did not exist); Matter of Kayla F., 39 A.D.3d 983, 833 N.Y.S.2d 742 (3rd Dept. 2007) (inference does not corroborate child's out-of-court statements when corroboration does not otherwise exist); Matter of Tysean P., 39 Misc.3d 1232(A) (Fam. Ct., Kings Co., 2013) (negative inference drawn against father could not provide missing element of proof); Matter of Janiyah T., 26 Misc.3d 1208(A), 2010 WL 58323 (Fam. Ct., Kings Co., 2010), aff'd 82 A.D.3d 1108 (2d Dept. 2011) (strongest negative inference cannot provide missing element of proof).

Different children's statements regarding the same or similar incidents of abuse or neglect may cross-corroborate each other, depending, of course, on the detail and consistency in the statements. Compare Matter of Francis Charles W., supra, 71 N.Y.2d 112; Matter of Jada A., 116 A.D.3d 769 (2d Dept. 2014) (evidence included independent and consistent out-of-court statements made by children, ages ten and three, to several individuals); Matter of Tristan R., 63 A.D.3d 1075, 883 N.Y.S.2d 229 (2d Dept. 2009) (children's recantation of earlier statements found incredible; detailed and explicit nature of children's description of father's sexual conduct were consistent and enhanced reliability of out-of-court statements); In re Anahys V., 68 A.D.3d 485, 891 N.Y.S.2d 34 (1st Dept. 2009) (statements of children cross-corroborative given similarity of accounts and one child's repeated statements that father touched her sister in same way he touched her); Matter of Astrid C., 43 A.D.3d 819, 841 N.Y.S.2d 356 (2d Dept. 2007); Matter of Beverly R., 38 A.D.3d 668, 831 N.Y.S.2d 717 (2d Dept. 2007); Matter of Elizabeth G., 255 A.D.2d 1010, 680 N.Y.S.2d 32 (4th Dept. 1998), lv denied 93 N.Y.2d 814, 697 N.Y.S.2d 561 (1999) and Matter of Tantalyn TT., 115 A.D.2d 799, 495 N.Y.S.2d 740 (3rd Dept. 1985) with Matter of Ashley G., 163 A.D.3d 963 (2d Dept. 2018) (cross-corroboration insufficient where, as to sexual abuse, other children's statements referred to their observations of child screaming and crying, but failed to provide detail as to alleged abuse; and, as to excessive corporal punishment, other children's statements did not provide detailed description of alleged excessive corporal punishment); In re Peter G., 6 A.D.2d 201, 774 N.Y.S.2d 686 (1st Dept. 2004) (three-judge majority concludes that statements were too general and contradicted victimized child's statements) and Matter of W., 2003 WL 51219 (Fam. Ct., Kings Co.) (corroboration insufficient where non-victimized child's statements were inconsistent).

A child's unsworn testimony is considered to be independent evidence, and, therefore, can supply adequate corroboration. Matter of Christina F., 74 N.Y.2d 532, 549 N.Y.S.2d 643 (1989) (adequate corroboration found where child testified and was questioned by all counsel). But see Matter of Jared "XX", 276 A.D.2d 980, 714 N.Y.S.2d 580 (3rd Dept. 2000) (child provided few specific details, answered no when asked if he knew "the difference between imagined things and things that really happened," and

gave confusing testimony). It is unclear whether such testimony may, by itself, constitute adequate corroboration even if the child is not cross-examined by counsel. Compare Matter of Nathaniel TT, 265 A.D.2d 611, 696 N.Y.S.2d 274 (3rd Dept. 1999); Matter of Jamie EE., 249 A.D.2d 603, 670 N.Y.S.2d 931 (3rd Dept. 1998) (while noting that "the in camera testimony of a child ... may provide the requisite corroboration," Third Department remits case to allow family court to conduct "in camera interview," as requested by child's attorney); and Matter of Fawn S., 123 A.D.2d 871, 507 N.Y.S.2d 651 (2d Dept. 1986) with Matter of Christina F., supra, 74 N.Y.2d 532 (corroborative evidence was testimony in court, before judge and court reporter, with direct examination, cross-examination by respondent's attorney, and additional questioning by both court and child's attorney); Matter of Randy A., 248 A.D.2d 838, 670 N.Y.S.2d 225 (3rd Dept. 1998) (while concluding that out-of-court statements were corroborated by evidence other than in camera testimony, court notes that exclusion of respondent must not create risk of erroneous deprivation of due process rights) and Matter of Leslie C., 224 A.D.2d 947, 637 N.Y.S.2d 560 (4th Dept. 1996).

Obviously, the sufficiency of the corroborative evidence must be determined on a case-by-case basis. For example, a finding may be made when the respondent has made extrajudicial admissions. Compare In re Lesli R., 138 A.D.3d 488 (1st Dept. 2016) (allegations that respondent inappropriately touched children sufficiently corroborated by admission that respondent knew "rough housing" was making children uncomfortable but continued touching them); Matter of Joanne II., 100 A.D.3d 1204 (3d Dept. 2012) (when confronted with sex abuse allegations, father stated that he was going to pick up youngest child and "go blow [his] head off," and wrote out and signed statement purporting to be a will); Matter of Joshua UU., 81 A.D.3d 1096, 2011 WL 536549 (3d Dept. 2011) (some corroboration provided by respondent's failure to deny allegations when confronted by child's mother); Matter of Thomas M.F., 63 A.D.3d 1667, 880 N.Y.S.2d 435 (4th Dept. 2009), lv denied 13 N.Y.3d 703 (in custody proceeding, statements adequately corroborated by medical evidence and testimony that mother's boyfriend was "deceptive" when questioned by police); Matter of Kayla N., 41 A.D.3d 920, 837 N.Y.S.2d 424 (3rd Dept. 2007) (finding against stepfather upheld

despite recantation by child and mother; court notes that recantation is reaction common among abused children, that child told police she did not want respondent to be arrested, and that mother's previous admission to neglecting daughter by failing to protect her from respondent is consistent with the veracity of her initial statements and inconsistent with her recantation); Matter of Karen BB., 216 A.D.2d 754, 628 N.Y.S.2d 431 (3rd Dept. 1995) and Matter of Margaret W., 83 A.D.2d 557, 441 N.Y.S.2d 17 (2d Dept. 198l), lv denied 54 N.Y.2d 609, 445 N.Y.S.2d 1028 (1981) with Matter of Lee-Ann W., 151 A.D.3d 1288 (3d Dept. 2017) (neither father's admissions to bathing with child and cleaning her after bowel movements, nor mother's testimony that she saw father and child bathing together naked on numerous occasions and often saw father's hands come into contact with child's genitals and buttocks when he was cleaning child after she had used bathroom, adequately corroborated child's sexual abuse allegations, or supported inference that father acted for purpose of sexual gratification); Matter of Heidi "CC", 270 A.D.2d 528, 703 N.Y.S.2d 593 (3rd Dept. 2000) (corroboration of child's allegation that mother knew of sexual abuse insufficient where mother admitted knowing of fiance's history of sexual abuse but believed those allegations were fabricated).

A finding may be based on corroborative evidence that another child has been harmed. See, e.g., Matter of Leah R., 104 A.D.3d 774 (2d Dept. 2013) (statements concerning abuse corroborated by, inter alia, testimony of child's cousin and half-sister regarding father's sexual abuse of them in similar manner many years earlier); Matter of Cindy JJ., 105 A.D.2d 189, 484 N.Y.S.2d 249 (3rd Dept. 1984).

A finding may be based on corroborative physical evidence. See Matter of Nicholas L., 50 A.D.3d 1141, 857 N.Y.S.2d 629 (2d Dept. 2008) (child's out-of-court statements that respondent struck him in face corroborated by caseworker's observation of injuries); Matter of Nicole H., 12 A.D.3d 182 (1st Dept. 2004) (statements alleging that mother hit child about head and face, pulled her hair and shoved her into bookcase corroborated by caseworker's observation of bruise and laceration on child's face, and photos taken at hospital); Matter of Jessica N., 234 A.D.2d 970, 652 N.Y.S.2d 177 (4th Dept. 1996), appeal dism'd 90 N.Y.2d 1008, 666 N.Y.S.2d 102 (1997)

(testimony of physician that findings are consistent with sexual abuse is sufficient; findings need not be conclusive); Matter of Department of Social Services o/b/o Jane H., 20 Misc.3d 1124(A), 867 N.Y.S.2d 373 (Fam. Ct., Nassau Co., 2008) (doctor testified that injury to hymen was consistent with “digital penetration with an adult size finger or fingers and also penile penetration, probably partial”); but see Matter of Alexander G., 93 A.D.3d 904 (3d Dept. 2012) (precise appearance and origin of red mark on child’s chest not established).

Corroboration can be supplied by expert "validation" testimony in a sexual abuse case (see below), or other expert mental health evidence. See In re Dorlis B., 132 A.D.3d 578 (1st Dept. 2015) (detailed out-of-court statements corroborated by child psychologist’s testimony that child suffered from depression, culminating in suicide attempt, consistent with sexual abuse and not otherwise explained); Matter of Zukowski v. Zukowski, 106 A.D.3d 1293 (3d Dept. 2013) (no adequate corroboration where psychotherapist testified that children suffered from adjustment disorder with anxiety and depressed mood due to emotional abuse by father, but mother participated in sessions and provided details concerning father that children had not mentioned, and psychotherapist’s findings were based, in part, on incidents mother reported).

Sometimes, there are certain facts that, given the particular context, constitute corroborative evidence. See, e.g., Matter of Victoria C., 155 A.D.3d 866 (2d Dept. 2017) (out-of-court statements alleging that mother regularly abused alcohol to point of intoxication and had threatened to put knife to children’s throats corroborated by testimony of caseworker who smelled alcohol on mother and was told by mother that she was not in, and did not need, alcohol treatment program); Matter of Nyasia C., 137 A.D.3d 781 (2d Dept. 2016) (mother’s testimony regarding observations of respondent and child in bed together corroborated statements regarding sexual abuse); Matter of Columbia County Department of Social Services v. Kristin M., 92 A.D.3d 1101 (where child told caseworker that individual, who was barred from premises by order protection, had visited and made child pancakes and was hiding in closet when caseworker was there, adequate corroboration supplied by caseworker's testimony that she observed several pairs of men’s shoes in hallway, which respondent later admitted belonged to

the excluded individual, that child was eating pancakes, and that there were closets with doorways large enough for person to walk through, and child's in camera statements); Matter of Destiny F., 85 A.D.3d 1229 (3d Dept. 2011), lv denied 17 N.Y.3d 854 (violation of protective order found where child stated that respondent had made her “double pinkie promise” to act badly when with grandparents so that they would not want her anymore and she could return to respondent; grandmother’s observations of child’s unusual misconduct immediately after visitation with respondent provided sufficient corroboration of child’s out-of-court statements); In re Ameena C., 83 A.D.3d 606 (1st Dept. 2011) (in case in which respondent allegedly punched child and rammed her head through a wall, corroboration included evidence of large hole in wall of family home); Matter of Jessica DD., 234 A.D.2d 785, 651 N.Y.S.2d 673 (3rd Dept. 1996), lv denied 89 N.Y.2d 812, 657 N.Y.S.2d 404 (1997) (child's out-of-court statements that she twice told mother about stepfather's acts were not adequately corroborated where stepfather’s departures from home were not connected to child’s statements); Matter of SF, 58 Misc.3d 1215(A) (Fam. Ct., Bronx Co., 2018) (in sex abuse case, corroboration included, inter alia, that respondent had access to child, that mother owned type of underwear respondent made child wear, that respondent, who allegedly showed the child pornography, watched pornography himself, and that respondent, who had been with the child in his car, owned a car); Matter of Autumn A., 24 Misc.3d 1250(A), 899 N.Y.S.2d 57 (Fam. Ct., Richmond Co., 2009) (officer observed father in hospital hovering over child with arms wrapped around her, kissing her neck and rubbing her face, and repeatedly saying “my baby, my baby” and “nobody is going to hurt my baby,” and father refused to allow hospital personnel near child to prepare sexual offense evidence kit); Matter of L. H., 24 Misc.3d 1209(A), 890 N.Y.S.2d 368 (Fam. Ct., Nassau Co., 2009) (adequate corroboration where child stated to mother that daddy took round thing from mommy's pocketbook, put it on his finger and put his finger in her butt and then threw round thing into garbage, and mother immediately went to trash and recovered condom; father left immediately and threw out trash, which mother stated he never did; DNA inside condom was father’s; and while child usually showered in underwear, on date of incident she removed underwear and washed it); Matter of

Department of Social Services o/b/o Jane H., supra, 20 Misc.3d 1124(A) (statements adequately corroborated where there was, inter alia, evidence that child reported that abuse took place while she was suspended from school and was home in morning when the other children went to computer club, and these additional facts were confirmed by other testimony, and layout of house and morning routine left respondent with opportunity to commit abuse since he was either only adult awake in home with child or only adult upstairs in child's bedroom area).

It appears that corroboration of certain elements of abuse or neglect referenced in the child's out-of-court statements may suffice even if other elements are not directly corroborated. See In re Milagros C., 121 A.D.3d 481 (1st Dept. 2014) (corroboration found where child made specific and consistent statements to numerous individuals indicating that mother walked in as child's brother was forcing her to engage in sexual activity, and brother pled guilty in related criminal proceeding); Matter of Monique M., 110 A.D.3d 814 (2d Dept. 2013) (statements that child informed mother that abuse was occurring and that mother did nothing to stop it were corroborated by evidence that mother's boyfriend pleaded guilty in criminal proceeding involving same incidents).

A finding may still be made after a child has recanted the out-of-court allegations. Compare Matter of Charlie S., 82 A.D.3d 1248 (child's testimony recanting allegations did not mandate that finding be set aside); Matter of Tristan R., 63 A.D.3d 1075 (children's recantation of earlier statements found incredible; detailed and explicit nature of description of father's sexual conduct were consistent and enhanced reliability of out-of-court statements); In re Frantrae W., 45 A.D.3d 412, 845 N.Y.S.2d 324 (1st Dept. 2007) (recantation did not invalidate child's original testimony outright, and, at most, raised credibility questions that family court resolved in favor of discrediting recantation); Matter of Kayla N., supra, 41 A.D.3d 920; Matter of Akia "KK", 282 A.D.2d 839, 724 N.Y.S.2d 207 (3rd Dept. 2001) (recantations merely created credibility issue for family court); In re R./B. Children, 256 A.D.2d 96, 681 N.Y.S.2d 265 (1st Dept. 1998) (credibility of out-of-court statements was not undermined by recantation where child was reluctant to upset mother and put respondent in jail); Matter of Karen F., 208 A.D.2d 994, 617 N.Y.S.2d 217 (3rd Dept. 1994) (court refuses to set aside finding

where child recanted after hearing) and Matter of Kyanna T., 27 Misc.3d 1210(A), 910 N.Y.S.2d 406 (Fam. Ct., Kings Co., 2010), aff'd 99 A.D.3d 1011 (2d Dept. 2012), lv denied 20 N.Y.3d 856 (if child was upset about father and her brother going to Grenada without her, or if she wanted more attention from mother, she would not have created story that resulted in complete separation from entire family, and she failed to explain why sister would corroborate false allegations) with Matter of Alexander G., 93 A.D.3d 904 (insufficient evidence of excessive corporal punishment where child recanted and precise appearance and origin of red mark on child's chest were not established).

**K. "Validation" Evidence**

**1. Admissibility Of "Syndrome" Evidence**

In Matter of Nicole V., 71 N.Y.2d 112, 524 N.Y.S.2d 19 (1988), the Court of Appeals held that expert testimony establishing that the child exhibited symptoms associated with the sexually abused-child syndrome was sufficient to corroborate the child's out-of-court statements. The Court of Appeals noted that "[t]he sexually abused-child syndrome is similar to the battered-child syndrome. It is a recognized diagnosis based upon comparisons between the characteristics of individuals and relationships in incestuous families, as described by mental health experts and the characteristics of the individuals and relationships of the family in question [citations omitted]." 71 N.Y.2d at 120-121.

This process of identifying post-traumatic stress from a "cluster of behaviors," has become known as "validation." Matter of Linda K., 132 A.D.2d 149, 158, 521 N.Y.S.2d 705 (2d Dept. 1987). Since they have been accepted in the "scientific" community, the principles underlying the validation process may be the subject of judicial notice. See Richardson On Evidence, §2-204(k). Cf. Matter of Sharrell B., 190 A.D.2d 629, 594 N.Y.S.2d 167 (1st Dept. 1993), lv denied 81 N.Y.2d 710, 600 N.Y.S.2d 197 (court notes significance of age-inappropriate sexual knowledge).

In the years since Nicole V. was decided, the courts have continued to accept the basic scientific validity of the evidence. See In re Wendy P., 155 A.D.3d 515 (1st Dept. 2017) (after noting that family court's pretrial ruling that validation testimony did not present novel scientific issue requiring Frye hearing could not be reviewed because

respondent did not appeal from that order, First Department concludes that testimony did not lack proper foundation where witness provided detailed information about guidelines used for interview and analysis of interview utilizing Sgroi's Sexual Abuse Dynamics framework; that proper foundation does not require general acceptance in scientific community and may be based on expert's personal knowledge acquired through professional experience; that any deviations from established protocols go to weight and not admissibility; and that, in any event, witness did not use leading or suggestive questions, considered alternative hypotheses, and promoted objective, neutral stance); Matter of Bethany F., 85 A.D.3d 1588 (4th Dept. 2011) (family court properly refused to hold Frye hearing since Court of Appeals and other New York courts have admitted validation testimony given by experts who utilized Sgroi method).

Notably, after Matter of Nicole V., the Court of Appeals recognized the existence of "rape trauma syndrome," and held that it is a proper subject of expert testimony. People v. Taylor, 75 N.Y.2d 277, 552 N.Y.S.2d 883 (1990).

However, the courts have recognized that a child who displays what appears to be age-inappropriate sexual knowledge or activity, or other symptoms often associated with sexual abuse, has not necessarily been the victim of sexual abuse. See Matter of Kayla J., 74 A.D.3d 1665, 903 N.Y.S.2d 601 (3rd Dept. 2010) (reliability of child's disclosures tainted by mother's influence and suggestiveness of multiple interviews and examinations, disclosures reflected adult viewpoints or legal knowledge, and, although child had age-inappropriate sexual knowledge, child had been exposed to sources of sexual knowledge unrelated to contact with respondent); In re Fatima M., 16 A.D.3d 263, 793 N.Y.S.2d 329 (1st Dept. 2005) (although witnesses attributed child's difficulties to sexual abuse syndrome, none of the witnesses ruled out possibility that child's psychiatric and behavioral problems might be unrelated to alleged abuse); Matter of Stephen "GG", 279 A.D.2d 651, 719 N.Y.S.2d 167 (3rd Dept. 2001) (pediatrician testified that masturbation was not unusual in children between ages of four and seven and caseworker acknowledged that there are other means by which children can become sexualized at an early age); Matter of Alexander "EE", 267 A.D.2d 723, 701 N.Y.S.2d 133 (3rd Dept. 1999) (validators confirmed that child was anxious and angry,

which was consistent with sexual abuse, but those symptoms were more likely related to child's prolonged separation from mother).

The admissibility of the expert's written report is limited by traditional evidence rules regarding hearsay and bolstering. See Matter of Arianna M., 105 A.D.3d 1401 (4th Dept. 2013), lv denied 21 N.Y.3d 862 (court erred in admitting written report of social worker who performed sexual abuse assessment because it contained prior consistent statements that bolstered her trial testimony).

**2. Scope Of Expert's Testimony**

Clearly, the expert should be permitted to testify concerning the behaviors and characteristics which comprise the syndrome, and the extent to which the child's clinical presentation fits within the broad profile. See, e.g., Matter of Makayla I., 162 A.D.3d 1139 (3d Dept. 2018) (statements corroborated by expert's conclusion that children's conduct was consistent with behavior typically exhibited by victims of sexual abuse); In Selena R., 81 A.D.3d 449 (1st Dept. 2011), lv denied 16 N.Y.3d 714 (out-of-court statements corroborated by testimony of social worker that children's behavior, including age-inappropriate knowledge of ejaculation by four-year-old, and sexual behavior manifested verbally, in activities with drawings, and in aggressive outbursts, was symptomatic of sexual abuse); Matter of Ingrid R., 18 Misc.3d 1129(A), 859 N.Y.S.2d 895 (Fam. Ct., Queens Co., 2008) (mental health expert determined that children exhibited behaviors consistent with children victimized by intra-familial sexual abuse).

Although, in a criminal case, an expert cannot usurp the fact-finder's function by opining that an offense did, in fact, occur [see, e.g., People v. Caccese, 211 A.D.2d 976, 621 N.Y.S.2d 735 (3rd Dept. 1995)], such testimony has been permitted in Article Ten proceedings. See, e.g., Matter of Nicole G., 105 A.D.3d 956 (2d Dept. 2013) (expert testimony discounted where she, inter alia, opined that child's "behavior" and "affect" were consistent with that of sexually abused child but did not render with reasonable degree of certainty professional opinion that it was likely abuse occurred); Matter of Destiny UU., 72 A.D.3d 1407, 900 N.Y.S.2d 199 (3rd Dept. 2010), lv denied 15 N.Y.3d 702 (out-of-court statements of five-year-old adequately corroborated by,

inter alia, testimony by expert who opined that child had been sexually abused and that it was likely respondent was abuser); In re Pearl M., 44 A.D.3d 348, 843 N.Y.S.2d 47 (1st Dept. 2007) (expert concluded that child had been abused after assessing child's demeanor and language and consistency of her statements over time, and child's demonstrations with anatomically correct doll); Matter of Thomas N., 229 A.D.2d 666, 645 N.Y.S.2d 573 (3rd Dept. 1996) (expert opined that child had been victim of abuse, and that respondent was likely perpetrator). Indeed, in Matter of Nicole V., the Court of Appeals alluded without criticism to such testimony.

However, a number of courts and experts have noted that, although the existence of a mental disease associated with sexual abuse is widely accepted in the scientific community, the validity of testimony confirming that abuse has taken place is not. Cf. Matter of Eli, 159 Misc.2d 974, 607 N.Y.S.2d 535 (Fam. Ct., N.Y. Co., 1993). If that is true, the admission of an expert's opinion that abuse has occurred is inconsistent with traditional rules requiring that the methodology underlying an expert's opinion be generally accepted as reliable by the scientific community. See, e.g., Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); see also Daubert v. Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993) (Frye test has been superseded by Federal Rules). In People v. Taylor, supra, 75 N.Y.2d 277, the Court of Appeals noted that "rape trauma syndrome is a therapeutic and not a legal concept," that "[p]hysicians and rape counselors ... are not charged with the responsibility of ascertaining whether the victim is telling the truth," and that "evidence of rape trauma syndrome does not by itself prove that the complainant was raped ...." 75 N.Y.2d at 287.

Similarly, expert testimony concerning an individual's credibility also trespasses upon the fact-finder's domain, and, in any event, is probably inadmissible due to a lack of scientific reliability. See Kravitz v. Long Island Medical Center, 113 A.D.2d 577, 497 N.Y.S.2d 51 (2d Dept. 1985) (it is "questionable at best whether the present state of the art" would permit such testimony); Matter of Sanchez, 141 Misc.2d 1066, 535 N.Y.S.2d 937 (Fam. Ct., Bronx Co., 1988). See also Matter of Morales, 583 S.E.2d 692 (N.C. Ct. App., 2003) (testimony by social worker and physician that they believed child was abused was improper endorsement of child’s credibility); Haimdas v. Haimdas, 2010

WL 652823 (EDNY 2010) (expert opinions that evaluate witness credibility, even when rooted in scientific or technical expertise, inadmissible under Federal Rules since credibility and weight of testimony are questions to be decided by finder of fact).

Nevertheless, such testimony has also been admitted in Article Ten proceedings. See, e.g., Matter of Jaclyn P., 86 N.Y.2d 875, 635 N.Y.S.2d 169 (1995) (court notes that expert concluded that child's descriptions were accurate and reliable); Matter of Dayannie I.M., 138 A.D.3d 747 (2d Dept. 2016) (expert testified that recantation was false); Matter of Ishanellys O., 129 A.D.3d 1450 (4th Dept. 2015) (expert opined that child's consistent and detailed accounts were reliable and consistent with sexual abuse victimization); Matter of Nicholas J.R., 83 A.D.3d 1490 (4th Dept. 2011), lv denied 17 N.Y.3d 708 (psychologist testified that child's statements were credible); Matter of Caitlyn U., 46 A.D.3d 1144, 847 N.Y.S.2d 753 (3rd Dept. 2007) (while finding no error in family court rejection of child's explanations for recantation, Third Department notes, inter alia, that testifying therapist opined that child's recantation was false); Matter of Yorimar K., 309 A.D.2d 1148, 765 N.Y.S.2d 283 (4th Dept. 2003) (court notes that there is no requirement that validator testify that child was truthful and was abused); Matter of Brandon UU., 193 A.D.2d 835, 597 N.Y.S.2d 525 (3rd Dept. 1993) (experts "opined their belief that [child] was being truthful"); but cf. Matter of Nikita W., 77 A.D.3d 1209, 910 N.Y.S.2d 202 (3rd Dept. 2010) (expert explained that reference to child's "credibility" was "loosely used" and that analysis did not involve credibility determination but rather determination as to whether certain elements found in accounts of known sexual abuse victims were present in alleged victim's account).

Some case law suggests that if a sound scientific basis exists, an expert can indirectly bolster a child's credibility by testifying that the nature and quality of the child's statements suggest the absence of coaching or fantasizing. In Matter of Kelly F., 206 A.D.2d 227, 621 N.Y.S.2d 698 (3rd Dept. 1994), appeal w'drawn 85 N.Y.2d 905, 627 N.Y.S.2d 327 (1995), the Third Department found insufficient corroboration where the expert merely vouched for the child's credibility. However, according to two dissenting judges, the expert's opinion that the child did not appear to have been programmed had an adequate scientific basis. See also Matter of Hadley C., 137 A.D.3d 1524 (3d Dept.

2016) (corroboration provided by testimony that, according to Yuille Step Wise Protocol for interviewing alleged victims of sexual abuse, child's account "was consistent with the accounts of known sexual abuse victims"); Matter of Joanne II., 100 A.D.3d 1204 (3d Dept. 2012) (certain criteria, such as "naïve" quality of child's language tended to demonstrate she had not been coached); Matter of Miranda HH., 80 A.D.3d 896 (experts stressed significance of spontaneity and sensory detail in child's statements); Matter of Nikita W., 77 A.D.3d 1209 (expert relied on spontaneous, coherent, logical, detailed and contextually embedded account of incident elicited from child through use of Yuille Step Wise Protocol, and testified that allegations were "consistent with accounts of known sexual abuse victims"; that detailed descriptions of what child was wearing, body positioning, conversations, games that were played, and how respondent touched her, together with child's use of gestures to describe incident, indicated that child actually experienced what she described; that child's description of feigning sleep during incident is "typical dynamic" where sexual abuse victim is scared or trying to pretend incident is not happening); Matter of Joseph YY. v. Terri YY., 75 A.D.3d 863, 905 N.Y.S.2d 352 (3rd Dept. 2010) (in custody/visitation proceeding, expert testified that mother's agenda was to make sure children had no access to father and that children were influenced by this agenda, and there was expert testimony that allegations of abuse were suspicious based on timing of disclosure and demeanor of children); In re Anahys V., 68 A.D.3d 485, 891 N.Y.S.2d 34 (1st Dept. 2009) (expert testified that child's narrative was spontaneous and lacked "robotic" quality of coached children); Matter of Richard SS., 29 A.D.3d 1118, 815 N.Y.S.2d 282 (3rd Dept. 2006) (expert testified that child's statements satisfied most of Yuille reliability criteria; report by child was consistent with other reports he made, and statements included extreme and unusual detail); Matter of Victoria KK., 233 A.D.2d 801, 650 N.Y.S.2d 390 (3rd Dept. 1996) (expert testified that child was spontaneous in her statements, which suggested that they were not rehearsed, and that child articulated specific and consistent sexual detail); Matter of Katje YY., 233 A.D.2d 695, 650 N.Y.S.2d 363 (3rd Dept. 1996) (child's account conformed well to pattern and content of accounts given by children known to have been abused); Matter of Tracy V. v. Donald W., 220 A.D.2d

888, 632 N.Y.S.2d 697 (3rd Dept. 1995) (no evidence that children had been "coached" or "programmed"); Vasquez v. State, 975 S.W.2d 415 (Texas Ct. App. 1998) (psychologist's testimony that statement validity analysis indicated that sex abuse victim's statement had characteristics commonly found in descriptions of actual events was admissible to rebut defense theory that victim had falsely accused defendant); Matter of Kyanna T., 27 Misc.3d 1210(A), 910 N.Y.S.2d 406 (Fam. Ct., Kings Co., 2010), aff'd 99 A.D.3d 1011 (2d Dept. 2012), lv denied 20 N.Y.3d 856 (expert testified that child had been subject to "traumatic sexualization" resulting from "developmentally inappropriate introduction to sex"; that there was congruity between psychological presentation and her disclosures and affect when she was describing what happened). See also Matter of Dora F., 239 A.D.2d 228, 657 N.Y.S.2d 655 (1st Dept. 1997), appeal dism'd 90 N.Y.2d 889, 661 N.Y.S.2d 832 (elaborative details and graphic descriptions provided by child "makes it more likely than not that her allegations were not simply the product of an overactive imagination"); United States v. Rouse, 100 F.3d 560 (8th Cir. 1996) (error to exclude court-appointed expert's opinion that child complainants had been subjected to suggestive questioning); Doe v. Johnson, 52 F.3d 1448 (7th Cir. 1995) (expert may testify about surrounding circumstances which could have influenced child).

Whether or not it is appropriate to permit an expert to directly suggest that a child is telling the truth, it is clear that an expert may "rehabilitate" the child by testifying that certain behavior which might cause a lay fact-finder to question the child's credibility, such as delayed disclosure or recantation, is not uncommon in sexual abuse cases. See, e.g., Matter of Ryan D., 125 A.D.2d 160, 512 N.Y.S.2d 601 (4th Dept. 1987); Matter of Kyanna T., 27 Misc.3d 1210(A) (expert testified that inconsistencies could have been due to child having been asleep during part of abuse or having suppressed certain information, or due to dissociative process).

### 3. Qualifications Of Expert

There is no requirement that the witness be formally certified as an expert. Matter of Kaitlyn "R", 267 A.D.2d 894, 700 N.Y.S.2d 533 (3rd Dept. 1999). Obviously, however, the probative value of the evidence will depend in part on the expert's

qualifications and experience. In Matter of Nicole V., 123 A.D.2d 97, 510 N.Y.S.2d 567 (1st Dept. 1986), aff'd 71 N.Y.2d 112, 524 N.Y.S.2d 19 (1989), the First Department noted that the witness "must be qualified to testify in this area through training, experience and the use of a reliable methodology through which his or her conclusions are reached," and must "demonstrate that the conclusions made are the product of that methodology or system of analysis." 123 A.D.2d at 108. In Matter of E.M., 137 Misc.2d 197, 520 N.Y.S.2d 327 (Fam. Ct., N.Y. Co., 1987), the court noted that more weight should be given to testimony by experts in recognized clinical disciplines, who are experienced in the diagnostic assessment of suspected victims of child abuse.

However, since expertise in the area of child sexual abuse is a critical element, there is no requirement that the witness be a psychologist or psychiatrist. In Matter of Nicole V., and in many other instances, a social worker experienced in the area of child sexual abuse has been permitted to testify. See, e.g., Matter of Eli, supra, 159 Misc.2d at 981-982 (although certification process "does not require a significant amount of training or expertise in human behavior or psychotherapy," some social workers have specialized training and may give expert testimony on mental health issues); Matter of Michael G., 129 Misc.2d 186, 492 N.Y.S.2d 993 (Fam. Ct., West. Co., 1985) (court credits testimony of therapist with master's degree in social work, who had interviewed many sexual abuse victims, rather than testimony of licensed psychologist, who was qualified in field of child psychology but had no expertise in area of child sexual abuse).

**4. Methodology Used By Expert**

The value of the testimony will also depend upon the frequency and scope of the expert's contacts with the child, as well as the extent to which the expert's information gathering and other techniques conformed to professionally acceptable standards. In many instances the expert has been consulted for the first time after allegations have been made, and been asked to evaluate the child. In those cases, the expert, who has become involved at a time after outside influences may have already been brought to bear upon the child, must be particularly scrupulous and thorough in gathering information and evaluating the allegations. In Matter of Linda K., supra, 132 A.D.2d 149, the court noted that the ideal witness is "the alleged victim's treating psychologist

or psychiatrist who has developed a rapport with the child and who has had an ongoing opportunity to witness that child's emotional reaction over a period of time." 132 A.D.2d at 160. See also Matter of East v. Giles, 134 A.D.3d 1409 (4th Dept. 2015) (mother's expert therapist not credited by court because therapist assumed from outset that daughter had been abused and relied on evidence derived predominately from contact with daughter in circumstances controlled by mother and her family, and court-appointed psychologist criticized aspects of therapist's approach, including practice of permitting mother to be present during some of daughter's therapy sessions); Matter of April WW., 133 A.D.3d 1113 (3d Dept. 2015) (respondent's expert's failure to examine child had significance but did not outweigh disparity between his training and experience and that of petitioner's experts); Matter of Anthony M.C., 119 A.D.3d 781 (2d Dept. 2014) (expert's testimony not insufficient where expert failed to consider effect of child's developmental disability on reliability of statements); Matter of Nicole G., 105 A.D.3d 956 (2d Dept. 2013) (expert testimony discounted where she, inter alia, failed to identify generally accepted professional protocols and compare them to protocol she employed); Matter of Joseph YY. v. Terri YY., 75 A.D.3d 863 (court-ordered evaluations in custody/visitation proceeding relied on interviews of both parties and children while mother's experts relied on evaluations that included no input from father); Matter of Kayla J., 74 A.D.3d 1665 (family court erred in concluding that testimony was unacceptable because therapists were retained for treatment rather than as objective investigators; however, because goals were therapeutic rather than forensic, neither expert followed interviewing protocols designed to avoid tainting or influencing child's testimony and proceeded from assumption that father had sexually abused child without attempting to formulate other working hypothesis, and mother provided history and descriptions of child's behavior, therapists did not seek history or information from anyone else, and one never met with respondent and other met with him in one session which was cut short when he became upset); In re Fatima M., supra, 16 A.D.3d 263 (child's first allegation of abuse came in response to leading question by school social worker, who suspected paternal abuse before asking child whether "[her] father [had] ever done anything that made [her] feel uncomfortable"); Matter of Jared

"XX", supra, 276 A.D.2d 980 (expert departed from "Yuille" interview protocol, and had not been advised of inconsistencies in the child's statements or of multiple interviews by petitioner's personnel during which respondent's mother had subjected the child to leading questions); Matter of Jaclyn P., 179 A.D.2d 646, 578 N.Y.S.2d 252 (2d Dept. 1992), aff'd 86 N.Y.2d 875, 635 N.Y.S.2d 169 (1995) (techniques of respondent's expert, who never spoke to the children, were flawed); Matter of D.M., Y.S. and G.R., 29 Misc.3d 1220(A), 2010 WL 4485873 (Fam. Ct., Bronx Co., 2010) (expert's testimony rejected where he borrowed from various protocols but never described protocols or why he borrowed parts from several; he relied on outside hearsay sources and reports without specifying them or following up, which violated guidelines in field; he failed to investigate or consider family history, child's ongoing therapy, or custody and visitation litigation between parents; and his interview of child was rife with leading questions and he repeated areas of inquiry when not satisfied with child's answers and then called mother into room); Matter of Julius G., 28 Misc.3d 1227(A), 2010 WL 3368656 (Fam. Ct., Queens Co., 2010) (petitioner's expert concluded that child's statements, behavior and affect were not consistent with sexual abuse and that father coached him, but offered little support for conclusions, spent little evaluation time discussing allegations or dynamics of relationship between child and parents or relationship of parents to each other, and at times appeared dissatisfied with child's answers and challenged them but at other times asked leading questions); Matter of Abraham P., 21 Misc.3d 1144(A), 875 N.Y.S.2d 818 (Fam. Ct., Kings Co., 2008) (statements elicited from child at hospital given no weight because doctor's interview technique was improper and his testimony was inconsistent); Matter of R./M. Children, 165 Misc.2d 441, 627 N.Y.S.2d 869 (Fam. Ct., Kings Co., 1995) (testimony excluded due to inadequate procedures); Matter of Smith, 133 Misc.2d 1115, 509 N.Y.S.2d 962 (Fam. Ct., Queens Co., 1986), aff'd 128 A.D.2d 784, 513 N.Y.S.2d 483 (2d Dept. 1987), lv denied 69 N.Y.2d 613, 517 N.Y.S.2d 1029 (court rejects testimony of validator who was unaware of child's behavior at day care center).

When there is testimony describing the child's use of anatomically correct dolls to demonstrate the alleged abuse, the expert's compliance with accepted procedures

governing use of the dolls will be at issue. See Matter of Jaclyn P., supra, 86 N.Y.2d 875 (Smith, J., dissenting opinion); Matter of Rosemary F., 262 A.D.2d 1036, 691 N.Y.S.2d 849 (4th Dept. 1999) (court properly admitted testimony concerning use of anatomically correct dolls and pictures that assisted child in explaining acts of abuse); Matter of Eli, supra, 159 Misc.2d at 983 ("interpretation of doll play, even when made by experts using anatomically detailed dolls and accepted protocols, is of questionable value"). See also CPL §60.44 (use of anatomically correct dolls in testifying); Executive Law §642-a(7).

Finally, like other experts, in appropriate circumstances the sex abuse expert may offer an opinion based on facts acquired by others, without actually meeting with the child. See Matter of SF, 58 Misc.3d 1215(A) (Fam. Ct., Bronx Co., 2018) (expert based opinion on information obtained from attorney for child and Legal Aid Society social worker, “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”).

**5. Lay Testimony Concerning Child's Behavior**

Although it would not qualify as "validation" evidence, even testimony by lay witnesses can be used to help corroborate a child's sexual abuse allegations. For instance, testimony that the child's general behavior, performance in school, or attitude towards the alleged abuser, changed in a manner consistent with the occurrence of abuse, or that the child has acted in a sexually provocative manner, may tend to support the reliability of sexual abuse allegations. See, e.g., In re Cerenity F., 160 A.D.3d 540 (1st Dept. 2018) (seven-year-old child’s out-of-court statements about observations of adult sexual activity were corroborated by her age-inappropriate, specific knowledge of sexual activity); Matter of William J.B. v. Dayna L.S., 158 A.D.3d 1223 (4th Dept. 2018) (out-of-court statements describing sexual abuse by mother’s boyfriend corroborated by child’s age-inappropriate knowledge of sexual activity and description of unique sexual conduct boyfriend also engaged in with mother); Matter of Kimberly Z., 88 A.D.3d 1181 (3d Dept. 2011) (statement regarding sexual abuse by father sufficiently corroborated by, inter alia, child’s conduct in fleeing home in middle of

night to seek help from neighbor and uncharacteristic demeanor following incident); In re Anahys V., 68 A.D.3d 485, 891 N.Y.S.2d 34 (1st Dept. 2009) (hospital records noted child's noticeable change in demeanor when talking about father, and therapy records revealed child's continued anger at father and fear of him); Matter of Michael CC., 57 A.D.3d 1037, 868 N.Y.S.2d 803 (3rd Dept. 2008) (in custody proceeding, evidence corroborating child's statements included, inter alia, behavioral problems attendant to child's visitation with mother); Matter of Briana A., 50 A.D.3d 1560, 857 N.Y.S.2d 837 (4th Dept. 2008) (corroboration requirement met by child's age-inappropriate knowledge of sexual conduct which demonstrated specific knowledge of sexual activity); Matter of Caitlyn U., 46 A.D.3d 1144, 847 N.Y.S.2d 753 (3rd Dept. 2007) (stepfather hugged child in way which mother had considered to be inappropriate and for which she had chastised him, child admitted she had plan to run away with friend, mother stopped working and told child she would never leave her alone with stepfather, and mother observed red mark or "hickey" on child's neck); Matter of Kayla F., 39 A.D.3d 983, 833 N.Y.S.2d 742 (3rd Dept. 2007) (evidence that teacher observed child playing with dolls in possibly sexual manner did not corroborate child's statements where petitioner did not present expert testimony interpreting the play or linking it to abuse); Matter of Cecilia "PP", 290 A.D.2d 836, 736 N.Y.S.2d 546 (3rd Dept. 2002) (child exhibited regressive behavior after visiting with respondent, and sexualized behavior increased after visits); Matter of Shaun X., 228 A.D.2d 730, 643 N.Y.S.2d 703 (3rd Dept. 1996) (mother testified that child pulled down his pants, used his "private parts" to play with a doll, and said that he learned it from respondent father); Matter of Dutchess County Department of Social Services o/b/o Chastity F., 186 A.D.2d 254, 588 N.Y.S.2d 333 (2d Dept. 1992) (children "act[ed] out sexual intercourse" with dolls, especially after visits with respondent); Matter of Anita U., 185 A.D.2d 378, 585 N.Y.S.2d 826 (3rd Dept. 1992) (child's speech therapist testified that child was fearful and emotionally withdrawn while discussing abuse, and was unwilling to articulate the word "daddy"); Matter of Shaune L., 150 A.D.2d 689, 541 N.Y.S.2d 562 (2d Dept. 1989), lv denied 74 N.Y.2d 609, 545 N.Y.S.2d 105 (grandmother testified that child experienced nightmares); Matter of Janiyah T., 26 Misc.3d 1208(A), 906 N.Y.S.2d 780 (Fam. Ct., Kings Co.,

2010), aff'd 82 A.D.3d 1108 (2d Dept. 2011) (corroboration included caseworker's testimony describing child's distress when she realized they were driving near father's home); Matter of Autumn A., 24 Misc.3d 1250(A), 899 N.Y.S.2d 57 (Fam. Ct., Richmond Co., 2009) (four-year-old child re-enacted with dolls abuse by father's friend, demonstrated abuse by father by placing her hand on her vagina, drew picture of father's penis and father's friend's penis, and used words "coochie" and "dick," danced provocatively, and undressed and licked butts of dolls, and there was evidence of adverse changes in child's behavior during relevant time period, including sexualized and aggressive behavior); Matter of Department of Social Services o/b/o Jane H., 20 Misc.3d 1124(A), 867 N.Y.S.2d 373 (Fam. Ct., Nassau Co., 2008) (child's description of abuse was far beyond that which child of six years would know, even if she had watched pornography, and, on at least one occasion, then five-year-old child was naked with another child who alleged that subject child was teaching him a game; also, while child had behavioral issues, negative behaviors did not continue once she disclosed abuse); Matter of Joanne P., 144 Misc.2d 754, 545 N.Y.S.2d 495 (Fam. Ct., N.Y. Co., 1989) (sufficient corroboration where child ran away from home after alleged abuse). But see Matter of Dezarae T., 110 A.D.3d 1396 (3d Dept. 2013) (witnesses consistently described child's upset demeanor, but there was no expert opinion connecting demeanor with alleged sexual abuse as opposed to trauma child may have suffered due to, among other causes, parental neglect, parents' separation and witnessing domestic violence); Matter of Maxfield "L", 291 A.D.2d 758, 738 N.Y.S.2d 124 (3rd Dept. 2002) (no finding where child's violent behavior had to be viewed in context of conduct disorder, and sexualized behavior was only small portion of behavioral problems); Matter of Zachariah "VV", 262 A.D.2d 719, 691 N.Y.S.2d 631 (3rd Dept. 1999), lv denied 94 N.Y.2d 756, 703 N.Y.S.2d 73 (evidence of child's sexualized behavior and nervousness in presence of respondent, and that child did not relate well to others, avoided eye contact and startled easily, was highly ambiguous and did not provide sufficient corroboration; petitioner "has given [the court] no reliable means of distinguishing apparently normal traits of a shy young boy from professionally recognized indicators of sexual abuse"); H.G. v. Commissioner of the Administration for

Children's Services, 253 A.D.2d 318, 686 N.Y.S.2d 396 (1st Dept. 1999) (sexual behavior was best understood as reflection of father's overexposure of child to nudity).

### L. Expert Testimony As To Respondent's Mental Condition

#### 1. Profile Evidence

There is some indication that expert testimony concerning the respondent's mental condition is admissible in an Article Ten proceeding. Compare Matter of Danielle YY., 188 A.D.2d 894, 591 N.Y.S.2d 636 (3rd Dept. 1992), lv denied 81 N.Y.2d 706, 597 N.Y.S.2d 936 (1993) (expert opined that respondent's personality was consistent with a "potential sex abuser"); Matter of Kasey C., 182 A.D.2d 1117, 586 N.Y.S.2d 163 (4th Dept. 1992), lv denied 80 N.Y.2d 757, 588 N.Y.S.2d 825 (expert testified concerning likelihood of recidivism); Matter of Tyson G., 144 A.D.2d 673, 534 N.Y.S.2d 1023 (2d Dept. 1988) (petitioner presented evidence that respondent suffered from major psychiatric disturbance, and exhibited "idiosyncratic" sexual preferences, including a foot fetish perversion) and Matter of Smith, 128 A.D.2d 784, 513 N.Y.S.2d 483 (2d Dept. 1987), aff'g 133 Misc.2d 1115, 509 N.Y.S.2d 962 (Fam. Ct., Queens Co., 1987) (in view of psychiatrist's testimony regarding respondent's emotional makeup, family court found it unbelievable that he would abuse son while an investigation was under way) with In re Isaiah F., 68 A.D.3d 627, 891 N.Y.S.2d 382 (1st Dept. 2009) (no error in Frye decision excluding expert testimony regarding "Abel" test results where court properly found that Abel test, while designed to diagnose and treat pedophilia, does not apply to intrafamilial sexual abuse which occurs as result of family dynamics rather than general sexual interest in children) and Matter of Aryeh-Levi K., 134 A.D.2d 428, 521 N.Y.S.2d 50 (2d Dept. 1987) (court upholds exclusion of expert testimony offered to show that respondent did not suffer from psychosexual disorder, and notes the "limited probative value" of testimony).

In order to develop such evidence, an application could be made for an examination of the respondent pursuant to FCA §251. See, e.g., Matter of M. Children, 171 Misc.2d 838, 656 N.Y.S.2d 119 (Fam. Ct., Kings Co., 1997).

#### 2. Polygraph Evidence

The weight of authority holds that polygraph test results are inadmissible. See,

e.g., Matter of Daniel BB., 26 A.D.3d 687, 809 N.Y.S.2d 303 (3rd Dept. 2006); Matter of Loren B., 13 A.D.3d 998, 788 N.Y.S.2d 215 (3rd Dept. 2004), lv denied 4 N.Y.3d 710, 797 N.Y.S.2d 816 (in custody proceeding, court improperly admitted results of psychophysiological detection of deception examination; other departments of Appellate Division have barred use of polygraph evidence in family court); Matter of Aryeh-Levi K., supra, 134 A.D.2d 428; Matter of Smith, supra, 128 A.D.2d 784; but see Matter of Jazmin M., 139 Misc.2d 731, 528 N.Y.S.2d 771 (Fam. Ct., Queens Co., 1988) (evidence may be admitted where procedural safeguards set forth in Matter of Smith are followed); Matter of Smith, supra, 133 Misc.2d 1115 (polygraph evidence may be admissible if obtained pursuant to court order or on stipulation of parties and presented in conjunction with psychological or psychiatric profile of respondent).

**M. Constitutional Suppression Rules**

Although Article Ten proceedings are civil in nature, the custodial rights at stake are compelling. As a result, when evidence of abuse or neglect acquired by the police has been offered into evidence at Article Ten fact-finding hearings, it has been argued that the constitutional rules which govern the admissibility of evidence in criminal proceedings should apply. However, in Matter of Diane P., 110 A.D.2d 354, 494 N.Y.S.2d 881 (2d Dept. 1985), appeal dism'd 67 N.Y.2d 918, 501 N.Y.S.2d 1027 (1986), the court rejected the respondent's contention that the Fourth Amendment exclusionary rule should apply in Article Ten proceedings when an illegal search has occurred. See also Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 118 S.Ct. 2014 (1998) (while holding that exclusionary rule does not apply at parole revocation hearing, five-judge majority notes that court has repeatedly declined to extend exclusionary rule to proceedings other than criminal trial); Matter of W.L.P., 202 P.3d 167 (Or., 2009) (neither State Constitution, nor federal exclusionary rule, requires suppression of unlawfully obtained evidence in juvenile dependency proceeding; father's interest in directing upbringing of child is not sufficiently analogous to liberties and rights at stake in criminal proceeding, and dependency proceeding involves child whose interests must be considered); but see Matter of Melinda I., 110 A.D.2d 991, 488 N.Y.S.2d 279 (3rd Dept. 1985). Although FCA §1034(2), which permits the court to

authorize an agency caseworker to enter the respondent's home, incorporates by reference the search warrant rules in Article Six Hundred Ninety of the Criminal Procedure Law, there is no indication that the exclusionary rule would apply in the event of a violation.

Similarly, in Matter of Simpson, 126 Misc.2d 162, 481 N.Y.S.2d 293 (Fam. Ct., N.Y. Co., 1984), the court held that the respondent could challenge her confession to police on common-law involuntariness grounds, but could not complain that Miranda warnings were not provided and move for suppression pursuant to the Fifth Amendment exclusionary rule. Accord, Matter of Michael WW., 20 A.D.3d 609, 798 N.Y.S.2d 222 (3rd Dept. 2005); Matter of Cassandra R., 132 Misc.2d 546, 504 N.Y.S.2d 602 (Fam. Ct., Onondaga Co., 1986). Obviously, the respondent cannot complain that a caseworker failed to provide Miranda warnings before conducting questioning. On the other hand, such a claim might be persuasive in a criminal proceeding. See State v. Helewa, 223 N.J.Super. 40, 537 A.2d 1328 (N.J.Super.A.D. 1988) (given caseworkers' close working relationship with police, statements are inadmissible in absence of Miranda warnings). Moreover, although a finding of guilt in a criminal or juvenile delinquency cannot be based on an uncorroborated confession, a respondent's admission may be sufficient, in and of itself, to support a finding. Matter of Michael WW., supra, 20 A.D.3d 609.

On the other hand, CPLR §3103(c) states that "[i]f any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed."

**N. Testimony Of Child**

Although the hearsay exception in FCA §1046(a)(vi) is designed to protect vulnerable children for whom testifying in court might well be traumatic, in some cases the petitioner cannot proceed without calling the child as a witness, and in other cases either the child's lawyer or the respondent may want to elicit testimony from the child. In such instances, practitioners need to be familiar with rules which have been designed to strike a balance between the right of a litigant to present the child's testimony or

confront and cross-examine the child, and the child's right to be protected from further harm. Since general due process principles govern the court in an Article Ten proceeding, in which Sixth Amendment confrontation and compulsory process rights are not applicable, practitioners will see that the court has substantial discretion in deciding whether, and under what conditions and in what manner, a child will testify.

### 1. Competency To Be Sworn, And Admissibility Of Unsworn Testimony

There is a rebuttable presumption that a child over fourteen is competent to be sworn in a civil proceeding. Fisch on New York Evidence, §260. A child over nine years of age is presumed competent to be sworn in a criminal or juvenile delinquency proceeding. CPL §60.20(2); FCA §343.1(2). It is not uncommon for children, even children of tender years, to give sworn testimony in Article Ten proceedings. See, e.g., In re Falon P., 250 A.D.2d 497, 672 N.Y.S.2d 877 (1st Dept. 1998) (six-year-old child was properly sworn); see also Matter of Tayleese M.C., 127 A.D.3d 1077 (2d Dept. 2015) (although family court did not determine child was competent to testify under oath, record established capacity).

The unsworn testimony of a minor is ordinarily inadmissible in a civil proceeding. Fisch on New York Evidence, §260. However, the court in an Article Ten proceeding "may dispense with the formality of placing a minor under oath before taking his testimony." FCA §152. In fact, a finding may be based solely upon unsworn testimony. Matter of Aryeh Levi K., 134 A.D.2d 428, 521 N.Y.S.2d 50 (2d Dept. 1987); Matter of Elizabeth D., 139 A.D.2d 66, 530 N.Y.S.2d 397 (4th Dept. 1988).

In Matter of Kim K., 150 Misc.2d 690, 570 N.Y.S.2d 423 (Fam. Ct., Bronx Co., 1991), it was held that a finding may be made even when counsel do not cross-examine the child, if the court poses questions submitted by counsel. But see Matter of Rockland County Department of Social Services o/b/o Kathryn B., 186 A.D.2d 136, 588 N.Y.S.2d 191 (2d Dept. 1992); Matter of Fawn S., supra, 123 A.D.2d 871 ("there is a significant question as to whether the nature of in camera testimony precludes it from being a sufficient basis by itself for a finding of fact"); Matter of Sabrina F.G., 37 Misc.3d 1219(A) (Fam. Ct., Kings Co., 2012) (child's testimony given weight of out-of-court

statements where child absconded and did not complete cross-examination).

Of course, unsworn testimony cannot be admitted unless the court finds that the child possesses sufficient ability to observe, recollect and narrate events. Fisch on New York Evidence, §260. See also CPL §60.20(2); FCA §343.1(2).

### 2. Respondent's Right Of Confrontation

#### a. Exclusion Of Respondent During Testimony

The Sixth Amendment and State constitutional (N.Y. Const., Art. I, §6) right of confrontation applicable at criminal trials does not apply in an Article Ten proceeding. Moreover, although the respondent's right to confront the child may well have constitutional due process implications [see Matter of Heather S., 19 A.D.3d 606, 797 N.Y.S.2d 136 (2d Dept. 2005); Matter of Karen BB., 216 A.D.2d 754, 628 N.Y.S.2d 431 (3rd Dept. 1995)], the court has substantial discretion in devising procedures which, consistent with constitutional due process principles, protect a vulnerable child witness in a manner which limits the respondent's right to confront the child face-to-face.

When very young children are involved, the court's protective powers are broad, since there is a greater risk that testifying in open court, in the respondent's presence, will undermine the child's ability to testify accurately and without inhibition. But see Z. Shareef v. M. Hassen, 29 Misc.3d 1234(A), 2010 WL 5071801 (Fam. Ct., Queens Co., 2010) (in family offense proceeding, court denies petitioner’s request to have six-year-old son testify via closed-circuit camera; petitioner presented no evidence regarding serious mental or emotional harm to child, and cases in which child witnesses were allowed to testify via two-way-camera involved sexual abuse allegations, while allegations here are that respondent hit child on one occasion); Matter of G./A. Children, 161 Misc.2d 64, 612 N.Y.S.2d 752 (Fam. Ct., Kings Co., 1994) (while noting that risk must arise from presence of respondent, not trial process in general, court refuses to take eight-year-old's testimony in camera or behind testimonial screen).

In the case of older children, it may be necessary to present the testimony or affidavit of an expert, or other evidence establishing a substantial risk that the child will suffer emotional harm or that the child will not be able to testify freely and candidly if the respondent is present; however, the standard seems more flexible when closed-circuit

television is used and thus the respondent is able to see and hear the testimony, and even when the child is in court but cannot be seen by the respondent. See Matter of Hannah T.R., 149 A.D.3d 958 (2d Dept. 2017) (court properly weighed rights and interests of mother and child before permitting child to testify via two-way closed-circuit television; mother, appearing pro se, permitted to be present for testimony and cross-examine child); Matter of Emily R., 140 A.D.3d 1074 (2d Dept. 2016), lv denied 28 N.Y.3d 903 (no error where court permitted child to testify from position within courtroom from which she could be heard but not seen while father and his attorney were present); In re Alejandra B., 135 A.D.3d 480 (1st Dept. 2016) (before permitting child to testify via closed-circuit television, court not required to find that child would suffer severe and substantial mental or emotional harm if she testified in open court); In re Giannis F., 95 A.D.3d 618 (1st Dept. 2012) (child testified regarding sexual abuse by step-brother via two-way closed circuit television, subject to contemporaneous cross-examination, where affidavit of social worker who interviewed child on multiple occasions and spoke with social worker at facility where child was being treated established potential trauma that would likely interfere with ability to testify accurately and without inhibition; evidentiary hearing not required since mother failed to present evidence that raised issues concerning social worker's assessment or expertise); In re Arlenys B., 70 A.D.3d 598, 896 N.Y.S.2d 321 (1st Dept. 2010) (no due process violation where child who was thirteen at time of alleged abuse testified via two-way video conferencing that allowed parties to observe child's testimony and demeanor, gave respondent's counsel opportunity to cross-examine, and allowed court to make record of testimony; child's initial testimony in open court and in respondent's presence was interrupted because it was inaudible, and child's psychologist who recommended that child testify outside of respondent's presence, confirmed that child had been intimidated by respondent's gaze and that initial testimony caused emotional distress); Matter of Kyanna T., 99 A.D.3d 1011 (2d Dept. 2012), lv denied 20 N.Y.3d 856 (since respondents' attorneys were present and cross-examined child, respondents' constitutional rights were not violated), aff'g 27 Misc.3d 1210(A), 910 N.Y.S,.2d 406 (Fam. Ct., Kings Co., 2010) (after hearing testimony from expert in child and adolescent

psychiatry, court found that child would likely suffer emotional harm or trauma if required to testify in open court; respondents permitted to observe by two-way closed circuit television and to discuss testimony with attorneys prior to cross-examination); Matter of R.T., 53 Misc.3d 889 (Fam. Ct., Bronx Co., 2017) (relying on social worker's affidavit stating that testifying in open court would very likely cause emotional and psychological harm, court permits respondent's twenty-one year-old daughter to testify via closed-circuit television; court notes that CCTV technology in courthouse is excellent, and that CCTV is, at most, a very minor impingement on respondent's rights); Matter of Kyanna T., 19 Misc.3d 1114(A), 859 N.Y.S.2d 904 (Fam. Ct., Kings Co., 2007) (ACS required to present competent evidence justifying exclusion of respondents from courtroom during testimony of fifteen-year-old; court noted that exclusion of respondent raises significant right of confrontation concerns when child's testimony constitutes both the first detailed airing of the facts and the core of petitioner's case, that it was not established that psychiatric expert had necessary expertise or employed sound practices in formulating tentative opinion that child "appear[ed] depressed" and that test results "tend[ed] to suggest that post-traumatic stress disorder [was] developing," and that neither ACS nor the expert made an effort to distinguish between mother and step-father with respect to likely impact upon child of testifying in open court); see also Matter of Annemarie R., 37 A.D.3d 723, 831 N.Y.S.2d 217 (2d Dept. 2007) (court erred in failing to balance respondent's due process rights against risk to child, and instead deferred to judgment of child's attorney); Matter of Robert "U", 283 A.D.2d 689, 724 N.Y.S.2d 527 (3rd Dept. 2001) (court erred in excluding respondent without balancing competing interests and abdicating responsibility to child's attorneys, who simply asserted that conversations with children led them to conclude that there would be risk of trauma); United States v. Moses, 137 F.3d 894 (6th Cir. 1998) (trial court improperly allowed victim to testify via closed-circuit television where expert who testified regarding likelihood of trauma had worked with abused children, but had no special skill or knowledge relating to trauma); cf. Matter of Rockland County Department of Social Services o/b/o Kathryn B., supra, 186 A.D.2d 136 (court erred in denying request to call fourteen-year-old child without considering age and maturity).

When excluding the respondent, the court should consider declaring a recess after the child's direct testimony so the respondent and counsel might confer. See Matter of Mirza S.A., 160 A.D.3d 715 (2d Dept. 2018) (to protect father's rights, court arranged for him to view testimony via video linkup, granted recess after ACS's direct case to permit father and attorney time to consult before cross-examining child, and permitted recess after completion of cross-examination for further consultation); In re Hadja B., 302 A.D.2d 226, 753 N.Y.S.2d 721 (1st Dept. 2003); In re Falon P., supra, 250 A.D.2d 497; Matter of G./A. Children, supra, 161 Misc.2d 64 (counsel should be able to consult with client prior to, and again before conclusion of, cross-examination).

**b. In Camera Interview In Absence Of Counsel**

In Lincoln v. Lincoln, 24 N.Y.2d 270, 299 N.Y.S.2d 842 (1969), a child custody case, the Court of Appeals upheld the use of an in camera interview, conducted in the absence of the parties and attorneys, to ascertain the children's preferences. The trial court had determined that such an interview was "the only method by which it might avoid placing an unjustifiable emotional burden on the three children, and, at the same time, enable them to speak freely and candidly ...." 24 N.Y.2d at 272. The Court of Appeals noted that, when new information adverse to any party arises, the judge should check on the accuracy of the information in open court. See also Matter of Benjamin v. Benjamin, 48 A.D.3d 912, 851 N.Y.S.2d 305 (3rd Dept. 2008 (court erred in relying on evidence from Lincoln hearing without checking its accuracy during open hearing). But generally, what the child said should not be disclosed. Matter of Verry v. Verry, 63 A.D.3d 1228, 880 N.Y.S.2d 730 (3d Dept. 2009).

The rationale for Lincoln hearings applies to children of all ages. Matter of Battin v. Battin, 130 A.D.3d 1265 (3d Dept. 2015) (in case involving failure to conduct Lincoln hearing with sixteen-year-old, court notes that Lincoln hearings are conducted because child who is explaining reasons for preference should not have to publicly relate difficulties with parents or be required to openly choose between them; that calling child to testify in Article Six proceeding is generally neither necessary nor appropriate and Lincoln hearing is preferred; and that these considerations apply with equal force to children of all ages).

Although Article Ten fact-finding hearings involve formal allegations, not a general inquiry into the best interests and preferences of the child, the Lincoln procedure has been utilized. Use of the Lincoln procedure may be appropriate when the testimony is being offered to corroborate the child's out-of-court statements and/or other eyewitness evidence and there is a showing that the child needs such protection, but it may be that a finding cannot be made where the Lincoln interview is the only corroboration. Compare Matter of Nathaniel TT, 265 A.D.2d 611, 696 N.Y.S.2d 274 (3rd Dept. 1999) (although not present for testimony, respondent's counsel had chance to submit questions in advance); Matter of Jamie EE., 249 A.D.2d 603, 670 N.Y.S.2d 931 (3rd Dept. 1998) (while noting that “the in camera testimony of a child ... may provide the requisite corroboration,” Third Department remits case to allow family court to conduct “in camera interview,” as requested by child’s attorney); Matter of Victoria KK., supra, 233 A.D.2d 801 (parties were given opportunity to submit questions for in camera interview) and Matter of Fawn S., supra, 123 A.D.2d 871 with Matter of Christina F., supra, 74 N.Y.2d 532 (corroborative evidence was testimony in court, before judge and court reporter, with direct examination, cross-examination by respondent's attorney, and additional questioning by both court and child’s attorney); Matter of Andrew B.-L., 43 A.D.3d 1046, 844 N.Y.S.2d 337 (2d Dept. 2007) (finding reversed where in camera interview of fourteen-year-old child improper without consideration of whether there was need to speak without presence of mother's legal adviser and without oath; although child was later asked in open court to swear to truth of statements she made in camera, procedure failed to impress upon child need to testify truthfully); Matter of Randy A., 248 A.D.2d 838, 670 N.Y.S.2d 225 (3rd Dept. 1998) (while concluding that out-of-court statements were corroborated by evidence other than in camera testimony, court notes that exclusion of respondent must not create risk of erroneous deprivation of due process rights) and Matter of Leslie C., 224 A.D.2d 947, 637 N.Y.S.2d 560 (4th Dept. 1996) (no basis for excluding respondent's attorney and precluding cross-examination of child, whose out-of-court statements were not otherwise corroborated; unlike custody case, abuse case places child in adversarial position to respondent, and, here, child had previously testified against respondent at

parole violation hearing).

Excluding a respondent and his/her counsel seems particularly problematic when the child's testimony constitutes both the first detailed airing of the facts, and the core of the petitioner's case. Since a finding may be based solely on unsworn testimony [see Matter of Aryeh Levi K., supra, 134 A.D.2d 428], use of the Lincoln procedure could preclude the respondent from directly challenging the only evidence in the case. See KES v. CAT, 107 P.3d 779 (Wyoming, 2005) (if any party in custody proceeding objects to private interview by court, interview should not take place and parties or court should fashion alternative procedure, such as recorded interview with counsel present); but see Matter of Jesse XX., 69 A.D.3d 1240, 893 N.Y.S.2d 686 (3rd Dept. 2010) (no due process violation where children testified without presence of respondents or their counsel, but respondents did not object when court announced procedures it would use and directed them to submit questions, which father did, and, in conference with counsel after hearing, court summarized children's testimony, indicated that they were found credible, and stated that transcripts could be obtained if necessary); Matter of Kim K., supra, 150 Misc.2d 690. In any event, the child's lawyer should be present. See Rexford v. Rexford, 270 A.D.2d 929, 704 N.Y.S.2d 767 (4th Dept. 2000).

In any action or proceeding to fix temporary or permanent custody or modify orders of custody in matrimonial proceedings, a stenographic record of an in camera interview must be made, and if an appeal is taken, the record must be forwarded under seal to the appellate division. CPLR §4019; FCA §664. The trial has limited discretion to allow access to the transcript. See Matter of Heasley v. Morse, 144 A.D.3d 1405 (3d Dept. 2016) (court properly denied father's request for transcript where father contended that child's sexual abuse allegations overcame child's right to confidentiality and also cited due process rights); Sellen v. Wright, 229 A.D.2d 680, 645 N.Y.S.2d 346 (3rd Dept. 1996) ("Children must be protected from having to openly choose between parents or openly divulging intimate details of their respective parent/child relationships"; parent failed to specify any harm or prejudice that resulted from court's ruling denying access to transcript); Ladd v. Bellavia, 151 A.D.2d 1015, 542 N.Y.S.2d 81 (4th Dept. 1989) (transcript of in camera interview should be sealed and made

available only to appellate court unless trial court in its discretion directs otherwise); Matter of Sandra S. v. Abdul S., 30 Misc.3d 797, 914 N.Y.S.2d 858 (Fam. Ct., Kings Co., 2010) (in custody proceeding, portions of transcripts of in camera interviews made available where children's statements, for the most part, were allegations of specific conduct by parents rather than expressions of children's preferences or opinions about parents' relative parenting abilities; court decided to review transcripts and redact "opinion" or "preference" statements, make redacted copies available to attorneys for parents, and make unredacted copies available to children's attorney, who was present during interviews, and parents' attorneys could review copies with clients in their offices but could not make additional copies or allow clients to take copies out of office).

Particularly given the admonition in Lincoln that a litigant must be informed of the substance of any new facts which come to light, and the heightened due process concerns in an Article Ten proceeding, it appears that the respondent should either be given access to a transcript, or should be clearly informed of what the child said. Matter of Justin CC., 77 A.D.3d 207, 903 N.Y.S.2d 806 (3rd Dept. 2010) (testimony taken from child during fact-finding stage of Article Ten proceeding, outside presence of respondent but with counsel present and permitted to cross-examine child, is not entitled to same confidentiality protections afforded to in camera testimony taken during Lincoln hearing in custody proceeding, and thus child's testimony may not be sealed, and, if appeal is taken, transcript of testimony shall be provided to all counsel and counsel may refer to testimony in brief and at oral argument; there is no basis for providing privacy protection when issue is whether petitioner has proved that child was neglected and/or abused by respondent, the position of the child may be adverse to respondent, and the testimony can either support a finding by itself or at a minimum provide requisite corroboration of child's out-of-court statements, and to "drape such testimony with the veil of confidentiality, thus precluding appellate counsel from both referring to that testimony by specific reference and making legal arguments based upon it, raises fundamental due process concerns for the purposes of an appeal"); cf. Matter of Forrest G., 180 A.D.2d 550, 580 N.Y.S.2d 277 (1st Dept. 1992) (court did not

abuse discretion when it mentioned aspects of child's in camera testimony when stating reasons for finding on record).

**c. Rape Shield Law**

In Matter of Trisha M., 150 Misc.2d 290, 568 N.Y.S.2d 288 (Fam. Ct., Rockland Co., 1991), the court denied the child's lawyer's motion for a declaration that CPL §60.42 (the "rape shield law") is applicable in an Article Ten sexual abuse proceeding. The court noted that it already had the responsibility to protect the child by insuring that she would not be subjected to unnecessary or irrelevant questioning. See also Matter of Doe v. Francis TT., 47 A.D.3d 283, 848 N.Y.S.2d 407 (3rd Dept. 2007), lv denied, 10 N.Y.3d 709 (respondent's supposition that rape shield law does not apply in Article Ten proceeding runs counter to existing authority); Matter of D.H., 859 N.E.2d 737 (Ind. Ct. App. 2007) (rape shield law not applicable).

**d. Tactical Considerations For Child's Lawyer**

Even when there is some justification for an in camera interview, tactical considerations may make it inappropriate for the child's lawyer to request protection for the child. For instance, because it is unclear whether an in camera interview can adequately corroborate an out-of-court statement, a request for use of the Lincoln procedure might be unwise if there is no other corroboration. In addition, the child's lawyer may have to reveal information about the child's mental condition which will undermine the child's credibility. Thus, the lawyer could choose to argue that the respondent should be excluded during the examination, or, when appropriate, consent to an examination in open court, unless it is clear that the child requires more protection in order to testify at all. Cf. Matter of Rockland County Department of Social Services o/b/o Kathryn B., 86 A.D.2d 136, 588 N.Y.S.2d 191 (2d Dept. 1992) (by denying request to call fourteen-year-old child to give sworn testimony, and conducting an in camera interview, court improperly precluded use of child's testimony to make out prima facie case without corroboration).

**e. Hearsay Evidence**

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the United States Supreme Court dismantled prior law regarding the Sixth Amendment's

Confrontation Clause and the admissibility of hearsay evidence in criminal proceedings. Based upon the Court's historical review and its conclusions regarding the Framers' intent, the Court concluded that the principal evil at which the Confrontation Clause was directed was the use of "testimonial" evidence; *i.e.*, statements that the declarant would reasonably expect to be used prosecutorially, including prior testimony at a court hearing, formalized materials such as affidavits and depositions, and statements taken by police officers. The Court then abandoned the test established in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980), which focuses for Confrontation Clause purposes on whether hearsay evidence bears adequate "indicia of reliability," and held that there is no such open-ended Confrontation Clause exception to the exclusion of "testimonial" evidence; rather, testimonial evidence simply is not admissible unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.

Admittedly, the Sixth Amendment Confrontation Clause is not applicable in Article Ten proceedings. Matter of Nicole V., 71 N.Y.2d 112, 117, 524 N.Y.S.2d 19 (1987) ("Because the accused parent is not subject to criminal sanctions in a child protective proceeding, the Legislature has provided that the usual rules of criminal evidence do not apply"); Matter of Linda S., 148 Misc.2d 169, 560 N.Y.S.2d 181 (Fam. Ct., West. Co., 1990). Moreover, the definition of testimonial evidence does not appear to encompass much of the hearsay typically offered in Article Ten proceedings. Thus, Crawford itself will never require the exclusion of hearsay evidence.

Under constitutional due process analysis [see Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976)], litigants in non-criminal proceedings do have confrontation rights, albeit not as expansive as those in a criminal proceeding. Particularly in proceedings in which compelling liberty interests are at stake, litigants may be able to establish a due process violation when they have had no opportunity to challenge crucial hearsay evidence. See United States v. Jarvis, 94 Fed.Appx. 501 (9th Cir. 2004) (citing, inter alia, Crawford v. Washington, court finds due process-based right of confrontation violation where only evidence of supervised release violations was a police report); People v. Johnson, 121 Cal.App.4th 1409 (Cal. Ct. App., 1st Dist., 2004) ("Sixth Amendment cases ... may provide helpful examples in determining the scope of

the more limited right of confrontation ... under the due process clause"); Matter of the Civil Commitment of G.G.N., 855 A.2d 569 (NJ App. Div., 2004) (Crawford does not apply in civil sexual offender commitment proceeding; but since "there is a tipping point where due process is violated by the use of hearsay," and "the infirmity lies in the greatly reduced, if not entirely absent, opportunity for effective cross-examination, a right specifically guaranteed by the [Sexually Violent Predator Act]," State's excessive reliance on hearsay was fundamentally unfair); Matter of the Civil Commitment of E.S.T., 854 A.2d 936 (NJ App. Div., 2004) (citing Crawford, court notes that "[a]lthough technically civil, an SVPA commitment hearing, with its very real threat of lengthy incarceration, is almost pseudo-criminal in nature and should provide as much procedural protection to the committee as the circumstances permit").

Pre- and post-Crawford, such arguments have met with considerable resistance in child protective proceedings. See Matter of Pamela A.G., 134 P.3d 746 (N.M., 2006) (Confrontation Clause did not apply, and due process rights were not violated by admission of child's hearsay statements); Matter of S.A., 708 N.W.2d 673 (SD 2005); In re G.B., 2006 WL 1382426 (Cal. Ct. App., 1st Dist., 2006); In re April C., 131 Cal.App.4th 599 (Cal. Ct. App., 2d Dist., 2005); In re C.M., 815 N.E.2d 49 (Ill. App. Ct., 2004); see also Cabinet for Health and Family Services v. A.G.G., 190 S.W.3d 338 (Ky. 2006) (Crawford not applicable in termination of parental rights proceeding); 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); In re Parker v. Carrion, 90 A.D.3d 512 (1st Dept. 2011) (reliance on hearsay, even double hearsay, at fair hearing does not violate due process); but see In re J.D.C., 159 P.3d 974 (Kansas, 2007) (while assuming but not deciding that federal and state due process principles required that mother be given adequate opportunity to confront child whose out-of-court statements were admitted, court concludes that mother did receive such an opportunity where judge was prepared to summon child to courtroom for examination, but mother declined invitation); Devon S v. Aundrea B-S, 32 Misc.3d 341 (Fam. Ct., Kings Co., 2011) (in custody proceeding, report cards and

teacher comments, and test reports containing subjective judgments, opinions, or testimonial assessments, not admissible as business records; while holding of Crawford v. Washington was not directly applicable to civil proceeding, principles articulated therein caution against expansive interpretation of hearsay exceptions to curtail litigant's right to confront witnesses in proceedings involving important interests, such as right to custody of one's children); Matter of M/B Child, 8 Misc.3d 1001(A), 2005 WL 1388846 (Fam. Ct., Kings Co., 2005) (Crawford 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).

In Matter of Brian R., 48 Misc.3d 410 (Fam. Ct., Kings Co., 2015), the court, finding that petitioner satisfied the threshold requirement by alleging threats by the respondent and his family members and violations of orders of protection, ordered a so-called "Sirois" hearing, invoking a line of criminal cases in which courts have admitted the otherwise inadmissible hearsay statements of a witness after a pretrial hearing and upon proof that the defendant's misconduct caused the witness's refusal to testify or disappearance or demise. In those cases, the accused forfeits the right of confrontation. The court in Brian R. also held that, although New York Sirois cases apply a clear and convincing evidence standard at the hearing, a fair preponderance of the evidence standard applies under Article Ten.

**O. Mistrials**

When determining whether retrial would violate a defendant's double jeopardy rights, courts require that the declaration of a mistrial be justified by "manifest necessity." Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083 (1982).

For purposes of a civil proceeding, CPLR Rule 4402 states that "[a]t any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just." See, e.g., Chung v. Shakur, 273 A.D.2d 340, 709 N.Y.S.2d 590 (2d Dept. 2000) (decision whether to grant mistrial lies within sound discretion of court).

Arguably, re-assignment of a judge to another county or court prior to completion

of the fact-finding hearing does not justify declaration of a mistrial. See Matter of Marcus B., 95 A.D.3d 15 (1st Dept. 2012); People ex rel. Thomas v. Judges of the Family Court, 85 Misc.2d 569, 379 N.Y.S.2d 656 (Sup. Ct., Kings Co., 1976) (family court judge improperly declared mistrial because he had been assigned to work in another county, and claimed that he could not or would not return to Kings County to complete the case: "[t]he rotation of Family Court Judges from county to county and from one jurisdiction to another for administrative purposes cannot justify the declaration of a mistrial for the convenience of the court system"); Matter of Kim v. Criminal Court of the City of New York, 77 Misc.2d 740, 354 N.Y.S.2d 833 (Sup. Ct., N.Y. Co., 1974), aff'd 47 A.D.2d 715, 366 N.Y.S.2d 608 (1st Dept. 1975) (double jeopardy barred re-prosecution where judge first declared a mistrial because the matter could not be concluded on the Friday it started and the judge was to be assigned to another court part on the following Monday, but the judge then "revoked" the order when he became concerned that the People might be barred from re-prosecuting); see also Matter of Delcol v. Dillon, 173 A.D.2d 704, 570 N.Y.S.2d 351 (2d Dept. 1991) ("That the court's term was shortly to end did not require the declaration of a mistrial"); New York State Constitution, Article 6, §26(k) ("After the expiration of any temporary assignment, as provided in this section, the judge or justice assigned shall have all the powers, duties and jurisdiction of a judge or justice of the court to which he or she was assigned with respect to matters pending before him or her during the term of such temporary assignment"); but see East Coast Medical Care, P.C. v. State Farm Mutual Auto Ins. Co., 11 Misc.3d 732, 813 N.Y.S.2d 881 (Civ. Ct., Kings Co., 2006) (trial judge's re-assignment left her no alternative but to declare mistrial).

Under Judiciary Law §21, a trial judge "shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge." This rule applies not only to oral argument of motions, but to the taking of testimony, and violation of the rule is a defect so fundamental that it cannot be waived. People v. Cameron, 194 A.D.2d 438, 599 N.Y.S.2d 256 (1st Dept. 1993); see also State v. General Electric Co., 215 A.D.2d 928, 626 N.Y.S.2d 861 (3rd Dept. 1995). Thus, when it appears that declaration of a mistrial is required after

witnesses have testified at a fact-finding hearing, the trial judge may not be replaced with another judge as an alternative to a mistrial.

## XIII. Orders Upon A Fact-Finding Hearing

At the conclusion of the fact-finding hearing, the court is required to render a decision concerning the charges contained in the petition. See CPLR 4213(c) (decision shall be rendered within sixty days after matter is submitted). However, so that the best interests of the child and the family can be served in all cases, the court is also given discretion to, on the one hand, refrain from interfering further with the family despite the existence of sufficient evidence, and, on the other hand, make findings based on new allegations elicited at trial which do not appear on the face of the petition. Particularly when the court has made a finding of abuse or neglect, practitioners will also find that technical defects in the proceedings or in a court order will be viewed with indulgence by the appellate courts.

### A. Dismissal Of Petition

If facts sufficient to sustain the petition are not established, the court must dismiss the petition. FCA §1051(c). Dismissal may be ordered after completion of the petitioner's case on the ground that a prima facie case has not been established [Matter of B. Children, 23 Misc.3d 1119(A), 886 N.Y.S.2d 70 (Fam. Ct., Kings Co., 2009) (court denies ACS's motion for leave to reargue decision granting respondent mother's prima facie motion to dismiss certain allegations; motion to reargue was never intended to be used to allow petitioner in child protective proceeding to resurrect previously dismissed cause of action and proceed on basis of subsequent events)], or at the close of the hearing.

In addition, "if, in a case of alleged neglect, the court concludes that its aid is not required on the record before it," the court may dismiss the petition even if there is sufficient evidence of neglect. FCA §1051(c). The court may order dismissal only after a fact-finding hearing has been held, although the court arguably could order dismissal if an adequate record is otherwise made, such as via a summary judgment motion. Matter of Jonathan M., 306 A.D.2d 413, 761 N.Y.S.2d 280 (2d Dept. 2003); Matter of Johanna W., _Misc.3d_, 2018 WL 4016925 (Fam. Ct., Kings Co., 2018) (dismissal based on non-hearsay evidence in record of §1028 hearing and in exhibits submitted with motion); Matter of Aalarah L., 59 Misc.3d 362 (Fam. Ct., Erie Co., 2017) (court may

order dismissal “on the record before it,” which can consist of evidence submitted in support of a motion, pleadings, discovery responses, and matters of which the court takes judicial notice); Matter of Kailynn I., 52 Misc.3d 740 (Fam. Ct., Kings Co., 2016) (court could order dismissal upon summary judgment motion without holding fact-finding hearing because record before court was sufficient); Matter of Julissa P., 52 Misc.3d 382 (Fam. Ct., Bronx Co., 2016) (court denies ACS motion to withdraw petition, noting that it could not conclude aid not required because fact-finding hearing had not been concluded); see also Matter of Zeykis B., 137 A.D.3d 1121 (2d Dept. 2016) (court erred in dismissing petition because domestic violence respondent relocated to Georgia, since he was the biological father of one child and could return to New York at any time; children were minors and finding could be significant in future court proceeding; and court’s conclusion that it could not issue meaningful dispositional order was not valid basis for dismissal and was also incorrect as a matter of law); Matter of Vernice B., 129 A.D.3d 714 (2d Dept. 2015) (dismissal improper where court failed to permit full development of facts, and information indicating that child was failing to participate in services and absconding from foster care did not provide valid basis for dismissal where child was in need of mental health services); In re Stephanie M., 122 A.D.3d 508 (1st Dept. 2014), lv denied 24 N.Y.3d 916 (aid of court necessary where child residing with her baby in mother and child program, and permanency goal was alternative planned permanent living arrangement); In re Tiffany H., 117 A.D.3d 419 (1st Dept. 2014) (where respondent sexually abused child’s sibling and had continued contact with and close proximity to child, court’s aid was necessary); In re Kevin N., 113 A.D.2d 524 (1st Dept. 2014) (aid of court required in light of child’s desire to continue seeing respondent and need to monitor compliance with order of protection); In re Jayline R., 110 A.D.3d 419 (1st Dept. 2013) (no dismissal where respondent refused to accept termination of relationship with children’s mother and engaged in obsessive and violent behavior in violation of order of protection, and court needed to issue separate orders of protection for children); Matter of Matthew M., 109 A.D.3d 472 (2d Dept. 2013) (dismissal denied where mother successfully completed parental skills training and anger management counseling, but supervision was appropriate, especially since

charged incident was not isolated and mother had not completed individual counseling); Matter of Kayden H., 104 A.D.3d 764 (2d Dept. 2013) (dismissal ordered where, following incident in which infant was left alone in sink and suffered burns from hot water, mother completed all required services; grandmother voluntarily attended parenting classes with mother; eighteen months before fact-finding hearing concluded, child was returned to mother and there were no ongoing safety concerns; and incident was isolated one); Matter of Phillips N., 104 A.D.3d 690 (2d Dept. 2013) (no dismissal where charges stemmed from incident in which mother allegedly hit daughter in face with shoe and hanger, causing visible injuries, and, despite mother's successful completion of parental skills training and anger management counseling, she never admitted responsibility for daughter's injuries); Matter of Imena V., 91 A.D.3d 1067 (3d Dept. 2012), lv denied 19 N.Y.3d 807 (no dismissal where father had been living in Ohio for over a year and been separated from mother and children, but continued to visit children and had failed to take steps to remedy problems that led to neglect proceeding, and children were still minors and finding could be significant in future proceeding); Matter of Quinton GG., 82 A.D.3d 1557 (3d Dept. 2011) (no dismissal where orders were entered in custody proceedings granting custody of children to relatives; custody orders granted visitation as agreed to and arranged between relatives and mother, with no involvement by or notice to petitioner, and were subject to modification without notice to petitioner, and, if neglect proceeding were dismissed, petitioner would have no authority to work with mother or children); In re Eustace B., 76 A.D.3d 428, 906 N.Y.S.2d 229 (1st Dept. 2010) (court's aid not required where court released child to respondent and effectively found no need for supervision or for respondent to participate in referrals made by agency, child was being raised as "model person and student" and wished to remain in mother's custody, and domestic violence incident between mother and boyfriend was isolated and relationship had ended); In re Sharnaza Q., 68 A.D.3d 436, 890 N.Y.S.2d d 506 (1st Dept. 2009) (no dismissal where one child was paroled to mother and other child was placed with respondent grandfather's mother, and respondent repeatedly stated that he wished to have contact, and did have unsupervised contact, with the children; placement did not

obviate necessity for court to impose conditions upon respondent, and, given the seriousness of respondent's involvement with controlled substances, supervision by agency was necessary); In re Kirk V., 60 A.D.3d 427, 874 N.Y.S.2d 445 (1st Dept. 2009) (dismissal upheld where, as of time of family court's decision, person alleged to be danger to child had not lived in or visited home for over four years, and petitioner failed to articulate what disposition it was seeking and what court action would be required to protect child); Matter of Mary Kate VV., 59 A.D.3d 873, 873 N.Y.S.2d 375 (3rd Dept. 2009), lv denied 12 N.Y.3d 711 (dismissal denied where respondent argued that he was having no further contact with children and thus did not pose risk to them, but he did have desire to re-establish contact with them and believed that corporal punishment he had imposed was justified and appropriate, and one child was still a minor and findings of neglect could prove significant in future proceeding); In re Angel R., 285 A.D.2d 407, 729 N.Y.S.2d 389 (1st Dept. 2001) (family court properly dismissed petition against mother where two of the children were already in Puerto Rico with their grandmother, and the other child was with the mother and under the agency's supervision); Matter of Lewis T., 249 A.D.2d 646, 671 N.Y.S.2d 180 (3rd Dept. 1998) (dismissal not appropriate where non-respondent father had custody, but court did not consider whether children's best interest required other remedies); Matter of Baby Girl W., 245 A.D.2d 830, 666 N.Y.S.2d 346 (3rd Dept. 1997) (dismissal not appropriate where periodic supervision was necessary); Matter of Johanna W., _Misc.3d_, 2018 WL 4016925 (dismissal justified where mother had shown considerable insight into mental health condition and commitment to maintaining stability, and there was family support if she did not succeed at any point; court's involvement only added unnecessary stress and mother had proven that she was entitled to move forward without court intervention); Matter of Aalarah L., 59 Misc.3d 362 (dismissal ordered where respondent had cooperated with DSS and participated in programs, and prosecuted abuser; case law recognizes that neglect adjudication may be important because of impact on future cases, but statute would be superfluous if such a concern barred relief in all cases); Matter of E.N., 56 Misc.3d 1209(A) (Fam. Ct., Orange Co., 2017) (mother left infant alone in vehicle for over twenty minutes in summer heat until

child was retrieved while mother was inside store, but home had been under agency supervision for approximately eleven months with no incident or safety concerns; mother had completed services; although she was unable to verbalize remorse, her testimony revealed mother who made mistake and did not intend to harm infant; and, since incident, she had been home with her four children and been sole caregiver during the day while husband worked); Matter of Robert W., 30 Misc.3d 1231(A) (Fam. Ct., Kings Co., 2011) (aid of court not required where mother, a public school teacher, inflicted excessive corporal punishment upon then sixteen-year-old son, but, two days after incident, on her own initiative, obtained services and treatment; court temporarily released children to mother under supervision five months after incident, and there had been no more incidents; and, when scheduling problems arose, agencies had been inflexible and unaccommodating); Matter of Makynli N., 17 Misc.3d 1127(A), 851 N.Y.S.2d 70 (Fam. Ct., Monroe Co., 2007) (if respondent fully complies with terms of suspended judgment order, court may vacate finding and dismiss underlying petition if it is in children's best interests and court's aid is no longer required; here, vacatur may result in removal of father’s name from Central Register, which might allow him to become employed in law enforcement, and his sons are thriving in his care, he is only parent upon whom they can rely, and he has strong relationship with sons and they are not in danger of neglect); Matter of J.H., 15 Misc.3d 1111(A), 839 N.Y.S.2d 433 (Fam. Ct., Bronx Co., 2007) (dismissal denied at conclusion of fact-finding hearing where mother had outstanding problems that needed to be monitored and there was still danger to the child); Matter of Jessica S., 13 Misc.3d 505, 824 N.Y.S.2d 768 (Fam. Ct., Kings Co., 2006) (motion denied where putative father argued that aid of court not required because he had no paternity rights and grandmother had obtained custody; court notes that respondent failed to present proof of cooperation with appropriate services, dismissal would set precedent of permitting putative fathers to evade responsibility for neglect by failing to establish paternity, custody order did not obviate need to impose conditions on respondent, and there could come a time when children will be returned to mother); Matter of Hickey, 124 Misc.2d 667, 477 N.Y.S.2d 258 (Fam. Ct., Suffolk Co., 1984). But see Matter of Jonathan W., 256 A.D.2d 1174, 682 N.Y.S.2d

500 (4th Dept. 1998) (court may not dismiss on this ground upon ACD violation hearing).

Although the statute could be read as contemplating that an order dismissing the petition because the aid of the court is not required may only be issued instead of a fact-finding order, and FCA §1051(d) seems to require that the court proceed to the dispositional stage after making a fact-finding, it seems clear that dismissal may be ordered if the fact-finding order is vacated, and the Second Department has ordered dismissal post-fact-finding without vacating the finding. See Matter of Anoushka G., 132 A.D.3d 867 (2d Dept. 2015) (no error in order directing that petitions be dismissed after expiration of six-month suspended judgment period, as aid of court no longer required); see also Matter of Zeykis B., 137 A.D.3d 1121 (2d Dept. 2016) (finds error in post-finding dismissal without questioning existence of authority); Matter of MN, 16 Misc.3d 499, 836 N.Y.S.2d 838 (Fam. Ct., Monroe Co., 2007) (court will consider dismissal if respondent complies with suspended judgment order); but see Matter of the N./G./T. Children, 50 Misc.3d 1213(A) (Fam. Ct., Bronx Co., 2015) (court denies motion to vacate fact-finding, noting that it may not order aid-of-the-court-not-required dismissal under FCA §1051(c) after fact-finding has been entered);. In any event, if a party seeks dismissal at the fact-finding hearing rather than at a subsequent dispositional hearing, the court would have to permit the parties to submit evidence going to that issue during the fact-finding hearing, including evidence that does not come within the four corners of the petition, and permit cross-examination of witnesses.

When ordering dismissal, the court must state the grounds for dismissal on the record. FCA §1051(c). See CPLR §4213(b) (court "shall state the facts it deems essential); Matter of Dezarae T., 110 A.D.3d 1396 (3d Dept. 2013) (court need not set forth evidentiary facts, only ultimate facts upon which rights and liabilities of parties depend, and, in this case, court summarized relevant testimony and made credibility determinations, and discussed applicable law regarding proof of abuse and need for corroboration); Matter of Erika M., 97 A.D.2d 847, 468 N.Y.S.2d 724 (2d Dept. l983) (case remitted for compliance with §1051).

An abuse charge may not be dismissed on the ground that the aid of the court is

not required Matter of Robert W., 234 A.D.2d 23, 650 N.Y.S.2d 167 (1st Dept. 1996). However, it appears that dismissal may be ordered where the petition alleges abuse, but the abuse charges are dismissed and only a neglect finding is made. Matter of Baby Girl W., supra, 245 A.D.2d 830.

The court has no power to impose conditions or issue further orders when dismissing a petition. See Matter of Natasha A., 99 A.D.2d 533, 471 N.Y.S.2d 320 (2d Dept. 1984). However, the court retains authority to find a child destitute under SSL § 371(3) and place the child. Matter of Nurayah J., 41 A.D.3d 477, 839 N.Y.S.2d 97 (2d Dept. 2007), lv denied 9 N.Y.3d 907.

**B. Abuse Or Neglect Finding**

If facts sufficient to sustain the petition are established, the court must enter an order finding that the child is an abused and/or neglected child, and state the grounds for the finding. FCA §1051(a); see also CPLR §4213(b); Matter of Alexisana PP., 136 A.D.3d 1170 (3d Dept. 2016) (although court did not employ “best practice,” no error where court stated that petitioner had established factual allegations in specified paragraphs of detailed petition, listed paragraphs, and held that proven facts constituted neglect; in any event, Third Department could make findings); Matter of Christina M., 247 A.D.2d 867, 668 N.Y.S.2d 301 (4th Dept. 1998), lv denied 91 N.Y.2d 812, 672 N.Y.S.2d 848 (when decision and order conflict, decision controls); Matter of Amy M., 234 A.D.2d 854, 651 N.Y.S.2d 688 (3rd Dept. 1996) (court need not refer to each specific allegation in petition); Matter of Anna Marie A., 194 A.D.2d 608, 599 N.Y.S.2d 66 (2d Dept. 1993) (to "save judicial time," Second Department makes findings where family court failed to state grounds); Matter of Kyesha A., 176 A.D.2d 381, 574 N.Y.S.2d 89 (3rd Dept. 1991) (case remitted to family court because of failure to make findings of fact).

When making a finding of abuse, the court must specify the paragraph(s) of FCA §1012(e) under which the finding is made, and, when making a finding of sexual abuse, must also specify any Penal Law Article One Hundred Thirty offense that the respondent committed. FCA §1051(e). However, when the record is clear, the Family Court's failure to specify the offense is a technical defect and an appellate court may

make the required finding. Matter of Jada A., 116 A.D.3d 769 (2d Dept. 2014); Matter of Shannon K., 222 A.D.2d 905, 635 N.Y.S.2d 751 (3rd Dept. 1995).

### C. Amendment Of Petition

"If the proof does not conform to the specific allegations of the petition," the court may, as in other civil proceedings [see CPLR 3025(c)], "amend the allegations to conform to the proof; provided, however, that in such case the respondent shall be given reasonable time to prepare to answer the amended allegations." FCA §1051(b); Matter of Brice L., 29 A.D.3d 910, 815 N.Y.S.2d 273 (2d Dept. 2006) (family court properly allowed amendment to conform to proof of incident that occurred after petition filed); Matter of Jessica YY., 258 A.D.2d 743, 685 N.Y.S.2d 489 (3rd Dept. 1999) (although petitioner's counsel alluded to her right to move to amend, she never did, and, therefore, the court erred in considering post-petition evidence); Matter of Kyanna T., 27 Misc.3d 1210(A), 910 N.Y.S.2d 406 (Fam. Ct., Kings Co., 2010), aff'd 99 A.D.3d 1011 (2d Dept. 2012), lv denied 20 N.Y.3d 856 (petitions amended to include additional Penal Law sections where respondents had notice of possible amendment given original allegation that father's actions "violated article 130 of the Penal Law, including but not limited to §§ 130.20 [and] 130.65"); but see In re Brianna R., 78 A.D.3d 437, 910 N.Y.S.2d 71 (1st Dept. 2010), lv denied 16 N.Y.3d 702 (court properly excluded testimony regarding mother's willingness, post-petition, to exclude father from home; generally, courts may not consider post-petition evidence); Matter of Ashley X., 50 A.D.3d 1194, 854 N.Y.S.2d 794 (3rd Dept. 2008) (although post-petition evidence usually should not be considered, testimony of day-care licensing representative was elicited for impeachment purposes and respondent was aware more than a week in advance that proof may be considered).

This is true even where the petitioner has filed a bill of particulars. See Albany County Department of Social Services v. James T., 172 Misc.2d 427, 658 N.Y.S.2d 184 (Fam. Ct., Albany Co., 1997) (court permits some amendments to bill of particulars, but not others, after petitioner's direct case). This provision has survived constitutional attack. See Matter of Terry S., 55 A.D.2d 689, 389 N.Y.S.2d 55 (3rd Dept. 1976). In Matter of Amanda "RR", 293 A.D.2d 779, 740 N.Y.S.2d 485 (3rd Dept. 2002), the Third

Department sua sponte amended the petition where the evidence was admitted without objection by the respondent. See also Matter of Angel L.H., 85 A.D.3d 1637 (4th Dept. 2011), lv denied 17 N.Y.3d 711 (although petitioner should have moved to amend petition, court may, given that evidence was received without objection, exercise interest of justice power and conform petition to evidence); but cf. Matter of Joseph O., 28 A.D.3d 562, 813 N.Y.S.2d 213 (2d Dept. 2006) (finding upon new allegation reversed where petition was never amended).

If sufficient proof is presented, the court may make a finding of abuse or neglect consistent with the amended allegations. Although a judge might be reluctant to add an entirely new charge, as opposed to allegations that support an already alleged theory, it appears that such an amendment is permissible. See In re Ne-Ashia R., 99 A.D.3d 616 (1st Dept. 2012), aff'g 34 Misc.3d 1233(A) (Fam. Ct., Bronx Co., 2012) (no error in court's sua sponte amendment of petition to conform to proof of severe abuse where, approximately two months before mother commenced her case, court advised parties it was considering petition "under a clear and convincing standard … and therefore, under the severe and repeated abuse statute" and mother never requested adjournment or moved to dismiss petition); Matter of Kila DD., 28 A.D.3d 805, 812 N.Y.S.2d 700 (3rd Dept. 2006) (physical and sexual abuse charges added to domestic violence charge); Matter of Fatima Mc., 292 A.D.2d 532, 740 N.Y.S.2d 87 (2d Dept. 2002) (charge of excessive corporal punishment added); Matter of the T. D. Children, 161 A.D.2d 464, 555 N.Y.S.2d 373 (1st Dept. 1990); Matter of Sharnetta N., supra, 120 A.D.2d 276; Matter of Kianna M., 189 Misc.2d 791, 736 N.Y.S.2d 850 (Fam. Ct., Suffolk Co., 2001) (abuse charge added based on burns different from those alleged in original neglect petition); see also Matter of Ruth Joanna O.O., 149 A.D.3d 32 (1st Dept. 2017) (no error where court sua sponte made motion apparently designed to justify consideration of events occurring after petition filing date, and mother was afforded due process because she was able to contest evidence and cross-examine witnesses); Matter of Christopher N., 221 A.D.2d 871, 634 N.Y.S.2d 247 (3rd Dept. 1995) (court may hear any evidence concerning relevant events occurring after commencement of proceeding); but see Matter of Nurayah J., 41 A.D.3d 477, 839 N.Y.S.2d 97 (2d Dept.

2007), lv denied 9 N.Y.3d 907 (family court properly denied petitioner's motion during inquest to conform pleadings to proof to include certain post-petition conduct, since respondent would have been unduly prejudiced).

In the absence of prejudice to the respondent, it will usually be an abuse of discretion for the court to deny a motion to amend made by either the petitioner or the child's attorney. See, e.g., Matter of Cameron K., 104 A.D.3d 688 (2d Dept. 2013) (leave to amend should be freely given, provided amendment is not palpably insufficient, does not prejudice or surprise opposing party, and is not patently devoid of merit, and no evidentiary showing of merit is required); Matter of Sharnetta N., 120 A.D.2d 276, 509 N.Y.S.2d 7 (1st Dept. 1986); Matter of Shawniece E., 110 A.D.2d 900, 488 N.Y.S.2d 733 (2d Dept. 1985). Obviously, amendments should be permitted more liberally prior to the start of a fact-finding hearing, since the respondent will be able to develop a response before any testimony is taken. See Matter of G.C. Children, 23 Misc.3d 1134(A), 889 N.Y.S.2d 882 (Fam. Ct., Kings Co., 2009) (no post-hearing amendment where mother was not given reasonable time to prepare to answer allegations and neither petitioner, nor child's attorney, sought to formally amend petition before hearing concluded; to permit post-hearing amendment would be inconsistent with intent if not explicit language of statute).

In addition, if the evidence in an abuse case supports a neglect finding, but not a finding of abuse, the court may, on its own motion, substitute a neglect petition for an abuse petition pursuant to FCA §1031(c) and then make a finding of neglect.

**D. Clear And Convincing Evidence Finding**

When making a finding of abuse, the court may enter a finding of severe or repeated abuse, as defined in SSL §384-b(8), and shall state the grounds for the finding. Such a finding shall be based upon clear and convincing evidence - the court shall so state in the fact-finding order [§1046(b)(ii)] - and is admissible in a termination of parental rights proceeding. FCA §1051(e). Indeed, such an abuse finding is conclusive in a termination proceeding. SSL §384-b(8)(d), (e).

Under SSL §384-b(8)(a), a finding that a child has been severely abused can be made where the parent: 1) has committed "reckless or intentional acts of the parent ...

under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in [Penal Law §10.00(10)]"; 2) has committed or knowingly allowed the commission of a felony sex offense defined in PL §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, or 130.80; 3) has been convicted of committing, attempting to commit, conspiring to commit, or soliciting or facilitating the commission of murder or manslaughter (manslaughter only if the parent acted voluntarily in committing the crime), or committing or attempting to commit second or first degree assault or aggravated assault upon a person less than eleven years old, where the victim or intended victim of the crime was the subject child or another child of the parent for whose care the parent is or has been responsible as defined in FCA §1012(g); or 4) has been convicted of one of the above-mentioned homicides or attempted homicides and the victim of the crime was another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide; and, unless excused pursuant to FCA §1039-b, the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future. See Matter of Latifah C., 34 A.D.3d 798, 826 N.Y.S.2d 333 (2d Dept. 2006) (severe abuse finding reversed where agency failed to prove diligent efforts); Matter of Elliott G., 59 Misc.3d 1069 (Fam. Ct., Clinton Co., 2018) (DSS failed to establish that mother "acted voluntarily"; while noting that one cannot commit crime of manslaughter in the second degree without acting intentionally and without coercion, court wonders whether statute requires voluntary manslaughter as opposed to involuntary manslaughter); Matter of Meredith DD., 13 Misc.3d 894, 821 N.Y.S.2d 741 (Fam. Ct., Chemung Co., 2006) (non-parent cannot charged with severe abuse). Convictions from jurisdictions other than New York qualify if the offense includes all the essential elements of the New York crime.

In Matter of Marino S., 100 N.Y.2d 361, 763 N.Y.S.2d 796 (2003), cert denied 540 U.S. 1059, 124 S.Ct. 834, the court held that a derivative finding of severe abuse

may be made as to siblings of the child who was actually abused, and include those children in an order terminating the reasonable efforts requirement. The court noted that, without derivative findings, one child would be on a different permanency planning track from his or her sibling.

Under SSL §384-b(8)(b), a finding that a child has been repeatedly abused can be made when the court finds pursuant to FCA §1012(e)(i) that the parent inflicted or allowed the infliction of abuse, or finds pursuant to FCA §1012(e)(iii) that the parent committed or knowingly allowed the commission of a felony sex offense defined in PL §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70, or 130.80, and the child, or another child for whose care the parent is or has been responsible has been previously found, within the five years immediately preceding the initiation of the proceeding in which the repeated abuse is alleged, to be an abused child based upon the parent's commission of the acts of abuse defined above.

Obviously, when the petitioner is seeking a clear and convincing evidence finding, the rules of evidence in FCA §1046 may not have the same effect as in other cases. For instance, it may not be possible in all cases to adequately corroborate a child's out-of-court statements pursuant to FCA §1046(a)(vi) with evidence merely "tending to support the reliability of the previous statements ...." Similarly, neither the "res ipsa" presumption in §1046(a)(ii), nor theories of derivative neglect raised pursuant to FCA §1046(a)(i), will go as far when the standard is clear and convincing evidence. These are considerations the child's lawyer should keep in mind when planning the presentation of evidence and evaluating the strength of the petitioner's case.

Finally, after the court makes a clear and convincing evidence finding of severe or repeated abuse, the petitioner may make an application pursuant to FCA §1039-b for an order terminating the reasonable efforts requirement.

### E. Issuance Of Orders

An order shall be in writing and signed or initialed by the judge who made it. The form of such order shall be promulgated pursuant to FCA §214 by the chief administrator of the courts. FCA §217(1). The original of the order shall be filed with the clerk of the family court in the county in which the family court making the order is

located. FCA §217(2). The court shall file or direct the filing of an order within twenty days of the decision. If the court directs that such order be settled on notice, such twenty day period shall commence on the date on which such order is settled. FCA §217(3).

Proposed orders, with proof of service on all parties, must be submitted for signature, unless otherwise directed by the court, within thirty days after the signing and filing of the decision directing that the order be settled or submitted. Proposed orders must be submitted for signature immediately, but in no event later than fourteen days of the earlier of the court's oral announcement of its decision or signing and filing of its decision, unless otherwise directed by the court. However, proposed orders pursuant to FCA §1022 must be submitted for signature immediately, but in no event later than the next court date following the removal of the child. 22 NYCRR §205.15. But see Matter of Bianca M., 57 A.D.3d 1253, 870 N.Y.S.2d 550 (3rd Dept. 2008), lv denied 12 N.Y.3d 705 (order of disposition and order of protection not rendered void due to delay between oral decision and filing); In re Adams H., 28 A.D.3d 213, 812 N.Y.S.2d 80 (1st Dept. 2006) (one and a half year delay between oral decision terminating parental rights and signing of order was reasonable since given court's concern about status of biological mother and man previously presumed to be child's biological father; neither 22 NYCRR §205.15 nor FCA §217[3] renders unenforceable order that is not timely submitted). The court shall direct service of a copy of an order in the manner it deems appropriate. If the court makes no direction, the applicable provisions of the CPLR shall apply. Where the clerk of the court is directed to serve such order, the clerk shall note in the court record the manner and date of service and the person to whom such order was served. FCA §217(4).

### F. Court-Ordered Reports And Investigations

The court may commence a "dispositional hearing" (see FCA §1045) immediately after making a fact-finding. FCA §1047(a). However, upon its own motion or a motion by the respondent, the petitioner or the child’s attorney, the court may adjourn the dispositional hearing. Indeed, unless enough information is already available as a result of an investigation by the child protective agency, the proceedings

should be adjourned "to enable the court to make inquiry into the surroundings, conditions, and capacities of the persons involved in the proceedings." FCA §1048(b). The court has a duty to arm itself with relevant information. See Matter of Gale, 135 Misc.2d 225, 514 N.Y.S.2d 860 (Fam. Ct., Kings Co., 1987).

Ordinarily, the court should order an investigation and report by the child protective agency. Such a report should contain the results of a visit to the child's present residence and the home of any potential custodian, including the respondent, an assessment of each potential custodian's ability to care for the child, a social history of the child and the family, the results of contacts with foster care agencies and other service providers which have worked with the family, and an assessment of the physical and emotional condition of the child and his or her present and future needs. If appropriate, the court may also order the probation department to conduct an investigation and make a report. FCA §252(d). It should be noted that any reports prepared prior to disposition "may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used at a dispositional hearing. FCA §1047(b). See also Matter of Bennett, 111 A.D.2d 328, 489 N.Y.S.2d 311 (2d Dept. 1985).

Reports prepared for disposition must be made available to all counsel for inspection and photocopying. See Baker v. Ratoon, 251 A.D.2d 921 (3d Dept. 1998) (no error where court made psychological evaluation available to counsel but not to respondent). The court may refuse to disclose any portion of a report which is not relevant to a proper disposition, as well as the identity of sources who have provided information upon a promise of confidentiality and any portion of the report whose disclosure would not be in the interest of justice or the child's best interest. If the court limits disclosure, the court must state for the record that a part or parts of the reports have been withheld and the reasons for such action, and the order is reviewable on appeal. FCA §1047(b). The court must also consider the parties' due process right to cross-examine the makers of the reports and otherwise challenge the evidence being offered. See Matter of Carmen, 37 A.D.2d 629, 325 N.Y.S.2d 265 (2d Dept. 1971) (court abused its discretion by relying upon psychiatric report which was not in evidence and which respondent had no opportunity to challenge); Matter of Dulay, 24 A.D.2d

208, 265 N.Y.S.2d 247 (4th Dept. 1965).

When appropriate, the court should also order psychiatric or psychological evaluations of the respondent and any other potential custodian, and/or the child. See FCA §251; Matter of Dylan L., 55 A.D.3d 1343, 864 N.Y.S.2d 636 (4th Dept. 2008) (where family court found that respondent exposed sons to pornographic videos but did not find that he sexually abused the children since there was evidence of possible involvement of another perpetrator, Fourth Department upholds order directing respondent to undergo mental health evaluation to address court's concerns that he may be in need of sex offender treatment; mental health evaluation was not subsequent action or proceeding and thus did not involve re-litigation of allegations of sexual abuse that would be barred by doctrine of collateral estoppel); Matter of Giselle H., 22 A.D.3d 578, 804 N.Y.S.2d 323 (2d Dept. 2005) (where mother had attempted to operate automobile while intoxicated and without child being buckled in car seat, court erred in releasing child to mother without first requiring her to undergo substance abuse and psychiatric evaluations); but see Matter of Crystal H., 135 Misc.2d 265, 514 N.Y.S.2d 865 (Fam. Ct., N.Y. Co., 1987) (although court may order examination of non-respondent parent, examination of other relatives cannot be compelled). “If it shall appear to the court that any child within its jurisdiction is mentally retarded, the court may cause such child to be examined as provided in the mental hygiene law and if found to be mentally retarded as therein defined, may commit such child in accordance with the provisions of such law.” FCA §231. See Matter of Kmea J., 54 A.D.3d 376, 861 N.Y.S.2d 948 (2d Dept. 2008) (family court lacked jurisdiction to entertain foster care agency’s motion for commitment of child pursuant to §231 where child had turned eighteen years of age). In addition to, or, when appropriate, in lieu of court-ordered mental health reports, a judge should solicit reports by mental health professionals who have counseled or treated the child or the family in the past.

It appears that the respondent has no right to have counsel present at a court-ordered mental health examination, but the court does have discretion to permit counsel to be present. Compare Matter of Jose D., 66 N.Y.2d 638, 495 N.Y.S.2d 360 (1985) (no right to have attorney present at dispositional stage exam in juvenile

delinquency proceeding) with Matter of J.R.U.-S., 110 P.3d 773 (Wash. Ct. App., 2005) (statute granting parent right to counsel at all stages of proceeding did not include right to counsel at court-ordered psychological examination; however, courts did not abuse discretion in allowing parents' counsel to attend) and M.A.M. v. M.R.M., 37 Misc.3d 1232(A) (Sup. Ct., Monroe Co., 2012) (in matrimonial/custody proceeding, court denies husband's request to have attorney present during court-ordered psychological evaluation, holding that there is no right to counsel; court critiques apparent New York rule allowing attorney to be present unless sufficient justification is proffered by objecting party, and opines that attorney's presence should be presumed to be intrusive and damage integrity of examination and that attorney should have burden to show that presence is necessary to protect identifiable right or privilege of client).

**G. Status Of Child Pending Disposition**

Upon entry of a fact-finding order, the court must make a de novo determination concerning the custodial status of the child pending disposition. The court shall determine whether any order, such as a removal order, is required by FCA §1027 to protect the child's interests. The court shall state the grounds for its determination. Moreover, the court may remove and remand the child, or temporarily place the child in the custody of a suitable person, if the court finds that there is a substantial probability that the disposition will be placement. FCA §1051(d). See Matter of Amber S., 84 A.D.3d 1243 (2d Dept. 2011) ("substantial probability" found where family's home was damaged by fire set by one of mother's adult children, seventeen-year-old child was living with boyfriend much of the time and smoked marijuana and drank alcohol without mother stopping her, thirteen-year-old did not attend school, came and went as he pleased, and smoked marijuana and drank alcohol, and twelve-year-old child frequently stayed out at night until 12:00 or 1:00 a.m. and often went to school dirty and emitting foul odor; although, in most cases, court should hold hearing to determine whether removal is proper, in this case court had abundance of information); see also In re Beautiful B., 106 A.D.3d 665 (1st Dept. 2013) (court properly removed children from father's care post-fact-finding after he cohabited with mother in violation of order of protection that limited mother's contact with one of the children to supervised visitation).

In determining whether there is a "substantial probability" of placement, the court shall consider whether "reasonable efforts" were made to prevent or eliminate the need for placement. FCA §§ 1051(d), 1052(b). A post-fact-finding removal on this ground presumably would be based upon an assumption that, if removal from the home and placement is inevitable, the child's transition to new surroundings should begin immediately. When the child has been remanded pending disposition in a neglect case, and in any abuse case, the adjournment should be as short as practicable. FCA §1049.

## XIV. Dispositional Proceedings

Article Ten proceedings are clearly bifurcated. After making a fact-finding of abuse or neglect, the court must proceed to the dispositional stage. Although the nature of the respondent's misconduct and the harm suffered by the children will certainly enter into the court's thinking, the seriousness of the charges in no way limits as a matter of law the court's power to issue appropriate orders at the dispositional stage. The court has broad authority to formulate a dispositional order designed to balance the rights and interests of the children, the respondents, and the family as a whole, and to move the family towards permanency.

### A. The Dispositional Hearing

#### 1. Generally

A "dispositional hearing" is "a hearing to determine what order of disposition should be made." FCA §1045. In order to reach a well-informed determination, the court must hold such a hearing. Compare Matter of Suffolk County Department of Social Services v. James M., 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994); Matter of Joseph B., 6 A.D.3d 609, 774 N.Y.S.2d 822 (2d Dept. 2004) (at a minimum, court could have considered at hearing whether petitioner was required to provide therapeutic services to child); Matter of Faith AA., 139 A.D.2d 22, 530 N.Y.S.2d 318 (3rd Dept. 1988) (court "improperly fashioned its dispositional hearing on the stipulation of the parties to testimony"); Matter of Marsha B.F., 110 A.D.2d 549, 488 N.Y.S.2d 3 (1st Dept. 1985) (dispositional hearing ordered despite intervening extension of placement; “the considerations and ultimate determination at [disposition and an extension proceeding] are different and should be fully and timely developed at the appropriate stage, as required by the statute”) and Matter of Dulay, 24 A.D.2d 208, 265 N.Y.S.2d 247 (4th Dept. 1965) (although family court properly precluded social worker from expressing opinion as to mother’s fitness, court should have permitted her to testify as to whether, given her observations, the mother was maintaining a suitable home for the infant) with Matter of Gladys H., 206 A.D.2d 606, 614 N.Y.S.2d 475 (3rd Dept. 1994) (no error in failure to hold hearing where court had timely information and parties waived hearing).

By not objecting or requesting a full hearing, the respondent waives any challenge to the court's failure to conduct a full hearing. Matter of Thomas J., 112 A.D.3d 718 (2d Dept. 2013).

The parties and the child have a right to present evidence, testify, cross-examine witnesses, and otherwise advance their position at the hearing. See Matter of Herbert F., 56 A.D.2d 601, 391 N.Y.S.2d 654 (2d Dept. 1977); but see Matter of McGrath v. Collins, 202 A.D.2d 719, 608 N.Y.S.2d 556 (3rd Dept. 1994) (in custody proceeding, court did not abuse discretion in failing to conduct in camera interview of child, who was less than five years of age; court had discretion to weigh asserted detriment to child with benefit of young child's input). This includes the right to cross-examine any caseworker or mental health professional whose written report has been submitted. Matter of Dulay, supra, 24 A.D.2d 208. However, hearsay evidence is admissible. FCA §1046(c); but see Matter of Kenneth G., 39 A.D.2d 709, 331 N.Y.S.2d 788 (2d Dept. 1972) (although psychiatrist's letter was admissible under §1046(c), family court abused discretion in admitting letter without first ascertaining that psychiatrist was unavailable to testify personally).

If, within the previous thirty days, the court has issued an order excusing reasonable efforts to make it possible for the child to return home, the dispositional proceeding will be a convenient forum for the required "permanency hearing."

At the conclusion of a dispositional hearing, the court shall enter an order of disposition directing one or more of the following:

(i) suspending judgment in accord with FCA §1053; or

(ii) releasing the child to a non-respondent parent or parents or non-respondent legal custodian or custodians or guardian or guardians, in accord with FCA §1054; or

(iii) placing the child in accord with FCA §1055; or

(iv) making an order of protection in accord with FCA §1056; or

(v) releasing the child to the respondent or respondents or placing the respondent or respondents under supervision, or both, in accord with FCA §1057; or

(vi) granting custody of the child to a respondent parent or parents, a relative or relatives or a suitable person or persons pursuant to FCA Article Six and FCA §1055-b; or

(vii) granting custody of the child to a non-respondent parent or parents pursuant to Article Six.

However, the court shall not enter an order of disposition combining placement of the child with a disposition suspending judgment or releasing the child to a non-respondent parent or parents or non-respondent legal custodian or custodians or guardian or guardians. An order granting custody of the child shall not be combined with any other disposition. FCA §1052(a).

The court shall state the grounds for the order. FCA §1052(b)(i); but see Matter of Matthew M., 46 A.D.3d 903, 847 N.Y.S.2d 865 (2d Dept. 2007) (family court's failure to include grounds for disposition in order found harmless given extent to which court set forth reasons on record and lack of prejudice to mother). The order must be based on a preponderance of the evidence. Matter of Kathleen "OO", 232 A.D.2d 784, 649 N.Y.S.2d 193 (3rd Dept. 1996); but see Matter of Oscar C., 192 A.D.2d 280, 600 N.Y.S.2d 937 (2d Dept. 1993), lv denied 82 N.Y.2d 660, 605 N.Y.S.2d 6 (although preponderance standard governed at fact-finding, family court properly held that Indian Child Welfare Act required clear and convincing evidence of need for placement at disposition).

Since a dispositional hearing focuses upon the interests of the child and the family, not the personal status of a respondent parent, the proceeding does not abate upon the death of the parent. Matter of S.B., 165 Misc.2d 632, 629 N.Y.S.2d 1017 (Fam. Ct., N.Y. Co., 1995).

### 2. "Best Interests" Of Child And Family

The initial focus of the hearing should be the parents' present ability to care for the children, with consideration of any special problems involved in the care of the child. See Matter of Austin A., 227 A.D.2d 677, 641 N.Y.S.2d 752 (3rd Dept. 1996) (extension of placement granted where respondent was unwilling or unable to understand severity of child's autism and the nature of the care and supervision required); Matter of Jamie

V., 111 A.D.2d 949, 490 N.Y.S.2d 45 (3rd Dept. 1985) (specialized treatment was beyond parents' ability, and home was not conducive setting).

However, in a contest with a non-parent, a parent has a superior right to custody unless "extraordinary circumstances" require the court to conduct an inquiry into the child's best interests. Thus, while the court is required to determine the child's best interests, the "extraordinary circumstances" test must kept in mind. See Matter of Michael B., 80 N.Y.2d 299, 590 N.Y.S.2d 60 (1992); Matter of Commissioner of Social Services o/b/o Tyrique P., 216 A.D.2d 387, 629 N.Y.S.2d 47 (2d Dept. 1995); Matter of Alfredo S., 172 A.D.2d 528, 568 N.Y.S.2d 123 (2d Dept. 1991), appeal dism'd 78 N.Y.2d 899, 573 N.Y.S.2d 459 (1991); see also Matter of P.B., 2003 WL 21689579 (D. C. Super. Ct., 2003) (clear and convincing evidence that placement is in child's best interest required where fit and competent parent objects).

It should be kept in mind that, even when the court is considering a release of the child to a non-respondent parent, a dispositional hearing must be held. Matter of Amanda B., 287 A.D.2d 561, 731 N.Y.S.2d 661 (2d Dept. 2001). The court may consolidate the dispositional hearing with a hearing on a custody petition brought by a parent, another relative, or anyone else with standing. Matter of John KK., 302 A.D.2d 811, 755 N.Y.S.2d 513 (3rd Dept. 2003), lv denied 100 N.Y.2d 504, 762 N.Y.S.2d 874 (2003).

Obviously, when a respondent parent is demanding custody, the traditional presumption in favor of the parent, and the parent's present ability to care for the child, must be viewed in the light of the respondent's recent misconduct and its effect on the child.

**B. Dispositional Orders**

As already noted, the court has broad authority to issue necessary and appropriate orders at the dispositional stage. Indeed, in addition to the orders discussed in the sections which follow, the court can turn to FCA §255 if authority for a desired order can be found nowhere else. Particularly in light of the court's authority to fashion very specific and far-reaching orders, it is important for the child's lawyer to prepare for the dispositional stage by drafting language designed for inclusion in any order the

lawyer will be requesting. If there is any uncertainty with respect to the court's authority to issue the order, the lawyer should prepare a legal argument in support of the application.

### 1. Suspended Judgment

Pursuant to FCA §1053, the court may suspend judgment for a period of up to one year, and may extend the order for an additional year if it finds at the conclusion of the initial period, upon a hearing, that exceptional circumstances require an extension. FCA §1053(b); see generally Matter of MN,, 16 Misc.3d 499, 836 N.Y.S.2d 838 (Fam. Ct., Monroe Co., 2007); see also Matter of Jesse D., 109 A.D.3d 990 (2d Dept. 2013) (order suspending judgment invalid where it was for indefinite period of "one year from the date of [the father's] release from incarceration); Matter of Eric Z., 100 A.D.3d 646 (2d Dept. 2012) (in case in which mother consented to finding of abuse and father consented to finding of neglect, Second Department reverses dispositional order releasing child under supervision and orders suspended judgments).

In termination of parental rights cases, the terms of a suspended judgment shall be deemed satisfied if no violation is alleged before the suspended judgment period expires and "an order committing the guardianship and custody of the child shall not be entered." FCA §633(d). In contrast, FCA §1053 is silent with respect to the legal effect of expiration of the suspended judgment period. Under the case law, the petition is not dismissed by operation of law if there is no court action prior to the expiration date of the suspended judgment order. In fact, in such instances, the suspended judgment itself does not expire, and the court retains jurisdiction to determine compliance with the terms and conditions of the order when a party alleges a violation, or asks the court to go to final judgment because the conditions have been satisfied. Matter of Leenasia C., 154 A.D.3d 1 (1st Dept. 2017).

A suspended judgment "affords a respondent the opportunity to correct his or her neglectful actions," and when, at the end of the suspended judgment period, the respondent alleges full compliance, the court may in its discretion order that the petition be dismissed. Matter of Leenasia C., 154 A.D.3d 1 (pursuant to FCA §1061, court could vacate order releasing children to mother, grant suspended judgment retroactively, and

dismiss petition). In Leenasia C., the First Department alluded to, but did not expressly rely upon, FCA §1051(c), which permits dismissal at the close of the fact-finding hearing when the court finds sufficient evidence of neglect but concludes that its aid is not required, but does not refer to the dispositional or post-dispositional stages. The Second Department, which had previously suggested in dicta that satisfaction of suspended judgment terms and conditions automatically results in dismissal of the petition [Matter of Eric Z., 100 A.D.3d 646, 953 N.Y.S.2d 644 (2d Dept. 2012)], has expressly relied on §1051(c) as a ground for discretionary dismissal at the conclusion of a suspended judgment. Matter of Anoushka G., 132 A.D.3d 867, 18 N.Y.S.3d 652 (2d Dept. 2015).

Dismissal of the petition upon the respondent's compliance with the order leaves the fact-finding order intact unless the respondent also moves pursuant to FCA § 1061 and establishes good cause to vacate that order. Matter of Leenasia C., 154 A.D.3d 1 (good cause properly found where mother had no prior history of neglect; children were not actually harmed; mother actively engaged with services and treatment and tested negative for illicit substances and maintained sobriety after ending abusive relationship; and, with finding vacated, mother could seek expungement of indicated finding in State Central Register and remove barrier to finding work in her chosen field, which was in children's best interest since poverty makes families vulnerable); Matter of Anoushka G., 132 A.D.3d 867 (court should have vacated neglect finding where parents' underlying conduct was aberrational; lead condition at home had been abated; and children's blood lead levels were within acceptable ranges and there was no risk that lead exposure would recur); Matter of Araynah B., 34 Misc.3d 566 (Fam. Ct., Kings Co., 2011) (finding vacated where respondent had addressed her problems and fully complied with dispositional order).

The terms and conditions of a suspended judgment must "relate to the acts or omissions of the parent or other person legally responsible for the care of the child." FCA §1053(a). The permissible terms and conditions are set forth in the Uniform Rules For The Family Court, 22 NYCRR §205.83. At least one of the enumerated terms and conditions must be included in the order. Uniform Rules, 22 NYCRR §205.83(a); see

Matter of Jesse D., 109 A.D.3d 990 (order suspending judgment invalid where it did not set forth any terms and conditions). Where the child is in foster care, the order must set forth the visitation plan for the child, and shall require the agency to notify the respondent of case conferences. A copy of the order, stating the duration and the terms and conditions, along with a current service plan, must be provided to the respondent. Uniform Rules, 22 NYCRR §205.83(a), (d).

The court may require the agency to make progress reports to the parties, the child's attorney and the court concerning implementation of the order. If the order was issued with the consent of all parties and the child's attorney, such a report shall be provided, no later than ninety days after issuance of the order, unless the court determines that, given the facts and circumstances, such a report is not required. FCA §1053(c).

### 2. Release To Non-Respondent Parent Or Legal Custodian Or Guardian

An order of disposition may release the child for a designated period of up to one year to a non-respondent parent or parents, or to a non-respondent person or persons who had been the child's legal custodian or guardian at the time of the filing of the petition. The order may be extended upon a hearing for a period of up to one year for good cause. FCA §1054(a); see Matter of Elizabetta C., 60 Misc.3d 603 (Fam. Ct., Clinton Co., 2018) (given fit parent's constitutional right to raise children, court may not place child without intervening parent's consent unless party advocating for placement demonstrates that parent is unfit or that other extraordinary circumstances exist).

The court may require the person or persons to whom the child is released to submit to the jurisdiction of the court with respect to the child for the period of the disposition or an extension thereof. The order may include, but is not limited to, a direction for such person or persons to cooperate in making the child available for court-ordered visitation with respondents, siblings and others; for appointments with and visits by the child protective agency, including visits in the home and in-person contact with the child protective agency, social services official or duly authorized agency; and for appointments with the child's attorney, clinician or other individual or

program providing services to the child. The order shall set forth the terms and conditions applicable to the non-respondent, child protective agency, social services official and duly authorized agency with respect to the child. FCA §1054(b).

In conjunction with the order, the court may also issue any or all of the following orders: an order of supervision of a respondent parent under FCA §1057, an order directing that services be provided to the respondent parent under FCA §1015-a or an order of protection under FCA §1056. An order of supervision may be extended upon a hearing for a period of up to one year for good cause. FCA §1054(c).

The court may require the child protective agency to make progress reports to the court, the parties, and the child's attorney on the implementation of the order. Where the order is issued upon the consent of the parties and the child's attorney, the agency shall report to the court, the parties and the child's attorney no later than ninety days after the issuance of the order and no later than sixty days prior to the expiration of the order, unless the court determines that the facts and circumstances of the case do not require the report to be made. FCA §1054(d).

It certainly behooves a non-respondent parent to seek FCA Article Six custody rather than gain custody of the child via a release of the child pursuant to §1054. The violation of an order could result in removal from the parent even if no Article Ten proceeding is commenced against him/her. Matter of Dashaun G., 117 A.D.3d 1526 (4th Dept. 2014), appeal dism'd 24 N.Y.3d 951 (no constitutional violation where court removed child from placement with father without requiring petitioner to commence neglect proceeding after father violated supervision order and petitioner sought removal by way of revocation of order). Yet, while a neglected or abused child's unique needs might justify some supervision of the non-respondent parent's home, it is hard to see how a child properly could be removed from that home in the absence of Article Ten charges and a finding of imminent risk.

### 3. Release To And Supervision Of Respondent

The court may release the child to the respondent or respondents. FCA §1057(a). In conjunction with such an order, or an order releasing the child in accord with FCA §1054, placing the child in accord with FCA §1055, or making an order of

protection in accord with FCA §1056, the court may place the respondent or respondents under supervision of a child protective agency or of a social services official or duly authorized agency. See Matter of Sheena D., 8 N.Y.3d 136, 831 N.Y.S.2d 92 (2007) (order of protection directing respondent father to stay away from children until their eighteenth birthdays was unlawful; even though family court released children to mother without supervision, court oversight and periodic review should take place whether or not underlying order has expiration date, and parties should be required to return to court on regular basis); Matter of Matthew M., 46 A.D.3d 903, 847 N.Y.S.2d 865 (2d Dept. 2007) (family court did not err in releasing child to father without supervision). The order of supervision shall set forth the terms and conditions of such supervision that the respondent or respondents must meet and the actions that the child protective agency, social services official or duly authorized agency must take to exercise such supervision. FCA §1057(b). Uniform statewide rules of court shall define permissible terms and conditions of supervision. FCA §1057(c); see also Uniform Rules, 22 NYCRR §205.83(b) (at least one of listed terms and conditions must be ordered).

As long as there is a basis in the record for requiring certain behavior, there is no requirement that the terms and conditions relate to behavior which was actually alleged in the petition. See Matter of Selena L., 289 A.D.2d 35, 734 N.Y.S.2d 123 (1st Dept. 2001) (direction that respondent undergo course of treatment for sex offenders was improper where family court had found insufficient evidence of sexual abuse); In re Tia B., 257 A.D.2d 366, 683 N.Y.S.2d 44 (1st Dept. 1999) (no error where directive in dispositional order required respondent, who had been in a three-year relationship with a known crack user and had been named in a social worker's report as a crack addict, to undergo random drug testing); see also Matter of Christopher H., 54 A.D.3d 373, 863 N.Y.S.2d 67 (2d Dept. 2008) (where father entered into "Alford" plea by consenting, without admission, to order finding that he sexually abused one daughter and derivatively neglected other daughter, father was entitled to hearing on visitation application where he alleged, inter alia, that therapist arranged for polygraph examination, examiner's opinion was that father's denials were truthful, and expert

concluded that father was thus not appropriate candidate for sex offender treatment); Matter of Derrick C., 52 A.D.3d 1325, 859 N.Y.S.2d 855 (4th Dept. 2008), lv denied, 11 N.Y.3d 705 (requirement that mother "acknowledge her role in the sexual abuse" of son was permissible condition of supervision; she could satisfy condition by acknowledging abuse occurred); Matter of Jemila PP., 12 A.D.3d 964, 785 N.Y.S.2d 185 (3rd Dept., 2004) (where dispositional order required respondent to, inter alia, "participate in sex offenders treatment program," respondent did not neglect child where he participated in program but failed to complete treatment within period of dispositional order, and failed to acknowledge responsibility for original abuse; dispositional order did not explicitly require respondent to complete program within specific time period and he should not be penalized for participating in longer treatment program approved by petitioner, and failing to acknowledge responsibility for abuse can constitute failure to plan and support termination of parental rights, but is insufficient to support finding of neglect); Matter of Kristi "AA", 295 A.D.2d 651, 742 N.Y.S.2d 920 (3rd Dept. 2002) (where respondent failed to sign sexual offender program contract containing clause admitting he is sexual offender, which was a prerequisite to admission and participation, Third Department rejects respondent's contention that family court violated his constitutional right against self-incrimination when it found him in willful violation of its prior order for refusing to admit he is a sexual offender; admission requirement of sex offender treatment program is therapeutic in nature and does not give rise to reasonable fear of criminal prosecution, particularly in light of privileges afforded by CPLR §4507 and 4508, and respondent failed to preserve argument that this case is different because he was required to sign waivers of his psychologist and social worker privileges); Matter of Bobbijean P., 46 A.D.3d 12, 842 N.Y.S.2d 826 (4th Dept. 2007), lv denied, 9 N.Y.3d 816 (court had no authority to issue supervision order prohibiting mother from becoming pregnant).

The duration of any period of release of the child to the respondent or respondents or supervision of the respondent or respondents or both shall be for an initial period of no more than one year. The court may at the expiration of that period, upon a hearing and for good cause shown, extend such release or supervision or both

for a period of up to one year. FCA §1057(d). See Matter of James U., 55 A.D.3d 972, 866 N.Y.S.2d 370 (3rd Dept. 2008) (extension of supervision proper where there was risk that respondent would permit child's father to have contact with child, and despite her disavowals of intention to allow father to return to household, respondent continued to deny that father had abused one of her daughters and did not fully comprehend risk posed to her son); Matter of R.B., 176 Misc.2d 530, 672 N.Y.S.2d 992 (Fam. Ct., West. Co., 1998) (court notes that statute contains no filing deadline for requests to extend supervision, but finds good cause for late filing in any event); see also Matter of Kevin M.H., 102 A.D.3d 690 (2d Dept. 2013) (children could seek extension of supervision and order of protection via motion pursuant to FCA §1061); Matter of Bernard P., 34 Misc.3d 1225(A) (Fam. Ct., Chemung Co., 2012) (order of supervision not automatically reviewed at permanency hearing; petitioner must file application for extension containing allegations demonstrating good cause, and, even if supervision could be extended without formal application, respondent is entitled to notice that extension is being considered).

The court must provide a copy of the order and the terms and conditions to the supervising agency and to the respondent. Uniform Rules, 22 NYCRR §205.83(c)(1),(d); but see Matter of Robert P., 132 A.D.3d 1032 (3d Dept. 2015) (where transcript reflected that respondent appeared with counsel and stipulated to imposition of conditions, they were binding regardless of whether they were reduced to written order and entered). The order must be accompanied by a statement informing the respondent that a willful failure to obey the terms and conditions may result in a jail term of up to six months. Uniform Rules, 22 NYCRR §205.83(c)(2).

The court may require the child protective agency to make progress reports to the court, the parties, and the child’s attorney on the implementation of the order. Where the order of disposition is issued upon the consent of the parties and the child’s attorney, such agency shall report to the court, the parties and the child’s attorney no later than ninety days after the issuance of the order and no later than sixty days prior to the expiration of the order, unless the court determines that the facts and circumstances of the case do not require such report to be made. FCA §1057(c).

If an order of supervision is issued in conjunction with an order of placement, the order shall, unless otherwise ordered by the court, be coextensive in duration with the placement order and extend until the completion of the permanency hearing. The order of supervision must be reviewed by the court along with the placement at the permanency hearing. 22 NYCRR §205.83(e); see also Matter of Fay GG., 97 A.D.3d 918 (3d Dept. 2012) (under narrow circumstances, court did not act beyond jurisdiction in directing respondent to participate in services in connection with child in placement who had elected to remain there after he turned eighteen where respondent's participation in services were in best interests of child).

**4. Placement**

**a. Generally**

Even when the child has already been removed, the burden is on the agency to establish the parent's present inability to provide adequate care; the burden is not on the parent to show that the child should be returned. See Matter of Kenneth G., 39 A.D.2d 709, 331 N.Y.S.2d 788 (2d Dept. 1972); see also FCA §1089(d) (at conclusion of permanency hearing, court must make determination "in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible"), and related case law.

The court may place the child in the custody of a relative or other suitable person pursuant to Article Ten, or of the local commissioner of social services or of such other officer, board or department as may be authorized to receive children as public charges, or a duly authorized association, agency, society or in an institution suitable for the placement of a child. FCA §1055(a)(i); see Matter of Erick X., 138 A.D.3d 1202 (3d Dept. 2016) (in father's Article Six proceeding seeking modification of order granting sole custody to mother, grandparents did not have to prove extraordinary circumstances where children were placed with them under Article Ten and not under Article Six); In re Tristram K., 25 A.D.3d 222, 804 N.Y.S.2d 83 (1st Dept. 2005) (family court improperly granted custody to aunt without full hearing; court also notes that under Article Ten placement with aunt, case would reappear before family court for

reassessment of child's adjustment to aunt's home and of mother's progress, and there would be permanency planning with mother).

The court may also place a child who it finds is a sexually exploited child as defined in SSL §447-a(1) with the local commissioner of social services for placement in an available long-term safe house. FCA §1055(a)(i).

The court also may place the child in the custody of the local commissioner of social services and direct the commissioner to have the child reside with a relative or other suitable person who has indicated a desire to become a foster parent for the child and further direct such commissioner, pursuant to regulations of the office of children and family services, to commence an investigation of the home of such relative or other suitable person within twenty-four hours and thereafter expedite approval or certification of such relative, if qualified, as a foster parent. If such home is found to be unqualified for approval or certification, the local commissioner shall report such fact to the court forthwith so that the court may make a placement determination that is in the best interests of the child. FCA §1055(a)(i).

The agency with which the child is placed "shall provide for such child as authorized by law, including, but not limited to [SSL §398]." FCA §1055(f).

An order placing a child with a relative or other suitable person may not be granted unless the relative or other suitable person consents to the jurisdiction of the court. The court may place the person with whom the child has been directly placed under supervision during the pendency of the proceeding. Such supervision shall be provided by a child protective agency, social services official or duly authorized agency. See Matter of Joshua J., 107 A.D.3d 893 (2d Dept. 2013) (no neglect where non-respondent father refused to allow DSS workers into his apartment and thereby violated terms and conditions of placement with him in neglect proceeding brought against mother; evidence did not establish impairment or imminent danger of impairment to child's condition). The court also may issue a temporary order of protection under FCA §1022(f), §1023 or §1029. An order of supervision shall set forth the terms and conditions that the relative or suitable person must meet and the actions that the child protective agency, social services official or duly authorized agency must take to

exercise such supervision. FCA §1055(a)(ii).

The court shall state on the record its findings supporting the placement, and the order of placement shall include, but not be limited to: a description of the visitation plan; a direction that the respondent or respondents shall be notified of the planning conference or conferences to be held pursuant to SSL §409-e(3), of their right to attend the conference, and of their right to have counsel or another representative or companion with them; and a notice that if the child remains in foster care for fifteen of the most recent twenty-two months, the agency may be required by law to file a petition to terminate parental rights. A copy of the court's order and the service plan shall be given to the respondent. FCA §1055(b)(i).

"Children placed under this section shall be placed until the court completes the initial permanency hearing scheduled pursuant to [FCA Article Ten-A]." FCA §1055(b)(i). If the child is being removed at disposition, the court shall set a date certain for the permanency hearing. 22 NYCRR §205.81(d). "Should the court determine pursuant to article ten-A of this act that placement shall be extended beyond completion of the scheduled permanency hearing, such extended placement and any such successive extensions of placement shall expire at the completion of the next scheduled permanency hearing, unless the court shall determine, pursuant to article ten-A of this act, to continue to extend such placement." FCA §1055(b)(i).

No placement may be made or continued beyond the child's eighteenth birthday without his/her consent and in no event past his/her twenty-first birthday. FCA §1055(e); see also Matter of Bridget Y., 92 A.D.3d 77 (4th Dept. 2011), appeal dism'd 19 N.Y.3d 845 (appeal moot as to children who had turned eighteen); Matter of Chanyae S., 82 A.D.3d 1247 (2d Dept. 2011) (because child had reached age of eighteen while appeal was pending, it was unnecessary to remit matter for dispositional hearing); Matter of Daniel W., 37 A.D.3d 842, 831 N.Y.S.2d 244 (2d Dept. 2007) (on remand, dispositional hearing need not include children who had turned eighteen because they could no longer be considered derivatively abused).

However, a former foster youth who was previously discharged from foster care due to a failure to consent to continuation of placement may be returned to foster care

placement if the court has granted the motion of the former foster care youth or local social services official upon a finding that the youth has no reasonable alternative to foster care and has consented to enrollment in and attendance at a vocational or educational program in accordance with FCA § 1091. FCA §1055(e); see also Matter of Tashia R., 29 Misc.3d 1091, 909 N.Y.S.2d 345 (Fam. Ct., Clinton Co., 2010) (despite child's previous consent, foster care ended when child turned eighteen because she was incapable of understanding concept of foster care; guardian could not consent after-the-fact since consent was required at time of child's eighteenth birthday).

Upon entry of a dispositional order in a termination of parental rights proceeding brought pursuant to SSL §384-b, an Article Ten order placing a child or extending placement is suspended, and expires upon the expiration of the time for appeal of the order, or upon the final determination of any appeal or appeals, in the termination proceeding. Where guardianship and custody have been committed pursuant to SSL §384-b or parental rights have been surrendered pursuant to SSL §383-c or §384, the child is deemed to continue in foster care until an adoption or other alternative living arrangement is finalized. The Article Ten order will not be suspended or expire with respect to any parent against whom a dispositional order in a termination proceeding has not been issued. FCA §1055(f).

**b. Inquiry And Determination Regarding Non-Respondent Parents And Relatives And Other Suitable Caretakers**

Presumably, by the time of placement the court has complied with the provisions of FCA §1017, which are designed to facilitate the involvement of non-respondent parents and relatives, and other suitable persons, who are willing to provide care for the child. If not, the court, upon a determination to enter an order of disposition placing the child pursuant to FCA §1055, must immediately require the local social services district to report to the court the results of any investigation to locate any non-respondent parent or relatives of the child, including all of the child`s grandparents, all suitable relatives identified by any respondent parent and any non-respondent parent and all relatives identified by a child over the age of five as relatives who play or have played a significant positive role in the child`s life, as required by FCA §1017. Such report shall