

# **SELECTED CHILD WELFARE CASELAW**

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## GENERAL EVIDENTIARY MATTERS in ART 10s

### **Matter of Isaiah T.F.C., 136 AD3d 687 (2<sup>nd</sup> Dept. 2016)**

The Second Department reversed Kings County Family Court for refusing to hold a full evidentiary hearing on a father's application to order ACS not to administer a psychotropic drug to the father's child who was in foster care. The concern regarding the child's proposed medical treatment deserves a full hearing on the issues of the child's liberty interests, the benefits of the treatments, the adverse side effects and any less intrusive alternative treatments. This question should not be decided upon papers only.

### **Matter of Annabella B.C., 136 AD3d 1364 (4<sup>th</sup> Dept. 2016)**

After an Erie County respondent consented to an adjudication on an Art. 10 case, she both appealed and moved in Family Court for a motion to vacate the order. The lower court dismissed her motion to vacate the order, ruling that she had an appeal pending that would decide the issue. However, the Fourth Department rejected the appeal, citing that there is no appeal of a consent adjudication, that the respondent's only option was a motion to vacate brought in the lower court. The appellate court reversed the dismissal of the motion and remanded the motion back to Family Court for decision.

### **Matter of Tremmel A., 50 Misc3rd 1219(A) (Monroe County Family Court 2016)**

When Monroe County DSS placed a newborn infant in foster care, they did not notify the adoptive parents of several half siblings of the infant as was required by a new statute. The adoptive home of the 9 year old half brother of the infant stepped forward seeking placement of the infant in their foster care. DSS supported moving the baby the home with the sibling. The Family Court declined to move the infant relying on evidence that the baby had formed an attachment to the first foster family. The court did cite 18 NYCRR § 431.10(e) and ordered that DSS set up sibling visitation.

### **Matter of T.P., 51 Misc3rd 738 (Kings County Family Court 2016)**

King County Family Court stuck the testimony of a police officer who admitted using sealed records from a respondent's related criminal proceeding to refresh his recollection. The court

would not have struck the testimony had the officer only used documents that were not sealed – such as the caseworkers notes or the officer’s memo book.

**Matter of Madison J.S., 136 AD3d 1404 (4<sup>th</sup> Dept. 2016)**

The Fourth Department affirmed the Steuben County Family Court’s dismissal of derivative neglect findings regarding three siblings of a targeted child. The appellate court found that there was not legal mandate to make derivative findings regarding siblings when a target child is neglected. Here there wasn’t evidence that the neglect of the one child was repeated or that it was extended to multiple children. There was no clear evidence that the siblings were even nearby when the neglect took place.

**Matter of Zeykis B., 137 AD3d 1121 (2<sup>nd</sup> Dept. 2016)**

The Second Department reversed Kings County Family Court’s dismissal of a neglect petition under FCA §1051 c. The respondent had neglected the children by engaging in domestic violence against the children’s mother in their presence. However the respondent had thereafter relocated to Georgia. The lower court ruled that there was no way to enter a meaningful dispositional order and therefore the aid of the court was not required. On appeal the Second Department found this to be error as relocation is not a valid reason under law to dismiss. The respondent was the biological father of at least one of the children and could return at any time. Also the children are all still minors and the finding may affect future proceedings regarding them.

**Matter of Chloe W., 137 AD3d 1684 (4<sup>th</sup> Dept. 2016)**

Two issues were reviewed by the Fourth Department in a Cattaraugus County neglect case that resulted in a reversal of the adjudication and a remand of the matter. In first issue the appellate court did support the lower court’s determination. The child had been born in Pennsylvania and lived there for the 2 days until DSS brought the petition in NYS. The appellate court concurred that under UCCJEA, jurisdiction could be exercised in a New York Court as the child and the family had a significant connection to New York. Just before the birth, the mother went to Pennsylvania to stay with a cousin until the baby was born. The mother had maintained her apartment in New York State and had been attending parenting classes and mental health counseling in New York State before the child was born. Further most of the mother’s family resided in New York State. The second issue however, resulted in the Fourth

Department reversing and remanding. The lower court erred in allowing into evidence a 3 year old report from a forensic psychologist who did not testify in person. The report was hearsay and it did not qualify as a business record. This error was not harmless as the court's decision that the mother had neglected the infant was in fact largely based on the report. The family court had quoted extensively from the report in its decision.

**Matter of Maddock E., 138 AD3d 559 (1<sup>st</sup> Dept. 2016)**

Without discussing any of the facts, the First Department reversed New York County Family Court's previous ruling that a fetus could be the subject of a neglect petition. In the lower court decision the facts were that the father engaged in domestic violence against a woman by choking her when she was in her 9<sup>th</sup> month of pregnancy. There had been six orders of protection issued against him and he had been arrested only a month before for violating the orders of protection. The appellate court indicated that the issue was now moot but that the reversal of the lower court decision was needed so that it would not be cited as precedent.

**Matter of Dominic B., 138 AD3d 1395 (4<sup>th</sup> Dept. 2016)**

The Fourth Department reversed a neglect adjudication from Cattaraugus County Family Court. In making the decision, the lower court relied heavily on a psychological evaluation of the mother that was not in fact received into evidence. The parties had expressly stipulated that if mother would have the evaluation pre fact-finding , any report would not be used as evidence in the fact-finding nor as evidence to amend the neglect petition. The court violated the mother's right to due process when it relied on a report not admitted in evidence. The matter was remitted for a new fact finding although the appellate court commented that "a new hearing may no longer be necessary" in light of information the parties supplied at the oral argument.

**Matter of Tyler M., 139 AD3d 1401 (4<sup>th</sup> Dept. 2016)**

The Fourth Department reversed Erie County Family Court's neglect adjudication. The evidence consisted of the mother's out of court admissions to the caseworker and the police. These out of court statements are hearsay and are not admissible against the father. No other proof existed that the child was impaired or in imminent danger of becoming impaired based on the father's behavior.

**Matter of Thomas B., 139 AD3d 1402 (4<sup>th</sup> Dept. 2016)**

Although an Ontario County neglect adjudication was affirmed on appeal, the Fourth Department remitted the matter for a new dispositional hearing ruling that the lower court should have allowed the respondent mother to appear by telephone under DRL § 75-j. The mother had relocated to Florida between the fact finding and the dispo with the knowledge and assistance of the DSS. She then requested permission to make future appearances by telephone but the lower court found that the mother should be present in person. The lower court did not consider the mother's limited financial resources in determining that she would have to appear in person. The appellate court did find that the dispositional order was properly entered on default as the mother failed to appear and her assigned attorney indicated that he had been instructed by the mother to seek to be removed as counsel. The court then appointed a new attorney for the mother who declined to be heard. The appellate court also ruled that the remitted dispositional hearing need only involve the younger child as the older child was now over 18.

**Matter of Gabrielle N., 139 AD3d 504 (1<sup>st</sup> Dept. 2016)**

Respondent parents appealed a neglect adjudication from the Bronx County Family Court. The allegations were that they had neglected their special needs child by interfering with the child's medical care and refusing to consent to needed surgery. However, the First Department remanded the matter for a reconstruction hearing as the appeal record did not include the child's many medical records that had been admitted into evidence.

**Matter of Baby Girl Z., \_\_AD3d \_\_\_\_, dec'd 6/8/16 (2<sup>nd</sup> Dept. 2016)**

The Second Department reversed a Queens County Family Court's order that the subject children in an Art. 10 matter be immunized over the mother's objection. The AFC had brought the motion regarding children who were in ACS foster care. PHL § 2164 allows parents who hold genuine and sincere religious beliefs to choose not to have their child immunized as is otherwise required by law. The statute puts the burden on the parent to prove their beliefs by a preponderance of the evidence. The mother's claim that the court was biased was not preserved as she did not move for a recusal. However, the appellate court reversed the order finding that the record demonstrated that the lower court had a predetermined outcome during the hearing. The court "took an adversarial stance, aggressively cross-examined the mother, continually interrupted her testimony, mocked her beliefs, and generally demonstrated bias." The matter was remitted to a different Family Court Judge.

## GENERAL and MIXED NEGLECT

### **Matter of Sahairah J., 135 AD3d 452 (1<sup>st</sup> Dept. 2016)**

Two New York County parents neglected their children by failing to provide medical care, adequate housing and by their use of drugs. The middle child was medically neglected as he had a full body rash and the parents did not return the child to the hospital as directed when the rash did not improve. The child in fact had scabies. The home was dirty, smelled and was infested with bed bugs and roaches. There was a large hole in the wall. The father admitted he used "K2", a synthetic marijuana, every other day. ACS called an expert to testify that "K2" was a Schedule 1 controlled substance. The FCA §1046 statutory presumption of neglect therefore applied and the father was unable to refute it.

### **Matter of Keith H., 135 AD3d 483 (1<sup>st</sup> Dept. 2016)**

A New York County newborn was derivatively neglected based on prior findings regarding the mother's older children. The prior findings involved excessive corporal punishment and concerns about the mother's mental health. The petition on this child was filed 4 months after the adjudication on the older children and the mother did not argue that this was remote in time. She did argue that she had improved. The evidence indicated that she had completed a mental health evaluation, a parenting skills program and an anger management program. She also regularly visited her older children. However she had failed to see a psychiatrist and take medication which had been recommended. She did not acknowledge that her prior behavior was a problem. Her therapist testified that the mother's condition had improved significantly, that she had already gotten all the services needed and that she did not need medication. However, the lower court appropriately discredited the therapist's opinion. She had never reviewed the mother's mental health evaluation, had not reviewed notes from prior therapist and did not really fully understand the mental health concerns that had resulted in the prior neglect findings.

### **Matter of Derick L., 135 AD3d 499 (1<sup>st</sup> Dept. 2016)**

The First Department upheld a neglect adjudication against a Bronx mother. The child missed 63 of the first 73 days of school. The mother also had long standing mental illness and she

rejected treatment. Her mental illness resulted in her failure to see that the child needed services and needed to go to school.

**Matter of Harper v NYS SCR 135 AD3d 519 (1<sup>st</sup> Dept. 2016)**

The First Department agreed that an indicated report against a foster mother should remain on the SCR. The foster mother delayed medical treatment for a 13 month old foster child in her care after the child fell out of his crib and hit his head. She waited 3 days to seek medical treatment for the child although she had been trained as a foster parent to seek medical attention for such an injury right away. It did not matter that the child's fall may have been broken by having fallen first on top of another child. Such a young baby could not have been able to tell the foster mother about any pain and could have suffered injuries that were not apparent absent medical evaluation. The fact that this indicated report may impede her ability to continue to foster children does not warrant unounding the report.

**Matter of Angelina M., 135 AD 651 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed New York County Family Court's adjudication of neglect regarding a man who was the father of the youngest of three subject children. He was a person legally responsible for the older two children. The respondent had PTSD, was bi polar and suffered from depression. He punched one of the children in the face in an attempt to extract a loose tooth. The older children made out of court statements that he choked the mother and threatened to kill her and that this happened in front of them. He also choked one of the children, threatened to kill the children and threatened to kill the caseworker. The children's out of court statements cross corroborated each other. Both the mother and two of the children were observed to have bruises.

**Matter of Marcus II., 135 AD3d 1002 (3<sup>rd</sup> Dept. 2016)**

Chemung County Family Court's adjudication of neglect was affirmed on appeal. The mother had 2 teenage sons and had some prior involvement with child protective. The two boys were declared JDs after they burglarized a school and had both been placed in a group home. A neglect petition was filed against the mother after the teens had been in placement for several months. Mother's argued that she was not a proper respondent since she did not have legal custody of the boys. However, the appellate division agreed that as she was a parent, it was immaterial that she did not have legal custody. She neglected the boys while they were home on an unsupervised visit and the mother tested positive for cocaine. Thereafter she refused any other drug testing even though this meant she would not be allowed unsupervised visitation. She also exposed the children to domestic violence. The mother's paramour assaulted her in front of the boys which upset the boys who were afraid of him. Even though she knew how the

boys felt, she brought the paramour to meetings with the group home and he was in her home during the boys' visits. She was often irate with the boys, yelled and used profanity toward them and the caseworkers. Meetings would have to end due to her behavior. The boys would respond to this behavior by mirroring their mother and acting out toward the staff at the group home.

**Matter of Chastity O.C., 136 AD 407 (1<sup>st</sup> Dept. 2016)**

ACS brought a neglect petition against a mother as it related to her teenage daughter and brought a petition against the teen mother as it related to her infant child. New York County Family Court found neglect on both petitions. However, the First Department reversed as to the mother of the teen and affirmed as to the teen in relation to her baby. The appellate court found that ACS had not provided sufficient proof of neglect as to the mother of the teen. Although the teen did not attend school, the mother had "formidable obstacles" in trying to get her daughter to go to school – including language issues and the fact that the teen was "violent and destructive." At the time of the filing of the petition, the mother had not placed her teenage daughter at imminent risk of neglect based in education or medical needs. She had been able to get her daughter to attend family therapy. Although she had not been able to get the teen into drug treatment, the mother believed that the teen had stopped abusing substances due to her pregnancy. In fact, at that point, ACS had stopped offering services to them.

However the First Department concurred with the lower court that the teen had neglected her new baby. She had a substantial history of substance abuse and never engaged in treatment. The young woman used drugs during her pregnancy and tested positive for marijuana when the baby was born. While she did engage in family therapy with her own mother, this did not address the drug issues. The presumption based on her drug use is enough to show that the baby was neglected; no actual harm to the baby needs to be proven. Lastly, since the facts of these two matters were related and involved the same witnesses, the lower court did not err in denying a motion to sever the matter into 2 fact finding hearings.

**Matter of Lakiyah M., 136 AD3d 424 ( 1<sup>st</sup> Dept. 2016)**

New York County Family Court's determination that a mother neglected her child was affirmed on appeal. She had an untreated psychiatric condition and abused substances and she had no insight that these issues would have an effect on her ability to take care of the child and would put the child at imminent risk of neglect.

**Matter of Dante W. 136 AD3d 473 (1<sup>st</sup> Dept. 2016)**

A father from the Bronx neglected his child. He misused alcohol to the extent that he lost control and injured the child with excessive corporal punishment. The child was observed to have bruises. The child's out of court statements regarding the father's neglect were corroborated as well by a neighbor's testimony who had witnessed one of the incidents. The father was ordered to submit to a mental health evaluation, complete an alcohol rehab program and a special needs parenting course. He was also ordered to have no visitation with the child until both a licensed counselor recommended visitation and the child was in agreement with visitation.

**Matter of Melanie C., 136 AD3d 512 (1<sup>st</sup> Dept 2016)**

A New York County mother neglected her child by threatening to kill herself and the child in the child's presence. The mother did not take her own medications and failed to provide medication for the child whose diaper rash was severe.

**Matter of Isobella A., 136 AD3d 1317 (4<sup>th</sup> Dept. 2016)**

A Cattaraugus County mother appealed the Family Court's determination that she neglected her 2 children and also appealed the court's award of Art. 6 custody of the children to their respective fathers. The Appellate Division affirmed the lower court. The mother neglected the children by alienating them from their respective fathers. She interfered with visitation and made false allegations against the fathers. She forced her son to lie about his father and videotaped the child telling the lies. She confused her daughter about her father to the extent that the child was confused as to who her father was and this resulted in a diagnoses of an adjustment disorder and poor behavior in school. The lower court properly combined the Art. 10 with the Art. 6 petitions by the respective fathers as many of the issues were the same. Out of court statements by the children of the neglect by the mother were admissible in the Art. 6 proceedings. This is well settled by the caselaw. Most of the children's out of court statements were corroborated and if some of them were not, it was harmless error. The mother's argument that the AFC for her daughter should not have substituted judgment had no merit. The child was 5 and 6 years old during the proceedings and the evidence showed that the child lacked the capacity for knowing, voluntary and considered judgment on the issues.

**Matter of Julio O., 137 AD3d 454 (1<sup>st</sup> Dept. 2016)**

The Bronx County Family Court properly ruled that a mother had neglected her child by failing to attend to his numerous special needs and by failing to follow through on a dispositional order on an earlier neglect adjudication. She derivatively neglected her other 3 children by this

action. Those children also were having difficulty in school and had hygiene issues. The older children had been the subjects of the prior neglect adjudication.

**Matter of John S. 137 AD3d 706 (1<sup>st</sup> Dept.2016)**

The First Department agreed with New York County Family Court that a mother neglected her child. While intoxicated, she assaulted the child's father in front of the child and also assaulted the child. After the petition was filed, the mother did complete intensive outpatient therapy but that does not change the fact that neglect occurred nor does it warrant a dismissal under FCA § 1051 c.

**Matter of Lopez v NYS OCFS 137 AD3d 1143 (2<sup>nd</sup> Dept. 2016)**

The Second Department refused to unfind an indicated report regarding a day care provider. The day care provider neglected a 4 year old boy in her care by failing to supervise the children at the day care. The boy was touched in a sexual way by another child. The boy was also told about sexual activities repeatedly by another child at the day care and this resulted in the 4 year old acting out sexually at home.

**Matter of Trinity E., 137 AD3d 1590 (4<sup>th</sup> Dept. 2016)**

Monroe County Family Court's determination that a father neglected his daughter was affirmed on appeal to the Fourth Department. The father had a long standing history of mental illness and he refused treatment. He also allowed the mother to care for the child and he knew she was not a suitable caretaker. Further, he exposed the child to an act of domestic violence. The the petition did not allege that the child had failed to thrive, but the court did not base its decision on this unalleged issue and only noted the situation in a foot note.

**Matter of Ashley B., 137 AD3d 1696 (4<sup>th</sup> Dept. 2016)**

Erie County Family Court's determination that a mother neglected her two older children and derivatively neglected her two younger children was affirmed on appeal. The mother forced her older children out of the house for days at a time. The children had to stay in shelters or on the streets. They were unsupervised and at imminent risk. Although the mother denied that this happened, the lower court made proper credibility determinations. The younger children

were derivatively neglected as the mother's behavior demonstrated an impaired level of parental judgment.

**Matter of Nadia S., 138 AD3d 526 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed a New York County Family Court adjudication that the parents neglected their daughter. The child was severely underweight and the parents did not comply with the child's doctor's recommendations or seek other medical advice. In fact the parents did not obtain further treatment of the child for 6 months. Further the father had untreated mental illness issues that resulted in his being committed involuntarily to a hospital. The mother admitted that she was fearful of his behavior and would not let him kiss the baby as she feared he would bite the baby. The mother described the father as talking to himself for 2 hours at a time and as being unstable with angry outbursts. However she left the child with the father while she went to work. The father used marijuana almost every day and refused to seek treatment. A negative inference was properly drawn from the mother's failure to testify.

**Matter of Jaci Robert B.A., 138 AD3d 550 (1<sup>st</sup> Dept. 2016)**

A New York County mother had been found to have neglected her older children less than a year before the birth of this child. She had been aware that her paramour had sexually abused one of her older children but had continued to be involved with him. The petition regarding the newborn was sufficiently proximate in time to find that this child was derivatively neglected. The mother had failed to make plans separate from the paramour and was not in compliance with her service plan.

**Matter of Anthony B., 138 AD3d 563 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed New York County Family Court's determination that a mother neglected her 2 year old son by failing to provide adequate shelter for him. The mother was unemployed and left her parent's home after disagreeing about the rules. She lied about her own mother's behavior to obtain an order of protection in order to qualify for a homeless shelter. She was then kicked out of the shelter for failing to obey the rules there. For at least a week she spent the nights riding the subway with the child. She claimed that she was also able to stay with a friend but when asked, could not provide the friend's name or address. When she did ultimately return to her parent's home, the child was observed to be "pale" and "hungry" and "not well taken care of".

**Matter of Riley C., 138 AD3d 990 (2<sup>nd</sup> Dept. 2016)**

A Suffolk father neglected his child when the father drove his car deliberately into another car in which the child was seated.

**Matter of Jailene A., 138 AD3d 1115 (2<sup>nd</sup> Dept. 2016)**

Richmond County Family Court correctly determined that a father neglected his children by putting them at imminent risk. One of the children called 911 after the father had been shot in the head and leg. When the police arrived, the father was lying on the floor with a gun near him and there were bullet holes in the door and shell casings inside and outside the apartment. There were 30 bags of marijuana on the kitchen table. The father told the CPS worker that he knew he was going to be robbed and so he put the marijuana in plain view so the robbers would just take it and not search the apartment and find the children who he claimed to have put in a back room.

**Matter of Olivia R., 138 AD3d 1122 (2<sup>nd</sup> Dept. 2016)**

The Second Department agreed with Orange County Family Court that a mother had neglected her two children who were 1 and 5 years old. She had left the young children alone at night and one child left the home and wandered outside unsupervised. A neighbor found the child and returned her to the home. The court ordered that the mother be supervised, go to parenting classes, have a mental health examination and meet monthly with the caseworker.

**Matter of Dawn M. v NYS SCR 138 AD3d 1492 (4<sup>th</sup> Dept. 2016)**

An Erie County grandmother's indicated report should not be unfounded. The two grandchildren lived with the grandmother and had been sexually abused by the grandmother's boyfriend's son. The girls' therapist had set up a treatment plan that included the boyfriend living in a separate residence as his presence made the girls uncomfortable. However the grandmother did not prevent the boyfriend from performing a "technique" on the girls that he called "Cloud 9" where he would run his hands up and down the sides of the girl's bodies. The girls told the grandmother that this made them uncomfortable but she did not stop it. The fact that other accusations that the girls made were later recanted by them did not require a different outcome. Lastly, a decision in a fair hearing can be written by a person who did not preside over the hearing.

**Matter of S.P., 51 Misc3rd 1205(A) (Onondaga County Family Court 2016)**

Onondaga County Family Court adjudicated a father to have neglected a newborn child where the father had previously been found to have sexually abused a 6 year old child. The father had served 4 years in prison. He was designated a level 3 sex offender and had then violated parole as he was in possession of pornography. He was sent back to prison. He provided no evidence that he had been rehabilitated. He had lost visitation rights to two of his other children and that was matter had been affirmed by the Fourth Department. The mother, who had mental health issues, neglected the infant as well. She was rough with the child and used profanities toward the child.

**Matter of Jonathan M., 139 AD3d 438 (1<sup>st</sup> Dept.2016)**

The New York County Family Court was affirmed on appeal to the First Department. The mother neglected her child as she left the child in the care of a paramour who used excessive corporal punishment on the child. The mother knew or should have known that the child was being neglected and she took no steps. Further the child was educationally neglected, having missed an excessive number of days of school. The boy had significant academic delay in all subjects and it was not clear if the child would pass to the next grade level. The mother was not responsive to the school's attempts to seek her involvement to resolve the child's school issues.

**Matter of Dior Z.J., 139 AD3d 1065 (2<sup>nd</sup> Dept. 2016)**

The Second Department affirmed a Queens County father's adjudication of neglect. He left the child with the mother despite knowing that the mother was violent and had a history of untreated mental illness. He knew that there was an order of protection that directed the mother to stay away from the child. After the child went into care, the father failed to tell the foster care agency how to contact him and did not communicate with the agency or the child for several months. The Family Court did not err in allowing ACS to reopen the proof to provide for testimony from the caseworker about the father's neglect of the child after the placement in foster care.

**Matter of Rakeem M., 139 AD3d 622 (1<sup>st</sup> Dept. 2016)**

A New York County mother neglected her children by having her transient, nomadic lifestyle. She and the children essentially had no home or shelter to live in and they ate junk food. The mother and children would sleep in the subway, in 24 hour restaurants and in storage facilities. The daughter was molested by a felon who also lived in one of the storage facilities. The fact that the mother and the daughter recanted the incident of the molestation was not credible.

The mother also educationally neglected the children in that she claimed to be homeschooling when she was simply having the children sit in the library during the day and use the library computers. She had not sought any approval from the school board to home school in any event.

**Matter of Stephanie RR., \_\_AD3d\_\_, dec'd 6/2/16 (3<sup>rd</sup> Dept. 2016)**

Sullivan County Family Court's adjudication of neglect regarding a father of 4 children who was also a grandfather of 2 children was affirmed on appeal. One child gave extensive oral and written out of court statements to the caseworker. He stated that the respondent frequently hit him, slapped him and smacked him, 2 of the other children and his mother. This child recalled being slapped in the face and being pushed to the garage floor with sufficient force to chip his teeth while the respondent laughed. This boy feared for his sisters and would check on them every morning to see if they had been hurt in the night. He described an incident where the respondent punched one sister twice for no reason. One sister had to wear some sort of a cast due to injuries the respondent had inflicted. This boy also described watching his mother get hit with objects and watching the respondent burn his mother's arm with a lighter. The father had been charged with rape and was then incarcerated and this child stated he was "happier" that the hitting had now finally stopped. The mother testified in court and corroborated the child's descriptions of the violence in the home. She said the respondent burned her with a lighter in front of one of her sons, dragged her by the hair in front of all of her children and hit her with a baseball bat. She described the children as being upset and frightened by witnessing the violence he used on her. She also concurred with the child's out of court statements that the respondent regularly hit, slapped and pushed the children. The respondent denied the violence but the lower court found the mother credible.

**Matter of Joelle T., \_\_AD3d\_\_, dec'd 6/16/16 (1<sup>st</sup> Dept. 2016)**

A Bronx mother neglected her child when she left the child at ACS with only the clothing the child had on. The mother made no provisions for food, clothing, shelter, medication or psychiatric care – all of which the child needed. The mother told the caseworker that she was not willing to take care of the child anymore and refused to work with the agency to deal with the problems the child did have. The mother had not provided the child previously with prescribed medications

**Matter of Nadjmaah S. B., \_\_AD3d\_\_, dec'd 6/22/16 (2<sup>nd</sup> Dept. 2016)**

A Kings County mother neglected her child by failing to provide adequate food and medical care. The child was at the 94<sup>th</sup> percentile for weight at birth but then dropped to the 15<sup>th</sup>

percentile by 13 months of age. The child had failed to thrive as the mother failed to give the baby adequate nutrition. The child gained weight after removal from her mother's care.

**Matter of Demetrius R., \_\_AD3d\_\_, dec'd 6/23/16( 1<sup>st</sup> Dept. 2016)**

New York County Family Court's adjudication of neglect was affirmed on appeal. A mother neglected her child by providing the child with only a vegan diet which resulted in the child being diagnosed as failure to thrive. She also refused to let the child be vaccinated and did not obtain medical and nutritional advice regarding the child's condition.

**Parental Mental Illness**

**Matter of Gabriel Y., 135 AD3d 781 (2<sup>nd</sup> Dept. 2016)**

The Second Department affirmed a neglect adjudication against a Suffolk County mother. The mother's mental illness placed the child in imminent danger of impairment.

**Matter of Justine N., 136 AD3d 452 (1<sup>st</sup> Dept. 2016)**

New York County Family Court was affirmed on appeal regarding the neglect of 4 children. The mother had mental health issues and engaged in "bizarre behaviors indicative of paranoid ideation". She demonstrated persecutory ideation and was functionally impaired to the point that she may have been suffering from a psychotic disorder. The mother forced the 15 year old out of the home overnight. The youngest child had nightmares and feared being sent home again and the lower court properly ended visitation for that child.

**Matter of Alexisana PP., 136 AD3d 1170 (3<sup>rd</sup> Dept. 2016)**

A Clinton County mother had her parental rights terminated to two children on mental illness grounds and then one year later had another child, the subject of this neglect petition. The Third Department agreed that this infant was derivatively neglected and that the lower court properly issued a FCA § 1039-b order for no efforts toward reunification based on the prior TPRs. The mother had a lengthy history of mental illness and failed to get treatment. She had placed the older two children at imminent risk due to her mental health problems. She was bipolar and had adjustment and personality disorders. The mother was aggressive, exhibited anger and was suicidal. She had placed her other children in a variety of unsafe situations –

including leaving them unattended in the bathtub and unattended in a room where they broke a window and were injured. She had left her older children unsupervised such that they spread their feces on the walls, floors and toys and had left them alone in an apartment where there was a door to an open second floor balcony. In the prior TPRs on the older children, there had been expert opinion that she was not capable to provide safe care for the children for the foreseeable future. She had not received any treatment since the prior TPRs and believed she did not need any treatment as she was getting vitamin shots and felt that this was resolving her issues. The lower court also noted that the mother's in court demeanor demonstrated that her mental health issues had not been addressed. The "no reunification efforts" order was appropriate. The defense did not even respond to the motion for the order as the attorney could not locate the mother.

**Matter of Michael P., 137 AD3d 499 (1<sup>st</sup> Dept. 2016)**

The First Department concurred with New York County Family Court that a mother's mental illness resulted in neglect of her child. The mother had paranoid delusions in which she believed her neighbors were harassing her and talking about her and that she is friends with an international pop star. The child's teeth are badly decayed and the mother failed to obtain dental care for him. Her untreated mental health issues result in her inability to provide basic supervision and guardianship which create a substantial probability that the child would be at imminent risk of harm in her care. Expert testimony as to how her mental illness would impair the child was not needed. The mother's failure to testify resulted in the court being able to make the strongest inference against her.

**Matter of Kiemiyah M., 137 AD3d 1279 (2<sup>nd</sup> Dept. 2016)**

Queens County Family Court's dismissal of a neglect petition was reversed on appeal. The Second Department found that the mother's mental illness posed an imminent danger to the child becoming impaired. The child was not yet 4 months old and she and the mother lived in a homeless shelter. The mother suffered paranoia and had delusions. The mother called the police on several occasions claiming that there were people outside the shelter who were threatening her and the baby. The proof at the hearing was that these beliefs were delusions. These delusions would become more vivid and unrealistic as she continued to talk about them. One cold night, the child was dressed only in a diaper and was shivering near an open window while the mother was not paying attention as she was distracted by these delusions. The mother was hospitalized and the child was removed. The mother did not follow up with mental health evaluations and her condition had not been resolved.

**Matter of Thomas B., 139 AD3d 1402 (4<sup>th</sup> Dept. 2016)**

An Ontario County mother neglected her children which warranted their placement in foster care. The mother engaged in bizarre and paranoid behavior toward the older child and this occurred in the presence of the younger child. There is no requirement that the DSS prove that a parent suffers from any particular diagnosis nor is DSS required to offer medical proof.

**Matter of Zoey A., 139 AD3d 528 (1<sup>st</sup> Dept. 2016)**

New York County Family Court's adjudication of neglect was affirmed on appeal. The mentally ill mother exhibited bizarre behavior in caring for her infant. The mother handled the child roughly, did not support the child's neck and head while holding her, left her unattended and did not keep her clean and changed. The mother's mental illness was severe, she displayed symptoms and would not acknowledge her problems and would not comply with treatment.

**Excessive Corporal Punishment**

**Matter of Nataysha O. 135 AD3d 660 (1<sup>st</sup> Dept. 2016)**

A Bronx County Family Court dismissal of neglect allegations was reversed by the First Department. The Appellate Division found that there was a preponderance of the evidence that the respondent had deliberately burned a child who was not yet 4 years old as punishment for the child having taken a toy from another child. The child was observed to have a round burn on the inner arm and the little girl stated to a caseworker that "Daddy burn me with a cigarette" when asked how she received her "boo boo". With another caseworker, the preschooler also used a circular motion to show that something had been pressed against her arm and referred to "poppy" as the person who gave her the mark. The respondent's testimony was determined to be "inherently improbable". He claimed that the child had come in contact with the lit cigarette by accident but he gave varying accounts and the location of the burn made that unlikely. Further he testified that the mark did not appear until the next day, that the mark was only the size of a mosquito bite and that the photo put in evidence of the mark was not accurate. Even though this was a single incident, intentionally burning a child demonstrates a strongly impaired parental judgment. This also is sufficient to find derivative neglect on the other children.

**Matter of Dylenn V., 136 AD3d 1160 (3<sup>rd</sup> Dept. 2016)**

A Schuyler County stepfather used excessive corporal punishment on his 14 year old stepson and his 12 year old stepdaughter. Both children made out of court statements that the stepfather was hitting them on an ongoing basis, cross corroborating each other. The stepfather punched and hit them with an open hand and a closed fist. The boy described an incident where the stepfather choked him and restrained him in a headlock. The children's grandparents who had lived with the family for about a month at one point corroborated the out of court statements of the children. They described seeing the stepfather use excessive corporal punishment on both children on more than one occasion. The children and their mother had relocated out of state before the dispositional hearing and the lower court issued an order of protection against the stepfather. The appellate court disagreed with the respondent's argument that it was inappropriate for the court to pursue the matter since the respondent and the children's mother had ended their relationship.

**Matter of Joseph R., 137 AD3d 420 (1<sup>st</sup> Dept. 2016)**

A New York County boy testified that his mother used excessive corporal punishment on him on a regular basis. She used a belt to strike him and made him kneel on rice while naked. She scratched the child deep enough to cause him to bleed and kneed him in the groin. The mother also used excessive corporal punishment on the daughter. It was in the children's best interests to be placed with their father even though his apartment was overcrowded. He was clearly attending to the children's needs.

**Matter of Jahmya J., 137 AD3d 1132 (2<sup>nd</sup> Dept. 2016)**

ACS appealed Kings County Family Court's failure to find derivative neglect regarding a sibling in an excessive corporal punishment case but the Second Department affirmed. Although the mother neglected one of her 15 year old twins by inflicting excessive punishment on her, there was nothing to show that the other twin was at risk. The court noted that the other twin did not want to be involved in the court proceedings and had not herself been attacked by the mother.

**Matter of Nephra P.I., 139 AD3d 485 (1<sup>st</sup> Dept. 2016)**

A newborn New York County child was derivately neglected based on the prior finding that the parents had used excessive corporal punishment on the older children. The older children had provided out of court statements that the father inflicted excessive corporal punishment on them and that the mother was aware of it. These statements cross corroborated each other and were also corroborated by the caseworker's observations of injuries.

## **Parental Substance Abuse**

### **Matter of Crystal W., 136 AD3d 835 (2<sup>nd</sup> Dept. 2016)**

A Suffolk County mother neglected her children as she repeatedly misused drugs to the extent that she was in a substantial state of stupor, unconsciousness, disorientation, incompetence or had substantially impaired judgment. This is prima facie evidence of neglect under FCA § 1046 (a)(iii). The mother did not rebut the presumption.

### **Matter of Vita C., 138 AD3d 739 (2<sup>nd</sup> Dept. 2016)**

Kings County Family Court's dismissal of a neglect petition against both parents was reversed and remanded on appeal by ACS. The lower court had dismissed the case at the close of the direct proof apparently due to arguments that there was no proof of harm to the children. The Second Department restored the petition and remanded the matter. The allegations were that the parents abused alcohol to the point of repeated intoxication and under FCA § 1046 (a) (iii), if such allegations are proven, there need not be proof of any impact on the children. Here the caseworker personally observed both parents to be intoxicated and the parents had been repeatedly admitted to the hospital for extreme intoxication. They had both been determined to be alcoholics and had not obtained any treatment. The 14 year old child made out of court statements that her parents drank every day, regularly became intoxicated and that she wanted her parents to get some help. This established a prima facie case of neglect.

### **Matter of Timothy B., 138 AD3d 1460 (4<sup>th</sup> Dept. 2016)**

A father and the children's AFC appealed a Livingston County adjudication of neglect but the Fourth Department affirmed the lower court. The evidence presented was that the father chronically misused alcohol to the point that he would be intoxicated, disoriented, incompetent and irrational and this established a presumption of neglect under FCA § 1046 (a)(iii). The father was driving while intoxicated at 2 in the afternoon on a weekday and was involved in an accident. He was intoxicated to the point that he was not able to perform the field sobriety tests. A couple of times, law enforcement officers present had to catch him from falling over or walking into traffic. The children made out of court statements that the father was mean and aggressive when he was drinking and had once pushed one of the children to the ground. The eldest child had to cook for the other children on a repeated basis as the parents would be so intoxicated that they could not make meals. The eldest child worked and would have to make arrangements for the youngest child to go to a friends' home to be cared for due to the parent's intoxication. The youngest child once hid under furniture when the parents were

drinking and fighting. Also, the father once attempted to grab one of the children and in so doing, pulled the hair of the youngest child. Although the father claimed that he and the mother only drank after the children were asleep, the evidence showed that the children were well aware of the drinking and had seen the parents intoxicated on multiple occasions at all hours. The father was not able to rebut the presumption that his chronic abuse of alcohol resulted in the children being at imminent risk of neglect.

**Matter of Anelina K., \_\_AD3d\_\_, dec' 6/8/16 (2<sup>nd</sup> Dept.)**

The Second Department agreed with Suffolk County Family Court that a mother neglected her child. The mother used heroin and morphine in the latter stages of pregnancy, she tested positive for drugs a few months after the child was born and she had a history of inability to care for her other children due to the misuse of drugs.

**Matter of Emily R., \_\_AD3d\_\_ dec'd 6/22/16 (2<sup>nd</sup> Dept. 2016)**

A Suffolk respondent neglected 3 children based on his abuse of alcohol which lead to imminent danger of emotional and mental impairment of the children. It was not error to allow the child to testify in court by placing her where she could be heard but not seen. The father and his attorney were present in the room as she testified and the court had properly balanced the due process rights of the respondent with the emotional health of the child. The respondent was ordered to have only supervised visitation with 2 of the children and no visitation at all with the oldest child until she was 18. He was also placed under DSS supervision and ordered to participate in a substance abuse program and a parenting skills program.

**Matter of Madison M., \_\_AD3d\_\_, dec'd 6/28/16 (1<sup>st</sup> Dept. 2016)**

The First Department concurred with Bronx County Family Court that a mother neglected her baby. She had a prior neglect adjudication with respect to another child based on her use of drugs. At the birth of this child, the mother initially refused to allow drug testing for herself or the infant even though she appeared to be under the influence. The baby was only 18 days old when the mother took the baby with her to crack houses. Within 9 months of the birth of this child, the mother was arrested for drug use when she was observed by a detective leaving a crack house with crack cocaine and a crack pipe. When she saw the detective, she left the baby in the crack house lobby. This all triggered the presumption of neglect of the baby under FCA § 1046(a)(iii) and she did not rebut the presumption.

## **Educational Neglect**

### **Matter of Ricky S., 139 AD3d 959 (2<sup>nd</sup> Dept. 2016)**

Kings County Family Court determined that a father educationally neglected his 15 year old daughter who missed 39 days of school out of 74. The court also found that this resulted in the derivative neglect of her siblings – including a child that was not yet of school age. Only the derivative neglect adjudication was appealed and the Second Department reversed the derivative finding. While the educational neglect of one child can result in a derivative neglect with respect to other children, including ones that are not yet of school age, here there was evidence that the 15 year old resisted going to school. There was also evidence that the respondent did meet with the school regarding the teen’s attendance issues. Under these circumstances, there is not sufficient evidence of such an impaired parental judgment to warrant a derivative finding regarding the child who was not even yet of school age.

### **Matter of Kiamal E., 139 AD3d 1062 (2<sup>nd</sup> Dept. 2016)**

The Second Department concurred with Kings County Family Court that a mother neglected 2 of her children and derivatively neglected the third. The 2 older children had excessive school absences and tardiness. These attendance issues had a negative impact on their schooling. The mother offered no credible justification for the children missing school.

## **Domestic Violence**

### **Matter of Clarence S., 135 AD3d 436 (1<sup>st</sup> Dept. 2016)**

A Bronx County man neglected the children by committing an act of domestic violence against the mother in the children’s presence. One of the older children described the fight to the caseworker and said the respondent had hit the child in the head with an iron when the child intervened to try to “save” his mother. The child had a wound on his forehead that was bandaged and indicated that this was the result of the respondent hitting him with the iron during the altercation with the mother. Another child also told the worker the same information when interviewed separately. The children’s out of court statements about the fighting were cross corroborated by each other, by the injury on the forehead and by the police report that domestic violence had been reported that day. The lower court properly denied the respondent’s request for an adjournment of the fact finding given that his claimed “good cause” was that he wanted to attend a family reunion in North Carolina.

**Matter of Moises G., 135 AD3d 527 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed a neglect finding by Bronx County Family Court. The father had stabbed the mother multiple times in the home while the children were in another room. One child heard the mother screaming for help. The injury was severe and the mother was in the hospital for a month. Even though the proof consisted of this single act of violence, this event showed the father's strongly impaired judgment and the children were harmed or in imminent danger of being harmed.

**Matter of Naveah P., 135 AD3d 581 (1<sup>st</sup> Dept. 2016)**

New York County Family Court was affirmed in its adjudication of neglect against two parents. The children were exposed to repeated incidents of domestic violence. The home consisted of only one room and the two young children were physically close to the fighting. The father made statements to the police that were admissible as excited utterances. His statements were corroborated by the parent's medical records. The father had a stab wound and the mother had bruises and bite marks.

**Matter of Aron H., 135 AD3d 759 (2<sup>nd</sup> Dept. 2016)**

A Kings County father neglected his child by engaging in acts of domestic violence against the child's mother in the child's presence. The other children were therefore derivatively neglected.

**Matter of Morgene R., 135 AD3d 769 (2<sup>nd</sup> Dept. 2016)**

Kings County Family Court correctly adjudicated a mother to have neglected her children by engaging in physical and verbal altercations in the presence of one of the children, causing that child to be neglected and his sibling to be derivatively neglected.

**Matter of Cheyenne OO., 135 AD3d 1096 (3<sup>rd</sup> Dept. 2016)**

The Third Department affirmed a neglect finding against a Columbia County father of 5. Two of the children made out of court statements that their parents would often yell and hit each other. The 8 year old girl said this made her "sad" and that they were now a "happy family" since the father had left. The 14 year old boy said that he would try to keep the younger children from seeing the violence but that all the children did in fact see the parental fights. This boy spoke of being frightened by the violence and of a particular time where he used his shirt to try to stop the blood flowing profusely from his mother's nose after his father had hit her. The mother testified in court that she was a frequent victim of the father's violence and

that all the children had been exposed to the violence. She also said the father verbally denigrated the children and they feared him and so would not respond to his verbal abuse. Further she said that he hit the children, particularly the 14 year old boy who would attempt to protect her.

**Matter of Sapphire G., 136 AD3d 687 (2<sup>nd</sup> Dept. 2016)**

A Kings County father neglected his child by committing an act of domestic violence against the child's mother in the child's presence.

**Matter of Joshua V., 137 AD3d 1153 (2<sup>nd</sup> Dept. 2016)**

Queens County Family Court was affirmed in adjudicating that the respondent neglected his 4 stepchildren and his biological child as well. The respondent committed acts of domestic violence against the children's mother while the children were present.

**Matter of Tavene H., 139 AD3d 633 (1<sup>st</sup> Dept. 2016)**

A New York County mother and stepfather neglected the children. The stepfather committed acts of domestic violence on the mother in front of the children and the mother failed to protect the children from being aware of the violence. The children made out of court statements that they saw the stepfather hit the mother and this was corroborated by the testimony of the caseworkers. Both children are autistic. The daughter stated that it made her cry when the stepfather hit her mother. The mother told the caseworker that the son did not like the arguing. The police were called on multiple occasions but the mother would not leave the stepfather. She knew that there was another neglect matter pending regarding the stepfather for his violence against his former paramour that had occurred in front of his own daughter. The mother also neglected these special needs children by leaving them alone on at least 2 occasions, knowing that the children had difficulties communicating and could not care for themselves. One of the children suffered from seizures.

## **ABUSE**

### **Physical Abuse**

#### **Matter of Semenah R., 135 AD3d 503 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed an abuse finding regarding a Bronx County respondent. The respondent was a person legally responsible and the primary caretaker of the subject children all day while the mother of the children worked. He told the mother, when she returned from work that the 3 year old was not feeling well. The mother later found the child unresponsive and the toddler was brought to the hospital in the early morning hours. The child had bruises on his body, had sustained blunt force trauma to his abdomen and his bowel and mesentery were crushed and torn. This resulted in the toddler going into cardiac arrest and he died. The ME testified that the injuries were non accidental and would have occurred just hours earlier in the day. The respondent failed to offer a reasonable explanation for the child's injuries and did not rebut the presumption that he was responsible. The other children were derivatively abused.

#### **Matter of George S., 135 AD3d 563 (1<sup>st</sup> Dept. 2016)**

The First Department concurred with Bronx County Family Court that a man severely abused a 3 year old girl. The child died of a blow to abdomen that ripped her bowel. The child also had abrasions on her body that indicated child abuse. The man was not the child's father but he was the primary caretaker of the child and two other children – one of whom was his child. The respondent offered no evidence to explain the injuries and did not testify. His severe abuse of this child was the basis for derivative severe abuse findings regarding the child's sibling and the respondents' own child.

#### **Matter of Maria S., 135 AD3d 944 (2<sup>nd</sup> Dept. 2016)**

Kings County parents abused one child and derivatively abused a sibling. The child suffered injuries that would not occur absent abuse. The parents provided no explanation for the injuries. They did not rebut the prima facie case of abuse.

#### **Matter of Marchella P., 137 AD3d 1286 (2<sup>nd</sup> Dept. 2016)**

After the 2010 murder of a 4 year old little girl, ACS brought abuse petitions against the child's mother and grandmother who were the caretakers of the deceased child and her 2 brothers. The child died as a result of acute drug poisoning, blunt impact trauma and malnutrition and dehydration. The father of the child was charged with neglect. The grandmother was

criminally convicted of manslaughter in the second degree and other charges in connection with the little girl's death. The family court adjudicated the grandmother to have abused the child and derivately abused the brothers by summary judgment motion. The father was found after fact finding to have neglected the deceased child as he should have known of the abuse of that child. He also neglected all 3 children based on his misuse of marijuana. The brothers were placed in foster care and the father was permitted only supervised visitation. Both the father and the grandmother appealed. The grandmother's argument that she was deprived of effective assistance of counsel as her Family Court attorney had not opposed the summary judgment motion was flawed. There was no argument that her counsel could have made that would have had a chance of success given her criminal conviction. The father failed to exercise minimal care of the deceased girl by failing to take any action to protect her as he knew or should have known of the abuse and this derivately neglected the surviving brothers.

**Matter of Davion E., 139 AD3d 944 (2<sup>nd</sup> Dept. 2016)**

A Richmond County mother appealed an abuse finding regarding her 5 month old infant. The child had an unexplained spiral fracture of his right femur. The mother failed to provide a reasonable and adequate explanation of the injuries and did not establish that the injuries took place when the child was in the exclusive care of someone other than herself. (The father had also been found to be abusive but apparently did not appeal) The mother failed to rebut the prima facie case of abuse of the baby and this also led to an appropriate derivative adjudication for the 5 other siblings. The children were all continued in foster care.

**Sexual Abuse**

**Matter of Alejandra B., 135 AD3d 480 (1<sup>st</sup> Dept. 2016)**

A Bronx respondent sexually abused a 10 year old girl. The child testified and was found to be credible. The child was permitted to testify via closed circuit television. This was appropriate given that the lower court properly balanced the respondent's due process rights with the child's well being. The lower court was not required to find that the child would suffer "severe and substantial mental or emotional harm" before allowing the closed circuit testimony as the respondent argued. Respondent's actions toward the girl were clearly intended for his sexual gratification and were not just innocent horseplay. On 2 occasions he had the 10 year old lock the bedroom door, give him a massage and then straddle him while he bounced her up and down near his penis and kissed her on the mouth. He also told the child not to tell her mother of the activity. This occurred in the presence of a younger child who was derivatively abused.

**Matter of Angel R., 136 Ad3D 1041 (2<sup>ND</sup> Dept. 2016)**

Queens County Family Court was affirmed on appeal. The respondent was a person legally responsible for 4 children and he sexually abused one of them. The child's out of court statements were corroborated by ACS' expert witness who was "an expert in the field of child sexual abuse". This abuse of the oldest girl in the home warranted a derivative neglect finding regarding the younger children as it demonstrates a fundamental defect in the respondent's understanding of parenting.

**Matter of Skylean A.P., 136 AD3d 515 (1<sup>st</sup> Dept. 2016)**

The Bronx County Family Court's sex abuse adjudication was affirmed on appeal. The respondent was a person legally responsible for the child. The child gave out of court statements about the abuse and these were corroborated by the testimony of an expert. The expert was a "psychotherapist specializing in child sexual abuse". Although the respondent also called an expert, this testimony was insufficient as rebuttal. Any inconsistencies in the child's statements were minor and the lack of physical injury to the child is not crucial. The court properly made a negative inference against the respondent for not testifying. This proof was sufficient for a finding of derivative neglect regarding the infant child who was born during the proceedings for the victim child. The respondent's situation had not changed as he continued to deny the abuse and did not complete a sex offender program.

**Matter of Nyasia C., 137 AD3d 781 (2<sup>nd</sup> Dept. 2016)**

The Second Department reversed Kings County Family Court's dismissal of a sexual abuse petition. The Appellate Division found that the respondent sexually abused a 4 year old girl and derivatively abused his own biological son. The child made out of court statements that were corroborated by the testimony of the mother that she found the respondent and the child in bed together. Although the mother's testimony did have some inconsistencies in it, they did not rise to the level of her being unworthy of belief as the lower court had ruled. However, the lower court did properly dismiss the allegations that the mother had neglected the 4 year old by failing to take the child to a counselor and failing to administer anti-HIV medication to the child once the sex abuse had been alleged. There was not sufficient evidence that the failure to provide medical care to the child placed the child in imminent danger of impairment.

**Matter of Shaquan A., 137 AD3d 1119 (2<sup>nd</sup> Dept. 2016)**

A Kings County man sexually abused one child and derivatively abused and neglected the other children. The child who was sexually abused testified credibly in court and that was sufficient to prove the respondent father had abused her. The intent to receive sexual gratification can be inferred from the nature of the acts he committed and the circumstances. He sexually abused the child while another child was in the home. He further failed to get medical attention for the sexually abused child when she began to have gynecological issues. The respondent gave the abused girl a pill without knowing what the pill was and would not get other medical attention for her. The father also used excessive corporal punishment against this same girl and another child. All 3 of the children were therefore directly or derivatively neglected or abused except for the oldest boy. The oldest child turned 18 while the matter was pending and he was not in the home when the sex abuse occurred so that child was not derivatively abused or neglected and his matter is dismissed.

**Matter of Dylan R., 137 AD3d 1492 (3<sup>rd</sup> Dept. 2016)**

The Third Department affirmed a sex abuse adjudication against a Clinton County stepfather of 2 boys, who also had 2 boys of his own. The stepchildren were teenagers and had been previously sexually abused by a relative. Due to concerns that they were being sexually inappropriate with each other, they were interviewed and they disclosed that the stepfather had forced them to engage in sexual acts with each other and with him several years earlier. The 2 stepchildren made out of court statements separately to 2 investigators that the stepfather had forced them each to perform oral and anal sex with each other while he watched and “coached” them on how to perform the acts. They also disclosed that he had forced the younger stepson to perform oral sex on him in the presence of the older stepson. The older stepson admitted he had told people that he and his brother were having sex with each other voluntarily because the stepfather badgered him at a meeting with the mother. Both boys said that the stepfather had also shown them pornography. The stepfather did admit that he had shown pornography to the older boy. The out of court statements of the boys cross corroborated each other and were further corroborated by the admission of the respondent that he had shown the older boy pornography. The court also drew an inference against the respondent for not testifying. This repeated sexual abuse of the stepchildren demonstrates such an impaired level of parental judgment that the respondent’s own children were derivatively abused and neglected.

**Matter of Hadley C., 137 AD3d 1524 (3<sup>rd</sup> Dept. 2016)** (note that the finding here was neglect but given the sexual contact involved, it is included here in the abuse section)

Saratoga County DSS filed both neglect and abuse petitions against a respondent regarding two children. The lower court dismissed the abuse petitions but did adjudicate neglect. On appeal, the Third Department reversed the neglect finding regarding the older child. She had been living in California with her paternal grandparents for over a year before the proceedings were brought. Under the UCCJEA, New York State was not her home state and the lower court had no jurisdiction over her. As to the younger girl, the appellate court affirmed the neglect finding. This child made out of court statements that the respondent had touched her vaginal area with his hand, put his finger into her vaginal area and touched her vaginal area with his clothed penis. She stated that this had happened on multiple occasions at night when she was in bed with him. She demonstrated the digital penetration to the psychologist who performed a sex abuse evaluation. The psychologist, who used the Yuille Step Wise Protocol for the interview, testified that the child's account of the events was consistent with the accounts of known sexual abuse victims. The respondent argued on appeal that no proof was provided that the alleged touching was for sexual purposes or even that he was awake when he allegedly touched the child. However, the appellate court ruled that those considerations were not relevant to the issue of his behavior having placed the child in imminent danger. Further the father argued that the expert witness' testimony that corroborated the child's out of court statements should not have been admitted as the opinion was based on known accounts of sex abuse – not neglect. However, here the Third Department found that the expert's opinion was sufficient to corroborate the child's out of court statements regardless of whether the petition alleged abuse or neglect. Abuse is in effect a subset of a broader concept of neglect. The respondent did not testify at the fact finding and the lower court declined to draw a negative inference but the lower court determined that the witnesses for the DSS were probative on the truthfulness of the child's out of court statements.

**Matter of Lesli R., 138 AD3d 488 (1<sup>st</sup> Dept. 2016)**

A Bronx respondent sexually abused his 2 stepdaughters which also supported a derivative abuse adjudication regarding his 5 biological children. The 2 stepdaughters made out of court statements that the stepfather was inappropriately touching them. These statements were corroborated by the stepfather's admission that he did engage in "rough housing" with the stepdaughters and that he knew this made them uncomfortable but he continued to touch them. The fact that he did not stop touching them supports that his intent was sexual gratification. The fact that the girls did not sustain any physical injury to corroborate their statements is not sufficient to reverse nor is the fact that one of the girls vaguely recanted her original statements. Three of his own biological children were in a lower bunk while he sexually abused one the stepdaughters in the upper bunk which supports the determination that the respondent has a fundamental defect in his understanding of parental duties. Lastly,

Family Court properly granted a motion by the stepdaughters' AFC to quash the respondent's subpoena to compel one of the stepdaughters to testify. The child's psychotherapist provided a letter and the social worker provided an affidavit that the child would potentially suffer psychological harm if forced to testify.

**Matter of Dayannie I.M., 138 AD3d 747 (2<sup>nd</sup> Dept. 2016)**

A Suffolk County father sexually abused his daughter. The child gave consistent, detailed and explicit statements out of court to the CPS worker, a police detective and a school social worker. Her out of court statements were corroborated by the testimony of a child sexual abuse expert as well as the father's own written confession he gave to the police. The father and the mother's claim at the Family Court proceedings that there had been no sexual abuse was not credible. The child did recant the allegations, before the Family Court hearing, but this does not require a determination that the child had not told the truth that she was abused. Recanting is a common reaction by abused children. The expert testified that it was a "false recantation" and that the child may have been pressured to recant after the father was jailed. This adjudication was sufficient to determine that the 4 other children were derivatively abused. Three were present in the home when the incidents occurred and the 4<sup>th</sup> child who was born after the incidents was sufficiently proximate in time to reasonably conclude that the threat to the children was still the same.

**Matter of Kayle D., 138 AD3d 835 (2<sup>nd</sup> Dept. 2016)**

The Second Department reversed Queens County Family Court's dismissal of a sex abuse petition. The appellate court found that sexual abuse had in fact been proven. The child made out of court statements that her father had sexually abused her and this was corroborated by the testimony of an expert in the field of child sexual abuse. The child's out of court statements were consistent and she had age inappropriate knowledge of sexual matters. The brother was derivatively neglected by this. The Second Department remanded the matter to a different Judge.

**Matter of D.M., 138 AD3d 856 (2<sup>nd</sup> Dept. 2016)**

The Second Department upheld a sex abuse adjudication from Suffolk County Family Court. The 10 year old child told a police officer who worked in her school that her father had been sexually abusing her for the past 5 or 6 years. The out of court statements of the child were

corroborated by the testimony of an eyewitness who indicated that she had seen the abuse on one occasion.

**Matter of W.P. and V.S. 51 Misc3d 1230 (A) (Bronx County Family Court 2016)**

Bronx County Family Court found abuse based on the child's out of court statements corroborated by the testimony of a "validator". She was an expert in developmental psychology and child sexual abuse. She followed professional guidelines and used the protocols developed by Dr. Sgroi – the same Dr. Sgroi referenced in the landmark NYS Court of Appeals **Matter of Nicole V. 71 NY2d 112** decision. The child's statements, behavior, affect and age inappropriate knowledge of sex were characteristics of a child who had been sexually abused. The child had spontaneously brought up the abuse without prompting or coaching. The defense expert had never conducted a sex abuse validation and could not prove that the guidelines used by the ACS expert were unacceptable to experts in the field. She also never met the child.

**Matter of Diana N., 139 AD3d 573 (1<sup>st</sup> Dept. 2016)**

The First Department commented that while New York was not the "home state" of the children in this matter for jurisdiction purposes under DRL §§ 75-a (7) and 76 (1), New York County Family Court did have temporary emergency jurisdiction as per DRL § 76-c- (1). The mother abused and neglected the children. The mother failed to protect the children from abuse, specifically she failed to protect them from her husband who had sexually abused one of the children for 7 years. Another child observed one of the incidents of sexual abuse. The target child made out of court statements that were corroborated by the husband's admissions and by his criminal conviction. Further the mother did not protect the children from her husband's excessive drinking as well as his physical abuse of the children. She did not provide the children with appropriate food, shelter, clothing, education or medical care.

**Matter of Daniel XX., \_\_AD3d \_\_, dec'd 6/2/16 (3<sup>rd</sup> Dept. 2016)**

A 15 year old girl credibly testified in court that her stepfather had sexually abused her. She testified that her stepfather forced her to kneel, took her shirt off and placed his penis between her breasts. Some 6 months later he fondled her breast both over and under her shirt while they were driving in his truck. She also recalled several incidents when she had been only 9 or 10 years old where he had taken her pants off or reached down her pants and touched her vagina. The stepfather testified and denied any sexual contact. The mother testified for the

stepfather and claimed that the child had not always been consistent in her claims of sexual abuse. The lower court determined that the child was credible. Her out of court statements need not be corroborated given that she provided credible in court testimony. The lower court should have permitted the respondent's counsel an opportunity to review the child's therapist's notes given that the therapist testified that she reviewed her notes to refresh herself for testimony. However this was harmless error as the court gave only inconsequential weight to the therapist's testimony. Further the claim that the mother should not have been allowed to testify about the sex tapes that she and her husband made as it violated the best evidence rule was not preserved. The finding that the respondent had engaged in sexual contact with the child over a pattern of years justified the derivative findings regarding a second stepdaughter and the respondent's own son. The dispositional order contained provisions that the stepfather could have no contact with both of the stepdaughters and suspended contact with his own son until the respondent complied with certain conditions.

**Matter of X. McC., \_\_AD3d \_\_, dec'd 6/20/16 (1<sup>st</sup> Dept. 2016)**

A Bronx County respondent sexually abused and neglected one child and derivately abused and neglected the other children, 2 of whom were his biological children. The 12 year old child made out of court statements that he had sexually abused her and this was corroborated by the respondent's own admissions in a "child safety conference" that ACS traditionally holds immediately upon such allegations. The respondent argued that since his counsel was prohibited from attending such conferences, his constitutional rights were violated. The First Department ruled that the right to counsel under FCA § 262 (a) did not attach until the first appearance in court and the first appearance did not occur until after the safety conference. Further the respondent also punished the same child with a belt that left bruises and marks on her body. These events support the derivative findings. The children were released to the mother and the respondent was ordered to complete sex abuse offender counseling and a batterer's accountability program.

**ARTICLE 10 DISPOSITIONS and PERMANENCY HEARINGS**

**Matter of D'Elyn Delilah W., 135 AD3d 417 (1<sup>st</sup> Dept. 2016)**

A New York County mother appealed the lower court's denial of her motion to increase visitation with the child. However, the First Department found the issue moot as the mother's rights had been terminated in the meantime. The Appellate Court indicated that the family court has no authority to order any contact after a contested TPR has resulted in a termination.

**Matter of Angelo FF., 135 AD3d 1082 (3<sup>rd</sup> Dept. 2016)**

Two children were placed in foster care voluntarily by their mother who was hospitalized for mental illness issues. The father was not noticed of the original placement proceedings. The father appeared at a permanency hearing and filed a FCA § 1062 motion to terminate the children's placement arguing that he had not been found to be neglectful or abusive and that the children should be placed with him. The Schenectady County Family Court held a lengthy permanency hearing and denied the father's motion, kept the children's goal return to parent and provided for more visitation for the father. The father appealed and argued that a parent is entitled to move to terminate a placement by asserting his superior right to custody over a non-parent entity and need not actually file for custody. The Third Department ruled that the question was moot as the father had since obtained joint legal and primary physical custody of the children before the appeal was heard.

**Matter of Duane FF., 135 AD3d 1093 (3<sup>rd</sup> Dept. 2016)**

A Clinton County mother gave birth to an infant while in the local jail awaiting transfer to state prison to serve a 7 year sentence. The DSS brought an Art. 10 petition alleging that the child was neglected as the mother could not care for the child while she was in prison and there were no relatives who were willing to care for the child. The mother had no other plan for the baby except foster care. The father was also serving a 5 year sentence and could not be a caretaker. The mother made an admission to neglect and the court held a combined dispositional and permanency hearing. At the hearing, the DSS took the position that the goal was reunification but DSS could not respond to the court's inquiry as to how they could accomplish reunification given the long sentences that both parents were serving. The court sua sponte changed the child's goal to adoption. The child was 3 ½ months old at that point. On appeal, the Third Department ruled that the lower court did not err in changing the child's goal to adoption particularly given that the foster parents expressed an interest in being the child's long term resource. The appellate court also affirmed the lower court's denial of visitation with the mother but for reasons that differed from the lower court. Family Court had found that the infant would receive "zero benefit" from any visitation. The Third Department found that given the child's very young age and the fact that the trip to the mother's prison would be a 12 hour round trip drive, denial of visitation was not improper. Lastly the appellate court indicated that the lower court's denial of a request for the infant to have sibling visitation with a half sibling was not error given the lack of any existing relationship and pointed out that this request was in the context of the permanency hearing and not done via a visitation petition.

**Matter of Jazmyne II., 135 AD3d 1090 (3<sup>rd</sup> Dept. 2016)**

A non respondent father was incarcerated when his daughter was found to have been neglected by the mother. When the Art. 10 was brought, the Clinton County caseworker located the father in prison some 250 miles away. He had been there since the 6 year old child had been 3 years old. The father had not had much contact with the child at all but the caseworker did provide for some supervised contact. At the combined dispositional and permanency hearing regarding the mother's adjudication, the court placed the child with a maternal grandfather and stated that there would be "no provisions for visitation" with the father in the court order. The father's only contact with the child would be through the same supervised contact that had been occurring. The father appealed that order and while the appeal was pending, the court held another permanency hearing. At the second permanency hearing, the lower court ruled that it was neither limiting contact nor awarding visitation as the father had made no efforts to formally establish visitation rights. The appellate court ruled the issue moot as the orders in question had all expired. Further the court pointed out that the caseworker had advised the father about his rights to visitation and the father had not taken any formal steps or made any request. The Third Department commented that if they were to rule on father's arguments, they would find no merit as he had not requested visitation and "prison visitation is not necessarily required."

**Matter of Deatrus Amir D., 136 AD3d 900 (2<sup>nd</sup> Dept. 2016)**

Queens County Family Court was affirmed on appeal regarding a dispositional order to grant custody of the 2 subject children to the non respondent parent father. The mother had abused the older child and derivately abused the younger one. The child's statements were corroborated by eyewitness testimony and photographs of the child's injuries. The incidents of abuse of the older child often happened in front of the younger child. The mother and father had a prior custody order which provided for joint legal custody and physical residence to the mother. The non respondent parent father filed for a modification of the prior order for sole custody. The lower court granted that modification and denied the mother's request that the order specify a schedule for visitation for her. Since the mother abused the child, it was appropriate to give the father full custody. Further as the father demonstrated a commitment to continue a relationship between the children and their mother, it was not necessary for the court to set a specific schedule of visitation in the order. The mother is free in the future to commence a visitation action if it is necessary.

**Matter of Justyce HH., 136 AD3d 1181 (3<sup>rd</sup> Dept. 2016)**

The Third Department reviewed a Clinton County permanency hearing. The father's child had been placed in foster care and the child's goal was return to parent. The lower court did not

provide for visitation between the child in placement and her half sibling, a newborn son of the father. The appellate court did not find this to be error as the siblings had never had any contact with each other and had no relationship. The foster child's AFC supported the lower court's ruling. The Third Department pointed out that there had been no actual sibling visitation petition filed. Further the father could not appeal the order of protection issued in the permanency hearing as he was not the subject of the order and therefore is not aggrieved by it.

**Matter of Desirea F., 137 AD3d 1074 (3<sup>rd</sup> Dept. 2016)**

The St. Lawrence County children who are the subjects of this action have been in foster care since 2007. They reside with foster parents in Pennsylvania who desire to adoption them. Permanent neglect termination petitions filed against the respondent mother were being heard by Family Court in 2010 when DSS replaced those petitions with mental illness terminations. The lower court granted the mental illness terminations but those orders were reversed on appeal in 2013. After that appeal, the children's goals were reinstated as "return to parent" but in June 2014 the court changed the permanency goal again to "adoption" and permanent neglect petitions were filed again. Those petitions were still pending when this appeal of the permanency hearing order was heard by the Third Department. The Third Department reversed family court, finding that the lower court did not have a sound and substantial basis to change the permanency goal again to adoption. First the Appellate Division noted that the record for the hearing was "meager" and did not reflect any "age appropriate consultation with the children" who would have been 8 and 10 years old at the time. Despite the fact that the termination order had been reversed, and the goal had been changed back to return to parent, the mother had not been given any visitation and no real efforts were made to further the goal of return to parent. The caseworker had "very limited knowledge" of the services being given to the children or the mother since the last permanency hearing and could not provide any information on the children's counseling. The caseworker was unable to name the mother's counselor and had no contact with that counselor. The caseworker did have twice monthly contact with the mother. The court made no real inquiry into the mother's current situation or if she had made efforts toward correcting the conditions that had led to the children's placement. The permanency report contained irrelevant information about an older child who was not part of the proceeding and the subsequent permanency hearing also focused on this older child – not the subject children. While continuing the children in the care of the DSS was warranted given how long they has been apart from their mother, there was no evidenced provided to support changing the permanency goal. The Appellate Court reversed the goal change and remitted the matter back to Family Court, also citing a concern that the lower court had granted a motion for the mother's counsel to be relieved and for the mother to proceed pro se.

There was a dissent. The dissent found that although the lower court's record should have been more fully developed, the family court had dealt with this family since 2007 and had a significant amount of knowledge about the family. The new TPR petitions had been filed and

clearly this was the direction that the DSS was headed. The record showed the significant history of mental health issues of the mother who had a criminal record for acts involving a child and was also a level one sex offender. The mother had allowed the children to be around sex offenders. The children had met with their AFC who provided information to the court about their happiness with the foster family and their desire to remain there. The AFC had requested that the children not be brought to court due to concerns about the mother's conduct and the caseworker testified that the children were very "stressed" about the ongoing legal proceedings. There was more than enough information about the children's preferences and to support changing the goal to adoption.

**Matter of Desirea F., 137 AD3d 1519 (3<sup>rd</sup> Dept. 2016)**

In yet another appeal in this St. Lawrence County children's matter, the Third Department commented on some of the practices in the most recent permanency hearing. The children were now 10 and 12 years old and had each been found to have been neglected by their mother when each of them had been about a year old. The children reside with foster parents in Pennsylvania and have not had any contact with their mother since 2001. While the appellate court ruled that the mother's appeal of this permanency hearing which was held in July of 2105 was moot as the orders had been superseded by more recent orders, the court did comment that there was "ongoing concerns". First the Third Department expressed concern that the mother continued to appear pro se in Family Court and that the record was not clear as to the reasons for this. Further the Third Department commented that the Family Court must hold an "age appropriate consultation" with the children and that this consultation does not mean that the respondent has an absolute right to be present at this consultation. However here, the court spoke to the children outside the presence of the respondent mother without balancing the interests of the respondent against the impact of the respondent's presence on the mental and emotional well being of the children. The AFC told the Judge that the children wanted to talk to the Judge without their mother present and the court did so without engaging in the required balancing test. Without this balancing, it was improper to exclude the mother from the consultation. It was also improper to inform the children that anything they said to the court would remain confidential. The court commented that there are still pending TPRs regarding the children.

**Matter of Josee L.H., 138 AD3d 545 (1<sup>st</sup> Dept. 2016)**

New York County Family Court properly changed the child's goal from reunification to adoption. The agency had been making reasonable efforts toward reunification but the mother was not cooperating. She would not sign releases or maintain contact with the agency. The child was living in Indiana with a kinship foster parent. The mother was not approved by the Indiana ICPC authorities to be a resource there as the mother refused to tell them where she lived and what

her income source was. She also had a felony warrant outstanding for an incident that had happened at the child's school. Lastly the mother had refused mental health treatment. The lower court did not err in refusing to grant the mother an adjournment as she feared appearing due to the outstanding warrant. The court also properly refused to let her appear by phone as she had been persistently disruptive and obstreperous during prior proceedings.

**Matter of Brianna B., 138 AD3d 832 (2<sup>nd</sup> Dept. 2016)**

The Second Department agreed with Queens County Family Court that the mother's visitation with the children should be suspended. The proof offered at the permanency hearing indicated that the mother had completed a parenting course as well as domestic violence counseling but she had stopped attending the court ordered mental health treatment. The mother made disparaging comments to one of the children during visits. She was hostile in the family therapy session. These things adversely affected the children.

**Matter of Erick X. v Keri Y., 138 AD3d 1202 (3<sup>rd</sup> Dept. 2016)**

An Ulster County mother had sole custody of 2 children after the father had pled guilty to assault in the third degree and endangering the welfare of a child for hitting the then 14 year old child in the presence of the then 11 year old child. The father was placed on probation and there was an order of protection that he had to stay away from the children for 7 months. While this order of protection was in place, an Art. 10 petition was filed against the mother and the children were placed with the maternal grandparents in a FCA §1017 placement. Just after the father's order of protection ended, the lower court ruled that the mother had neglected the children for drug use, including smoking marijuana in front of the older child. The maternal grandparents were then given ongoing Art. 10 custody of the children and a permanency hearing date was set. Within 2 days of this disposition, the non respondent father filed an Art. 6 petition for custody of the children seeking to modify both the mother's order of custody and the court's Art. 10 dispo order. The court combined the proceedings, held a hearing and dismissed the father's custody petition. On appeal, the Third Department affirmed. Since the grandparents had Art 10 custody as suitable resources, they did not need to prove "extraordinary circumstances" as against the father as they would have had to if they had Art. 6 custody. The father did allege a change in circumstances in that the order of protection had ended and he had completed parenting and domestic violence programs. But the children have spent the majority of their lives with their maternal grandparents and have developed connections within the school district where the grandparents live. The father has never lived with the children, lives in another school district and has 2 other children to care for in his home. He "minimized" the difficulty of these children moving to his home. He claimed that

the children's behavioral problems were due to the grandparents' inability to control the children but he provided not insight into how he would handle their issues. The father continued to describe the event that led to his arrest, probation and an order of protection at getting "a little physical" with the child. He also said that if things with the children became difficult, he would send them back to the grandparents. The father was unable to prove that it was in the best interests of the children for him to have Art. 6 custody.

**Matter of E.C. and D.W. \_\_ Misc3d \_\_ dec'd 3/3/16 (New York County Family Court 2016)**

After New Jersey ICPC twice refused to approve a non respondent parent father to have custody of his children who were in foster care in New York County, the New York County Family Court ruled that the ICPC request had been only a "courtesy home study" and gave it only that weight and granted Art. 6 custody of the child to the father. The court noted that the New York foster care agency had been monitoring the father and had conducted its own investigation and had found him suitable.

**Matter of Denise J. \_\_ Misc3d \_\_, dec'd 6/2/16 (Westchester County Family Court 2016)**

In anticipation of the new FCA § 1090-a regarding children's appearance at permanency hearings, a Westchester AFC made a motion that her 16 year old client wished to be present at her upcoming permanency hearing and should be transported to the court hearing. The child was in a congregate care placement in New Hampshire and had severe behavioral issues. DSS opposed bringing the child to the hearing saying that the child is aggressive and dangerous and it would not be in her best interests for her to be transported for hours under the medication she would need to make such a trip. The court ruled that the AFC was not substituting judgment for the child, who may well have severe issues but who the AFC has not said is incapable of a knowing, voluntary and considered judgment about attending. The court ruled that the new legislation gives no power to the court to prevent the child's attendance in person and that DSS will have to transport her.

**Matter of Zenaida O. \_\_ AD3d \_\_, dec'd 6/8/16 (2<sup>nd</sup> Dept. 2016)**

A Kings County respondent appealed the court's decision in a permanency hearing but the lower court was affirmed. The respondent was the biological father of 3 children and a person legally responsible for 2 other children. He had admitted to educational neglect of 3 of the children and consented to a finding that he had sexually abused the 2 of the children. He also pled guilty in criminal court to sexually abusing one of the children and was sentenced to 13

years in prison. The family court ordered that he had to complete a sex offenders program and that visitation with his own children could only be supervised. At the permanency hearing, the court ruled that the respondent had not completed any sex offender program, that the visitation with his children should remain supervised and returned the children to the mother's care. On appeal, the respondent argued that since the children had been discharged to the mother, the lower court no longer had jurisdiction regarding him. The Second Department disagreed with his arguments and ruled that FCA § 1089(d) specifically says that the court can terminate the placement of the children but issue further orders that are appropriate.

**Matter of Demetria FF., \_\_AD3d \_\_, dec'd 6/9/16 (3<sup>rd</sup> Dept. 2016)**

The out of state maternal uncle of children in foster care in Saratoga County appealed the lower court's denial of his motion to intervene in the Family Court matter. The 2 children were placed in care in September of 2014 and were determined to be neglected and remained in care. At the November 2015 permanency hearing, the court denied the uncle's motion to intervene to seek custody of the children. All the parties had agreed to the uncle's motion to intervene under FCA § 1035 (f) but the lower court ruled that he could not intervene as the case had been resolved. The Third Department reversed, ruling that the uncle was entitled to intervene as such motions are specifically permitted in all phases of the dispositional proceedings and are to be liberally granted. Further there is no complete resolution of any matter involving children in foster care until they achieve permanency and leave foster care placement. There is no question that the uncle is entitled to intervene and the court erred in not permitting it. The matter is remitted for the lower court to hear the uncle's petition for custody.

**Matter of Grace J., \_\_AD3d \_\_, dec'd 6/29/16 (2<sup>nd</sup> Dept. 2016)**

Suffolk County Family Court properly revoked the suspended judgments of both parents. Months after accepting suspended judgments, the parents both tested positive for illegal narcotics based on hair follicle tests. The lower court held a hearing and sentenced each parent to 6 months in jail for violating the order of protection, and revoked the suspended judgments. The parents appealed claiming that the hair follicle test results should not have been admitted into evidence. The Second Department disagreed, finding that hearsay is admissible in a revocation of a suspended judgment preceding which is a dispositional hearing. Further each person who handled the testing procedure was acting in the regular course of business and the information regarding the results of the tests.

**Matter of Keishaun P. \_\_AD3d\_\_, dec'd 6/29/16 (2<sup>nd</sup> Dept. 2016)**

ACS alleged that a respondent had severely abused 3 children he was a person legally responsible for and that he therefore derivatively severely abused his biological child. While in the fact finding on the matter was proceeding in family court, he pled guilty to attempted course of sexual conduct with one of the children for whom he was a person legally responsible. The family court then granted summary judgment motions regarding the severe abuse and the derivative severe abuse. ACS moved for a FCA §1039(b) (sic – it is FCA §1039-b) order that reasonable efforts were not needed to reunite the respondent with his biological child and the motion was granted. The respondent appealed. First the Second Department agreed that the biological child was derivatively severely abused by the respondent's sexual abuse of the other child. Further once ACS produced proof of the criminal conviction, it was then the burden of the respondent to argue against the no efforts order and attempt to prove that "reasonable efforts would be in the best interest of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future". ACS is not obligated to disprove this to obtain the no efforts order, it is an exception that the parent can attempt to prove and this respondent did not.

**TERMINATIONS of PARENTAL RIGHTS**

**GENERAL TERMINATION ISSUES**

**Matter of Christopher D.S., 136 AD3d 1285 (4<sup>th</sup> Dept. 2016)**

The father in an Allegany County termination argued on appeal that the lower court abused its discretion by failing to grant his request that the Judge recuse himself. The Judge had presided over the criminal trial regarding the father's sexual abuse of his daughter which was also the basis for the family court proceedings. Such a situation is not a statutory basis for recusal and there was no abuse of discretion on the part of the Judge. Further the father argued that the court should not have granted an order that the DSS need not offer diligent efforts to the father however, the father provided no records of the lower court regarding the rulings on that issue in his record on appeal and therefore the court will not consider the issue. It is the obligation of the appellant to assemble the full record on appeal.

**Matter of Joey J., \_\_AD3d\_\_, dec'd 6/10/16 (4<sup>th</sup> Dept. 2016)**

An Erie County defense attorney did not provide ineffective assistance of counsel to a mother simply because he recommended that she admit the allegations in the TPR petition.

## ABANDONMENT TPR

### **Matter of Tinisha J., 135 AD3d 760 (2<sup>nd</sup> Dept. 2016)**

A Westchester father abandoned his 4 children. There was an order of protection that prohibited the father from contacting the children directly but he was obligated to stay in contact with the DSS. The father was incarcerated but this was not excuse. Any contact he did make with the agency was minimal, sporadic and insubstantial. It was in their best interests to be adopted.

### **Matter of Nadine Nicky McD., 138 AD3d 495 (1<sup>st</sup> Dept. 2016)**

A mother from the Bronx abandoned her 2 children and the termination of her parental rights was affirmed on appeal. She failed to effectively communicate with the agency during the six months prior to the filing. She only made minimal and insubstantial contacts which are not enough to defeat the petition. While the children had moved to the state of Delaware with their foster parents, the mother still had an obligation to maintain contact with the agency. Diligent efforts need not be proven in an abandonment termination and if the mother alleges that the agency prevented or discouraged her from contacting them, it is her burden to prove that and she did not.

### **Matter of Mya Anaya M., 138 AD3d 569 (1<sup>st</sup> Dept. 2016)**

The New York County Family Court determined both that a man's consent was not needed for the child to be freed for adoption and also that he had abandoned the child. The father failed to provide any support for the child and the agency was not required to inform him that he needed to do so. He only visited the child twice early on in the relevant 6 months and he did not prove that the agency prevented or discouraged him from further contact. The agency is under no duty to prove it made diligent efforts with a parent who abandons.

### **Matter of Colby II., \_\_\_AD3d\_\_\_, dec'd 6/23/16 (3<sup>rd</sup> Dept. 2016)**

An Albany County father abandoned his child. During the 6 months before the proceeding, the father visited twice, attended the child's permanency hearing, twice applied for custody and visitation and left one telephone message for the caseworker. This was not sufficient to defeat the allegation of abandonment. Although the DSS is not required to demonstrate diligent

efforts, they certainly did not impede the father. The caseworker visited the father in jail and told the father about the potential for visitation and told him he could send letters to the child through the agency. The caseworker attempted twice to return the father's one phone message and also sent the father several letters. The father did not inform the DSS when he was released from jail and never followed up on the one phone call he did make. He was out of jail for approximately 2 months and made no attempt to contact the child. His incarceration does not excuse his failure to maintain contact with the agency. He did nothing to contact the child directly and did not write any letters. Although the caseworker informed him that the child did not want to visit him at the jail, this was not discouragement of visitation and the father had declined jail visits in any event. The caseworker indicated that she would have brought the child for visits at the jail had the father asked for them. The court did not need to hold a dispositional hearing as one is not required in an abandonment TPR. The father's prolonged failure to contact the child or the agency as well as the length of time the child had been in care negated any need for a dispositional hearing.

#### **MENTAL ILLNESS and MENTAL RETARDATION\* TPRs**

**(\* NOTE: the statute now refers to "Intellectual Disability" )**

#### **Matter of Brayden R., 136 AD3d 1320 (4<sup>th</sup> Dept. 2016)**

Erie County Family Court properly terminated a father's rights to his son on mental illness grounds. The Fourth Department had previously affirmed the termination of the father's rights to another child and the father's mental health status had not changed since then. The father consented to the lower court taking judicial notice of the past mental illness termination proceeding.

#### **Matter of Donovan Jermaine R., 137 AD3d 448 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed the termination of a New York County mother's rights on mental illness grounds. Less than 2 years before the birth of this child, the mother had murdered her 3 other children. She slit the throat of her oldest child and then drowned all of them in the bathtub. She pled not responsible by reason of mental illness and had for the last 8 years resided in a forensic psychiatric center. The petitioner's expert testified that she has persistent and severe schizoaffective disorder and anti social personality disorder. The expert reviewed the mother's extensive medical records and interviewed her as well. The mother offered no evidence to refute the expert.

**Matter of Abjah C.P., 137 AD3d 791 (2<sup>nd</sup> Dept. 2016)**

The Second Department concurred with Kings County Family Court that a mother's mental illness was too severe for her to be able to care safely for her child for the foreseeable future. The child had been in care since a few days after birth and at the time of the lower court termination, the child was 4 years old. The expert testified that the mother suffered from schizoaffective disorder, bipolar type and had suffered chronically for over 16 years. The mother was compliant with treatment and was stabilized however she exhibited symptoms, including hallucinations, mood liability and disturbed thinking. The expert opined that these symptoms would place the child at risk.

**Matter of Kaylee Y.B., 137 AD3d 901 (2<sup>nd</sup> Dept. 2016)**

Suffolk County Family Court properly terminated a mother's rights on mental retardation grounds. Two psychologists testified that the mother had sub average intellectual functioning that had originated in childhood. She had impaired adaptive functioning, impaired parental capacity and would not be able to care for the children without danger of neglect.

**Matter of Bruce P., 138 AD3d 864 (2<sup>nd</sup> Dept. 2016) and Matter of Chloe S., 138 AD3d 867(2<sup>nd</sup> Dept. 2016)**

An Orange County mother's rights were terminated to her 2 children on mental illness grounds. The court appointed expert examined the mother for 2 hours and reviewed her numerous medical records and records regarding visitation and concluded that the mother could not safely parent the children for the foreseeable future. The mother had bipolar disorder, did not take her medications and had a lack of insight into her problems. She was frustrated when dealing with the children, had no basic parenting skills and was homeless. The court did err in admitting that portion of the expert's report which contained a description of the records he had reviewed that he labeled as "collateral data". This information was inadmissible hearsay but the error was harmless.

**Matter of Summer S.S., 139 AD3d 1118 (3<sup>rd</sup> Dept. 2016)**

The Third Department affirmed the termination of both Clinton County parents' rights to their daughter. The child was placed in care at birth based on imminent risk of harm due to the parent's mental health issues. At the first permanency hearing, when the child had been in care about 10 months, the lower court changed the baby's goal to adoption and ended all visitation. The DSS brought mental illness termination petitions against both parents as soon as the child had been in care one year. The parents failed to attend the court ordered mental health evaluations but the appointed psychologist ultimately testified that he was able to form an opinion based on evaluations that he had made himself of the two parents less than 2 years

earlier regarding their care of an older child. He also reviewed prior mental health records and caseworker records. The expert opined that the father has antisocial personality disorder, intermittent explosive disorder, bipolar disorder, ADHD, substance abuse disorder and borderline intellectual functioning. These issues caused the father to have poor judgment, a lack of morality, anger management issues and poor impulse control. These issues were long standing in the father and are issues that are extremely resistant to treatment. The psychologist testified that the mother suffered with borderline personality disorder, bipolar disorder, anxiety disorder, disruptive impulse control, conduct disorder and had learning disabilities. These conditions gave her poor judgment and cause her to be impulsive. She prioritizes her needs above her children's. Unlike the father, the mother's conditions might respond to medication but the mother had not followed through with treatment or medications. The psychologist indicated that the parents had not improved since he saw them before the birth of this latest child, commenting that they both choose to leave with a traveling carnival for 2 months just after this child was born and placed in foster care. He opined that neither parent could properly and safely care for this child due to their mental health issues and would not be able to for the foreseeable future.

Since the parents choose not to attend the evaluations, the expert was entitled to rely on available records to determine if he could evaluate the parents and he did so. The parents offered no expert to contradict that their problems were longstanding and that they had refused treatment. This established clear and convincing evidence that both of the parents could not provide proper care to the child for the foreseeable future.

**Matter of Akiko Miami-Lyn A. 139 AD3d 617 (1<sup>st</sup> Dept. 2016)**

Bronx County Family Court's termination of a mother's rights to her child on mental illness grounds was affirmed on appeal. The clear and convincing evidence demonstrated that the mother has long standing mental illness issues. She has schizoaffective disorder and cannot care for this special needs child. The court appointed expert interviewed the mother, read her medical records and prepared a detailed report. The mother has no insight into her problems and does not comply with medication or treatment recommendations. The mother herself testified that she had no mental illness issues and would not take her medications if she was not being ordered by the court to do so.

**Matter of Marie ZZ., \_\_\_AD3d \_\_, dec'd 6/2/16 (3<sup>rd</sup> Dept. 2016)**

An Ulster County mother had her rights terminated on both permanent neglect and mental illness grounds. On appeal, she argued that the court should have provided her with a Guardian Ad Litem. The Third Department found that neither she nor her attorney had asked for one to be appointed. Further, she was able to give coherent testimony in which she stated

that she was aware that she suffered from severe mental illness and knew it was important to take her medications and defended her actions with the child during her supervised visits. The record indicates that she was capable of understanding the proceedings and of defending herself and working with her attorney. It was not error for the court to fail, sua sponte, to appoint a GAL.

#### **PERMANENT NEGLECT TPR**

##### **Matter of Iasha Tameeka McL. 135 AD3d 601 (1<sup>st</sup> Dept. 2016)**

A Bronx County father's parental rights were properly terminated. The agency made diligent efforts but the father failed to acknowledge or meaningfully address the sexual abuse of an older daughter who was not one of the subject children in the termination. He failed to complete a sex offender program and did not "meaningfully address his deviant sexual behavior". A suspended judgment is not appropriate as the children would not be safe in his care. The foster parents wish to adopt and have provided a stable, loving home that meets the children's special needs.

##### **Matter of Elijah M.A., 135 AD3d 744 (2<sup>nd</sup> Dept. 2016)**

Kings County Family Court was affirmed on appeal regarding the termination of a father's rights to his son. The agency offered diligent efforts by providing referrals for mental health counseling and substance abuse. They set up visitation and urged the father to comply and complete the programs. The father however failed to plan for the child's future.

##### **Matter of Nay'anya W.R., 135 AD3d 770 (2<sup>nd</sup> Dept. 2016)**

The Second Department affirmed a Suffolk County Family Court termination of a mother's rights to her child. The agency offered diligent efforts by setting up visits, provided referrals for individual therapy, therapeutic visits and a forensic parenting evaluation. They advised the mother of the importance of complying with the court's order regarding services. The mother did not regularly attend the therapy or the therapeutic visitation. She never obtained safe housing. It was in the child's best interests to be freed for adoption.

**Matter of Tsulyn R.A., 135 AD3d 935 (2<sup>nd</sup> Dept. 2016)**

The Second Department concurred with Westchester County Family Court that a mother's rights to her child should be terminated. The agency provided clear and convincing evidence that they offered her diligent efforts. The caseworkers made numerous referrals to mental health programs and parenting services and followed up on these programs as well as ones suggested by the mother. They encouraged the mother to comply with the programs and set up visitation with the child. The caseworkers provided information to the mother about the child's special needs and the child's services. The mother did not complete her mental health services and did not gain insight into her issues. She missed numerous visits with the child. The DSS was not required to provide testimony of a psychiatrist or psychologist as the TPR was on permanent neglect grounds.

**Matter of Senaya Simone J., 136 AD3d 434 (1<sup>st</sup> Dept. 2016)**

New York County's termination of a mother's rights to her child was affirmed on appeal to the First Department. The agency provided diligent efforts by monitoring the mother's drug treatment programs. They also set up visitation. The agency is not required to refer a parent to programs if the parent is already involved in relevant programs. The mother however did not change her behavior as she repeatedly relapsed into drug use and the child had to be removed from her care during a trial discharge. Although the mother made efforts to stop using drugs, this does not warrant a suspended judgment. The child's best interests require that she be freed for adoption by the foster mother that she has lived with for most of her life.

**Matter of Alexandria D., 136 AD3d 604 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed the termination of a Bronx County mother's parental rights to her daughter. The agency offered diligent efforts in that they referred the mother to anger management and mental health therapy. They referred her to parenting skills programs designed for parenting special needs children. The agency set up visitation and provided a visitation coach. The mother failed to plan in that she did not focus on her mental health issues, her anger management problems or on the child's special needs. The mother was often late to visits and the quality of the mother's visits varied. She would sometimes keep the child waiting for 2 hours for the visit to start and then she would focus on her other children, leaving this child to play alone. The mother did not contact the child's teachers or therapists. It was in the child's best interests to be freed for adoption by the foster mother who had lovingly cared for the child for 4 years. The child's needs are met in the foster home. A suspended judgment is not in the child's best interests as any delay would not result in a different outcome and the child needs stability.

**Matter of Gabriel B.S.P., 136 AD3d 619 (2<sup>nd</sup> Dept. 2016)**

The Second Department reversed Suffolk County Family Court's termination of a non respondent parent father's rights to his 2 children. The children were removed from their mother's care due to her drug abuse. The father lived with the mother when the removal occurred but he was never made a respondent. However, at the time of the removal, the lower court issued an order that he would only have supervised visitation. As the case against the mother proceeded, the father moved for unsupervised contact but he was denied without a hearing. The mother ultimately surrendered both children for adoption and the DSS brought termination petitions against the father. The Appellate Division ruled that the DSS had not in fact provided the non respondent parent father with diligent efforts. The caseworker focused her efforts on the mother. DSS did tell the father to seek unsupervised visits from the court but then they did not support the father when he requested them. DSS did schedule visits for the father and included him in permanency hearings and service plan reviews. However, DSS determined that the father had issues regarding his ability to have the children and then did not make affirmative, repeated and meaningful efforts to assist him with his issues. Everything the caseworkers asked of the father he did, including a parenting class and marriage counseling. During visits he was loving and appropriate with the children. The lower court erred in terminating his rights.

**Matter of Bawasilya Nyairah R., 137 AD3d 675 (1<sup>st</sup> Dept.2016)**

A New York County mother permanently neglected her daughter. The agency made diligent efforts and the mother completed a parenting skills course and attended therapy. However, visitation with the child was poor as the mother clearly favored her son over this child and she also demeaned the appearance of both children. The mother also did not complete anger management or vocational training.

**Matter of William E.P., 137 AD3d 918 (2<sup>nd</sup> Dept. 2016)**

The Second Department affirmed the lower court's freeing of a Westchester child for adoption. (there were 2 other children for which the Second Department issued the same decision under different cites) The child had been placed in care in 2010 and the agency provided diligent efforts of visitation, referrals to programs and held planning conferences. In 2013, the DSS filed a termination petition against the mother. The mother did participate in services but did not deal with her issues. She was unable to control her anger and other emotions and continued to have violent interactions with others. She did not benefit from the programs she attended.

**Matter of Lawanna M., 138 AD3d 408 (1<sup>st</sup> Dept. 2016)**

A 16 year old New York County teen was freed to be adopted by her foster mother who had already adopted the child's brother. The father permanently neglected the teen. The agency offered him diligent efforts to improve the parental relationship by referring him to anger management and parenting skills. The caseworkers sent over 25 letters and emails asking him to engage in services and giving him contact information. The father acted out in court and the child refused to visit the father based on the father's anger issues. The father however denied that he needed the services and argued that instead the teen should have been forced to engage in family therapy with him. However, the child's therapist indicated that such therapy would be harmful to the child. The father did not take steps to correct the conditions that would allow the child to safely return. The child indicated that she felt unsafe with the father and wanted to be adopted by the foster mother.

**Matter of Daniel K.L., 138 AD3d 743 (2<sup>nd</sup> Dept. 2016)**

Queens County Family Court was affirmed on appeal regarding the termination of a mother's rights. The agency provided her with diligent efforts toward reunification. She was given a service plan, urged to comply, referred to parenting classes, mental health evaluations, housing assistance and provided with weekly visitation. She only belatedly and partially complied with the service plan and this was not sufficient. It was not error for the lower court to deny the request to adjourn the fact findings as the mother had already been given numerous adjournments and had not advised her attorney as to why she was not present. It was also not error to refuse to provide the mother with new assigned counsel as she did not provide and good cause to do so. It was in the children's best interests to be freed for adoption by their foster mother.

**Matter of London J., 138 AD3d 1457 (4<sup>th</sup> Dept. 2016)**

Onondaga County Family Court terminated the parental rights of a mother to her child and was affirmed on appeal. The mother did attend and made progress in some of the services offered but she did not complete any of them and never gained insight into the problems that resulted in the child's placement in foster care. Any progress the mother made was not sufficient to leave the child unsettled and in foster care.

**Matter of Essence T.W., 139 AD2d 403 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed New York County Family Court's termination of a mother's rights to her children. There was clear and convincing evidence that the agency offered the mother

diligent efforts. The agency offered referrals to counseling and parenting classes, set up visitation and directed random drugs screens. The mother was reminded of her mental health appointments by the agency. However the mother did not attend her mental health services and failed to maintain regular contact with the children. The children have bonded with the foster mother who wishes to adopt them.

**Matter of Zhane A. F. v Catholic Socy, & Home Bur. 139 AD3d 458 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed New York County's termination of a mother's rights. The agency provided diligent efforts to assist the mother to no avail. The agency designed a service plan, met with the mother, made service referrals and assisted her with compliance. However, the mother did not comply with services including her mental health services. She failed to visit the children at one point for 7 months. The mother had no insight into her mental health services. A suspended judgment is not warranted given that the mother had not made significant progress. The children need the stability of the foster home.

**Matter of Cameron W., 139 AD3d 494 (1<sup>st</sup> Dept. 2016)**

New York County Family Court properly terminated a mother's rights to her 4 children. Diligent efforts were offered in that the mother was referred to domestic violence counseling, mental health services and parenting classes. The agency also set up visitation. The mother continued to deny responsibility for the children's removal to foster care. She did not complete the parenting skills programs and did not benefit from them. She was unable to demonstrate that she had adequate parenting skills. She was disruptive and violent during visits and did not always visit consistently. She never appreciated why the children had been placed in foster care. It was in the best interests of the children to be adopted by the stable foster family where they had lived for most of their lives. The children wanted to stay there and their needs are being met by a foster mother who wishes to adopt them.

**Matter of Tylynn M.A 139 AD3d 569 (1<sup>st</sup> Dept. 2016)**

The Bronx County Family Court's dismissal of a permanent neglect petition against a mother was affirmed on appeal. The agency failed to make out a prima facie case. The mother was undergoing drug treatment and had in fact completed several courses. She completed a parenting course and remained in contact with the agency, speaking to them about the children's status and was receptive to the agency advice. When not in jail, she visited the children regularly and the children enjoyed seeing her. When she was incarcerated, she called them most nights from the jail and talked to them about their day. The lower court correctly found the mother to be engaged in her services and called her a "present parent". The agency claimed on appeal that the mother had not completed a domestic violence program but in fact

the caseworker could not recall if the mother did or not and the records the caseworker used to refresh her recollection were not put into evidence nor was her further testimony definitive.

**Matter of Lihanna A., \_\_AD3d \_\_, dec'd 6/2/16 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed a termination of a mother's rights to her child. The agency is permitted to file to free a child for adoption even when the child is directly placed in a non foster home. The agency offered diligent efforts by referring the mother to drug treatment and providing visitation. The mother did not complete drug treatment and relapsed multiple times. She did not visit the child regularly. It was in the child's best interests to be freed for adoption by the family that has cared for her since she was 9 months old. She is thriving in that home and the mother has not planned for the child's future.

**Matter of Amarnee T.T., \_\_AD3d \_\_, dec'd 6/7/16 (1<sup>st</sup> Dept. 2016)**

The First Department affirmed a Bronx County Family Court termination of a mother's rights to her special needs children. There was clear and convincing evidence that the agency offered diligent efforts. They scheduled visits, referred the mother to therapy and set up a trial discharge. After the trial discharge failed, the mother would not come to a family conference, would not regularly attend her counseling and did not attend the beginnings of a parenting course for special needs children. Further she refused another parenting program and missed visits with the children. She often did not engage the children when she did attend visits. There was no reason to consider a suspended judgment as the mother did not have a realistic and feasible plan to provide a stable home for the children. Her home was not suitable and did not have the space needed for the children, she did not have contact with the children's service providers and missed therapy visits. The children were thriving in their foster home where they had been for over 4 years and where they were bonded to the family.

**Matter of Hope Linda P., \_\_AD3d \_\_, dec'd 6/9/16 (1<sup>st</sup> Dept. 2016)**

The Second Department reversed New York County Family Court's dismissal of a termination against the mother and remitted the matter for a dispo hearing. The mother did not show any interest in planning for the children independently of a relative assisting her, until 5 months before the TPR was filed. The agency at that time did offer diligent efforts by assisting her with housing and services. The caseworker remained in contact with the mother's therapist to seek his assistance with the mother since she would not cooperate with the agency. Regular visitation was also offered and the mother was kept apprised of the children's health and educational issues. The mother failed to cooperate, refused services, and refused to consent to her mental health records being obtained.

**Matter of Joshua T.N., \_\_AD3d \_\_, dec'd 6/17/16 (4<sup>th</sup> Dept. 2016)**

A Wayne County Family Court termination was affirmed on appeal. DSS offered the father diligent efforts by setting up visitation, referring the father to services for his issues with mental health, anger management, substance abuse and parenting. DSS can engage in diligent efforts while also “simultaneously planning” for the potential of the children being adopted. The father did involve himself in some services but he did not apply the knowledge he should have obtained from the services as he continued to act inappropriately in front of the children. He specifically failed to cooperate with the caseworker despite a court order to do so. The father did not resolve the issues that led to the children being placed in foster care. A suspended judgment would not be warranted as the father did not make sufficient progress in the 2 years that the children were in care.

**TPR DISPOSITIONS**

**Matter of Naethael Makai A., 135 AD3d 438 (1<sup>st</sup> Dept. 2016)**

A Bronx County Family Court’s determination that a mother had violated the suspended judgment of a termination was affirmed on appeal. The preponderance of the evidence demonstrated that the mother did not move to New York State, did not obtain suitable housing, did not have a steady income and did not visit the child on a regular basis. The lower court did not err in refusing a request for an adjournment of the hearing based on the claim that the mother has “missed her train”. There was no detail provided and the mother had a history of failing to appear for visits and meetings. The foster mother has cared for the child for over 3 years and it was in the child’s best interests to be adopted.

**Matter of Alicja M.S.L. 135 AD3d 764 (2<sup>nd</sup> Dept. 2016)**

The Second Department reversed a termination of the parental rights of both parents to this Queens County child. Although permanent neglect was established, the court should have considered another disposition. The parents, who defaulted on the disposition and had failed to complete their service plans, had nonetheless made efforts toward reunification and had consistently visited. The child, who was almost 11 years old was strongly opposed to an adoption and wanted to continue the relationship with her parents. There was no viable person who was seeking to adopt the child. Termination was not in the child’s best interests and the matter was remitted for a new dispositional hearing.

**Matter of Joseph H., \_\_\_ Misc3d \_\_\_, dec'd 2/11/16 reported in NYLJ 3/8/16 (Clinton County Family Court 2016)**

Clinton County Family Court concluded that it had authority to issue a “no contact” order of protection that would run until the child was 18 years old against a father whose parental rights had been surrendered. The court concluded that the limitation in FCA § 1056(4) regarding persons who are related by “blood” should not be read to include parents who no longer have a legal relationship to their child.

**Matter of Kareem H., \_\_\_ Misc2d \_\_\_, dec'd 5/10/16 (Kings County Family Court 2016)**

Kings County Family Court granted Art. 6 custody to a great aunt in Oklahoma in a disposition of the termination instead of freeing the child for adoption by the foster family. The agency had been working with the great aunt since beginning when the child had been in care for a year. The great aunt had regular visitation with the child and the child was attached to her. The great aunt rearranged her life to travel to NYC and see the child on a regular basis. She also understood that she could not allow the mother to have unsupervised visits. The child would be able to reside with a 13 year old cousin. The foster parents may want to adopt and have treated the child as a loving member of their family but they knew foster care was a temporary situation. They have known for over a year that the plan was for the great aunt to be the child's resource if the child did not return home. Freeing the child for adoption would also mean an indefinite period of time for that to occur whereas the great aunt is able to take Art. 6 custody of the child immediately.

**Matter of Elizabeth L. v Jaris S. \_\_\_ Misc3rd \_\_\_, dec'd 6/1/16 (Kings County Family Court 2016)**

A former foster parent was permitted to file for Art. 6 custody of a child who is the subject of a permanent neglect petition because the former foster parent is a relative. The child had been in the great aunt's care as a foster child but was removed by the agency because the great aunt assaulted her paramour in front of the child. While nonparents can seek custody only with a showing of extraordinary circumstances, there are such circumstances here in this case given the permanent neglect by the mother. The great aunt has standing to file due to her relative status and does not lose that status simply because she was also a foster parent for the child at one point.

**Matter of Selena L., \_\_\_ AD3d \_\_\_, dec'd 6/1/16 (2<sup>nd</sup> Dept. 2016)**

The Second Department affirmed a revocation of a Kings County mother's suspended judgment on a termination. In October of 2010 the mother admitted to permanent neglect and the court granted a suspended judgment for a year. Nine months later, the agency moved to revoke the

suspended judgment and the lower court did so. On appeal, the Appellate Division stated that a suspended judgment can be revoked where the preponderance of the evidence shows that the parents failed to comply with one or more conditions. As it is a dispositional hearing, hearsay is admissible. A parent's attempt to comply with the conditions is not enough, they must also demonstrate that real progress has been made to overcome the problems that had resulted in the child being in care. The mother did go to services including therapy and domestic violence counseling but she did not gain any insight. She did not develop parenting skills or effective communication techniques. She allowed the father to have contact with the child in violation of the terms of the suspended judgment. The child's out of court statements regarding this were admissible. The mother also failed to obtain a satisfactory home and to maintain a source of income. The agency need not show that diligent efforts were offered as the permanent neglect has already been determined. It was in the best interests of the child to be freed for adoption.

**Matter of Alexis R.L., \_\_AD3d \_\_, dec'd 6/10/16 (4<sup>th</sup> Dept. 2016)**

Genesee County Family Court was affirmed on appeal to the Fourth Department. The mother argued that the court should have granted her a suspended judgment or awarded custody of the children to their grandmother after the permanent neglect adjudication. The mother had only made minimal progress that was not sufficient to continue the children's "unsettled familial status" in a suspended judgment. The mother failed to preserve the issue of custody to the grandmother as she did not request this at the dispositional hearing.

**Matter of Amanda M., \_\_AD3d \_\_, dec'd 6/10/16 (4<sup>th</sup> Dept. 2016)**

The Fourth Department concurred with Erie County Family Court that a father had failed to comply with the terms of his suspended judgment and that it was in the children's best interests to terminate his parental rights. The suspended judgment had been entered after the father had admitted to abandoning his 4 children.

**Matter of Jade D.S.M.A.S., \_\_AD3d \_\_, dec'd 6/22/16 (2<sup>nd</sup> Dept. 2016)**

The Richmond County child in this matter was placed in foster care when she was born. After the child had been in care for 15 months, the maternal grandmother filed for custody of the child. Fifteen months after that, a termination petition was filed. The lower court determined that the mother had permanently neglected the child and combined the custody petition with the dispositional hearing on the termination. The Second Department concurred that it was in the child's best interests to be freed for adoption by her foster parents instead of being placed in the custody of the grandmother. A grandparent has no right to custody superior to the family chosen by the agency to adopt the child. The foster parents had provided a stable home for the child since she was 6 days old and were the only parents the child had ever known. The

child was bonded with them. Further the grandmother's argument that the lower court did not properly apply the Indian Child Welfare Act to the matter was without merit as the grandmother did not provide sufficient information to put the court on notice that the child might be an Indian child as per ICWA.

**Matter of Patricia I. H., \_\_\_ AD3d\_\_ dec'd 6/29/16 (2<sup>nd</sup> Dept. 2016)**

A Kings County child was placed in non kinship foster care within days of his birth. Over 2 years later, the maternal grandmother filed for custody and the agency filed a termination against both parents. The lower court found permanent neglect against the parents and tried the custody petition along with the termination disposition and ruled that the child should be freed for adoption. The grandmother appealed. The Second Department agreed with the lower court that a relative takes no precedence for custody over adoptive parents selected by the agency. Here the child had been with the foster parent since birth – now 9 years – and the child was bonded to the family, healthy, happy and well provided for and should be freed to be adopted by his foster parent.

**SURRENDERS and ADOPTIONS**

**Matter of Hayden II., 135 AD3d 997 (3<sup>rd</sup> Dept. 2016)**

In a private stepparent adoption, the father and his new wife alleged that mother's consent was not required for the stepmother to adopt based on the mother's abandonment. The Third Department affirmed Columbia County Family Court's ruling that the mother had abandoned the child. Although there was an order of protection in place for her to not contact the child, she was not precluded from contacting people about the child. However, the mother did not attempt any contact with the child's caretakers for the 6 month period. She claimed she could not communicate as she was incarcerated and not allowed to make phone calls. However, she made no effort to communicate with anyone by mail either – there were no cards or letters to the caretakers asking about the child nor was there any attempt to contact the child's caretakers through any family or friend. She admitted that she had access to pen and paper while in jail and she did not write, did not ask friends or family for so much as a stamp or to assist in checking on the child's well being.

**Matter of Stephen M., 50 Misc3d 1216 (A) (Ulster County Family Court 2016)**

The birth parents signed a surrender in Ulster County Family Court with a condition that the child should be adopted by a particular person and the surrender also stated that if that person was unable to adopt, that DSS could find another adoptive family. When the identified person indicated she was unwilling to adopt, the Family Court ruled that this was a failure of a material condition and allowed the parents to vacate the surrender. The child is now over the age of 14 and will not consent to being adopted and the goal is changed to return to parent.

**Matter of Shaquana Michelle M.L., v Leake & Watts 139 AD3d 513 (1<sup>st</sup> Dept. 2016)**

Bronx County Family Court properly denied a mother's motion for visitation and contact with her children who had been adopted. It was no longer in the children's best interests to continue contact as the mother was irrational, unstable and violent. She was hostile to the children's adoptive parents and did not understand the significance and finality of the surrenders she had signed.

**Matter of Naquan L.G., \_\_AD3d \_\_, dec'd 6/1/16 (2<sup>nd</sup> Dept. 2016)**

The Second Department affirmed Queens County Family Court's denial of a motion by a mother to vacate her judicial surrenders of her children. The children had been in kinship foster care since 2008 based on neglect of the mother. In 2010 a termination was filed and in 2011 the mother executed voluntary surrenders of the children in court with counsel. Approximately 23 months later, the mother moved by order to show cause to vacate the surrenders. The Second Department noted that SSL §§ 383-c(3)(b) and 383-c(5)(c) describes the procedures needed to take a judicial surrender of foster children but the statute says nothing about remedies if the court does not follow the procedures. The law does state that fraud, duress and coercion in the inducement or execution of the surrender can be alleged and that other than that the surrendering parent cannot bring an action to revoke or annul the surrender. The instruments the mother signed stated in bold capital letters that the surrenders were immediate and final and that she could not cancel or change the surrender or regain custody. These were conditional surrenders that stated that the mother would be permitted contact "as mutually agreeable by the parties". There was an in court voir dire of the mother's understanding, mental clarity, satisfaction with her counsel and her understanding of the anticipated adoption and the visitation agreement. However in the 2 years since the signing, problems had occurred with the agreed upon visitation and the mother then filed to revoke her surrenders claiming that the court never advised her of the option of supportive counseling. Although it does appear that the court did not advise her of offering of supportive counseling, there is nothing in the law that allows for a revocation of a surrender for this failure.

There was a dissent. The dissent argued that the Family Court's colloquy was misleading and fundamentally unfair and that the mother should have been allowed to vacate the surrenders.

The dissent found that the court's statements regarding the visitation agreement led the mother to believe she had "rights" regarding visitation when in fact the visitation was only to be by "mutual agreement" which in fact meant she would get no visits if the adoptive parent choose not to grant them. The dissent found this manifestly unfair as it was likely that the mother focused on what the Judge was saying to her and less on the legal paperwork. Further the dissent argued that if only fraud, duress or coercion allowed for a surrender to be vacated then there was no remedy for a lower court that did virtually nothing to ensure that the parent understood what they were doing.

### **RIGHTS OF UNWED FATHERS**

#### **Matter of S'Mya Jade R., 135 AD3d 488 (1<sup>st</sup> Dept. 2016)**

The First Department concurred with Bronx County Family Court that a man's consent was not needed for the children to be freed for adoption. He visited the children no more than 10 times in 7 months and did not provide financial support.

#### **Matter of Jonathan M.H., 135 AD3d 493 (1<sup>st</sup> Dept. 2016)**

A Bronx father's consent was not needed to free the child for adoption. After the child was placed in foster care, the incarcerated father provided no support for the child and did not make efforts to maintain communication with the child, the caseworker or the child's godmother caretaker. Incarceration did not excuse this lack of support or contact. Further, the court did not err in failing to provide an adjournment to the father who refused to be produced from prison for the court hearing until he was assured that he would be returned to his preferred prison.

#### **Matter of Hope B v Avery G., 51 Misc3d 425 (New York County Family Court 2016)**

The New York County Family Court refused to allow an out of wedlock father to surrender his rights to a child who was not to be adopted but was to remain in the custody of the mother. There was no step parent adoption contemplated as the birth mother was not married. The father had "prepaid" child support of \$150,000 and did not want to be involved with the child. The court ruled it had no authority to issue such an order and gave the mother sole custody and she may seek ongoing support as the father's income is likely to rise.

**Matter of Nina M., 135 AD3d 623 (1<sup>st</sup> Dept. 2016)**

The First Department concurred with Bronx County Family Court that a man was not a “notice father” in regard to a mother’s termination and the child subsequent adoption proceeding. Although he claimed that he had lived with the child’s mother at the time of the child’s birth, he did not live with the child as the statute requires. The child had been removed from the hospital at birth. In any event he did not demonstrate that the child’s adoption by her kinship foster mother was not in the child’s best interests.

**Matter of Patrick A. v Rochelle B., 135 AD3d 1025 (3<sup>rd</sup> Dept. 2016)**

When a Cortland County mother gave birth to twin girls out of wedlock, she indicated that there were 4 different potential fathers. The petitioner in this matter was one of the men named but he declined to sign the acknowledgement of paternity, claiming concerns about financial obligations. Approximately 10 years later, he filed a paternity petition and sought genetic testing after the mother cut off his relationship with the children. The lower court ordered the testing and the respondent mother appealed. The mother and the AFC opposed the testing and argued that he should be equitably estopped from seeking an adjudication of paternity. The Third Department ruled that equitable estoppel was not relevant given that no other man had been named as the children’s father. Although the twins had other male figures in their lives, the petitioner had been involved with the children over the years, at some points living in the home and assuming some parental duties. The Third Department saw no negative impact on the children in formally determining if the petitioner was the children’s biological father.

**Matter of Blake I., 136 AD3d 1190 (3<sup>rd</sup> Dept. 2016)**

A Washington County father’s consent to a stepparent adoption was not required. The lower court had found that the father had abandoned the child. However the Third Department pointed out that resolution of this issue is a 2 step process. First the court must determine if the unwed father is in fact a consent father and if he is, then the issue of abandonment can be litigated. Here it was not necessary to reach the issue of abandonment as the father is not a man whose consent is necessary as he has never provided any support for the child. The father has been in prison for most of the 2 years before the adoption was filed. He is still responsible for supporting the child, however and he offered no proof that he supported the child before the prison sentence nor that it was not able to provide some support while incarcerated. The fact that there was no court order that he pay support is not an excuse.

**Matter of Angel P. 137 AD3d 793 (2<sup>nd</sup> Dept. 2016)**

The child of this Queens County Family Court matter was placed in kinship foster care at 8 months of age. At that time a man had signed an acknowledgement of paternity and his name was on the child's birth certificate and that man was registered with the Putative Father's registry. Over 3 years later, this respondent came forward and informed the foster care agency that he was in fact the real biological father and he filed a paternity petition. This paternity petition was dismissed as there was no motion to vacate the acknowledged father's paternity. The foster care agency then filed to terminate both the rights of the mother and the acknowledged father and this respondent moved to intervene in the termination. Family Court allowed the intervention, ordered a DNA test and it was determined that the respondent was in fact the child's biological father. Visitation was then set up and the father filed for custody of the child. The mother surrendered her rights in a conditional surrender. The court then held a hearing to determine if the father was a consent father and heard his custody petition at the same time. The Second Department concurred that the father's consent was not necessary to free the child for adoption. He had not paid fair or reasonable sums for child support as required by DRL § 111 (d)(i). Further it was in the child's best interests to be adopted by the kinship foster parents. There was no need to order a forensic evaluation and it was harmless error to limit questions regarding the living arrangements of the child's sibling.

**Matter of John J. v Kayla I., 137 AD3d 1500 (3<sup>rd</sup> Dept. 2016)**

A St. Lawrence County woman was married but living apart from her husband when she became pregnant by another man. Before the child was born, she and her husband reconciled and were together when the baby was born. The child was placed in foster care at birth under a derivative petition against the mother and the husband. Within 6 weeks of the baby's birth, this petitioner filed a paternity petition and the husband responded claiming equitable estoppel and citing all his support of the mother during the pregnancy. The court ordered a DNA testing and the petitioner was determined to be the biological father. The court determined that there had been no circumstances that warranted equitable estoppel and ordered that the petitioner be adjudicated the child's father. On appeal, the Third Department did note that the lower court should have held the equitable estoppel hearing before ordering the DNA testing. Although it is of some merit that the husband was supportive during the pregnancy, equitable estoppel rests on the reliance of a child on the representation that a husband is the child's father. Here the child was placed in foster care at birth and has never spent one night at the husband's home and only sees the husband at weekly supervised visits. The husband's failure to show up for visits has resulted in a decrease in the time the child sees him. It is true that the husband has provided the child with food, clothing, toys and affection during the visits and that the now 2 ½ year old calls the husband "daddy". However, even if the child has some measure of reliance on the husband being the father, the petitioner did not "acquiesce" in this and he had promptly brought the paternity proceeding. The husband and the child are not in a

“recognized and operative” parenting relationship and the lower court correctly ruled that the petitioner should be adjudicated as the child’s father.

**Matter of Ysabel M., 137 AD3d 1502 (3<sup>rd</sup> Dept. 2016)**

Sullivan County Family Court was affirmed on appeal regarding a ruling that an out of wedlock father’s consent was not needed for his daughter to be adopted by a maternal aunt and uncle. When the child had been about 3 years old, the aunt and uncle had obtained custody and then some 9 years later, filed to adopt her. The father had not seen the child in 8 years and perhaps had spoken to the child once on the phone during that time. He insisted that he had sent cards, letters and gifts to the child through the mother but the relative caretakers indicated that nothing was ever received. The father claimed not to have an address for the aunt and uncle but in fact he had been to their house and they had lived at the same address for over 20 years and their address and phone number were in the local phone book. The father had been incarcerated but he had access to phone books and did not attempt to contact them or ask any friends or family to help him contact the child or the caretakers. He claimed to have sent money through his family to the child’s mother but again there was no evidence that substantiated this. He also claimed he thought there was an order of protection denying him access but there was no such order. He further claimed he did not contact the aunt and uncle “out of respect”. His incarceration did not absolve him of his responsibility to remain in contact with the child and to support her.

**Matter of Augustine A. v Samantha R. S., 138 AD3d 458 (1<sup>st</sup> Dept. 2016)**

The First Department reversed Bronx County Family Court’s order for DNA testing as premature. The petitioner alleged he was the father of the child but the mother told the Support Magistrate that another man had already signed an acknowledgement of paternity and that the child’s birth certificate was in the process of being amended and the child’s last name was to be changed. This should have resulted in an equitable estoppel hearing before a Judge and the child should be appointed an AFC.

**Matter of Baby Boy B., 138 AD3d 578 (1<sup>st</sup> Dept. 2016)**

An unwed father who wished to argue that his consent was necessary in the adoption of a Bronx child, effectively exhausted his right to assigned counsel by his own misconduct toward multiple assigned attorneys. The court repeatedly warned him that his tactics would – and did – end up in his representation of himself and this was not a violation of due process.

**Matter of Nevaeh R. v Rueben M., 139 AD3d 602 (1<sup>st</sup> Dept. 2016)**

A Bronx man was not a person whose consent was needed for the child to be adopted. The child had been placed for adoption before she was 6 months old. The respondent did not live with the mother for the 6 months before the birth and he did not manifest his willingness to be a custodial parent. He did not file a paternity petition until the child was a year old and by then the child had been in the adoptive home for almost 8 months. He had made no significant effort to parent the child, support the child or even see the child until he learned someone else sought to adopt the child.

**Matter of Stephen N. v Amanda O., \_\_AD3d\_\_, dec'd 6/2/16 (3<sup>rd</sup> Dept. 2016)**

Shortly after an Albany County woman gave birth to a child out of wedlock, a man came forward and acknowledged paternity. Some 3 years later, the petitioner in this matter saw the child and believed he was the biological father of the child and in fact took a DNA test and was determined to be the biological father. He then petitioned the court for paternity and the family court denied his petition ruling that he had no standing to challenge an acknowledgment form that he had not signed. He filed again a paternity petition again some 6 years later and again it was dismissed and he appealed this second dismissal. The Third Department reversed and remanded the matter. He is entitled to file a paternity petition to challenge the established paternity, however of course the acknowledged father may have an equitable estoppel argument and the court should hold a hearing, if necessary on that issue.

**MISCELLANEOUS**

**Matter of Joyesha J. v Oscar S., 135 AD3d 557 (1<sup>st</sup> Dept. 2016)**

The First Department concurred with New York County Family Court that a petitioner did not prove that a family offense occurred under Art. 8. The petitioner mother claimed that the father had improperly touched the children. Although the children made statements to the Referee during in camera interviews, this cannot be considered as admissible evidence as neither the parties nor their counsel were present and in an Art. 8 proceeding that would be a violation of due process. Further, although a maternal great aunt testified that she had observed an incident some 4 years earlier, the trial court found her testimony to be not credible.

**Mayorga v Berkshire Farm Ctr. & Servs. For Youth 136 AD3d 1262 (3<sup>rd</sup> Dept. 2016)**

The Third Department affirmed the Supreme Court's dismissal of a lawsuit brought against Berkshire Farms. The plaintiff had been driving a car that was hit by a JD who was driving another car. The JD had been placed at Berkshire's non secure detention a few weeks earlier but had run away after only 24 hours. The plaintiff argued that Berkshire had some liability as they should have been more aggressive at keeping the child on the non secure campus, particularly as they knew the child to have run away before. The appellate court found that a resident can simply leave a non secure facility, this is why it is called "non secure". The court concurred with Supreme Court that Berkshire Farms owed no legal duty to the other driver, particularly since the child had left the facility weeks before.

**Matter of Rose 137 AD3d 431 (1<sup>st</sup> Dept. 2016)**

The First Department reversed New York County Surrogates Court's denial of a petition to unseal adoption records. The petitioner wanted copies of his deceased father's original birth certificate. He wanted to be able to establish Italian citizenship for himself and his children. The petitioner claimed that his father had been adopted and was now deceased and that his father's birth parents would be deceased as his father would be 96 years old if alive. The adoptive parents were deceased and his father had had no siblings. The appellate court ruled that this was "good cause" under DRL §114 (2) but that the petitioner's mother and his sister are living relatives of his deceased father and that they should be noticed to seek their consent. Further the NYC Dept. of Health, who would be the caretaker of the original birth certificate, should also be served with a copy of the petition. The First Department remanded the matter for service on these entities.

**Matter of Edick v Gagnon 139 AD3d 1126 (3<sup>rd</sup> Dept. 2016)**

In a private custody case where the court awarded primary physical custody to the father, the mother, among other issues, argued that evidence regarding an unfounded CPS report should not have been admitted. The Third Department ruled that the underlying facts related to the CPS investigation are admissible if relevant. (Note: It appears that the CPS worker testified about these "underlying facts" which raises a question about how to interpret FCA §651-a which indicates that an "unfounded report or portion thereof" is not admissible in a custody case. What is the point of the statute if the CPS worker can testify about the unfounded investigation?)

**Uwadiogwu V DSS of Suffolk County \_\_\_ F.3d \_\_\_ (2<sup>nd</sup> Cir 2016)**

The 2<sup>nd</sup> Circuit affirmed the dismissal of a father's §1983 action that alleged that Suffolk County DSS had violated his rights by denying him visitation with his children and by helping his wife relocate to Mississippi with his children. The limitation with his visitation was not DSS' doing –

it was the result of two neglect petitions that had been filed against the father and a decision by the family court. Ultimately, the father can seek to enforce his visitation rights in Mississippi.

**Lawson v Broome County \_\_ F.3d \_\_ (NDNY 2016)**

Ex- foster parents filed a § 1983 action against Broome County alleging that the child that had been in their foster home was removed because the foster family had complained about the agency and had interfered with the permanency plans to return the child to the birth mother. The foster parents had been indicated in the SCR due to complaints by the birth mother. The federal court ruled that the ex-foster parents had no liberty interest in a continued relationship with a foster child who had been removed from their home. Further they failed to allege how their inclusion on the SCR would have an impact on their right to be a foster or adoptive parent in the future.

**Duhs v Capra \_\_ F.3d \_\_ (2d Circuit 2016)**

The Second Circuit reversed the US District Court for the Eastern District regarding the admissibility of an out of court statement that a 3 year old boy made regarding burns he suffered from hot tub water in the defendant's criminal trial. The child said "he wouldn't let me out" to a treating pediatrician who asked him about how he had gotten burned. Since the doctor's primary intent in asking the child questions was to render medical assistance to the child, the statements the child made to the doctor were admissible in the criminal case. It does not matter that the doctor may have had a secondary motive regarding reporting child abuse. The child's statements therefore were non-testimonial and do not implicate the confrontation clause.

**People v Badalamenti \_\_ NY2d \_\_, dec'd 4/5/16 (2016)**

A divided Court of Appeals acknowledged an exception to the illegal eavesdropping statute ruling that parents can record conversations involving their minor children if it is based on a good faith belief of protecting the children's best interests. The case involved a father taping a phone call in which the child can be heard screaming as he is being beaten by the mother's paramour.

**Matter of O'Dale UU v Lisa UU., \_\_ AD3d \_\_, dec'd 6/2/16 (3<sup>rd</sup> Dept. 2016)**

In a private custody petition, the lower court awarded custody to the father based on a neglect finding against the mother for giving the behaviorally challenged child two to three times the recommended dosage of Benadryl to "help him fall asleep". She did this three of four times a

week over a three month period. The father observed the child to be in a “zombie-like” state due to this medication abuse. The child was also underweight, pulled out his hair and threatened to harm himself.