# SELECTED CHILD WELFARE CASELAW

## January 2019 – June 2019

Margaret A Burt, Esq.

Mburt5@aol.com

585-385-4252

# Removals and General Art 10 Evidentiary Rulings

## Persons Legally Responsible

### Matter of Chance R., 168 AD3d 554 (1st Dept. 2019)

A New York County respondent was a PLR for the children in the home that he was not biologically related to given that he transported them to school, disciplined them and had been in a 3 year relationship with the mother. He claimed to only spend the night occasionally but there was evidence that he lived in the apartment with the mother and 2 of the children. The children who did not live there reported that he was always there when they visited and that the mother was always with him. He was also the biological father of the mother's youngest child and had been in the home daily to help with that child in the first month after birth.

### Matter of Deandre C., 169 AD3d 609 (1st Dept. 2019)

A New York County respondent was a PLR for 2 children that were not his biological children. He was the "functional equivalent of a father" and lived with them on and off over a 5 year period. He cooked for them, watched them afterschool and helped with homework. Even when he was not living in the home, he regularly visited and stayed overnight.

**Matter of Kevin D., 169 AD3d 1034 (2nd Dept. 2019)**

A Richmond County half sibling was a PLR. The half sibling was responsible to transport the child to a grandmother's house on weekends and school breaks He also fed the child and performed other parental tasks to aid the grandmother in her care of the child. He watched two of the half siblings when their parents were not home and it was during this time that he sexually abused them.

**Matter of Alisha A., 172 AD3d 1470 (1st Dept. 2019)**

The First Department concurred with New York County Court that the respondent was a PLR for the subject child that he sexually abused. The respondent cared for the child and assumed household duties. He told people that the child was his daughter and brought her to an outing with his current girlfriend and the girlfriend's family. The child, her mother and the respondent's girlfriend all testified to his relationship to the child. The fact that he did not live in the same house as the child did not preclude a finding that he was a person legally responsible.

**Matter of Jennifer P., 172 AD3d 1377 (2nd Dept. 2019)**

Kings County Family Court incorrectly dismissed an abuse petition on the respondent's motion, ruling that the respondent was not a person legally responsible. The Second Department

ruled that he was a PLR as he was the long term boyfriend of the child's mother and was the father of the child's half-sister and that at times he lived in the household as the father figure. He engaged in family activities, sometimes was the only adult in the home with the target child and when he was arrested for the sexual abuse, he gave his address as the family's home. The mother also testified that she and the respondent functioned as the parents to the children. However, the lower court, before the dismissal, did correctly rule that ACS could not introduce the respondent's criminal records regarding the sexual abuse of unrelated children as it was not corroborative. The matter was remitted to complete the fact finding and determine the allegations on the merits.

**Matter of Heavenly A.__AD3d__, dec'd 6/7/19 (4th Dept. 2019)**

An Onondaga respondent was a person legally responsible for the children in an educational neglect matter. To determine if a non-parent is a functional equivalent of a parent in a household setting, the court should look at the frequency and nature of the contact between the child and the respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the contact and the respondent's relationship with the parent. If a parent's partner participates in the family setting on a regular basis and shares responsibilities for supervising the children, this is a factor. This respondent

lived with the mother and the children, provided care for the children and he also was listed as an emergency contact at the school and on at least one occasion called the school to report the child as being absent.

## Removals and Orders of Protection

**Matter of Taith E., 168 AD3d 935 (2nd Dept. 2019)**

Kings County Family Court granted the mother's FCA § 1028 request for the child to be returned to her care, ACS obtained a stay and the Second Department reversed. The mother admitted that she hit her son with an extension cord and left welts on him in order to get "control" over him when he would not clean his room. The mother claimed that she only hit him on his arms and legs but the photos admitted showed he had been hit on the chest as well. The mother failed to address her mental health issues that had led to the incident. The child should not be returned to the mother's custody pending the outcome of the Art. 10 matter as he would be at imminent risk. The child shall remain in the care of the non-respondent father with supervised parental access to the mother.

**Matter of Cheryl P., 168 AD3d 1062 (2nd Dept. 2019)**

A 14 year old Orange County child was properly removed in FCA § 1028 hearing as the child and the mother had physical

altercations and the mother failed to ensure that the child was taking prescribed medication for mental health issues.

**Matter of Kayla C., 169 AD3d 495 (1st Dept. 2019)**

The First Department concurred with Bronx County Family Court that the 2 mothers in this matter should have temporary unsupervised visitation with their respective children. There is no evidence that the mothers perpetrated the sexual abuse or posed a safety risk to the children. The lower court also ordered that the no one else could be present during the visits, that the visits had to occur in public settings, that the children could not be left with anyone else during the visits and that the visits would be limited to 3 hours twice a week.

**Matter of Camille L., 170 AD3d 580 (1st Dept. 2019)**

Although the issue was moot by the time the appeal was heard, the First Department commented that the lower court did not abuse discretion in issuing a temporary order of protection against a Bronx mother. The petition alleged that the mother was neglecting her child due to the mother's untreated mental illness. The mother would not take her meds for schizophrenia and was repeatedly filing false claims that the child was sexually abused which disrupted the child's life.

## Summary Judgment Motions

### Matter of Annalise L., 170 AD3d 835 (2nd Dept. 2019)

A Queens County mother derivatively neglected her newborn based on the prior actions regarding her older children. The court correctly adjudicated neglect by summary judgment. The 4 older children had been adjudicated as neglected in the recent past. One of the children was still in foster care. The mother's whereabouts had been unknown for over 6 months during this pregnancy. She had not visited the older children during that time. The mother had not completed mental illness or substance abuse counseling and had not obtained suitable housing. Her lack of action on the issues that had resulted in the neglect of the older 4 children evinced a fundamental defect in the understanding of parenthood. The mother raised no triable issues of fact.

### Matter of Jaylhon C., 170 AD3d 999 (2nd Dept. 2019)

Queens County Family Court appropriately adjudicated neglect and derivative neglect by summary judgment of the mother of 8 children. Due to the mother's untreated mental illness and her violent aggressive behavior, there had been 2 prior adjudications of neglect regarding her oldest 4 children and her younger 3 children. Those 7 children and her 8th newborn infant were now

the subject of this proceeding. Although the FCA does not contain provisions for summary judgment, CPLR 3212 summary judgment can be granted if there are no triable issues of fact. The prior orders required the mother to undergo a full mental health evaluation and to comply with all recommendations. To date, the mother had not done so. Her fundamental defect in understanding the duties of parenthood justify the derivative finding regarding the newborn 8th child. The prior orders are proximate in time and it can be reasonable concluded that the issues are still present. The mother raised no triable issue of fact. The mother's argument that a motion for summary judgment must be accompanied by an affidavit by a person with knowledge of the facts as required by CPLR 3212(b) was not preserved for appeal.

**Matter of Sebastian R., 171 AD3d 928 (2nd Dept. 2019)**

Queens County Family Court appropriately adjudicated derivative neglect by summary judgment regarding the mother's 5th child. The four older children had been found to be neglected in a proximate time frame and it can reasonably be concluded that the conditions still exist. The mother did not rebut that the conduct or condition cannot be reasonably be expected to exist currently.

**Matter of Joseph Z., __AD3d__, dec'd 6/19/19 (2nd Dept. 2019)**

The Second Department reversed a neglect adjudication based on a summary judgment motion and remanded the matter for a hearing on the facts. ACS had moved for summary judgment based on the FCA § 1028 removal hearing. At the hearing, the mother, who was speaking through a sign language interpreter as she is deaf, did admit that the child's injuries were due to her but claimed that the child's scratches and marks occurred when she accidently scratched the child who she was trying to restrain. The child was difficult to control due to ADHD and oppositional defiant disorder. Therefore there are triable issues of fact.

## Other Evidentiary Rulings

**Matter of Logan R., 168 AD3d 946 (2nd Dept. 2019)**

Queens County Family Court did not err in denying a father his request for an adjournment to secure private counsel. The lower court had already accommodated 2 requests by the father for assignment of new counsel and a 3rd request to proceed pro se and these caused extensive delays.

## Matter of Faith B. 169 AD3d 1509 (4th Dept. 2019)

An Erie County father was found to have sexually abused his child while she was an inpatient at a psychiatric unit of the hospital. Prior to fact finding, the father moved for disclosure of the child's psychiatric records. The lower court reviewed the records in camera. The court also allowed the father's attorney to review the records as it related to the dates the sexual abuse allegedly occurred but not all of the child's records. The father's attorney objected and asked the court to mark the remaining records as an exhibit for any appellate review. On appeal, it was discovered that those records had been lost. The father argued that the lower court committed reversible error for failing to preserve the records. The Fourth Department ruled that this was not an appealable issue in that the father only alleged that the records were lost and not that the lower court abused its discretion by refusing to allow the father's counsel to review the records.

## Matter of Jaylyn Z., 170 AD3d 516 (1st Dept. 2019)

Bronx County Family Court properly considered the FCA §1028 testimony of the 14 year old child as an out of court statement in the child sexual abuse matter. The child was subjected to 3 days of cross examination in the removal hearing and then refused to return to court to testify further and so her testimony was stricken for the 1028. Her therapist indicated it would be

detrimental to force the child to return to the stand. However, the stricken testimony was appropriately used as an out of court statement in the fact finding which was then corroborated by testimony from the child's therapist that the child expressed symptoms and exhibited behaviors consistent with PTSD based on sexual abuse.

**Matter of Aliyah N., 171 AD3d 563 (1st Dept. 2019)**

The First Department reversed Bronx County Family Court's denial of a respondent father's motion to compel an EBT of the ACS expert medical witness. Pursuant to CPLR § 3101 (d)(1)(iii), there were special circumstances. ACS did not oppose the motion, did not know what the doctors evidence would be or even if the doctors opinion would support the allegations of child abuse. The medical records provided to the father did not include the expert's opinion of the child's injuries, her prognosis for the child or on what facts she had based her conclusion that the child's injuries were not accidental.

**Matter of Kaeyden H., _ 171 AD3d 627(1st Dept. 2019)**

A respondent in an Art. 10 matter must be allowed to share transcripts and notes obtained in the Art. 10 matter with any attorney representing him in a related criminal case. The court may not order otherwise.

**<u>Matter of Dupree M.,</u> 171 AD3d 752 (2nd Dept. 2019)**

Pursuant to the Indian Child Welfare Act and NYS law, Suffolk County Family Court transferred an Art. 10 proceeding to the Unkechaug Indian Nation's court. The child's attorney appealed the transfer order and the Second Department affirmed. All parties except the AFC had agreed to the mother and the Nation's request for the case to be transferred. Although the Unkechaug are not a recognized tribe under federal law, they are recognized by NYS and under SSL § 39 and 18 NYCRR 431.18 federal ICWA is to be applied to all state recognized tribes. Under ICWA, a " child custody proceeding" can be transferred to tribal court when the child is not domiciled on tribal land but where the parties and the tribe seek the transfer absent a finding by the court that there is "good cause" to refuse the transfer. An Art. 10 proceedings fits the definition of a "child custody proceeding" as this proceeding may result in a foster care placement. SSL §39(6) and 18 NYCRR 431.189a)(4) provide for such a transfer where there is a state court child custody proceeding involving a foster care placement or one that may culminate in a foster care placement as is the case with an Art.10. The AFC did argue that the most recent modification of NYS regulation that clarified that the transfer can occur in a matter that "may" culminate in a foster care placement did not occur until 1 month after the filing of this petition however,

federal ICWA applied at that time and the federal regulations did use the term "may culminate".

**Matter of Vicktoria DD., 172 AD3d 1470 (3rd Dept. 2019)**

A Saratoga County respondent cannot appeal an admission he made to neglect with counsel's assistance. Although there had been a day of testimony where the respondent had not been represented by counsel, this was his own choice.

**Matter of Baby Boy W., __AD3d__, dec'd 6/26/19 (2nd Dept. 2019)**

A Westchester County mother argued that the Family Court had no jurisdiction over her neglect matter when at a permanency hearing, she claimed to be "a hundred percent Native American" and that therefore the matter was an ICWA matter to be handled by the tribal courts. This contention was without merit as the mother failed to be able to identify any Indian tribe that she or her child was a member of and therefore provided no information to put the Family Court on notice that the child may be an Indian child under ICWA.

**Matter of Alana G., __AD3d__, dec'd 6/28/19 (4th Dept. 2019)**

The Fourth Department affirmed Erie County Family Court's neglect adjudication and ruled that an Art. 10 petition need not be verified citing to FCA § 1031, 165(a) and the Practice Commentaries among others. Further the admission of the child's school records was harmless if it was an error, as the information in them was cumulative of testimony and the finding of neglect was expressly not based on educational neglect.

## NEGLECT

## General and Mixed Neglect

**Matter of Olivia J.R., 168 AD3d 433 (1st Dept. 2019)**

A New York County mother neglected her 5 year old daughter. The child was absent from school 64 times and late 40 times in one year. The child's poor attendance contributed to her having educational delays and to her performing below average and she also did not obtain the special services she was to have under her IEP. The NYC Dept. of Education requires all children 5 and older to attend school. The mother also left the child with her paternal grandmother without advising the grandmother that she planned on leaving the child there for the whole school year and

not just for a day as she told the grandmother. The child was left in dirty clothing with no other clothing or provision for food or medical care. The mother only brought the child some clothes and medical documents after the foster care agency asked her to do so. The mother did not provide this young child with a stable home.

**Matter of T.N. 168 AD3d 743 (2nd Dept. 2019)**

A Rockland County father neglected his 6 month old child by leaving her with the child's mother who he knew to be a danger to the infant. The mother made "chilling" statements to the father over a 2 week period that she did not want the child and that she intended to suffocate the child by putting a pillow over the baby's head. The father moved out of the family home during this time period and left the infant in the care of the mother and delayed for several days before seeking custody of the child at court.

**Matter of Justice L., 168 AD3d 1057 (2nd Dept. 2019)**

A Suffolk County mother neglected her children by inflicting excessive corporal punishment on them. She failed to supply the children with food and she allowed a child to ride in a car with the father when the father was intoxicated.

## Matter of Deandre C., 169 AD3d 609 (1st Dept. 2019)

New York County Family Court was affirmed on appeal. A respondent neglected the 3 children in the home when he engaged in violence against the mother. He choked her, kicked her, slapped her in the face and threw garbage at her – all in the presence of 2 of the children. He also used excessive corporal punishment on one of the children including throwing him into a bathtub where the child hit his head. His behavior was derivately neglectful of the 3rd child.

## Matter of Zahir W., 169 AD3d 909 (2nd Dept. 2019)

The Second Department reversed a neglect adjudication against a Queens' mother. The mother left her 2 children with her sister, the children's aunt, for the summer. They had agreed that she would pick up the children in the beginning of October. When she did not return to pick the children up as agreed, ACS filed an Art. 10 petition and the Family Court adjudicated neglect. The Second Department disagreed, ruling that there was no evidence that the children were at any risk or harmed in any way while living with the aunt and therefore there was no neglect.

## Matter of Evanna S., 170 AD3d 496 (1st Dept. 2019)

New York County children were neglected by their parents. The mother's home was chronically unsanitary with dirty diapers and feces thrown about the room. The children were unkempt and smelled. The children did not receive proper nutrition or medical care. The pediatrician had to tell the mother that the children's weight loss was an issue and prescribed a feeding plan. The mother failed to follow caseworker instructions to obtain medical care for the children when they were seriously ill. She did not attend therapy that she needed to and routinely used poor judgment in caring for both the children and herself. The children's father had untreated mental health issues and did not properly care for the children at the times that the children lived with him. He also failed to testify and a negative inference can be drawn.

## Matter of Jacob W., 170 AD3d 1513 (4th Dept. 2019)

An Onondaga County father neglected his 2 children and derivatively neglected the 3rd child. The father engaged in abuse toward the mother while the children were present. Also the father choked the older boy twice in 2 months. The 2 older children said they were afraid of and apprehensive about the father. Their condition had been impaired or was in imminent danger of being impaired. This fundamental defect in the father's understanding of appropriate parenting behavior made

the 3rd child derivatively neglected. A stay away order of protection for one year for the father was not an abuse of discretion and was in the children's best interests.

**Matter of Jordin B., 170 AD3d 996 (2nd Dept. 2019)**

The Kings County Family Court dismissal of a neglect petition against a mother and a person legally responsible was affirmed on appeal. The PLR had previously, some 6 years earlier, been found to have sexually abused a child in an unrelated proceeding. This did not establish that the subject child was in imminent danger simply by being in the same household as the PLR.

**Matter of Ricky A., 170 AD3d 1667 (4th Dept. 2019)**

Based on events occurring in a 24 hour period, a Wayne County mother neglected her children. The mother's boyfriend, who was also the father of one of the children, 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. They both then left the home which left the children alone. Having seen their father's intoxication, the domestic violence and the father's 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 the home – a trip that takes about 2 hours. The sister also 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 to the home but when they saw the police presence at the home, they chose to drive away and stayed away another 4 hours. The mother failed to protect the children from the father and failed to provide proper supervision of the children by leaving them alone.

**Matter of Aerobella T., _170 AD3d 1453 (3rd Dept. 2019)**

Only the respondent father of the 4 subject children appealed the neglect adjudication that Sullivan County Family Court had made against the 2 parents. The Third Department affirmed that the father had neglected the children as it related to 2 petitions. The first petition had been filed after the mother had given birth to a 4th child who appeared to be in drug withdrawal. When the CPS worker arrived at the hospital, she also found that the father had left the 3 older children at the hospital alone with the mother who had just given birth hours earlier. When the father arrived back at the hospital, he was unable to tell the caseworker what the plan was for the older children's care. Two of the children were wearing no underwear, had dirty feet and shoes that were too small and on the wrong feet. The other child

had blotches and scratches on her and one child said they were from the father hitting her. The children smelled and had bug bites on their legs.

After a brief removal, the children were allowed back in the home under DSS supervision with an order that the father was not to allow the mother to be alone with the infant. In just a few weeks, a second petition was filed and this resulted in another adjudication against the father. This was based on events that took placed when two workers arrived at the home for a scheduled visit to check on the family. They could hear the children inside but could not gain access. They knocked on the door repeatedly and telephoned the respondents' phones but for 40 minutes could get no response. One child said through the door that he could not get his parents to wake up. The caseworkers called for law enforcement.

The state trooper had to force entry through a back door that led to a bedroom where the 3 older children were confined by a sort of half door that separated them for the parents' bedroom. The trooper yelled at the parents to wake up repeatedly but not until he touched the father's feet several times did the father finally wake up. One of the children was completely naked, another was naked from the waist down and all three children were covered in diaper cream and the youngest of the 3 had the diaper cream all in her mouth. The 3 week old baby was located in another room in an unsafe situation – in a bassinet covered with several blankets and with a bottle propped. The home was

unsanitary. A training toilet had feces in it and there was feces on the floor of the room where the children had been confined. They were also 2 mattresses in the room that were very dirty and had no sheets. There was food all over the floor.

The father's version was that he had taken a nap and that the conditions of the home and the children was fine as he lay down for the nap but the lower court found his testimony implausible. The children were both impaired and at imminent risk of impairment.

**Matter of Kyle L., 171 AD3d 1068 (2nd Dept. 2019)**

The Second Department reversed the Westchester County Family Court's dismissal of a neglect petition. The allegations were that the mother subjected the child to unnecessary medical procedures that could have had harmed the child. At first the Family Court held the petition in abeyance while an Art. 6 petition between the parents was handled before a different Family Court Judge but then, sua sponte, the Judge dismissed the Art. 10 petition without prejudice. When DSS learned of the dismissal, they refiled another petition essentially alleging the same issues. The Art. 10 Judge then learned that the father had gotten temporary custody in the Art. 6 proceeding and that the mother had not sought visitation with the child for some time. The Judge again dismissed the Art. 10 petition again – this time for a failure to state a cause of action. The Second Department

reinstated the petition ruling that the petition did state a cause of action.

## **Matter of Maggie YY., 172 AD3d 1562 (3rd Dept. 2019)**

The Third Department affirmed Chemung County Family Court's determination that a mother neglected her 5 children. The stepfather, who was also the father of the youngest child, forcibly removed an air conditioner from the window of the family home and then kicked in the front door to get into the home where he then had a physical fight with the mother and the oldest child. The younger children saw him doing this. The mother continued to permit the stepfather to be present in the home knowing his history of domestic violence and his untreated mental illness. The maternal grandmother testified that the mother regularly smoked marijuana in the home in front of 2 of the children. The grandmother also testified of an incident where the mother broke one child's eyeglasses and another incident where 2 of the children seriously injured a 3rd child while the mother was present and did not protect the injured child.

## **Matter of Myracle N.P., 172 AD3d 479 (1st Dept. 2019)**

A New York County father derivatively neglected his newborn child. A 2010 adjudication of neglect based on sexual

misconduct with his older child as well as his failure to obtain mental health treatment and take prescribed medication was proximate enough in time to support the derivative finding. The father had complied with some services and had visited his other children but that was not sufficient given that he continued to failure to accept responsibility for his sexual misconduct. He had also refused to continue any therapy or medication even though he had been ordered to do so under the prior neglect matter.

## Matter of Heavens v State of New York OCFS

## 172 AD3d 594 (1st Dept. 2019)

A Bronx day care worker brought an Art. 78 proceeding after losing a fair hearing that sought to unfound an indicated report. The Appellate Division agreed that the indicated report should remain on the SCR. The day care worker failed to supervise a 4 year old child such that the child fell out of a window. Approximately an hour passed between the last time the child was seen and when the child was admitted to the hospital after being found outside on the ground unconscious. The day care worker argued that she was not given the OCFS exhibits that would have helped her refute the allegations but in fact the ALJ asked her if she wanted to review the OCFS materials before the hearing and she declined to do so.

**<u>Matter of Ellysha JJ.,</u> __AD3d__, dec'd 6/6/19 (3rd Dept. 2019)**

A Broome County father neglected his daughter by coaching her to lie about neglect and abuse in the home of the mother. This resulted in the child being the subject of multiple examinations and investigations. The father reported the mother for physical abuse of the child, claiming the child had bruises. The mother testified that neither she nor anyone in her home ever used corporal punishment on the child. The child told the CPS worker that she was told by the father to lie and blame her mother for the bruising on her legs and to tell CPS that she was afraid to be at the mother's home. The caseworker said the child's bruises appeared to be typical childhood bruises.

The father also made several claims that the child was being sexually abused by someone in the mother's home. This resulted in repeated examinations and interviews of the child which were invasive and intimidating on some level. This also resulted in an order of protection which kept the child from some maternal family. A PA testified that she could not find any physical evidence that the child was being abused and law enforcement testified that the child appeared to be coached. The CPS worker stated that at first the child told her she was being sexually abused but then she said she was not and the CPS worker believed that the child was being coached. A sexual assault forensic examiner did find a small tear in the child's vaginal area that was suspicious for sexual abuse. The child

indicated that the father regularly checked her vagina looking for "dirt". The CPS worker told the father that based on the child's age, he should not be examining the child's vagina but the father continued to do so, claiming that he needed to look for evidence that the child was being sexually abused. The lower court found that the father was fixated on harassing the mother and subjected the child to unnecessary investigations and medical procedures in an attempt to obtain custody of the child. The Appellate Court affirmed.

**Matter of Renezmae X., __AD3d__, dec'd 6/6/19 (3rd Dept. 2017)**

Two Broome County parents of a newborn derivatively neglected the child. A prior finding of neglect regarding the oldest child had resulted in an order some 7 months before this child was born. That prior order had required that the parents had to participate in mental health counseling, parenting classes, substance abuse evaluations and maintain a clean and safe home. After this child was born, the apartment was observed to have urine and dog feces on the floor from the 4 dogs living in the family home. The back door was broken and did not latch, the tub was leaking and the apartment had no electricity. The mother had tested positive for drugs while pregnant with this child and at birth, the baby was observed to be "jittery" and "shaky". The mother was continuing to have seizures and had to be advised to see a neurologist, her attendance in the court

ordered parenting classes was poor and she had not completed ordered substance abuse treatment. The mother missed drug screens and visits with the older child. She failed to attend the older child's doctor appointments. Given the proximity of the prior finding and the current issues, the newborn was neglected.

**Matter of Peter T., 04952__AD3d__, dec'd 6/19/19 (2nd Dept. 2019)**

A Westchester County couple loved their 5 month old child and were willing to participate in services to help them care for the child. Sadly, the couple's respective intellectual disabilities gave them insufficient skills to meet his needs. There was also a history of domestic violence perpetrated by the father on the mother. The child was in imminent danger of becoming impaired due to the parent's failure to exercise a minimum degree of care.

**Matter of Doe v OCFS__AD3d__, dec'd 6/19/19 (2nd Dept. 2019)**

The Second Department agreed that a SCR report should remain indicated and was reasonable related to employment. The mother accidently hit her 5 year old in the face causing bleeding while fighting with her husband. Just 3 weeks later she was

arrested and ultimately plead guilty driving while intoxicated while her 3 and 5 year old were in the car.

**<u>Matter of Jack NN.,__</u>AD3d__ dec'd 6/20/19 (3rd Dept. 2019)**

A Chenango County couple neglected their child who lived with them as well as her 2 children from a previous relationship who lived with a non-respondent father but visited the mother's home 3 weekends a month. On appeal, the respondents claimed that the court should not have proceeded in their absence on the day of the hearing but should have granted the defense attorney's request for an adjournment. The respondents had appeared at the court house that day but left shortly after a deputy told them that there was a warrant for the father's arrest and that he would be taken into custody after the hearing. The respondents claimed that they left as the father was having chest pains and they went to the emergency room. The lower court did give the parents 2 hours to appear and contact was made to see if they were at the emergency room. They did not appear at the local hospital and they never contacted the court or their attorneys. The lower court was correct to proceed and to grant an adjournment.

Further, there was sufficient proof of neglect. The court took judicial notice of the non hearsay portion of the removal hearings, including photographs, as well as police reports of the

charges made against the respondents for EWOC and possession of marijuana that were still pending against the father and the mother's conviction for EWOC. The police reports were admitted to show the criminal charges made on the day the youngest child was removed from the home, redacting the supporting narratives and affidavits which contained hearsay. The DSS offered no other testimonial proof. The respondents argued on appeal that it was not legally sufficient to base a decision solely on the testimony at a removal hearing unless there is a finding under CLPR 4517 that the witnesses are currently unavailable. However, here there was more evidence offered than just the removal hearing testimony. At the removal hearing, the lower court had found that the home was deplorable, unsafe and unsanitary with garbage in every corner, only one sink and no bath or shower. The toilet and sink were "caked in filth". There were medications, uncapped syringes, suboxone wrappers and marijuana remnants all throughout the home in areas that were readily accessible to the children. There appeared to be growing equipment for marijuana. The youngest child slept in a tent in the living room near garbage and marijuana remnants. This was all established in non hearsay testimony at the removal hearing and subsequently the mother was then criminally convicted of EWOC based on the conditions of the home and the father has similar charges still pending. It may have been a "better practice" for DSS to have produced the caseworker to testify again about what had been observed in the home on that day, but given the circumstances, a failure to

establish her unavailability to testify was harmless error. Further, the DSS did prove that they made reasonable efforts to reunify the family by providing a parent aide, referral to substance abuse programs, parenting courses, domestic violence counseling and mental health evaluations. Weekly visits were provided. The respondents did meet with a parenting aide and the mother was able to clean up the home once a grandmother moved in with them. However, the mother did not engage in the other recommended treatments and had stopped visiting the older children. The parents claimed they needed transportation help but had not asked for it. The agency indicated they would have provided such help had the respondents said they needed it. DSS has made reasonable efforts towards reunification and any failure is due to the respondents' conduct.

**Matter of Ethan L., __AD3d__, dec'd 6/26/19 (2nd Dept. 2019)**

A Queens County father neglected his child when he verbally threatened to kill the child and the child's mother. In the presence of the child, the father threatened to throw the 2 year old child off the apartment balcony.

## Educational Neglect

**Matter of Selena O., 168 AD3d 590(1st Dept. 2019)**

Despite two Bronx parents having a history of neglect and a prior termination, the First Department reversed a new neglect adjudication. ACS failed to prove that the 3rd grader was educationally neglected as alleged. The child was regularly attending school and had special needs. The problems were connected to a lack of communication between the parents and the school and some of that was because the school used the child, who had learning disabilities, to communicate with the mother. ACS also failed to prove the 3 year old was neglected in that the younger child did have speech delays but the only proof offered was that the mother and the CPS worker discussed those delays. There was no evidence presented that there had been any recommendations or referrals that were ignored. As to the 3rd child, no proof was presented at all.

**Matter of Jaime D., 170 AD3d 1524 (4th Dept. 2019)**

Oswego County Family Court correctly adjudicated a father to have educationally neglected his child. The child had significant unexcused absences and was tardy to the extent that these things affected his education. There was no explanation offered for the multiple absences. The father was adequately represented even though he did not have an opportunity to meet with his lawyer on the morning of the fact finding. The lower

court gave the father and his counsel time to discuss the situation before the hearing began.

**Matter of Jahzir Barbee M., 171 AD3d 1181 (2nd Dept. 2019)**

The Second Department reversed a neglect adjudication against the Queens' mother of a special needs child. The child had speech and language impairments and had had an IEP since the 3rd grade. In 5th grade, he was also diagnosed with ADHA and dyslexia and in 6th grade he was classified as emotionally disturbed and special education classes were recommended. The mother disagreed at that time with the schools assessment and revoked her consent for the IEP. She also refused to allow independent neuropsychological testing and transferred the child to a new school for 7th grade. There the child was diagnosed with oppositional defiant disorder and ADHD and prescribed Adderall. The child was classified as emotionally disturbed and the mother then consented to a new IEP. Contrary to the lower court ruling, the mother had not educationally neglected the child by her refusal to consent at one point to an IEP or by her refusal to allow independent neuropsychological testing. It was not medical neglect to refuse the testing nor was it neglect that the child missed some Adderall doses when he visited with his father.

**Matter of Puah B., __AD3d__, dec'd 6/6/19 (1st Dept. 2019)**

Although the First Department reversed findings of neglect by the Bronx County Family Court based on inadequate food, clothing and shelter, the court affirmed the educational neglect finding. Testimony regarding the condition of the family home on one visit was not sufficient for the adjudication regarding food clothing and shelter. However, the two older children were 9 and 7 and were not enrolled in school. The mother did not follow the proper procedures to obtain DOE approval for home schooling. The mother did not establish that she was qualified to teach the children, she admitted that her plan had not been approved by the DOE and she did not show that her instruction was substantially equivalent for the public school or that the children were educated for as many hours as they would be in public school. She used college level textbooks with the children and gave them high school examinations which was inappropriate based on their ages. The mother claimed she spent 25 hours a week educating the children but she also had a full time job in Manhattan. Although it would have been helpful to have the children tested to see if they were harmed by the absence of proper education, this did not occur due to the mother's lack of cooperation. The younger children were derivately neglected even though they were not yet of school age. There was a dissent that argued that there was no proof provided that the children were harmed in any way by the

mother's home schooling and that failing to obtain specific permission for the home schooling plan is not per se neglect.

**Matter of Heavenly A.__AD3d__, dec'd 6/7/19 (4th Dept. 2019)**

Onondaga County Family Court was affirmed in its determination that the children in this matter were educationally neglected. In the most recent school year, the children were out of school more often than they attended. The failure of one respondent to appear and testify resulted in the strongest inference against him.

## Parental Substance Abuse

**Matter of Jillian E., _170 AD3d 1627 (4th Dept. 2019)**

The Fourth Department concurred with Oneida County Family Court that a mother neglected her children based on evidence that drug paraphernalia used in the manufacture of meth – including acetone – was located in the family home. The materials were in areas accessible to the children.

## Matter of Royal P., 172 AD3d 533 (1st Dept. 2019)

The First Department reversed New York County Family Court's neglect adjudication. Although ACS argued that the father's alcohol and cocaine use established a prima facie case of neglect, the father rebutted the inference. The father was able to show that the child was well cared for, healthy, well fed, had appropriate clothing and his medical needs were addressed. It is not necessary to determine if the father's participation in court ordered substance abuse treatment was "voluntary" in the context of the defense to the presumption since the father successfully rebutted the presumption with the child's condition. Further, although the father did test positive for alcohol and cocaine on several occasions, the child was in the care of a babysitter on those occasions and there was no proof that the father had every used or was under the influence when in the child's presence. The caseworkers never saw the father under the influence when the child was in his care.

## Matter of Eliani M.-R., 172 AD3d 636 (1st Dept. 2019)

A New York County mother neglected her child by placing her 13 year old in close proximity to narcotics trafficking. The mother took the young teen with her while she drove to New Jersey with cocaine and ecstasy with the intent to engage in drug sales. The mother dropped off her daughter and her own husband in a parking lot while she went to another parking lot

and sold drugs. The police then arrived and arrested the mother in front of the teen who began to cry hysterically. The child was placed in imminent physical, mental and emotional danger due to being in close proximity to drug trafficking.

**Matter of Jack S., __AD3d__, dec'd 6/28/19 (4th Dept. 2019)**

Erie County Family Court correctly relied on the presumption in FCA § 1046 (a)(ii) that the father's drug abuse was neglectful of the children. Here the father used cocaine nearly nonstop for the week prior to the children being removed. He admitted he was addicted to cocaine. The mother called the police to assist and the father was injecting cocaine just as the police arrived. There were dozens of needles in the home. The father also failed to testify at trial. He did not rebut the presumption of neglect as he failed to show that he was regularly participating in a voluntary program even if he was enrolled in one.

## Parental Domestic Violence

**Matter of Chandler A., 168 AD3d 576 (1st Dept. 2019)**

A Bronx father neglected his children based on his violence to the mother. He physically struck the mother in front of the children, hitting her in the face, yanking her by the hair and punching her in the nose which caused her to bleed. The mother credibly testified to this and the father's denial was not credible.

Both parents admitted that the children were very scared and nervous and the oldest child cried out "stop it! " during the fight. The oldest child grabbed the younger children and locked herself and her siblings in the bathroom until the police came. Supervised visitation for this father was proper.

**Matter of Damaris D., 169 AD3d 504 (1st Dept. 2019)**

A New York County respondent neglected the children based on the numerous physical altercations that the children saw between him and their mother. The respondent admitted that the children showed that they were fearful when he fought with the mother. The mother testified that they hit each other in front of the children. During one fight, not only did the children witness the fight, but the 4 year old attempted to intervene. The respondent picked up the child and threw her into a chair. The respondent claimed that the mother was the aggressor but there was a prior finding in Family Court against the respondent for the same children and their half siblings. The respondent had not completed a batter's program, anger management or a mental health evaluation as previously ordered.

**Matter of Kamryn C., 169 AD3d 672 (2nd Dept. 2019)**

Kings County Family Court was affirmed on appeal. The father forced his way into a home where his 7 month old son and

another older child, who he was responsible for, lived. He grabbed the 7 month old and while holding the baby, he physically attacked the child's uncle and the child's mother. The baby sustained injuries during the altercation that followed. He did not act as a reasonable and prudent parent. This evinced a profound lack of understanding of parental responsibilities such that the older child, who was not even present, was derivatively neglected.

**Matter of O'Ryan Elizah H., 171 AD3d 429 (1st Dept. 2019)**

New York County children were neglected by their father due to the repeated incidents of domestic violence between the father and the mother. The children were in close proximity to the violence and this put them at imminent risk of neglect.

**Matter of Terrence B., 171 AD3d 463 (1st Dept. 2019)**

A New York County father neglected his son. The father engaged in multiple fights with the child's mother – both verbal and physical. He inflicted physical violence on the mother while the child was in the home on a least 2 occasions. The child had become "overly- aggressive and uncooperative" toward his teachers and the other students at school and had "significant" behavioral issues at home. This showed that the

child was at imminent risk of impairment due to the violence in the home.

**Matter of Serenity G v Modi K. 171 AD3d 588 (1st Dept. 2019)**

As to the allegations in this matter of domestic violence and neglect, the First Department concurred with Bronx County Family Court. The 3 older children stated that they frequently saw the respondent hit their mother. One child saw him hit the mother when she was pregnant, throw a fan at her and "stomp" on her while she lay on the floor. The children indicated that they felt "sad" and "scared" when they saw the violence. The children's out of court statements cross corroborated each other. The mother had also obtained an order of protection. The 2 younger children were in the apartment when the domestic violence occurred and therefor were also neglected as they were in close proximity to the violence.

**Matter of Joseph PP., 172 AD3d 1478 (3rd Dept. 2019)**

A Sullivan County mother appealed her neglect adjudication. The mother lived with her boyfriend and her toddler. On one occasion, the mother and boyfriend were arguing and the boyfriend was punching and kicking her. The mother went to the room where the toddler was in his pack and play and called

911 on her phone, leaving the phone hidden but connected so that the rest of the fight was taped by the 911 line. The father continued to yell at the mother, came into the child's room and picked up the crying child and threw him back into the pack and play and yelled at the child to "shut the f___ up". The father then picked up a piece of the child's furniture and threw it at the mother but it bounced and hit the child. An order of protection was then issued that directed the boyfriend to stay away from the child and the mother. Less than 2 months later, the mother, child and the boyfriend all attended a party at the grandmother's home and they all stayed the night. The mother had asked the grandmother if the boyfriend could attend. The mother and father started fighting the next day at the grandmother's and the police were called. The child had been left sitting on the kitchen table while the parents were fighting. The mother was charged with EWOC and the criminal court issued an order of protection keeping the mother away from the child. An Art. 10 proceeding was filed. Family Court found the mother to have neglected the child.

On appeal, the mother argued that her behavior was bad parenting but not neglect. The Third Department found that the child had been injured by the boyfriend in a violent and traumatic fight and that an order of protection had been issued to keep him away. Thereafter the mother willingly invited the boyfriend to the party and to stay overnight. This was only a short time later and therefore she willingly exposed the child to

imminent danger of harm by the boyfriend. Both of these adults disregarded the child by arguing loudly and physically fighting again, resulting again in police involvement. Exposing this child to such danger is not something a reasonable and prudent parent would do.

**Matter of Justin E., 172 AD3d 613 (1st Dept. 2019)**

The out of court statements of a New York County child about the domestic violence the respondent and her mother were involved in was corroborated by the respondent's own statements to the caseworker. The court properly took an adverse inference from the respondent's failure to testify in court or to offer any evidence. The child was impacted by the respondent's behavior in that the child indicated she was afraid of him. She was therefore neglected and the child's half sibling, who was the respondent's child was therefore derivatively neglected.

**Matter of Najaie C., __AD3d__, dec'd 6/19/19 (2nd Dept. 2019)**

The Second Department reversed a Kings County dismissal of a neglect petition against a mother. The mother attacked her pregnant sister with a knife causing cuts to woman's ear which required medical treatment. This happened while the children

were in the home. The lower court found that there was no proof that the children were at risk of harm but the Appellate Division disagreed. Imminent danger can be inferred from the mother's egregious conduct and from the children's proximately to the violence even if they were unaware of it.

## Excessive Corporal Punishment

**Matter of Chance R., 168 AD3d 554 (1st Dept. 2019)**

A New York County respondent neglected a child by inflicting excessive corporal punishment. The child made out of court statements corroborated by medical records and the caseworker's observations. One incident can support excessive corporal punishment. This warranted a derivative neglect ruling regarding the other children.

**Matter of Justin M.F., 170 AD3d 1502 (4th Dept. 2019)**

Monroe County Family Court's dismissal of an excessive corporal punishment matter was reversed. DSS established that the father had neglected the child by striking the child. Witnesses and medical reports indicated that the child had a bruised left temple, a bruised eye and a bloody and swollen nose.

## Matter of Jonathan L v Poole 170 AD3d 1515 (4th Dept. 2019)

The Fourth Department unfounded an indicated report on excessive corporal punishment from Erie County. A father struck his 10 year old son 2 or 3 times with a belt over the child's clothing. The father and the mother claimed the child seemed unfazed by the punishment and did not complain of pain. The school observed marks on the child's leg and back on the next day and the CPS worker noted marks on the child's leg but not on the back. The worker called the child "upset" but DSS did not present any evidence that the child was impacted by the incident. Any marks on the child's back were such that apparently they were gone the next day as the CPS worker did not see them. Although the ALJ found that the marks on the back were caused by the father, the ALJ only found that the father "most likely" caused only one mark on the child's leg. This was not enough to establish that the child was impaired or at imminent risk of impairment.

## Matter of David B., 171 AD3d 104 (2nd Dept. 2019)

The Second Department affirmed a Queens County Family Court's adjudication of excessive corporal punishment. The child's stepfather denied the allegations but the child made out of court statements that he had pushed her to the ground and choked her. These statements were corroborated by the out of

court statements of the child's brother who witnessed the incident. Although the caseworker did not see any marks or bruises on the child, she did see the child limping and saw a bandage on the child's leg.

**Matter of Alyssa-Marie D., 171 AD3d 493 (1st Dept. 2019)**

A New York County father used excessive corporal punishment on his son. The child made out of court statements and the statements were corroborated by the mother's testimony and by photos of the injuries. One incident is sufficient for an adjudication. The other children were derivatively neglected by the father's actions and do not need to have been injured themselves for the derivative adjudication.

**Matter of Serenity G v Modi K. 171 AD3d 588 (1st Dept. 2019)**

As to the allegations of excessive corporal punishment in this Bronx County Family Court matter, the First Department concurred that the respondent beat the children. The 3 older children told the caseworker of the beatings and of the respondent's threats to "make them bleed". One child said the respondent used his hand and a belt and that once he was hit so hard that he urinated on himself. Another child told of being

dragged around the apartment. The 3 children's statements cross corroborated each other.

**Matter of Zana C., 171 AD3d 1045 (2nd Dept. 2019)**

A Kings County mother used excessive corporal punishment on her daughter. The mother started a fight with the child by physically attacking and choking the child. The fight was over the flavors of ice pops.

**Matter of Patrick A. St. M-H., 172 AD3d 603 (1st Dept. 2019)**

A 7 year old New York County boy was neglected by his father. After spending the weekend with him, he returned to the mother's home with a bruise on his cheek. The child told multiple people that his father slapped him twice in the face, causing his tooth to bleed. There was still a 2-3 centimeter linear bruise on the child 3 days later.

# Parental Mental Health

## Matter of Joseph L., 168 AD3d 1055 (2nd Dept. 2019)

The Second Department affirmed Suffolk County Family Court's adjudication that a mother's mental illness created a risk of imminent harm to the child. The mother's protracted history of severe psychosis was largely untreated. During her testimony, the mother had a "colorless speech pattern" and a "vacant expression" and blamed group home staff, group home residents, and her medical professionals for her situation. The mother lacked insight into having an untreated mental illness that affected her child.

## Matter of Amiracle R., 169 AD3d 1453 (4th Dept. 2019)

Erie County Family Court adjudicated that the mother of 4 children neglected them. Despite the fact that the mother had consented to the disposition and that the dispositional order had since ended, the mother is entitled to appeal the adjudication of neglect as it is a permanent stigma. The mother did not default at the fact finding even though she failed to appear for court on the second day of the hearing. All the testimony was on the first day and the court only issued its decision on the second day. DSS did establish that the mother's mental illness created an imminent risk of harm to the children. There was appropriate

proof of her mental illness and that she had voluntarily sought treatment for her condition. She admitted to delusions and paranoia. Her illness resulted in her staying in the home with the shades closed and she would not allow the children to go outside. The mother admitted that one of the children did most of the cooking for the family as the mother was too depressed to do so. The mother also admitted that she was irritable with the children, yelled at them and called them names. She knew she had been violent in the past and called the children names to try to stop herself from hitting them. The mother screamed at and threatened a caseworker in front of the children and hit the youngest child during a psychiatric assessment.

**Matter of Baby Boy W., 170 AD3d 538 (1st Dept. 2019)**

New York County Family Court was affirmed on appeal regarding a mentally ill mother's neglect adjudication. The child was a newborn and the mother had untreated mental health issues. She had been diagnosed with anxiety, schizophrenia, bipolar disorder and personality disorder. She was aggressive, depressed, had poor impulse control and suicidal ideation. She had been repeatedly hospitalized. This behavior put the infant at imminent risk of impairment.

## Matter of Zackery S., 170 AD3d 1594 (4th Dept. 2019)

The Fourth Department affirmed Monroe County Family Court's determination that a mentally ill mother neglected her child. The lower court did not err in allowing into evidence hearsay statements in the mother's medical records as medical records are within the business records exception to the hearsay rule where they are relevant. Here the mother had been brought to the hospital on a mental hygiene arrest and the details of how and why that occurred and her refusal to inform the hospital of her situation such that her condition could be dealt with was relevant. Even if some of the records contained hearsay that should not have been admitted, such error was harmless. The mother engaged in bizarre and paranoid behavior that placed the child at imminent danger of becoming impaired. The child need not actually suffer an injury as only a near or impending injury is required.

## Matter of Micah T., 171 AD3d 546 (1st Dept. 2019)

While a suspended judgment on a termination regarding her 3 older children was pending, a New York Count mother had a 4th child. The mother's untreated mental health issues resulted in a neglect adjudication regarding this child. The mother had a personality disorder with narcissistic and borderline traits and would not attend counseling. She made bizarre and delusional statements to a family counselor and impulsively moved this

child and her older 3 children to Florida without advising the agency, the court or the child's father. The child was emotionally harmed by being abruptly moved and prevented from seeing her father who had been awarded temporary custody. The court gave the father full custody. On appeal, the mother also argued that she was denied due process regarding the appointment of an attorney. However, she in fact was appointed some 6 different attorneys, all of who she refused to work with and each of whom asked to be relived. She exhausted her right to assigned counsel and upon being advised on the risks of self-representation, she knowingly, willingly and voluntarily waived her right to counsel.

**Matter of Nakya SS., __AD3d__, dec'd 6/6/19 (3rd Dept. 2019)**

The Third Department affirmed Saratoga County Family Court's determination that a mother neglected her child. The mother was involuntarily committed to the mental health unit of the hospital after law enforcement intervention. The mother's erratic behavior presented a real risk of harm to the child and after her release from the hospital, the mother failed to cooperate with the caseworker in obtaining mental health assistance. Her own testimony in court demonstrated that she continued her bizarre conduct.

# ABUSE

## Sexual Abuse

**Matter of Jeremy B., 168 AD3d 494 (1st Dept. 2019)**

The First Department concurred with Bronx County Family Court that a respondent father sexually abused his daughter and derivatively neglected his son and another child in the home. The child's out of court statement to the physician about the sex abuse was corroborated by her medical records.

**Matter of Ja'Dore G., 169 AD3d 544 (1st Dept. 2019)**

A New York County father abused his 6 year old child and the child's paternal grandparents neglected the child. The grandparents were PLRs as the child visited the grandparents' home every other weekend, often spending the night. The grandparents cared for the child during this time frame. The grandparents and the father were aware that the child repeatedly disclosed that a 16 year old cousin was sexually abusing a 6 year old half-brother and the grandparents and the father did not take action to protect the child. The father also committed acts of domestic violence that neglected the child. He assaulted the mother outside of the courthouse at a child support proceeding which resulted in the mother being injured and then not following through with the child support proceeding. He also assaulted the mother when picking up the child for a visit

putting the child in imminent danger of physical harm. The father also engaged in sexual activity in front of the 6 year old such that the child had inappropriate knowledge of sexual behavior. The child was not however derivately abused on the basis of the cousin's out of court statements that the father had sexually abused him years before as that older child's statements were not corroborated.

**Matter of Samantha F., 169 AD3d 549 (1st Dept. 2019)**

A Bronx child's out of court statements as to sexual abuse by a PLR were corroborated by the child's mother, another child's out of court statements and the expert testimony of a social worker with a specialization in child sexual abuse. The expert opined that the child's behavior and demeanor were consistent with children who have been sexually abused. Although this expert apparently did not examine the child directly, the opinion was based on the testimony of another social worker who was subject to cross examination and who was reliable. The respondent's sexual abuse of the eldest child in the home supported a derivative findings on the other children, particularly since the children were in the sole care of the respondent when the sexual abuse occurred.

**Matter of Antonio T., 169 AD3d 699 (2nd Dept. 2019)**

A Queens' respondent sexually abused 2 children who provided out of court statements that cross corroborated each other. The mother's testimony also corroborated the children's statements. This formed the basis for a derivative abuse finding as to the 6 other children in the home. Further out of court statements by 2 of the children cross corroborated excessive corporal punishment of another 2 children. The mother and the CPS worker both observed injuries on the children. The respondent also failed to provide 3 of the children with adequate dental care and neglected all of the children based on the unsanitary and deplorable living conditions of the home.

**Matter of Kevin D., 169 AD3d 1034 (2nd Dept. 2019)**

The Richmond County Family Court's adjudication of sexual abuse was affirmed. The PLR half sibling sexually abused 2 of his half-sisters whose out of court statements cross corroborated each other. They described similar incidents of abuse and were independent from and consistent with each other's statements.

**Matter of Liam M.J., _170 AD3d 1623 (4th Dept. 2019)**

A Genesee County father sexually abused his child. The child's out of court statements were corroborated by a forensic expert. Also the caseworker and the child's caretaker, who were not

involved in the custody dispute with the mother corroborated the child's statements. The child had age inappropriate knowledge of sexual matters. And although the child's multiple consistent descriptions of the abuse out of court do not themselves provide sufficient corroboration, the consistency of these statements enhances the reliability of the statements. The lower court did err in drawing a negative inference against the father for his failure to call his girlfriend as a witness. The father is entitled to notice of the intent to draw such a negative inference such that the father be given an opportunity to explain his failure to call the witness. This error however was harmless.

**Matter of Melanie S., 172 AD3d 436 (1st Dept. 2019)**

A Bronx respondent sexually abused the children whose out of court statements corroborated each other as did the medical records.

**Matter of M.W., 172 AD3d 879 (2nd Dept. 2019)**

The Second Department affirmed a sexual abuse adjudication from the Queens County Family Court. The child's testimony established that her father sexually abused her. The father's intent to sexually gratify himself by his conduct can be inferred from what he did and the circumstances. The father also neglected the child by inflicting excessive corporal punishment

on her. The child made out of court statements and testified in court and the caseworker corroborated this by testifying that there were marks and scabs on the child's back. The father's behavior toward the target child supported derivative findings as to the other two children. Some of the neglectful behavior toward the victim child occurred in the presence of the other children and this "permeated their daily lives". This father had a fundamental defect in his understanding of parenthood.

**Matter of Crisnell F., 172 AD3d 546 (1st Dept. 2019)**

A Bronx County stepfather sexually abused his stepdaughter and derivatively neglected the other children. The child's out of court statements were corroborated by the statements she made to her mother and the caseworker, hospital records and the stepfather's direct admission to the mother that he had sexually abused the child.

## Physical Abuse

**Matter of Sheyla G.R., 169 AD3d 676 (2nd Dept. 2019)**

A Suffolk County father physically abused an infant and derivatively neglected the other child who was then 2 years old. The 6 week old little girl had a skull fracture with a hematoma

and healing rib fractures that were some 7-10 days older than the skull fracture. The child also had bruises on her wrist and both legs. The father claimed the child fell from a swing the week before. Both parents were found to have abused and neglected the children and the baby was placed in foster care. The father appealed. The injuries to the infant were res ipsa injuries for child abuse and the parents were the caretakers. The father failed to rebut the presumption of responsibility since he did not provide a reasonable explanation for the multiple injuries that were in various stages of healing. The parental judgment was clearly impaired to the extent that the other child was derivatively neglected. (NOTE: in some other similar cases, there have been adjudications of severe abuse and derivative severe abuse)

**Matter of Jeffrey J.P. 170 AD3d 853 (2nd Dept. 2019)**

The Second Department concurred with Queens County Family Court that the mother's criminal conviction for the murder of the children's father and stepfather supported a summary judgment motion for severe abuse of the son and abuse of the step son.

**Matter of Addison M., __AD3d__, dec'd 6/14/19 (4th Dept. 2019)**

An Erie County mother abused her 21 month old little girl. The child had 25 distinct bruises which included a black eye, bruises on her forehead, ear and under her eye and an adult sized bite mark on her arm. The child was missing large clumps of hair. The medical testimony was that the bruises and injuries were inflicted and not accidental and that the hair was forcefully pulled from the child's head. The mother's explanations that the child bit herself and that the hair loss was due to a fungal condition were not credible. These injuries are of a magnitude that constitutes abuse and not just neglect as the child was at substantial risk of serious injury. Records the mother offered regarding the child's behavior were properly precluded as they related to her situation more than a year after the petition.

## Art. 10 Dispositions and Permanency Hearings

**Matter of Sir D.C., 168 AD3d 726 (2nd Dept. 2019)**

The Second Department concurred with Kings County Family Court that a respondent mother violated an Art. 10 order of disposition and placed the children with their father. ACS established by clear and convincing evidence that the mother

willfully violated the order. She failed to maintain suitable housing or keep ACS informed of her address and she did not complete mental health evaluations or comply with reasonable recommendations. The mother did not keep the children's medical appointments or make sure they received proper services. It was in the best interests of the children to remain with their father.

**Matter of Mia C., 168 AD3d 836 (2nd Dept. 2019)**

A Kings County respondent was the father of two children and a PLR for two other children in the home. ACS alleged that he had abused and neglected all 4 of the children, including raping a 13 year old girl that he was not the parent of and making sexual advances a 16 year old child for whom he was also not the parent. It was further alleged that he had used excessive corporal punishment against 3 of the children. The father consented to a finding of abuse regarding all 4 children without an admission. The court allowed him supervised visitation with the 2 children that were his. There was some sporadic visitation that ceased while he was incarcerated for some of the allegations. However, 4 months after the adjudication , the children moved for visits to cease and the lower court denied the motion, ordering that visits would continue, finding that there was no evidence that the children had witnessed the abuse of their half siblings. The Second Department reversed.

The children's therapists testified that the children have PTSD because of the physical and sexual abuse they witnessed committed on their mother and their half siblings. The 2 children corroborated each other that they had witnessed the abuse. Neither child wanted to visit with the father and the therapists each recommended that visits cease until the children made more progress in therapy. Parental access, even supervised, is not in the children's best interests. There was no evidence that the children were not in fact suffering from PTSD and trauma by having contact with the father.

**Matter of Pedro A. v Gloria A. 168 AD3d 1152 (3rd Dept. 2019)**

The Third Department reversed Sullivan County's dismissal of an incarcerated father's petition for contact with his 2 children. In a prior neglect petition, the Family Court had issued an order of protection prohibiting contact until 2022. This order however was not permissible as the court is only allowed by statute to issue an order of protection for one year against a parent. The order could only have been for one year and it would have now expired. The order of protection granted by the criminal court concerns other children. Therefore, there is no legal order of protection was in place and the lower court should not have dismissed his petition for contact with the children without a hearing. The matter was remitted for a hearing on the merits.

## Matter of Avery M., 169 AD3d 684 (2nd Dept. 2019)

A Kings County sister had been appointed the guardian of her younger brother after their mother had died. ACS brought a neglect petition alleging that she used excessive corporal punishment on the child, made statements that there was something wrong with him due to his sexual orientation and bathed him in bleach due to his alleged poor hygiene. The sister denied the allegations. Several dates were set for future proceedings and the defense counsel informed the court on one of those dates, that the parties had agreed that the sister would place the child voluntarily under SSL and that this agreement would be signed shortly. When the matter was on for a permanency hearing, the sister did not appear and the voluntary had not been signed and so the court went forward with an inquest and adjudicated neglect. The sister moved to vacate and indicated she had not received notice of the court's intention to hold an inquest if she did not appear. The lower court denied the motion and on appeal, the Second Department reversed.

The sister stated that she had not been told by her lawyer that she needed to come back to court nor had she received any notice from the court. Although she had been in court when dates were given, she understood that she would be signing a voluntary and believed she was not required to come back to court or did not think that a hearing would be held if she did not come. She denied the allegations of neglect and therefore had a meritorious defense to offer. The matter was remitted.

**Matter of Rodriguez v ACS Kings 169 AD3d 693 (2nd Dept. 2019)**

Kings County Family Court properly dismissed a grandmother's petition for visitation with her grandchildren who were in foster care. In order to obtain grandparent visitation, the grandparent must allege a sufficient relationship with the children to obtain standing and then the court would hold a hearing on best interests. This grandmother did not allege a sufficient relationship with the children and is not entitled to a hearing.

**Matter of Lakeya P v Ajja M., 169 AD3d 1409 (4th Dept. 2019)**

The Fourth Department did modify some of the dispositional terms in an Onondaga County Family Court matter. The court's dispositional order placed the children in 2 different relative homes under Art. 6 orders. The children had been removed some 2 years earlier. On appeal, the mother argued that the court had erred by granting "concurrent" goals for the children – both permanent placement with a relative and reunification with the mother. However, the court ruled that this issue was not before the court as the mother had not appealed the permanency orders. Next the mother argued that the court erred in rejecting her attorney's request for an adjournment when the mother did not appear on the last day of the hearing. The Appellate Court found that the mother's attorneys claim that her client was being

evicted and that she could not be at court was not sufficient reason for an adjournment where the eviction issue had been pending for some time and the marshals were not at the mother's apartment that day trying to remove her. Further the mother had a history of leaving court when the proceedings were in process. Extraordinary circumstances and best interests were established in this matter such that the children should be placed in Art. 6 custody with their relatives. The mother had serious mental health issues – acute depression and suicidal thoughts. The children had been removed 2 years earlier. The mother even admitted that she was incapable of caring for the children and since the removal, the mother had "wholly failed" to obtain mental health services. However the Fourth Department remanded the matter on 2 other issues. The lower court had erred in ordering that the mother's visitation with the children must be supervised and scheduled as "deemed appropriate" by the custodian relatives. It is the responsibility of the court to set a visitation schedule and not to delegate that to the parties. Further the lower court erred in ordering that the mother could not, in the future, file modification or enforcement actions regarding the children's custody or visitation without the Judges permission. Such an order can only be made where the court has found that the party has engaged in meritless or frivolous litigation or abused the judicial process. There was no proof presented that the mother had commenced any frivolous proceedings and the mother's access to the court should therefore not be restricted.

**Matter of Tanisha M.M., 170 AD3d 841 (2nd Dept. 2019)**

Kings County Family Court correctly awarded kinship guardianship of 2 children to the maternal aunt foster parent over the father's objection. The children had been out of the home for 3 years and the mother was consenting to the aunt's kinship guardianship. The father had been incarcerated since the children were very young and there were extraordinary circumstances to grant the guardianship. The aunt had been providing a stable home for the children and was meeting their medical, education and special needs. It was in the children's best interests to be placed in the aunt's guardianship. The Referee did not interfere improperly with the trial. The Referee only directed the father to answer the questions in order focus the testimony on what was material and relevant. The father's request for a 3rd new counsel, made towards the end of the hearing, was properly denied as the father did not articulate legitimate grounds for yet another lawyer to be appointed.

**Matter of Gabrielle N.N., 171 AD3d 671 (1st Dept. 2017)**

A Bronx respondent cannot appeal the court's goal of adoption in a permanency hearing when that was also the prior goal in the earlier permanency hearing which was not appealed. Also, although the court orally stated that the goal was adoption with a concurrent plan for reunification, the court did not

impermissibly order two goals as the written order itself stated only one goal - adoption.

**Matter of Carmela H., 171 AD3d 1488 (4th Dept. 2019)**

The Fourth Department affirmed Onondaga County Family Court's order under FCA §1039-b that DSS was not obligated to provide reunification efforts to a mother who had a prior TPR regarding another child. Once DSS provides evidence of the prior TPR, the court is required to issue the order of no reunification efforts unless the respondent proves the 3 part defense. The defense – that (1) the efforts would be in the child's best interest, that (2) the efforts would not be contrary to the child's health and safety and that (3) the efforts would likely result in the reunification of the parent and child in the foreseeable future – was not proven here by the mother. The caseworker testified that the mother was continuing to live with the father who was violent and was an impediment to any reunification. The mother did eventually move out of his home as this proceeding progressed but not of her own volition. She had never lived alone before and she also could not demonstrate even basic parenting skills. The mother herself admitted that she did not learn anything in prior parenting classes and the caseworker testified that she did not think the mother was able to make any real progress to care for any children.

**Matter of Cheron B., __AD3d__, dec'd 6/18/19 (1st Dept. 2019)**

A New York County mother had her parental rights terminated to her older children and therefore there were grounds for a FCA § 1039-b order that no efforts needed to be made to reunify the mother with her younger child. To prevent such an order, the respondent must submit evidence that reasonable efforts would be in the child's best interests, would not be contrary to the child's health and safety and would be likely to result in reunification in the foreseeable future and she failed to do so.

**Matter of Leslie T., _172 AD3d 730 (2nd Dept. 2019)**

Suffolk County DSS brought a petition against a mother regarding the neglect of her son based on her abuse of alcohol. The child was removed and placed with the non-respondent father who is a member of the Unkechaug Nation. The decision did not say if father's status made the child an ICWA child specifically but apparently at some point the court did rule that the child was an ICWA child. The father tested positive for cocaine and the child was then placed with the maternal grandmother. The Unkechaung Nation intervened and requested to take jurisdiction of the case but since the child had never resided on the Nation's reservation, jurisdiction to the tribal court can only occur if both parents consent and here the mother refused to consent to the transfer. The matter remained

in Suffolk County Family Court and the Nation argued that the child should be placed with a paternal uncle who was also a member of the Nation. The court placed the child with the uncle but 2 days later, the mother argued that the child should be returned to her care. The AFC opposed the move to the uncle saying that the child objected, that the child did not even know the uncle and, the AFC reported, that the child had threatened suicide by hanging himself or that he would run away. The child had been admitted to a psychiatric emergency program at the hospital. DSS supported the child being returned to the mother who they said had made excellent progress. The Nation opposed the child being returned to the mother and argued that the uncle had done what was asked of him to be able to care for the child. The mother entered an admission of neglect and the court released the child to the mother under DSS supervision.

The Unkechaug Nation appealed arguing that this was a violation of ICWA to move the child from the uncle to the mother without a hearing. The Nation argued that the lower court was required by ICWA to hold a hearing to remove a child from "an Indian custodian", that is the uncle, unless there was clear and convincing proof that the placement with the uncle was likely to result in serious emotional or physical harm and that included the testimony of a qualified expert witness. The Second Department affirmed the lower court. Such a hearing is not required where the child was only temporarily placed with the uncle due to the Art. 10. The hearing described is only

required by ICWA where the child is being removed from a parent or an Indian custodian for placement in foster care. Here the court was returning the child to his mother.

**Matter of Zavion O., 173 AD3d 28 (1st Dept. 2019)**

In a dramatic case of first impression, the First Department ruled that Family Court has no authority to issue a warrant for the arrest of a child or youth who is placed in ACS care by a voluntary placement order and who is missing or has run away from that placement. The appellate court consolidated 2 cases where they stated that the children involved were at "high risk of harm to themselves or putting themselves in positions where other may harm them" by running from their placements to "enter life on the streets". Both children were significantly vulnerable and had histories of running away. Both children had multiple mental health diagnoses and would not take required meds when they were on runaway states which would further exacerbate their risk. ACS cited FCA §153 to justify seeking a warrant and in fact the lower courts have historically issued such warrants, sometimes with language to law enforcement not to use handcuffs or to bring the child to the court or the children's center. The Appellate Court ruled that FCA §153 does not in fact apply to a child or youth who is the subject of the voluntary placement and is not a witness. These children were not alleged to be JDs or PINS where there are sections of FCA Art. 3 and 7 that would apply. The PINS runaway provisions under FCA

§718 should not be the basis for an arrest warrant. 22 NYCRR 205.26 and 205.80 address children who have absconded from facilities and FCA § 1037 addressed bringing parents before the court. General *parens patriae* cannot create jurisdiction where there is no statute for a court with limited jurisdiction. There is simply no statutory process that the Family Court can use to compel a child who has been voluntarily placed in care to return to that court ordered care despite how at risk the child may be with chronic absconding behavior.

The First Department went out of its way to say that there was no criticism intended of ACS or the Family Courts and that the problem of the safety of these children should be addressed by statutory reform by the legislature.

(Note: Both children were placed on a SSL voluntary basis but it would seem as though the court decision applies to Art.10 placed children as well)

**Matter of Giovanni H.B., 172 AD3d 489(1st Dept. 2019)**

An incarcerated Bronx father sought visitation with his young son who was in foster care. The father was incarcerated for raping the boy's half-sister who was 6 years old at the time of the rape. The son was 18 months old at the time of the rape and the child had not seen the father since he was about 2 years old. The child had many serious issues – autism, cognitive and social deficits, he is aggressive, defiant, has tantrums, runs away and

has serious problems with change or being in public. Visitation would not be in the child's best interests. The child had not seen the father in years, may not have even been aware that the respondent was his father and did not ask about his father or to see his father. The lower court took a "measured, reasonable approach" that the father could send letters to the foster care agency which would be kept on file and provided to the child at such time as there was more information from the child's mental health professionals who could provide information to the court about providing the letters to the child.

**Matter of Alisah H., 168 AD3d 842 (2nd Dept. 2019)**

Kings County Family Court granted a father's FCA § 1061 motion to vacate his admission to neglect but the Appellate Division reversed. The father had admitted to neglect based on domestic violence that impacted his 6 children. Six months later the father moved to vacate the adjudication. The Appellate Court found that vacating the adjudication was not appropriate given the serious and repeated nature of his neglect and that he showed no remorse for his actions despite having completed the court ordered programs. He did not demonstrate why vacating the adjudication was in his children's best interests.

**Matter of Aaliyah B., 170 AD3d 712 (2nd Dept. 2019)**

Kings County Family Court was affirmed in its denial of a mother's motion to vacate the neglect adjudication based on excessive corporal punishment from a year earlier. The mother failed to demonstrate that vacating the order was in the child's best interests as the child is still a minor and the finding of neglect could be significant in future court hearings. The mother's fear that she might lose her job was a concern but was not sufficient.

**Matter of Leilany R., _172 AD3d 656 (1st Dept. 2019)**

The First Department affirmed Bronx County Family Court's denial of a mother's motion to vacate her prior adjudication for educational neglect under FCA § 1061. While under the supervision order, the mother still did not ensure that the children attended school regularly. The mother did not request a hearing on the 1061 motion nor was one warranted.

**Matter of Shreesta R., __AD3d__, dec'd 6/19/19 (2nd Dept. 2019)**

Queens County Family Court was affirmed in its denial of a father's motion for a post adjudication suspended judgment to vacate an admission he had made to neglect based on excessive corporal punishment and domestic violence. The father did not

demonstrate how modifying the adjudication would serve the children's best interests.

**Matter of Emma R., __AD3d__, dec'd 6/19/19 (2nd Dept. 2019)**

The Second Department reversed the Queens County Family Court's denial of a FCA § 1061 motion to vacate the adjudication order of a mother who had consented to a neglect finding. The adjudication was based on inadequate supervision of her 2 children and 11 months after the order was issued, the mother sought the order to vacate. The lower court denied the motion but the Appellate Division found that there was good cause to vacate. The mother had completed her court ordered programs, she had complied with the conditions of the order and the modification was in the best interests of the children.

**Matter of Madison H., __AD3d__, dec'd 6/6/19 (1st Dept. 2019)**

The First Department concurred with the Bronx County Family Court that a father's visits with his child should remain supervised. The father's neglect adjudication was related to violence and he has a history or acting aggressively, would be unable to control his anger and would be intimidating. This would occur in supervised visits and in the court room. There is

a lack of evidence that the father was making attempts to overcome his behavior. The child indicated that she was scared when her father became angry and her feelings are entitled to considerable weight.

**Matter of Peter T., 04953__AD3d__, dec'd 6/19/19 (2nd Dept. 2019)**

A Westchester County mother cannot appeal the extension of the child's placement in foster care given that the order expired by the next permanency hearing. However, she can appeal the goal change to adoption. The goal change was affirmed as the child would be in danger in he were returned to the mother and the child had been in foster care for almost 2 years since his removal when he was 5 months old. Services were offered to the mother for reunification but she is not benefitting from those services and reunification is no longer a viable goal.

# TERMINATIONS OF PARENTAL RIGHTS

## General

### Matter of Toussaint Thoreau E., 170 AD3d 551 (1st Dept. 2019)

It was not improper for New York County Family Court to terminate a father's rights to the child on abandonment grounds given that the mother's rights were not terminated. The mother's termination was based on a different factual situation and the father never requested that his disposition be delayed while the mother's TPR was pending. Once the mother received a suspended judgment on her TPR, he did not seek to vacate his termination.

### Matter of Ricardo T. _172 AD3d 732 (2nd Dept. 2019)

An Orange County father was denied effective assistance of counsel when his assigned counsel failed to file a timely notice of appeal of the order terminating his parental rights. The Second Department reversed the order and remitted the matter for a new order so that the father's time to appeal runs anew.

**Matter of Olivia G., __AD3d__, dec'd 6/7/19 (4th Dept. 2019)**

The Fourth Department ruled that a Cattaraugus County father did not preserve his argument that the lower court erred in not providing him with an adequate interpreter at the out of state prison where he appeared via video conference for his TPR proceedings. The father's counsel did not request that the court ask about the qualifications of the interpreters used or ask that he be provided with other interpreters. Further the father did confirm during the proceedings that he was comfortable with the interpretation and that he understood the proceedings. All relatives that the father suggested as resources where investigated by DSS and they failed to respond to ICPC requests.

**Matter of Patience T., __AD3d__, dec'd 6/14/19 (4th Dept. 2019)**

An Erie County father failed to appear for his TPR hearing and his attorney moved to withdraw as counsel. The father failed to raise this issue in his motion before the trial court to vacate the default ruling. In any event, the lower court properly granted the motion for the attorney to withdraw as the father had been given notice of the motion and the attorney provide sufficient cause to be permitted to withdraw. Even if the father had had a good reason for the default, he offered no meritorious defense.

**Matter of Cherokee C., __AD3d__ , dec'd 6/27/19 (3rd Dept. 2019)**

The Third Department found that it was not error for Schenectady County Family Court to terminate the rights of a father to his child when there was no TPR petition against the mother. It was claimed that the mother was awaiting the outcome of the father's hearing and if he lost rights, she intended to surrender her rights. Given that situation it was not inconsistent to terminate the father's rights without a TPR pending against the mother.

**Matter of Innocence A., __AD3d__, dec'd 6/12/19 (2nd Dept. 2019)**

The Second Department rejected an argument on appeal that the lower court could not terminate a parent's rights if the Art. 10 matter was not yet resolved, citing several cases that such an argument has not merit as it is not required that the Art. 10 be resolved to prove permanent neglect.

## Abandonment TPR

**Matter of Michael T.J.K., 168 AD3d 545 (1st Dept. 2019)**

A Bronx mother abandoned her child. She claimed that she did not know where the child was living but all she did was contact

a prior agency once to try to find the child. This is insufficient to defeat the presumption of abandonment given that she had not had any direct or indirect contact with the child for the most recent 6 months. The agency did not discourage or prevent her from making contact with the child.

**Matter of Tiara Dora S., 170 AD3d 458 (1st Dept. 2019)**

A Bronx mother abandoned her children. She left the children with the foster mother for a year and made no contact with the children or the agency. She did not communicate with the agency until 6 months after a TPR had been filed. The mother claimed she was discouraged from contacting the children by the agency who had threatened to have her charged with kidnapping when she refused previously to tell the agency the location of the children during a failed trial discharge. The Appellate Court ruled that this action did not constitute discouragement. Further the mother had relapsed into drug use and when the foster mother then advised her that she should contact the agency to arrange for more formal communication with the children, the mother refused to do so.

**Matter of Max HH., 170 AD3d 1456 (3rd Dept. 2019)**

The Third Department concurred with Chenango County Family Court that a mother had abandoned her son. The child had been

placed in care at birth due to a positive tox and the mother's long standing drug addiction. The mother visited the child 2 days after his birth while he was still in the hospital and stayed for one hour. This was the one and only contact with the baby until the abandonment petition was filed over 7 months later. The mother had also not sent the child any cards, letters or gifts. Although the agency does not need to prove that it made diligent efforts to facilitate contact, in fact they did make repeated and unsuccessful attempts to set up visits. The mother claimed she could not visit as she did not have a car or any money for transportation but she also testified that she did not want to see the child when she was under the influence of drugs as it was "not fair to him". She acknowledged that the money she used to purchase drugs could have been used to obtain transportation for visits.

**Matter of Morgan A.H., 172 AD3d 861 (2nd Dept. 2019)**

A Kings County mother abandoned her child when she failed to visit or communicate with the child and the agency for over 6 months. She testified about minimal, sporadic and insubstantial contacts with the agency which was not sufficient to overcome the presumption of abandonment. Diligent efforts need not be proven in an abandonment.

**Matter of Jarrett P., __AD3d___, dec'd 6/7/19 (4th Dept. 2019)**

The Fourth Department reversed an abandonment termination against an incarcerated father. While the father did initially fail to pursue paternity, he did ultimately establish paternity while he was incarcerated. This occurred less than 2 months into the most recent 6 month time period – the relevant time for an abandonment. The father also communicated with the caseworker throughout the 6 months in question by sending the caseworker at least 4 letters asking about the child and he included a card and a drawing for the child in at least one letter. He also participated in a service plan review. This was not minimal, sporadic or insubstantial. (See below where the Fourth Department did however affirm the termination on permanent neglect grounds)

## Mental Illness TPRs

**Matter of Quaiza S.P., 168 AD3d 851 (2nd Dept. 2019)**

A Westchester County father's rights were terminated on mental illness grounds. The court appointed psychiatrist examined the father and reviewed his extensive medical records. The expert testified that the father suffered from a "serious and chronic psychiatric illness that is likely schizoaffective disorder" that included hallucinations, delusions and periods of depression. Within the last 3 years, the father had been hospitalized multiple times, had suicidal and homicidal ideation and was not

compliant with treatment. He had circular and illogical thinking, impaired judgment and had no insight into his condition. He could not care for himself and unequivocally could not safely care for his children. He is unable, for the foreseeable future, to be able to care for them due to his mental illness.

**Matter of Oluwashola J.P., __AD3d__, dec'd 6/4/19 (1st Dept. 2019)**

A New York County mother's rights to her son were terminated on mental illness grounds. The court appointed psychologist conducted a mental health evaluation of the mother, performed a questionnaire and an extensive clinical interview. The expert provided a report and testified that the mother suffered from schizophrenia, paranoia, disorganized thoughts and behaviors and has a mood disorder. The mother has limited insight into her condition and was inconsistent in treatment and non-compliant with her meds. It was not necessary that the expert observe the interactions between the mother and the child.

**Matter of Elijah L.J., __AD3d__, dec'd 6/26/19 (2nd Dept. 2019)**

The Second Department affirmed a Queens County Family Court's termination of a mothers rights to her 2 older children

on mental illness grounds. The court appointed psychologist interviewed the mother and reviewed her medical and other records. She had a long history of psychiatric problems and had bipolar disorder. The expert opined that the older 2 children were at risk of neglect if returned to her. The court also appropriately granted a summary judgment motion to find that the mother had derivately neglected the 3rd child as the mother had not resolved the issues that had resulted in the older 2 children being placed in care.

## Permanent Neglect

**Matter of Messiah G., 168 AD3d 420 (1st Dept. 2019)**

A New York County mother did not have a valid argument to reopen her default termination. She claimed to be unaware of the date of the hearing and also that she was overcome with grief over the death of her grandmother. She was unable to support either claim. The record showed that she was given the date on a paper at court and if she had lost the paper, she could have called her lawyer or the agency. The grandmother had died a month earlier and the respondent had been in court since then, in fact she was in court on the day of the grandmother's memorial service. There was clear and convincing evidence that the agency offered diligent efforts. There were visits and planning meetings offered and referrals for appropriate services. The mother was told of the importance of complying with the service

plan. However, the mother was inconsistent with visitation, she did not avail herself of offered services, and she refused to acknowledge her need for substance abuse or mental health treatment. Also the mother failed to testify and a negative inference can be drawn.

**Matter of Elizabeth E.R.T., 168 AD3d 448 (1st Dept. 2019)**

The First Department affirmed the Bronx County Family Court's termination of a mother's rights. The foster care agency offered her diligent efforts that included creating a service plan, providing weekly visits, giving her a Metro card, preparing paperwork to get abuse clearances for her husband and helping her to file paperwork to terminate a guardianship order that had placed the child with an out of state grandmother. The agency could not actually file the legal papers for her but gave her information and assistance to do so. The mother had failed to deal with the grandmother's prior neglect of the child, even though they were all living together and she did not file paperwork to end the grandmother's guardianship. The mother had a prior history of drug abuse and used drugs at least once and had a psychiatric history and was hospitalized for mental health issues several times. She did not maintain suitable housing, withdrew a request for custody of the children as she was not ready to handle them and did not complete the paperwork for her husband's abuse clearances. Her visits became inconsistent and less appropriate. The caseworker

progress notes were admitted as business records and even though no caseworker testified, the mother's own testimony supported the petition.

## Matter of L. Children v Catholic Guardian Services

## 168 AD3d 455 (1st Dept. 2019)

New York County Family Court's termination of a mother's rights was affirmed on appeal. The agency offered diligent efforts and although the mother did attend visitation, she did not plan for the children's future. She refused to acknowledge that her son was autistic and did not cooperate with the help he needed. The mother would not acknowledge the reasons for the removal of the children and would not acknowledge that she needed assistance and counseling. To the extent that she did attend some services, she did not ever "come to terms" with the issues or understand proper parenting. Even on appeal, the mother continued to argue that the agency did not offer enough help, even where it appeared that she refused to accept responsibility that her own actions caused difficulty in providing services. Lastly it was in the children's best interests to be freed for adoption. The boy has been in foster care since 2013 and the girls have been in care by 2015. The foster home is stable and the children call the foster mother "mommy". The family want to adopt. An adult sibling and an aunt had both filed for custody of the children but those petitions were properly dismissed.

Neither of these persons any real relationship with the children and simply being family members does not make them preferable over the foster mother who has been the stable caretaker.

**Matter of Frank Enrique S., 168 AD3d 539 (1st Dept. 2019)**

The First Department affirmed the New York County Family Court's termination of a mother's rights. Diligent efforts were offered to the mother in that the agency offered mental health services, offered help with safety issues in the home and set up visitation. The mother had a mental illness but would not take medication and she would not attend therapy. This was the key to why the children remained in care. The 2 children had been in foster care for their entire lives and are thriving.

**Matter of Jahvani Z., 168 AD3d 1146 (3rd Dept. 2019)**

A Broome County 17 year old gave birth to a child who was placed in care due to domestic violence between the teen mother and her own mother. The child was first placed with a grandfather and then with an uncle and his fiancé under FCA §1055 and this arrangement was what the mother wanted. The uncle later became a foster parent. The uncle lived in Steuben County. The uncle filed a permanent neglect petition against the mother after the child had been in his home for about 18 months.

The father surrendered the child. The uncle does have standing to file an TPR under SSL §384-b (3)(a) as a relative with care and custody of the child. The mother was aware that this could happen as the permanent neglect petition clearly informed her of the consequences. The uncle proved that DSS, with his assistance, provided diligent efforts. There was a service plan, the caseworkers attempted to meet with the mother and give her counseling and assistance although she frequently moved and would not give DSS or the uncle contact information – sometimes for a month or more. She was offered housing assistance but she failed to follow through and was always bouncing between residences. She was referred to substance abuse evaluations, drug screening, anger management and parenting classes. She completed some programs but did not complete substance abuse treatment. She was given transportation assistance and bus passes to visit the child over an hour away. She would often miss visits by failing to pick up the bus passes. The uncle gave her bus money and rides and encouraged her to move closer but she failed to do so. The uncle allowed her to spend weekends with them until she was rude and disrespectful. The young mother never benefitted from the services offered and did not obtain housing or maintain employment. There were altercations with family members and others and constant missed visits. She did manage however to visit her incarcerated boyfriend on a weekly basis - whose prison was located out of state. The mother provided no child support for the child and engaged in drug related activity with her

boyfriend who she wanted to be the child's father figure. The uncle and his fiancé want to adopt the child and have given the child a home where she is thriving. The mother has had 3 years and had not been able to correct her issues.

**Matter of Logan C., 169 AD3d 1240 (3rd Dept. 2019)**

A Schuyler County father's rights to his 2 children were appropriately terminated. The children had been placed in care in 2015 after the girl had sustained serious life threatening injuries when the father left the children in the care of a family friend he knew or should have known was abusive. The 2017 appeal of that underlying Art. 10 had resulted not only in the Third Department upholding the neglect and abuse adjudications but also adding a finding of severe abuse against the father. While the Art. 10 was on appeal, the DSS brought a TPR against the father in early 2017. In May 2018 the Schuyler County Family Court terminated the father's rights but also ordered that the son's therapist be consulted before the child was actually freed for adoption. In July 2018, after DSS argued that the court had no authority to order a consultation with the child's therapist before freeing the child and the lower court modified its order to say that the child was freed but that the therapist had to be consulted regarding the manner and method of telling the children about being freed for adoption and about the ending of visitation with the father.

On this appeal the father argued that diligent efforts had not been offered but the Third Department disagreed. Visitation was offered at the Family Resource Center and in the community. Visitation coaching was provided as were "debriefings" after visitation. Mental health evaluations and ultimately mental health services, parent education classes and anger management classes were all offered and the father was repeatedly encouraged to participate in these services. Even when the father moved to another county, the caseworkers continued their diligent efforts directly and by asking the other county to also help offer services to the father. The father did complete the substance abuse evaluations and treatment and anger management but he did not complete parenting and did not engage in the recommended mental health services. The parent educator testified that she could not say the father had improved as he did not seem to implement parenting strategies at his visits, he did not address safety concerns at the visits and he did not seem to understand the severity of the injuries to his daughter based on the abuse that had occurred. The father frequently failed to follow the rules to set up community visits in advance and so did not take full advantage of that offer. At one community visit with the father that did occur, the family friend who had caused the severe life threatening injury was present and this friend was also on at least one occasion at the father's home even though the father had been told multiple times about the inappropriateness of his continued contact with a person who severely injured his daughter. The father was

diagnosed to be suffering from a personality disorder that included passive-aggressiveness, narcissism, dependency and depression with anxiety to the extent that the psychologist opined that without treatment, the father could not provide a safe environment for the children. However, the father did not enroll in any mental health treatment. He also failed to keep DSS informed of his address changes and violated his criminal probation for an unrelated grand larceny conviction. He admitted he was not paying any child support despite being able financially to do so. He failed to adequately address the issues and take the steps necessary to have the children returned. There was no reason to provide him the opportunity of a suspended judgment given that the children have been in care 3 years and he has only just started with this needed mental health treatment. The children were getting needed counseling and have a solid relationship with their foster family. In a footnote, the Appellate Division commented that the amended order that the children's therapist be consulted as to how the children were told of the termination and the cessation of visits was not improper as it did not delegate any authority to the therapist that was properly the court's responsibility. The amended order only concerned that the children be appropriately informed of the consequences of the court's order that their father's rights were terminated.

**Matter of Shakira M.S., 169 AD3d 1050 (2nd Dept. 2019)**

A Kings County father permanently neglected his 2 children. The children were born in 2001 and 2002 and placed in care shortly after their respective births in the same foster home. In the spring of 2012, the lower court suspended parental visitation based primarily on the children no longer wishing to have contact and the mother surrendered the children shortly thereafter. In 2015 (!) TPR proceedings were then brought against the father. In 2017, Kings County Family Court terminated his parental rights and he appealed. The father argued that the agency had not offered him diligent efforts to reunify as there had been years of no visits. However the appellate court agreed with the lower court that the agency had offered diligent efforts in that the lack of visitation was based on a court order focused on the children's refusal to visit. The agency was not required to seek any modification of that order. The father did not oppose the order and never sought any modification of it in the years that followed. Further, he also failed to go for a mental health evaluation or obtain any treatment, he did not attend a parenting skills class, did not provide information to the agency to help with obtaining housing and failed to attend caseworker sessions and family planning conferences. The agency made diligent efforts to provide for these services as per the case plan and the father failed to comply. Comment: The decision notes that the children had in fact been adopted in 2017 – of course that would

have been in violation of the regulation that the commissioner may not consent to an adoption while an appeal of the TPR is pending. There was no discussion in the decision as to if the adoption mooted the appeal.

**Matter of Jeffrey J.P. 170 AD3d 853 (2nd Dept. 2019)**

The agency offered diligent efforts to an incarcerated mother who was in prison for murder of the father. The agency advised her of the child's progress and encouraged her to participate in the planning for the child. The lower court had forbid any visitation or contact. The agency advised the mother that alternative custodial resources needed to be located and she failed to provide a realistic alternative to foster care for the child. No one she recommended was willing to be a resource for the child.

**Matter of Riyanna N.F., 170 AD3d 1009 (2nd Dept. 2019)**

A Queens County child was placed in foster care at birth. Six years later (!) the agency filed a TPR against the mother. The mother had failed to keep the agency apprised of her whereabouts for more than 6 months – in fact she provided no contact with the agency or the child for over 2 years – and therefore the agency was not required to prove they had offered diligent efforts. In any event, they had offered efforts by

referring the mother to drug treatment programs, parenting classes and counseling and encouraging visits. The mother's failure to maintain contact was sufficient to support a permanent neglect adjudication.

**Matter of Gregory A.J., 170 AD3d 1017 (2nd Dept. 2019)**

The agency offered a Queens' father diligent efforts to reunify by referring the father to anger management and providing visitation with the children. The father did not gain any insight into the obstacles he needed to overcome. A suspended judgment was not appropriate and the children should be adopted by the foster mother who has cared for them for 10 years (!)

**Matter of Eden S., 170 AD3d 1580 (4th Dept. 2019)**

The Fourth Department reviewed several issues in the appeal of the termination of Cayuga County parents' rights to their children and affirmed the terminations. The father argued that the lower court should not have ruled that DSS was relived of diligent efforts as the motion for that order was not done in writing. However, that order was itself from the prior Art. 10 proceeding that was not appealed and cannot now be raised. Further the father argued that the court should not have proceeded on the dispositional hearing in his absence. However

he choose not to appear and his attorney did represent him at the hearing and there was no prejudice to him due to his absence.

As to the mother, DSS offered her diligent efforts. These services were tailored to her needs and included parenting classes, mental health counseling, non- offender parent classes and services to assist her to clean and maintain her home. She was provided with visitation with her youngest child at all times, including offering alternative locations when it was deemed that her home was unsuitable for visits. As to the older two children, in person visits were offered at first but the mother continued to fail to acknowledge that the father had sexually abused the oldest child. The mother prompted that child to recant the allegations in a video and the mother posted that video online. This behavior caused the older 2 children significant emotional harm and therefore in person visits were appropriately ended as they were detrimental to the best interest of the children. The mother was allowed phone contact and was provided information about the children's school activities. The mother was also repeatedly advised on the importance of emotionally supporting the children. The mother failed to gain insight into the abuse and the need to protect the children and did not support them emotionally. She did not benefit from the services that she did attend. She also did not consistently maintain a safe and clean home. There was no reason to offer a suspended judgment as it was not in the children's best interests. Lastly, there was no need to hold a *Lincoln* hearing as part of the

disposition and if it was error to admit photographs of the state of the home at the time of the removal, it was harmless.

**<u>Matter of Callie H.,</u> 170 AD3d 1612 (4th Dept. 2019)**

The Fourth Department affirmed the Erie County Family Court's termination of an incarcerated mother's rights. DSS offered diligent efforts before the mother was incarcerated and the mother did not dispute that but argued that the efforts offered after the incarceration were not diligent. The Appellate Court disagreed. DSS did let the mother know about the child's well being, did develop a service plan, investigated placement options with relatives suggested by the parent and answered her inquires about the child. Although DSS did not offer the mother phone contact with the child, the child was too young to communicate on the phone. The mother's family did take the child for 5 visits while the mother was incarcerated and DSS was not obligated to also provide visitation as it would simply have been duplicative. The mother was unable to provide an alternative to foster care for the child while incarcerated. Although the mother did participate in services, she did not gain insight or address the issues.

## Matter of Deon M., 170 AD3d 1586 (4th Dept. 2019)

An Erie County father's rights were appropriately terminated. DSS offered diligent efforts. As to his younger child, the father did participate in some services but did not address his issues or gain insight into his problems. As to his older child, the father offered no reasonable alternative for the child except foster care until the father would be released from prison. His failure to complete services and inadequate efforts to visit the children make a suspended judgment not in the children's best interests.

## Matter of Spirtual AA., 170 AD3d 1020 (2nd Dept. 2019)

The Second Department properly terminated a Westchester County mother's rights to her child. The agency offered the mother an appropriate service plan, referred the mother to a parenting program and set up visitation. The mother was inconsistent in attending the parenting program, did not gain insight and was less than forthcoming with the caseworkers. She did not sufficiently provide information about her relationship with the child's father who she claimed was going to help her parent the child. She engaged in "disturbing behavior" during visits. Termination was in the best interests of the child. The father was only a notice father and did not need to have his rights terminated.

**Matter of Ankhenaten Amen-Ra C. 170 AD3d 998 (2nd Dept. 2019)**

A Queens County mother's rights to her 3 children were terminated. The agency offered diligent efforts toward reunification by creating a service plan, setting up a mental health evaluation, individual counseling, a parenting skills program and visitation and also urged the mother to make plans apart from the father. The agency also paid for services and referred the mother to agencies to help her with immigration issues and her housing issues. The mother did not complete her counseling, did not let the agency know where she was living and did not assist in keeping the father away from the children or plan without him. She also did not attend visitation on a timely basis. She did complete a parenting class but this was insufficient.

**Matter of Jaxon S., 170 AD3d 1687 (4th Dept. 2019)**

The Fourth Department affirmed the termination of an Ontario County father's rights to his child. The court did note that the child had been adopted by the time of the appeal ruled that the disposition of freeing the child for adoption was therefore moot and cannot be appealed but the underlying fact finding can be reviewed. There were diligent efforts offered for the incarcerated father. The caseworker looked for and located the

father when his whereabouts were unknown and asked the father for names of relatives who might be a custodial resource. The caseworker told the father he was entitled to visits and gave him updates and photos of the child and provided all the permanency reports to the father. The father failed to plan as he had no option for the child other than foster care and he also failed to engage in drug treatment of parenting classes while incarcerated.

**Matter of Zariah M.E., 171 AD3d 607 (1st Dept. 2019)**

A Bronx mother's parental rights were terminated on permanent neglect grounds. The agency offered referrals for parenting skills and mental health services, offered to assist with housing and attempted to schedule visits with the child. The mother would go for months at a time without visiting – which in and of itself is grounds to terminate – and she did not address her mental health issues.

**Matter of Morgan A.H., 172 AD3d 861 (2nd Dept. 2019)**

The Second Department concurred with Kings County Family Court that a mother permanently neglected her child. The agency was relived of having to prove they provided diligent efforts given that the mother failed for at least 6 months to inform the agency of her location. SSL § 384-b(7)(i) The agency did, however, offer diligent efforts any way by creating a

service plan and the mother failed to comply with any aspect of the plan. The foster parents have provided the child with a stable, loving home and want to adopt her.

**Matter of Stefano E.W., 172 AD3d 882 (2nd Dept. 2019)**

A Richmond County 3 month old infant was placed in foster care due the parents' inadequate guardianship and abuse of drugs. More than 3 years later, the parents had been visiting the child and completing services and the child was trial discharged to them. The trial discharge lasted 6 months and the child was then finally discharged. Only 6 weeks later, the child was brought back into foster care due again to inadequate guardianship and abuse of drugs. Eight months after the child's return to foster care, the foster care agency filed to terminate the rights of both parents and the Family Court did so. The statute allows a permanent neglect to be filed where either has been a placement of 1 year or one of 15 out of 22 months. Here the fact that the child was finally discharged for a period of time, does not preclude a permanent neglect as the child was in care for 15 out of the most recent 22 months.

The agency did offer diligent efforts in that they supervised a trial discharge, and when the child was returned again to care, urged the parents to comply with drug screenings and services, made referrals and set up visitation. The parents failed to gain

insight or address their problems. A suspended judgment was not warranted.

**Matter of Chon-Michael S., 172 AD3d 494 (1st Dept. 2019)**

A New York County mother permanently neglected her child who was freed for adoption. The agency offered diligent efforts for reunification but the mother failed to comply with services. The agency offered mental health treatment, anger management, drug testing and visitation. The agency tried to maintain contact with the mother and encourage her cooperation but she was unreachable, unresponsive and repeatedly missed visits with the child. The child should be adopted by his foster family where he is well cared for and they want to adopt him. The mother offered no feasible plan. The lower court did not abuse its discretion in denying an adjournment. The mother did not appear for visits with the child, meetings with the agency, arrived 30 minutes late for the fact finding and did not appear at the continued hearing.

**Matter of Nahzzear Y.G., 172 AD3d 526 (1st Dept. 2019)**

A Bronx mother permanently neglected her children. The agency offered diligent effort by creating a service plan and discussing it with her. They attempted to monitor her mental health treatment and set up visitation with the children twice a

week. The mother made some progress but she continued to speak aggressively, curse repeatedly and threaten violence to other people. She did not see that these actions may harm her children and she did not benefit from her therapy. She would not sign releases to allow the agency to monitor her mental health treatment and did not obtain suitable housing. She missed one third of her visits with the children in a 2 year period. The children were thriving in foster care where they had lived for most of their lives and where the family wished to adopt.

**Matter of Ziah X.C., 172 AD3d 549 (1st Dept. 2019)**

The First Department affirmed a Bronx County Family Court's termination of a father's rights. The agency offered diligent efforts by arranging a service plan, referring him to a parenting program for special needs children as well as to marriage and individual counseling and domestic violence programs. The father did complete services but he failed to demonstrate parenting skills and would not separate from the mother who would not obtain treatment for her alcoholism. The children had lived with the foster mother for most of their lives, are bonded with her and she handles their special needs and wants to adopt them. The father lacks insight into the children's special needs and moved 3 hours away from them.

**Matter of Lennox M.,__AD3d__, dec'd 6/7/19 (4th Dept. 2019)**

Steuben County Family Court was affirmed on appeal. The mother permanently neglected the 2 children. Before her incarceration, DSS offered mental health and substance abuse treatment referrals and attempted to provide housing assistance. The caseworker offered visitation and conducted service plan reviews. After her incarceration, the DSS offered jail visitation, provided ongoing permanency reports and service plan reviews and investigated placing the children with people the mother recommended. However the mother was uncooperative before her incarceration, continued to test positive for drugs and was discharged from both mental health and substance abuse treatment programs. There was no reason to offer a suspended judgment as she had never really had care of with child for more than a few weeks and the children had been in care for several years. Even after being released from jail, she would still need to resolve her issues.

**Matter of Jarrett P.,__AD3d___, dec'd 6/7/19 (4th Dept 2019)**

The Fourth Department did affirm the termination on parental rights of an Ontario County father on permanent neglect grounds. The father had been present at the hospital when the child was born but delayed filing for paternity for several

months and then refused to pay for DNA testing and missed the court appearance and his paternity petition was dismissed. He did not file again until he was later incarcerated. Although the caseworker did not speak to the father about filing the second petition, she did not discourage it and in fact DSS then paid for the DNA testing. After he was adjudicated the father, the caseworker sent him monthly letters that contained updates on the child's progress and medical conditions and with photographs of the child. She sent him stamped envelopes so he could communicate back. The caseworker included the father in 2 service plan reviews. The agency is not required to offer services - such as parenting and substance abuse - to an incarcerated parent. The father did not suggest relative resources for the child and the only relatives who did contact the caseworker, were not offering to be a resources. Given the circumstances, the efforts offered were diligent.

The father had no realistic plan other than when he was released from prison, he intended to live with his own father and work in construction. This paternal grandfather had never been mentioned before the termination hearing. Since the lower court had also terminated the father's rights on abandonment grounds, there was no dispositional hearing. The Appellate Division overturned the abandonment termination (see above) and so the court did remand the matter for a dispositional hearing on the permanent neglect ground.

**Matter of D'Angel M.B., __AD3d__ dec'd 6/14/19 (4th Dept. 2019)**

An Onondaga County father's rights to his child were properly terminated. DSS did offer diligent efforts be developing a service plan, setting up substance abuse evaluations, a psychological evaluation, domestic violence classes, parenting classes and visitation with the child. DSS also encouraged safe and stable housing, tried to inspect the father's home and continued to seek alternative resources for the child's placement. The father did not participate in services and claimed that his attorney told him not to do so but the lower court found that claim to be of "limited credibility". There was no reason to offer a suspended judgment. The father made some progress after the TPR had been filed but he did not attend domestic violence counseling, would not sign releases, continued to use drugs and had no source of income. This was not sufficient progress to further prolong the child's stay in foster care.

**Matter of Elijah G., __AD3d__, dec'd 6/18/19 (1st Dept. 2019)**

The First Department affirmed a New York County Family Court decision to terminate the parental rights of a mother to her children. The agency offered the mother diligent efforts by creating an individualized service plan. She was offered numerous referrals to domestic violence programs, parenting

skills, counseling and was given visitation. She was referred to a program about the danger of exposing children to persons who use PCP which caused people to hallucinate and become violent. The mother did not bring her children to obtain medical services for the serious burns that had been deliberately inflicted on them. She denied responsibility for the conditions that led to the children being removed and continued her relationship with a person who used PCP. The children live with a maternal grandfather and his wife in a safe, stable and loving foster home. All their special needs are being met and the foster parents wish to adopt.

## TPR Dispositions

**Matter of Pahyttene Uriah V.A.J.C., 168 AD3d 599 (1st Dept. 2019)**

A New York County AFC appealed the Family Court's granting of a suspended judgment based on the child's position that she wanted to be freed for adoption. The First Department affirmed and stated there was no reported case of an appellate division ever reversing the family court's granting of a suspended judgment due to the disagreement of the child. The AFC was the only party opposed to the suspended judgment as the agency took the position that the mother was in compliance with her

service plan, was not using drugs and maintained consistent visitation.

## **Matter of Isabella M., 168 AD3d 1234 (3rd Dept. 2019)**

Clinton County Family Court's termination of a mother's rights was affirmed on appeal. The mother had consented to a permanent neglect adjudication and the lower court terminated her rights in a dispositional hearing. It was not an abuse of discretion to deny a suspended judgment. Although the mother had made some progress in substance abuse treatment, she could not explain the impact her drug abuse had in the placement of the child and she continued to minimize the neglect of the child. She was unable to demonstrate parenting skills and an ability to independently parent the child – despite this being her 5th child. She failed to understand the importance of stability and bonding to a young child. She would place her needs and desires before those of the child and would not engage in services until repeatedly asked to do so. She did not baby proof her apartment so that she could have visits in the home. Her mental health provider opined that the mother had long standing issues that were not easily resolved and would render her incapable of safely caring for the child. Her older 4 children were all in the care of others and she only had supervised visits with them. This child is just short of 2 years old and has lived with her foster family for all but 1 month of her life. They wish to adopt her.

## Matter of Jace N., 168 AD3d 1236 (3rd Dept. 2019)

A Schenectady mother's rights were terminated and this was affirmed on appeal. The child came into care when the mother was arrested on federal charges of transporting child pornography after she shared pornographic photos of the preschooler with a former boyfriend. Prior to arriving locally with a boyfriend she had met on the internet, the mother and the child had lived in North Carolina with her parents. The DSS facilitated visits with the mother while she was in a local jail until she was transferred back to federal prison in North Carolina. She pled guilty and was sentenced to 6 years in prison and 5 years of post-release supervision. During the post release, she could have no contact with the child without approval of the probation officer. While in federal prison, DSS sent the mother monthly letters with updates on the child, shared photos of the child and encouraged the mother to contact her lawyer. She wrote to the child about 5 times. She was never able to identify any resources that would help her with in person contact with the child while she was in prison. Given the distance and the child's young age, DSS was not obligated to provide visits. Although the child had lived with the maternal grandparents for the first 4 years of his life, it was not appropriate to return the child to their home. DSS provided diligent efforts.

The mother did attempt to complete service programs in the prison but she will be in prison for a while and is not likely to be allowed contact with the child once she is out of prison. The

child should be freed for adoption by the foster family who has cared for him for the last 3 years. He is happy and thriving.

**Matter of Jasiah T-VS.J., 169 AD3d 1041 (2nd Dept. 2019)**

Where the Second Department had in prior appeals, terminated the parental rights of a Kings County mother and ruled that the father was only a notice father, therefore freeing the child for adoption, the Family Court had no authority to order ongoing visitation with the father. There is no authority to order ongoing contact with the birth parents after the child has been freed.

**Matter of Ashante H., 169 AD3d 1454 (4th Dept. 2019)**

An Erie County father violated the terms of a suspended judgment and it was in his 3 children's best interests to be freed for adoption. A preponderance of evidence established the father was not compliant with any of the terms. DSS is not required to wait until the end of the suspended judgment to file a motion to revoke.

**Matter of Matthew S. Jr., 169 AD3d 1456 (4th Dept. 2019)**

On appeal to the Fourth Department, the court ruled that Erie County Family Court did not abuse its discretion by refusing to order a suspended judgment for a father. There was no evidence

that the father had a realistic and feasible plan to care for the children. Even if given more time, the father was not likely to change sufficiently to enable him to parent the children. His minimal progress in the weeks between the fact finding and the dispositional hearing was not sufficient to prolong the children's unsettled status.

**Matter of Dominic T.M., 169 AD3d 1469 (4th Dept. 2019)**

A Niagara County mother appealed the lower court's revocation of a suspended judgment as to her 4 children. Since she consented to the adjudication of permanent neglect, she cannot appeal the issue of diligent efforts to reunite. There was sound and substantial basis that the DSS proved by a preponderance of the evidence that the mother violated several terms of the suspended judgment. She did not maintain a verifiable source of income and she did not abide by the visitation rules. Violation of the terms constitutes strong evidence that termination of parental rights is in the children's best interests and here the lower court correctly determined both the violation and that termination was in the children's best interests.

**Matter of Melissa KK v Michael LL 170 AD3d 1293 (3rd Dept. 2019)**

Clinton County Family Court correctly dismissed a grandmother's Art. 6 petition for 2 grandchildren in foster care. The parents had surrendered the children to DSS and they were now freed for adoption. Family Court has no authority to entertain a custody petitions where a parent has surrendered the child for adoption.

**Matter of Destiney D.M.L. 170 AD3d 838 (2nd Dept. 2019)**

After a termination, this Kings County father is not entitled to a "hearing to determine if he should be allowed a conditional surrender". His rights were terminated in an adversarial proceeding and the court has no authority to order any of post termination visitation or contact.

**Matter of Max HH., 170 AD3d 1456 (3rd Dept. 2019)**

A Chenango County mother violated the terms of her suspended judgment as to her daughter and the child was freed for adoption. The child, who was 3 years old at the time of the fact finding, had been in foster care for most of her life due to the mother's serious drug addictions. Six months into a 12 month agreed upon suspended judgment of a permanent neglect matter, the DSS brought a violation petition against the mother. She

failed to comply with almost all the terms and conditions of the suspended judgment. She continued to use drugs and had not visited her daughter in a year. The mother testified that she did not want to visit the child when she was "dope sick or high". The mother did not remain in contact with DSS who therefore did not know where she was living, her employment situation or any attempts she may have made with services. The child was doing very well with her foster parent and foster siblings. They wanted to adopt her and it was in her best interest to be adopted.

**Matter of Micah T., 171 AD3d 546 (1st Dept. 2019)**

New York County Family Court's determination that a mother had violated the terms of her suspended judgment was affirmed on appeal. The 3 children should be freed for adoption given the violation and their current best interests. The mother failed to bring the children to family therapy, failed to attend her individual therapy, would not sign releases for the agency to obtain the children's medical records and did not attend conferences with the agency. During the suspended judgment time frame, the mother took the children to Florida and enrolled them in school there without seeking permission from the court or the agency. She provided an incorrect address in Florida. The children were well cared for by the foster parent who was their aunt and wanted to adopt them. During the same time period, the mother had a 4th child that the court found to be neglected.

## **Matter of Markel C., 172 AD3d 709 (2nd Dept. 2019)**

The Second Department agreed with Nassau County Family Court that the mother had violated the terms of the suspended judgment but reversed on the child's best interests being served by a termination of her rights. The child had been removed in 2010 when at 3 years of age, he weighed only 13 pounds, was severely malnourished and dehydrated. Over 2 years later, DSS filed to terminate parental rights and the mother admitted to permanent neglect and received a suspended judgment. At this point, the child had been in care for 4 years. Four months later the DSS filed to revoke the suspended judgment alleging that the mother had not cooperated, did not accept parenting services, did not share information about the child with service providers, did not find stable housing, did not join a parent support group, did not provide information to DSS about her housing issues and did not accept preventive services for her other children. The lower court found that the mother had violated all 6 conditions of her suspended judgment and that it was in the child's best interests to be adopted.

The Appellate Division disagreed about the child's best interests. The child had been living in a residential children's home and the mother had learned to provide the special care the child needed and the mother was emotionally attuned to the child. The mother had, by the hearing, obtained housing and was then involved in counseling. While the mother, who distrusted the caseworkers, had refused to sign releases

regarding her other children, she did not deny preventive services workers access to her home or to the children that were in her home. The mother had taken responsibility for the neglect that had placed the child in care. This mother loves her child and attends to his needs and cooperates with service providers. Her interaction with the child is appropriate and the visits go well. The siblings are connected to the child and want him to come home. The mother now has a support system she has not have in the past. Termination of the mother's rights was not in her son's best interests.

**Matter of Nahlaya MM., 172 AD3d 1482 (3rd Dept. 2019)**

The Third Department reversed and modified Chemung County Family Court's revocation of a suspended judgment. The father and the mother both admitted to permanent neglect and were given 1 year suspended judgments relative to their 2 children. Just 17 days later DSS moved to revoke the suspended judgments of both parents and the Family Court did so and then terminated the parental rights of both parents. On appeal, the Third Department reviewed the terms of the order for the mother. She had been required to sign releases, notify of any change of address, receive substance abuse treatment, enroll in mental health counseling, parenting programs and domestic violence programs. She was required to attend all visits, attend the children's medical appointments and maintain a stable, safe and sanitary home. The caseworker testified that she had no

information that the mother had signed up for substance abuse treatment before filing the violation although there was information that she signed up after the violation had been filed. The caseworker had no information that the mother had signed up for parenting or domestic violence programs. The mother had an initial appointment for the mental health counseling by the time of the hearing. The mother did ultimately sign all releases and no evidence was offered regarding attendance issues with the children's medical appointments. The mother's lawyer had given DSS the mother's updated address. The caseworker testified that the mother was working with the agency to locate appropriate housing. The mother had missed 3 visits and was late for 2 others but this had occurred after the filing of the violation petition and should not have been considered by the court. The DSS did not move to conform the pleadings to this more recent information. The Third Department agreed that mother had been given a "short leash" based on her history and that there had been some noncompliance but that many of the allegations really predated the suspended judgment or after the action petition to violate had been filed and should not have been considered. Given the short time between the issuance of the suspended judgment and the violation filing, the mother could not have completed the programs even with good faith efforts. The DSS did not prove that the mother violated the terms during the short time period and the Appellate Division reversed the violation and the

termination as to the mother and reinstated the suspending judgment as to her.

As to the father, there was enough evidence to determine that he had violated the suspended judgment but the lower court did not consider the current best interests of the children as required in ruling that the father's rights were terminated. The court did not hear any evidence about visits, about the children's present circumstances in the foster home about the children's bond with the father and the foster family and the impact a termination might have on the children. Without this information, the court did not consider the children's best interests. The appellate court remanded the matter as to the father for a best interests hearing as to the disposition of the father's violation.

**Matter of Hayleigh C., 172 AD3d 1921 (4th Dept. 2019)**

Since a Genesee County father did not request a suspended judgment, he did not preserve his right to appeal the issue. In an event, it would have not been warranted as he has made no progress in the issues that resulted in the placement.

**Matter of Ramon F., __AD3d__, dec'd 6/14/19 (4th Dept. 2019)**

Monroe County Family Court did not err in admitting reports from a psychiatrist, who did not testify, in the violation hearing

on a father's suspended judgment. Hearsay is admissible in a dispositional hearing of a TPR and there was no objection to relevancy or materiality. As this is a civil and not criminal matter, the due process right to "confrontation" of a witness is not absolute. In any event, it does not appear that the lower court relied on the exhibit to determine that termination was in the child's best interests.

## Unwed Fathers Rights

**Matter of Damani Cory B., 168 AD3d 510 (1st Dept. 2019)**

A New York County unwed father was only a notice father whose rights did not need to be terminated. He failed to provide financial support to the children. He only provided support for 6 months for one child and none for the other child. He claimed to be on public assistance and that he brought food and toys to the visits for the children but constant support should take precedence over gifts and snacks. He offered no explanation why he could not find work of over 2 years and did not contact the children for several months after a trial discharge failed due to his inconsistent visits.

## Matter of Gabrielle G., 168 AD3d 589 (1st Dept. 2019)

A New York County unwed father's consent was not necessary for the children to be adopted. The father did not pay any child support for the children after they went into foster care. The agency is not required to inform the father of his obligation to support the children. The father did not preserve his argument that DRL§ 111(1)(d) is unconstitutional as it does not impose the same duties on wed fathers.

## Matter of Tiara Dora S., 170 AD3d 458 (1st Dept. 2019)

An out of wedlock Bronx father's consent was not needed to free the children for adoption. For one year, he failed to maintain substantial and continuous contact with the children or provide them with financial support. He was incarcerated but he did not communicate with the agency or the children and made no formal inquiries about the children's welfare or their whereabouts. These same facts would also establish permanent neglect and the agency is not required to provide evidence of diligent efforts since the father failed for a 6 month period to let the agency know where he was.

**Matter of Russell J v Delaware County DSS 170 AD3d 1433 (3rd Dept. 2019)**

A Delaware County unwed father did not need to have a termination petition filed against him as he was not a consent father. The father had been charged with rape for impregnating the mother who was underage. He later plead guilty to EWOC. He was told by DSS to contact the agency when he was released from jail but he did not do so and instead waited and filed a custody petition when the child was about 18 months old. DSS filed to terminate his rights on both abandonment and permanent neglect grounds but this was unnecessary as he had no consent rights. He never paid child support, he never met the child, called her or sent her any letters, gifts or cards. He knew the child was in foster care but never asked for the contact information of the foster parents and did not contact DSS although he was advised to do so. Although DSS did not encourage him to contact the child, they did not discourage him. His consent is not required to free the child for adoption.

**Matter of Floyd J.B., 172 AD3d 1200 (2nd Dept. 2019)**

A Queen's County father was only a notice father and his consent was not needed for an adoption. The child was over 6 months old and the out of wedlock father was unable to prove that he had provided a fair and reasonable sum for child support. The fact that he was incarcerated did not absolve him of either

his responsibility to support the child or communicate with the child. Although this father did provide the mother with some child support before the child went into foster care, he did not support the child after that. The agency is not required to instruct the father to pay child support. Even if this father had not been found to be only a notice father, the evidence showed he had permanently neglected the child. He did complete some services while incarcerated but he did not address his issues and did not plan for the child's future.

**Matter of Cynthia M.V., __AD3d__, dec'd 6/26/19 (2nd Dept. 2019)**

A Kings County man's consent was not needed to free the children for adoption. The unwed father's consent was not needed as he did not maintain substantial and continuous or repeated contact with the children as he did not pay any child support for them. It was in the children's best interests to be adopted by their maternal grandparents who had fostered them for several years and with whom they were bonded.

# Surrenders and Adoptions

## Matter of Dajah S. v NYC ACS 171 AD3d 539 (1st Dept. 2019)

The Bronx County Family Court properly dismissed an adult half-sister's petition for custody of her half-brother who was in foster care. The child had been freed for adoption and so only an adoption petition can be filed. There was no current adoption petition pending so the half-sister was not permitted to participate in anyone else's adoption hearing. She had previously filed for guardianship of the child and that had been dismissed with prejudice. Other than her being related to the child, there was no reason that the child's best interests would be supported by awarding custody to the half sibling. Relatives have no greater standing at this point than foster parents do and this special needs child is well cared for and loved in the only home he has ever known.

## Matter of Mehki L.W., __AD3d__, dec'd 6/27/19 (1st Dept. 2019)

The birth mother of a child brought a motion to vacate her conditional surrender of the child based on the substantial failure of a material condition – that the identified foster father would not be adopting the child. The lower court denied the motion.

While on appeal, the child was adopted. The adoption mooted the issue. However, had the matter not been moot, the court commented it would have found that the motion was properly denied as the mother waited over a year after learning that the foster father would not be adopting before bringing her motion. She also failed to provide the foster care agency with ongoing contact information as required by the terms of the surrender so that she could be notified or any substantial failure of a material condition.

## Misc

**Lansner & Kubitschek v OCFS __Misc 3d __ dec'd 2/15/19 (Supreme Court, Albany County 2019)**

Petitioner law firm brought an Art. 78 proceeding seeking an order under FOIL to compel OCFS to produce fair hearing decisions regarding child centers. The Albany County Supreme Court granted the motion, ruling that the protections in SSL § 422 do not apply to fair hearing decision nor is there any regulation that applies and OCFS can redact any information that is an unwarranted invasion of personal privacy. The law firm is not claiming that the decisions are needed by them for research purposes but to better represent its clients in fair hearings. The court noted that the Justice Center makes its hearing decisions public. The court also awarded the law firm attorney's fees.

**<u>Matter of Nilesha RR.,</u> 172 AD3d 1793 (3rd Dept. 2019)**

The Third Department reviewed a Broome County child's situation again, this time in the context of a destitute child proceeding brought by the DSS. The child was born in 2013 and at that time, the father of the child was living with a woman who was not the child's mother. The child lived from birth with the father and this "stepmother" – the court called the women a stepmother although it is not clear if she was married to the father. The child has never lived with her mother. When the child was only 3 months old, DSS removed the child and placed the child with foster parents for about 10 months when she was returned to the father's care. Just over a year later, the father died and a month after his death, the stepmother apparently left the state with the child. Broome County DSS then brought a destitute child proceeding and Family Court removed the child from the stepmother and placed the child back with the DSS for placement with the original foster parents. The stepmother filed for Art. 6 custody of the child. (The stepmother's Art. 6 petition was dismissed by Family Court but that was reversed by the Third Department in a prior appeal) Eight months later, the court granted the destitute child petition and acknowledged that the stepmother had been having extended visitation with the child but that now that needed to be limited pending a full disposition of the matter. The lower court then reduced the stepmother's contact to limited supervised visitation while the matter was

pending. But a week later, DSS told the court that the stepmother has become a certified foster parent and that they had in fact moved the child to the stepmother's home. Further DSS had filed an abandonment TPR against the birth mother. The AFC filed a motion asking that DSS be held in contempt for placing the child in foster care with the stepmother when the court had clearly meant for the child to be with the former foster parents. The former foster parents then filed an Art. 6 petition themselves and DSS opposed that petition arguing they had no standing.

Family Court held a hearing on all of the petitions jointly, ruling that the former foster parents could participate in the joint hearing and kept the child in the DSS custody for foster care under the destitute child petition in the foster care placement of the stepmother, dismissed the former foster parent's custody petition and found DSS in contempt and fined them $250. DSS appealed the contempt finding and the former foster parents appealed the decision to deny them custody and the AFC appealed supporting the former foster parents.

Although the former foster parents did not have standing to pursue an Art. 6 custody petition as they had not had the child in their home for over a consecutive year, it was not inappropriate for the lower court to deem them to be parties to the destitute child proceedings given that in total they had care of the child for 15 months of her life and had a "significant connection" to her. Family Court properly kept the child in DSS care for

placement with the stepmother foster parent. A destitute child can only be placed with DSS or under an Art 6 petition to a relative or suitable person by statute. Since the stepmother at that point, did not have an Art. 6 petition pending, the only options for the court were placement with the former foster parents under their Art. 6 or with DSS. Although the matter was a "close call", the lower court was correct in placing the child with DSS which meant placing the child with the stepmother who had a strong bond with and was committed to the child and had care of her for the last 11 months. The former foster parents had not seen the child in 10 months and had only had the child in their care for 15 nonconsecutive months of her life. Moving this child yet again could be traumatic for the child who was currently stable in the stepmother's home. The stepmother practiced the same religion as the deceased father. The former foster parents had diverse racial and ethnic adopted children in the home but the former foster mother did have some limitations in her ability to engage with the child due to medical conditions. It is not an abuse of discretion for the court to consider the age, race and religions of the two households are these are factors that contribute to a child's best interests.

The lower court erred in holding DSS in civil contempt. DSS did immediately notify the court when they moved the child into the stepmother's home as a certified foster home and therefor there was not clear and convincing evidence that their failure to abide by the court' s order limiting the stepmother's contact

"prejudiced the child's rights" as is required for a finding of civil contempt.

**New York Citizen's Coalition for Children v Poole 2019 WL 1747011 (2nd Cir. 4/19/19)**

The Second Circuit held that the Coalition has standing to sue OCFS over alleged inadequate rates for foster parents to provide for foster children. The court reinstated the law suit after the district court had dismissed it ruling that the federal law did not created an enforceable right to payments. The 2nd Circuit now agrees with the 6th and the 9th Circuits on this point and is in disagreement with the 8th Circuit.