SELECTED CHILD WELFARE CASELAW

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ART. 10 REMOVALS, PRELIMINARY ORDERS and GENERAL EVIDENTIARY

Matter of Jorge T. 157AD3d 800 (2nd Dept. 2018)

The Second Department concurred with Kings County Family Court that ACS had not proven imminent risk such that the child's mother should be ordered out of the home or that she should be prohibited from being alone with the child during the pendency of the Art.10. The allegations were that the mother was misusing drugs and failing to comply with treatment and the child was neglected. ACS moved for an order that the mother be removed from the home or in the alternative that she not be allowed alone with the child. The lower court, after a hearing, denied the motion and allowed the child to be released to the custody of the parents without any supervision while the matter was ending. The Second Department agreed and ruled that an order excluding a parent from the home with the child was effectively a removal from a parent and so the same standards as a FCA § 1027 and 1028 apply. There must be proof of imminent risk to the child's life or health and the court must weigh the risk of harm that removal of the parent may bring as opposed to the risk of harm if the parent remained in the home. ACS did not prove that the child was at imminent risk.

Matter of Aaliyah J., 157 AD3d 955 (2nd Dept. 2018)

The Second Department refused to modify a visitation order while an abuse petition was pending, The Queens mother was alleged to have abused her 3 month old child whose arm and skull were fractured. That child was in the care of a relative and while the petition was pending, the mother gave birth to a second child. The second child was removed at birth and placed with a different relative and the mother sought permission to have overnight visitation with the second child at the

relative's home. The lower court allowed the overnight visitation under very specific conditions. The mother had signed a release for ACS to see her mental health records, the mother had begun parenting classes and the caretaking relative who supervised the visitation with the abused child said that visits with that child had been appropriate. The relative caretaker of this second child agreed to install a lock on the door to the bedroom where she would sleep with the new infant and when that infant awoke in the night, the relative would bring the child to the mother's bed and supervise the contact. This would allow the mother to breast feed and bond with the infant. The lower court advised both the mother and the relative of the consequences of any failure to abide by the specific terms of the visitation. ACS appealed the order and the Second Department found that it was not abuse of discretion to allow for the overnight visitation given the safeguards put in place.

Matter of Elijah G., 158 AD3d 762 (2nd Dept. 2018)

The Second Department agreed with Queens County Family Court that a newborn child needed to be removed while the Art. 10 was pending. There had been prior findings of neglect against the parents related to 3 other children, they had failed to benefit from services for those children and had not fully engaged in mental health treatment. The child's emotional, mental and physical health would be at imminent risk if he was returned to the parent's care.

Matter of Esscence R., 158 AD3d 806 (2nd Dept. 2018)

ACS appealed a Kings County Family Court decision to grant a mother's FCA §1028 request for the return of her child. The Second Department agreed that any imminent risk to the child was mitigated by the lower court having set conditions regarding the return of the child. The mother was required to participate in therapy, to bring the child to

the foster home for visits with siblings and to take the child to all medical appointments.

Matter of Ruth H., _159 AD3d 1487 (4th Dept. 2018)

The Fourth Department modified an Oswego County Family Court removal order which had found that the DSS had not engaged in reasonable efforts to prevent the need for the removal. The parents had consented to the two children being removed and the lower court had ruled that the temporary removal was in the children's best interests while a neglect petition was pending. The petition centered on a parental failure to provide adequate nutrition and a safe home for the children. The lower court also had ordered that the DSS had to find a foster home for the family cat.

The lower court had listed numerous services that it felt DSS should have offered to the family before the removal. However, the Appellate Division determined that the evidence at the fact finding demonstrated that DSS had in fact offered services to the family before the removal consisting of public assistance for rent, monies for medical care including for treatment of the father's mental health issues as well as provided food stamps and WIC help for purchasing groceries. A preventive worker met with the parents up to 4 times a month. This caseworker set up and attend doctor appointments for the mother and the children, picked up medicine at the pharmacy, brought food and cleaning products to the home, brought the family holiday food baskets and toys for the children and provided transportation. The caseworker counseled the family on nutrition and hygiene information, provided information to assist with dangerous living conditions including choking hazards and cigarette butts littering the toddler's bedroom. The caseworker had also tried to help the parents locate other housing and initiated HUD applications. DSS also helped the father to restart his social security payments and referred the respondents to multiple

programs. Although the lower court had listed other services that it felt should have also been offered to the family prior to the removal, the Appellate Division found that the offers made to the family were in fact "reasonable efforts" to try to eliminate the need for the removal. Further the Appellate Division found that family court is a court of limited jurisdiction and cannot exercise powers beyond those in a statute. The court had no authority to order DSS to locate a foster home for a cat.

Matter of Piper S., 159 AD3d 911 (2nd Dept. 2018)

The Westchester County Family Court had authority to order that a respondent father provide the child's health insurance card to DSS within 48 hours so that it could be made available to the paternal grandmother who had been given temporary custody during the pending Art. 10.

Matter of Mirza S. A., 160 AD3d 715 (2nd Dept. 2018)

The Second Department approved of Queens County Family Court's handling of the in court testimony of a child. First the lower court concluded that the child would suffer emotional trauma if compelled to testify in front of the father who was accused of neglect based on domestic violence. The court allowed the child to testify out of the father's presence and allowed the father to view the testimony via video. The court granted a recess after the direct examination of the child to allow the father to consult with his attorney regarding the cross examination. At the end of the cross of the child, the court allowed another recess for the father to consult with the attorney about the resolution of the cross. This was an appropriate balance of the children's potential trauma with the rights of the father.

Matter of Renezmae X., 161 AD3d 1247 (3rd Dept. 2018)

A Broome County Family Court removal of a newborn for temporary placement in foster care pending the resolution of a neglect petition against the mother was affirmed on appeal. Eight months before the subject child was born, the mother admitted to neglect of an older child and ordered the mother to participate in parenting classes, mental health and substance abuse evaluations and cooperate with recommendations. After this child was born, DSS removed the child on a FCA §1022 court order and then filed a petition alleging derivative neglect. The mother requested a FCA §1028 hearing about 3 months after the child had been removed but a return was denied. The mother's argument on appeal was that the DSS did not demonstrate at the 1028 that it had made reasonable efforts after the child's removal to return the child. The Appellate Division agreed that the child needed to stay in care, commenting that the reasonable efforts evidence was not extensive but it did demonstrate proper efforts. There were caseworker services and referrals for mental health and substance abuse issues which were the core reasons for the child's removal. The mother had failed to address these circumstances and the removal was necessary to avoid imminent risk.

Matter of Tyriek J., 161 AD3d 864 (2nd Dept. 2018)

The Second Department reversed an order by Suffolk County Family Court for a mother to have a psychological examination prior to the fact finding. The allegations in the petition involved the mother failing to work cooperatively to obtain counseling for her son who was believed to have been sexually abused. It was claimed that she had failed to protect the child from his farther was alleged to be abusive. Although family court has authority to order such an evaluation before a fact finding, here

is was not warranted as there was nothing in the petition or on the record that alleged that the mother was suspected of having a mental illness.

Matter of Cameron M., 161 AD3d 1156 (2nd Dept. 2018)

The Second Department reversed an order from Suffolk County Family Court that ordered DSS to provide defense counsel with all discovery material on paper as opposed to the compact disc that DSS had provided. The respondents did not present a bias for their argument that they needed the discovery materials in paper form. There was no argument that the CD was not responsive to the demand or that the format was defective in any way.

GENERAL NEGLECT

Matter of Boryana D. 157 AD3d 1011 (3rd Dept. 2018)

A Schuyler County mother neglected her children by allowing her ex-husband to have a relationship with the children that resulted in sexual abuse. The mother adopted two children from Bulgaria as a single parent – a boy and a girl. The girl was approximately 12 years old when she was adopted. About a year after the adoption, the boy told officials at school that he observed sexual activity between the mother's ex-husband and his sister while the 3 of them were sleeping together in the same bed. The girl disclosed that she and the ex-husband of her adopted mother had engaged in sexual intercourse while in the same bed with the brother and that she and the ex-husband had a sexual relationship for a few months. The lower court found that the mother's behavior in

allowing contact between her adopted daughter and her ex-husband was not sufficiently protective and was neglectful and the appellate court agreed.

The mother had ample evidence that should have resulted in her protecting the children. She knew that the ex-husband has a prior indicted report for child abuse (which had been reversed on a fair hearing) that resulted from his admission that he was looking at a porn magazine in the company of an 8 year old girl. The mother was aware that the children had a traumatic past in Bulgaria and that the daughter had been raped in the past. She knew that her daughter evinced an age inappropriate interest in sex. The child viewed porn on her computer and sought attention from adult men. The mother knew that her ex-husband had taken her daughter to a wine and food festival on his motorcycle and allowed her to drink wine and has given her a bracelet with a heart charm. The son had told the mother that he saw his sister being very affectionate to the ex-husband and the ex-husband reported the same. Most "notable" was that the mother was aware that the children slept in bed with the ex-husband when they visited him and she allowed overnight visits as much as 3 times a week. She even allowed overnight visits in her own home where the children also slept with her ex-husband in the same bed. The mother did not aggressively attempt to deal with the daughter's viewing of porn on the family computer and made only limited efforts to obtain counseling for these children. The mother's behavior was not that of a reasonable prudent parent and was neglectful of both children.

Matter of Corey J., 157 AD3d 449 (1st Dept. 2018)

A Bronx father neglected his oldest child and derivatively neglected the younger children. The oldest child made out of court statements that there was domestic violence perpetrated by the father on the mother, that the father used excessive corporal punishment and that he was afraid to

the father. These out of court statements were corroborated by the consistent testimony of the CPS worker and the mother to long standing domestic violence in the presence of the children as well as ongoing excessive corporal punishment of the oldest child. The father denied the conduct and blamed the mother for the violence. He did admit that he had grabbed the mother by the throat once and that he had "popped" the child on the hand. Hospital records corroborated that the child was afraid of the father and "trained hospital personnel did not find that this fear was feigned." The father's excessive corporal punishment of the child demonstrated a flawed understanding of parental duty such that the younger children were at risk of harm.

Matter of Jerell P. 157 AD3d 443 (1st Dept. 2018)

The First Department agreed that a Bronx mother derivatively neglected her newborn and that a motion for summary judgment was appropriately granted. The mother had been found to have neglected her 4 older children in prior findings that had been issued over a 2 year period between 2014 and 2016. The mother had limited cognitive ability and impaired judgment and was unable to care for any child. The conduct in the prior neglect adjudications was sufficient in time to support the conclusion that the conditions still existed. The repeated findings of neglect, her ongoing failure to participate in any services and the fact that none of the other children had been returned to her care all established that this 5th child would be at risk if in her care. The mother failed to rebut the presumption in the motion that the conditions had been remedied.

Matter of Chorney v NYS OCFS 157 AD3d 437 (1st Dept. 2018)

In an Art. 78 proceeding an indication for maltreatment was properly retained by the ALJ at the fair hearing. The out of court statements of

the 3 year old that the subject of the indicted report had kicked him in the groin were corroborated. The child made repeated and consistent statements that the subject of the report had kicked him in the penis during a toilet training session. The child was seen at a hospital where the records noted that he had mild penile swelling, significant swelling on the head of the penis, ecchymosis to both thighs and his left scrotum. The records indicated that the examining physician said that the injuries were consistent with an impact. The child was consistent in his statements and had no motive to fabricate whereas the subject gave inconsistent and waffling accounts of the incident.

Matter of Cohen D., 157 AD3d 472 (1st Dept. 2018)

Both parents neglected their children in a New York County matter reviewed by the First Department. One of the two children was born prematurely and with serious medical issues. Both parents failed to ensure that this child was properly fed and he ultimately was admitted to the hospital for failure to thrive. Other medical reasons for his condition were ruled out. When admitted to the hospital the child was able to feed well, gained weight and exhibited none of the intestinal issues that the parent claimed were the problems. The mother was uncooperative with the child's doctors, missed appointments and did not heed medical advice regarding the child. She delayed obtaining early intervention services and failed to address her own obvious mental health issues. Her judgment concerning the medical and other needs of both her children was significantly impaired. The father also left the home at some point, leaving the children in the care of the inadequate mother. The parents' medical neglect of the one child demonstrated a flawed understanding of the duties of parenthood such that the other child was also derivatively neglected.

Matter of Leah VV., 157 AD3d 1066 (3rd Dept. 2018)

Sullivan County Family Court dismissed a neglect petition against the mother of 5 children but the Third Department reversed and adjudicated neglect. The mother left her 16 month old in a bathtub with about 4 inches of water while she attended to her 3 year old in another room. She got the 3 year old a bowl of cereal and changed his diaper and estimated that she was out of the room for less than 10 minutes. When she returned the child was unresponsive in the water and the toddler ultimately died. The mother did not testify and offered no other explanation. The Third Department found that leaving a child this young unattended in the bath with no parental view of the tub was not the action of a reasonable and prudent parent. The mother failed to exercise a minimum degree of care.

Matter of Ashley S., 157 AD3d 536 (1st Dept. 2018)

The First Department concurred that a Bronx mother had neglected her 4 children. She medically neglected two of the children. One child had sustained serious second degree burns and the mother did not follow through on the medical instructions for follow up care. The mother also medically neglected her infant child by not providing medicine that the child needed for a potentially serious or terminal illness. These acts of medical neglect supported a derivative neglect on a third child. Lastly she educationally neglected a fourth child as the child was absent 22 times and late 36 times in a 5 month period. Only 11 of these times was the absence due to illness. The mother offered no evidence of any obstacle or explanation for the child's frequent absence and tardiness and the child was demonstrating developmental and academic delays that were exacerbated by the excessive absences.

Matter of Maurice R., 157 AD3d 798 (2nd Dept. 2018)

Queens County Family Court's adjudication of medical neglect was affirmed on appeal. The 15 year old child had ADHD, autism, bipolar disorder and exhibited suicidal ideation. He was hospitalized for a month and then discharged with instructions for therapy and medication. The mother did not follow up on the instructions and less than 3 months later, the child again exhibited suicidal ideations - saying he wanted to jump off the Van Wyck Expressway. The caseworker told the mother to take the child to the hospital and the mother said she would but did not do so. The caseworker took the child herself the following day where the child had to be admitted for several weeks.

Matter of Cheron B., Jr. 157AD3d 618 (1st Dept. 2018)

A New York County newborn was derivately neglected. This was based on prior findings of neglect against the mother regarding her older children. The mother had not corrected the conditions that led to those findings. The older children were still in foster care. In fact the mother's rights had been terminated to the older children as she was not in compliance with prior orders.

Matter of Ellie Jo L.H., _158 AD3d 1232 (4th Dept. 2018)

The Fourth Department reversed a neglect adjudication by Jefferson County Family Court. The proceeding had been brought by an AFC alleging that the child had been emotionally neglected by her mother due to the mother's actions regarding the father of the child. The AFC had authority to bring the Art. 10 petition under FCA § 1032(b) as the court had directed the AFC to bring the petition. The mother claimed that the

AFC should not have substituted her judgment for that of the child. The appellate court agreed that the child lacked the capacity for a "knowing, voluntary and considered judgment" and that the AFC appropriately substituted judgment. However, the AFC failed to prove neglect. There was not sufficient proof that the child's emotional condition was impaired or at imminent risk of impairment by the mother's actions. The lower court had concluded that the mother was either a "woman determined to cause emotional harm to the father" or was a "mother determined to protect her child" but that in either case, the lower court used the phrase that the mother's behavior "may be" emotional harmful to the child. The Fourth Department found that the mother's behavior was troubling but there was no proof that the child was impaired or in imminent danger of impairment.

Matter of Gabrielle N., 158 AD3d 486 (1st Dept. 2018)

Two Bronx parents medically neglected their special needs child by interfering with her medical care and delaying necessary treatment. ACS had to obtain a court order to override the parent's refusal to consent to needed surgery. This level of impaired judgment created a substantial risk of harm to the other child and supported a derivative neglect adjudication for the sibling.

Matter of Justine R., 158 AD3d 701 (2nd Dept. 2018)

Richmond County Family Court dismissed a neglect petition against a father and his girlfriend at the close of the ACS' case for failure to make a prima facie case. The Second Department reversed and remanded the matter for a continuation of the fact-finding. The father had 3 children

and he lived with a girlfriend who had a 19 year old son who apparently had mental health problems. This older son broke down the door to the family home and punched one of the father's children in the face. When the police arrived, he was standing on the roof of the home brandishing a knife. The police talked him down and took him to a hospital. ACS interviewed the family and learned that over the last 2 years, this older youth's behavior had deteriorated. He had punched holes in the walls, urinated and defecated on the floor, urinated in the father's water bottle, put out cigarettes on the furniture and smoked marijuana in the family home. The girlfriend refused to acknowledge the son's mental health condition and a neglect petition were filed against her regarding the father's 3 children. When the father failed to obtain orders of protection on behalf of the children, ACS filed petitions against the father as well. Viewing the offered evidence in the light most favorable, a motion to dismiss should not have been granted at the close of the petitioner's case. The proof was that the older son was exhibiting violent and erratic behavior which was escalating. Not only were there statements by the family members but there were also photos of the holes that the son had punched in the walls and photos of a mirror he broke and the father's water bottle filled with urine. Despite the father and his girlfriend being aware of this worsening behavior, they continued to allow the young children to live with this older son.

Matter of Autumn O., 158 AD3d 696 (2nd Dept. 2018)

Richmond County Family Court was reversed on appeal for the dismissal of an Art. 10 petition. ACS filed a medical neglect petition against the parents of the child. Four months later, the lower court dismissed the petition, without prejudice, for failure to state a cause of action. ACS filed a second petition the next day alleging the same facts as the first petition and adding some new allegations. Sua sponte, the

lower court dismissed those of the allegations in the second petition that had been made in the first. The Appellate Division reversed.

To determine if a petition should be dismissed for failure to allege a cause of action, the court must presume that the allegations are true. Here the allegations were sufficient. The child had been diagnosed with asthma at birth and parents were told the child should see her pediatrician every 2 months to monitor the condition. It was alleged that the parents missed 6 appointments in a 3 month period and the child's immunizations were not up to date. The child had been brought to the ER in respiratory distress and was wheezing audibly. The mother left the hospital with the child against medical advice before the child received treatment. She also failed to follow up with the child's pediatrician. These allegations were sufficient to state a cause of action of medical neglect.

The Second Department also ruled that the lower court erred in dismissing the allegations in the second petition that had been alleged in the first petition. The dismissal of the first petition was not made on the merits.

Matter of Nsongurua N., 158 AD3d 695 (2nd Dept. 2018)

A Dutchess County father neglected his 12 year old daughter. The child made out of court statements of excessive corporal punishment and the CPS worker and police officer observed scars and lacerations on the child's body that were consistent with her statements. Further the father admitted that the child suffered from chronic bed wetting for over a year while she had been in his care. The father had failed to seek any medical treatment for the child but instead had her sleep on the kitchen floor and woke her up periodically during the night. This was unreasonable and inappropriate and placed the child at imminent danger of harm.

Matter of Isaiah D., 159 AD3d 534 (1st Dept. 2018)

The First Department concurred with New York County Family Court that a respondent neglected his own child and another child he was responsible for in several ways. First he neglected them both by using being violent towards the mother in their presence. Both the mother and the respondent testified that the younger child was present for an incident of violence. The mother testified that this incident caused the younger child to be scared, to cry and to appear stunned. The older child made out of court statements that he had witnessed the violence. The mother testified that this older child would try to get the respondent to stop hurting the mother. The older child was in therapy due to the violence in the home and the child told the CPS worker that he had anger issues due to the violence.

The older child had also been subjected to excessive corporal punishment based on his out of court statements that the respondent had caused a mark on his back. The caseworker observed the mark and the mother testified that she also saw marks on the child's back after the respondent had disciplined him. Since the petition did not allege that the younger child was derivately neglected by the excessive corporal punishment of the older child, that finding cannot be made.

Matter of Nathanael E., 160 AD3d 1075 (3rd Dept. 2018)

Two Broome County parents medically neglected their youngest child. While in the home for a CPS report on different issues, the caseworker noticed that the youngest child had a bruise on his head. The mother indicated that the child had fallen from a bouncy chair and hit his head the day before. The mother first said that the child had seen a doctor but then admitted that the child had not seen a doctor but that she had a medical appointment later in the week. The child had been born 6 weeks

premature and had spent the first month of his life in the hospital. The caseworker insisted that the child should be taken to a walk in clinic that day when the father returned to the home. The caseworker returned to the home in the late afternoon to make sure the child had seen a doctor. The father indicated that he, the father, had needed to rest and so the child still had not been taken to the doctor. Finally that evening the parents did take the child to a clinic. The clinic determined that the child had a three centimeter area of deep erythema to the right front region of the head and that the child needed additional testing at the hospital. Although the testing did not result in any positive findings, the child was admitted to the hospital for 3 days. The doctor did not agree that the injury was consistent with a fall and that the child appeared to be small for his age and needed to be admitted for "failure to thrive". Further the doctor testified that the baby should have received immediate medical attention as his bruise was significant and could have been a sign of a serious injury.

The parents testified that the child had accidently injured himself by falling in his bouncy chair when the mother had briefly left the room. The mother had put ice on the injury and both she had the father determined that they would "monitor" the child as they believed the injury to be minor. The child was covered under the father's health insurance and the mother was a certified nurse assistant. The father was an aide who worked with developmentally disabled individuals who were medically frail and so both claimed to be knowledgeable about injuries. They claimed that they did not see any evidence of serious problems even though the child's bruise did get darker. The mother testified that the bruise was the size of a quarter but the photos showed a pronounced large reddish bruise on the child's head.

The lower court determined that the mother was credible that the injury was accidental and not the result of neglect but found that the parents should have sought immediate medical care for the child. The Appellate

Division agreed that the respondents only limited medical backgrounds and used that to justify their response of only monitoring the child. However, given that the baby had been premature and underweight and that it was his head that was bruised, reasonable and prudent parents would have sought medical treatment, especially when the injury worsened in size and color.

Matter of Kyeley V. 160 AD3d 468 (1st Dept. 2018)

The First Department concurred that a New York County mother neglected her children by failing to provide adequate medical care and adequate education. The older child had a debilitating foot condition which may have resulted from a neurological disorder. The child was in chronic pain and could not walk with her feet flat on the ground. The mother failed to take both children for physical examinations and failed get them immunizations and delayed treatment for the older child's serious condition. The younger child had her own extensive medical needs and had untreated severe eczema and asthma. The mother also did not provide authorization to the grandmother to obtain health care for the children when she left the children with the grandmother for several months. The mother failed to make sure the school aged older child attended regularly and on time. The child had noted educational delays and half way through first grade, still could not read.

Matter of Ahriyah VV., 160 AD3d 1140 (3rd Dept. 2018)

Broome County Family Court was affirmed on appeal after an adjudication that 2 parents neglected their 3 preschool children. The DSS caseworkers testified about the "dirty, chaotic and haphazard" conditions they observed in several home visits. The children were dirty

and unbathed. One child was naked and the other was wearing only a diaper that was full of feces and urine. The children's feet were black with dirt and their hair was not combed. There was garbage on the porch and a blackened mattress smelling strongly of feces and urine. The living room was extremely dirty and had no furniture except for mattresses on the floor that had no bedding. On one occasion one of the children answered the door and the parents were both asleep with the children unsupervised. On another occasion, the caseworker had to intervene to stop the children who kept picking up scissors. She had to instruct the father to put the scissors out of the children's reach and he did not do so. The caseworker observed the father drinking vodka during another home visit and when told that he needed to change a child's diaper, the father indicated that he did not know where the diapers or wipes were kept.

Although no drugs were ever observed in the home, one of the children told the caseworker that the parents "used the pokey things in their arms and legs". Law enforcement found drug paraphernalia, needles, toxic chemical and items used to manufacture meth in the apartment, some within reach of the children. There was lighter fluid was next to the child's sippy cup. The father admitted to the police that he had a history of drug use and knew how to manufacture meth. There was testimony that fires and burning skin were a danger in any home where meth was manufactured.

Matter of Dior S., 160 AD3d 495 (1st Dept. 2018)

A New York County mother neglected her children due to her mental health issues and her drug use. The grandmother testified about the mother's violent behavior toward her and the mother admitted she had bipolar disorder. She was not being treated for her mental illness. This

untreated mental illness resulted in an incident where she threw a metal pot cover at the child and struck him in the head. His injuries were visible for at least 3 days. The mother also been abusing drugs for a long period while the children had been in care. This was prima facie neglect that she was unable to rebut by showing that she was in treatment. She did enter treatment for drugs 16 days after the Art. 10 petition was filed but this does not outweigh her long history of drug abuse.

Matter of Cerenity F., 160 AD3d 540 (1st Dept. 2018)

A Bronx stepfather neglected the mother's 7 year old daughter. The child was exposed to adult sexual activity and pornography. The child made out of court statements that she had observed adult sexual activity and this was corroborated by her age inappropriate knowledge of specific types of sexual activity. Further the home was unsanitary. The child described a very dirty home that was covered with cat urine and feces. This was corroborated by the stepfather's admissions and the caseworker's observation of the father who smelled of cat urine. The child was also observed in dirty, stained clothes and was unkempt.

Matter of Melody Marie A., 161 AD3d 540 (1st Dept. 2018)

Bronx County Family Court was affirmed after finding that a mother neglected her child. A pediatric abuse expert testified that the child's injuries would not ordinarily have been sustained without the caretaker's acts or omissions. The child had hematomas on her head and under her eye, bleeding in her ear and bleeding under her scalp from hair pulling. This resulted in a prima facie showing of neglect under FCA §1046 (a)(ii) that the mother did not to rebut. The mother and the uncle were

caretakers of the child at the time of the injuries. ACS is not required to prove which of them or both committed the actual acts. The mother failed to rebut the presumption as she simply denied fault and only offered inconsistent explanations that were not deemed credible. Further the mother medically neglected the child by failing to seek medical attention when she knew the child was bleeding and badly bruised.

Matter of Shaun H., 161 AD3d 559 (1st Dept. 2018)

The First Department found that a New York County mother neglected her child. The mother admitted to the CPS worker that she smoked marijuana 8-10 times a week to deal with stress. The mother herself testified that she used marijuana and told the caseworker that she did so because "she liked it." The mother did not rebut the prima facie case of neglect based on her drug use by demonstrating that she was voluntarily and regularly participating in a drug rehab program. Further she neglected the child by leaving the child at a local fire station with people who she did not know. She was told at the fire station that they do not supervise children. The lower court's ruling that the mother also neglected the child by failing to plan for the child was vacated on appeal as the appellate court found that the caseworker did testify that the mother had agreed to accept services.

Matter of Juelz U., __ AD3d__, dec'd 6/7/18 (1st Dept 2018)

A New York County mother derivately neglected her new born. Three months after the subject child was born, the mother was adjudicated for neglecting her older children – medical neglect of the older brother and derivative neglect of the older sister. The mother's untreated mental health issues resulted in her inability to properly care for the children. During the proceedings the mother continued to engage in bizarre

behavior. She ran away with the child which resulted in a warrant for her arrest. She acknowledged that she tried to hide the baby from the agency. She refused to submit to the mental health evaluation that the dispo order on the older children required.

Matter of Natasha W v NYSOCFS ., __ NY3d___ (2018)

The Court of Appeals reversed the Appellate Division's decision in a frequently discussed case about a mother who brought her 5 year old son along when she shoplifted at a well-known upscale department store. The mother was arrested with the stolen merchandise on her and had dressed her son in stolen merchandise as well. The matter was indicated by ACS and upheld as indicated in a fair hearing but reversed and unfounded on appeal. The Court of Appeals in a short decision reversed and held that it was rational for the ALJ to have concluded the child was placed at imminent risk of impairment and that the mother's actions were reasonable related to employment in a child care field. That using a child as a "pawn in a shoplifting scheme" created a risk of harm in that there was a potential for physical confrontation by security. Also it created a potential for emotional harm because using a child in a crime teaches a child that such behavior is acceptable and this was particularly a risk given this child's age. The Court echoed the ALJ that this action by the mother is reasonably related to employment in the childcare field and that this is a matter of common sense. There was a strong and lengthy dissent by one Justice who recounted that the mother was educated and that this was an out of character, that the child did not seem particularly disturbed by the event, that this event would not lead the child to a "life of crime" and that any risk to the child could not have been "imminent" since ACS would have done more than just indicate and close if it was imminent. (Note: The dissent is quite colorfully written and well worth reading!)

Matter of Raven F., __AD3d__ dec'd 6/29/18 (4th Dept. 2018)

The Fourth Department modified a neglect adjudication against an Erie County father. The appellate court determined that the DSS did not prove that the older child was neglected due to domestic violence given there was only a presumption that the child was present for the violence. That portion of the adjudication was reversed and dismissed. However, the Fourth Department did concur that the father neglected the child based on the father's long standing history of mental illness which included aggressive and erratic actions. The younger child was derivately neglected in that the impairment of the father's judgment created a substantial risk of hard to any child in the father's care. The neglect of the older child was sufficiently proximate in time to support a reasonable conclusion that the problems continued.

Matter of Ricky A., ___AD3d___, dec'd 6/29/18 (4th Dept. 2018)

Based on events occurring in a 24 hour period, a Wayne County man neglected his children. The father had untreated posttraumatic stress and substance abuse disorders. One day, the father drank and then returned to the home where he acted erratically in front of the children. He argued with the mother and then became physical with her. He built a fire in the backyard and threw his phone into the fire. He then left the home with the mother, leaving the children alone. Having seen their father's intoxication, the domestic violence and his bizarre behavior, the children became afraid when they heard nothing from their parents and when no one else was sent to check on them. The children finally contacted their older sister by using Facebook and she immediately drove from Utica to them – a trip that takes about 2 hours. The sister meanwhile called the police to report that the parents were missing and

the police went to the children's home where they had now been alone for 20 hours. Meanwhile, the parents returned but when they saw the police presence at the home, they chose to drive away and stayed away another 4 hours. The children's out of court statements as to what all that had happened were cross corroborated by each of the other children's out of court statements and were corroborated by the father's own testimony as well as the police officer's testimony.

Domestic Violence

Matter of Tyjaa E., 157 AD3d 420 (1st Dept. 2018)

The First Department affirmed Bronx County Family Court's determination that a father neglected his 2 children. The father exposed the older child to repeated episodes of domestic violence in the small shelter apartment in which they lived. In the incident which resulting in the petition, the father choked the mother, kicked and stomped on her stomach and this was while the mother was pregnant with the younger child. The older child was in close proximity as this happened. Since this incident occurred shortly before the birth of the younger child, it was proximate enough in time that it can be reasonably concluded that the condition still existed such that the younger child was derivately neglected.

Matter of Autumn H., 157 AD3d 791 (2nd Dept. 2018)

Suffolk County DSS failed to prove by a preponderance of the evidence that a child was neglected by the father. The caseworker testified that the mother made out of court statements that the father had choked her and these statements were corroborated by certified hospital records. However the caseworker was not consistent and equivocal regarding the

child's presence during the incident. Therefore there was not sufficient evidence that the child was in imminent danger of impairment.

Matter of Kenny J.M., 157 AD3d 593 (1st Dept. 2018)

A Bronx father neglected his child by engaging in domestic violence against the child's mother in the child's presence. The child made out of court statements and the mother testified to an incident where the father attacked and assaulted the mother. The child witnessed the event, asked his father to stop and attempted to assist his mother. The child was crying. Even though it was only the one event, this was imminent risk of impairment for the child and there is no need for expert testimony.

Matter of Christopher D.B., 157 AD3d 944 (2nd Dept. 2018)

Kings County Family Court was affirmed on appeal. The parents both neglected their 10 month old child but not their older 2 children. The father neglected the baby as he pushed the mother while she was holding the infant and caused both the mother and the baby to fall and the baby had to be taken to the hospital. The child's hospital records were admitted as business records and the statements made in the records by the mother as to the circumstances of the fall were admissible. These statements are exceptions to the hearsay rule as they were made to a medical provider and relevant to the diagnoses and treatment of the baby. It does not matter that the statements were made by the mother and not the baby. Further, the father failed to testify in his own defense. The mother was also neglectful of the baby. The police had a history of being called to the family home. On the stand, the mother claimed she could not recall telling the police about what happened and she invoked

her right to remain silent. She claimed not to recall taking the baby to the hospital for his head trauma. Under these circumstances, the mother failed to protect her child from the father.

However there was no evidence presented that the older children had witnessed any DV incidents or that they were placed in any imminent danger. The petition did not allege derivative neglect. So the allegations regarding the neglect of the older children were properly dismissed.

Matter of Asher M., 158 AD3d 766 (2nd Dept. 2018)

Queens County Family Court's adjudication of neglect against a father was affirmed on appeal. He engaged in domestic violence in the presence of the children and this impaired or created an imminent danger of impairing the children. The out of court statements of the children cross corroborate each other and were also corroborated by the mother's testimony.

Matter of Mark WW. v Jennifer B., 158 AD3d 1013 (3rd Dept. 2018)

The Third Department reviewed a matter from Cortland County Family Court. The lower court found that a mother had neglected her children due to ongoing domestic violence with a boyfriend. The trial court also awarded custody of the children to the father. There had been a significant incident where the boyfriend has beaten the mother, knocked out 3 of her teeth and smashed the TV and a window using a space heater. The child expressed fear of the boyfriend and did not want to have contact with him. The boyfriend had a violent history that included a CPS report and criminal charges 5 years earlier for excessive corporal punishment of another girlfriend's child. He harassed and threatened

people in front of these children, including threatening to kill a neighbor and menacing another parent at the child's school. For the last 2 years, law enforcement had been repeatedly called to the home to deal with domestic incidents. The relationship with the mother was tempestuous. However, the mother would allow the boyfriend back into the home after the violence and was not concerned with the impact on the children. She refused preventive services and talked of moving to another state with the boyfriend to avoid prior orders of protection. Her behavior clearly neglected the children. (The boyfriend was also adjudicated to have neglected the children but he did not appeal)

Further the lower court's award of custody to the children's father was affirmed. He was not an ideal parent and the mother had custody originally due to domestic violence on his part but the court agreed that he was the better option than the mother. The mother married the neglectful boyfriend before the dispositional hearing ended. The boyfriend had never accepted responsibility for his actions and was not engaged in mental health or anger management treatment. The mother had accepted some preventive services but she failed to see the risk her boyfriend, now husband, posed. She admitted that she did not think any preventive services were necessary and that services did not "really matter". She consistently refused to give the father visitation with the children, had withheld information about the children from the father and had engaged in "relentless" efforts to try to trap the father into violating an order of protection. The father had taken domestic violence classes and he had not engaged in violent behavior since the services. He was employed. He also agreed to obtain more favorable housing.

Matter of John MM., 160 AD3d 646 (2nd Dept. 2018)

The Queens County Family Court dismissed an Art. 10 petition at the close of ACS' case upon a motion that a prima facie case of neglect against a father had not been proven. ACS appealed and the Second

Department reversed and remanded for a full hearing. The evidence demonstrated that the father had thrown an object at the mother's head, choked her, threw her to the ground and caused her to lose consciousness. This occurred at the side of their bed while their 11 month old infant was lying on the bed. This does constitute a prima facie case of neglect on the father's part and the petition was reinstated for a full hearing.

Matter of AnnMarie S.W., 160 AD3d 548 (1st Dept. 2018)

A father from the Bronx neglected his children when he struck and choked the mother and she stabbed him. The lower court did not believe the father's claim that he was only defending himself. The older child made out of court statements that she felt "bad" while the altercation was going on, corroborated by the mother who testified that this older child was in fact screaming and that the younger child was crying.

Matter of Takoda G., 161 AD3d 1574 (4th Dept. 2018)

The Fourth Department affirmed Ontario County Family Court's neglect adjudication made upon a summary judgment motion. The father did not preserve the issue below but the appellate court commented that his arguments lacked merit in any event. The father had been criminally convicted of criminal possession of a weapon in the 2nd degree as well as 5 counts of endangering the welfare of a minor. There had been a physical altercation between him and the children's mother and a loaded firearm was fired in the family apartment with the children present. The children were in actual or imminent danger and the criminal

conviction provided appropriate grounds to determine by summary judgment that his actions neglected the children

Matter of Jordan R., __AD3d___, dec'd 6/6/18 (2nd Dept. 2018)

Orange County Family Court was affirmed on appeal. A mother neglected the children based on her domestic violence toward the father in the children's presence. The father told the police that the mother had, in front of the children, threatened to kill him with a knife. Interviewed separately, the children told the police that the mother had threatened to kill the father with a knife and that they had on several occasions had watched the mother hit the father. The children said they did not feel safe when the mother was in the home. On 3 different dates, the police had responded to the home after receiving reports of a domestic disturbance and the children had been present during those times.

Matter of Maria PP v Com'r of NYSOCFS__AD3d__ dec'd 6/14/18 (3rd Dept. 2018)

In an Art. 78 action regarding a fair hearing decision to deny a Rensselaer mother's request to have two CPS indicated reports unfounded, the Third Department concurred that the reports should remain indicated as to the mother's 2 older children. The mother first argued that the CPS investigations were not concluded, as required, in 60 days. The Third Department concluded that DSS is directed to do so in 60 days but as there is no language in the statute as to any consequence if they fail to do so, it is not a mandate. The determination should not be vacated on that basis unless there is substantial prejudice

demonstrated. On the merits, the appellate court agreed that the reports as to the older child should remain indicated given the out of court statements the children and the mother made to the caseworker. The eldest child watched the mother's boyfriend push the mother to the ground in one incident. In another incident the boyfriend had been arrested for hitting the middle child in the course of an argument. Both of these incidents occurred after the mother had obtained an order of protection. The mother claimed that she had not seen the boyfriend for some time after the order of protection but later acknowledged that they had in fact continued to date. The child confirmed that she had continued to see him. The eldest child described another incident of domestic violence she had observed and incidents in which the boyfriend was abusive. She said she was afraid of the boyfriend and believed that her sibling was also afraid. The middle child said that her mother and the boyfriend "fought with their words all the time". The mother had been told of the children's statements and their fear but she claimed there had only been one incident and the rest of the claims by the children were not true. The mother also said that she was the one who assaulted the boyfriend and not the other way around. The mother claimed she called the police on him and then "remarkably" told the middle child to lie to the police and say that the boyfriend had hit her. The mother neglected the eldest child by allowing her to be impaired emotionally as a result of not keeping the boyfriend away and she neglected the middle child by attacking the boyfriend in that child's presence and telling that child to lie to the police about it. The middle child had mental health problems and issues with lying. "Substantial" evidence supported the finding to retain these portions of the indicated reports and the mother "fell far below" the reasonable and prudent parent in her situation.

Matter of Neleh B., _AD3d__, dec'd 6/27/18 (2nd Dept. 2018)

The Second Department affirmed a neglect finding from Queens County Family Court. The respondent was a person legally responsible for the mother's 6 year old child and was the father of the 3 month old child. The 6 year old told the caseworker that the respondent had hit the mother and had pushed the mother on top of the child and the baby. The child said she was afraid the respondent would hit would hit her mother again if he came back to the home. The mother testified that the respondent would hit her and push her on numerous occasions and that one time he bruised her face. She called the police on that occasion and a photo of her injured face was admitted into evidence.

Matter of Anonymous v Poole___AD3d____, dec'd 6/28/18 (1st Dept. 2018)

A New York County mother brought an Art. 78 after losing a fair hearing in which she requested that a CPS indicated report be unfounded. The First Department concurred that the report should remain indicated. While in a domestic dispute with her 1 year old infant's father, the mother drove down the street with the father, who was holding the baby, holding on to the hood of the car. The mother argued ***Nicholson*** and the First Department ruled that the case had limited applicability. In fact the mother did not met the standard of a reasonable and prudent parent in a similar situation considering the frequency and severity of the violence in the house hold and the resources and options available to the mother.

Excessive Corporal Punishment

Matter of Michele S., 157 AD3d 551 (1st Dept. 2018)

The First Department affirmed New York County Family Court's ruling that a mother neglected her child. The child stated out of court that her mother had scratched and pinched her. This was corroborated by the bruises and scratch marks visible on the child even days later. The caseworker observed the injuries and even the mother agreed that the child's arm was bruised. The mother's statements to the child were also supportive of the neglect adjudication. She would tell the child that she wished the child had never been born and that it had her cost too much money to get the child back out of foster care. The mother corroborated in her testimony that she said these things to her child.

Matter of Ivahly M., 159 AD3d 423 (1st Dept. 2018)

A New York County mother neglected her 2 children and derivatively neglected 3 others. She used excessive corporal punishment on the 2 children. The children made cross corroborating out of court statements that on more than one occasion the mother had hit them. She punched one child in the face hard enough that the child was unconscious after the blow, leaving a bruise on his forehead. The caseworker and the grandmother both observed bruises and a laceration on a child's lip caused by a punch from the mother.

Matter of Michael S., 159 AD3d 1378 (4th Dept. 2018)

An Onondaga County Family Court's determination that a mother neglected her child by failing to protect the child from the mother's

boyfriend was affirmed on appeal. The child had significant bruising on the left side of his face, a dark bruise on his right cheek, was missing a tooth and had lacerations and bruising on his lips. The medical testimony was that these bruises were in various stages of healing and were not accidentally caused. The mother claimed the injuries were due to the child having sleep disturbances which the medical experts did not find plausible. The child continued to have sleep disturbances in foster care but had no new injuries. The lower court concluded that the mother knew or should have known that the child was being beaten by the boyfriend. The mother argued on appeal that the lower court should have granted her attorney an adjournment to obtain a medical witness to support her argument that the child had been injured due to sleep disturbances. However, no such witness was ever identified. It was only mere speculation that such a witness could be found that would support the mother's theory.

Matter of Elisa V., 159 AD3d 827 (2nd Dept. 2018)

A Queens father used excessive corporal punishment on his 17 and 15 year old daughters. The father beat them with a softball bat because the 15 year old would not give him password access to her phone and laptop. He wanted this access because the mother had found flyers regarding STD testing in the teens' bedroom. Both children told their guidance counselor, the CPS worker and the police this information. There was photographic and medical evidence of the children's injuries and the father admitted to the CPS worker and the police that he had hit the children with the bat because the 15 year old would not give up her password. The 17 year old then later testified in court that the two teen sisters had hit each other with the bat and then lied and blamed the father to get back at him for not allowing them to sleep over at a friend's home. The father and the 15 year old did not testify. The lower court did not

err in rejecting the 17 year olds recantation in court as the lower court found that she lacked credibility when she testified.

Matter of Rashawn J., 159 AD3d 1436 (4th Dept. 2018)

A Monroe County Family Court adjudication of neglect by a mother was modified on appeal. The Appellate Division agreed that there was sufficient proof that the mother had used excessive corporal punishment on one child and that the other children were therefore derivatively neglected. However, the allegations of drug abuse, domestic violence and failure to supply adequate food, medical care and education were not proven and those allegations were dismissed on appeal. The child's out of court statements that she was hit with a jump rope were corroborated by the observations of injuries on the child by the school nurse and the caseworkers. Also there were photographs of the injuries and a medical expert reviewed the photographs and testified. Further this child also made statements about other inflicted excessive punishment on another child as well. The lower court was entitled to reject the alleged explanations the mother had given the caseworker and the lower court properly drew the strongest possible negative inference from the mother's failure to testify at the fact finding. The neglect of the one child is closely connected with the care of the other children and therefore the other children are at risk and are derivatively neglected.

Matter of Samuel W., 160 AD3d 755 (2nd Dept. 2018)

Kings County Family Court's adjudication of neglect was affirmed on appeal. The child made out of court statements that her mother had choked her and this was corroborated by the observations of the

caseworkers and the police officers who observed the child's injuries. The statements were also corroborated by the child's medical records and photographs of the injuries. The mother's denial lacked credibility and the child's partial in court recantation was appropriately rejected by the lower court.

Matter of Angelica A., 161 AD3d 471 (1st Dept. 2018)

The First Department affirmed that a Bronx father neglected his child. He chased her down a flight of stairs and struck the girl with the handle of a sword on the back of her head which caused cuts and lacerations on and around her ear, swelling to her finger and a concussion. The child made out of court statements about these injuries and the caseworker and the hospital staff observed the injuries. Photos and medical records were also introduced into evidence. Although mere repetitions of out of court statements by a child does not corroborate the child's statement , the consistency of such statements does enhance a child's credibility.

Matter of Angela-Marie C., __AD3d___, dec'd 6/27/18 (2nd Dept. 2018)

A Westchester mother used excessive corporal punishment on her 14 year old daughter. The mother scratched the child's face, chest and arms and burnt her with cigarettes. The child made out of court statements which were corroborated by the caseworkers observations of the child's injuries, photographs of the injuries and the mother's admission that she "may" have scratched the child during an altercation. The mother's denial was not credible as it was based on her unsupported allegations. She also provided contradictory testimony and was disruptive in the

court room. While the matter was pending the child was removed from the mother's home and placed in the home of an adult sister. The sister sought Art. 6 custody of the child. The lower court combined the Art. 6 custody petition with the Art.10 dispo and properly gave custody to the sister. The child had been in the sister's home 19 months by the time the matter reached disposition and she was thriving there. She wanted no contact with her mother. The mother refused services and wanted to the child remain out of the home. This established extraordinary circumstances and it was in the child's best interests to remain in the sister's home.

Parental Substance Abuse

Matter of Gabriela T., 160 AD3d 968 (2nd Dept. 2018)

The Second Department reversed a Queens County Family Court's dismissal of a neglect petition. ACS presented proof that the mother regularly used marijuana which she had been advised could worsen a preexisting mental health condition. Under FCA §1046(b)(i) this established a prima facie case of neglect and not actual or specific risk of neglect to the children does not need to be proven. The mother did not prove that she was voluntarily and regularly participating in a drug rehab program and failed to rebut the FCA §1046 presumption of neglect. The Appellate Court adjudicated neglect and remitted the matter for a dispositional hearing.

Matter of Victoria B., 161 AD3d 1145 (2nd Dept. 2018)

Westchester County Family Court was affirmed on appeal regarding an adjudication that a father neglected his newborn child and derivately

neglected the infant's older brother. The father planned to allow the baby to live with the mother despite the fact that he knew the mother had a long ongoing history of drug abuse, that she was noncompliant with treatment and that he knew the mother had recently been adjudicated of neglecting the baby's older brother. It was in the child's best interest to be placed in foster care.

Matter of Oscar Alejandro C.L., 161 AD3d 705 (1st Dept. 2018)

A New York County mother neglected her newborn baby. She tested positive for cocaine while pregnant with the child. There had been a prior neglect adjudication regarding an older child due to her long standing cocaine abuse. She lost custody of that child and had repeatedly failed to cooperate with drug treatment. This was inconsistent with her current claim that she had not used cocaine for over 2 years before she had the most recent positive tox screen.

Matter of Thamel J. __ AD3d___, dec'd 6/14/18 (1st Dept. 2018)

The First Department affirmed New York County Family Court that a father neglected his newborn baby. He knew that the mother was smoking marijuana while pregnant and failed to take any steps to stop her and in fact smoked marijuana with her including on the day of the child's birth. The child was impacted as he was born with a positive tox, had a low birth weight and was in intensive neonatal care for a week. The father also failed to comply with a service plan for another child and would not submit to drug testing.

Matter of Jamiah C., ___AD3d___, dec'd 6/27/18 (2nd Dept. 2018)

The Second Department affirmed Westchester County Family Court's adjudication that a mother neglected her children. The evidence demonstrated that the children were aware that their parents were under the influence of alcohol and drugs when the police responded to the home for a domestic incident. Law enforcement observed the mother to be under the influence of drugs and alcohol and that her breath smelled of alcohol. The mother acknowledged to the caseworker that she had been drinking that night. She also minimized the effect on the children from the father's acts of domestic violence against her and her adult child in the presence of the younger children.

Parental Mental Health

Matter of Catalina A., 157 AD3d 667 (2nd Dept. 2018)

The First Department reversed Queens County Family Court's dismissal of a neglect petition after the close of the ACS case. The appellate court found that ACS had proven a prima facie case and remanded the matter for a full hearing. ACS had introduced tapes of two 911 calls. The mother's stepdaughter had made the calls alleging that the mother was holding the child while slapping the mother's sister. She also claimed that the mother was yelling, throwing things and getting violent and was manic. An attending psychiatrist from the emergency department assessed the mother's condition and testified that she was unable to care for a child and ordered her admitted to the psychiatric emergency program to be observed frequently for at least 24 hours. Hospital records were introduced that that detailed that the mother was

described as "paranoid, violent, and lacking insight and impulse control" and that her situation was not resolved within 24 hours and that she was admitted into an extended observation unit of the hospital. ACS was not required to prove that the mother had a specific diagnosed mental illness in order to allege a prima facie case.

Matter of Sa'Fiyah D., 158 AD3d 415 (1st Dept. 2018)

New York County Family Court was affirmed on appeal. The mother's mental illness put the child at imminent risk of neglect. The mother had a long standing and well documented mental illness and was non-compliant with her medications and therapy. This continued even after the filing of the petition. She would be confrontational, impulsive and violent in front of the child. The mother appeared to be delusional and paranoid and had no insight into her behavior. Her erratic actions and untreated mental illness placed the child at imminent risk of harm.

Matter of Shanirca D., 158 AD3d 426 (1st Dept. 2018)

The First Department concurred with New York County Family Court that a mother had neglected her child. The mother had an untreated mental illness and had no insight into how this affected her child. The mother also misused alcohol. The mother's issues created a "substantial probability" that the child would not get the mental health treatment that the child needed. This would place the child at imminent risk of harm.

Matter of Bella S., 158 AD3d 703 (2nd Dept. 2018)

The Second Department reversed a neglect adjudication from Kings County. The lower court found that the mother had bipolar disorder and other mental illnesses and was not receiving adequate mental health treatment. The lower court found that the mother was observed to be "manic" and had "mood swings" while visiting her newborn and that the mother was taking medication but that her psychiatrist was nothing more than a "prescription mill". In reversing, the Appellate Division stated that there was no proof offered that the mother posed a risk to her child. The mother had been homeless and had used heroin in the past. However, when pregnant, she had been able to obtain housing at a shelter designed for high risk pregnant women. She obtained prenatal care and the services of a social worker and she stayed involved in a methadone program that included counseling. She took medications that were prescribed by a licensed psychiatrist. There was also evidence that she did interact with the newborn appropriately. There was no evidence that the mother's treatment was improper.

Matter of Geoffrey D., 158 AD3d 758 (2nd Dept. 2018)

On appeal, the Second Department reversed a Queens County Family Court's adjudication of neglect against a father. ACS failed to establish that there was any causal connection between the father's mental illness and any actual or potential harm to the child. The father was receiving treatment and there was no evidence that he was unable to care for the child or that the child was placed at imminent danger of being impaired.

Matter of William Maragh E., 159 AD3d 462 (1st Dept. 2018)

In a Bronx County Family Court matter, ACS moved for summary judgment neglect regarding a newborn baby. The child was born 3 months after the mother's 3 older children had been freed for adoption based on permanent neglect. Those children had been the subject of 2007 and 2011 petitions alleging the mother's longstanding failure to treat her mental illness. Attached to the summary judgment motion was an affidavit by the caseworker that the mother continued to show a lack of insight into her mental health problems that had led to the placement of the older children and their eventual freeing. The First Department concurred that this was a prima facie showing of derivative neglect.

The mother opposed the motion but failed to rebut the presumption that she continued to have mental illness issues to the extent that she cannot care for a child. The mother did have a psychologist testify that she was currently stable and was in therapy and was observed to handle the baby very well for a 30 minute period. But the same psychologist acknowledged that the mother had a long history of serious mental illness that included violent outbursts and psychotic episodes. The mother also was not taking her meds and was refusing to do so. The Appellate Division found that even if the mother was doing better in the 3 months since the older children were freed, her long term failure to comply with treatments demonstrated a fundamental defect in her understanding of parenthood and she is unable to care for this child.

Matter of Jayden S., 159 AD3d 500 (1st Dept. 2018)

A New York County mother's mental illness impaired her ability to care for her child to the extent that the child was neglected. The mother had a long standing history of mental illness, was resistant to treatment and lacked insight. She had been diagnosed with schizophrenia by 2

different hospitals and had been hospitalized several times for this over the years. She denied her illness and refused medication. Shortly after the child was born, the mother was observed by several witnesses to be easily flustered, behaving erratically and was so disorganized in her thinking that she was impaired in her ability to feed and care for her newborn son. The mother made a pro se motion after the fact finding seeking the court's review of her medical records, apparently with the intention of challenging her diagnoses. It was properly denied as the court did not base its finding on a specific diagnoses but on the evidence of the mother's mental health limiting her ability to care safely for the child.

Matter of Mylah C., 159 AD3d 553 (1st Dept. 2018)

New York County Family Court's neglect adjudication was affirmed on appeal. The mother suffered from mental illness and psychosis and lacked insight into her illness and her need for treatment. She was seen at the ER numerous times exhibiting psychotic and aggressive behavior. She had homicidal ideation, somatic preoccupation, and poor judgment and once had to be physically restrained. The mother was hospitalized on numerous occasions for mental illness and frequently relapsed when she would refuse to be compliant with medication and therapy. The child was not actually injured but was at imminent risk as the mental illness interfered with the mother's ability to care for and plan for the child.

Matter of Jayden A., 159 AD3d 572 (1st Dept. 2018)

The First Department concurred with New York County Family Court that a father had neglected his 2 children by exposing the children to the mother who had long standing and serious mental health problems. There was a temporary order of protection barring the mother from

having any contact with the children and the father's actions were neglectful regardless. The father knew of the problems and allowed the children to be around the mother after her release from the hospital, ignoring ACS directive to not do so. Although the father claimed that he left an adult sibling in the home at the time, the mother could easily access the children. ACS had told him not to leave the children with the mother or the mother's relatives. The caseworker had also heard the children's voices on a phone call with the mother on another occasion.

Matter of Toussaint E., 159 AD3d 598 (1st Dept. 2018)

A New York County respondent suffered from a form of schizoaffective disorder and had no insight into the effect this had on his ability to care for his child. He left the 2 year old alone many times. Once he did so based on the delusional belief that the mother had a terminal illness and needed pizza. He did not take his prescribed medication consistently and told his medical professionals that he had no mental illness. He also subjected the child to repeated incidents of his violence to the mother in close physical proximity to the child.

Educational Neglect

Matter of McKain W., 157 AD3d 708 (2nd Dept. 2018)

ACS provided proof that a Queens child was absent from school excessively and that she was failing her classes. The mother offered no reasonable justification for the absences, did not actively engage with the school about the issues and did not plan with the teacher in any way for an alternative means for the child's education.

Matter of Jamel N. A. 161 AD3d 1070 (2nd Dept. 2018)

Kings County Family Court was affirmed on appeal. A mother educationally neglected her child. He was excessively absent and tardy and this had resulted in failing grades. The mother did not offer any evidence that reasonably justified the situation.

PHYSICAL ABUSE

Matter of Isaac C., 158 AD3d 556 (1st Dept. 2018)

The First Department agreed with New York County Family Court that the respondent parents in this case had rebutted the ACS physical abuse allegations. The parents' witnesses testified that the 5 month old child's symptoms were consistent with bone fragility due to rickets and severe vitamin D deficiency.

Matter of Deseante L.R., 159 AD3d 1534 (4th Dept. 2018)

The Fourth Department concurred with Erie County Family Court that there was sufficient evidence that a mother abused her children. The caseworker and a nurse practitioner testified that the youngest child had injuries sustained by the mother consistent with hitting him with an electrical cord. The nurse practitioner was an expert witness based on her formal training, long observations and actual experience and she testified that the wounds were not accidental and could not have been caused by another child as the mother claimed. The caseworker had undergone training in identifying injuries and their causes and was also allowed to give expert opinion testimony that the mark on the child

raised a concern that it had been inflicted with a cord or belt. Another child had "old looking" scars on his body. The mother's conduct supported the inference that the mother had caused these scars as well. The eldest child was derivatively abused based on the injuries to the other two children.

Matter of Tyree B., 160 AD3d 1389 (4th Dept. 2018)

Two Erie County parents abused their 3 month old infant and derivatively abused their 2 year old. The father appealed his adjudication. The medical testimony demonstrated that the 3 month old had a fractured leg and rib and that the parents' explanations were inconsistent with the nature and severity of the injuries. The father failed to rebut this prima facie case. The father's denial of responsibility and the mother's attempt to blame the 2 year old were insufficient to rebut the medical evidence. DSS was not required to prove which of the parents inflicted the injuries or if they both had. The father also claimed that the court erred in allowing the entire DSS file into evidence as it contained hearsay. But in fact the lower court only received the case file records conditionally, subject to any hearsay objections by the father. In any event, it was harmless error as the result reached would have been the same without the records and there is no indication that the court relied on any inadmissible hearsay in reaching the adjudication.

SEXUAL ABUSE

Matter of Cristalyn G., 160 AD3d 1389 (1st Dept. 2018)

A New York County respondent was a person legally responsible for 2 children when he sexually abused the older child. The older child

testified under oath at the fact finding which in and of itself was sufficient proof. The testimony was also corroborated by expert testimony that the respondent's semen was "soaked" and "imbedded into the material of the child's shorts". The expert indicated that this could not have happened by some incidental or accidental transfer of DNA. The respondent's expert was unable to rebut the proof. The fact that the child had no physical injury does not require a dismissal of the allegation. The younger child, who lived in the home at the time of the sexual abuse, was derivatively abused.

The respondent also neglected the children as he punched and choked their mother in their presence. The older child made out of court statements about this incident that were corroborated by the mother's testimony and the other child's out of court statements. The fact that there was only one incident does not preclude the adjudication of neglect.

Matter of Aliyah M., 159 AD3d 1564 (4th Dept. 2018)

Erie County Family Court's adjudication of abuse was affirmed on appeal. The lower court did not improperly rely on inadmissible hearsay. The out of court statements made by an adult daughter were hearsay but the court expressly stated in its decision that it had not considered those statements for the truth of the matter asserted. The out of court statements of the victim child who was sexually abused by the mother's boyfriend were sufficiently corroborated by an expert witness' opinion. The expert witness was qualified in his capacity as a mental health counselor who was skilled in forensic mental health as it related to sexual abuse. He had a long history of observations and actual experience in addition to his academic credentials.

<u>Matter of Alexis W.,</u> 159 AD3d 547 (1st Dept. 2018)

A Bronx stepfather sexually abused his stepdaughter and derivately abused his 3 biological children. The step daughter testified in court to incidents of sexual abuse with specific detail. Although a detective testified that the child had recanted, the lower court properly rejected this testimony. The detective had interviewed the child, without warning, in her bedroom, waking her up in the middle of the night and talking to her in the presence of the stepfather. This behavior was in violation of interview protocols.

The stepfather argued on appeal that the AFC was improperly permitted to ask leading questions of the child. The Appellate Division noted that the father failed to identify even one question that he was arguing was "leading". The father's lawyer was had been allowed to cross examine after the AFC but he had declined to do so. Also the degree to which leading questions of a child witness in a sexual abuse case are permitted in within the discretion of the court given the child's age and the nature of the allegations. Lastly to the extent it was error, it was harmless as the court looked at other evidence in making the determination. (Note: not sure what all the fuss was here given that ACS put the child on the stand which gives the AFC the total right to cross examine and lead)

Lastly the derivative finding as to the 3 biological children was appropriate. While the respondent did have a positive relationship with his children, all of the incidents with the stepdaughter occurred when the biological children were in the house and the respondent was the sole caretaker of all of them. At least one incident took place in the presence of one of the biological children. The respondent's daughter is now the same age as the stepdaughter was when she was abused. His conduct demonstrated a fundamental defect in his understanding or parenthood and puts the biological children at imminent risk.

Matter of Kaylin P., 159 AD3d 658 (1st Dept. 2018)

The First Department affirmed a sex abuse finding from New York County Family Court and reversed the lower court's dismissal of a derivative finding on another child. The respondent sexually abused a child that he was legally responsible for by touching her in a sexual manner. The child testified in detail about it and was consistent under cross examination. Her in court testimony was also consistent with the out of court detailed statements she had made to her teacher, the caseworker and the police. The child also testified to her fear and her emotional distress in response to the ongoing and escalating domestic violence that the respondent had inflicted on her mother. In particular she was frightened by seeing her mother's bruised face, eye and cut lip in response to a physical assault by the respondent.

The lower court had dismissed derivative findings regarding the respondents own child who lived in the home but the Appellate Division reversed the dismissal. The sexual abuse and domestic violence demonstrated such an impaired level of parental judgment that any child in the respondent's care would be at substantial risk of harm.

Matter of Kristina S., 160 AD3d 1057 (3rd Dept. 2018)

The Third Department concurred with Chemung County Family Court that a respondent sexually abused his two oldest daughters and a niece that he was legally responsible for at the time. This abuse constituted derivative abuse and neglect of his two other children as well. The three girls all testified in court under oath that the statements they had given

out of court with detailed the sexual contact where true. The girls were all subject to cross examination. The lower court also viewed video recording made out of court and was able to evaluate the demeanor of the children as they described the incidents. The girls out of court statements were corroborated by their in court, sworn, cross examined testimony. The lower court found that one of the daughters and the niece were particularly compelling witnesses who presented in an authentic and credible manner. The two children also cross corroborated each other with consistent details. Further, other witnesses confirmed some of the details the girls testified to – such as the name of a friend who interrupted one of the incidents of abuse and the fact that the father's girlfriend was in fact in the hospital and not in the home when the sexual abuse took place.

Matter of Lea C., 160 AD3d 724 (2nd Dept. 2018)

The Second Department affirmed Kings County Family Court's summary judgment adjudication of abuse based on the criminal conviction of the respondent for committing a course of sexual conduct with a child in the first degree after a jury trial. The allegations in the Art. 10 petition were based on the same acts and the second child in the home was therefore derivatively abused. ACS also proved that the respondent was a person legally responsible.

Matter of Harmonee B., 161 AD3d 852 (2nd Dept. 2018)

A Brooklyn father derivatively abused his child. The father lived for about a year and a half with the mother, this child and the mother's two other minor daughters. There was a domestic dispute and the mother moved out with all three children but later returned the subject child to

the child's father. ACS alleged that when the parties had lived together the father had sexually abused the older 2 children of the mother and that action resulted in derivative abuse of his own child who was in the home. The Second Department affirmed the Kings County Family Court adjudication of derivative abuse. This action evinced that the father had a flawed understanding and of parenting and an impaired parental judgments such that his own child was at risk of abuse.

Matter of Brysen A., 161 AD3d 850 (2nd Dept. 2018)

The Second Department concurred with Kings County Family Court that a father derivately abused his two children based on his federal convictions for sex trafficking of a child. The father had pled guilty in federal court to conspiracy to commit sex trafficking, sex trafficking of a child and promotion of prostitution. His criminal behavior had gone on for over 10 years and included his having had minors perform sexually for money. He and the child's mother operated a prostitution business. He also had consented in another family court case to have inflicted excessive corporal punishment on his 16 year old half-sister. This behavior formed a basis for a derivative abuse finding regarding his own children. Further the disposition he received, consisting of supervision by ACS and an order of protection that he could only have supervised visitation with the children, was appropriate

Matter of Makayla I., __AD3d___, dec's 6/7/18 (3rd Dept. 2018)

The Third Department reviewed several issues in a sex abuse matter from Schenectady County Family Court. There were two respondents. One was the stepfather of the oldest child and the father of the two younger children. The other respondent was the first respondent's father

and so he was the step grandfather of one child and the grandfather of the other two. The allegations were that the stepfather had not prevented the step grandfather from sexually abusing the 9 year old girl and that the father had sexually abused one of his own children. Both the 9 year old victim child and her younger half-sister told the CPS caseworker that the 9 year old had a "secret" that she could not tell as the stepfather and step grandfather would "go to jail" if she told. The 9 year old made drawings that indicated that she had sexual contact with the step grandfather and that this was the "secret". She demonstrated with a marker moving back and forth between closed fingers and saying that this is "what happened with the penis and the vagina" when she had the step grandfather had sex. She also said that the step grandfather was her "boyfriend" and that boyfriends and girlfriends do this and she was told not to talk about it. She wrote the word "sex" on a paper. The CPS caseworker testified to all these statements. Further the caseworker testified that the 9 year old told her that her stepfather walked in when she and the step grandfather were having sex and that her stepfather yelled at the step grandfather and then her stepfather spanked her. The child had said that all this was now a "secret" with her 'daddy". This older child also told a case manager that she had a "secret" that she could not tell because a person would go to jail and that she promised her step father not to tell the "secret" about her step grandfather. The child also said she was "going to be eight years pregnant".

The four year old child told the CPS caseworker that her father had put his finger in her vagina. This child had also been observed masturbating after being placed in foster care.

An expert who was both an expert in sex abuse treatment and a sex abuse therapist, examined both girls. She reported that the 9 year old had repeatedly and over time described genital to genital contact with the step grandfather and that the child described the activity as "sex". The expert indicated that the child had a level of sexual knowledge that

was beyond that of a child her age and that her account of the abuse was reliable in that the child presented in a manner consistent with sexually abused children. As to the younger child, the expert opined that she was consistent in her disclosures and although the expert could not complete a "reliability assessment" of the younger child given how young she was, the child also presented with behaviors consistent with young children who had been sexually abused.

Given all this, the lower court correctly concluded that there was sufficient evidence that the two respondents had sexually abused the children and that the step father knew of the sex grandfather's sexual abuse. The expert opinion corroborated the children's out of court statements. The court was also permitted to draw a negative inference due to the failure of either respondent to testify.

The lower court ordered that the grandfather/step grandfather should have no contact with the 3 children until they were 18. Precluding contact with the children was supported by his having sexually abused a child less than 10 and his denial of the same at the dispositional hearing. However, FCA §1056(4) does not permit the court to do this as the grandfather/step grandfather is related to two of the children in the home and therefore the order of protection prohibiting his contact with the two children he is related to I limited to a one year period. For the victim child that he is a step grandfather to – the 9 year old – the Third Department ruled that he is not a "related by marriage" as per FCA §1056 (4) as his son is married to the child's mother and he is not married to any relative of the child. Had the legislation meant a step grandparent relationship to be included in the limitation on the order of protection, the wording in the statue would be "related by affinity". A step grandfather has no legal standing to even seek visitation. Since it is not his own marriage that makes him related to the 9 year old, this section of the statute should not be applicable. However, the statue goes on to say that an order of protection is limited to 1 year if the

respondent is related to any member of the child's household. So, if the 9 year old was living in the same home as the two half siblings – who are his grandchildren- then the order of protection for the victim child is limited to one year intervals. The matter was remitted to determine if that was the case and if so, the order of protection has to be limited to one year.

Matter of Kaydence O., __AD3d__, dec'd 6/7/18 (3rd Dept. 2018)

The Third Department affirmed abuse and neglect findings in a St. Lawrence County case. The matter was appealed by the respondent father of the younger of the 2 children in the home. The respondent sexually abused the older child in the home. The state police officer testified that this child described 4 different instances of sexual abuse. These including that the respondent rubbed his penis on the child's vagina and inserted his penis into her vagina "just a little bit". The child signed a sworn statement which was admitted into evidence. The child abuse pediatrician who examined the child testified that the child told her that the respondent has touched her vaginal and anal areas more than once and threatened the child that if she told, she would never see her mother again. The mother testified that the child had texted her that the respondent "hurt her" but she did not think this was about sexual abuse. This testimony was contradicted by the caseworker who testified that the mother had told her that the child disclosed the sex abuse to the mother in the text.

These out of court statements were corroborated by the child's own in court testimony. The child gave detailed testimony that conformed substantially to what she had told people outside of court. She testified that the respondent had sexual contact with her 4 times when she was in 5th grade. Twice he took her clothes off but she was able to stop him

before he went any further. On the 3rd occasion he got into her bed, removed her lower clothing and rubbed his penis against her vagina. On the 4th occasion, he removed all her clothing and put his penis in her vagina "just a little bit". When she was in the 6th grade, he came into her bedroom in the middle of the night and tried to take off her pajamas. She testified when she was in the 6th grade that she told her mother that he was doing these things but her mother did not believe her. She was credible and the respondent's testimony that he could not have done this as he had a back injury, was not credible.

The child was also neglected by the domestic violence in the home. The maternal grandfather testified about this as did his wife. The mother had made out of court admissions on this issue as well. The older child also testified that she watched domestic violence on several occasions. She saw the respondent choke the mother, pick the mother up by the throat, and threaten to "gut" the mother. She saw a cut on her mother's forehead that required stiches and her mother told her that the respondent had caused the injury by throwing a lighter at her because he was "mad". This testimony was consistent with disclosures the child had made to the caseworkers out of court. The older child told the caseworkers that the younger child had been struck accidently during one episode and that the younger child would cry during the arguments. The older child had told the caseworkers that she was "terrified" during the fighting and had once even had a panic attack. The maternal grandfather and his wife testified that the mother had told them much of the same information about the domestic violence. The respondent abused and neglected the older child and derivately abused and neglected the younger child. In a footnote the court commented that the DSS had requested a finding of severe abuse but that the lower court denied that as the child he abused was not his child. (Note: That statute was changed and effective as of 2/18/15 a non-parent respondent can be found to have severely abused a child)

Matter of Sean P.,__AD3d___, dec'd 6/8/18 (4th Dept. 2018)

An Onondaga County father derivately neglected his newborn child based on an earlier finding that he had sexually abused another child. The sex abuse adjudication was proximate enough in time to believe that the father's proclivity for sexual abuse has not changed.

Matter of Caiden G.,___AD3d___, dec'd 6/8/18 (4th Dept. 2018)

Onondaga County DSS alleged that the father failed to protect his child after the child disclosed that he had been sexually abused by the paternal grandfather. The father failed to bring the child to 2 scheduled appointments at the child advocacy center and in fact allowed to child to continue to have contact with the grandfather despite being specifically told not to by the police and CPS. After the disclosure, the child stayed for 2 days in the grandfather's home and was found sleeping in the grandfather's bed. It was also alleged that the father had engaged in acts of domestic violence in front to the child. The father admitted to neglect on these facts in Onondaga County Family Court and therefore his appeal of the substance is not reviewable. (Note: So why not dismiss that portion of the appeal on a motion?) The father's argument that the child should have been placed back in his home with an order of protection instead of being placed in foster care was rejected by Fourth Department. Although the father had been given sexual abuse education and counseling and completed domestic violence classes, he made little progress.

Matter of David C.,__AD3d__, dec'd 6/15/18 (4th Dept. 2018)

The Fourth Department concurred that Erie County DSS proved that a respondent sexually abused a 7 year old girl by raping her anally. The

child made out of court statements to two teachers, her sister and the police. She did not "waver in her description" of what happened, when and where and there were only minor inconsistences in her repeated disclosures. Her statements were corroborated by medical evidence that she had anal bruising and redness. Further the respondent also provided some corroboration in that he denied the anal penetration but did admit to being alone with her in the bedroom on the date and claimed that his hair may have "inadvertently come into contact with the victim's vagina." He did not testify at the fact finding hearing and so the strongest possible inference can be held against him. His rape of this child formed an appropriate basis for a derivative finding on the 2 siblings of the child as well as a biological child of the respondent's born during the proceeding.

DISPOS of ART. 10 PROCEEDINGS

Matter of Boston G., 157 AD3d 675 (2nd Dept. 2018)

The Second Department concurred with Kings County Family Court that a mother's consent finding to neglect should be vacated. In the summer of 2015, the mother's child was removed and in the fall she consented to a finding of neglect and the child was released to her care under a one year order of supervision. In the spring of 2016, the parties agreed to end the period of supervision 5 months early. In the fall of 2016, the mother moved under FCA § 1061 to vacate the neglect finding. ACS argued that there was no jurisdiction to vacate an order that had been entered on consent and where the dispo order had ended months earlier. The Appellate Court affirmed the dismissal finding that FCA § 1061 allows the court to vacate an order at any time for good cause shown. Here the mother had no prior child protective history, she had strictly

complied with the court ordered services and treatment and she had shown commitment to ameliorating the issues that had led to the finding.

Matter of Jacob P.E., __AD3d__, dec'd 6/27/18 (2nd Dept. 2018)

A Queens County father who had consented, without admission, to an adjudication of neglect based on domestic violence and abuse of alcohol, filed a FCA § 1061 motion as his order of disposition was expiring seeking a suspended judgment and a vacating of the adjudication and a dismissal of the petition. Acknowledging that the family court has authority to do this "upon good cause shown", the Second Department concurred with the lower court that the father had not shown good cause or why it was in the child's best interest to vacate the adjudication of neglect.

Matter of Jaylanisa M.A., 157 AD3d 497 (1st Dept. 2018)

The First Department reviewed a Bronx County kin gap order and affirmed the granting of the order. A man, alleging that he was the father of the child appealed the order granting kin gap status to the child's foster mother who was also a maternal cousin. The child had been placed in foster care at 2 weeks of age and the birth mother had been found to have neglected the child. The statute does allow the court to order a kin gap over the objection of a parent if there is proof of extraordinary circumstances and that it is in the best interests of the child. Here the mother and the alleged father lived in a tent under a highway overpass. This man had never lived with the child, had never assumed a parental role toward the child, never supported the child and had been separated from the child since the child was a newborn. In fact

there was no evidence that this man had ever sought custody or visitation of this child. He never was married to the mother, he never filed a paternity petition or an acknowledgement of paternity. There was no evidence that he and the mother had even agreed to conceive a child and raise the child together or that the mother agreed to this man creating a parenting like relationship with her child.

Matter of Natalia J., 157 AD3d 793 (2nd Dept. 2018)

A Westchester father pled guilty in criminal court to manslaughter in the second degree for recklessly causing his daughter's death. Family court adjudicated his other child and a third child who was in the home, to be derivatively abused and neglected and the deceased child to be severely abused, abused and neglected upon summary judgment. The lower court also issued a FCA §1039-b order that no efforts needed to be made to reunite the father's surviving child to him and ordered full stay away orders on that child and the other child in the home. The Second Department affirmed all of the orders on appeal.

Matter of Rachel D., 157 AD3d 638 (1st Dept. 2018)

The Bronx County Family Court was reversed on appeal by the First Department for modifying a dispo order and ordering a supervised therapeutic visitation for the mother with her children. The evidence in fact showed that the visitation would not be in the children's' best interests. The lower court erred in finding that the mother had no visits since 2012 when in fact there had been a supervised therapeutic visits in December 2013 which had resulted in the older child having a resurgence of stress and anxiety related symptoms. There were numerous professional evaluations of the children, all of which consistently recommended that visitation with the mother would be detrimental. Although the lower court concluded that the agency was

lax in making reunification efforts, no explanation was given for the court's conclusion. There had been a finding of abuse and neglect against the mother and a documented history of the children being stressed and traumatized by prior visits. It was error for the lower court to order a supervised therapeutic visit at this time especially since the court did not even allow for argument on the issue at the children's permanency hearing.

Matter of Nevaeh MM., 158 AD3d 1001 (3rd Dept. 2018)

The Third Department reviewed the dispositional result of a Chemung County Art. 10 matter. The child had primarily resided with a maternal grandmother since her birth. DSS brought a neglect petition against the grandmother, the grandfather and the mother. The child was placed in foster care. Five months later, the child's aunt petitioned for Art. 6 custody of the child and one month later, the non-respondent father also filed for Art. 6 custody of the child. The respondents all consented to neglect adjudications but neither the grandmother nor the child's father agreed with the child being placed in the custody of the aunt. The court held a combined Art. 10 dispo hearing with the two Art. 6 petitions and granted Art. 6 custody to the aunt. The non-respondent father's Art. 6 petition was also part of combined hearing so the court needed to find both extraordinary circumstances and then assess best interests. The lower court improperly reviewed the extraordinary circumstances threshold as it related to the grandmother's situation. The threshold of extraordinary circumstances should be considered vis a vis the parent who opposes the custody to the non-parent – here the father's circumstances.

The Third Department did find that there were extraordinary circumstances vis a vis the father. He had made no effort to establish

paternity until DSS commenced a paternity proceeding. He consistently missed visits with this child. The father had fathered 5 children with 4 different mothers and his current girlfriend was pregnant with his 6th child. The father had virtually no current contact with his 2 older children who in fact lived with the aunt who was seeking custody of the child in this matter. The father was unemployed and not seeking employment. The father had no stable housing and currently lived with his pregnant girlfriend who had 3 children she was caring for while awaiting the birth of her 4th. The girlfriend provided the primary child care and she had bipolar disorder, anxiety disorder, depression and a history of domestic violence and an adjudication of child neglect. These circumstances established extraordinary circumstances. The aunt then was able to show that it was in the child's best interests to be placed in her custody. The grandmother had repeated instances of domestic violence in her home as the grandfather had a substance abuse problem but she continued her relationship with him. The grandmother had been arrested for shoplifting while the child and the mother with her. She also had financial and living instability. The aunt owned her own home, worked 2 jobs, raised her children and was raising the two older siblings of this child. She had no substance abuse or domestic violence in her life. It was in this child's best interests to be placed in the custody of the aunt and the Art. 10 dispo was resolved with an Art. 6 order to the aunt.

Matter of Zahyre A., 160 AD3d 717 (2nd Dept. 2018)

After Orange County Family Court accepted a mother's consent to a neglect adjudication, the court held a dispositional hearing and placed the children in foster care. On appeal, the Second Department concurred that mother's mental illness rendered her unable to obtain appropriate medical care for the children or to make sure they attended school regularly. The court properly assessed the mother's capacity to supervise the children given the threat of future abuse or neglect.

Matter of Myeenul E., 160 AD3d 848 (2nd Dept. 2018)

Suffolk County DSS brought a neglect petition against the father of 3 children alleging domestic violence and excessive corporal punishment. The lower court adjudicated the children as neglected and released the children to the non-respondent mother with an order of protection and a supervision order that required the father to be out of the home. Shortly after the order of disposition, the AFC for the oldest child, a daughter, made a motion for that child to be placed in foster care and the lower court responded by issuing an order of protection against the mother. About a week after that, the AFC filed neglect petitions against the mother and the father and again sought the placement of the oldest child in care who was just days short of her 18th birthday. One day before the child was to turn 18, the lower court placed the eldest child in foster care. The AFC for the 2 younger children then filed a motion seeking to have the father allowed to return to the home. The lower court dismissed the Art. 10 petitions filed regarding the older child, kept her in foster care ordering that she be in foster care "nunc pro tunc" to the date of the filing of the now dismissed neglect petition and allowed the father to return to the home. DSS appealed the lower court's "nunc pro tunc" order placing the oldest child and the AFC for the oldest child appealed the dismissal of the Art. 10 petitions that she had brought.

The Second Department concurred that the lower court properly modified the order of disposition by placing the eldest child in care. Family court is entitled under FCA §1061 to modify any order for good cause shown and after due notice. Such a modification should be based on the best interests of the child and does need not necessarily require a hearing. Here this older daughter had a strained relationship with both parents and the mother was not able to care for her adequately. The home was hostile to the child as she was blamed for the father having

been removed from the home. It was in this child's best interests to be removed and placed in care. There was no reason for the lower court to order the placement to be "nunc pro tunc" to the date of the later dismissed neglect petitions. The court placed the child in foster care upon a 1027 order of removal prior to the child's 18th birthday and therefore modified the pending disposition order of the original neglect adjudication.

Matter of Jerrell OO., __AD3d__, dec'd 6/7/18 (3rd Dept. 2018)

A Saratoga County respondent was properly found to have violated an ACD order and to have neglected a child. The respondent was the uncle of two children. He resided with his own parents and at least one of the children. He admitted he had neglected the older child and derivately neglected the younger child and upon his admission, the family court adjudicated neglect but then also ordered an ACD with terms and conditions. Ten months later, DSS brought a petition that the uncle had violated the terms of the ACD order as it related to the younger child. The court conducted a hearing and concluded he had violated the terms of the ACD but since there had already been an adjudication of neglect, simply set a date for a new dispositional hearing. DSS then filed a letter indicting that they did not seek any further dispositional order and the lower court reiterating the derivative order of neglect regarding the younger child and imposed no other conditions. The respondent appealed.

The respondent did not cooperate with DSS and so violated the terms of the ACD. The caseworker made 19 scheduled visits to the respondent's home, left 7 letters for him and several telephone messages and the respondent was never present. Although his parents let the caseworker into the home, she could not access the respondent's bedroom, where

this younger child also slept, because there was a keypad on the bedroom door. The respondent argued that he did not know that the caseworker was trying to see him and did not know his room would ever need to be seen by the worker. Since the younger child slept in that room, it was foreseeable that he would have to make it available to the caseworker and at least one of the letters to him specifically indicated that she needed to see the child's sleeping area. Given the number of attempts by the caseworker, it is highly unlikely he "did not know" that she was trying to reach him.

Lastly, the respondent claimed that the petition to violate the ACD was brought "in bad faith" given that DSS did not seek any further disposition in the matter. There was no malice or bad faith, DSS simply indicated that the younger child enjoyed his relationship with the respondent and that continued DSS involvement was only hurting the child.

PERMANENCY HEARINGS

Matter of Shawn S.__AD3d__ dec'd 6/8/18 (4th Dept. 2018)

Oswego County Family Court was reversed by the Fourth Department on the issue of ordering a freed child to physically attend his permanency hearing. The family court is without authority to compel a child to appear for a permanency hearing. One week before the hearing, the AFC filed a form indicating to the court that the child, who was 14 years old, did not wish to attend his permanency hearing and that the child waived that right. The AFC did appear at the hearing alone and reiterated that the child did not wish to appear. The court ordered that the child had to appear and after several adjournments, the child did

appear by telephone. The AFC appealed and although the issue was now moot, the Fourth Department ruled that the issue may be likely to reoccur. The statute clearly states that the court cannot order the child to appear, that the decision is clearly the child's decision to make.

TERMINATIONS OF PARENTAL RIGHTS

GENERAL TPR

Matter of Serenity C.W., 158 AD3d 716 (2nd Dept. 2018)

Westchester County Family Court terminated a birth mother's rights. On the day of the fact finding, the mother appeared with her assigned attorney and requested an adjournment claiming she wished to hire private counsel. The lower court denied the adjournment and the mother walked out of the court room and refused to return. The court proceeded with the hearing with the assigned counsel not participating. This action is a default on the mother's parent and she cannot appeal a default. The lower court did not abuse its discretion by denying the adjournment as the hearing had been scheduled well in advance and the mother offered no explanation as to why she had delayed in hiring private counsel. The child had been in foster care for 4 years. (Note: If a default cannot be appealed, why allow the appeal to proceed -which took a year- and then give a decision that says there is no right to appeal. Why is this sort of case not more quickly resolved by a dismissal by motion?)

Matter of Jeremiah G.F., 160 AD3d 731 (2nd Dept. 2018)

A termination of parental rights petition against a Kings County father alleging abandonment was filed in December of 2013. After numerous prior adjournments and delays, the matter was finally on for a fact finding hearing on July of 2016 (that would be 31 months or 2 and a half years after the petition was filed) At this time, the father's counsel appeared but the father did not and counsel asked for an adjournment and indicated that the father wanted counsel to be relived. Family court proceeded with the hearings and father's counsel did not participate. The lower court terminated the father's rights and the father appealed to the Second Department. The Second Department ruled (21 months after the termination order) – that the lower court did not err in denying the attorneys request for an adjournment and his request to be relived given the delays in the proceeding and the father's prior refusal to appear.

Matter of Thaiheed O.H., AD3d , dec'd 6/12/18 (1st Dept. 2018)

A Bronx father failed to appear for his abandonment TPR fact finding. His counsel chose not to participate in the hearing and the hearing proceeded by inquest. Counsel did this in order to preserve the father's right to seek to reopen the default if he could. This was a tactical decision on the attorney's part but it was not ineffective assistance of counsel as the father now claims on appeal. In any event, there was firm evidence presented that the father has abandoned the child and any cross examination would not have impeached. The father also argued on appeal that his lawyer failed to submit a brief to the court on the issue of "diligent efforts". The court did offer counsel an opportunity to submit a brief but did not require counsel to do so and there is no requirement for proof of diligent efforts in an abandonment. The father's argument at the court inserted itself in the proceedings by taking on the function of an advocate for the agency was not preserved.

ABANDONMENT TPR

Matter of Mason H., ___NY3rd___ (2018)

The Court of Appeals reversed the Third Department's ruling in a Broome County Family Court abandonment TPR of an incarcerated father. While DSS did prove that the father did not visit the child or communicate with DSS in the relevant 6 month period, they did not prove that he failed to communicate directly with the child or through the foster parent. The burden is on DSS to prove the lack of that communication as well.

SEVERE ABUSE TPR

Matter of Riley C.P. 157 AD3d 957 (2nd Dept. 2018)

A Kings County respondent pled guilty in criminal court to an attempted course of sexual conduct against a child in the first degree regarding a female child he was legally responsible for and this resulted in a summary judgment adjudication for severe abuse in family court. The respondent was also the father of the sexually abused child's half brother and the lower court also found that this action derivately severely abused that child. ACS them moved for a FCA § 1039-b motion that reasonable efforts for reunification towards the son were not required and that was granted. The agency then brought a termination on severe abuse grounds and moved for summary judgment. The lower court granted the motion and terminated the father's rights to the boy, freeing

him for adoption. The father appealed arguing that since the sexual offense was against a child that was not his biological child, that the lower court had to hold a hearing on the question of severe abuse for the termination on his biological child. The Second Department disagreed. The severe abuse finding on the Art. 10 was upon clear and convincing evidence based on the criminal conviction. His son was found to be derivately severely abused and this TPR ground contemplates derivative findings. It is in the child's best interests to be adopted by his foster mother that he has lived with for 6 years and to whom he is bonded.

Matter of Karmer A.E., 158 AD3d 627 (2nd Dept. 2018)

The Second Department affirmed the termination of a father's rights on severe abuse grounds. The father had been criminally convicted of manslaughter in the first degree for killing the child's mother. The child had been in the home when the murder was committed. First the lower court made a finding of severe abuse in the Art. 10 and then granted a severe abuse TPR on a summary judgment motion. This was in the child's best interests.

MENTAL ILLNESS AND INTELLECTUAL DISABILITY TPRS

Matter of Chad Nasir S., 157 AD3d 425 (1st Dept. 2018)

New York County Family Court's termination of parental rights of a mother to her 2 children was affirmed on appeal. There was clear and convincing evidence that the mother was mentally ill to the extent that

she could not care for the children safely. The court appointed psychologist examined her for several hours and reviewed an extensive medical history. The mother's prognosis was "quite poor" according to the expert as she lacked insight into her mental health, refused counseling and medication and ended therapy when her therapist was no longer working at the same location. The psychologist testified that it was likely that the mother would need future hospitalization. Although the court did err in allowing hearsay statements that the father had made to be admitted within the expert's report, this error was harmless. The evidence before the court, including those portions of the expert's report that were not hearsay was sufficient to support the finding that the mother was currently mentally ill and would be unable for the foreseeable future to provide adequate care for the children.

Matter of Rayquan Reginald M., 158 AD3d 584 (1st Dept. 2018)

The First Department affirmed New York County Family Court's termination of a mother's rights to her children based on intellectual disability grounds. The court appointed psychiatrist testified that the children would be at risk of neglect if returned to their mother who was intellectually disabled. The mother had not been able to properly care for the children before they were removed. Even with the help of a visit coach, the mother had not been able to even move to unsupervised visits after 2 years. She could not control the children and she could not get the children in and out of the leg braces that they wore. Additional parenting training would make no difference in her skills and a dispositional hearing was not required or necessary.

Matter of Ty'Nayshia H., 159 AD3d 420 (1st Dept. 2018)

The First Department affirmed an intellectual disability termination on a New York County mother by summary judgment. The mother's parental rights to her 2 older children had been terminated based on intellectual disability just 10 days before a summary judgment motion was made regarding this 3rd child. The agency submitted the sworn testimony of the court appointed psychologist from the prior proceeding, the expert's clinical report from the prior proceeding as well as the prior findings of fact, conclusions of law and order of commitment of the older children. There were no objections to the admission. The prior testimony was that the mother had a developmental disability that would not improve and that the children would be at risk of neglect if in her care. The mother argued that summary judgment was not appropriate as she had just been accepted for a homemaking service after the parental rights for her 2 older children had been terminated and that there should be a hearing regarding this third child as her parental functioning should be assessed. However, the Appellate Division agreed with the lower court that the expressed testimony of the expert had been that long term supportive services would not change mother's intellection disabilities such that she could care for her children in the foreseeable future. The evidence was that this mother's cognitive and adaptive deceits affected her parenting such that she could not care for any child never mind a child who has severe special needs as this child does. There was no material issue of fact and summary judgment was proper.

Matter of Dieucothaaam PT., 160 AD3d 881 (2nd Dept. 2018)

The Second Department affirmed a mental illness termination on a Westchester County mother by summary judgment. The mother's rights to an older child had been terminated on mental illness grounds in late 2015 based on a court appointed psychologist testified that the mother was mentally ill and could not presently or for the foreseeable future

care safely for the child. In the spring of 2016 – less than a year later, the DSS brought this TPR regarding the mother's second child and moved for a summary judgment TPR based on the prior adjudication. The mother submitted an affirmation by her attorney that she had been in consistent treatment and had not committed any act that was a danger or neglectful to this child when she visited with him. The lower court did not order a new psychological evaluation and did not hold a hearing but terminated the mother's rights to this child by summary judgment. On appeal, the Second Department concurred that hearing was not necessary as a prima facie case for mental illness termination was established based on the recent rulings on the older child and that a new mental health evaluation was not required.

Matter of Yeshua G., ___AD3d___, dec'd 6/8/18 (4th Dept. 2018)

The Fourth Department affirmed a mental illness termination on a Erie County father by summary judgment. The court properly granted the motion on collateral estoppel grounds as the issue of the father being "presently and for the foreseeable future unable, by reason of mental illness…, to provide proper and adequate care for a child" was already decided in another child's TPR case not a year earlier. The father did not dispute that he had a fair opportunity to litigate that issue in the earlier trial. DSS was not even obligated to submit the prior experts' report as the prior determination is sufficient for summary judgment.

Matter of Jason B., 160 AD3d 1433 (4th Dept. 2018)

Yates County Family Court properly terminated a mother's rights on mental illness grounds. The court appointed psychologist examined the

mother and testified that the mother had a personality disorder that would mean the child would be in danger of being neglected if returned to her care. At the present or in the foreseeable future. The mother failed to object to the testimony of the expert on the ground that the opinion was based partially on inadmissible hearsay and so that argument was not preserved.

Matter of Madison Mia B., ___AD3d___, dec'd 6/21/18 (1st Dept. 2018)

A young New York County mother failed to appear for her hearing on the termination of her parental rights on the grounds of mental illness. The psychologist testimony was that the mother suffered from severe bipolar disorder. This was based on a review of the mother's detailed mental health records as the mother failed to attend the numerous mental health evaluations scheduled. The mother had increasingly violent and self-injurious behaviors that has started at the age of 7 and had been hospitalized throughout her life. Since she failed to appear, the lower court's order was entered on default and there is no appeal of a default and so the First Department dismissed the appeal.

NOTE: It took over a year for the Appellate Division to hear this "appeal" and determine that it was not appealable. This practice obviously delays permanency. These "appeals" should be dismissed immediately upon motion with a showing that the lower court order says it was made on default and inquest.

Matter of Inuel S., __AD3d___, dec'd 6/28/18 (1st Dept. 2018)

The First Department affirmed Bronx County Family Court's termination of mother's rights to her children on mental illness grounds.

There was clear and convincing evidence that included a report and testimony from the court appointed psychologist that the mother suffered from schizoaffective disorder, bipolar type. This was based on his examination of the mother and a review of her records. The court also heard testimony from the mother's older daughter and from the mother herself. If the children were returned they would risk neglect for the foreseeable future. It was not necessary for the expert to observe any interactions between the mother and the children based on the mother's long history of mental illness, her noncompliance with treatment and the pervasive nature of her problems.

PERMANENT NEGLECT

Matter of Justice N.L.J. 157 AD3d 461 (1st Dept. 2018)

The First Department affirmed New York County Family Court's termination of a mother's rights to her child. The agency made diligent efforts by referring the mother to programs for substance abuse, anger management, parenting skills for parents of special needs children, mental health therapy and scheduled visitation. The agency provided a visitation coach. The mother however failed to plan in that she did not resolve her mental health problems or her anger issues. She was able to successfully address her substance abuse but the other issues remained. The mother was unable to deal with the child's special needs and could not properly deal with the child's behavior at visits – resorting to physically restraining the child. She was not receptive to the coaching at visitation ant the visits would end in a chaotic fashion with the mother hurrying the leave. It was in the child's best interest to be freed to be adopted. The child had been in the same foster home for 3 years with

his half-brother and an uncle. His needs were being met and the foster parents wished to adopt.

Matter of Tymel P., 157 AD3d 699 (2nd Dept. 2018)

Two Kings County children had been in foster care since 2010 when their sister had been killed by their mother and their maternal grandmother. The Second Department affirmed the termination of the rights of the father, freeing the children to be adopted. The agency did provide him with diligent efforts toward reunification and he did participate in services. However, he did not benefit from the services, programs and support offered and did not demonstrate the lessons learned in his classes or use the tools he has been taught. He did not plan for the children's future. There was no reason to provide him with a suspended judgment given his lack of insight and his failure to address his issues. The children should be freed to be adopted by the foster mother with whom they have lived with for over 7 years.

Matter of Adam D., 157 AD3d 673 (2nd Dept. 2018)

The Second Department reversed Queens County Family Court's dismissal of a TPR of a mother's rights. The lower court found that the agency had not provided the mother with diligent efforts to reunite but the appellate disagreed. The agency developed a service plan, provided the mother with referrals and maintained contact with her by phone and in person. They set up visits and provided transportation to the visits. The agency "notably" advised the mother that her therapy and anger management counseling were part of the service plan and if she failed to complete them, she would risk a termination. These efforts were

sufficiently diligent and proven on a clear and convincing level. The mother did not maintain regular visitation with the children. Although she did obtain suitable housing and completed a parenting skills class, she failed for several years to complete anger management, failed to submit to random drug testing and failed to complete counseling. "Significantly" the mother said she was tired of going to anger management classes and answering the same questions over and over. She did not sign a consent form for one of the children who was autistic and the child lost needed services for a time. There was clear and convincing evidence that she did not plan for the children's return. The matter was remitted for a dispo hearing.

Matter of Angelica D., 157 AD3d 587 (1st Dept. 2018)

A New York County mother permanently neglected her children. There was clear and convincing evidence of diligent efforts offered by the agency. They referred the mother for a mental health evaluation, parenting skills and anger management and also arranged visitation. The mother repeatedly rejected the agency's efforts and stated she had no issues and that the children should not be in care. She would not provide a home address so the agency was never able to make a home visit to her to assess the home environment. She not only failed to take steps to correct the issues but she also failed to visit the children consistently by attending less than half of the scheduled visits. Her lack of contact itself would be a grounds for permanent neglect. A suspended judgment was not appropriate given that the mother had no insight and the children had special needs. Their needs were being met in the foster home that they had been in for over 5 years. They are well bonded to the foster parents who wish to adopt.

Matter of Christian D. 157 AD3d 587 (1st Dept. 2018)

The First Department affirmed New York County Family Court's termination of a mother's rights to her children. There was clear and convincing evidence that the agency made diligent efforts by referring the mother for parenting programs, mental health services, setting up visitation and encouraging her to engage in services with the Family Treatment Court for her drug abuse. She never meaningfully engaged in services and never maintained sobriety. She relapsed numerous times, did not complete her service plan and was not consistent in her visitation which never moved beyond supervised visits due to the strained relationship with the children. The children were in two foster homes where their needs were being met and where the foster parents wished to adopt. The foster parents committed to maintain a relationship with the siblings.

Matter of Soraya S., 158 AD3d 1305 (4th Dept. 2018)

The Fourth Department affirmed Chautauqua County Family Court's termination of a mother's rights to her child. There was clear and convincing evidence that DSS offered diligent efforts to reunite. They provided mental health care referrals, parenting classes, counseling, transportation to services and to the child's health appointments and set up visitation. The mother did not complete the various programs or attend her mental health treatment. She stopped going to her court ordered attachment based therapy and when she had gone she was not engaged or cooperative. She missed two thirds of the child's medical appointments and missed numerous visits. She did not address or gain

insight into her problems and asserted that she did not "need to be taught how to be a parent".

Matter of Isiah M., 158 AD3d 688 (2nd Dept. 2018)

Kings County Family Court's termination of the parental rights of 2 parents was affirmed on appeal. The children were placed in care in the summer of 2006 and released on a trial discharge in the spring of 2011. They were returned to care in a month due to the father's ongoing drug use. In Feb 2012, TPR proceedings were brought. At the fact finding, the agency provided clear and convincing evidence of diligent efforts to reunite. The agency offered visitation, transportation, financial assistance, 24 hour homemaking services, individual counseling and family counseling and mental health services. The parents were encouraged to comply with the services and were provided with the trial discharge period that failed. The parents failed to gain insight and change their behavior. The parents failed to appear of the dispo hearing and their counsel did not participate so the dispo was a default and that portion of the matter cannot be appealed. At the time of this appellate decision, the children would have been in care for 11 and a half years.

Matter of Kaylee JJ., 159 AD3d 1077 (3rd Dept. 2018)

The Third Department concurred with Delaware County Family Court that a mother's rights to her 2 children should be terminated. The children were removed from the mother in 2013 after the mother had threatened to kill them and to blow up their school. The mother was also arrested and incarcerated. The mother served 6 months in jail and

then was on probation. She violated her probation and was re-incarcerated. In early 2016, DSS filed a permanent neglect proceeding to free the children. DSS did offer diligent efforts to strengthen their relationship.

While she was incarcerated, the caseworker wrote "absent parent letters" to tell the mother of the children's progress and to encourage the mother to engage in any services available to her at the jail as well as to remind her that she needed to plan for the children's future. An order of protection was in place and so the DSS could not provide the mother with any direct contact with the children. The DSS advised the mother that she needed to locate a non-foster care placement for the children. She asked that the maternal grandmother be considered. This was investigated by DSS but it was not a viable placement.

The mother testified that she had taken meds, sought mental health services and completed parenting, anger management and some business courses while she was incarcerated. She could not however detail any of the substance of these services and on the witness stand she simply ignored questions would remain silent for long periods of time. She made no effort to modify the order of protection that limited her contact with the children and offered no other plan for the children when told that the grandmother was not suitable. She did not demonstrate that she had benefitted from any of the services she claimed to have obtained in jail. The mother was in prison at time of the TPR fact-finding although she was released during the pendency of the dispositional hearing. But since leaving prison, the mother had not pursued any job opportunities and was living with her mother, the maternal grandmother. The order of protection was still in place. The grandmother sought custody of the children but the mother did not attempt to find an alternative residence that would allow the children to reside there.

A suspended judgment was not appropriate nor was placing the children with the grandmother. The children had to be separated from each other

due to behavioral issues and they each have significant needs that were being met by their respective foster families. They had supportive services and were making progress. Reunification with the mother, or placement with the grandmother until some reunification with the mother was simply not realistic given the history. The mother did not evince a sincere understanding as to why the children had been removed nor was there a desire to improve her abilities to parent.

Matter of Deryck V.J., 159 AD3d 411 (1st Dept. 2018)

Although the First Department found that the New York County respondent father in this matter had not properly appealed as his arguments were focused on the fact-finding to which he had in fact defaulted, the court none the less commented on his arguments. He had not preserved any argument that he was deprived of counsel at the hearing and it was his own failure to appear that caused his attorney to not be able to participate. The agency had provided diligent efforts but the father lacked interest in the child and did not cooperate. He was incarcerated and would not sign consents so the agency could be advised on the services he was obtaining in the prison. The agency arranged for the child to visit the father imprisoned at Rickers Island. Once the father was transferred to another prison 10 hours away, it was not in the child's best interests to be transported there as the child has chronic asthma for which he has been hospitalized in the past. The child's doctors say such travel was not medically advisable for the child.

Matter of Joseph I.N., 159 AD3d 705 (2nd Dept. 2018)

The Second Department reversed Kings County Family Court's dismissal of a mother and father's TPR petitions regarding 3 children.

The Appellate Court found that the agency had proven clearly and convincingly that they had offered the parents diligent efforts toward reunification. A service plan was developed and the parents were referred to drug treatment, parenting skills and mental health evaluations. They were advised they needed to obtain suitable housing and visitation was set up. The parents were told consistently that they needed to complete these services so that the children could be returned.

However the parents failed over a 2 year period to complete a drug program. The parent's longtime abuse of marijuana was a significant obstacle to the return of the children and the agency had made multiple referrals to drug programs but the programs were never completed. One or more of the children had been in foster care for various periods of time since 2009 (that would be 9 years) and the parents have never completed any drug treatment since then. The children are entitled to permanency. The matter was remitted for a dispositional hearing.

Matter of Anthony D., 159 AD3d 818 (2nd Dept. 2018)

A Queens's father's rights were properly terminated. The agency offered diligent efforts tailored to the individual situation. This included referrals to mental health, parenting programs and housing services as well as encouraging the father's compliance with the programs and setting up visitation. The father failed to plan for the child's return including failing to take steps to secure appropriate housing.

Matter of Michael S., 159 AD3d 1378 (4th Dept. 2018)

The Fourth Department affirmed Chautauqua County Family Court's termination of a father's rights to his children. DSS had offered the

father a psychological evaluation, connected him with mental health providers, set up regular visitation, sent him to parenting classes and encouraged him to set up medical appointments for the children. DSS also gave him transportation assistance, budget counseling and encouraged him to maintain safe and suitable housing. The finding of permanent neglect was appropriate. The father then violated the subsequently agreed upon suspended judgment and so it was in the children's best interests to terminate his parental rights.

Matter of Tion Lavon J., 159 AD3d 579 (1st Dept. 2018)

New York County Family Court's termination of a mother's rights to her child was affirmed on appeal. The agency offered diligent efforts to reunify by referring the mother for drug treatment and mental health services and setting up visitation. The mother did not provide any contact information to the agency and failed to engage in mental health services or substance abuse services. She did not submit to random drug testing and continued to use drugs and did not visit the child consistently. She had no insight into the issues concerning the placement in care and did not benefit from the minimal services that did use. There is no reason to offer a suspended judgment as there was no indication that she would be able to care for the child in the future. In fact her situation had become worse. The child should be adopted by her foster mother who was a maternal great aunt. She met the child's needs and he is stable, doing well with her and wants to stay with her.

Matter of Joshua W. Jr., 159 AD3d 1589 (4th Dept. 2018)

A Cattaraugus County father's rights were properly terminated. There was clear and convincing evidence of diligent efforts by DSS. They set

up a psychological examination for the father, supervised visitation and attempted unsupervised visits with the child. DSS provided referrals for various other services. The father did participate in some of the services of them but failed to address the issues that had resulted in the child's placement in care. The father completed parenting and domestic violence classes but he did not complete mental health treatment or substance abuse treatment. He did not apply the knowledge and benefits he has obtained from the services provided. The father had no realistic and feasible plan for the child other than the child remaining in foster care while the father was in prison.

Matter of Samatha B., 159 AD3d 1006 (2nd Dept. 2018)

Kings County Family Court dismissed permanent neglect petitions filed against 2 parents whose child had been in foster care since her birth and the agency appealed the dismissal. The Second Department found that the lower court had erred in determining that diligent efforts were not offered – there were such efforts. The agency created service plans for the parents, offered visitation, encouraged attendance at the child's therapy sessions, referred the mother for drug treatment and took action when the drug treatment program was not cooperative in assisting the mother. However, the TPRs were appropriately dismissed as the agency did not prove by clear and convincing evidence that the mother and father failed to maintain contact with or plan for the child's future. At the time of this appellate decision, the child would have been in care for 10 years.

Matter of Bilet M., 159 AD3d 633 (1st Dept. 2018)

A Bronx father lost his parental rights to his children. The father was serving a 21 year prison term and would not be out of custody before the youngest child was an adult. The agency offered diligent efforts by exploring the permanency resources that the father offered, attempting to arrange for him to be involved in agency meetings, forwarding letters from him to the children's therapist as per the court's order and keeping him apprised of the children's progress. The paternal grandfather had been offered as a resource and had been checked out as it related to a US address he provided but the grandfather then failed to submit a Mexican address that he indicated he would be taking the children to raise them. The father did maintain contact with the children but none of the resources he suggested were viable and he had no realistic plan for an alternative to foster care. The children had been living with their foster families for over 4 years and the families wished to adopt them. It was in their best interests to be freed for adoption.

Matter of Jacqueline E.S.B., 160 AD3d 828 (2nd Dept. 2018)

The Second Department reviewed a permanent neglect adjudication from Kings County. The TPR on 2 children was filed in the fall of 2011. (The children would have been approximately 1 and 3 years old at that point) Kings County Family Court adjudicated and freed the children in the spring on 2016. (over 5 years that would be – so the children would now be about 6 and 8) The father appealed and the appellate division issued its order in the spring of 2018 (2 years later, making the children 8 and 10 by the time of this decision)

The father's argument on appeal was that he was not present on one day of the hearing. The record reflected that he had voluntarily absented himself from the proceedings and there was no video or audio

conferencing alternative available. The father's attorney was present on that date however and on future dates the father did appear and was able to testify. Given those circumstances, the lower court did not abuse discretion by declining the defense request for an adjournment on the one day. There was clear and convincing evidence of diligent efforts offered to the father. He failed to complete significant services including mental health therapy and drug testing. Termination of the father's rights was in the children's best interests.

Matter of Karina A.G., 160 AD3d 560 (1st Dept. 2018)

The First Department affirmed the termination of a Bronx father's rights to his child. The agency offered diligent efforts toward reunification. They referred the father to drug treatment, parenting skills and anger management and set up visitation. The father repeatedly refused the services offered and did not keep in contact with the agency. The father did find a program on his own but refused to give the agency any consent to obtain information about the services they offered or how he was doing in any services. He never took responsibility for his actions that had resulted in the child being placed in care but instead blamed the agency and the foster mother. The father claimed that the child was being brainwashed to say that she did not want to have contact with him. But when there was visitation, the father was intimidating and was not empathetic to the child.

Matter of Mariama J., 160 AD3d 593 (1st Dept. 2018)

An incarcerated Bronx mother's parental rights to her child were terminated. The agency offered diligent efforts by arranging for contact

with the child, obtaining services for the mother in the prison, reminding her of her obligation to make a plan for the the child and keeping her updated on the child's progress. The mother first planned to have the child be cared for by relatives but the child was abused by the relatives. The mother's only other plan was to keep the child in foster care until the end of the mother's incarceration which was to continue until at least 2020 and this is not an acceptable plan.

Matter of Zyrrius Q., 161 AD3d 123 (3rd Dept. 2018)

A Tompkins County child was properly freed for adoption. There was clear and convincing evidence that the DSS offered the mother diligent efforts to try to reunite the mother with the child. A service plan was prepared to respond to the mother's issues with her mental health, anger management and substance abuse. Counseling was offered on anger management and parenting. Family team meetings where held with the mother and visits were provided. The mother did not develop any plan for the child. She did visit and she did attend some classes but her problems continued. She did not attend her mental health services regularly. She would cancel visits with the child. At one visit, the mother became upset when she was told that she would not receive a make-up visit after a missed visit and there was a fear that she would drop the child in her anger. She was distracted at visits and would use her cell phone although she was told that was not permitted at visits. She would drive to the visits on a suspended license and would not arrive early enough to the visit for the coaching help she needed. She did not maintain a suitable living environment and continued to have criminal interactions. She was arrested for stealing a laptop and for

advertising prostitution services. The mother sent threatening text messages to the foster parents. At one point, she left the state.

It was in the child's best interests to be freed for adoption as the child thrives with the foster parents who wish to adopt. He has lived with them his entire life.

Matter of Khadija J.K., 161 AD3d 1153 (2nd Dept. 2018)

A Richmond County mother permanently neglected her child. The mother was offered parent skills training which she did not complete, mental health services including individual counseling and medication that she did not comply with and she failed to consistently exercise visitation that the agency offered. The mother argued that the agency should have offered her mental health services that were specifically designed to treat her paranoid schizophrenia but the appellate court found that argument to be meritless.

Matter of Caidence M., ___AD3d___, dec'd 6/8/18 (4th Dept. 2018)

The Fourth Department affirmed Seneca County Family Court's termination of an incarcerated father's rights to his 3 children. In the 4 months before the father was incarcerated for armed robbery and possession of a controlled substance, the DSS offered him drug treatment, parenting counseling, transportation and housing assistance. He refused drug treatment and parenting and tested positive for cocaine. After entering prison, the DSS was still obligated to provide diligent efforts. Efforts for an incarcerated parent include keeping the parent apprised of the child's well-being , developing a service plan, investigation other non-foster care resources for placement, responding

to the parent's inquires about the child and helping with contact between the child and the parent. DSS did those things by arranging for visits at the prison including making special arrangements to do that outside of normal visitation times. DSS also kept him informed of the children's wellbeing and the investigated possible placement with relatives. The father did offer his mother and also his brother as possible placement options for the children. Both were investigated and determined not to be viable candidates. In particular, the uncle was only interested in taking one of the children. The father then sought to have the children remain in foster care until he was released from prison but that was not in their best interests as it did not meet their need for permanency. The father claimed that the AFC was biased against him and that there was a conflict of interest between the children's desires such that the should have been 2 AFCs appointed. Also he argued that the AFC should not have substituted her judgment for the younger children. This was not preserved as the father never raised these issues at the trial level.

Matter of Bryce Raymond R., __AD3d___, dec'd 6/19/18 (1st Dept. 2018)

The First Department affirmed the New York County Family Court's termination of a mother's rights to her child. The agency offered referrals for drug treatment, mental health services, random drug testing and scheduled visitation. The mother failed to complete the drug program and relapsed into drug use. She did not regularly engage in mental health services or submit to drug testing. She did not visit the child consistently. The child should be freed for adoption by the foster parents who have had the child in their home since his birth. There was no indication that the mother would ever be able to care for the child so a suspended judgment was unwarranted.

Matter of George R.__AD3d__, dec'd 6/27/18 (2nd Dept. 2018)

A Kings County mother's rights to her child were terminated. The agency was not in fact required to offer her diligent efforts as she failed to keep the foster care agency aware of her location for at least six months. SSL§384-b(7)(e)(i). However the agency did prove that it offered such efforts anyway by scheduling visitation, referring the mother to drug treatment, parenting classes and counseling. The mother did not visit the child for a year.

Matter of Mirabella H.,__AD3d___, dec'd 6/29/18 (4th Dept. 2018)

The Fourth Department affirmed the termination of a Cayuga County mother's rights to her child. The mother argued that DSS did not due its duty to contact relatives for placement as an alternative to foster care. The Fourth Department ruled that even assuming that the DSS failed to notify an uncle about the child being placed in foster care and of the opportunity to become a foster parents or seek custody, under FCA §1017, the uncle did know the child was in foster care as he did file an Art. 6 petition for custody of the child. This petition was dismissed when the uncle failed to appear in court and that dismissal was not appealed. There was no prejudice even if DSS did not properly notify this uncle since he was well aware of the child's situation. The mother did participate in some services but her progress was not sufficient and she failed to address or gain insight into the reason for the child's removal. Her progress was also not sufficient enough to warrant a suspended judgment.

TPR Dispos

Matter of Jerhia EE., 157 AD3d 1017 (3rd Dept. 2018)

Three Broome County children were placed in foster care in the fall of 2009. In the spring of 2013, DSS brought TPR petitions against the father and 7 months later, the father agreed to a suspended judgment for 8 months. DSS later filed a petition alleging that the father had violated the suspended judgment terms. The lower court held a fact-finding hearing, then a dispositional hearing and also in camera hearings with the children as it related to the violation. In the fall of 2016, the lower court found that the father had violated the terms of the suspended judgment and the father appealed. The Third Department affirmed the violation and the freeing of the children. The father refused multiple times to submit to court ordered drug screens. When he was advised of the importance of submitting on one occasion, he laughed. He missed visitation with the children. He was obligated by the terms of the order to obtain a suitable home for the children that had at least one bedroom but he only had a rented a single room in a "boarding house". The caseworker did provide bus passes but he did not use them to visit the children or to attend the drug screens. The children should be freed for adoption as they have a strong bond and relationship with the foster mother and they are thriving in her care. The father has no realistic plan for the children. At the time of the appellate decision, the children had been in foster care for 9 years.

Matter of Skyler G., 157 AD3d 787 (2nd Dept. 2018)

The Second Department disagreed with Dutchess County Family Court's termination of a mother's rights and remitted the matter for a new hearing. The mother had admitted to permanent neglect and consented to a suspended judgment. Four months later, DSS filed a violation and the lower court revoked the suspended judgment and terminated rights. The Appellate Court agreed that the mother had in fact violated the suspended judgment but reversed on the issue of the children's best interest. The children had been in foster care for years but the emphatically wanted to be with the mother. The children had regular visitation and a strong bond with the mother. One child was in residential care with no pre-adoptive home identified. The mother was not using drugs, was committed to her recovery and regularly went to AA. She had completed anger management programs and DV programs and had obtained an order of protection against her abuser. She had engaged in mental health treatment. Her violation of the suspended judgment was primarily a failure to complete a parenting program which she then completed before the violation hearing was concluded. It was not in the children's best interests to be freed for adoption.

Matter of El v ACS Queens 159 AD3d 700 (2nd Dept. 2018)

A grandmother's custody petition was dismissed in favor of the freed child being adopted by the current foster parents. When the child was born, the maternal grandmother took the infant from the hospital with the intention of filing for Art. 6 custody of the baby. The grandmother had Art. 6 custody of the infant's older brother. However, ACS recommended to the grandmother that she instead become a foster parent so that she could get more funding. The grandmother then became a foster parent for the baby. When the baby was about 5 months old, the grandmother decided to relocate to the state of Pennsylvania. Since the child was in foster care, she was told that she could not bring

the baby with her until there was an approval by the ICPC. The grandmother left the state with the understanding that the baby would be placed with her son, the baby's uncle and that her son would become a certified foster parent and care for the child until such time as the ICPC was finished. The son, however, did not qualify to become certified and the baby – at 9 months of age – went to live with her current foster mother where she has remained. Meanwhile the grandmother made efforts to complete the ICPC process and become a certified foster parent in Pennsylvania but encountered many difficulties. The ICPC process was finally completed when the child was 22 months old. The agency now determined that the grandmother had failed to maintain sufficient contact with the child and did not wish to move the child back to the grandmother but had instead started TPR proceedings for the child to be freed and adopted by the foster mother.

The grandmother was allowed to have more regular visits with the child in the year that the TPR was pending. The lower court then determined that the mother had abandoned the child and that a notice father had not responded to a notice and proceeded to a TPR dispositional hearing. The grandmother sought Art. 6 custody of the child but the Appellate Division agreed with the lower court that it was in the child's best interests to be adopted by the foster mother. Biological family have no special preference with regard to custody over a foster parents who has cared for a child continuously for over 12 months. SSL §383(3). This child has now lived with her foster mother for 6 years and she is strongly and lovingly bonded to the foster mother and her family. (Note: **Matter of Tabitha T.S.M., 159 AD3d 703** was decided on the same day and here the Second Department reversed the Queens County Family Court's order that placed the child with the maternal grandmother. This order had occurred just a month before the lower court freed the child for adoption and was the subject of the above appeal. The appellate court noted that "inappropriate weight" had been given to the fact that the grandmother had the child in her home for a few months at the

beginning of her life and had custody of the child's brother. This should not outweigh the years since where the child had been with the current foster mother.)

Matter of Armoni M.K.I., 159 AD3d 495 (1st Dept. 2018)

The First Department affirmed the New York County Family Court's determination that a mother's 2016 admission to violating her suspended judgment should result in a termination of her rights. The mother had obtained employment but she failed to maintain suitable housing or to attend mental health regularly, did not visit the children consistently and did not complete a parenting program – all of which had been required. She acknowledged that she had not done these things. The children have been in the same foster home for most of their lives and the foster mother met their special needs and wants to adopt them. The mother has made no progress with her mental health issues and does not have the ability to care for the children.

Matter of Anissa Jaquanna Aishah H., 159 AD3d 516 (1st Dept. 2018)

A Bronx father violated the terms of his suspended judgment. He repeatedly failed to submit to drug screens and when he did, he tested positive for PCP and other drugs. It is in the children's best interests to be freed for adoption as they have resided in a stable foster home and are happy and well adjusted. (Note: The suspended judgment had been entered in March of 2014 – 4 years before the determination that it was violated)

Matter of Wendy KK. V Jennifer KK., 160 AD3d 1059(3rd Dept. 2018)

A Delaware County maternal grandmother filed a custody and visitation petition during the pendency of the TPR of the children's mother. The Family Court denied her custody and the grandmother appealed. The Third Department found that the grandmother did establish extraordinary circumstances and that she also established that she had a prior relationship with the children that created standing to seek visitation. However neither custody nor visitation were in the best interests of the children. The grandmother had a limited relationship with the children and had not seen the older child in 2 years. She had only supervised contact with the younger child. The grandmother had limited insight into the children's situation. The grandmother had 2 prior indicated reports in her past, including one as to the mother of these children when the mother had been a teen. The grandmother did not understand the gravity of the mother's behavior or the impact it had on the children.

Matter of Gabriel M.I., 160 AD3d 858 (2nd Dept. 2018)

The Second Department concurred with Dutchess County Family Court that a father had violated his suspended judgment and that it was in the children's best interested for his rights to be terminated. The father admitted to permanent neglect and a suspended judgment was entered. Seven months later, the DSS brought a violation petition. The Appellate Court agreed that there was a preponderance of evidence that the father did not attend weekly visits, did not provide the children with appropriate food during visits, did not regularly attend therapy or obtain a stable residence apart from his mother and that he had engaged in criminal activity. The father failed to gain insight into the problems that were causing the children to remain in care.

Matter of Joseph QQ., 161 AD3d1252 (3rd Dept. 2018)

The Broome County Family Court was affirmed on appeal. There was a preponderance of the evidence that the mother had violated her suspended judgment and that her rights should be terminated. The violation petition was filed 3 and a half months after the suspended judgment was ordered. The mother admitted that she had relapsed and used drugs, did not engage with the treatment program, violated the terms of a criminal probation sentence and was currently incarcerated. She had not obtained housing but instead had been living in an overcrowded apartment that she planned to live in again when she was released from jail. These actions violated the suspended judgment order. The freeing of the children for adoption was in their best interests given the circumstances.

Matter of Isabella R.W., 161 AD3d 990 (2nd Dept. 2018)

An Orange County child was placed in foster care in mid-2012. The county filed a TPR on the mother in 2014 based on mental illness grounds. The mother failed to appear mid hearing and as it was a mental illness termination, the lower court determined that a dispositional hearing was not warranted and freed the child. The mother then in February 2015 brought a motion seeking to vacate the order which was denied. The mother appealed that denial to the Second Department. The Second Department remitted the matter back to Family Court ruling that the lower court should hold a dispositional hearing. The lower court then held the dispositional hearing and again terminated the mother's rights in January 2017. The mother appealed again to the Second Department who concurred that the child should be freed for adoption. That appellate decision finally freeing the child occurred in May 2018.

Matter of Jasnia Y., __AD3d__, dec'd 6/7/18 (3rd Dept. 2018)

Broome County Family Court was affirmed in revoking a mother's suspended judgment and freeing her children for adoption. The children were placed in care in 2009. In 2013, DSS filed to terminate her rights. The mother consented to a 6 month suspended judgment in 2014. One month before the suspended judgment was to run, DSS brought a violation petition. The mother failed to comply with the terms in significant aspects. She continued to have ties to a partner with whom she had a history of domestic violence and lied about it so clearly she had not benefited from her domestic violence counseling. During visitation she made inappropriate comments to the children about their foster family, ignored the children and made phone calls. She exhibited significant anger toward the caseworker in the presence of the children. She also stabbed a man in a domestic dispute. Therefore, her anger management treatment "had been for naught". She did not cooperate with the caseworkers as she lied about a pregnancy, lied about her living situation and would not execute releases. The mother's testimony on these issues was "wholly incredible". It was in the children's best interests to be adopted as they have a strong bond with their adoptive family where they have lived for years and it was unclear if the mother would be able to ever care for the children properly. The mother complained that a custodial arrangement with her sister had not been properly considered by the lower court. However the sister had a history of domestic violence and anger management issues. Further the mother has no standing to raise the issue on behalf of the sister. At the time of the appellate decision, the children would have been in care about 9 years.

Matter of Zander L., __AD3d___, dec'd 6/15/18 (4th Dept. 2018)

An Erie County mother violated her suspended judgment and the child was freed for adoption. The mother did not demonstrate safe and developmentally appropriate parenting, she did not maintain adequate housing or refrain from brining others to visitation. The mother acknowledged on the stand that she had been evicted from her apartment due to her friends causing problems and damaging the apartment. In one case, a drug addict friend had a seizure and got blood "everywhere" and the police were called. The mother did obtain a new apartment but her new roommate had a history of drug abuse and involvement with CPS. This roommate was present at some of the visits with the child. This new apartment did not allow children to live there but the mother made no efforts to find housing that did allow children. The lack of housing alone was enough to revoke the suspended judgment.

Matter of Elizabeth R., __AD3d___, dec'd 6/21/18 (1st Dept. 2018)

A maternal grandmother's petition for guardianship of one child and custody of another child was properly dismissed in New York County Family Court. The children were in stable and loving foster homes with foster parents who cared for them, wanted to adopt them and were likely to encourage sibling relationships. The grandmother was unsuitable as she repeatedly failed to acknowledge her daughter's severe abuse of 3 of her children. The grandmother also lacked insight into the child's history of abuse and their emotional needs.

Rights of Unwed Fathers

Matter of Joyelli Latasha M., 159 AD3d 426 (1st Dept. 2018)

A New York County unwed father's consent was not needed for an adoption. He failed to provide financial support for the child and failed to maintain contact with the child. Even when he was not incarcerated, he only visited once after the child was placed in foster care. Being incarcerated did not relieve him of his duty to support the child and communicate with her while she was in foster care.

Matter of Montrell A.D., 161 AD3d 411 (1st Dept. 2018)

The First Department agreed that a Bronx unwed father's consent was not needed for the children to be adopted. He did not maintain contact with the children or support them for the 2 years that the children were in foster care. He did not communicate with the children or the agency on a monthly basis as the statute requires. Although the court had suspended his rights to visitation, this was due to his own conduct and did not mean he was not still responsible to contact the agency about the children. The agency is not required to tell a parent that they have to provide support. His claim that he gave the children money and toys was not substantiated and is not enough in any event to show him to be a reliable source of support that was fair and reasonable according to his means. The father claimed that his due process right to counsel was denied but in fact his court appointed attorneys were relived to the father's own misconduct. He exhausted his right to an assigned attorney and he was sufficiently advised on the risks of self-representation.

Matter of Cristal O.C. 161 AD3d 726 (2nd Dept. 2018)

A Brooklyn father of two was not a consent father whose rights needed to be terminated. The children were born in 2005 and 2003 and no man's name was ever placed on either birth certificate nor was any man named in the putative father's registry. In 2012 the children were removed from their mother and placed in foster care. The alleged father was incarcerated at that time. Eight months later he appeared at the foster care agency offices and claimed to be the child's father. He was told repeated by the case workers to file for paternity of the children but did not do so for months. He ultimately did file and was adjudicated to the children's father – one day after a TPR petition had already been filed against the mother. The TPR did allege that while he might be the children's father, he did not have rights that needed to be terminated. The children were freed for adoption from the mother and the lower court ruled that the father had no rights. On appeal, the Second Department agreed that he had not met his burden of showing that he maintained substantial and continuous or repeated contact with the children, had not paid support and had not had regular visitation or other communication with the children.

Matter of Elijah Manuel V., 161 AD3d 665 (1st Dept. 2018)

Bronx County Family Court's determination that an unwed father was a notice only father or in the alternative that he had abandoned the child was affirmed on appeal. First the unwed father argued that the requirement in DRL § 111(1)(d) that an unwed father prove that he has financially supported the child is unconstitutional as the same

requirement is not made of unwed mothers. The First Department questioned the notice on this issue to the AG but did in any event did find that the statute was constitutional as the SCOTUS has ruled that gender based distinctions for out of wedlock children are not violations of equal protection. The agency has the burden of going forward with evidence that the unwed father's consent is not necessary and they did so here by proving that the father did not pay child support or maintain contact with the child since the child entered foster care in 2012. The father was not able to rebut this. His incarceration does not excuse his failure to maintain contact and he offered no proof that he had paid any support to the child according to his means. He did not testify at the hearing and a negative inference was properly drawn.

Lastly, the lower court's alternative finding that if he was a consent father, he had abandoned the child was also upheld. He did not visit or communicate with the child or the agency for the 6 months before the filing of the petition. His mother's testimony that he had visited the child in her home and that visits had occurred while he was incarcerated was not credible. The grandmother's interest and contact with the child cannot be imputed to the father in any event.

Matter of Khiry A.N.B. Jr., ___AD3d___ dec'd 6/5/18 (1st Dept. 2018)

A Bronx man was only a notice father as he had not supported the child. His rights do not need to be terminated. Even if he briefly cared for and supported the child for a few months, he had not provided support before that time. His incarceration and the failure of the foster care agency to inform him of his duty to support the child do not absolve him of the responsibility to do so.

Surrenders and Adoptions

Matter of Noah W., 158 AD3d 1258 (4th Dept. 2018)

An Erie County mother surrendered her 2 children, who had been in foster care, for adoption in the fall of 2010. The PACA that the mother and the adoptive parents and DSS had signed provided for 2 supervised visits a year. The visits were to be supervised by the Catholic Charities organization whose fee for that service was to be paid by the mother. There was also a clause in the agreement that if the mother missed any 2 visits, her rights to further visitation would be forfeited. The agreement also stated that she would receive a photograph of each of the children every spring. The agreement for the photograph was a separate and independent clause to the visitation. In 2016, the mother filed a petition alleged that she had not been given visitation or the photos and that she had been lied to by DSS and the adoptive parents. The lower court correctly dismissed the mother's requests for the visitation clause to be enforced as she had not seen the children in several years and offered no reason for that and provided no allegations as to why the visitation would now be in the children's best interests. The lower court did not abuse its discretion in denying the request of the mother's attorney for an adjournment to amend the petition and in dismissing that portion of the mother's petition without a hearing. However, the lower court erred in not granting the mother's motion for photos of the children as her right to receive the photos was absolute and not conditioned on the visitation. The mother alleged that she had been notifying the adoptive parent of her address and should have received the photos if they had been sent. The matter was remitted to Erie County Family Court with respect to the issue of the photographs.

Matter of Isabella 158 AD3d 799 (2nd Dept. 2018)

The Second Department reversed Orange County Family Court's dismissal of an adoption petition and remanded the matter back before a different Judge. The petitioner had been the child's legal guardian for over 5 years. The birth mother had abandoned the child and the birth father consented to the adoption. However, the lower court dismissed the adoption petition based on the petitioner's lengthy criminal record. The Second Department found that the criminal convictions had all occurred more than 20 years before the filing of the adoption petition and that the lower court erred in not hearing testimony on the child's best interests. Perfection is not required of adoptive parents and all relevant factors should be considered, not just the existence of a criminal record. Even if an adoptive parent has an "unacceptable record of misconduct" it could still be in the child's best interests to be adopted if the child is happy and healthy and considers the petitioner to be the parent.

Matter of Jason 159 AD3d 905 (2nd Dept. 2018)

Queens County Family Court dismissed an adoption petition and the Second Department reversed the dismissal, reinstated the petition and remanded the matter. The petitioner was the child's grandmother who had been the child's foster parent when the child was freed for adoption and now sought to adopt him. The agency approved of the adoption. The grandmother was separated from her husband and produced a separation agreement that she had her husband and executed. The lower court ruled that the separation agreement was just an agreement to live separately and apart and did not settle the full marital issues and therefore was not a valid separation as required by DRL §110. As a

married woman, the grandmother could not adopt alone. The Second Department ruled that the agreement was signed by both of the parties and contained their agreement to live separately, it was in writing, subscribed to by both of the parties and acknowledged in the form required to entitle a deed to be recorded as is described in DRL § 110. The agreement satisfied the statutory requirement. The fact that it did not include other marital issues is of no import.

Matter of Elizabeth P v Joann C. 160 AD3d 412 (1st Dept. 2018)

A Bronx birth mother filed for guardianship of her two children who had been freed for adoption. The adoptive mother's motion to dismiss was properly granted. The eldest child is over 18 and the matter is moot as to him. The birth mother has no standing to seek guardianship of the younger child since the birth mother surrendered that child and the adoptive mother has legally adopted the child. There are no rights under the conditional surrender that the birth mother is seeking to enforce. There are no allegations that the adoptive mother has become unfit or has abandoned the child.

Matter of Yasmine T., 161 AD3d 1179 (2nd Dept. 2018)

A Westchester County mother surrendered her 2 children with terms that included 4 supervised visits a year and photographs mailed to her twice a year. The terms also contained a provision that when each child turned 14, contact with the mother would only continue upon the child's consent. The children were adopted by an aunt. Over 3 years later, the mother filed petitions alleging that the adoptive mother was not providing the visits or the photos. The family court dismissed the petition and the mother appealed. Since the older child was now 19

years old, her issues are moot. The younger child's matter should be decided on the best interests of that child and that child is now 14 and does not wish contact. The child has the prerogative to make that decision under the agreement and there was nothing on the record reflecting any reason to rule otherwise.

Matter of Baby Boy O., __AD3d___, dec'd 6/8/18 (4th Dept. 2018)

In a private agency adoption, the birth mother signed a valid extra judicial surrender of her infant but then timely revoked the surrender. This revocation triggers a hearing on the child's best interests under SSL § 384 (6). Wayne County Surrogate's Court decision that the prospective adoptive parents were better suited to adopt and raise the child than the birth mother was affirmed by the Fourth Department. The adoptive parents had continuous stable relationships and employment and were better suited to meet the short term and long term needs of the child. It was not unreasonable for the lower court to have also considered the testimony of an expert as to bonding and attachment disorder.

Matter of Monica J.T. __AD3d __, dec'd 6/20/18 (2nd Dept. 2018)

A Kings County child was placed in foster care with a maternal great aunt shortly after her birth. Seven years later the agency brought a TPR proceeding and 10 months later while the TPR was still pending, the agency moved the child out of the great aunts home and placed the child in foster care with a non-relative. The great aunt then filed a petition for guardianship and one for visitation or custody. One year after that, the lower court terminated the mother's rights and dismissed the great aunts petitions. The great aunt sought a stay of the adoption while she appealed but the stay was denied by the Second Department. On appeal,

the parties informed the court that the child had in fact been adopted 2 months earlier and the Appellate Court, criticizing the parties' failure to tell them of the adoption, dismissed the great aunts appeal as now being moot.

MISCELLANEOUS

In Re Pascall v Poole 157 AD3d 463 (1st Dept. 2018)

The First Department upheld a fair hearing decisions that the foster care parents was not entitled to retroactive foster care benefits at the exceptional rate. No qualified psychiatrist or psychologist had during that time period, certified that the child had severe behavioral problems that required high levels of care nor had any physician certified that the child required around the clock care or had a qualifying illness. 18 NYCRR § 427.6 (2) and (3) and (4). After the child was in fact diagnosed with autism by a physician, then the foster parent was entitled to the exceptional rate from that point forward.

Matter of Velez v NYS OCFS 157 AD3d 575 (1st Dept. 2018)

In reviewing a fair hearing decision, the First Department concurred that the report should remain indicated and that it was reasonable related to future employment or foster care or adoption status. The caseworker's notes reflected that both the child and the mother stated that the subject of the report was driving a car with the mother in the passenger seat and the child in the back. They both stated that the subject hit the mother and pulled her hair and that this caused the child to become afraid and

cry. Even the subject admitted that the car swerved and that he feared an accident. The fair hearing properly credited these statements which were consistent with each other and which the mother had also provided to the emergency room and the police. The fact that there was no conviction on the criminal charges and that the subject had a different version of the events does not require OCFS to unfound the report. Further there was substantial evidence that this maltreatment was "relevant and reasonably related" to employment or fostering and adopting in that the subject refused to take responsibility for his actions, he refused to acknowledge that he had endangered a child, he refused to appreciate the seriousness of what he did. This demonstrates that he is likely to commit maltreatment again. This is a factor reasonable related to employment in a child care field and to being licensed as a foster or adoptive parent.

JA v SCO Family of Services dec'd 1/22/18 EDNY

In a federal law suit against a foster care agency based on allegations that a foster father sexually abused multiple children in his home, the EDNY ruled on the discoverability of the foster care records. Since the issue has arisen in a federal lawsuit, the SSL §372 rules do not apply but federal law governs the discoverability of the records. The federal court must weigh the plaintiff's interest in disclosure against the state interest in the confidentiality of foster care records particularly as it concerns names, birth dates and social security numbers of nonparty foster children. The plaintiffs are alleging widespread sexual abuse by one foster parent and alleging that the foster care agency knew or should have known of this. The claim is that the foster father's care of the children that were placed in his home should have been monitored more closely and so the agency's records of their overview of that care are relevant. The federal court ordered that all agency records must be

produced except for social security numbers but that the records would be subject to a confidentiality stipulation which would control and limit re-disclosure of the information in the records. The records disclosure is also limited only to the time period before the foster father's arrest regarding the same issues.

K.B. v SCO Family of Services 159 AD3d 416 (1st Dept. 2018)

In a Bronx County lawsuit against a foster care agency, the First Department reviewed discovery issues concerning the foster care records of a specific foster home where it was alleged that the child had been abused. The lower court had refused to allow access to some unredacted records but the First Department reversed. The mother's lawsuit alleged that the agency negligently certified the foster home her child had been placed in and failed to properly supervise it. The First Department found that SSL §372 requires that SCO keep records on foster homes and that these records are confidential. Such records are however discoverable under Art. 31 of the CPLR. This law is meant to protect the privacy of children in foster care and their birth parents but it is not meant to prevent a former foster child form obtaining access to their own records. When a child seeks their own records to further a law suit against an agency, only a very compelling showing should prevent or restrict the child's access to those records. Here, it was proper for the court to conduct an in camera review of the records so that no private information of nonparties would be released. But the lower court erred in ordering that the identities of the ACS caseworkers, the mental health professionals and other professionals who were involved in this matter be redacted. That information is being sought for potential witnesses and there was no privacy interests of these professional advanced that warrants removing their names. Also the lower court had ordered that both the plaintiff and SCO could subpoena investigative records from

ACS. There were difficulties in obtaining such information from ACS and so the lower court should have ordered that to the extent that such records also existed in SCO files, SCO should be ordered to produce them.

Matter of Charlotte MM. v Commissioner of Children and Family Services, 159 AD3d 1081 (3rd Dept. 2018)

The Third Department ruled on several procedural issues in this Art. 78 regarding an indicted report. The mother had custody of 2 of her 4 children. They were 13 and 17 years old. The mother traveled to Nigeria for 9 days to see her own mother and did not tell the children she was leaving the country. Schenectady County DSS indicated her for inadequate guardianship as she left the children alone without planning for them to be supervised when she left the country. The children's father had the other 2 children. He resided in Cortland County and the two parents had been involved in a custody dispute at the time.

First the mother argued that she was not provided with the proper information before the fair hearing. The file was provided to the mother before the hearing and her lawyer came to the hearing with a copy of the DSS case file although it had apparently been copied in a format that omitted some text. The ALJ allowed the mother's attorney to view the DSS copy of the documents before the hearing began and provided him with a complete copy after the hearing. The mother's counsel did not object to this and said he wanted proceed and did not object when the case file was admitted into evidence. There was no deprivation of due process.

Second the mother argued that the ALJ should have allowed the children's sworn statements into evidence or allowed them to testify by

telephone. The ALJ indicated that it was not normally procedure to allow an alleged maltreated child to testify. The Third Department found this to be rational as it protects children from being forced to testify or from being coached. Also the ALJ asked for an offer a proof and then concluded that what the children had to say was not much more than what was already in the record.

As to the substance, the mother claimed that while she did leave the children for 9 days while she was in Nigeria, the neighbors were watching the children. She had not provided any releases to these neighbors for medical or educational issues the children might have. The CPS notes indicated that the children, the neighbors and the ex-husband did not know where the mother was going and when exactly she would return. The neighbors told CPS that they had been asked to knock on the door in the mornings to make sure the children were awake but had not been asked to supervise the children or to have them stay at their apartment. Further the neighbors told CPS that the mother had asked them to lie to CPS about the level of their supervision. While the mother was out of the country, the 13 year old got suspended from school, the children argued with each other to the point that a neighbor had to intervene, the food left for them turned rancid and they had no money for food. The children had asked their father to wire them money for food. The children were distressed and scared. The report should remain indicated.

Matter of Loretta RR v Maryann SS., 160 AD3d 1065 (3rd Dept. 2018)

A Broome County father's girlfriend had helped him to care for his child since the child's birth. The biological mother did not object and was not involved with the child. The father died and the girlfriend continued to care for the toddler. DSS went to the home to investigate an allegation and found a note on the door that the girlfriend had taken the child out of

state. The DSS then obtained assistance from the South Carolina authorities and brought the child back to NYS and placed the child in foster care claiming that the girlfriend had no legal custody or biological relationship with the child. DSS filed a petition that the child was destitute and the girlfriend filed a petition seeking Art. 6 custody of the child. The child's foster parents also filed a petition for custody.

The lower court held a hearing on the custody petition and determined that the girl friend did not have a stable home environment and dismissed her petition. She appealed. On appeal, the girlfriend argued that the Family Court failed to utilize the extraordinary circumstances test and claimed that she did demonstrate extraordinary circumstances. The Third Department concurred that the lower court made no threshold finding on extraordinary circumstances and only considered the issue of the home environment of the girlfriend. While the appeal was pending, the child remained in foster care and the lower court dismissed the foster parent's custody petition. Now, however, DSS supports that the child be given to the girlfriend. While the appeal was pending, the lower court ruled that the girlfriend appeared to have demonstrated stability and is extremely committed to the child and that the child is very bonded to the girlfriend and is thriving with the girlfriend. The Third Department found that this new information means that the appellate court is no longer in a position to determine the appropriate underlying custody for the child. The original denial of the custody order is reversed and the matter remitted for further proceedings. The lower court must determine if the girlfriend can demonstrate extraordinary circumstances and then consider the best interest of the child.

Matter of Linda S.M., v Demetrius W., 160 AD3d 860 (2nd Dept. 2018)

Queens County Family Court properly dismissed a grandmother's Art. 6 petition that had been filed at a time when the grandchildren were in foster care as a result of an Art. 10 petition against the mother. However, at this point, the mother has been given the children back and had been granted an ACD on the petition. The mother had successfully completed the ACD terms and the Art. 10 petition had been dismissed. There are no extraordinary circumstances to provide the grandmother with standing to seek custody.

Autumn and Hemerd Black v Krista Ranley SDNY dec'd 6/8/18

In a federal lawsuit that a couple brought against an ACS attorney regarding claims that she violated their constitutional rights in ongoing Bronx County Family Court proceedings, the court indicated that an ACS attorney is analogous to a prosecutor and has absolute immunity on any personal claims against her. The court can only consider those claims brought against her in her official capacity.