SELECTED CHILD WELFARE CASE LAW

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REMOVALS, TEMP ORDERS and EVIDENTIARY ISSUES in ART. 10 MATTERS

Matter of Mario D., 147 AD3d 828 (2nd Dept. 2017)

The Second Department reversed Queens County Family Court's sua sponte modification of a visitation order in a pending Art. 10 proceeding. The child was in foster care and the mother was awarded supervised visitation by court order. The Family Court, sua sponte, determined that there should be a hearing on the issue of the mother being given "sandwich visits" - the NYC slang for having some unsupervised visit time that starts and ends with supervision by the agency. The lower court held a hearing and ordered that the mother have 3 hour sandwich visits. ACS obtained a stay of the order and appealed. The Appellate Division reversed and determined that there was not a sound and substantial basis on the record to provide the mother with unsupervised visitation. A sandwich visit that included unsupervised time with the child should not be provided if it would be detrimental to the child.

Matter of Audrey L., 147 AD3d 838 (2nd Dept. 2017)

The Queens County Family Court was reversed by the Second Department. The lower court had returned a child to the mother in a FCA §1028 hearing. The child had been removed after birth on a derivative Art. 10 petition. The mother's older 2 children were in foster care when the subject third child was born. The lower court found no imminent risk to the infant and ordered the child returned. ACS obtained a stay of the order. The Second Department found that the lower court had not found a substantial basis for the return of the child. The evidence established that the mother had not addressed the circumstances that had led to the removals of the older 2 children.

Matter of Rihana J. H., 147 AD3d 945 (2nd Dept. 2017)

ACS filed an abuse petition against a Kings County mother and removed the child and Family Court issued an order of protection that the mother was to have no contact with the child except for supervised visitation, supervised by ACS or an ACS approved resource. The mother was also facing criminal charge. The next day, in criminal court, an order of protection was issued that the mother could have no contact with the child but subject to any subsequent order of Family Court. Two months later, Family Court ordered that the mother could now visit the child supervised by the maternal grandmother. Two weeks after the Family Court had modified the contact, criminal court issued yet another order of protection ordering that the mother could have visitation but only supervised by the agency and that there could not be any "kinship" supervision. This second order from criminal court did not contain a provision that the order was subject to any subsequent order of Family Court. The mother then requested that the Family Court issue an order that the grandmother be allowed to continue to supervise visitation. Family Court ruled that it had no jurisdiction to, in effect, countermand a criminal court order of protection. On appeal, The Second Department concurred.

Matter of Kaliia F., 148 AD3d 805 (2nd Dept. 2017)

The Second Department affirmed Kings County Family Court's dismissal of a derivative neglect petition against a father for failing to establish a prima facie case. The evidence consisted of the caseworker testifying about the out of court statements of a child in regard to the father's previous criminal matters. However, there was no proof that the respondent father had in fact been a person legally responsible for the child, who had given these out of court statements in the past. These out of court statements should not be admissible under FCA § 1046 (a)(vi) unless they were made by a child that this respondent had been legally responsible for at the time. ACS had sought adjournments to attempt to obtain this child's presence in court to give in court testimony but the

child failed to appear. The only other evidence offered of this prior abuse of a child was a criminal record regarding the father's convictions of endangering the welfare of a child. These records were not sufficient as they did not detail the underlying facts of the convictions.

Matter of Aidin V., 149 AD3d 757 (2nd Dept. 2017)

Suffolk County Family Court was reversed on appeal. The lower court had ordered that DSS was to turn over discovery materials in whatever means the respondent father's attorney wanted. DSS had provided a compact disc with some of the requested documents and the father's counsel demanded that all the discovery material be produced on paper. The lower court ruled that in this and all future cases before the court, that DSS can turn over discovery in any form it wishes to but if an attorney asked for it to be in paper format, then it must be produced in paper format as well. The Second Department ruled that as to this case, the issue was moot as the documents had already been provided by paper. However, Family Court exceeded its authority in directing that in the future, DSS must produce documents in paper if requested by counsel.

Matter of Issac C., __Misc3d ___ dec'd 3/29/17 (Family Court, Bronx Cty 2017)

ACS sought an access order under FCA § 1034(2) requiring that a 9 year old boy and his 2 year old sibling be produced at a CAC for observation and interviews. It had been alleged that the 9 year old had sexually abused the 2 year old and the mother had been reported to the hotline. The statute does allow such a request to be made ex parte. However, an attorney representing the mother and one representing the child moved to intervene and to vacate any ex parte order. The court did find that intervention is authorized given the implications of such an access order to the 9 year old and his parents. The Bronx County Family Court denied ACS' request for the access order noting that the SCR report was 8 months old, that ACS had technically closed their investigation itself but had keep the case open, that ACS had viewed a video of the supposed abuse and did not see any

abuse, and that ACS had already observed the children on numerous occasion and had not documented any risk of harm or safely concerns. The court expressed concerns about the 9 year old's due process rights at such an interview since law enforcement would be present and charges could be filed against him. ACS appeared to be trying to force the parents to comply with ACS' desires by bringing an untimely motion for access.

Matter of Isayah R., 149 AD3d 1223 (3rd Dept. 2017)

Sullivan County DSS sought the removal of a child with special needs from a mother who had ongoing substance abuse issues. The Family Court denied the removal request. Instead the court ordered that the child remain with the mother while the Art. 10 was pending and that mother refrain from the use of drugs or alcohol as well as remain compliant taking her prescribed medication. After only a short few weeks, DSS was back in court seeking removal again. The proof at the second hearing was the law enforcement had been called to the mother's apartment several times regarding allegations that the mother was impaired. On one of these occasions the caseworker was present and observed the mother to be intoxicated. The mother also admitted that she was not taking 2 of the 3 medications prescribed to her. The caseworker noted that as to the 3rd medication, a large quantity of those pills were missing. The Third Department affirmed the lower court's order of removal of the child at the second hearing.

Matter of Milani X., 149 AD3d 1225 (3rd Dept. 2017)

The Third Department reviewed the jurisdictional issues in an Art. 10 proceeding from Sullivan County. The DSS brought an Art. 10 proceeding against the mother of a child alleging drug abuse. The child had been born in a hospital in Pennsylvania and due to positive toxicology at birth, was in withdrawal. The DSS filed the petition while the child was still hospitalized in Pennsylvania. The

mother argued that the child had never lived in New York State and that the Sullivan County Family Court lacked jurisdiction. The Third Department affirmed the lower court ruling that it did have jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (the UCCJEA, which is in New York law at DRL Art. 5-a)

The mother and the father had been living in Sullivan County and had intended to move to NYC after their child was born. However, the child was born in a hospital in Pennsylvania and was still there when the Art. 10 was filed. The court found that the child did not "live" in Pennsylvania as being in a hospital temporarily does not make that location a person's legal residence. The child had no "home state" under the UCCJEA as there has not been any time to establish a home; the child had just been born. Under the UCCJEA, if a child has no "home state", then jurisdiction can be where the parent has a significant connection to a state or where there is substantial evidence concerning the child. Here both parents had significant connections to New York and evidence about the parents and the child's relationship with other relatives was all in New York State. The UCCJEA allows New York to exercise jurisdiction over this infant. The court commented in a foot note that the fact that the child was ultimately placed with a relative in New York State did not give that state jurisdiction, as the jurisdiction question is to be reached relative to the date of the commencement of the action, not based on what happens afterward.

Matter of Cameron B., 149 AD3d 1502 (4th Dept. 2017)

The Fourth Department reversed and remanded a neglect adjudication from Chautauqua County Family Court. On the day of the fact finding, the defense attorney appeared and indicated that his client was ill and asked for an adjournment and the court refused and proceeded with the hearing. The defense counsel participated and did not remain silent but in fact objected to offered evidence several times. Therefore this hearing is not a default and the adjudication can be appealed. The lower court abused its discretion and should have adjourned the matter. The attorney indicated that he had heard from his

client and that she was ill. The client had also contacted DSS about being ill. Further the mother had personally appeared at all prior proceedings and the matter had not been protracted. This was the first time the mother had ever asked for an adjournment. The matter was remitted for a new fact finding.

Matter of Hannah T.R. 149 AD3d 958 (2nd Dept. 2017)

Kings County Family Court ruled that the subject child in an Art. 10 proceeding could testify by closed circuit television and the Second Department affirmed the ruling. A respondent's right to be present is not absolute in a civil matter. The court is to balance the respondent's right to due process with the mental and emotional well being of the child. The lower court weighed the respective rights and properly determined that the child should testify via closed circuit. The mother, who was pro se, was allowed to be present in the courtroom and to cross examine while the child testified over closed circuit.

Matter of Carmen V., __AD3d__, dec'd 6/21/17 (2nd Dept. 2017)

The Second Department reversed a temporary order by Queens County Family Court. ACS filed a neglect petition alleging that a father had slapped his 5 year old in the face and caused an injury to her eye. At first the lower court ordered that the child would be released to the non respondent mother and that the father had to leave the home and stay away from the children. However, after about 2 weeks, the court ordered that the father could reside in the home on the condition that the mother monitor the father's contact with the children at all times. ACS appealed and the Second Department reversed. The father should not be allowed back in the home while the matter is pending given the allegations and that there was evidence that the mother would not provide the needed supervision.

Matter of Alexander Z., __AD3d__, dec'd 6/1/17 (1st Dept. 2017)

The First Department ruled that an AFC cannot appeal a neglect finding on behalf of the children – they are not aggrieved by a parent's adjudication of neglect. Children can appeal a dispositional order, but in this case, the order has now expired and any appeal of that order is moot.

Matter of Nasir A., __AD3d__, dec'd 6/21/17 (2nd Dept. 2017)

The Kings County Family Court ruled that ACS did not prove that a father was a proper respondent and further that neither the father nor the respondent grandmother had neglected the children. The Second Department found that the lower court erred regarding the father's status. Any parent is, by definition, a proper respondent. There was no question that this respondent was the biological father of the 4 subject children and that he had not had his parental rights terminated to any of them. However, the Second Department did agree that ACS had not proven neglect against either respondent. ACS had not provided a prima facie case that the grandmother medically neglected the children or that the father's mental illness caused any risk of impairment to the children.

Matter of Sean M., __AD3d___, dec'd 6/27/17 (1st Dept. 2017)

In a highly significant decision the First Department reversed Bronx County Family Court's order that ACS caseworker notes and other notes provided in discovery to the respondent's counsel could not be shared with the attorneys representing the respondents on their criminal matters. Respondent's counsel is free to share caseworker notes obtained in an Art. 10 matter with the counsel representing the same clients in criminal matters. SSL 424(4)(A) does not bar the sharing of such notes with criminal defense counsel. The respondent's rights under the 1st and 6th Amendment would be violated by an order that the records could not be shared between the attorneys.

GENERAL NEGLECT

Matter of Ashantae H., 146 AD3d 453 (1st Dept. 2017)

A Bronx County mother's aggressive and uncontrollable behavior resulted in her children being neglected. She has anger issues that have resulted in repeated arguments with a neighbor, building staff and other tenants. These arguments occurred in the presence of one or more of the children. The shelter where the family resided had called the police on repeated occasions and had repeatedly warned the mother that she could be evicted or arrested and that the children could be harmed. The "strongest adverse inference" was made against the mother who failed to testify. There need not be proof that the children were actually harmed given the clear detrimental effect that the mother's actions had on the children.

Matter of Nazere McK., 146 AD3d 487 (1st Dept. 2017)

A one month old Bronx County infant sustained a subconjunctival hemorrhage in his eyes, a scratch on his nostril and a torn frenulum on his upper lip. These are not injuries that ordinarily occur unless there is neglect by the caretaker. The mother was the sole caretaker of the infant and offered conflicting accounts of how the child became injured. The mother's expert did opine that the child could have gotten the eye hemorrhage from the birth, or from violent screaming, vomiting, coughing or from an infection - but the child had none of these conditions before the date he sustained the injury. The mother's expert also claimed that the child could have been injured on his lip by falling face first onto the floor. However, she also testified that she had only seen that occur once in thousands of cases and that a blow from a hand to the child's face could also have caused the injury to the lip. The lower court found the mother less than credible in her testimony particularly as she admitted that she failed to tell the truth about

the injuries at first, fearing that the baby would be removed from her. The First Department affirmed the neglect adjudication against the mother.

Matter of Kimberly F., 146 AD3d 562 (1st Dept. 2017)

A New York County mother neglected her daughter when she refused to allow the child to return to the home. The child claimed she had been raped. The mother called the child a liar and refused to discuss services for the child with ACS. Failing to offer any plan for a child other than foster care is neglect. It does not matter that the mother would have considered a voluntary placement had it been offered as such a placement is only appropriate when the parent is unable to care for the child, not when the parent is unwilling. The mother claimed that her own health problems and that discipline issues with the child prevented her from caring for the child but these claims were not documented in any way. The fact that ACS may have failed to assist the mother with the child in the past also does not offer an adequate defense to the mother's failure to cooperate with efforts to adequately plan for the child's needs and care at this time. An issue raised on appeal about the limitations the court put on visitation is moot since the mother has now unconditionally surrendered the child.

Matter of William KK., 146 AD3d 1052 (3rd Dept. 2017)

The Third Department agreed with Broome County Family Court that a mother had neglected her child. The child was brought to the hospital by the paternal grandmother who watched the infant in her home while the mother worked. The grandmother testified that the child had been fine the day before. The next day when the mother dropped the child off at the grandmother's for the day, the mother said the child had a rash due to his pajamas. The grandmother noticed that the baby was fussy, quiet and would not eat. When the grandmother went

to change the diaper and the child's clothes, the child did not want to be put on his back and appeared to be in pain. The grandmother then noticed bruises on his chest, leg, shoulder and head and took him to the hospital. This was approximately 3 hours after the child had been dropped off by the mother. The medical examination showed that child had a skull fracture and numerous bruises that had been caused by non accidental means. These injuries would likely have occurred 15-18 hours earlier. The mother denied she had injured the child and blamed the grandmother. The mother argued that the medical opinion on the dating of the injuries should be disregarded as the opining doctor did not personally examine the child. The Appellate Division found that this failure to examine the child affected the weight of the evidence but was not a reason to exclude it totally. The grandmother's testimony that nothing untoward occurred with the child in the 3 hours she had the boy before bringing him to the hospital was deemed credible. The mother, however, took the 5th when she was asked on the stand if she had hurt the child or was aware of his injuries before dropping the baby with the grandmother. This properly resulted in a negative inference against the mother. The mother did not defeat the prima facie case that she was the caretaker when the child was injured and that she was therefore responsible for the child's injuries.

Matter of Jasmine G., 147 AD3d 593 (1st Dept. 2017)

A New York County mother neglected her 13 year old daughter. The mother would make the child sit outside in the freezing weather without sufficient clothing and without food and would yell at the child and curse her from inside. The mother withheld food from the young teen or would only give her food she was allergic to or did not like. The child's younger sister would, at risk of punishment, sneak food to her older sister. The mother emotionally rejected the child and told ACS, in front of the child, that they could "keep her". The mother had done the same to another older son in the past.

Matter of Shajada B., 147 AD3d 645 (1st Dept. 2017)

The First Department agreed with the Bronx County Family Court that a mother neglected her children. She left her 12 year old daughter alone to babysit the younger children for extended periods of time. The younger children were 9, 7 and 6 and the mother left them all without a working telephone and without adequate food or instructions. The mother also regularly misused marijuana in the home when the children were present. ACS was not required to prove that any child had actually been impaired by these actions.

Matter of Baby Girl L., 147 AD3d 683 (1st Dept. 2017)

A Bronx father derivately neglected his newborn daughter. The prior findings had been made regarding his older children sufficiently close in time. He had not ameliorated the conditions that resulted in the prior neglect finding. He had a "transient lifestyle" and was unable to provide adequate housing for the child or make any provisions for the care of the child.

Matter of Cameron O., 147 AD3d 1257 (3rd Dept. 2017)

Otsego County Family Court found that a father neglected his 4 sons. The children were in the home when a canister of butane exploded in the kitchen. This was a major explosion that left severe burns to the father and significant damage to the home. None of the children were hurt. The father claimed he had several canisters of butane in the kitchen as he had been refilling a cigarette lighter. He said he had been cooking dinner and that a butane canister was 2 feet from the lit stove and it apparently was leaking and that this was what set off the explosion. DSS claimed he was actually using the butane to refine marijuana into "butane honey oil". However, regardless of why the butane was there, the father had neglected the children by his failure to exercise reasonable and prudent care. He should not have been engaging in any activity involving butane canisters near a lit stove.

Stead v Joyce 147 AD3d 1317 (4th Dept. 2017)

An Erie County indicated report should remain indicated where the subject took several children to eat lunch at a busy fast food restaurant and left the children in the play area. One of the children left the play area and was out of sight of the caretaker for several minutes. The caretaker was unaware that the child had wandered off until an employee brought the child back to her.

Matter of Nivek A.S., 148 AD3d 459 (1st Dept. 2017)

The First Department agreed with the New York County Family Court that a mother neglected her children. The children were at imminent risk of impairment due to chronic poor hygiene, medical and educational neglect. One child's eczema was neglected by the mother to the extent that the child had to be hospitalized for 3 days. Two of the children missed so much school that it was detrimental to their education and resulted in poor grades. The mother would not allow one of the children to have a recommended evaluation for educational purposes.

Matter of Mia G., 146 AD3d 882 (2nd Dept. 2017)

A Suffolk respondent neglected the 3 children in the home. He failed to obtain medical treatment for a week after the youngest child was born at home with no medical assistance and 6 weeks premature. When he did seek medical attention for the little baby, he was told to go to the emergency room and he waited a full day before he finally did so. The baby had to be admitted to the pediatric intensive care unit. This action supported a derivative neglect adjudication for the other 2 children in the home. He also neglected all 3 children by his misuse of drugs. He admitted he had used marijuana and cocaine for years. While the newborn was in his care for a week, he used cocaine about 3 times and marijuana

about 5 times. Also a 30 day hair follicle test performed on the father resulted positive for both cocaine and marijuana. This drug usage established a prima facie case of neglect which the father failed to rebut.

Matter of Justin P., 148 AD3d 903 (2nd Dept. 2017)

The Second Department reversed the Kings County Family Court's neglect adjudication regarding a father who allegedly failed to provide adequate food to his 12 year old son. The father and the child were living with relatives and the child was given meals by the relative while the father was at work. The child was also allowed access to food that was in the kitchen area of the home. There was no showing that the child's condition had become impaired or was in imminent danger of impairment as a result of the father having not provided him with adequate food.

Matter of Cody W., 148 AD3d 914 (2nd Dept. 2017)

A Suffolk father neglected his 3 children by misusing marijuana in their presence and by committing an act of domestic violence in their presence. The father had previously been found to have neglected the children due to substance abuse and had a toxicology screening tested positive for marijuana. This corroborated the out of court statements of the 5 and 7 year old who said that their father smoked "weed" about once a week in their presence. Further the 7 year old had found a remnant of a marijuana cigarette in the ashtray and tried to smoke it himself. Also the father threw a stone object at the mother's car windshield and shattered it while the 3 and 5 year old were present and standing between the two parents.

Matter of Zepher D., 148 AD3d 1013 (2nd Dept. 2017)

The Second Department concurred with Kings County Family Court over the dismissal of a neglect petition. ACS did not prove that the respondent was a

person legally responsible for the child. The child's maternal grandmother as well as the father of the respondent both testified that the child's grandmother was the child's primary caretaker and was the person who paid the expenses of the child during the time period in question. Further, even if the respondent had been a person legally responsible for the child, there was not adequate proof of neglect. The only witness was the child's mother who testified about alleged domestic violence and the court found her testimony not credible. The child's out of court statements about the domestic violence allegations were not sufficiently corroborated.

Matter of Aryelle F., 148 AD3d 1014 (2nd Dept. 2017)

The Second Department concurred with the Queens County Family Court that a mother had derivately neglected a child who was born after the mother had been found to have neglected an older half sibling. The mother had failed to complete a parenting program and was not attending a counseling program both of which had been ordered by the prior order of disposition. The neglect of the older child was sufficiently proximate in time such that it could be reasonably concluded that the neglectful conditions still exist. The mother did not establish that the conditions do not exist or will not continue to exist in the foreseeable future.

Matter of Jade F., 149 AD3d 1180 (3rd Dept. 2017)

A Broome County respondent was the father of the younger girl in the home and was a person legally responsible for her older brother. He lived with the children and their mother. Both the mother and the respondent were found to have neglected the boy and derivately neglected the girl. The boy was approximately 8 years old and had bruising on several parts of his face, ear, leg and torso. The boy indicated that the respondent head butted him, flicked his ear and hit him and that this would occur "wherever and wherever" the respondent wanted to and that the respondent used his hands and feet. The caseworker observed the boy's bruises and testified that the child said he was afraid of the respondent. Photos

of the child's bruises were entered into evidence. The mother denied that she had ever seen the respondent hit the child. She did admit that she and the respondent had fights to the extent that she would telephone her mother – sometimes in the middle of the night – to come and get them. The caseworker noted that the mother had a bruise around her eye and bruises on her arms.

The boyfriend had 2 other children, who were 4 and 5 years old and did not live in the home but visited. These children told the casework that the respondent, their father is mean to the target child and yells at him. The 5 year old said she had seen her father hit the mother of the children in the head and had seen a bruise on the mother. The 4 year old said she had seen her father push the children's mother up against the wall and hit the mother on the arm.

The respondent denied bruising the child and claimed the mother's bruises were due to her having fallen out of bed. The mother denied any of her bruising was at the hands of the boyfriend but gave a variety of explanations for her bruises. She also said the child's bruises were due to playing. The lower court observed that the mother's demeanor when testifying was "loud" and "agitated" and "bordered on rude" and noticed that she constantly looked to the boyfriend as she answered questions. The boyfriend was hostile and angry when he testified. The caseworkers experienced the parents as uncooperative during the investigation to the point that had summoned 3 police officers when they attempted to speak to the parents.

The parents did not offer reasonable explanations of the child's injuries and the respondent committed acts of domestic violence in front of the children. The mother failed to intervene or protect her son and even said that if the boy liked foster care, she would leave him there. Both the mother and the respondent neglected the 2 children in the home.

Matter of Emmanuel J., 149 AD3d 1292 (3rd Dept. 2017)

A Fulton County man neglected the 6 children in the home; 3 of whom were his children and 3 of whom, he was a person legally responsible for. The respondent

appealed the neglect finding but only as to the issues for 2 of the children. As to those 2 children, the Third Department affirmed the neglect finding. The older of the 2 children, approximately 7 years old at time, was often sent to school in ill-fitting clothing, unkempt and smelling of urine and body odor. The child would be sent to the school nurse who would then have the little girl take wash herself, brush her teeth and change to clean clothes the nurse had for her. The little girl's strong odor of urine was a recurrent issue throughout the whole school year. The child was incontinent and had frequent UTIs. The child was also sometimes locked into her bedroom overnight with no access to a bathroom. She would have to urinate the mattress that she slept on and it was not cleaned. She also repeatedly had lice. The child would often cry in the nurse's office and express fear that she would be in trouble with the respondent for being in the nurses office again. There was a marked improvement in this child's demeanor, confidence and academic performance once she was placed in foster care. This issue was not isolated, it affected the child and was neglectful on the part of the respondent.

The other child appealed about was an infant who suffered from sleep apnea and hypoxemia and was to be on an apnea monitor and be given oxygen therapy. On one occasion, the caseworker observed the baby struggling to breathe in full view of the respondent who was doing nothing. The child was not using the monitor or the oxygen and the caseworker alerted the father to the child needing immediate medical attention as she was having trouble breathing. The father responded that the child had seen the doctor 2 days earlier. The caseworker had to insist that the father call the doctor immediately. The father finally did so, telling the doctor that "CPS is here and they are making me call you". The caseworker told the father that he had to insist on an immediate appointment for the baby which with the caseworker's coaching, he finally did . The child arrived at the doctors in "acute respiratory distress". The baby could have died had she not been seen and treated that day. Later that baby had to be hospitalized for pneumonia, RSV and difficulty breathing. The father failed to comprehend the urgent medical needs of this baby.

The father also argued that the children should not have been placed out of the home. However, DSS had previously offered the family in home intensive services twice a week and the home was still unsafe and unsanitary. The home smelled of urine and was infested with cockroaches. All of the children had head lice. The home was inhabitable and only minimal efforts were made by the respondent to do something about the conditions.

The AFC did her job properly and while she did substitute her judgment for 2 of the children who stated that they wanted to remain in the home, she also advised the court repeatedly of the children's positions. She was not obligated to withdraw from representation of them.

Matter of Angelise L., 149 AD3d 469 (1st Dept. 2017)

A Bronx father neglected his children in several ways. The father had mental health issues and failed to comply with treatment. He continued to use marijuana which directly impacted the children. He failed to toilet train one of the children who was still wearing diapers at age 5 and could not be enrolled in school. The father failed to obtain educational and other services needed for the children who were developmentally delayed. He failed to follow through on referrals by medical professionals regarding the children's serious developmental problems, obesity and one child's extensive tooth decay due to "bottle rot".

Matter of Zachariah W., 149 AD3d 853 (2nd Dept. 2017)

The Second Department reversed a neglect finding from Kings County Family Court regarding a newborn baby. The mother had given birth and was taking appropriate care of the newborn in the hospital room. However the hospital called the hotline as the mother indicated that she was not welcome to return to her own mother's home and that her source of income was public assistance. ACS did not offer the mother any housing information or help, did not discuss

emergency housing or provide any baby supplies but instead simply did an emergency removal. The Family Court determined the mother had neglected the infant. The Second Department ruled that ACS had not proven that the mother failed to provide the infant with adequate food, clothing or shelter although financially able to do so or offered reasonable means to do so.

Matter of Qualiayah J., 149 AD3d 495 (1st Dept. 2017)

The First Department affirmed the New York County Family Court's determination that a mother neglected her children. The mother regularly and over a long time period of time, abused marijuana while the children were in her care. She was unable to rebut the presumption of neglect under FCA § 1046(a)(iii). She continued to maintain that she was not addicted to marijuana and refused all referrals to drug treatment. Her apartment was also deplorable and unsanitary. The court did not abuse discretion by directing in the dispositional order that the agency should set up visitation if and when either the children or the mother requested visits. This wording did not give the children an unconditional "veto" on visitation.

Matter of Monica M., __AD3d__ ,dec'd 6/9/17 (4th Dept. 2017)

A Cattaraugus County mother neglected her 7 month old baby. She left the child with someone she knew to be an inappropriate caretaker. She smoked marijuana while caring for the child which was also a violation of the mother's probation terms. She did not consistently attend the substance abuse or mental health treatment that she needed. A psychologist who examined the mother testified that the mother was incapable of safely caring for the baby given the mother's mental health and substance abuse issues unless she was receiving treatment. Even with treatment her abilities were marginal.

Matter of Alonzo R., __AD3d__, dec'd 6/15/17 (1st Dept. 2017)

The Bronx County Family Court was affirmed on appeal. A mother neglected her child by allowing the child to live with a person the mother had never met. The mother did not even know the full name and address of this person and did not give the person paperwork needed for the child to receive dental treatment. The mother provided no support for the child and did nothing, for months, when she learned the child had become homeless. The mother's behavior did not stem from illness and poverty but was based on her intention to abdicate her parental responsibilities for the child.

Matter of Jihad H., __AD3d__, dec'd 6/28/17 (2nd Dept. 2017)

The Second Department reversed a Kings County Family Court's dismissal of a neglect petition against a father of 4 children. The children provided out of court statements that 2 of them had seen the father hit the mother and choke her. The oldest child was pushed by the father when the child sought to protect his mother. A third child had heard this fight between the parents. The police were called and the father was arrested. The 3 older children indicated that they had seen the father use violence against the mother on other occasions in the past and that they knew the father used drugs. The father was in possession of drugs when he was arrested for the domestic violence and later was criminally convicted of possession. One child said he could tell by the father's appearance when he had been using drugs and another child said he could tell his father had used drugs as the father would then continue to nod his head while sitting down. The lower court did not find this to be enough evidence of neglect and dismissed the petition. However, the Second Department ruled that this neglect as the violence had occurred in front of the children and had been on a repeated basis. Further the children were aware of the father's drug use. The father did not testify and the strongest inference can be made against him.

EXCESSIVE CORPORAL PUNISHMENT

Matter of Tyson T., 146 AD3d 669 (1st Dept. 2017)

A New York County father neglected his son by hitting him with a plastic bat and a belt such that the child's elbow was bruised, swollen and scratched. The child made out of court statements and this was corroborated by the caseworker's observations of the injuries and photographs. The fact that the child did not need medical treatment did not mean that the punishment was not excessive. The First Department did however modify and dismiss the adjudication of neglect regarding a second child who was also punished. The appellate court ruled that this second child had not been physically or emotionally harmed by the punishment used on him. The appellate court substituted an adjudication of derivative neglect regarding this second child as he was in the home when the incident with the first child was hit with the bat and belt and he was aware of what happened. A third child was also in the home and aware and she was properly found to have been derivatively neglected. The mother did not intervene but sat on the couch and observed the father hitting the child with the belt and the bat. She also neglected the target child and she derivately neglected the other 2 children.

Matter of Eliora B., 146 AD3d 772 (2nd Dept. 2017)

Queens County Family Court adjudicated a father to have neglected his teenage daughter and derivatively neglected the other two teens in the home. The father became angry when the mother left the home without having made dinner for the 3 teens. The father blocked the door and instructed the 3 teens not to let their mother back into the home. The oldest child helped her mother come back in and the father responded by striking that child with a chair. The child's arm was bruised when she raised it to protect herself. As she then tried to stand up, the father grabbed her by the throat and threw her down. This one incident of

excessive corporal punishment is sufficient to make a finding of neglect as well as derivative neglect regarding the other children. The father's action demonstrates an impaired level of judgment and creates a substantial risk of harm to the other children. The dispositional order requiring the father to engage in individual counseling, anger management and a batter program as well as supervised visitation was appropriate.

Matter of Paul M., 146 AD3d 961 (2nd Dept. 2017)

A Kings County mother neglected her son by hitting him with her fist and a broomstick. The father had also neglected the child but only the mother appealed. The child's out of court statements were corroborated by the testimony of the police, the child's medical records and the caseworker's progress notes – all of which confirmed that the child had suffered injuries.

Matter of Douglas L., 147 AD3d 840 (2nd Dept. 2017)

The Second Department affirmed a neglect finding from Kings County Family Court. The mother punched, bit, scratched and attempted to strangle her daughter over the child's failure to wash the dishes. The child's out of court statements about this incident were corroborated by testimony of the caseworker's observations and photographs the caseworker had taken of the injuries. The mother's testimony lacked credibility. This behavior supported a finding that the other 3 children in the home were derivately neglected.

Matter of Jaivon J., 148 AD3d 890 (2nd Dept. 2017)

Kings County Family Court dismissed a neglect petition after ACS presented its case for failure to prove a prima facie case. On appeal, the Second Department reversed and remanded for a new hearing. A prima facie case regarding excessive corporal punishment was proven based on the records of two 911 calls as well as

testimony from a police officer and a caseworker that the mother admitted to using a belt on her 8 year old. The fact that there were no physical injuries is not dispositive and in fact the child's out of court statements were that her upper arm was hurt as she tried to defend herself. Although the child gave conflicting statements to the police officer, this did not mean there was not a prima facie case. The petition of neglect and derivative neglect was reinstated and remanded.

Matter of Emerson v NYS OCFS 148 AD3d 1627 (4th Dept. 2017)

The Fourth Department reviewed an Art. 78 action from Erie County regarding the failure of OCFS to unfound an indicted report. The matter concerned an incident at the employment of the subject. The child told a nurse and a CPS worker that the subject had punched him and hit him with a shoe. There was a witness to the incident and the child had scratches and redness consistent with the child's account. The fact that there was other contrary evidence did not require an unfounding of the report.

Matter of Naitalya B., 150 AD3d 441 (1st Dept. 2017)

The First Department concurred with New York County Family Court that a mother neglected her daughter. She hit the child with a plastic bat and with her hands. The child sustained bruises all over her body. The child gave repeated out of court statements that were corroborated by the observations and photos of the bruises by the caseworker and the medical treatment providers. The mother also threatened the child's emotional health by forcing her to remain in the bathroom for 2 days and shaving uneven portions of the child's head. The victim child's brother was derivately neglected by the mother's behavior.

PARENTAL SUBSTANCE ABUSE

Matter of Ja'Vaughn Kiaymonie S., 146 AD3d 422 (1st Dept. 2017)

The First Department agreed that a New York County father neglected his newborn. The father knew or should have known that the mother abused drugs while she was pregnant and failed to take any steps to stop her. The lower court should have stated its grounds for the adjudication.

Matter of Jayden H., 146 AD3d 444 (1st Dept. 2017)

A Bronx County father neglected his children by using the family home as the base for his drug trafficking. A DEA agent testified that the father would go in and out of the home and engage in conversations with individuals in vehicles at numerous times of the day. When the home was searched, a large quantity of various drugs were found – cocaine, crack cocaine, and oxycodone - as well as cash. This behavior placed the children at risk. The father's rights were not prejudiced and his due process was not violated based on a delay in the family court proceedings. The delay was caused by issues in the production of the father from jail and due to concerns about not prejudicing the pending criminal case against him.

Matter of Kenneth C., 148 AD3d 799 (2nd Dept. 2017)

The Second Department affirmed a Suffolk County Family Court's determination that a mother neglected her children. The mother repeated misused drugs and alcohol. She repeatedly tested positive for marijuana and cocaine and she failed to regularly attend any substance abuse treatment program. Under FCA §1046 (a)(iii), this established a prima facie case of neglect and no actual impairment or specific risk of impairment to the children needed to be established.

Matter of Baby B.W., 148 AD3d 1786 (4th Dept. 2017)

The Oneida County Family Court was affirmed on appeal. A father neglected his infant based on the father's use of drugs with the mother while the mother was pregnant. His behavior contributed to the mother using drugs which was harmful to the baby. The child was born with a positive toxicology for crack cocaine and for marijuana. The father had a history of substance abuse, would not submit to drug screening and had mental health issues. He failed to take his medication and failed to go to his mental health appointments. The lower court was also permitted to draw the strongest interference against him for failing to testify.

Matter of Jonathan E., 149 AD3d 1197 (3rd Dept. 2017)

A Columbia County father neglected his 3 children. One of the children was a baby who lived with him and the baby's mother. The other 2 children resided with their own mother in a separate home but visited on weekends. The evidence demonstrated the father admitted, when he received medical attention, that he consumed significant quantities of heroin, marijuana and other drugs. He admitted to consuming "30 to 40" bags of heroin a day at some points. Three months after the petition was filed, he admitted he was then using "5 to 10" bags of heroin a day along with other drugs. This drug abuse constitutes prima facie neglect of his children as per FCA § 1046 (a)(iii). There was no evidence that he was voluntarily and regularly engaged in a drug rehab program. The father did argue on appeal that his hospital records should not have been admitted into evidence in total but should have been differentiated between those records relevant to the matter and those that were not. The records were admitted as business records under FCA §1046(a)(iv) and they clearly were business records. It is true that only portions of the records were relevant to the matter were the father's admissions and treatment for his drug problems and that the entire record was admitted. However, the court only relied on those portions of the record that related to the father's admissions regarding drugs, so the admission of other portions of the hospital records was inconsequential.

Matter of Brooklyn S., 150 AD3d 1698 (4th Dept. 2017)

An Onondaga County father neglected his child. The father abused drugs, including heroin. This is prima facie evidence of neglect under FCA § 1046 (a)(iii) unless the parent is voluntarily and regularly participating in a recognized rehab program. While the father was voluntarily in a program, he was not "regularly" participating in that program as he only attended a third of the time and he tested positive for drugs while in the program. Also the father was aware that the mother was using drugs when she was caring for the child and he did not intervene. The child was born positive for opiates and had to remain in the hospital to be weaned off with morphine management. However, the child's condition in fact got worse which led the doctors to question if there were drugs in the mother's breast milk. A sample of the breast milk tested positive for morphine, codeine and heroin. The father then admitted he knew that the mother had "gone on a bender" and used drugs the weekend before her breast milk was found to be tainted. The father was neglectful for not intervening to prevent the mother nursing the infant with her tainted breast milk.

Matter of Brianna C., __AD3d__, dec'd 6/8/17 (1st Dept. 2017)

The First Department affirmed New York County Family Court's determination that a mother neglected her child. The mother admitted to hospital staff that she smoked marijuana on the weekends, drank 5-6 drinks a day on a regular basis and would "black out" from drinking. She would become violent and physically attacked others and attempted suicide. Under FCA § 1046(a)(iii) this was prima facie evidence that her child was neglected and no risk of impairment needed to be proven.

Matter of Lasondra D., __AD3d___ dec'd 6/9/17 (4th Dept. 2017)

A Wyoming County father neglected his child as he should have known that the mother's substance abuse placed the child at risk of neglect.

Matter of Michael D., __AD3d__, dec'd 6/14/17 (2nd Dept. 2017)

The Second Department affirmed the Suffolk County Family Court's determination that a father neglected his child given the father's repeated misuse of drugs and alcohol. The adjudication is appropriate regardless of the lack of evidence of the children being impaired. His repeated misuse triggers the prima facie case of neglect under FCA § 1046 (a)(iii) and no actual impairment of risk of impairment need be proven.

SEXUAL PERPETRATOR IN THE HOME

Matter of Lillian S.S., 146 AD3d 1088 (3rd Dept. 2017)

The two Ulster County respondents in this matter were the parents of a toddler girl and she was the mother and he the stepfather of a teenage boy. The respondent father had a history of sexual abuse of children. He had been criminally convicted of placing his penis in the mouth of his then 2 year old daughter in 1996 in North Carolina. While on probation for that offense, he was charged with raping a girlfriend's 18 month old daughter. As to that matter, he took an Alford plea in 1999 to the crime of "indecent liberties with a child". When he relocated to New York State, he was classified as a level 3 sex offender. Ulster County DSS alleged that both parents neglected the children currently in the home – he as an untreated sex offender and she for allowing him to be in the home as an untreated sex offender.

The Third Department affirmed neglect findings on both respondents. The mother knew of her husband's convictions but refused to believe he had committed any of the crimes he was convicted of in North Carolina. This was true even after she learned that he had not been honest with her about the convictions and that he had not told her the truth about obtaining treatment. The mother simply refused to see the danger he posed to the children – particularly

her daughter who was of the same age as the two children he had previously sexually abused.

The father's argument on appeal concerned his legal representation. In the middle of his dispositional hearing, he claimed he wanted new counsel appointed or an adjournment to obtain new counsel. The lower court ruled that his request was untimely as the hearing had been pending for months and was actually in its 5th day of testimony and the father had already rested his case. When the father then said he would not go forward with his current counsel, the court cautioned him about proceeding pro se and then continued the hearing with his assigned counsel simply serving as legal advisor. The appellate court found this procedure to be acceptable particularly given the significant amount of time the father had to seek a change of counsel prior to the hearing commencing again and the fact that the father really did not articulate any reasons why he was unhappy with his counsel. Further the father returned to court for more of the hearing 2 months later but he continued to represent himself with the assigned attorney acting as legal advisor.

The lower court did not abuse discretion in denying the father visitation with his young daughter in the dispositional order. The AFC called a licensed psychologist to the stand at the dispositional hearing and after reviewing the entire history of the father, she opined that the father was at "moderate risk" of reoffending and that he should obtain treatment for his sexual abuse and that without treatment he posed a "danger to prepubescent girls" in particular. The father called an expert who worked for the Ulster County Probation Department as the clinical coordinator of sexual offerender services who offered another opinion but the lower court did not err in its decision on credibility between the experts.

Lastly, the Third Department did rule that the lower court should not have ordered that the mother and the children had to reside in Ulster County. This requirement was written in the court's order but had not been in the court's written decision. It has also not been in the conditions of supervision that the mother had agreed to; in fact the transcript reflected that the DSS was aware that the mother would be supervised by an agency in the county where she was living.

The Third Department commented in a footnote that both of the respondents were ultimately found by the lower court to have violated terms of the dispositional orders and had been sentenced to jail for contempt. There was further comment that both of the parents now resided out of state – she in Pennsylvania and he in North Carolina -- but that regardless of their location, the Ulster County Family Court retained jurisdiction and DSS retained responsibility for the parent's compliance with the dispositional orders.

Matter of Enrique R. 148 AD3d 474 (1st Dept. 2017)

The First Department agreed with Bronx County Family Court that the father derivately neglected his children. The father had been convicted of sexually abusing an unrelated 5 year old child in the past. As per the Court of Appeals ruling in ***Afton C.,*** the neglect finding for his own children was not based wholly on the criminal conviction. The derivative neglect of the respondent's own children was based on the circumstances of the conviction. The criminal conviction did involve the child of a friend. The father had failed to obtain treatment for sexual offenders and the father denied responsibility - even though he had pled guilty to the crime. The father's parole terms expressly required that he was not permitted to live with children without the approval of the criminal court and he had violated this term. Further a negative inference could be drawn by the father's failure to testify and his ongoing denial of responsibility. These factors demonstrate that the father was not acting as a reasonable and prudent parent toward his own children.

DOMESTIC VIOLENCE

Matter of Emily S., 146 AD3d 599 (1st Dept. 2017)

The First Department agreed that two children were neglected by their New York County father. One of the children made an out of court statement that she and her sister had seen episodes of her father hitting her mother, although the

children had not been present for the most recent episode. There had been 2 prior orders of protections and the father admitted that there had been domestic violence. The parents denied that the children had been present for the violence but the lower court found them not to be credible. The child made statements to multiple persons that she would hide when her father hit her mother and that she was scared. The fact that the child's statements were not detailed reflects the fact that she would try to hide.

Matter of Mariya M., 147 AD3d 1062 (2nd Dept. 2017)

A Suffolk County father neglected his children by committing acts of violence against the children's mother in their presence. The mother testified and corroborated the children's out of court statements about the incident. The father pushed the mother and threw a chair into a window. The children witnessed the father push, punch, and choke the mother. The father had inadvertently hit one of the children who had tried to intervene and protect the mother.

Matter of Macin D., 148 AD3d 572 (1st Dept. 2017)

The First Department affirmed a neglect adjudication by the Bronx County Family Court. The father was aggressive an intimidating and was violent to the mother in front of the children. The children were visibly distressed by his actions.

Matter of Elizabeth B v NYS OCFS 149 AD3d 8 (3rd Dept. 2017)

The Third Department unfounded an indicated report against a mother of 3 children whose boyfriend – and father of her youngest – committed acts of domestic violence. In one situation, the boyfriend punched the mother in the arm and leg while he was driving on a highway. The 3 week old baby was in the back seat when this occurred. On the next day, he hit the mother on the back as she

was holding the baby which caused her to fall and then he choked and threatened the mother. The eldest child witnessed that incident. The mother reported these incidents to the police 3 days later and the boyfriend was arrested. Ontario County DSS indicated the mother for inadequate guardianship, primarily due to her delay in reporting the incidents and her refusal to accept services. After a fair hearing, OCFS denied her request to unfound. However, the Third Department found that the fair hearing had not considered the mother's situation in that the mother feared for her own safety and that of the children as he had threatened to kill her. She was the caretaker of 3 children, including a 3 week old baby and she did not have access to a vehicle. She waited just a few days until she had a plan with relatives to help her with the children and had access to a vehicle before she left him and went the police. This was not unreasonable. The mother sought her own counseling for herself and her older child and was not required to accept the counseling that DSS offered. While the mother did ask the court to modify the order of protection that had been issued, she did so only to be able to discuss finances and child care with the boyfriend. He was incarcerated and the mother did not bring the children to see him. It was only mere speculation by DSS that the mother would ever go back to him. She testified that she would not return to him unless he completed the anger management and domestic violence classes that had ordered by the court. There was no evidence that the children were impaired or in immediate danger of impairment based on the mother's actions. The danger to the children was caused by the boyfriend's actions.

Matter of Annarae I., 148 AD3d 1243 (3rd Dept. 2017)

The out of court statements of the 4 Broome County children in this matter were sufficiently corroborated. The mother neglected the children by exposing them to domestic violence. Each of the children separately told the caseworker that the mother and her boyfriend fought front in front of them and that the police had to come "a lot" because of the "big fights". Two children recalled a fight where the 2 respondents were pushing each other and the boyfriend ended up pushing one of the children. Two of the children recalled another fight where the mother

locked the boyfriend out of the house and he climbed back in through a window. The children also described a fight where the boyfriend threw clothing at the both the mother and the children. Each child disclosed feeling "scared" or "unsafe".

Also the police arrived in one incident where the children were observed to be present and they were called in another incident where the boyfriend had yelled at the mother in front of the children and had "smashed" a piece of furniture and the mother had sent the children to a neighbor. This particular incident resulted in the mother obtaining an order of protection for herself but she did not obtain one for the children as the caseworker suggested. The mother continued to allow the boyfriend to remain in the home and actually attempted to reduce the terms of the order of protection. The mother was also aware that her boyfriend was a heroin addict. She allowed him to remain in the home when he relapsed but told the children not to be alone with him.

Further the mother had a history of involvement with violent men. The mother acknowledged domestic violence also with her ex-husband and said that one of the children was "messed up" having witnessed the prior violence with her ex. She claimed that the children had to have counseling to deal with the violence from this man. However, she continued to let this ex in her home for a substantial amount of time. The mother neglected the children in that she lacked insight into the effect her actions with these men had on her children.

Matter of Jubilee S., 149 AD3d 965 (2nd Dept. 2017)

The Second Department reversed Kings County Family Court's dismissal of a neglect petition against a father, finding that the child's out of court statements were corroborated. The child told the caseworker that her father hits her mother all over her body and that the mother cries. The mother tries to fight back and hits the father. The child told the worker that when this happens she cries too and she and her siblings are scared and they run to the back bedroom and hide because they are afraid of what he is doing. The child's out of court statements were corroborated by proof that the father had previously neglected

the children by acts of violence against the mother in the children's presence. The father, did not appear or testify and so a negative inference can be drawn. The child's statements demonstrated that the father's actions impaired or created an imminent danger of impairing the children's condition.

Matter of Serina C., 150 AD3d 463 (1st Dept. 2017)

Two Bronx parents neglected their child due to mutual domestic violence. The father allowed the mother to return to the home after an order of protection had been issued based on her repeated assaults on the father. She had also been criminally convicted for arson for setting the father's apartment on fire. The father had engaged in domestic violence toward the mother in close proximity to the infant.

Matter of Toussaint E., ___AD3d__ dec'd 6/1/17 (1st Dept. 2017)

The First Department affirmed New York County Family Court's determination that a mother neglected her child. The child was subject to actual or imminent impairment as he was exposed to repeated incidents of domestic violence between the parents that occurred in close proximity to the child. The mother argued that she was a victim and should not be penalized, However, she had refused referrals for assistance, had denied that any violence was taking place and had allowed the violent father to watch the child while she worked even after knowing that the father had left the child alone. She knew the father was mentally ill and did not protect the child.

PARENTAL MENTAL ILLNESS

Matter of Jaurelious G., 148 AD3d 807 (2nd Dept. 2017)

The Second Department affirmed Queens County Family Court's dismissal of a neglect petition against a mother. ACS failed to prove that the children were in imminent danger of becoming impaired due to the mother's mental health. In fact the evidence showed that the children were healthy and well cared for by the mother despite her issues.

Matter of Ruth Joanna O.O., 149 AD3d 32 (1st Dept. 2017)

In an uncharacteristically lengthy decision, the First Department wrestled with a Bronx County matter involved the mother of a 3 month old. The majority opinion went into much detail about the factual allegations that the mother suffered from a mental illness and lacked insight into her illness and her need for treatment which resulted in the young baby being at risk. The mother had experienced several instances of delusional episodes and had traveled to multiple states with this young baby for what seemed to be irrational reasons. The mother had a week of hospitalization in Texas based on her behaviors, further hospitalization in New York and was non compliant regarding her medication. She expressed an unfounded belief that the baby had been raped which resulted in her checking the child's rectum repeatedly and bringing the baby for medical treatment for the "rape". At times the mother had to be restrained and sedated. The majority opinion affirmed the lower court decision that the mother's mental illness put her young baby at risk of neglect.

One Judge dissented, also in much detail about the facts that had been presented. The dissent argued that the mother had not neglected the baby in any way and that even if the mother had serious mental health problems, she posed no threat

to the child and never spoke of hurting or actually ever did hurt the child in any way. The dissent found that the facts indicated that the mother was never aggressive toward the baby and that her failure to take medication was only shown to have occurred for a day or two at best. The mother in fact was seen by witnesses as "very loving" and "very nurturing" toward the baby.

Matter of Tyler W., 149 AD3d 968 (2nd Dept. 2017)

A Queens County mother neglected her children as she had a paranoid and delusional belief that she and the children had been sexually abused by the father. The mother made repeated and unfounded allegations of abuse against the father. This resulted in the children having medical examinations and being interviewed about sexual issues. The mother also constantly questioned the children about being touched by the father. The oldest child described feeling "very sad and uncomfortable".

Matter of Hope P., 149 AD3d 947 (2nd Dept. 2017)

The Suffolk County Family Court correctly ruled that a mother derivatively neglected her newborn child based on the permanent neglect finding ten months earlier regarding two older siblings. The terminations were based on the mother's failure to deal with her mental health issues. The finding regarding the newborn was made by summary judgment motion . Given the proximate time of the prior findings, the respondent mother had the burden to prove that the neglectful conditions no longer existed. The mother submitted only an attorney's affirmation and this was insufficient to raise a triable issue of fact.

Matter of Catherine M., __AD3d___, dec'd 6/13/17 (1st Dept. 2017)

New York County Family Court was affirmed by the First Department. The lower court had adjudicated a mother to have neglected her child. The mother had an

untreated mental illness that resulted in her removing the child from school and keeping the child socially isolated. The mother had an unfounded fear that her home was radioactive. This resulted in her throwing away all the child's toys, clothing, the furniture and the food. The child and the mother were not eating. The mother also had emergency personnel enter the home and transport he child to the hospital to be unnecessarily tested. The child told the caseworkers this made her nervous.

Matter of Jemima M., __AD3d__, dec'd 6/14/17 (2nd Dept. 2017)

A Queens County mother neglected her child by putting her at risk. The mother failed to maintain the prescribed treatment for her own mental illness.

ABUSE

PHYSICAL ABUSE

Matter of Nayomi M., 147 AD3d 413 (1st Dept. 2017)

The respondent father of the youngest of 5 Bronx children was found that have abused the older 3 children and derivately neglected the younger two. He would hit the 3 older children on "pressure points", would make them stand on one leg and then kick the leg out from under them and he would lock them in a room for extended periods of time without access to a toilet. He abused the oldest boy the most. The 2 older girls observed his abuse of this oldest boy. He slammed the boy against the wall and choked him. The boy had bruises, scratches, black eyes, and bruises on the back of his neck and ears that were indicative of strangulation. The children's out of court statements corroborated each other as did the photos of the older boy's injuries. The caseworker observed that child's injuries and the smell of urine in the room the children were locked into. There was medical evidence that the older boy's injuries could not have been self inflicted and the

respondent did make some out of court admissions. Further the respondent did not take the stand and a negative inference can be drawn against him regardless of there being a related criminal case pending.

The Appellate Division also ruled that the younger 2 children were derivatively neglected but not derivately abused. The violent and repeated abuse of the oldest child demonstrated the respondent's faulty understanding of the duties of parenthood. However, the youngest child was a baby and was not directly exposed to the abuse and the 2 year old was locked in the room with the other children but was apparently not subjected to the other abuse.

Matter of Zoey D., 148 AD3d 802 (2nd Dept. 2017)

Kings County Family Court was affirmed on appeal regarding the abuse of a 3 month old infant. The child had multiple unexplained skeletal fractures and had been in the care of only the mother and a child care provider. It was uncontested that the injuries were caused by abuse. The lower court made a finding on both respondents and the mother appealed. In such a res ipsa type situation, the petitioner is not required to prove which of the two caretakers actually inflicted the injuries. The mother's abuse adjudication was upheld.

Matter of Mackenzie P.G., 148 AD3d 1015 (2nd Dept. 2017)

The Second Department affirmed the adjudications made by Richmond County Family Court against a mother and her boyfriend in the death of the mother's 2 year old toddler. The mother and boyfriend had been the only caretakers of the child when she arrived at the hospital with a skull fracture, bilateral hemorrhaging of the eyes, swelling of the brain and old blood collected in her brain – all indicative of child abuse. The child died 8 days later due to her head injury which was caused by blunt force trauma. The mother offered no explanation for the injuries at the time and did not testify in the proceeding. The injuries occurred when she was caring for the child and could not have been caused accidently or

have been self inflicted. Given the severity of the injuries and her failure to rebut the evidence, the lower court correctly found her to have severely abused the child, abused the child and medically neglected the child. The boyfriend was a person legally responsible for the child as he lived in the home and fed the child, transported the child to day care and watched the child when the mother attended school. He testified that the mother was responsible for the child's injuries however he testified that he was in the room when the mother injured the child. He did not testify that he tried to stop the mother. Therefore he was also properly found to have physically abused the child and medically neglected the child.

Matter of Clifford S. 148 AD3d 1159 (2nd Dept. 2017)

A six month old Queen's County infant died due to abusive head trauma. The child had a brain injury and retinal hemorrhaging consistent with what used to be called shaken baby syndrome. The father of the child was the caretaker. There were two other older children in the home – one was his biological child and another child that he was legally responsible for. After ACS established a prima facie case of abuse as to the deceased child, it was up to the father to rebut the presumption of his responsibility for the abuse and he failed to do so. The father's abuse of the deceased child resulted in derivate abuse of the other two children in the home.

Matter of Persaius A-K., 150 AD3d 1225 (2nd Dept. 2017)

The AFC in this Kings County matter appealed the Family Court order that a dismissed severe abuse and abuse allegations against a respondent father. The Second Department agreed with the AFC and reversed the lower court, finding that the father had abused one child and derivatively abused the other child. The

father testified that it was his girlfriend that had abused the target child. However the father was also responsible as the child was in his care as well when the child was injured and he failed to protect the child. This abuse demonstrates that the father's judgment is impaired such that the other child was derivately abused. However, there was not sufficient proof of circumstances evincing that he had a depraved indifference to the child's life to warrant a severe abuse adjudication

SEX ABUSE

Matter of Kayla S., 146 AD3d 648 (1st Dept. 2017)

The child in this Bronx County matter testified in court about the respondent's sexual abuse of her. Although her in court testimony did not need to be corroborated, there were also medical records and testimony by a "child protection specialist". The respondent did not testify and so a negative inference can be drawn. His witnesses did not offer any real defense. The adjudication of abuse was affirmed.

Matter of Andrew R., 146 AD3d 709 (1st Dept. 2017)

A Bronx respondent sexually abused one child and derivatively neglected that child's brother. The target child testified in court and this was sufficient to make a finding despite the lack of physical injury or medical corroboration. Although there were "significant issues" raised as to the child's credibility, the lower court did consider these issues in determining the weight to give the child's testimony. The derivative finding is supported by the respondent's long term sexual abuse of the girl which indicated the respondent's faulty understanding of his responsibility

to the children. The aid of the court is needed to protect the brother particularly given that child's ongoing relationship with the respondent.

Matter of Karmine R., 147 AD3d 439 (1st Dept. 2017)

Bronx County Family Court was affirmed on appeal regarding an adjudication of sexual abuse and derivative abuse. The respondent was a person legally responsible for the 2 older children when the sex abuse occurred. Given what the oldest child testified to, the court could draw an "inference of substantial familiarity" between herself, the other children and the respondent. The oldest child testified in court and described the respondent touching her breasts and vagina. There were only minor inconsistencies in her testimony and the prior statements she had made to the CAC and the caseworker. The respondent's intent for sexual gratification was properly inferred from the acts themselves and no other acceptable explanation was provided. The respondent had made an out of court admission that he had "hugged" the child and did not intend anything else but he in court he failed to take the stand in his own defense. The strongest negative inference can be drawn regardless of there being pending criminal charges. At the time of the abuse, the youngest child had not yet been born and the middle child was only an infant however derivative abuse adjudications regarding those children are still appropriate given the respondent's actions.

Matter of Anthony G., 147 AD3d 829 (2nd Dept. 2017)

The Second Department reversed the Kings County Family Court's dismissal of a sex abuse petition. The child made out of court statements which were corroborated primarily by the father's admission in criminal court to endangering the welfare of a child. Also there was a negative inference against the father for his failure to testify in family court in his own defense. Further there was some corroborating testimony by the caseworker and the mother. The other child in the home was derivatively abused by the father's actions.

Matter of Taurice M., 147 AD3d 844 (2nd Dept. 2017)

A Kings County respondent sexually abused one of the children in the home and derivately neglected the other 3 children. The child made out of court statements to her therapist and to caseworkers. Her statements were also corroborated by medical records that showed that the child had become pregnant. Although the child had stated at first, out of court, that a teenage neighbor had impregnated her, there was testimony in court that the respondent told her to blame the neighbor. He abused the child when the other 3 children were in the home and were sleeping and while the mother was at work. He was the caretaker of all the children when the sexual acts occurred and this demonstrates a fundamental defect in his understanding of appropriate caretaker roles such that the other children are derivately neglected.

Matter of D.S. 147 AD3d 856 (2nd Dept. 2017)

The Second Department reversed the Kings County Family Court's dismissal of a sex abuse petition. The respondent was a person legally responsible for one child when on 3 occasions he grabbed the buttocks of the girl. The youth testified that on each occasion that he grabbed her buttocks, she then looked at him and he smiled and said "What?". The girl said each incident made her feel uncomfortable. The respondent did not testify and a negative inference can be drawn from this. His intent to gain sexual gratification can be inferred from the nature of what he did. However, the Appellate Division did find that the derivative abuse and neglect petition as it related to a biological son who was born after the incidents should be dismissed.

Matter of Arcis A.R-M. 148 AD3d 1156 (2nd Dept. 2017)

A Suffolk County stepfather sexually abused his stepdaughter and derivately neglected his stepson. The stepdaughter's out of court statements were corroborated by the out of court statements of the stepson and by the testimony

of an expert in the field of child abuse. The stepfather's flawed understanding of his duties toward the stepdaughter are sufficient to find derivate neglect of the step son.

Matter of Django K. 149 AD3d 405 (1st Dept. 2017)

The First Department affirmed the dismissal of a New Your County Family Court sex abuse petition. The parents were involved in a custody dispute and the allegations that the father had sexually abused the son could not be separated from that custody issue. The child's out of court statements contained several inconsistencies. The child could not remember details when questioned at the CAC. The child did not testify. There were no admissions by the father and no physical evidence. The lower court did not abuse its discretion in refusing to qualify a witness that was offered as an expert child sexual abuse validator. Even if the court had qualified the witness as an expert, the child's video statements had inconsistencies. The only corroboration of the child's court of court statements offered was the testimony of the mother. The mother's testimony had many inconsistencies and was not credible in the eyes of the trial court.

Matter of Blima M., 150 AD3d 1006 (2d Dept. 2017)

In April 2012, a Kings County father was alleged to have sexually abused his daughter and derivately neglected his 5 other children. He was also indicted on 4 counts of sexual abuse in the 1st degree, 4 counts of sexual abuse in the 2nd degree and four counts of endangering the welfare of a child as it related to the victim child. He was allowed to plead guilty to one count of EWOC in full satisfaction for all the felony sexual charges. The criminal court noted that the father was not being asked to admit to any particular acts when accepting his plea deal in criminal court "in view of the pending Family Court child protective proceeding". In May 2014, the father was sentenced to 3 years of probation and ordered to stay away from the victim daughter for 5 years in criminal court. ACS then moved for summary judgment on the abuse petition. Family Court refused

to make abuse findings but did make neglect and derivative findings based on the plea in criminal court. The father appealed and the First Department agreed that the father's plea in criminal court established that he had neglected the target child and that there was no triable issue in regard to that child. However, the lower court erred in finding that the 5 siblings were derivately neglected on summary judgment grounds. Without proof being offered as to what the behavior was to the target child, the court cannot determine if the siblings were at risk of neglect. The appellate division remanded the matter for a fact finding regarding the siblings.

Matter of Genesis A., 150 AD3d 616 (1st Dept. 2017)

The First Department affirmed the Bronx County Family Court's adjudication of a father for sexual abuse of his daughter and for derivative neglect of the sibling. The child testified in court and was credible – no corroboration is needed. There were also prior statements that the child had made to the caseworker and the CAC and although some discrepancies were noted, the lower court found the child's explanations believable and the father's denials not credible. The father was ordered to stay away from the children except for supervised visitation and he was also ordered to complete sex offender treatment, a parenting skills program and stay in engaged in a fathers program.

Matter of Lee-Ann W., __AD3d___, dec'd 6/15/17 (3rd Dept. 2017)

The Third Department found that a Sullivan County father had neglected his 4 year old daughter but that sexual abuse had not been proven and reversed the lower court's finding on that. The child had given multiple out of court statements that her father bathed her while both of them were naked, that sometimes he would have her sit on his lap in the bath and his penis would touch her "butt". The child said her father had put his finger on her vagina and her

"butt" and washed her vagina with his hand and soap. She also said he had placed her on the bed and spread her legs, smelled her vagina and put his nose on it. Lastly she said that her father walked around the house "without any clothes on". The mother testified that she had seen the father take baths with the child and had asked him to stop doing that and he finally did but only after his sister told him to stop. She said she had not seen him put the child on his lap and had only seen him touch the child's genitals and buttocks when he was cleaning them after the child had used the bathroom. She gave inconsistent testimony about whether she had ever seen the father touch his nose to the child's vagina. The father did testify that some of this activity occurred but that it was all nonsexual. He did say that he sometimes had no clothes on in the home and that he did sniff her buttocks – from a distance – to determine if she required more cleaning after a bowel movement. He also stated that he did clean her buttocks with soap and water when she needed extra cleaning. However, he denied that his penis ever came in contact with any part of her body or that he ever put his finger in the child's vagina or anus or ever touched her inappropriately. The lower court had ruled that the father's statements corroborated the child's out of court statements. The Third Department ruled that the father's conduct in regard to bathing with her while naked and being naked in her presence was neglectful. However, the Third Department reversed the sex abuse adjudication ruling that the father's admissions did not corroborate the child's out of court statements that any of the activity was actually sexual abuse. No other evidence had been offered that did corroborate the 4 year olds out of court statements.

The Appellate Court also pointed out that the child's statements were first made on the day that the father had a custody petition served on the mother. There was no medical indication of abuse, no change in the child's behavior nor any indication of inappropriate sexual knowledge. The child was quite social and highly verbal. There was no expert validation testimony offered. In fact the only expert who testified was a psychologist who expressed significant concerns about the child's reliability. The expert indicated that the child did not disclose in her first interview by a trained professional. The child first disclosed to subsequent persons who did not record those interviews. After all these interviews, the

expert wondered if the child was now providing answers in an effort to please people. He saw the child as a "people pleaser" type who was exceptionally suggestible and was skeptical of the child's allegations.

ARTICLE 10 DISPOS and PERMANENCY HEARINGS

Matter of Izora W., 146 AD3d 569 (1st Dept. 2017)

The First Department affirmed the Bronx County Family Court's appointment of a teenager's grandmother as a subsidized kinship guardian over the mother's objection. The grandmother proved extraordinary circumstances in that the child had been placed in foster care with the grandmother 2 years earlier after her mother severely beat her. The mother had since failed to engage in services, did not communicate with the agency and did not visit the child. There was no indication that the mother intended to change her behavior. The grandmother gave the child a safe and stable home and the child was in high school and thriving. It was in the child's best interest to be placed in the guardianship of the grandmother as neither adoption nor return home were appropriate for this older youth. The child's attorney had met with the child and took the position that the child fully supported the plan with the grandmother. The child signed a notarized preference form.

Matter of Angela F. v St. Lawrence County DSS 146 AD3d 1243 (3rd Dept. 2017)

In a St. Lawrence County matter that has been repeatedly appealed, the Third Department took the Family Court to task for a "tragic situation in which Family Court's repeated judicial errors have contributed" to the mother and two of her children being separated. The children were adjudicated as neglected by the mother in 2004 and 2006 when they were still babies. They were placed in foster

care in 2007 and again found to be neglected by the mother in 2008. At first the children were in separate foster homes but they have now been together in the same foster home since 2011. That foster family has left the state and as of the time of this appeal was living in Iowa with the children. In 2009 the lower court changed the children's permanency goal to one of both return to parent and placement for adoption. On a previous appeal that decision was reversed. The lower court had improperly given the children two permanency goals that were inherently contradictory and only one goal can be given to a child. DSS then filed to terminate the mother's rights on permanent neglect grounds but then withdrew that TPR and filed another TPR, this one on mental illness grounds. In 2011 the lower court terminated the mother's parental rights to these two children on mental illness grounds and the mother's contact with the children was stopped at that point. In 2013, the Third Department reversed those terminations.

At that point, the mother filed the current matter - an Art. 6 petition for custody of the children. She also filed to modify the Art. 10 order and sought to have visitation with the children restored. The lower court refused to allow the mother to have contact with the children – in any form – while her custody petition was pending, finding that she had not had contact with the children, due to the TPR, in over 2 years. DSS also brought another TPR petition, this one on permanent neglect grounds. The court continued to hold permanency hearings while the mother's custody petition was pending. In these permanency hearings, the court ruled that the children's goal was adoption. The permanency hearings were also appealed and the Third Department reversed the rulings in those hearings, finding in that appeal that the court did not make an adequate record and that there was no examination of the mother's situation or discussion of what efforts were being toward reunification. On that appeal, the Third Department reversed the lower court and ordered that the mother's goal should be reunification. Eight months after the mother had filed for return of custody or visitation, the court then started hearing proof and the custody hearing continued over a 7 month period. Twenty months after the petition had been filed by the mother, the lower court

dismissed the Art. 6 petition matter and the mother appealed again, creating this current appeal. As this appeal was argued, the latest TPR was still pending.

The Third Department indicated that when it had reversed the TPR in the fall of 2013 that by law this meant that the mother's rights were in fact reinstated. The lower court erroneously found and acted on the belief that the reversal did not restore the mother's rights because the appellate decision did not expressly say so. It is fundamental that the reversal of an order restores the party who prevailed to the position they were in prior to the order that was reversed. Since the mother had been getting visits once a week before the 2011 TPR, that situation should have been restored immediately after the reversal decision. Visitation with a parent is presumed to be in the child's best interests unless there was proof that visitation would be detrimental or harmful. The reversal of the TPR should have resulted in an immediate calendaring of the matter by the lower court. The lower court improperly placed the burden on the mother, whose rights had been restored, to bring a petition and gave her the burden of proving that visitation would be in the children's best interests. The Appellate Court criticized the lower court for the 20 months of delay after the reversed terminations in which the mother had no contact of any kind with children for whom she still had parental rights. The mother ultimately went almost 5 years with no contact with the children until a permanency hearing in the summer of 2016 when the children appeared by phone and the mother was permitted to speak to them.

Further, the Third Department found that the lower court erred in then ultimately denying visitation based at least on part on the amount of time that has passed since the mother had seen the children – since that was not the fault of the mother's. The absence of contact was caused by judicial error. Further the lower court did not make any findings that the visitation would be detrimental or harmful to the children. The mother may have mental health or medical issues but these can be accommodated, if determined necessary, generally in supervised or even therapeutic visitation.

Lastly the court ordered that the remitted matter be assigned to a new Judge and reheard within 30 days. The Third Department denied the mother's request for a new AFC but commented that the new Judge should ensure that the AFC has sufficient and recent contact with the children so as to ensure that the attorney is protecting the children's interests.

NOTE: The Third Department also reviewed this mother's matters with her other children in 2 separate other appeals. **Matter of Abigail QQ. 146 AD3d 1252 (3rd Dept. 2017)** in which the lower court had extended a supervision order that limited the mother's access to this child who was in the custody of the father and the Third Department found was now moot due to subsequent orders. **Matter of Angela F v Gail WW., 146 AD3d 1248 (3rd Dept. 2017)** in which the Appellate Court reviewed a private custody and visitation order for another child of this mother who was in the joint legal custody of the mother, the father and the paternal grandmother. The mother only had limited visitation with this child. The mother had sought more visitation supervised by her current husband. Here the Appellate Court reversed and remanded the matter for a new hearing before a different judge after finding the lower court made errors. DSS had filed a brief in this matter but the Third Department indicated that they were not a party to this Art. 6 proceedings and had not sought to intervene as an interested party.

Matter of Inocencia W., 147 AD3d 865 (2nd Dept. 2017)

A Queens County mother consented to a finding of neglect without an admission. The court granted her a suspended judgment for one year with a dispostional order of various terms and conditions. After the year, the suspended judgment with terms and conditions was then extended for one more year. As that order came to an end, the mother moved to vacate the fact finding order and to dismiss the petition arguing that she had complied with all the terms and conditions of the suspended judgment. The lower court's denial of the motion was affirmed by the Second Department. Under FCA § 1061 the court can set aside, modify or

vacate any order for good cause shown. However, the Appellate Division opined that "…as a general rule, a parent's compliance with the terms and conditions of a suspended judgment does not eradicate the prior neglect finding…". Here the mother did not establish any good cause to vacate the prior adjudication.

Matter of Stephanie M., 147 AD3d 954 (2nd Dept. 2017)

In a Westchester County Family Court severe abuse and neglect case, the court had given temporary custody to the maternal aunt. That temporary order was not appealed by the parents. Two weeks later, the aunt filed an Art. 6 petition and with the consent of the parents, the court awarded sole legal custody to the aunt under Art. 6 while the Art. 10 matter was pending (NOTE: The Art. 6 order was made in 2013, such action would not be permitted under current law that requires that a permanent Art. 6 custody may not be ordered while the Art. 10 matter is still pending) When the Art. 10 matter was then on for disposition, 2 and a half years later, the lower court noted that all parties had already agreed to Art. 6 custody and reconfirmed that order and held no dispositional hearing. The father appealed and argued that he was entitled to a dispositional hearing. The Second Department affirmed. Although an award of Art. 6 custody should not occur without a full hearing, here the parties had consented to the order much earlier, and so the court did not need to hold a dispositional hearing.

Matter of Aidin V. 149 AD3d 757 (2nd Dept. 2017)

After a fact finding, Suffolk County Family Court determined that the father had neglected his child by misusing drugs. The father was ordered to refrain from using substances and to become involved in a substance abuse program that included drug testing. After one extension of this order of supervision, the DSS filed a petition alleging the father was in violation of the order. The father moved

for discovery and the DSS provided the attorney with a CD containing some discovery documents. The attorney moved to have the documents provided in paper form and the court ordered that "in any matter before the Court" that DSS must provide discovery in paper format if this was requested in writing by the other attorney. DSS appealed the ruling. As to this matter, the issue is now academic as the discovery materials were provided in paper format. However, the Second Department ruled that the lower court's ruling that paper documents must be provided in "any matter" before the court exceeded the court's authority.

Matter of Craig S v Emily S., 149 AD3d 751 (2nd Dept. 2017)

A Queens County couple were living separately when it was alleged that the mother had neglected the children who lived with her. The mother admitted to neglect both for smoking marijuana 3 times a day and that the children had missed a lot of school. The father filed for Art. 6 custody of the children and the Family Court held a combination dispo and custody hearing and granted the father custody with visitation to the mother. The court also ordered that the father could relocate out of state with the children. Since the father was moving out of state, the mother's visitation was limited to a supervised every other month contact when the father would bring the children back to NYC. The mother was also ordered to not be under the influence of drugs or alcohol when visiting. The mother appealed. The Second Department concurred that a combined hearing was appropriate and that awarding custody to the father was in the children's best interests. The mother's claim that she was no longer drinking was not credible and she had failed to complete a substance abuse program.

Matter of Antonio E.B., 149 AD3d 540 (1st Dept. 2017)

The First Department affirmed the New York County Family Court's dismissal of an Art. 6 petition that a maternal aunt filed at this child's permanency hearing. The

aunt had been the child's care taker but she then had an aneurism and a stroke and had become incapable of caring for him. The child had then been placed with a foster family who had adopted his siblings. The evidence demonstrated that the aunt did not understand the child's special needs and used poor judgment in allowing people she did not know well to live in her home. She allowed a person to remain living in her home who used marijuana. The child is thriving in the foster home with a family who understands his special needs.

Matter of Jahred S., 149 AD3d 963 (2nd Dept. 2017)

Westchester County Family Court ruled that the DSS did not prove that a respondent father had violated his dispositional order but did extend the order and modified the terms. The Second Department affirmed. Although DSS failed to provide competent proof that the father violated the order of disposition only a few days after the order was issued, there was good cause to extend the order of supervision based on the father being arrested for assaulting the mother when the children were present in the home. The original finding of neglect had been based on domestic violence. The supervision of the father was to continue for another year and the order was modified to require that he attend, participate in and complete a batterer's program and that he stay away from the home of the children. All exchanges of the children for the father's visitation will have to take place at the local police department.

Matter of Emily W., 150 AD3d 1707 (4th Dept. 2017)

The Fourth Department agreed with the Erie County Family Court's decision to not return children to their mother. Most of the children were in foster care and one of the children was with a non respondent father and the mother sought to have them all returned to her care. The mother failed to prove that it would be in the children's best interests to be returned to her custody. She continued to have a tumultuous relationship with one of the fathers whose domestic violence had resulted in the neglect adjudication and the children's placement. This father had

failed to complete any of his service plan. One of the children is now in counseling regarding the emotional trauma of the domestic violence. The mother did complete some counseling and parenting services but she had made no progress. The mother's ongoing relationship with the father, even though she had completed domestic violence counseling, demonstrated that there had been no meaningful change in her life. The mother had even asked for the order of protection that protected her from the father, be modified so that she could "be together" with the father.

Matter of Kaylub T., 150 AD3d 862 (2nd Dept. 2017)

The Second Department concurred with Kings County Family Court that a maternal aunt and uncle be given guardianship of their nephew. The child had been placed in foster care with these relatives in 2009. The lower court had adjudicated neglect in 2010. In 2014, the foster parent relatives filed a petition to be guardians of the child. The mother opposed the petition but the lower court correctly found that there were extraordinary circumstances based on the fact that the mother suffered from mental illness and did not have insight into her problems. The child had been with the relatives for 5 years and was closely bonded to them.

Matter of Gerald Y.-C., 150 AD3d 457(1st Dept. 2017)

The First Department struggled with the issue of visitation with a child while a TPR was pending. The child had been in care since he was 14 months old and in 2012, Bronx County Family Court had found that the father had neglected the child. The child was in the foster home of the paternal grandmother to his half sibling. In April of 2015, the child's goal was changed to adoption and a TPR was filed against the father. At that time the father had 2 visits a week with the child, supervised at the agency for 2 hours each. In 2016, with the TPR pending, the

father requested that his visitation be expanded to include some unsupervised "sandwich visits" - the NYC slang term for a visit that starts supervised and ends supervised but allows for unsupervised time in between. Both ACS and the AFC opposed expanding the visits. The father argued that he was working full time, getting therapy and drug treatment and that he had tested negative for drugs since the beginning of 2016 and that his supervised visits went well. The lower court denied the change in visitation ruling that the court was in the process of hearing the TPR and that the child had been in care since March of 2012 and expanding visitation was not in the child's best interest.

On appeal, the First Department reversed and found that the father had demonstrated good cause to expand the visitation to "sandwich visits". The father posed no risk of physical harm to the child and had made significant progress. He had been testing clean since January of 2016 and was trying to build a relationship with the child, who is now 6 years old. There is no evidence that the limited expansion of visitation with the child will be emotionally damaging to the child should the father's rights be terminated.

One Judge dissented finding that the lower court had a rational basis to deny the request for the expansion. The child had been in foster care since he was 14 months old and he was now 6 years old. The child was in care because the father had neglected him and the child is with a family who loves him and is ready to adopt him. If in fact the father did regain custody of the child, visitation could be re-adjusted to deal with this but if the pending TPR results in a termination, more visits will then have confused and disoriented the child. The majority decision will result in encouraging the child to develop a deeper attachment to a person whose relationship with the child will "in all likelihood" be ended.

Matter of Nevaeh T. __AD3d__, dec'd 6/9/17 (4th Dept. 2017)

The Fourth Department concurred that an Erie County respondent was a person legally responsible for the subject children of an Art. 10 petition. The testimony demonstrated that he was at the mother's home on a regular basis if not actually

living there. However the lower court erred in including in the dispositional order that the respondent could have no contact with the children until they were 18. Such an order under FCA § 1056(4) can only be issued where a respondent is not related by blood or marriage to any member of the household and at the time of the dispositional hearing, the respondent was the father of a newborn child in the home.

Matter of Madison P., __AD3d___, dec'd 6/15/17 (3rd Dept.)

A Broome County mother cannot appeal the disposition on a neglect matter as she defaulted. She and her boyfriend admitted to neglecting her 2 year old son based on the boyfriend holding the child's hands under hot water such that the toddler had second degree burns on his palms and the backs of his hands. The child was placed temporarily with his father in Ohio. Then, before the dispositional hearing, the mother and her boyfriend relocated to Tennessee without notifying the DSS or the court. Neither respondent returned for the hearing although the court provided numerous opportunities for them to participate. The attorney for the boyfriend indicted that his client consented to an order of protection but the mother's attorney elected to not put on a case. Therefore the mother defaulted and cannot appeal the disposition.

Matter of Marcia ZZ v April A., __AD3d__, dec'd 6/16/17 (3rd Dept. 2017)

After a determination that an Ulster County mother neglected her children, the children's paternal cousin who had been their caretaker while the matter was pending, filed for Art. 6 custody of the children. The lower court granted custody and provided the mother with visitation and the mother appealed. Both DSS and the AFC supported the Art. 6 custody order to the cousin. The mother had neglected the children due to her long standing substance abuse and mental health problems as well as domestic violence in the home. The mother had been

discharged from the substance abuse treatment program after having significant attendance issues and behavior issues, she was resistant to treatment and relapsed. She failed to consistently take her psychiatrically prescribed medication and continued to struggle with mental health issues. She is fixated in her belief that the cousin or the cousin's family abuse the children and regularly inspects their bodies and persistently questions them about being harmed during visitations. There is no merit to her concerns. The children have a strong bond with the cousin who provides stability and consistency for the children. The children's half siblings live next door to the cousin's home. The visitation schedule set for the mother was appropriate except for the portion of the schedule that allowed the cousin to determine holiday visits, that portion was remanded for a new hearing to set a specific schedule.

Matter of Nevaeh D.J., __AD3d__, dec'd 6/16/17 (4th Dept. 2017)

The Erie County Family Court was reversed on appeal. The lower court had granted a grandmother Art. 6 custody after an Art. 10 matter was resolved. The mother had consented to the Art. 6 custody but the father's lawyer objected on behalf of the father who had failed to appear. Given that there was no consent by the father, the lower court was obligated to hold a hearing and determine that there was "extraordinary circumstances" before ordering Art. 6 custody to a non parent. The matter was remanded for a hearing.

Matter of Dawn M., __ AD3d__, dec'd 6/29/17 (3rd Dept. 2017)

Although the Third Department concurred with Broome County Family Court's ruling in a permanency hearing that 4 children needed to remain in foster care and that the goal should be changed to adoption, the Appellate Division remanded the matter. The AFC for the 3 younger children had not made the court aware of the children's specific position in the matter. The supervised

visitation with the mother was not going well. The mother would become extremely frustrated at the visits when she would try to discipline the children. More than once she almost hit the children when she would literally throw up her hands in exasperation showing no awareness as to where the children were as she moved her hands upward. The supervising caseworker feared that the mother's frustration with the children would rise to the level of physical force. Once the mother threatened the children that she would leave the visit, causing the children to become upset. After these visits or any contact by the mother, the children would have poor behavior in the foster home and hurt other children at school. The mother would not follow suggestions from the caseworker about handling the children and was resistant to attending more parenting classes. The mother would not acknowledge that her use of corporal punishment and poor parenting skills were the reasons the children were in care . She did not benefit from services and continued to be very frustrated with the children. Continuing the children in care and modifying the goal to adoption was appropriate.

However the lower court erred in failing to conduct an age appropriate consultation with the children. A personal meeting with the children is not mandated by law but the court must find some means of ascertaining the children's wishes. The oldest child's AFC clearly informed the court in his closing statement that the child wanted to be adopted and reminded the court that the child had told the mother specifically that during the most recent service plan review. However the AFC for the younger children (who would have been approximately 8,7, and 6 years old at the time) did not indicate in his closing what their wishes were and although such desires by the children are "not dispositive" they "carry significance and cannot be lightly overlooked" . The matter was remanded for the court to conduct an age appropriate inquiry of the younger children's position.

TERMINATION OF PARENTAL RIGHTS

GENERAL

Matter of Anastasia E.M., 146 AD3d 887 (2nd Dept. 2017)

A 15 year old mother's infant was placed in foster care. When the mother was 17 years old, Suffolk County DSS brought a TPR petition on mental illness grounds. The mother's attorney requested a guardian ad litem for the mother before the fact finding and during the proceedings both the GAL and the lawyer represented the mother. On 2 of the court dates scheduled for the fact finding hearing, the mother failed to appear but her attorney did not request an adjournment and proceeded with the hearing, assisted by the GAL. The lower court terminated the mother's rights on mental illness grounds and the mother appealed arguing that the court erred in appointing her a GAL and in not granting adjournments when she failed to appear. The Second Department ruled that the appointment of the GAL was proper given that it was requested by her own attorney and given the fact that the mother was less than 18 years old. The procedure used to make the appointment of the GAL may have been irregular but that did not result in any prejudice to the mother. There was no error in not granting adjournments when the mother failed to appear on 2 occasions as her attorney did not request an adjournment. Further both her lawyer and her GAL actively participated in the matter and she had been present on several other hearing dates and had been given an opportunity to testify.

Matter of Ari W. N.T., 146 AD3d 892 (2nd Dept. 2017)

The Second Department reviewed an appeal from Westchester County Family Court and affirmed the termination. The child was placed in a FCA §1055 placement with an aunt. In 2010 the DSS filed to terminate the parental rights of the mother. In 2012, a finding of permanent neglect was made but the mother's

attorney passed away before the dispositional hearing had been completed. In 2013 and 2014, the lower court held a de novo dispositional hearing at which time DSS provided evidence that the mother had failed to comply with court ordered services and that it was in the best interests of the child to be freed to be adopted by her aunt. The aunt and child were bonded and the child had lived there for 5 years.

Matter of Chloe W., 148 AD3d 1672 (4th Dept.2017)

When this Cattaraugus County TPR matter was in the neglect stage, the Fourth Department had ruled that the lower court had erred in allowing a report from a forensic psychologist to be admitted in the fact finding as the report was not a qualified as a business record under FCA § 1046(a)(iv). In the neglect proceeding, the lower court had relied heavily on the contents of this report and so the appellate court had reversed and remanded the matter. The lower court then terminated the mother's rights and admitted the same report into evidence on the TPR and the mother appealed again. The Fourth Department found that the requirements of FCA §1046(a)(iv) are not applicable to TPRs and the proper requirements regarding admission are contained in CPLR § 4518. The mother's arguments on appeal were not related to CPLR § 4518. Even if the foundational requirements of CPLR § 4518 had not been met, the lower court did not base the TPR matter's determinations on the report. Even without considering the report, there was enough evidence that the agency made diligent efforts and that the mother did not comply with her service plan, did not attend regular visitation and did not find stable housing.

Matter of Melijah NN. 150 AD3d 1348 (3rd Dept. 2017)

The Third Department refused to hear an appeal from a Sullivan County father of 2 children regarding his termination. He had appealed the fact finding decision, which as a non final order, cannot be appealed from as of right. His lawyer had appeared and represented him on the fact finding even thought he himself had

not appeared. There had apparently been an outstanding warrant for his arrest due to a violation of his parole. He defaulted on the dispositional hearing as he did not appear and he attorney did not appear for him. Given the circumstances and the "apparent lack of merit" on the facts, the appellate court refused to treat the appeal as a request for permission to appeal.

Matter of Destiny G., __AD3d__, dec'd 6/16/17 (4th Dept. 2017)

An Erie County termination of a mother's rights on intellectual disability grounds was reversed on appeal. The Fourth Department found that the lower court should have granted an adjournment when the mother's counsel had advised the court on the afternoon of the final day of the hearing that the mother was unable to appear due to her emotional distress. Given that the issue was termination of her rights, the court abused its discretion by not granting the adjournment. The matter was remitted for a new hearing.

ABANDONMENT TPR

Matter of Karin R., 146 AD3d 526 (1st Dept. 2017)

A New York County mother both abandoned and permanently neglected her child. As to the abandonment, the First Department agreed that she failed to have any contact with the child for the relevant 6 months and had only one contact with the agency – this is minimal and insubstantial. The fact that the mother did communicate with the maternal grandmother who did visit the child does not evince an intention to maintain a parental role.

Matter of Clifford W.C., 146 AD3d 640 (1st Dept. 2017)

The New York County Family Court's termination of a father's rights was affirmed on appeal. The father had been informed by a letter that his child had been placed in foster care after the child's mother died. By his own admission, the father's only response was a single letter he sent to the agency at some point asking that the child be given to his mother and sister. The father also claimed that his mother called the agency once. This minimal effort was insufficient.

Matter of Madelynn T., 148 AD3d 1784 (4th Dept. 2017)

An Erie County mother abandoned her child. She did not dispute that she had failed to maintain contact for the relevant 6 months but claimed that a period of hospitalization and her own repeated drug use constituted a valid defense. Hospitalization does not per se excuse a parent from maintaining contact. The mother did not submit any supporting documents that substantiated the length or extent of her alleged illness and hospitalization. She also claimed that when she left the hospital she asked the child's grandmother to find out information about the child. Even if that were true, it is insubstantial contact that she never followed up on. Her drug abuse does not excuse her failure to follow up on the status of her child. Being incarcerated is also no defense and there was at least a short portion of time when she was not incarcerated and again she did nothing to attempt contact with anyone about the child.

Matter of Isaiah OO., 149 AD3d 1188 (3rd Dept. 2017)

The Third Department affirmed the lower court's decision that an Albany County father had abandoned his son. The child was placed in care at 5 days of age and the respondent was then adjudicated as the child's father the following year. A TPR on abandonment was filed against the father, who appeared at the fact finding, having been produced from prison, and he testified. After the fact

finding, the lower court scheduled a dispo hearing. At that hearing the mother surrendered her rights to the child. The father had at first said he would also surrender on that day but instead he refused to be produced from prison that day. He told his lawyer that he had decided not to surrender. The court then dispended with the dispositional hearing and terminated his rights. The Third Department affirmed.

The testimony was that the father had sent the caseworker one letter in the relevant 6 month period asking about the child and asking for the child to be brought to visit him in prison in Clinton County. The caseworker wrote back indicating that she would not bring the child for a visit given that he was an infant and that there would be a great deal of travel time involved but also told the father how the child was doing. The caseworker received no more communication and to her knowledge, did not know of any contact the father made to the child directly. The caseworker made no attempt to discourage communication with her or with the child. The father never contacted the case planner or the parent aide who supervised the mother's visits, although he had their contact information. However, both the father and the mother testified that when the mother had supervised visits with the child, she would put the father on speaker phone and allow the child to hear the father's voice. The father testified that this happened "at least 16" times in the relevant 6 month period. However, mother only had 10 visits during that period and none of the visit supervisors remembered any calls during those visits. The father acknowledged he did not contact the caseworker but the one letter, that he never sent any cards or letters to the child and that he never filed any petition in court asking for visits. This contact by the father, even if credited, was sporadic, infrequent and insubstantial and does not defeat the abandonment. The fact that the caseworker discussed surrender with the father does not mean that the caseworker discouraged contact. As the child had been in foster care since birth and the mother had surrendered and the father was in prison until at least 2022, it was reasonable that the caseworker sought to ask the father about a surrender. Lastly, there was no reason for the lower court to have held a dispositional hearing when the father

choose not to appear since the dispositional hearing is not required in an abandonment termination.

Matter of John F., 149 AD3d 1581 (4th Dept. 2017)

The Fourth Department reversed an abandonment termination from Ontario County Family Court. The father was incarcerated for most of the relevant 6 months but he had contacted the children or DSS every month. He wrote letters to the children, called them and met with them. He also wrote letters to the caseworker. Further, he filed a petition seeking custody or visitation during the 6 month period. He may have failed to offer a meaningful plan for the children but that would be relevant to a permanent neglect petition not an abandonment petition.

Matter of Tamar T. W., 149 AD3d 852 (2nd Dept. 2017)

A Kings County mother of three abandoned her children. She failed to remain on contact with the children and being incarcerated did not relive her of her responsibility to communicate with the children or with the agency. The agency need not prove that they engaged in diligent efforts to encourage visitation or communication in an abandonment TPR.

MENTAL ILLNESS and INTELLECTUAL DISABILITY TPR

Matter of Elijah W.L., 146 AD3d 782 (2nd Dept. 2017)

In this Queens County Family Court matter, the Second Department reversed the termination of both parents' rights. As to the mother, who was terminated on

the grounds of mental illness, the Appellate Division found that the lower court erred in not complying with SSL§ 384-b(6)(e). The lower court failed to take the testimony of a qualified psychiatrist or psychologist who had been ordered to examine the mother. Without this testimony the court cannot determine if the mother's mental illness is such that she is unable to parent safely in the future. The mother's case was remanded for a new fact finding.

Matter of Priseten T., 147 AD3d 458 (1st Dept. 2017)

A New York County mother's rights were terminated on the grounds of mental illness. The clear and convincing evidence was based on uncontroverted expert testimony of a court appointed psychologist. The mother had schizophrenia and cannot safely care for the child now and for the foreseeable future. The expert's detailed report was placed in evidence and was based on an interview with the mother and a review of her mental health records. The mother had limited insight into her illness and was repeatedly hospitalized and not consistent in obtaining treatment. Her own testimony demonstrated that she would not acknowledge her condition and did not think she needed any medication. There was no reason to hold a dispositional hearing.

Matter of Morphius I., 147 AD3d 948 (2nd Dept. 2017)

The Second Department affirmed the termination of a Kings County mother's rights . The lower court terminated on both permanent neglect and mental illness grounds (NOTE: The Fourth Department has ruled that you cannot terminate on both of those grounds – only one or the other) but the mother only appealed the mental illness grounds. The Second Department ruled that the agency had proven with clear and convincing evidence that the mother was unable to safely care for the child for the foreseeable future based on her suffering from schizoaffective disorder with bipolar features. The mother exhibited delusional

behavior. The court heard the testimony of a court appointed clinical psychologist who relied on records that were admissible as business records. It was not error for him to rely on such records.

Matter of Ariella D., 150 AD3d 620 (1st Dept. 2017)

The First Department affirmed the New York County Family Court's termination of a mother's rights to her children on mental illness grounds. The court appointed psychiatrist testified and provided a report after interviewing the mother and reviewing her records. He opined that the mother had bipolar disorder and an alcohol use disorder and that the child would be at risk of neglect for the foreseeable future if returned to the mother's care. The mother had a long history of mental illness and she failed to comply with treatment for that or for her alcohol issues. It was not necessary for the court appointed expert to see the mother interact with the children before reaching his conclusion. The court also was provided with agency and medical records, a prior court ordered evaluation of the mother and the testimony of 2 caseworkers and the mother's therapist. All of this evidence supported the court's conclusion. The mother did not offer any rebuttal witnesses and did not testify herself. It was proper to draw a negative inference from her failure to testify. A dispositional hearing was not necessary.

Matter of Duane H., __AD3d___, dec'd 6/1/17 (3rd Dept. 2017)

The Third Department affirmed a Clinton County mental illness termination but 2 Judges dissented and would have reversed. The court appointed expert psychologist testified that the respondent father had a number of mental health issues and that he had a significantly dysfunctional childhood and adolescence and suffered with psychiatric problems since then. Currently the father had a mixed personality disorder, antisocial borderline and narcissistic features, depressive disorder, anxiety disorder as well as alcohol, cannabis, opioid and

cocaine use disorders. The fact that he had both psychiatric and substance abuse disorders meant unequivocally that he was presently unable to care for his children safely. However as to the foreseeable future, the expert felt less sure and testified repeatedly that it was a "close call". When pushed he said he was 90% sure that the father would not be able to parent safely for the foreseeable future. The majority opinion found that this was sufficient particularly when combined with the expert's opinion that the father's denial, rationalization and compartmentalization gave the father little insight into changes he would have to make to parent safely. Two Judges disagreed and found that this equivocal testimony simply did not meet the requirement of clear and convincing evidence of the inability of the father to parent safely in the foreseeable future.

Matter of Jazmyne I.I., ___AD3d__, dec'd 6/1/17 (3rd Dept. 2017)

A Clinton County termination of the parental rights of a mother to her 2 children was affirmed on appeal. The court appointed psychologist interviewed the mother, administered testing and reviewed records of prior mental health treatment and opined that the mother had a fairly severe borderline personality disorder. She was impulsive, unpredictable, blamed others and minimized and denied her problems. She put her needs above the children's and her emotional volatility, poor judgment and lack of impulse control put her children at risk of neglect. The expert described several incidents in the mother's recent past that demonstrated how she put her children at risk due to her actions that resulted from her mental illness. The expert indicated that the mental illness itself as one that was very difficult to change and that her denial of the problem on top of that meant she would be unable to safely parent of the foreseeable future.

Matter of Akayla M., ___AD3d___, dec'd 6/9/17 (4th Dept. 2017)

An Onondaga County termination of a mother's rights to her 4 children on intellectual disability grounds was affirmed on appeal. The two psychologists who examined the mother and testified concluded that she had a below average IQ

and that any children in her care would be at risk of neglect for the foreseeable future. DSS also provided evidence that the mother had been given services and was unable to improve her parenting skills and that additional services would not assist given the mother's limitations. Although the lower court was not required to hold a dispositional hearing, the court choose to and determined it was in the children's' best interests to be freed for adoption. In any event, there is no statutory authority to grant a suspended judgment in an intellectual disability TPR. The lower court did err in allowing a report for one of the psychologists into evidence as a business record as the report was prepared for litigation and is therefore not a business record. But this was harmless error as the same result would have been reached without the report.

PERMANENT NEGLECT

Matter of Selvin Adolph F., 146 AD3d 418 (1st Dept. 2017)

The First Department agreed with the Bronx County Family Court that a mother's rights to her 17 year old son should be terminated. The mother refused to obtain mental health services even though she had been repeatedly ordered and encouraged to go. The mother had previously appealed the order requiring her to engage in such services and lost. The teen has not lived with his mother since he was 9 months old. He has lived with the current foster mother for the majority of his life and wants to be adopted by her. A suspended judgment would only delay the inevitable as the mother continues to refuse mental health treatment. The child deserves permanency after this extended time and if he wants to continue contact and visits with his mother, there is nothing preventing him from choosing to do so.

Matter of Jaydein Celso M., 146 AD3d 448 (1st Dept. 2017)

The First Department concurred with the New York County Family Court's decision to terminate a mother's rights to her children. The agency made diligent efforts toward reunification by developing an individualized service plan and referred her for drug and mental health counseling, set up random drug testing and visitation. The mother failed to complete the services, continued to deny responsibility and repeatedly failed drug testing. She was incarcerated at times and continued her relationship with the father for whom there was an order of protection. She did not understand the children's significant special needs. The children have spent several years in a stable and loving foster home where the foster mother wishes to adopt and where their needs are met.

Matter of Karin R., 146 AD3d 526 (1st Dept. 2017)

A New York County mother both abandoned and permanently neglected her child. As to the permanent neglect ground, the agency provided clear and convincing evidence that they offered diligent efforts. They developed a service plan and offered drug testing, drug rehab and visitation. The mother was expelled from drug treatment for non compliance and failed to keep in contact with the agency. She failed to address the issues that had resulted in the placement. The mother argued that the court should have given custody of the child to a grandmother instead of freeing the child for adoption, but the First Department agreed that the child should not be uprooted from the foster home who wished to adopt him. This is the only stable home he has known.

Matter of Maranda R., 146 AD3d 612 (1st Dept. 2017)

The First Department affirmed Bronx County Family Court's termination of a mother's rights to her children. The agency made diligent efforts with referrals to mental health treatment, drug treatment and domestic violence counseling. They encouraged the mother to leave the father and to obtain stable housing.

Supervised visitation was scheduled for the younger 2 children and therapeutic visitation for the older 2 children. The progress notes of the caseworker were properly authenticated and established that diligent efforts had been offered. The mother did complete some goals and many of the visits with the children were positive but she failed to gain insight into the issues and would not separate from the father and 2 of the children were afraid of him. Her efforts were not sufficient to equate to appropriate planning for the children's return

Matter of Felicia Malon Rogue J., 146 AD3d 725 (1st Dept. 2017)

Since the Bronx County mother's termination in this matter was entered on default, she cannot appeal. However, the First Department indicated that if it was properly before the appellate court, they would affirm. The agency had offered diligent efforts consisting of meeting with the mother, reviewing the service plan with her, setting up visitation, giving her reimbursement for traveling and trying to keep in contact with the mother's various service providers who were upstate. The mother was to have mental health treatment, parenting skills training and anger management classes. The mother only visited the children 5 times in a year, did not prove that she had gone to parenting or anger management and refused to sign releases. The mother had still not resolved her mental health issues. The children have lived most of their lives with the foster father who wants to adopt them. He meets their special needs.

Matter of Shyann Jael S., 146 AD3d 730 (1st Dept. 2017)

The First Department affirmed the Bronx County Family Court's termination of a mother's rights to her children. The mother was provided with diligent efforts to reunite. The agency created a service plan, set up visits and assisted with housing. On 2 occasions they permitted trial discharges of the children. The mother did not claim that there was some service that she was not provided with

that she had needed. However, the mother continued to use marijuana and allowed the father, a "fugitive who physically abused her", to remain in the home. She did not complete a drug program and did not visit consistently. It was in the best interest of the children to be freed for adoption by the foster mother that they had lived with for more than 4 years.

Matter of Elijah W.L., 146 AD3d 782 (2nd Dept. 2017)

In this Queens County Family Court matter, the Second Department reversed the termination of both parents' rights. In the father's appeal regarding his termination based on permanent neglect, the Second Department ruled that the agency had not provided clear and convincing evidence of diligent efforts. There was not sufficient evidence that the agency assisted the father in the key issue of obtaining housing, or that they helped the father enroll in a second anger management and domestic violence course. Further, the agency had suspended visitation with the children after an alleged altercation between the father and an employee and then failed to later reinstate the visitation.

Matter of Hector V.P. 146 AD3d 889 (2nd Dept. 2017)

The Second Department affirmed the Richmond County Family Court's termination of a mother's rights to her 2 children. At the fact finding, the foster care agency offered a trial brief that was a summary of facts as well as the agency progress notes. The notes were admitted without objection. The lower court erred in ruling that the agency established a prima facie case based on the trial brief alone, but the caseworker notes, which were not objected to, did establish a prima facie case. The attorney for the child also called the caseworker as a witness and this provided the respondent the opportunity to cross examine. There was clear and convincing evidence that the agency offered diligent efforts to the mother. This included visitation with a visitation coach, referrals to

parenting classes, domestic violence programs, mental health therapy and they also encouraged her to find housing. The mother did not correct the conditions that had resulted in the children's placement. The mother's continued lack of insight, her failure to address the issues of the removal meant that a suspended judgment was not in the children's best interests.

Matter of Destiny A.K., 147 AD3d 758 (2nd Dept. 2017)

The Queens County Family Court's termination of a mother's rights to her child was affirmed on appeal. The agency offered diligent efforts to reunify, specifically by providing visitation, referrals to drug treatment and mental health evaluations and advised the mother of the need to attend these programs and to obtain housing. The mother missed many visits, did not correct her anger management issues, did not maintain an income and did not understand the child's special needs. The child was freed to be adopted by the foster mother.

Matter of Selena R.M., 147 AD3d 953 (2nd Dept. 2017)

The Second Department concurred with the Queens County Family Court regarding the termination of a mother's rights to her child. The mother failed to gain any insight into her issues and when the child was placed with her on a trial basis, the mother failed to take the child to therapy appointments and failed to make sure the child was given her medications. The agency made diligent efforts and it was in the child's best interests to be freed for adoption.

Matter of Anastasia E.Mc., 147 AD3d 955 (2nd Dept. 2017)

A Suffolk County father's parental rights were terminated. The lower court properly took judicial notice of the prior neglect proceedings. The agency

provided clear and convincing evidence that they had offered him diligent efforts towards reunification. They offered visitation, referrals to parenting programs, substance abuse treatment and gave him a schedule of the child's medical appointments. The father was not cooperative and did not address the underlying concerns. Since the father failed to appear for the dispositional hearing and his attorney chose not to participate in his absence, he cannot appeal the dispositional aspect of the matter.

Matter of Zoey O., 147 AD3d 1227 (3rd Dept. 2017)

In a highly unusual fact pattern, the Third Department reversed the disposition of the termination of a Broome County mother's rights to her 4 children. The 3 older children were removed from her care in 2011 when another child died under suspicious circumstances. At first the children were in the care of a relative but then they were placed in foster care. The mother gave birth to another child while the criminal matters were pending and that child was also removed. The mother was then criminally convicted of murder in the 2nd degree and manslaughter in the 1st degree and she was sentenced to 25 years to life. The DSS then brought permanent neglect terminations and the Family Court terminated her parental rights to the 4 children. Diligent efforts had been offered as was visitation and efforts continued to be offered to the mother, albeit it in a more limited way, after the mother was incarcerated. All visits did cease when the mother was convicted. The mother did not provide for any other individuals who could care for the children outside of foster care and the children were freed for adoption. However, the mother's murder conviction has now been reversed on appeal and the mother is no longer facing a lengthy prison term. Therefore a new dispositional hearing must be held to determine what is currently in the best interest of the children. The matter was remanded for a new dispositional hearing given the reversal of the murder conviction.

Matter of Dante Alexander W., 148 AD3d 492 (1st Dept. 2017)

A Bronx father's rights were terminated on both abandonment and permanent neglect grounds. As to the permanent neglect, the First Department concurred that the agency had offered diligent efforts by referring the father for alcohol abuse treatment, anger management and parenting skills for special needs children. The father did not cooperate and avoided contact with agency. He refused the referrals for services and he continued to deny the reasons for the placement. The father did not preserve issues regarding the disposition, however the lower court correctly found that it was in the child's best interests to be freed for adoption. The child is 16 years old and has been in foster care since 2010. The child has been in the same foster home the whole time and wants to be adopted by the foster mother. The child has no relationship with the father.

Matter of Skye N., 148 AD3d 1542 (4th Dept. 2017)

The termination of the parental rights of a father with respect to his children by Erie County Family Court was affirmed on appeal. The children were in care after the father pled guilty to rape in the first degree as well as other felony charges as it concerned his 14 year old stepdaughter. The stepdaughter is not the subject of this termination proceeding however the rape conviction resulted in the father being incarcerated. The DSS did provide diligent efforts toward the father by keeping him updated on the children's situation and reminding him to comply with services. The father argued that he was prohibited from planning for his children's return. He could not take part in a sexual offender program as it was not offered at the prison where he was incarcerated. However, DSS is not obligated to bring services to a prison for a parent. Further, the father continued to refuse to acknowledge the sexual abuse of the older stepdaughter and provided no alternative for his children but foster care. A suspended judgment was not warranted as any progress he had made was not sufficient to prolong the children's unsettled family situation.

Matter of Christian C.B., 148 AD3d 1775 (4th Dept. 2017)

The Fourth Department affirmed the termination of both parents in a Livingston County matter. As to the father, he only argued that the lower court erred by not giving the mother a suspended judgment. The Fourth Department found that he was not an aggrieved party in that regard and dismissed his appeal. Regarding the mother, the appellate court agreed that the DSS had provided diligent efforts toward reunification including visitation, planning resources and keeping the mother apprised of the children's status. The mother had no realistic plan to provide an adequate home for the children. There was no reason to provide a suspended judgment as there was little chance the mother could control her addiction or gain insight. The children deserved to be freed for adoption which would provide hope for adoption instead of perpetual limbo.

Matter of Alexander Z., 149 AD3d 1177 (3rd Dept. 2017)

An Albany County father's rights to his 2 children were terminated and the order was affirmed. The children were born while the TPR proceedings were concluding regarding his 3 older children and these younger children were placed in care within days of their respective births – in 2011 and 2013. Ultimately in 2014, DSS was relived of diligent effort obligations for these children after father's parental rights were terminated as to the older children. However, DSS still offered services until that point and even beyond. The DSS caseworker had been working with the father on his issues since 2008. She set up supervised visitation, gave him free public transportation passes for visitation, medical appointments, and job interviews as well as helped him manage his appointments. He frequently would miss or double book appointments. The caseworker helped him enroll in parenting classes and referred him for employment and housing help and grief management. When housing became an issue, he was provided with assistance to use the shelter care system. The father was coached at visitation. Despite extensive services from multiple providers, the father was

never able to progress beyond supervised visits. At visits he would have to be constantly redirected to focus on safely supervising the children or to only engage in appropriate areas of conversation. He often was difficult to reach as he would fail to inform DSS where he was living. He would miss medical appointments for the children. He did not engage in mental health counseling on a regular basis and he failed to take advantage of the resources made available to him.

There was no reason to provide him with a suspended judgment. The children have been in foster care their whole lives with a foster family where another older sibling also resides. The children have a strong and loving bond with this foster family who keep the children in contact with their siblings and they wish to adopt the children. A suspended judgment would just prolong the instability for these children.

Matter of Kasey Rene'e R., 149 AD3d 507 (1st Dept. 2017)

On appeal, Bronx County Family Court's termination of a mother's rights to her children was affirmed. There was clear and convincing evidence that the agency offered the mother diligent efforts. They set up referrals for parenting programs, mental health services as well as scheduled visitation. The mother engaged in services but did not improve her parenting. She would speak to the children in a threatening and aggressive manner. She used inappropriate physical punishment despite being counseled about discipline. A suspended judgment is not in the best interests of the children as the mother lacks insight into her behavior and the children have special needs. The children have lived in the foster home since 2010 and their needs are being met in that home.

Matter of Nephra P.I., 149 AD3d 642 (1st Dept. 2017)

The New York County Family Court terminated the parental rights of both parents to their 7 children. The agency offered diligent efforts to the parents to try to

assist with reunification. Specialized service plans were developed to fit their situation. They were referred to parenting skills class, anger management and individual counseling. The parents only partially compiled with the services and did not benefit from them as they continued to deny responsibility for the issues that had resulted in the children's placement. The parents not only did not benefit from services but they also kidnapped the children from the agency and set off a week long manhunt. The children were recovered when the police, with guns drawn, surrounded the van where the parents and children were located. During this week long run, the parents did not have the children's medications, the children were not given enough to eat and they were forced to sleep in the van and to urinate is bottles. The children were traumatized in this harrowing ordeal. At least 2 of the children were beaten. The father resorted to corporal punishment in the short one week he had the children. This was clear and convincing evidence that the parents had not benefitted from services. The children have been in stable and loving foster homes for several years where their needs are met and where foster families wish to adopt.

Matter of Cerenithy B., 149 AD3d 637 (1st Dept. 2017)

New York County Family Court terminated the rights of both parents to their children and the decision was affirmed on appeal. The agency made diligent efforts by referring the parents to various parenting programs and mental health services and setting up visitation. The mother continually failed to respond to the agency's contacts. She failed to obtain a mental health evaluation or to engage in mental health treatment and did not visit the children consistently. She failed to gain insight and failed to benefit from those few services that she did engage with. The father, who was diagnosed as bipolar and severely depressed, did not engage in mental health services and did not take his medications. His visitation was consistent but never progressed beyond alternate weekends at his mother's home where his mother actually took the primary care of the children. The father's home is unsuitable and he is not ready to care for the children. The

children should be adopted by their long term foster mother who meets their needs.

Matter of Stephon B.M., 149 AD3d 1080 (2nd Dept. 2017)

The Second Department affirmed the termination of a Queens County father's rights. The agency offered diligent efforts including visitation arrangements and referral for domestic violence counseling. The father did not plan for the child's return. It was in the best interests of the child to deny a suspended judgment as the father had a lack of insight into his problems and into the child's special needs. The father failed to acknowledge or work on the many issues that had resulted in the child's placement.

Matter of Matthew Louis S., 150 AD3d 430 (1st Dept. 2017)

The Bronx County Family Court was affirmed on appeal. The child was freed for adoption based on the father's permanent neglect. The agency made diligent efforts to reunite the child with his father by referrals to parenting skills and anger management programs, setting up random drug screens and referrals for mental health evaluations and services. Visitation was set up and included a visitation coach. The father's behavior worsened during visits and in fact was never able to progress beyond supervised visits. A suspended judgment was not warranted as it would continue the child's lack of permanency. It was in the child's best interests to be adopted by his long term foster mother who has cared for him since 2010 when the child was 4 months old. The child is bonded with this woman and she provides him with a stable, loving home – the only home he has ever known.

Matter of Nataylia C.B., 150 AD3d 1657 (4th Dept. 2017)

An Onondaga County father's rights were terminated and the termination was affirmed by the Fourth Department. The father argued several evidentiary issues on appeal. He argued that the petition was jurisdictionally defective as it did not allege detailed diligent efforts. The appellate court ruled that this had not been preserved and that in any event the petition did specify the efforts made. The father argued that his admission to permanent neglect was insufficient as the court did not explore the diligent efforts made by the DSS. The Fourth Department ruled that an exploration of diligent efforts is not necessary when a parent is admitting to permanent neglect. The father also argued that he was denied effective assistance of counsel as his attorney counseled him to admit to the allegations but his was not ineffective assistance, merely a strategy. Lastly, there was no reason to offer a suspended judgment as the children were in a positive living situation with the foster parents and there was no significant relationship with the father, it was not certain when the father would be released from prison and where he would live when he was released and further delay in permanency for the children was not in their best interests

Matter of Cordell M., 150 AD3d 1424 (3rd Dept. 2017)

Both Broome County parents' rights were terminated and they appealed. The Third Department affirmed the termination. The child was placed in care as an infant due to the parent's substance abuse and domestic violence. The agency offered diligent efforts in that they repeatedly referred the parents for substance abuse, domestic violence and mental health services. The DSS encouraged visitation and provided bus passes. The parents both missed or failed drug screening – testing positive for cocaine and opiates. They did not complete substance abuse programs. They missed the vast majority of visits with the child. They refused to acknowledge the domestic violence issues and refused treatment for that. The child was thriving with his foster parents and was bonded to them.

Matter of Raymond C., 150 AD3d 476 (1st Dept. 2017)

The First Department affirmed a mother's termination of parental rights to her child by the New York County Family Court. Clear and convincing evidence was presented that the agency offered the mother diligent efforts toward reunification. The mother was repeatedly referred for drug treatment, drug screenings, mental health treatment and housing assistance. She failed to complete a drug program or to obtain a mental health evaluation. The child has lived with the foster mother since he was 7 months old and thrives in her care. The foster mother wants to adopt him.

Matter of Tiffany N.L., 150 AD3d 499 (1st Dept. 2017)

The parental rights of a New York County father to his child were properly terminated. The agency offered diligent efforts to reunite. This included drug treatment and assistance in obtaining housing. The father did not avail himself of services and failed to visit consistently. When he did visit, he behaved inappropriately and frightened the child. The child was injured to the extent that he needed medical treatment on an overnight unsupervised visit with the father and those visits were ended. The best interests of the child require that the child be freed and adopted by the foster mother that the child has lived with she was 3 days old. The foster mother meets all of the child's special needs and wants to adopt the child.

Matter of Lierre J.M., 150 AD3d 1009 (2nd Dept. 2017)

Richmond County Family Court terminated the parental rights of a mother to her children and it was affirmed on appeal. The agency offered diligent efforts toward reunification by providing visitation, referring the mother repeatedly to

drug treatment programs and mental health evaluations and encouraging her attendance and advising her of consequences if she failed to attend. The mother did partially comply with services but not enough to defeat the permanent neglect and she did not consistently maintain contact with the children. There was no reason the court needed to conduct an in camera interview of one of the children.

Matter of Giulio D., 150 AD3d 580 (1st Dept. 2017)

The First Department affirmed the termination of a mother's rights to her child by the New York County Family Court. The mother had been offered referrals to substance abuse treatment, parenting skills and mental health services and visitation was scheduled. She did complete many aspects of the service plan but never gained insight into her issues and did not benefit from the services. The mother's therapist opined that the mother had gained little insight even though she was in therapy. The caseworker testified that the mother continued to fail to take responsibility for the circumstances that resulted in the children being in foster care. Her poor parenting skills at visits with the children resulted in the children requesting that they no longer visit with her.

Matter of Shaquan D.M., 150 AD3d 1119 (2nd Dept. 2017)

In 2009, a four month old infant was removed from the mother's care due to the mother's mental health issues putting the child at risk. In 2013, a TPR petition was filed in Kings County Family Court and in 2017, when the child was now 8 years old, the Second Department affirmed the termination. The agency demonstrated clearly and convincingly that they offered the mother diligent efforts toward reunification. They made referrals to mental health and parenting programs, they encouraged the mother's participation in the programs and

referred her for housing services. The agency set up visitation. The mother however did not complete a mental health program, did not gain insight into her mental health issues and missed many visits with the child or was late in arriving. Freeing the child for adoption is in the child's best interests as a suspended judgment is not appropriate given the failure of the mother to gain insight into and acknowledge the problems that prevent a safe return.

Matter of De'Lyn D.W., 150 AD3d 599 (1st Dept. 2017)

The New York County Family Court was affirmed on appeal to the First Department regarding the termination of a mother's rights to her child. There was clear and convincing evidence that the agency offered the mother diligent efforts for four years. The agency developed a service plan aimed at resolving the mother's hoarding problem and set up visitation with the child. The agency attempted to stay in frequent contact with the mother and encouraged her participation in services. The mother failed to gain insight and did not correct the unsanitary and unsafe condition of her apartment despite the time period that passed. The mother also repeatedly violated the visitation orders and made comments to the child about the foster mother. It was in the best interests of the child to be freed and adopted.

Matter of Sydney A.B., __AD3d__, dec'd 6/13/17 (1st Dept. 2017)

A New York County mother permanently neglected her child and the father was not a man whose consent was necessary. The mother was given diligent efforts by the agency who created a service plan, made referrals for services, monitored and encouraged the mother and provided visitation. The mother did not visit consistently, was non compliant with substance abuse and mental health treatments and failed to plan for the child. Not enough progress had been made

to consider a suspended judgment. This special needs child needs the stability and care he receives in the foster home. The father never paid any child support and did not visit the child regularly or maintain contact with the caretakers of the child. He was only a notice father and his consent was not necessary.

TPR DISPOS

Matter of Alexsander N., 146 AD3d 1047 (3rd Dept. 2017)

An Albany County mother violated the terms of her suspended judgment and her rights to her child were terminated. The mother failed to cooperate with DSS, refused to follow recommendations about visits with the child, especially as to providing him with healthy snacks and staying away from places that would cause him distress. The mother told the child to disobey the worker and to run away from the worker. On one occasion the mother insisted on bringing the child to a buffet restaurant even though she was told the environment would be too stimulating for the child. Despite being told not to give the child sugary foods, she stuffed cake and other desserts into the child's mouth directly from the buffet line, putting the half eaten food back on the buffet. The child then became disruptive, the mother could not control him and the child had to be removed and the visit had to be ended. The mother was also arrested and incarcerated during the suspended judgment and did not notify DSS of the situation which resulted in her missing numerous mental health appointments and other appointments for herself and the child. Her mental health issues will last indefinitely and she is not committed to mental health counseling and treatment.

Matter of Bayley W., 146 AD3d 1097 (3rd Dept. 2017)

The Third Department reviewed this suspended judgment from Delaware County for a second time. The respondent in this matter is the father of two children who have been in foster care since 2009. The father has been in prison since 2010 with a sentence that runs until 2028. In 2011 he admitted to permanent neglect but was given a suspended judgment for one year in which he acknowledged that if the children did not return to the mother, he had to provide an appropriate non foster care resource for them. In 2012, the mother surrendered the children and 10 days later, the DSS filed a violation of the father's suspended judgment alleging that he had not provided an appropriate resource for the children. Family Court then had revoked the suspended judgment and terminated his rights. However, on appeal, in 2014, the Third Department had reversed this termination and had remanded the matter for a hearing on the issue of what he had done or not done regarding attempted compliance to locate a resource.

On the remand, the lower court held an evidentiary hearing and determined that he had violated the suspended judgment order by not providing a resource for the children and terminated his rights. The father appealed for a second time. The Third Department concurred that he had not complied and that the children should be freed for adoption. The father became aware of the mother's increasing issues and that she was going to be unable to regain custody but he failed to identify any option of placement except his own mother. However, the s grandmother indicated that due to her age, she was unwilling to be a resource for the children. After the petition to revoke the suspended judgment was filed, the father named two friends as possible placement options. The caseworker indicated that these people were not biologically related to the children, had no meaningful relationship with the children and had never contacted or visited the children and were not appropriate particularly since the children were bonded to the foster family they had lived with since the summer of 2009. The father claimed he had given these names to the caseworker much earlier and therefore a relationship with the children could have been created. The father argued that the caseworker did not bring her notes to court and that had she done so, the

notes may have shown the conversations he claimed they had on this issue. However, there was no record in the permanency hearings or court appearances that he had brought up these resources earlier. The father had not requested the caseworkers notes in discovery and the lower court did not err for failing to stop the proceedings to require that the caseworker obtain the file and bring it to court.

The father also argued that the agency should have been providing visitation to him at the prison but this concerns issues of diligent efforts for the permanency neglect and the father had consented to that finding. Also, DSS is not required to provide visitation with an incarcerated parent when it is not in the children's best interests due to distance or the children's age. The father will not be out of prison for many years, the children have spent most of their lives with the foster family who wants to adopt them. Termination of the father's rights is in their best interests.

Matter of Isabella M., 147 AD3d 106 (2nd Dept. 2017)

The AFC appealed this termination on behalf of the subject Orange County child and the Second Department reversed and remanded for a new dispositional hearing. The DSS had filed a TPR in 2011 and the mother consented to a finding of permanent neglect and a suspended judgment in April 2012. The DSS filed several violation petitions and Family Court repeatedly extended the period of the suspended judgment. Finally in the late fall of 2015, DSS sought to revoke the order of suspended judgment alleging that the mother was not attending individual or family therapy and that her case had been closed at the counseling center due to her lack of compliance. The court held a hearing and ruled that the mother had violated the suspended judgment and terminated her parental rights. The child appealed the termination.

The Second Department ruled the there was not a preponderance of evidence that the termination was in the best interests of the child even though the mother had clearly violated the suspended judgment. The child resided in a treatment

facility and freeing the child for adoption did not seem to increase the likelihood that the child would get adopted. The mother and the child had a strong bond and the child looks forward to her mother's visits. The lower court called the mother the child's "lifeline". The matter was remitted on the question of the child s best interests and the appellate court advised that the issue of supervised visitation for the mother and child at the treatment facility should be assessed.

Matter of Ariana S.S., 148 AD3d 581 (1st Dept. 2017)

The First Department concurred with New York County Family Court that a mother's parental rights should be terminated and that a suspended judgment was not warranted. The mother had not addressed the issues that led to the placement. She had a long term substance abuse problem and failed to engage in treatment for that and for needed mental health treatment. She failed to remain in contact with the agency, including a 6 month period when she effectively "disappeared". She continued to reside with the child's "putative father" who was not permitted to be around children due to his sex offender status. It was in the child's best interest to be adopted by the foster mother she has lived with her whole life. (NOTE: the case says the mother admitted to abandonment and that this was the grounds for termination. A suspended judgment is not a dispositional alternative under the statute for abandonment)

Matter of Breana R.S., 148 AD3d 1157 (2nd Dept. 2017)

A Kings County mother violated the terms of her suspended judgment and her rights were properly terminated. The mother had admitted to permanent neglect and was given a suspended judgment. She violated the terms by failing to attend and complete a substance abuse program and failing to regularly attend visitation with the child. The lower court did not need to hold a separate disposition hearing as to the child's best interests since the court was very familiar with the

parties and the prior proceedings and the record in fact demonstrated that the court considered the child's best interests in reaching the decision to terminate the mother's rights.

Matter of James P., 148 AD3d 1526 (4th Dept. 2017)

An Onondaga County mother admitted to permanent neglect and so cannot appeal that portion of the order. As to the dispositional hearing that terminated her rights, the Fourth Department affirmed the termination. The lower court properly limited the evidence regarding the foster parent's qualifications to adopt the child. The issue in a dispositional hearing is if the child's best interests to be freed for adoption – not who should adopt. The child's progress in the foster home was satisfactory and the mother was not capable to offer a safe home. It was not in the child's best interest to be freed for adoption. There was no need to offer a suspended judgment to the mother as the mother has only made very minimal progress and the child's stay in foster care should not be prolonged.

Matter of Joseph M., Jr., 150 AD3d 1647 (4th Dept. 2017)

The Fourth Department concurred with Erie County Family Court that a father had violated a suspended judgment and that his rights to his child should be terminated. The lower court properly found by a preponderance of the evidence that the father only made minimal progress on the conditions that had resulted in the child being in care. He failed to make progress and he continued to deny the existence of problems. The lower court did not err in limiting the cross examination of a witness as counsel was asking questions that were remote and speculative. The father argued that two exhibits were improperly entered into evidence, but at the hearing the father's attorney withdrew his objections to the validity of the certification of the records. In any event, the Fourth Department found that FCA 1046 (a) requirements do not apply in terminations. Lastly, the

court properly allowed DSS access to the father's mental health records as he had put his mental health at issue in that he denied he needed to comply with the order that directed him to undergo mental health treatment.

Matter of Danaryee B., __AD3d__, dec'd 6/9/17 (4th Dept. 2017)

The Fourth Department agreed with Erie County Family Court that it was not in the child's best interest to grant the mother a suspended judgment. The mother had no suitable home for the child as she had no stove, no bed and no clothes for the child. The mother had not had meaningful visitation with the child and did not have transportation or secure financial resources.

UNWED FATHER'S RIGHTS

Matter of Gabriella Kamina M., 146 AD3d 500 (1st Dept. 2017)

The foster care agency proved by clear and convincing evidence that the father of the child was not a consent father and therefore his rights did not have to be terminated to free the child for adoption. He only had very minimal and sporadic contact with the child and the agency and never provided any financial support. While he was incarcerated, he did not ask for visitation and only visited after the agency filed proceedings to free the child. He never sought to place himself on the child's birth certificate or file with the putative father registry and only filed a paternity petition after the agency filed its petition when the child was then over a year old.

Matter of DSS v Dwayne W., 146 AD3d 718 (1st Dept. 2017)

A New York County man was equitably estopped from being given a DNA test regarding paternity of a 10 year old boy. The child considers this man to be his

father and calls him “Dad”. The man had lived in the child’s household for 2 years, spends holidays with him, including Father’s Day and introduces the child to friends and family as his son.

Matter of Thomas T. v Luba R., 148 AD3d 912 (2nd Dept. 2017)

A Queens County man was equitably estopped from seeking paternity of a 4 year old child when he knew that he could be the child’s father since shortly after the child birth. The child referred to another man as her “Daddy” and had established a strong father-daughter relationship with that man since she was 18 months old. The petitioner had never had a parent child relationship with the child and had not even seen the child in years. The child does not even recognize the petitioner’s name.

Matter of Akasha J.G., 149 AD3d 734 (2nd Dept. 2017)

The agency brought a petition alleging that this Kings County unwed father’s consent was not necessary for the child to be adopted and alternatively that if his consent was necessary, he had abandoned the child. The Family Court ruled that the father’s consent was necessary but that he had abandoned the child and so terminated his rights. On appeal, the Second Department reversed the ruling that the father’s consent was necessary, finding by clear and convincing evidence that he was only a notice father. It was of no consequence given his abandonment of the child in any event.

Matter of Beth R v Ronald S. 149 AD3d 1216 (3rd Dept. 2017)

The Third Department reviewed a matter from Tioga County Family Court regarding the paternity of a 13 year old girl. The mother had been married when the child was born, however the child had been born just 3 weeks after the wedding. When the child was 13, a prior boyfriend of the mothers sought DNA

testing. The now incarcerated husband opposed and sought prison visitation with his "daughter". The lower court determined that the presumption of legitimacy was overcome based on the fact that the husband never had previously taken the position that he was the biological father or even that he could have been. In fact the husband had been incarcerated at the time of conception. On the dates of likely conception the mother had been in an exclusive relationship with the man who now sought to be identified as the father. The child took the position that she wanted to actually know who her biological father was and claimed that she would suffer no emotional damage in DNA testing were permitted. The husband had in fact never really established a parental relationship with her and had spent most of in life in prison. The DNA test showed that the prior boyfriend was the father and excluded the husband. The lower court correctly issued an order of filiation and dismissed the husband's petition for visits.

Matter of Mario WW v Kristin XX., 149 AD3d 1227 (3rd Dept. 2017)

Shortly after the birth of a Tompkins County baby, a man filed for paternity and the lower court dismissed the petition as the mother was married at the time of the conception and the birth. The petitioning alleged biological father appealed. The Third Department remanded the matter for a hearing regarding the child's best interests. The mother had testified that she believed her husband to be the biological father and the the husband was willing to raise the child as his own but no evidence was offered on the quality of the relationship between the child and the husband. The child was only 7 months old buy the time the hearing was completed. The appellate court found it "notable" that the husband did not testify that he was the father but only submitted an affidavit in which he stated that he was happy that the baby was born, was on the child's birth certificate as the father and had been holding himself out as the father. The lower court did not assess if the infant would be traumatized by potentially identifying the petitioning "father" as her biological father and the appellate court ruled that this was necessary. The appellate court, commenting on the difficulty of the conflict here, stated in a footnote that 2 different AFCs had acted in this case and had, of

course substituted judgment given the child's young age, but that each had argued for opposite results.

Matter of Carlos O. v Maria G., 149 AD3d 945 (2nd Dept. 2017)

An Orange County man filed a paternity petition regarding a child who was 8 years old, asking that genetic testing be ordered. While the mother concurred that the petitioner was in fact the biological father of the child, it was the mother's husband who was on the child's birth certificate and who had raised the child as his son for the entire 8 years. Orange County Family Court dismissed the petition and the Second Department concurred. It was in the best interest of the child to deny the petition. Although the petitioner had provided some limited financial support for the child and had seen the child perhaps 20 times in the 8 years of the child's life, it was the husband who has assumed the role of the child's father consistently for the 8 years. The lower court properly estopped an assertation of a paternity claim that would disrupt the relationship.

Matter of Darnel J. P., v Lianna Y.D., 150 AD3d 406 (1st Dept. 2017)

The New York County petitioner in this matter was precluded on equitable estoppel grounds from claiming paternity. The child was already 4 years old and he had only seen the child about 4 times before he filed for paternity. He had never communicated with the child or paid any child support. He had physically abused the mother and she had obtained an order of protection and then "curiously" he filed for paternity just 2 weeks later. The child believed that the mother's husband was his father. She called that man "Daddy" and knew the petitioner only as a man who had hit her mother. It is not in the child's best interest to interfere with the current relationship she has with the mother's husband.

FREED CHILDREN, SURRENDERS and ADOPTION ISSUES

Matter of Diane T. v Shawn N., 147 AD3d 463 (1st Dept. 2017)

A Bronx County foster child's grandmother filed under DRL §72 for visitation or custody of the child. However, the grandmother failed to prove that she had standing as she did not demonstrate that she had an existing relationship with the boy. In fact she did not have any meaningful relationship with him due to her very infrequent visits in the past. It was also not in the best interests of the child to be placed in the custody of the grandmother. Kinship relatives do not have any greater standing than the child's foster parents. This child is bonded, loved and cared for by his foster parents in the only home he has ever known. The agency supports adoption by the foster family and would not consent to the grandmother being given custody or adopting the child. The AFC properly substituted judgment for the 2 year old in advocating for his best interest.

Matter of Carmen P. v ACS 149 AD3d 577 (1st Dept. 2017)

A New York County AFC's motion to dismiss an Art. 6 petition for custody of the subject children was properly granted. The children had been adopted by their foster parents 2 months after the lower court dismissed the Art. 6 petition and so the appeal of the Art. 6 petition dismissal is now moot. In any event there is no standing to file an Art. 6 petition once the children had been freed for adoption.

Matter of Boyd v Westchester County DSS 149 AD3d 1069 (2nd Dept. 2017)

Westchester County Family Court was affirmed on appeal. A maternal uncle has no standing to file for custody or visitation with a foster child who had been freed for adoption over a month earlier.

Matter of Aliyah B. v Taliby K., 149 AD3d 667 (1st Dept. 2017)

A Bronx parent's Art. 6 petition was properly dismissed as moot. After the lower court had dismissed the Art. 6 petition, the child had been adopted by his foster parent who was also his maternal aunt. The petitioning parent's rights had been terminated and the petition should have been dismissed on that ground in any event. ACS and the AFC opposed the parent being granted custody.

Matter of Jason F.A., ___AD3d__, dec'd 6/21/17 (2nd Dept. 2017)

A Dutchess County father sought to vacate his judicial conditional surrender of his parental rights 10 months after he signed the surrender. The Second Department concurred with Family Court that he could not do so. A surrender signed in court is final and irrevocable unless the parent can prove there was fraud, duress or coercion. Here the Family Court told the father in detail what rights he was giving up by signing the surrender, told him of his rights to legal counsel and supportive counseling. The father had acknowledged that he understood his rights, that he had no psychical or mental condition that prevented him from understanding and that he understood the negotiated annual visit with the child that was in the conditions. He had specifically stated to the court that he was not being coerced.

MISCELLANEOUS RELATED CASES

Matter of Dhanmatic G v Zamin B., 146 AD3d 495 (1st Dept. 2017)

The FCA §1046(a)(vi) hearsay exception for children's statements made outside of court about neglect or abuse can be applied to private custody cases but not to family offense proceedings.

Matter of Mary M v Tremaine L.M., 146 AD3d 960 (2nd Dept. 2017)

In 2008, two children were placed in foster care with the youngest child's paternal grandmother. In 2014, they were removed from her foster home due to criminal charges being filed against the foster parent's son regarding an incident with the then 6 year old foster child. Later the children were freed for adoption. In 2015, the ex foster mother filed for unsupervised visitation with the children. The Second Department found that she had no standing to seek visitation with the older child who was not her grandchild and that there was a sound basis to deny her visitation with the grandchild without a hearing.

Matter of Chess v Lichtman 147 AD3d 754 (2nd Dept. 2017)

The Second Department reversed Westchester County Family Court's dismissal of a mother's motion to modify custody of her children. The mother filed to change the custody provision with her ex husband after the husband had been alleged to have sexually abused their oldest, then 13 year old, daughter. DSS had indicated a SCR report and had filed an Art. 10 petition against the father alleging the sexual abuse. The lower court held the mother's Art. 6 modification petition in abeyance while the Art. 10 matter was pending and suspended the father's visitation with the children. Eight months after the Art. 10 petition was filed, the father was granted an ACD over the objection of the oldest daughter's AFC. The mother had not been permitted to participate in the Art. 10 and the court did not allow the oldest child to provide in camera testimony. While the Art. 10 was pending, the court had gradually reinstated the father's visitation with the younger children. including an unsupervised weekend visit. This was over the mother's objection and without a full hearing. The father then moved for a dismissal of the mother's original motion to modify custody and the lower court granted it without a hearing.

There was clearly a change of circumstances in the there were allegations of sexual abuse. The relationship between the parents had deteriorated over that and the older child was no longer visiting the father. The ACD of the Art. 10 was not on decision on the merits and it did not resolve the question of sexual abuse allegations - in fact the lower court never ruled on the allegations of sexual abuse. The Second Department remanded the matter for a new hearing in front of a different Judge.

Charles v ACS EDNY dec'd 1/24/17

The Eastern District dismissed a §1983 action where it was alleged that ACS had wrongfully removed the plaintiffs' children based on a report from a landlord that there was insufficient room for the children. The landlord had rented different portions of the apartment to different families and had allegedly called in the report when he learned he was going to be reported for failing to repair the apartment. The federal court dismissed the action for failing to state a claim noting that ACS as an entity cannot be sued, it must be the City of NY and further that a removal of 4 days duration did not rise to the level of a violation of the parent's rights.

Matter of Corrigan v NYS OCFS 28 NY3d 636 (2017)

Westchester County DSS handled an allegation of educational neglect on the Family Assessment Response (FAR) track. After the case was closed, the parents wrote to OCFS and requested expungment of the report and the FAR records. OCFS took the position that the statue only allowed indicated reports to be expunged and that a FAR report was not an indicated report. The parents filed an Art. 78. The parents alleged that if their records were not expunged, then a person placed on the FAR track has fewer remedies that a person who had an unfounded report. The Court of Appeals affirmed the dismissal of the Art. 78 action. The statue is a balance of the state's need to retain records of a SCR report and the desire of parents to eliminate a stigma. The courts will uphold the legislatures' intent regarding that balance.

Anonymous v OCFS ___Misc3d ___, dec'd 2/20/17 (Supreme County, New York County 2017)

A woman petitioned the Supreme Court in New York County to order OCFS to remove the name of a man's name from the Putative Father Registry who had listed his name as the father of her 2 children. The woman claimed that the children were conceived by anonymous sperm donation and the man was not the

father of either child. He was a man who had been harassing her. She had obtained an order of protection against him and he had been incarcerated for violating it. She sought an order that OCFS was to put no man's name on the Putative Father's Registry for either of her children. OCFS claimed that the woman had not followed the statutory procedure to vacate an acknowledgement of paternity. The Supreme Court issued the order to remove the man's name and to place no man's name on the registry. .

Jones v County of Suffolk dec'd EDNY 2/21/17

In a federal §1983 action, Suffolk County was sued for not removing a child from his home before he died. The child's sister had been removed. The Eastern District dismissed the claim ruling that there is no protected interest in a specific outcome such as removal in the NYS child welfare scheme. The deceased child was never in the custody of the county including at the times he was abused and removing his sister did not create a "special relationship" with him.

Matter of Alan U v Mandy V., 146 AD3d 1186 (3rd Dept. 2017)

In 2011 a Broome County Art. 10 sex abuse petition was resolved with the father consenting without admission to allegations he had sexually abused the older child. The mother was given Art. 6 custody of both children and the father was told he could apply for visitation when he completed the Art. 10 dispositional order. (NOTE: Now, under current law, there could not be a dispositional order for services in the Art. 10 dispo if the mother was given Art. 6 custody, it could only be done if the children were being "released" to the mother under the Art. 10) In 2015, the father sought to have visitation with the younger child only and was able to show some compliance with the prior ordered requirements that he obtain services. Both the mother and the AFC opposed contact as the father continued to deny he had sexually abused the older child and had not been permitted to finish treatment for sexual abuse due to his denial. The mother

testified to the years of therapy that the younger child had required due to the abuse of the older child. The father took the 5th on the stand when asked about the sexual abuse of the older child. Ultimately , the lower court granted him supervised visits once a month in an office environment and for one hour only. The father appealed and the Third Department affirmed.

Matter of Melody J.M.M. 147 AD3d 953 (2nd Dept. 2017)

An uncle has no standing to seek visitation of a niece.

Matter of B.S. v B.T. 148 AD3d 1029 (2nd Dept. 2017)

A step-grandparent has no standing to seek visitation – only a grandparent can under DRL §72.

Matter of Theresa B v Clarence D.P. 148 AD3d 1144 (2nd Dept. 2017)

A former foster parent filed for guardianship of her former foster children who had been removed from her home a year earlier based on allegations that she was not attending to their special needs. The children had at that time been in her foster home for 6 months and the foster mother had previously adopted 2 of the children's siblings. The foster mother had not followed through with an administrative fair hearing on the removal of the children but did seek guardianship of them in Kings County Family Court. The Second Department concluded that the family court correctly dismissed the petition for guardianship without a hearing.

Matter of Smith v Jefferson County DSS 149 AD3d 1539 (4th Dept. 2017)

A Jefferson County father was sued for child support to reimburse for the expenses of foster care. He argued that during the time period when the child had been in his home on a trial basis he should not be liable for any reimbursement of foster care funds. The Support Magistrate ruled that the father had incurred expenses while the child was in his home on a trial basis and that it would be "unjust and inappropriate" to make him pay for foster care funds during that time period. The DSS appealed and the Fourth Department affirmed ruling that the deviation from the child support standards was appropriate.

Matter of William EE v Christy FF., __AD3d__, dec'd 6/8/17 (3rd Dept. 2017)

In this private custody matter, the Third Department commented that Chemung County Family Court should not have considered a "report" from DSS in its decision on the mother's dismissal motion. The Appellate Division did say it was harmless error given other evidence.