SELECTED CHILD WELFARE CASELAW

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Abuse and Neglect Removals, Temporary Orders and General Evidentiary Issues in Art. 10s

Matter of Amara AA., 152 AD3d 845 (3rd Dept. 2017)

The Third Department reviewed a matter from Franklin County Family Court regarding a violation of a temporary order of protection. After an Art. 10 petition had been filed in April 2015, the court issued a temporary order of protection that required the respondent mother not to use drugs and to submit to random drug screening. In October 2015, the respondent admitted to violating the order and was promised no more than a 60 day jail sentence. The court delayed the mother's obligation to report to the jail until a conference in January 2016. In January of 2016, all the parties agreed that the mother's start of the jail sentence should be delayed until June of 2016, now some 8 months after the original sentence. This order was entered in March 2016. In June 2016, the lower court orally ordered the mother to begin her 60 day sentence. The mother appealed the March order and the Third Department stayed the mother's requirement to appear at the jail.

The Third Department first found that the mother was not aggrieved by the March order which delayed her need to report to the jail , which was in fact her request. It was clearly the order from the June appearance – the one requiring her to appear at the jail to start her sentence – that she wanted to appeal. However, the lower court had refused to write an order reflecting the June requirement for her to report and so the respondent could not appeal it. The Third Department commented that they were "troubled" by the lower court's refusal to sign a written order regarding the oral order that the mother had to begin her sentence for 8 months earlier, but commented that an Art. 78 would be the appropriate remedy for this failure.

The concurring opinion commented that this delayed sentence format "should not be utilized" as the original commitment order was an open ended order that is contrary to the dispositions in FCA Art. 10 proceedings.

Matter of Kameron V., 153 AD3d 1625 (4th Dept. 2017)

An Erie County Family Court's adjudication of neglect was reversed on appeal with the Fourth Department ruling that there was not sufficient evidence that the

respondent was a person legally responsible for the child. While it did appear that the respondent lived in the home with the mother and the child, there was no evidence that the respondent acted in a parental fashion toward the child. There was no testimony that they were living together as a family unit, that the respondent provided child care or financial support or performed household duties.

Matter of Devin W., 154 AD3d 723 (2nd Dept. 2017)

The Second Department concurred with Kings County Family Court that a respondent was a person legally responsible for the child. He was the boyfriend of the child's mother and referred to the child as his son, even in court. He admitted that he visited the home on a regular basis and interacted with the child during the visits. A caseworker had seen the respondent caring for the child and he had told the worker that the child was his son.

Matter of Gary J., 54 AD3d 939 (2nd Dept. 2017)

The Second Department reversed Kings County Family Court's dismissal of a neglect petition against a respondent. The lower court erred in ruling that ACS had not proven that the respondent was a person legally responsible for the 4 children. The respondent was a long term live in boyfriend of the mother of the older children and had frequent contact with the older children. In the time frame of the allegations in the petition, he had lived in the same house as the older children for a few weeks. He is also the father of the 2 younger children who also lived in the same house. The respondent "exercised control" over the older children and supervised them when the mother was not present, he disciplined them and mediated arguments between the children. He acted as the "functional equivalent of a parent in a familial or household setting".

Further the lower court erred in ruling that the respondent's behavior was not neglectful. He in fact neglected the older children and derivatively neglected the younger children. He committed acts of domestic violence against the mother in front of the older child and they were frightened. He also inflicted excessive corporal punishment on one of the older children.

Matter of David L.S., 155 AD3d 633 (2nd Dept. 2017)

Although the Second Department deemed it "harmless error", Kings County Family Court did err in admitting into evidence testimony by a grandmother about statements an aunt made to her as well as a recorded conversation between the two grandmothers. These were hearsay statements and do not comport with the present sense impression exception.

Matter of Julius C., 155 AD3d 623 (2nd Dept. 2017)

The Second Department affirmed a Queens County Family Court's FCA § 1028 order that the children were removed to foster care while a neglect petition was pending. The children were frequently absent from school, had poor hygiene and were not properly supervised. The children were at imminent risk.

Matter of Delilah D., 155 AD3d 723 (2nd Dept. 2017)

In an Orange County matter, the Second Department ruled that the lower court erred in finding derivative neglect by the father regarding a newborn based on the ACD of a neglect petition regarding an older child. The Appellate Court found that since an ACD is not a determination on the merits and since DSS did not move to reopen the earlier proceedings and establish the original neglect, there could not be a derivative finding on the new baby.

COMMENT: The outcome of this matter make sense but the reasoning is puzzling. There are many reported cases of derivative neglect/abuse where there was never any original neglect/abuse finding on the target child. For example, a child is murdered by the parent and the siblings are found to be derivatively abused even though there may be no petition filed regarding the deceased child. Or an older child – now adult and out of the home - testifies that she was sexually abused while in the family home but there was never any disclosure and now her testimony results in a derivative case regarding children who are still in the home. I think the difference is that in these examples, the underlying abuse or neglect is "proven" even though there is not a prior adjudication. For DSS, they need to be thinking of proving the underlying original neglect.

Matter of Elizabeth C., ___AD3d___, dec'd 11/29/17 (2nd Dept. 2017)

The Second Department ruled that a Queens County father was entitled to a FCA § 1028 hearing before the court could order a "stay away" order of protection. The father lived in the home with the mother and the five subject children. ACS filed a petition alleging that the father had sexually abused a 14 year old niece and that the father's 5 children were therefore derivately abused and neglected. The lower court issued a temporary order of protection which excluded the father from the home while the matter was pending without a hearing. The lower court found that a §1028 hearing was not required as the order of protection was not an "order of removal" of the children. The Appellate Court found that a parent has a fundamental right to parent their child and that there are serious constitutional implications regarding the interference of the relationship. Exclusion of a parent from a home where they have been living with their children should require a showing of imminent risk and should trigger an immediate hearing on that standard within 3 court days as it is for all practical purposes akin to a physical removal of the child from that parent. To deny the parent such a hearing , or to argue that a motion for a FCA §1061 modification is adequate, is inconsistent with due process and would leave grave doubts as to the constitutionality of the statute. The Appellate Court cited their ruling in *Lucinda R.* 85 AD3d 78 in which they required that if a child was ordered to be transferred from the home of the parent that they had been living with to the home of the other parent, a FCA §1028 hearing was also required.
NOTE: Most county DSS' report that their courts have not been holding FCA §1028 hearings regarding order of protection that remove a parent from the home and so the decision may result in some significant changes in practice. ACS agreed with the argument that a FCA §1028 was required and so this case will not be appealed to the Court of Appeals.

Matter of Xiomara C., ___AD3d___, dec'd 12/6/17 (2nd Dept. 2017)

The Second Department agreed with Kings County Family Court that 4 of 6 children needed to be removed from their mother's care while an Art. 10 petition was pending. It was alleged that the mother had one of the children to escort 3 of her siblings from a shelter in the Bronx to a school in Brooklyn and 2 of the children became lost.

Matter of Giannis F., __AD3d__, dec'd 12/7/17 (1st Dept. 2017)

A Bronx County half -brother was a person legally responsible in a sex abuse petition regarding his half-sister. The half-brother was a minor when he started sexually abusing the girl who was 5 years younger. There is no requirement that a respondent be an adult. The half brother abused this sibling for 4 years but the mother did not believe the girl when she disclosed the abuse. The mother was also found to be neglectful.

Matter of Gage II., __AD3d__, dec'd 12/21/17 (3rd Dept. 2017)

The Third Department reviewed an order from St. Lawrence County Family Court that ordered Jefferson County DSS to prosecute a neglect petition. The mother and the father were involved in a custody matter in St. Lawrence County Family Court and the court ordered a FCA § 1034 investigation. The Jefferson County DSS agreed to do the 1034 investigation as a courtesy to St. Lawrence County DSS as the father's sister was a supervisor in the CPS unit in St. Lawrence County. After the 1034 report was filed with the court, the AFC filed a neglect proceeding against the parents and moved the St. Lawrence County Family Court to order one of the counties to prosecute the neglect petition. The lower court ordered Jefferson County DSS to prosecute the Art. 10 petition and Jefferson County DSS appealed. The Third Department found that the "mere fact" that the father's sister was a CPS supervisor did not disqualify St. Lawrence County DSS from prosecuting the neglect petition. St. Lawrence County had taken steps to make sure the father's sister had no role in the father's case. The lower court should have ordered St. Lawrence County DSS to prosecute.
NOTE: Courts have permitted AFC to file Art. 10 petitions under this section, usually when the local district does not wish to file a petition, and generally this has resulted in the AFC prosecuting the Art. 10 – sometimes successfully and sometimes not. It is hard to imagine how a court could "order" a DSS to file a petition and pursue an adjudication in a matter where that DSS did not agree that there was in fact sufficient evidence to prove neglect.

Matter of Jaydee P., ___AD3d___, dec'd 12/22/17 (4th Dept. 2017)

A Herkimer County mother appealed her neglect adjudication but the Fourth Department affirmed the lower court's ruling. The mother argued that she should have been allowed to appear for the fact finding by phone. One month before the hearing, the mother was served with the notice of the date and warned that if she failed to appear, the court would proceed in her absence "on an inquest basis". After this notice went out, the mother moved to Michigan and on the eve of the trial sent a letter to the court claiming that she could not afford to return and wanted a "phone interview". She stated that she was not working and was ineligible for public assistance in NYS. The court informed defense counsel that the mother's request to appear by phone was denied and the attorney did not object or seek an adjournment. The issue of an adjournment was therefore not preserved. However, since the mother did seek a phone appearance and that was denied, that issue was preserved. DRL § 75-j(2) applies to neglect proceedings and states that the court may allow for telephonic testimony but does not require it. Given the circumstances of the mother's abrupt move to Michigan on the eve of the hearing, the court did not abuse its discretion is denying her request to appear by phone. The lower court did err in admitting into evidence the entire case file of the DSS worker as it did contain inadmissible hearsay. However, this was harmless error as the result reached without the hearsay portions would have been the same. Also the lower court did not consider or rely on the inadmissible hearsay in reaching its decision.

Matter of Hannah T.R., __AD3d__, dec'd 12/27/17 (2nd Dept. 2017)

Kings County Family Court correctly ruled that an AFC did not have a conflict of interest simply due to the fact that she had previously shared office space with another attorney who had represented the father in the parent's divorce 3 years earlier as the mother argued. There was no allegation that the AFC had ever discussed the divorce with the attorney.

GENERAL NEGLECT

Matter of Kymani H., 152 AD3d 519 (2nd Dept. 2017)

Kings County Family Court neglect adjudication was reversed on appeal. The Second Department found that the mother had not neglected her 16 year old son. ACS had argued that the mother allowed her teen to live with inappropriate

caretakers and would not allow him to move back in with her. The Second Department saw it otherwise. The child voluntarily left his mother's home and moved in with 2 people who, although not related to the child in any way, had functioned as a father and a grandmother for the child since he had been a toddler. The child's needs were met in this home and the mother spoke with the child and the caretakers some 3 to 4 times a week. There was no evidence that the child's condition was impaired or that he was in imminent danger of impairment.

Matter of Antonia S., 154 AD3d 420 (1st Dept. 2017)

The Bronx father of 3 children neglected the 2 oldest children and derivatively neglected the younger. The 2 older children made out of court statements to CPS that their father would leave them alone for extended periods, did not give them enough food and hit them. He would use a belt or his hand to hit them if they did not clean the home or if they refused to panhandle for money. The children expressed fear of the father. The children's out of court statements cross corroborated each other. The mother also corroborated by testifying that she had found the children alone in the father's home and had seen no food in the home. She also had seen the father slap the oldest child and had seen marks on that child. The father failed to testify and so an adverse inference was appropriate. The father failed to provide proper supervision for the children and used excessive corporal punishment which formed a basis for the derivative neglect finding regarding the youngest child.

Matter of Cameron D., 154 AD3d 849 (2nd Dept. 2017)

The Second Department affirmed the Kings County Family Court's dismissal of a neglect petition against a father. There was not sufficient proof that the one act of domestic violence against the mother in the presence of the children established that the children were impaired or had been in danger of becoming impaired. Further there was not sufficient proof that the father misused alcohol to the extent that the lost self control of his actions or that the children were impaired or in imminent danger of becoming impaired.

Matter of Kieran XX., 154 AD3d 1094 (3rd Dept. 2017)

Two Otsego County parents neglected their 10 month old baby. There was a derivative finding regarding the mother's older children but that adjudication was not appealed. The police were called to the apartment after the parents had engaged in an altercation with each other that had lasted for several hours. The mother testified that the father had choked her and punched her and would not let her leave or use the phone. While this was occurring, the mother testified that the baby was present in the immediate area. The father also testified that while the fight was going on, he was holding the baby and the mother grabbed the father's shirt in a rage and yelled at the father. This behavior on the part of the parents meant that the infant was put in imminent harm of physical injury. The parents also further neglected the child in that when the police responded to the domestic violence, they found that the apartment smelled of marijuana and discovered a marijuana growing operation and 3 pounds of marijuana. Further, the lower court properly found that the parents violated the temporary orders of protection that the court had put in place. The mother violated the order that she was not to have contact with the father and the father violated the order that he attend drug treatment. Only the mother appealed but the Third Department concurred that she had neglected the children and violated the temporary order of protection. The violation of the order of protection can also be considered as further evidence of neglect.

Matter of Kathleen NN., 154 AD3d 1105 (3rd Dept. 2017)

Sullivan County DSS brought neglect petitions against the mother, the father and the mother's boyfriend but the family court dismissed all three petitions. The DSS and the AFC appealed and the Third Department reversed the dismissal as to the father but affirmed the dismissal as to the mother and her boyfriend. The petitions centered on an incident that had occurred when the mother, her boyfriend and the child's grandmother took the child to the pediatrician for a well baby check up. The father arrived at the doctor's office unexpectedly and grabbed the baby from the mother's arms and attempted to take the child's things from the grandmother. While holding the child, the father tried to leave and the boyfriend blocked the doorway. Pushing and shoving ensued and everyone followed outside where the father then dropped the baby into a bush near the concrete sidewalk. The grandmother caught the baby just before her head hit the concrete. The father and boyfriend began to fight and the police were called to the scene. The child was screaming, red in the face and very distraught but had only minor scrapes and

scratches. This incident was sufficient to find that the father had neglected the baby. Physical injury to the baby did not need to be proven.

After the incident, CPS learned that the boyfriend had previous indicated reports including a serious incident of physical injury to a 2 year old. CPS made a safety plan with the mother that the boyfriend would not be around the child. However, within the next few days, caseworkers found the boyfriend in the home on 2 occasions. The mother testified that the boyfriend had not moved in until after the incident at the doctors and further that she did not understand that the safety plan meant she had agreed to keep him away from the baby. She felt the boyfriend had tried to protect the baby from the father at the doctor's appointment and believed that his prior protective incident with a 2 year old was due to an accident. Since there was no evidence that the boyfriend had been a person legally responsible for the child at the time of the incident at the doctor's office, he could not be found to have neglected the child at that time. Assuming he was a person legally responsible after the incident given that he then moved in with the mother and baby, neither he nor the mother were neglectful given their failure to abide by the safety plan. The safety plan was a recommendation, not a requirement and was based on the allegations that the boyfriend had prior incidents of neglect. However, the details of these prior incidents were not clearly proven in the court proceeding. The only evidence on 2 of the incidents was that the boyfriend was fighting in the presence of children. As to the allegation of serious injury to a 2 year old, the boyfriend told the caseworker that this had happened by accident. The caseworker had not determined if this more serious incident had even resulted in a Family Court proceeding in the county where it allegedly occurred or if the father's claim of it being an accident could have been accurate. Although the parents initial failure to comply with the safety plan was not appropriate, it did not prove that the child was at imminent risk of neglect.

Matter of Janan II., 154 AD3d 1082 (3rd Dept. 2017)

Broome County Family Court's neglect neglect adjudication against 2 parents was affirmed on appeal. The 3 oldest children made out of court statements that cross corroborated each other and were also corroborated by some of the respondents own testimony. There was "troubling" parental behavior alleged but in particular, one incident was problematic. The father, unhappy with damage the 3 children had made to their clothing, separated the children, screamed at them and rubbed his knuckles against their heads. The children all indicated that his actions caused

them physical pain but more significantly the incident was so frightening to them that each one of them lost bladder control and wet themselves. The children were 12, 10 and 5 years old. The children were "unhinged" by the actions of the father. The neglect was not so much really about excessive corporal punishment (which had been the indication) as it was about the children's emotional response and the parents failure to deal with that. It was not reasonable or prudent on the part of the parent to fail to attend to the children's emotional response. The parents knew that the children were emotionally harmed by the father's behavior and instead of trying to resolve that issues, the parents actively avoided the concerns. The parents ordered the children not to speak to any counselors and the mother refused to answer the door to CPS. The older child disobeyed the parental order that she not talk about this issues and did seek help from a school psychologist. The mother refused to give permission for this child to become involved in an after school program that the psychologist thought would be helping to the child's emotional issues. Further the father wrote a threatening letter to the psychologist, demanding a meeting about the discussions the psychologist was having with the child.

Matter of Izabela S., 155 AD3d 446 (1st Dept. 2017)

New York County parents neglected their child who had severe physical and neurological abnormalities. They were "lax" in their day to day care of the child, did not provide her with adequate food and missed "crucial" appointments with various medical professionals.

Matter of Malachi B., 155 AD3d 492 (1st Dept.)

The First Department agreed that a Bronx father had neglected his child. He repeatedly indicated that he wanted no contact with the child, did not visit the child and did not plan for the child. The father had no permanent home and never provided proof of any legal income. He abdicated his parental obligations. His failure to testify or offer any evidence permits the strongest inference against him. The lower court did err in finding that the father had neglected the child by abandoning the child as this was not specifically alleged in the petition and the petition was never properly amended to include that allegation.

Matter of Evan T., 155 AD3d 964 (2nd Dept. 2017)

The Second Department affirmed an adjudication that a Suffolk County mother neglected her child. The mother asked DSS to place the child in foster care because she could not "afford" to care for him but declined the county's offer of preventive services. She abdicated her parental obligation to adequately plan for her child despite being offered financial and other means to do so.

Matter of Jacklynn BB., 155 AD3d 1363 (3rd Dept. 2017)

A Schenectady County teen overdosed on Ambien, called 911 and was transported to the hospital where it was determined that the overdose was accidental and that she was not a threat to herself or others. The mother, however, refused to take the teen home or to make an alternative plan for her. The father, who lived in a separate home, also refused to take the child. The mother did consent to the teen being placed in foster care and DSS brought neglect petitions against both parents. The family court found both parents neglected the teen for failing to make a plan for the child and the mother appealed. The mother admitted that she was unwilling to have the child returned to her home and that she had consented to the child being placed in foster care. The child did have a mental health history and a difficult relationship with her mother. Allegedly the child had threatened to kill the mother or to commit suicide. However, the child's issues do not excuse the mother's refusal to make plans for the child. There was no proof adduced that the child would have been unsafe if returned home.

Matter of Natalee M., 155 AD3d 1466 (3rd Dept. 2017)

Two Broome County parents neglected their newborn infant. Although the mother knew she was pregnant, she denied the pregnancy and hid it from others and failed to obtain any prenatal care. Even 2 days **after** giving birth, she continued to deny that she had in fact delivered a baby. She refused to sign for emergency medical care for the baby as she said it was not hers. The mother tested positive for meth and acknowledged using meth during her pregnancy including within a week or two of the baby's birth. The baby tested positive for meth, was premature had a low birth weight and needed to stay in the NICU. The mother clearly neglected this newborn. The father also neglected the child. Assuming that he did not know the mother was pregnant (which the lower court found unbelievable) , he had failed to obtain safe housing for the child once she was born. The home had sustained

flood damage and it was not suitable. It was a virtual "construction site". The caseworker had to make an unannounced visit a month after the baby was born as the parents would not allow the caseworker in the home earlier. The caseworker testified that it was difficult to walk around in the home as there were tools, nails, buckets of plaster laying around , there was no sheet rock on the living room walls or in some of the upstairs rooms. Two motorcycles were parked in the home. There were containers of fuel on the counters and a chemical or gas smell throughout the home. There was also no workable safety plan for the baby to reside with a relative. The father did not procure adequate housing for this fragile infant. The father failed to appear on 3 days of the fact-finding and did not testify.

Matter of Andru G., __AD3d___, dec'd 12/12/17 (1st Dept. 2017)

The First Department affirmed New York County Family Court's adjudication of neglect regarding the mother of 3 children. The children were exposed to the mother's violence with other members of the family, including the father of one of the children. The children were in the apartment and were in close proximity to the violence and were therefore at imminent danger of physical injury. There was an incident were the mother and one father each were pulling on the child in a custody exchange. This incident alone was sufficient for a neglect adjudication. The mother also failed to provide an appropriate home for the children as the apartment was cluttered with boxes and contained plastic bags full of the children's dirty clothes which had not been washed in over a year. Further while keeping a child for an unauthorized 4 day visit, the mother failed to obtain timely dental care for the child's abscess.

Matter of Angelos F., __AD3d___, dec'd 12/14/17 (1st Dept. 2017)

The First Department agreed with New York County Family Court that a father neglected his child. The father believed that he was the victim of a conspiracy and that he was being surveilled. There was no evidence that this was true. The father isolated the child in an unsanitary room in a homeless shelter. The child was unkempt and did not have access to a shower for over a month. The child was extremely distraught, anxious and angry. The child was upset to the point of harming himself. The father did not enroll the child in school, missed several weeks of school and provided no other education alternative for the child.

Matter of Jakob Z., ___AD3d___, dec'd 12/21/17 (3rd Dept. 2017)

The Third Department concurred with Broome County Family Court that a father had neglected his 2 children based on several incidents. In the one incident the 11 year old son was bruised on his elbow and had a laceration in his armpit. The out of court statements of the son detailed that his father had ripped a shirt off him in anger, causing the injuries and causing the child to cry. The daughter also made out of court statements that she heard the incident and saw her brother bleeding. The mother also heard the incident, saw the torn shirt and saw the boy upset and crying. The caseworker confirmed the injuries on the boy. The father did acknowledge that he was angry and that he was rough with the boy. In another incident just a few days later the father lost his temper and yelled and banged his hand on the table. The children were present, the parents argued and the father then locked the mother out of the home and she called the police. The father barricaded himself and the children in the bathroom for 3 hours. The daughter expressed fear that the police would shoot her father. The daughter made out of court statements that the mother had bruises "all the time". The mother acknowledged that the children were present for at least 2 incidents of the father being violent to her. The father had pushed the mother down the stairs and the daughter saw this and saw her mother cry and beg the father to leave her alone. The father himself admitted that he did not blame the mother for fearing him given what he had done to her.

Matter of Jamil S., __AD3d__, dec'd 12/28/17 (1st Dept. 2017)

The First Department affirmed New York County Family Court's adjudication that a mother had derivatively neglected her newborn twins. Over the previous 10 years, the mother had had multiple prior adjudications, including one of sexual abuse. She had her rights terminated to another child about 5 months before the birth of the twins. She had been ordered to complete a number of service plans over the years that included anger management, domestic violence counseling, individual therapy and substance abuse treatment. She stopped attending all services when she became pregnant with the twins claiming she had been placed on "bed rest" but she was unable to produce any medical documentation of this requirement. She had been discharged from her therapy for nonattendance and the academic counseling that she received was not related to her need for mental health therapy. She did not make sure her other children were in regular attendance at

school and missed appointments for them – including probation appointments for her son.

DOMESTIC VIOLENCE

Matter of Zelda McM., 154 AD3d 573 (1st Dept. 2017)

A New York County father neglected his child by committing acts of violence against the child's mother when the child was physically close enough to be hurt. The mother provided detailed testimony of multiple acts of violence. The caseworker also provided photographs of the mother's injuries and medical records. The father did not testify and the strongest possible negative inference can be drawn. The mother also testified that the father used drugs every day and was never sober and that he smoked marijuana while caring for the child. ACS was not required to prove that the drug use impaired the child or put the child at imminent risk of a specific impairment. FCA § 1046(a)(iii).

Matter of Isabella S., 154 AD3d 606 (1st Dept. 2017)

A Bronx County Family Court's dismissal of a neglect petition was reversed on appeal. The respondent neglected the two children, one of whom was his child. He choked the mother in the presence of the 6 year old and within a few feet of the sleeping 4 month old. The mother testified and her testimony was supported by the records of the shelter where the family lived. Both children were neglected by his actions. The 4 month old was in imminent danger of physical harm given how close the baby was to the violence.

Matter of Eric P. __AD3d___, dec'd 11/29/17 (2nd Dept. 2017)

Suffolk County Family Court was affirmed on appeal to the Second Department regarding a father's neglect of 3 children. The father grabbed the mother's face and punched her while the 2 of the children were present. Both children saw him grab the mother and one saw him hit the mother. The out of court statements of the one child were corroborated by out of court statements of the siblings and by the photos of the mother's injuries. The children were both afraid of the father and there had been ongoing domestic violence in the home.

EXCESSIVE CORPORAL PUNISHMENT

Matter of Tarelle J., 152 AD3d 593 (2nd Dept. 2017)

A Kings County father used excessive corporal punishment on his 7 year old. He admitted that he hit his son once with a wooden ruler. The child had visible marks and swelling on his arm. This was not an isolated incident.

Matter of Bryan O., 153 AD3d 1641 (4th Dept. 2017)

The Fourth Department concurred with Erie County Family Court that a father had used excessive corporal punishment on his son. The child's out of court statement described the father pushing him to the ground and dragging him to a bed causing bruises and scratches. This was corroborated by the caseworker and the mother's observations of the injuries on the child as well as photographs of the injuries. Further there were corroborating out of court statements by the siblings who heard and saw the fight. Actual serious injury to the child need not be proven. The child was impacted as he was "hysterical" and crying uncontrollably over the incident and had been upset in response to the father's verbal abuse and threats in the past. The Appellate Division did however disagree that there was sufficient proof that the father neglected the child for failing to care for his minimal needs at times when the mother was not home and dismissed that allegation.

Matter of Maya B., __AD3d__, dec'd 12/20/17 (2nd Dept. 2017)

A Queens County father neglected his 14 year old daughter. The father repeatedly slapped the child in the face, knocked her to the ground, punched her in the face with a closed fist, kicked her in the ribs and threw a can of soda at her that hit her in the forehead. The child's out of court statements were corroborated by the caseworkers observation of her bruises, the emergency room records, out of court statements of the older brother and some admissions by the father.

Matter of Damone H. Jr., ___AD3d___, dec'd 12/22/17 (4th Dept. 2017)

An Erie County Family Court's neglect adjudication was reversed on appeal. The Fourth Department found that the father's behavior did not intentionally harm the child nor was it a pattern of excessive corporal punishment. A parent does have

the right to use reasonable physical force to instill discipline. The child had 2 small bruises on his face by his temple. The child first said he was roughhousing with his siblings and although he later gave varying accounts, he maintained that his father had not caused those bruises. The father testified that the bruises were due to the child playing with the siblings. Two months later the child had several scratches on his face, a bruise on his cheek and several minor bruises and abrasions on the face and one on the abdomen. The child said he had gotten in trouble at school and that his father hit him. The father testified that he was called to school due to the child misbehaving. As the father talked to the child about the situation, the child began to run around the classroom. The father chased the child and in an attempt to grab him, accidently caught him in the face with his hand and this caused the marks. There was not a preponderance of evidence that the child was in imminent danger of neglect by the father.

Matter of Israel S., __AD3d___, dec'd 12/27/17 (2nd Dept. 2017)

The Second Department concurred with Kings County Family Court that the mother's actions toward her 13 year old were not excessive corporal punishment. The mother became unhappy with the teen for putting bleach in a dark colored load of laundry and began to scold her. The child then swore at her mother. The mother responded by striking the child in the face, throwing bleach in her face and scratching her arm. The child then retaliated by punching the mother and twisting her arm. The mother did admit that she had slapped the 13 year old a couple of times in the face. While a single episode of excessive corporal punishment may sometimes constitute neglect, this incident was not sufficient. The lower court properly considered the child's "age and size, the provocation, and the dynamics of the incident".

PARENTAL MENTAL HEALTH

Matter of Michael G., 152 AD3d 590 (2nd Dept. 2017)

A Kings County Family Court adjudication that a mother had neglected her children was affirmed by the Second Department. The mother's mental health issues put the children at imminent risk of neglect. In a 3 month period, the mother was hospitalized 3 times with paranoid delusions. The focus of the delusions directly involved the children.

Matter of Tyzavier M., 155 AD3d 578 (1st Dept. 2017)

The First Department concurred with New York County Family Court that a mother's mental instability resulted in her neglect of her 14 month old. The mother had a history of mental illness and hospitalizations – including 2 involuntary hospitalizations since the child had been born. The mother claimed that the child was with the grandmother during the hospitalizations but was unable to describe how the child had gotten to the grandmothers. The mother missed appointments and would not fill out needed paperwork at Covenant House where she resided. She also screamed in the hallways, threatened staff and engaged in other inappropriate behaviors. She did not correctly provide the child some needed asthma medication and pulled the child on the stairs in a stroller.

Matter of Jonathan H., __AD3d__, dec'd 12/20/17 (2nd Dept. 2017)

A Queens County mother neglected her child based on the mother's inability to care safely for the child due to mental illness. The mother had a long history of mental health problems and hospitalizations. She did not comply with recommended medications and therapy. The mother's bizarre behavior directly involved the child. Her mental health resulted also in dangerous conditions in the home.

Matter of Sean P., ___AD3d___, dec'd 12/22/17 (4th Dept. 2017)

An Onondaga mother neglected her 4 day old infant. The evidence demonstrated that the mother's mental illness and her intellectual disabilities were such that there was an imminent risk to the baby. She was unable to feed the baby correctly and did not support the infant's head even with the supervision of hospital staff. The neonatal records and hospital records demonstrated that the mother would not be able to maintain a feeding schedule for the baby or be able to safely hold the baby in an unsupervised setting.

PARENTAL SUBSTANCE ABUSE

Matter of Isiah L., 154 AD3d 680 (2nd Dept. 2017)

The Second Department reversed the Kings County Family Court's dismissal of a neglect petition after petitioners proof for failure to prove a prima facie case. The mother tested positive for cocaine and marijuana at the birth of her 5th child. The infant also tested positive for cocaine. The mother admitted to CPS that she had been using drugs since she was a teenager and had never gotten any substance abuse treatment. She also admitted to being depressed for years and that in the last 4 months of this pregnancy, she simply stayed in bed all day and barely interacted with her older 4 children. She said she was using cocaine in the latter stages of her pregnancy to help her get out of bed and using marijuana to give her an appetite. She admitted she had used cocaine 3 days before giving birth. This evidence does establish a prima facie case of neglect under FCA § 1046 (a)(iii) and no impairment of risk of a specific impairment to the children needs to be proven. The matter was remanded for a new hearing.

Matter of Kaylee D., 154 AD3d 1343 (4th Dept. 2017)

Genesee County Family Court was affirmed in neglect adjudication of a mother after an incident involving her abuse of prescription drugs. The mother was found by the police outside in the early morning hours with her 5 and 11 year old children. The children were in light coats and pajamas in 45 degree rainy weather. The mother claimed that they were out for a walk but the officer observed that the mother had droopy eyes, was lethargic and she would not always answer his questions but would simply stare. The police officer suspected the mother was under the influence of narcotics. The children indicated that the mother was behaving bizarrely and woke them up and told them they had to leave due to an emergency. She made them carry a box with random wires and pipes in it. The children were cold and wet and the mother tried to leave but was arrested. The police found that the mother had a box of suboxone that was missing 22 doses even though the prescription had just been issued 5 days before and the med was to be taken only twice a day. The mother's doctor stated that the mother had a tendency to increase the dosage on her own and that such increase could result in sedation, dysphoria and mood changes, including altered cognitive abilities. This behavior was neglectful of the children and the mother's judgment was strongly impaired and the children were exposed to a risk of substantial harm. Further, the mother

also neglected the children by not contacting the children after her arrest. Lastly, the appellate court commented that the family court had not been biased against her as the court has "broad authority" to question witnesses and to interrupt to elicit and clarify testimony.

Matter of Carter B., 154 AD3d 1323 (4th Dept. 2017)

An Onondaga County mother neglected her children given the overwhelming evidence that she repeatedly misused cocaine and heroin. Under FCA § 1046 (a)(iii) the DSS established a prima facie case of neglect and neither actual impairment nor specific risk of impairment of the children needed to be proven. The DSS was not obligated to "present additional specific evidence to establish the common-sense proposition that repeated, multi-year abuse of cocaine and heroin" would ordinarily have the affect to producing in the user a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence or a substantial impairment of judgment or a substantial manifestation of irrationality. Although the mother claimed that the FCA § 1046 (a)(iii) exception of participation on a recognized rehabilitative program applied, she in fact had 18 separate positive drugs tests and admitted to continued use of drugs while in her methadone replacement program. She clearly was not voluntarily and regularly participating in the program.

Matter of Giah A., 154 AD3d 84 (2nd Dept. 2017)

The Second Department affirmed Suffolk County Family Court's determination that a father neglected his children by repeated misuse of prescription drugs. The evidence of his repeated misuse establishes prima facie neglect under FCA § 1046 (a)(iii) and neither the actual impairment nor a specific risk of impairment of the children needs to be proven. The appeal for one of the children was dismissed as academic as the lower court had since vacated all orders as to that child after the child died.

ABUSE

PHYSICAL ABUSE

Matter of Syriah J., 153 AD3d 430 (1st Dept. 2017)

The First Department affirmed an abuse finding by Bronx County Family Court. The child died after suffering a traumatic brain injury while in the care of the mother and grandmother. ACS is not required to prove which of the two respondents committed the acts that resulted in the injuries. The child had anoxic ischemic encephalopathy and subdural hematoma which is usually explained by vigorous shaking. The testifying expert opined that to a reasonable degree of medical certainty the injuries to the child were the result of a shaking event, in particular given that there was no skull fracture. The mother and grandmother claimed that the child's injuries occurred due to short fall from a mattress to the floor but the ACS experts ruled this out as a possible explanation. Even the respondent's expert testified that it would be "unusual" and "extremely rare" for the child to have received these sorts of injuries in this manner. The petitioner's expert was specifically trained in shaken baby syndrome and was a board certified pediatrician with a sub certification in child abuse. The respondents' experts had not observed the child first hand. Further the respondents' testimony of the events were "riddled with inconsistencies, and simply not credible". In a footnote, the First Department commented that one of the amici briefs contended that there was new scientific research about shaken baby syndrome; however there was no argument by the respondents that the lower court had erred in not considering this new research.

Matter of Angela N. L., 153 AD3d 1408 (2nd Dept. 2017)

The Second Department affirmed the findings of Queens County Family Court that the parents derivatively severely abused their newborn child, that no efforts need to be made to attempt reunification and that the goal for the child should be adoption. The parents' first child had died while in their care at 2 months of age. The father was convicted of manslaughter in the second degree. The subject baby in this case was born to the mother while she was in jail waiting her criminal trial. The mother's criminal charges were ultimately dismissed. Due to the criminal conviction, the Appellate Court concurred that it was appropriate for a summary judgment derivative severe abuse adjudication against the father. The deceased

child had sustained a rib fracture about 2 weeks before her death and also had retinal hemorrhages, subdural hemorrhage, a skull fracture and a severe brain injury. The proof was that this baby had died from nonaccidental head trauma with acceleration injuries while in the care of the parents. These injuries would have occurred as early as 3 days before the baby was brought to the hospital. The 2 month old would have shown immediate and serious symptoms of her injuries, including lethargy, limpness, vomiting and fever. Although the father was convicted of the baby's murder, the mother continued to maintain that neither she nor the father had injured the child and that the injuries had just occurred spontaneously.

The mother was derivatively severely abusive as to the new baby as she stood by and did not protect the deceased child. She acted recklessly under circumstances that evinced a depraved indifference to the life of the deceased 2 month old by clear and convincing evidence. FCA §1039-b allows for a determination that reasonable efforts toward reunification are not required where a parent has been found to be have severely abused a child. Here the parents did not prove the requisite findings to prevent the "no efforts" finding. They did not establish, as would be required, that efforts to reunite would be in the best interests of the child, not contrary to her health and safety and would likely result in reunification in the foreseeable future. The lower court properly changed the child's goal to adoption in light of the mother's continued insistence that neither she nor the father had done anything to cause the death of their first baby.

Matter of Logan C., 154 AD3d 1100 (3rd Dept. 2017)

Schuyler County Family Court found a mother, father and a baby sitter had all abused and neglected 2 children. They all appealed and DSS and the AFC cross appealed the lower court's refusal to find severe abuse. The Appellate Division affirmed the abuse and neglect finding and amended the finding against the father to include severe abuse. There were two incidents that had occurred, some two months apart. In the first incident, the father who had physical custody of the children left them with the babysitter and one child, a toddler, suffered a spiral fracture of the left tibia. The father knew that this injury had occurred and did not seek medical treatment for the little girl until the next day. The father claimed that the older child – a 7 year old – had caused the injury and the father was inappropriate with the son – cursing him and berating him at the hospital and in front of the injured girl. The father neglected the younger child by failing to obtain medical care quickly also failed to follow up with the early intervention and parent

education that the CPS worker recommended. The father stopped using the babysitter after this incident but then began to use her again even though he had reason to beware that the care there was not sufficient. The father was also present and slept overnight at the babysitter's home on the evening of the second event. The mother also was neglectful as she too knew, from her visitation with the children, that the babysitter had resumed caring for the children after the broken leg incident. The mother was aware that the child had blisters in her mouth and on her arm and marks and bruises on the bottom of her foot and on her legs. The mother did not take the child for medical attention but simply notified the father of her observations.

The second incident was life threatening for this same child. When an ambulance was summoned to the caretakers home, the little girl had no pulse, was not breathing and had extensive bruising on her arms, legs, abdomen and back in various degrees of healing. The child also had extensive head trauma, blood in her mouth and nose and was airlifted to a pediatric intensive care hospital. The expert testimony was that the child had suffered one extreme nonaccidental trauma within a few hours of being seen at the hospital that resulted in a subdural hematoma and bilateral retinal hemorrhages. There also had been prior incidents given the older injuries. Neither the babysitter nor the father could explain the injuries. This "extensive and damning proof" was enough to prove that the father and the caretaker had abused and neglected the child by either inflicting the injuries or allowing them to be inflicted. The older boy was clearly derivatively abused and neglected by this behavior as well. There was no medical proof offered by either the father or the babysitter and their testimony was inadequate and not credible. However, the lower court erred in not finding severe abuse on the part of the father. The father would have been present when this child was seriously, almost fatally, injured. He offered no credible explanation. He had also recklessly allowed the babysitter to resume caring for the child, knowing that the child had suffered a broken leg in her care just 2 months earlier. He should have been aware of the extensive bruising the child had that suggested she was being abused. He placed his own interests above the health, well being and medical needs of his child. This provides clear and convincing evidence that he acted with a disregard to her life.

Matter of Angel P., 155 AD3d 569 (1st Dept. 2017)

The First Department reviewed a severe abuse case from Bronx County Family Court and modified the adjudication. The lower court had adjudicated the

respondent to have severely abused and abused one child and derivatively abused and derivatively severely abused the other. The target child was proven, by a preponderance of the evidence, to be abused by his stepfather based on the child's out of court statements and the observations of the child's injuries. On appeal, the Appellate Division ruled that the respondent could only be found to have abused the target child and not severely abused as the respondent was not the child's father. The court acknowledged that at the time of the fact finding, severe abuse could not be found against a non parent and that although FCA § 1051(e) had been amended to include non parents, this was not retroactive. However the target child's half sibling was the child of the respondent and the Appellate Division found that this child was derivatively abused and derivatively severely abused because the respondent's actions towards the target child evinced depraved indifference to that child's life and resulted in serious and protracted disfigurement to that child. There was clear and convincing evidence that the respondent's own child was derivatively severely abused. The lower court properly drew a negative inferenced from the respondent's failure to testify. It was not relevant that the respondent was facing criminal charges for the same event, the negative inference still applies. Further the family court did not err in refusing to adjourn the family court matter until the resolution of the criminal court proceedings.

Matter of Jeremiah D., 155AD3d 414 (1st Dept. 2017)

The First Department affirmed an abuse finding by New York County Family Court. The medical evidence offered by ACS was that the 3 month old infant had suffered abusive head trauma while in the care of the father. The father did not rebut with any credible explanation for the injuries. The lower court correctly rejected the father's expert's theory that the child's injuries were due to a benign enlargement of the subarachnoid spaces. This does not explain the child's retinal hemorrhages, his going limp or the fact that he stopped breathing.

Matter of Nyair J., 155 AD3d 730 (2nd Dept. 2017)

The Second Department concurred with Kings County Family Court that a respondent had abused his infant son but reversed the lower court's dismissal on the derivative petition on the 3 year old child in the home, finding that that child was derivately neglected. The injured one month old baby had subdural hematomas and bilateral retinal hemorrhages with seizures and vomiting. The

expert testimony was that the child had nonaccidental trauma due to forceful shaking. The child also have a fracture to his lower left tibia that the experts opined was also caused by non accidental trauma within the last 4 days. His parents were his only caretakers and at the time of the head injuries, the mother was hospitalized and the father had been caring for the child. The father put a doctor on the stand who testified that the father told him that he had "vigorously" shaken the baby to try to get him to stop crying that the doctor testified that this is what caused the child's injuries. The lower court made a finding of abuse as to the head injuries and neglect as to the broken leg but dismissed the petition as to the 3 year old reasoning that this child was "beyond the age" where the father could cause injury by shaking him.

The father appealed and ACS cross appealed the dismissal of the older child's allegations. The Second Department found that ACS had established a prima facie case that the father abused the baby and that the father himself helped to establish the case by providing a witness who stated that the father admitted to shaking the child and causing the brain bleed and the hemorrhaging of the eyes. Regarding the leg, ACS was not required to prove that the child was only in the care of the father at the time of the injury as once the prima facie injury is proven, it is up to the parent to explain the injury as accidental or to show that he was not the care taker at the time and the father did neither.

The Second Department refused to find derivative abuse as to the three year old but then found that the father had derivately neglected the three year old given that fundamental defect in the father's understanding of appropriate parenting demonstrated by his abuse of the infant.
NOTE – The First and the Second Departments have both had recent cases in which they choose to find "derivative neglect" but not "derivative abuse" when there has in fact been very serious abuse of the target child. Here there was very serious and multiple physical abuse of a one month old with a 3 year old in the home. In the recent case of Matter of Nayomi M. 147 AD3d 413 (1st Dept. 2017) the respondent virtually tortured the older children but the appellate court would only find "derivative neglect" regarding the 2 year old who although was also locked into a room with the older children as a punishment was never "directly exposed" to the other children's "more severe" abuse. It would seem that being "exposed" to target abuse could be alleged to be direct emotional neglect. In the past case law, "derivative" has referred to cases where the impaired parental judgment of the abuse of the target child is the evidence that the other child is at imminent risk. If serious abuse of the target child does not mean the other children

are derivatively abused but only derivatively neglected , then what actually does constitute derivative abuse?

Matter of Victoria C., 155 AD3d 866 (2nd Dept. 2017)

A Kings County mother physically abused her son and derivatively abused her daughter. The son made out of court statements that his mother choked him to the point where he was suffocating and felt he was about to pass out. These out of court statements were corroborated by the out of court statements of the daughter who witnessed the incident and by the caseworkers observation of a deep red thumb sized bruise on the child's neck and 4 or 5 scratches on the other side of his neck. This behavior demonstrated a fundamental defect in the mother's understanding of proper parenthood which resulted in the derivative finding regarding the daughter. Further the mother neglected both children in that she regularly abused alcohol to the point of intoxication and threatened to put a knife to the children's throats. This neglectful behavior was reported by both children, cross corroborating each other and also by the caseworker who smelled alcohol on the mother's breath. The mother was not engaged in any substance abuse program and stated that she did not need one.

Matter of Lucien HH., 155 AD3d 1347 (3rd Dept. 2017)

A respondent mother from Otsego County was found by family court to have abused and neglected her 4 month old and her 4 year old. The adjudications were reversed on appeal. The younger child had an acute fracture to his right ankle and prior healing fractures to his left ulna, left humerus and left femur. A prima facie case was established that the father of the 4 month old had severely abused the child and he had in fact admitted pulling on the child's leg. The fractures could not have been self inflicted or inflicted by the toddler brother and the child did not have any bone disease. The mother and the father were the sole caretakers of the infant. It was the father who admitted that he had grabbed, pulled and twisted the baby's leg as he dragged the child toward him on the couch perhaps some 8 or 9 times. Therefore the mother was only accountable for abuse or neglect if she knew or should have known of the father's inclinations and that she was placing the infant in danger when leaving him in the care of the father.

The mother continuously maintained that she did not know how the child's fractures occurred, that she did not think the father had caused them and that she did not notice anything unusual about the child's leg until the day she took him to

the doctor. Although the father had admitted to her that he was frustrated with the children, she did not think he would hurt the children. She testified that he was not a person who yelled or who spanked the children. She was cooperative with the investigation and had even participated in a controlled phone call to the father where he admitted he had hurt the child. She was visibly upset and cried when he admitted the injuries. Although the family had been receiving preventive services from DSS at the time of the child's injuries, the mother claimed this was because she had told a nurse that the father left the hospital at one time as he was upset and did not want to be upset around the child. At no time did the father ever implicate the mother on the injury to the baby or claim that she was complicit in any way. The doctors indicted that not all fractures of children this young result in redness and swelling and that any pain or discomfort on the part of the baby may not have been obvious after a short time. The child was a happy, non fussy baby who the mother had properly taken to his well baby check ups where nothing unusual had ever been noted. The mother thought the child's fussiness and redness and swelling were due to vaccines and reacted with appropriate monitoring which ultimately led her to take the child to the pediatrician. It was not proven that the mother knew that the child was in danger with the father or that she acted unreasonably in leaving the child with the father.

Matter of Alexander H., __AD3d__, dec'd 12/28/17 (1st Dept. 2017)

New York County Family Court properly granted ACS' motion for summary judgment for severe abuse. The mother had been criminal convicted of second degree assault with respect to another child and there was a prior order excusing efforts to reunify.

SEX ABUSE

Matter of Markeith G., 152 AD3d 424 (1st Dept. 2017)

The First Department affirmed a Bronx County Family Court's sex abuse adjudication. The child testified in court and although there were some inconstancies, the lower court evaluated them in determining the child to be credible. The sexual intent can be inferred from the respondent's acts toward the child and his failure to offer any other explanation. A negative inference can be drawn from the respondent's failure to offer testimony even though there was also

a criminal matter pending. The two male children in the home were derivately abused also – they were sleeping in the same room during the sexual abuse and his parental judgment and impulse control are clearly defective such that any child in his care is at substantial risk.

Matter of Brianna M., 152 AD3d 600 (2nd Dept. 2017)

A Kings County Family Court adjudication of neglect and sexual abuse was affirmed on appeal. The respondent used excessive corporal punishment on the children and was violent to their mother in their presence. The children gave out of court statements regarding the excessive corporal punishment that was corroborated by the respondent's own admissions to CPS. The domestic violence impaired the children's' mental and emotional health. The sexual abuse was proven by the in court testimony of the victim child. Minor inconsistences in her testimony did not make the testimony unbelievable.

Matter of Kylee R., 154AD3d 1089 (3rd Dept. 2017)

An Albany County father sexually abused his teenage daughter. The teen called a rape crisis hotline and reported her father's sexual abuse of her. The child's out of court statements to the rape crisis hotline and to the CPS caseworker were corroborated by her own in court testimony. The child was "hysterical" about the situation when interviewed by CPS and provided detailed descriptions of at least 3 occasions of sexual abuse, including one event of forcible sexual intercourse. The child's in court testimony was consistent in all respects. The father did not testify and a negative inference was properly drawn. This repeated sexual abuse of the daughter demonstrates such impaired parental judgment as to uphold a derivative abuse finding regarding the target child's 2 brothers. The father also neglected the children by his abuse of alcohol. He admitted to drinking "roughly" 6 beers a day on average and claimed to have stopped drinking after his daughter accused him of sexual abuse. All 3 children made out of court statements that the father drank and the daughter described the drinking in her testimony in court. She stated that he drank virtually every day and that this caused her to feel depressed and anxious. She also testified that she believed he had been drinking when he forced her to have intercourse with him and saw him driving his car with one of her brothers in the car after drinking.

Matter of Wendy P., 155 AD3d 515 (1st Dept. 2017)

The First Department affirmed a sex abuse finding regarding a Bronx stepfather and reviewed in detail the testimony of the expert validator. Although the stepfather raised a *Frye* argument regarding the testimony of the validation expert, this issue cannot be heard on appeal as the respondent did not appeal from the separate order that denied the application for a *Frye* hearing. Further the respondent stepfather's argument that the validation expert's testimony lacked proper foundation was not successful with the First Department. The validator (Dr. Treacy) provided detailed testimony about the guidelines she used to interview the child and that she used the Sgroi Sexual Abuse Dynamics framework to analyze the interview. A proper foundation for her testimony was established by her personal knowledge acquired through professional experience. It is not necessary to proof that there is general acceptance in the scientific community. To the extent that the expert deviated from the protocols, this goes to weight. In any event, the expert adhered closely to the protocols. The expert validator did not use leading or suggestive questioning and considered alternative hypotheses. She promoted an "objective, neutral stance" while evaluating the child. The lower court did not abuse its discretion in relying on the expert testimony as corroboration of the child's out of court statements. The child gave spontaneous, repeated and unrecanted descriptions of sexual abuse. There appeared to be no motive for the child to fabricate the allegations. Further observations of the child when she was at the hospital provided additional corroboration. The stepfather failed to present any evidence that he had no committed the abuse and in fact had admitted to the caseworker that he had porn on his electronic device. The expert offered by the respondent did not interview the child and in fact did not provide an opinion as to whether the child had been abused.

Matter of Michael NN v Chenango County DSS 155AD3d 1463 (3rd Dept. 2017)

In an Art. 78 proceeding, the Third Department reviewed the ruling in a fair hearing to expunge a child protective report regarding sexual abuse. The allegations concerned the mother's fiancé sexually abusing her 7 and 8 year old children. The ALJ had ruled that there was not a fair preponderance of evidence that he had abused the younger child but there was a fair preponderance of evidence that he had abused the older child and that he had failed to provide

adequate guardianship to the to the younger child. This ruling was affirmed by the Third Department. At the fair hearing the CPS worker testified as to what the child had said and the ALJ viewed a DVD recording of the interviews of the children. The ALJ determined that the boyfriend had forced the older child to touch the boyfriend's genital area near his penis. The ALF found the older child credible when she described this act noting the change in her demeanor as she described it. The boyfriend had admitted that he had entered the child's bedroom at night and "repositioned her" in the manner the child described. However, the ALJ did not find that the boyfriend had touched the older child but in fact had positioned her to prevent her from falling out of her bed. Further the boyfriend was "less credible" as he described the mother hitting the children with a studded belt – claiming that this had occurred perhaps 200 times in the 2 years he lived with them. There was no evidence that this had happened or it seemed implausible that the boyfriend, who was a paramedic, would have observed such behavior and done nothing. In fact the evidence was that the mother was frequently absent from the home and uninvolved with the children and that discipline had been left to the boyfriend. The hearsay statements of the older child regarding being made to touch the boyfriend near his penis were sufficiently reliable to maintain the indicated report regarding both children.

Matter of Demetrius C., __AD3d___, dec'd 12/14/17 (1st Dept. 2017)

The Fourth Department affirmed a sex abuse adjudication against a father but reversed the derivative neglect adjudication regarding the son. The target child testified in court and was credible. Her inconsistences were minor and peripheral. The fact that she was unable to recall some details about the abuse that had occurred 6 years earlier did not render her testimony unbelievable. The father also did not testify and a negative inference can be drawn, notwithstanding the ongoing criminal investigation. The First Department did however determine that the derivative neglect finding regarding the son was not proper. The sexual abuse had occurred 6 years earlier and did not demonstrate that the son was at risk. The son was much younger and was unware of the abuse. The son had supervised and unsupervised visits with the father for the 6 years since the abuse and there was no evidence that the son was ever at risk during those visits.
NOTE: This is not reflective of the current case law in this area where virtually all caselaw finds a derivative adjudication on a sibling or half sibling when the target child has been sexually abused. Derivative adjudications are based on the parent's behavior toward the target child and whether that behavior demonstrates if the parental judgment is fundamentally flawed. Sexually abusing your daughter is has

generally been found by the appellate courts to be a fundamental flaw in parenting. Here the court seems to be saying that because the event happened 6 years ago and the other child has not been harmed since, there is no derivative.

Matter of Brooke T., __AD3d___ dec'd 12/22/17 (4th Dept. 2017)

A Jefferson County adjudication of severe abuse was affirmed on appeal. The father committed felony sexual acts against his daughter. The evidence was clear and convincing that the father committed the acts. The child's disclosures were corroborated by the testimony of validation experts, a school psychologist, the investigators and the child's counselor. The child gave multiple, consistent descriptions of sexual abuse and had age –inappropriate knowledge of sexual matters. The consistency of a child's repeated out of court statements does not serve to corroborate but it does enhance the reliability of the child's out of court statements. The agency is not required to show diligent efforts in order to establish severe abuse and FCA § 1051(e) was amended prior to the filing of this petition to clarify that this is not a required element.

Art. 10 POST ADJUDICATION and DISPOSITIONAL ISSUES

Matter of Dawn N. v Schenectady County DSS 152 AD3d 135 (3rd Dept. 2017)

In a significant case, the Third Department ruled that the Interstate Compact on the Placement of Children (ICPC) clearly applies when an out of state relative seeks Art. 6 custody of a child who is at that time in foster care due to an Art. 10 proceeding. The child in this matter was in foster care in Schenectady County DSS after an Art. 10 petition was filed against the child's mother for taking pornographic pictures of the child and sending them to a man online. The child was placed in foster care. The child's maternal grandmother lived in North Carolina and after the Art. 10 was filed, she filed an Art. 6 custody petition. She was not seeking that she be made a foster parent or that she receive any services or supervision, only that she be given custody of the child. An ICPC home study by North Carolina resulted in a negative recommendation primarily as the grandmother was already caring for 3 other grandchildren.

As the mother (who was in federal prison for the acts in question) consented to the grandmother being given custody, a finding of exceptional circumstances was not

legally required and the lower court held a best interests only custody hearing. The lower court dismissed the grandmother's custody petition and the grandmother appealed.

The Appellate Division affirmed the dismissal but for different reasons. Since ICPC requires that the receiving state approve of the placement and here North Carolina had not approved, the lower court in fact was not permitted to place the child in the grandmother's custody. Since there was an Art. 10 pending and the child was in foster care on that matter, any placement by the court, even by an Art. 6, to a non parent out of state requires the application of the ICPC.

Matter of Sutton S., 152 AD3d 608 (2nd Dept. 2017)

Nassau County DSS filed a petition to vacate a prior order of protection against the mother but it was opposed by the children's attorney. The lower court vacated the order without a hearing. On appeal, the Second Department affirmed that the modification was for a good cause shown and consistent with the best interests of the children and a hearing was not necessary. The lower court had sufficient information for its review and decision.

Matter of Jeanette V., 152 AD3d 706 (2nd Dept. 2017)

The Second Department reversed Queens County Family Court and remanded the matter for a hearing. Several years after the respondent mother consented to a neglect adjudication, the court allowed for unsupervised daytime visitation. A few months later, the mother sought unsupervised overnight visitation and ACS opposed. The lower court ordered the overnight visitation without a hearing. ACS was granted a stay of the order pending appeal. While a court can modify the visitation order for "good cause shown", the lower court should not make children available for overnight visitation without finding that a neglectful parent has successfully overcome the prior patterns of behavior. A hearing is needed.

Matter of Michael F., 152 AD3d 770(2nd Dept. 2017)

The Second Department reversed a Kings County Family Court's finding of contempt against a non respondent father. The respondent mother had brought a

motion claiming that the non respondent father had violated terms of the dispositional order and that he should be held in contempt and the lower court did so without a hearing. Civil contempt must be proven by clear and convincing evidence and there must be proof that the court had issued a unequivocal mandate and that the party disobeyed the order knowing of the terms and that the other party was prejudiced by the conduct. The mother's papers did not allege that the father's violation had prejudiced her rights.

Matter of Bryce Q., 152 AD3d 889 (3rd Dept. 2017)

A Franklin County respondent mother appealed an order that she violated the dispositional terms of her Art. 10 matter and the Third Department affirmed. Three months after a dispositional order that required that the respondent not use alcohol or drugs and complete mental health services, DSS filed a violation alleging that the respondent had violated both terms. The mother admitted to the violation and in August of 2014 she was sentenced to 90 days in jail. The lower court indicated that the report date for beginning the jail sentence would be delayed if the respondent would comply with the order. Several times the matter was reviewed and several times the date to report for the sentence was delayed but in early 2015, the mother tested positive for drugs. This resulted in her criminal probation sentence being violated and she was placed in state prison for that. The family court then ordered that she would have to serve her 90 day jail sentence as soon as she was released from state prison. The mother's attorney then argued that the mother had done very well in prison and that the 90 days would be again delayed and in March 2016, the lower court ruled that the jail sentence would be deemed satisfied if the mother produced proof that she had completed treatment in prison, has obtained a GED and that she would have specific parole terms. The mother did not provide this proof and was ordered to begin her sentence and she appealed. The Third Department ordered a stay but then did affirm. The mother appealed the March order to produce the documents or serve the previously ordered jail sentence but that order only deemed the previous jail sentence satisfied if documentation was produced, it is not an appeal of the original jail sentence. The original jail sentence is not in fact now appealable. The mother did not produce her GED as required by the March order and still is not able to produce it and so the lower court's order was reasonable and fair.

One Judge wrote a lengthy dissent, commenting that the extra conditions to produce documentation were not made by the mother's consent or after a hearing and therefore were improper. Further the mother had completed the shock

incarceration that was required in her criminal matter and there was a lengthy time between the original family court jail sentence and the time she was newly required to produce documents. The DSS allowed orders of supervision and protection to expire during this time. The dissent found that there was good cause to terminate the 90 day jail sentence.

Matter of Leenasia C., 154 AD3d 1 (1st Dept. 2017)

In a dramatic ruling, the First Department found that family court has the authority to order a "retroactive suspended judgment" when a respondent has done well on a dispositional order of an Art. 10 matter. A Bronx mother neglected her 4 children when the police found 22 bags of PCP in her refrigerator as well as cartridges and marijuana cigars in her dirty roach and spider filled apartment. She admitted that she used marijuana and PCP. She did not manage the medication of her eldest daughter who had several mental health issues. The children were placed in foster care. Four months later, after making improvements, the mother consented to a finding of neglect. A month after that, the mother having made even more improvement, the court allowed the children to return to the home and issued a dispositional order of supervision for 12 months. As the order of supervision was coming to an end, the mother moved under FCA § 1061 to modify the order to a suspended judgment and to then vacate the fact finding and dismiss the neglect petition. She provided supportive reports as to how well she had progressed with services. The mother argued that a suspended judgment and the dismissal of the neglect petition would help her expunge the indicated report in the SCR so she could work as a home health aide. ACS argued that vacating a neglect finding given the seriousness of the allegations was not in the children's best interests and was not authorized by the FCA. Further ACS argued that simply complying with a court order, as is to be expected of litigants, should not be seen as "good cause" to negate the underlying adjudication. ACS also pointed out that the "barriers to employment argument" was hypothetical and the mother's job prospects where not the central concern of an Art. 10 proceeding. The lower court granted the retroactive suspended judgment and ACS appealed.

The First Department affirmed, ruling that the family court has discretion to dismiss a petition at various stages including at a post dispositional stage under FCA § 1061. The statute allows the court to modify both the fact finding order and the dispositional orders as it says "any order" and had the legislature intended to exclude post dispositional orders, it would have said so explicitly. Compliance with the terms and conditions of a suspended judgment does not mean that the

neglect adjudication is vacated but FCA §1061 does give the court authority to consider a motion to vacate an Art. 10 fact finding at any time upon a showing of compliance and good cause. Here the mother had no previous CPS history, the children were not actually harmed and the mother engaged in services and treatment and also ended her abusive relationship with her boyfriend, reunited with the children and maintained sobriety. Vacating the neglect finding as a removal of what may be a barrier to the mother's employment is in the best interests of the children. With the neglect finding vacated, mother can seek to expunge the indicated finding in the SCR. Lastly, the Appellate Division indicated that granting this motion would not set a "bad precedent" as the option afforded this mother would depend heavily on the facts of an individual case. This offers parents a real opportunity to work toward reversing a finding of neglect.

Matter of Daniella A., 153 AD3d 426 (1st Dept. 2017)

Citing to *Leennasia C.,* the First Department reviewed Bronx County Family Court and ruled again that Family Court has authority to modify a prior Art. 10 disposition and order a "retroactive suspended judgment" and dismiss the neglect adjudication. The mother had complied with the dispositional order, she was dedicated to changing the conditions which had resulted in the neglect finding – this was "good cause" to now dismiss the neglect adjudication. Further this dismissal would allow the mother to work in her chosen field and being employed is in the best interest of the children.

Matter of Lylah D.M., 154 AD3d 851 (2nd Dept. 2017)

Three months after a Richmond County child was determined to be neglected and placed in foster care, the child's older siblings were freed for adoption based on a TPR against the mother. ACS then moved under FCA §1039-b for an order that no efforts needed to be made toward reunification of this child with the mother. The family court issued the order and the Second Department affirmed on appeal. The termination of the parental rights of the parent to another child is grounds to issue an order of no reunification efforts. It is the mother who is required to prove that the efforts should nonetheless be made under the exception in FCA § 1039-b(b) and she failed to establish the grounds for the exception.

Matter of Renee DD v Saratoga County DSS 154 AD3d 1131 (3rd Dept. 2017)

The girlfriend of the father of a Saratoga County child lived with the father and his son from the time the boy was a year old and functioned essentially as the child's mother figure. The father eventually was incarcerated when the child was about 6 years old but the girlfriend continued to care for the child. The mother of the boy then sought and was granted legal custody but instead left the state and left the child to remain with the girlfriend. The girlfriend then placed the child with the DSS as the house was in her words "falling apart". The father remained in jail. Subsequently, the girlfriend wanted the child returned to her and filed for custody of the child back from DSS. The lower court denied her custody petition and the Third Department affirmed. Although the girlfriend loved the child and had played a significant role in raising and caring for the child, after the father had been incarcerated, she had inadvisably married another man who was serving a prison sentence for both murder and endangering the welfare of a child. She was aware that DSS had concerns about this relationship and testified that she would keep the child away from her husband but in fact she had taken the child to visit the husband at the prison. Further the child was thriving in foster care and his needs were being met. It was not in the child's best interests to be removed from his foster home and placed in the custody of this resource. Reunification efforts by DSS are not required as the resource is not the child's parent. The court noted in foot notes that the mother of the boy had since surrendered her rights to the child and that the father did not seek custody but supported the ex-girlfriends attempt to obtain custody.

Matter of Cori XX., 155 AD3d 113 (3rd Dept. 2017)

In this Otsego County appeal, the Third Department ruled that a violation of an Art. 10 order of protection must be proven beyond a reasonable doubt where a term of incarceration is being imposed as a punitive remedy and without the possibility of purging the contempt. In this matter, the court did find that the violation had been proven beyond a reasonable doubt. The court had ordered the father to stay away from the mother. On the way out of court she had stopped to read a document and he passed her in close proximity and said " I'm going to kill you." Although he denied that he had said this, he did admit that he passed her closely as

he "wasn't gonna turn around and go the other way". The lower court properly credited the mother's testimony. Although the lower court had relied on a lower standard of proof, the lower court had actually commented that there was "beyond any reasonable doubt" proof of the violation and the Third Department concurred.

Matter of Brian P., 155AD3d 871 (2nd Dept. 2017)

A Kings County mother violated the terms of her ACD and the original neglect petition was appropriately restored. She had failed to complete an anger management course, had missed counseling session and was uncooperative with supervision.

Matter of Jamel HH., 155 AD3d 1379 (3rd Dept. 2017)

A Schenectady County AFC appealed the dispositional order that placed the subject child in foster care. The Third Department concurred with the lower court that it was in the child's best interests to be placed in foster care. Further the appellate division ruled that the lower court did not err in refusing the AFC's request that the court hold an in camera interview of the child to determine the child's wishes. A psychologist testified at the dispositional hearings that the child, who was approximately 11 years old, had behavioral issues, was highly distractible and had difficulty focusing. The expert testified that the home was chaotic and that the mother could not meet the child's needs. The expert acknowledged that there was a negative impact to removing a child from his home but concluded that placing the child out of the home was in the child's best interests and would in fact be beneficial to the rest of the family. The mother was overwhelmed and the child's special needs were not being met in the home. Both DSS and the mother herself supported the child being placed in foster care. The lower court had properly ruled that the child had significant needs and issues and meeting the child regarding his placement would not be helpful and the child's wishes were well known to the court via the closing argument of the AFC.

Matter of Frankie S., 155 AD3d 559 (1st Dept. 2017)

A Bronx County mother had a significant child protective history. There had been 2 Art. 10 petitions filed against her. The first alleged medical and educational

neglect and was resolved with an ACD. After completing the conditions of the ACD, a second petition was filed alleging some of the same types of allegations and excessive corporal punishment as well. This second petition resulted in a neglect finding. However more than a year after the second dispo order, the mother moved to vacate the neglect finding . The lower court denied the request and the First Department affirmed the denial. A vacatur of the neglect finding is not authorized under FCA § 1051 since that statue only relates to dismissal at the fact finding stage. Vacatur is not warranted under FCA § 1061 as the mother did not provide any good cause that promoted the children's best interests. She did not provide any affidavit or seek any hearing to provide any evidence as to why the neglect finding should be vacated. There was no evidence that she was remorseful, that she acknowledged the issues in the past or that she had correct them. It was not unreasonable to believe that the court's aid would be required again the in future.

PERMANENCY HEARINGS

Matter of Angel RR., 152 AD3d 1010 (3rd Dept. 2017)

A Sullivan County father appealed a permanency hearing order which continued the children in care, arguing that he should have been given visitation with the children. The Third Department found that his lack of visitation stemmed from an order of protection and that he should have appealed the order of protection or move in Family Court to modify the order under FCA §1061 and if denied, appeal that denial. An appeal of the permanency hearing order does not raise issues form the order of protection.

Matter of Lacee L., 153 AD3d 1151 (1st Dept. 2017)

The First Department ruled that the Americans with Disabilities Act (ADA) does not apply in a permanency hearing. Although the ADA standards for guidance may be used by a family court to assess "diligent efforts" in a termination of parental rights matter, it is not used to determine the issue of reasonable efforts in a permanency hearing. However, the lower court should, and in this case did, consider the special needs of this mother, who had cognitive disabilities, in determining if the agency was offering a service plan that was tailored to the

mother's needs and was reasonable under her circumstances. This is considerate of the purpose of the ADA.

Matter of Jamie J., Court of Appeals dec'd 11/20/17 (2017)

The Court of Appeals reversed the Fourth Departments ruling that a permanency order continued a child legally in foster care even after the underlying Art. 10 petition had been dismissed. The family court no longer has subject matter jurisdiction over an Art. 10-A permanency matter once the underlying neglect petition has been dismissed for failure to prove neglect. A "hyperliteral reading" of FCA § 1088 cannot overcome the parents rights to due process and Art. 10-A cannot be read in isolation. To do otherwise allows a temporary order issued in an ex parte proceeding to provide an end run around the protections of Art. 10 and would subvert the entire statutory scheme.

Matter of Natalia R., __AD3d__, dec'd 12/28/17 (1st Dept. 2017)

A New York County father, who was merely a notice father, is not aggrieved by a family court order to change a child's goal to adoption. His appeal to the First Department on that issue was dismissed. The appellate court did comment that in any event changing the child's goal to adoption was proper as the preponderance of evidence demonstrated that adoption was in the child's best interests. The child was thriving in the foster home with her half sister. After residing there for 2 years, she was bonded with the foster parents who wished to adopt her. The father had no relationship with the child, had an untreated mental illness and limited financial resources and he was not the father of the half sister. The father claimed that the agency was resisting helping him develop a relationship with the child but this was not supported by the record and in any event, since he is a notice father only they are not required to show "diligent efforts" toward developing a relationship.

NOTE: There is no comment as to what stage any TPR may be in regarding this child. There is no legal requirement that a goal be changed to adoption before a TPR is filed. If no TPR has been filed, this father might still have time to make himself a consent father and then of course diligent efforts may have to be proven.

TERMINATIONS OF PARENTAL RIGHTS

GENERAL

Matter of Cyle F., 155AD3d 1626 (3rd Dept. 2017)

While affirming this permanent neglect adjudication and the freeing of two Seneca County children, the Fourth Department made several evidentiary rulings. Portions of the caseworker's notes were properly admitted into evidence as business records based on the testimony of the caseworker and the typist. This established that the caseworker was legally required to maintaining the records and did so contemporaneously. The father's objection that some of the case file should not have been admitted as portions were hearsay statements by persons under no business duty to report was a proper objection. However it was harmless error in that had those portions been excluded, the resulting order would have been the same. Further, although the lower court may have erred in considering the father's marijuana use as it was post petition, again this was harmless error considering the weight of the admissible facts. Lastly, although the eldest child is now over 14 years old and does not wish to consent to an adoption, it is still appropriate to free the child for adoption. The child's desires are but one factor to consider and although he is hesitant to agree to an adoption, it is in his best interests to be freed for adoption.

ABANDONMENT TPR

Matter of Gloria A.T.S.E., 153 AD3d 1172 (1st Dept. 2017)

A New York County father argued that since ACS did not notify him that his child was placed in foster care, he should not be found to have abandoned her. The First Department found this argument unpersuasive given that the father had no contact with the child for more than 4 years. ACS was not required to show that it made any efforts to encourage the father to meet his parental responsibilities.

Matter of Kaylee Z., 154 AD3d 1341 (4th Dept. 2017)

The Fourth Department concurred with Erie County Family Court that a mother abandoned her child. The mother admitted that she had moved to Florida while the child was in foster care due to a neglect adjudication. She only visited the child

once and that was after the TPR petition had been filed. Her only contact in the relevant 6 month period was several telephone calls and one birthday gift. These contacts are sporadic and insubstantial.

Matter of Jackie Ann W., 154 AD3d 459 (1st Dept. 2017)

The First Department affirmed New York County Family Court's termination of a mother's rights to her child on multiple grounds – abandonment, mental illness and permanent neglect. As to the abandonment ground, the First Department agreed that the proof showed that the mother did not contact the child at all in the relevant 6 months. Although the mother contacted the agency 3 times, this was not sufficient to rebut the abandonment. Also, even though she was hospitalized for a portion of the 6 months, this does not excuse her not maintaining contact before or after the hospitalization.

Matter of Darrell J.D.J., __ AD3d__, dec'd 12/20/17 (2nd Dept. 2017)

The Second Department reversed a Dutchess County abandonment termination. When the mother gave birth, she and another man listed him on the birth certificate. The child come into care at 16 months of age and the mother died just 3 weeks later. After she died, it was determined that the man on the birth certificate was not the biological father. When the child was about 19 months old, a second man filed a paternity petition and a DNA test proved he was the biological father. A filiation order was entered when the child was 20 months old . Four months later, DSS filed an abandonment petition against this father. The Second Department found that once the father had sufficient reason to believe he might be the father, he took action to assert his paternity and sought to have contact with the child. He filed for custody and visited the child twice and tried to visit a third time. He brought the child snacks, toys and clothes. He talked to the caseworker multiple times and told the caseworker where he was living, who he was living with and where he could use day care if he were given custody. He did not abandon the child.

Matter of Angelicah U., 155 AD3d 455 (1st Dept. 2017)

The First Department affirmed a termination of a father's youngest child on abandonment grounds. He did not even name the child when she was born and he did not visit her at all or communicate with her for the relevant 6 month period.

The fact that there was a single contact with the agency for a service plan meeting is not sufficient contact to defeat an abandonment.

PERMANENT NEGLECT TPR

Matter of Walter DD., 152 AD3d 896 (3rd Dept. 2017)

Chemung County Family Court was affirmed on appeal and an incarcerated father's rights to his 2 children were terminated. The children had been removed from the mother due to her neglect while the father had been incarcerated. He was out of jail briefly and sought visitation with the children but returned to prison for stabbing a girlfriend. He was not scheduled to be released until the fall of 2019. The agency offered him diligent efforts by providing letters with updates on the children, offering to assist in connecting him with services that were in the jail and asking him about his plans for the children. Visitation was also provided. This testimony as well as the permanency report prepared by the caseworker established clear and convincing evidence of diligent efforts.

The father failed to plan for the children in that he wanted them to remain in foster care until he was released. They had already been in care for 5 years. He had no specific realistic plans for how he would care for them when he was released. Well meaning intentions are not enough of a plan. It was in the children's best interest to be freed for adoption. The children have strong relationships with the foster parents who wish to adopt. The father has mental health issues and engages in aberrant behavior. The limited visits he had with the children were chaotic and he did not use proper supervision or discipline. The children should not be kept in a "state of suspended animation".

Matter of Jessica U., 152 AD3d 1001 (3rd Dept. 2017)

A Chemung County mother appealed the permanent neglect finding regarding 5 of her 6 children as well as the termination disposition of the youngest three. The Third Department affirmed the family court decision. The respondent was the mother of 6 children and DSS had been involved with her for over 15 years – since the birth of the oldest child. The children had been in and out of foster care and this time had been in care since 2013 - except for the youngest who had been in care since birth at 2014. After the TPRs were filed, the lower court returned the

oldest child – then 15 – to the mother's care and so he was not a subject of the appeal. The lower court had freed the youngest 3 children for adoption and had suspended judgment on the other 2 children.

The DSS provide that they had engaged in diligent efforts with the mother. In fact for many years they had offered an "astounding" array of services including mental health and family counseling, multiple parenting classes for various ages of children, visitation, transportation support, housing and household management assistance, phone services, school enrollment, medical care, medication management, safety and fire prevention plans, household cleaning, safety training, psychological testing, protective parenting training, domestic violence counseling, day care referrals, co-parenting training with the foster parents, respite care, counseling regarding interaction with the oldest child, and communication building assistance. The mother was also offered programs regarding the serious behavioral and emotional problems of the children. Testimony was offered on all these services by caseworkers, social workers, program providers, visitation supervisors, CASA, family counselors and mental health providers. Virtually every aspect of the mother's problems where addressed by multiple services and approaches, all tailored to her needs.

While she did visit and did attend and even complete many of the services offered the mother did not benefit from the services or meaningfully improve her situation. Very little actually changed for the mother and not enough progress was made to safely return the children even after all the years of many services. The mother was combative, hostile and uncooperative with DSS and service providers. She would be violent and make threats even during visitation. She was never able to even move to unsupervised visits with the children. She did not place the needs of her children above her own anger and resentment. She would sometimes refuse to sign necessary consent forms for the children to get treatment and medication. She would engage in harmful and unsafe behaviors with the children. Her home was unsafe and chaotic and she could not manage the children. She had mental illness issues that included poor judgment and an inability to control her emotions and handle relationships. She failed to plan for the children's future.

It was in the best interests of the youngest 3 children to be freed for adoption as they had spent very little time in the mother's care and are doing well in homes that wish to adopt. The older two children are sadly oppositional, defiant, explosive and impulsive and their chances for adoption are poor and the lower court properly determined not to free them as this time.

Matter of Kemari W., 153 AD3d 1667 (4th Dept. 2017)

The Fourth Department affirmed a Cayuga County mother's termination. DSS offered diligent efforts by setting up an appropriate service plan that included a psychological assessment, service plan review meetings, visitation and notifying her of the children's medical appointments. The mother insisted that she wanted visits in the home but would not allow the caseworkers to conduct a home inspection so that could occur.

Matter of Jackie Ann W., 154 AD3d 459 (1st Dept. 2017)

The First Department affirmed New York County Family Court's termination of a mother's rights to her child on multiple grounds – abandonment, mental illness and permanent neglect. As to the permanent neglect, the appellate court agreed that the mother failed to keep the agency aware of her whereabouts for over 6 months and therefore diligent efforts need not be proven. However, in fact that agency did try to provide diligent efforts . The mother did not take advantage of the services offered and failed to maintain contact.

Matter of Justin T., 154 AD3d 1338 (4th Dept. 2017)

An Onondaga County father permanently neglected his child. The agency was excused in providing proof of diligent efforts toward reunification under SSL § 358-a(3)(b) grounds – and not due to the father's incarceration as he alleged on appeal. The father failed to resolve the problems that had led to the child being placed in care. He did not preserve for review the question of a suspended judgment but in any event, he had made no progress toward addressing his issues.

Matter of Brady J.C., 154 AD3d 1325 (4th Dept. 2017)

Monroe County Family Court was affirmed on appeal. The father had permanently neglected his children. The children had been removed due to the father beating the mother in front of the children and throwing objects, including one that hit one of the children. The agency offered diligent efforts to the father toward reunification by referring the father to parenting, domestic violence programs, anger management and mental health counseling. The father was also offered

visitation until the visits had to be suspended due to his behavior. He was belligerent and threatening during visits and he did not successfully address or gain insight into his problems. The lower court properly colloquied the father and then permitted him to represent himself at the dispositional hearing. The father made the decision to represent himself knowingly, intelligently and voluntarily. The father claimed on appeal that the court relied on an exhibit that was not admitted into evidence in the dispositional hearing. However, the exhibit consisted of incident reports of the father threatening visitation staff and caseworkers and was already before the court as it was in the caseworker's visitation notes which were admitted into evidence. Some of the incident reports had been admitted into evidence in the fact finding hearing to which the court took judicial notice of at the dispositional. To the extent that the information was not already in the record, it was harmless given that the record otherwise supports the court's determination to free the children for adoption.

Matter of Valentina M.S., 154 AD3d 1309 (4th Dept. 2017)

Livingston County Family Court properly terminated the rights of a father to his child. The father argued that the case should be reversed as the DSS did not comply with the FCA § 1017 requirement to advise the child's grandmother of the pendency of the proceeding and her right to become a foster parent or to seek custody of the child. The Appellate Division ruled that even if that was accurate, a reversal of the TPR is not required. The grandmother filed an Art. 6 petition and the court denied the petition and determined that custody to the grandmother was not in the child's best interests. Therefore any notice to the grandmother by DSS would not have resulted in a placement with the grandmother in any event. DSS did prove by clear and convincing evidence that it had made diligent efforts toward reunification. They offered regular visits and referred the father to mental health treatment and parenting skills. He took advantage of some of the services but did not regularly attend visitation and would not engage in mental health treatment. The lower court did misstate that the father failed to engage in sex offender treatment as opposed to mental health treatment however such a misstatement is not grounds for reversal. There was no reason to offer a suspended judgment as the father had not made sufficient progress.

Matter of Duane FF., _ 154AD3d 1086 (3rd Dept. 2017)

The Third Department agreed with Clinton County Family Court that an incarcerated mother permanently neglected her child and freed the child for adoption. The child was born while the mother was incarcerated and placed immediately in foster care and the mother was subsequently found to have neglected the child. The lower court had sua sponte changed the child's goal to adoption at the first permanency hearing. The agency did prove clearly and convincingly that they had offered the mother diligent efforts. The caseworkers sent her regular letters and called her at the prison telling her about the child's well being. They gave the mother letters from the foster mother, photographs of the child and copies of the child's medical information. They provided the foster home with letters and gifts for the child from the mother. The caseworkers spoke to the mother on numerous occasions about the need to make a permanent plan for the child and DSS investigated all the people the mother offered as possible non foster care resources for the child. Although no visitation was provided, this was not required given how young the child was and the 300 mile trip between the foster home and the prison where the mother was incarcerated. The mother however failed to plan. Each of the persons she suggested as resources were either unavailable or unsuitable, leaving her with only the unacceptable plan that the child stay in foster care until the mother was released. The mother's earliest possible release date was 2020. The child is strongly bonded to the foster family who wishes to adopt him and he has no relationship with the mother. The mother is unable due to her incarceration to care for the child and has no acceptable plan other than foster care. It is in the child's best interests to be adopted. The mother's argument that she had ineffective assistance of counsel was without merit. The mother had asked the Family Court to provide her with a different attorney but at that time the mother did say that she had had sufficient communication with her lawyer and that she did not object to the hearing continuing. Her claim that the attorney should have called her possible resources as witnesses lacks merit as these resources were in fact either unwilling or unable to provide a satisfactory home for the child.

Matter of Unique M., 154 AD3d 590 (1st Dept. 2017)

The First Department affirmed New York County Family Court's termination of a mother's rights to her children. There was clear and convincing proof of diligent efforts on the agencies part. They developed an individualized service plan and

offered referrals for domestic violence counseling, individual counsel and help with housing. They provided visitation. The mother continued to deny her responsibility for the children's placement in care and gained no insight into her issues.

Matter of Christopher S., 155 AD3d 630 (2nd Dept. 2017)

The parental rights of both a Queens' county mother and father to their son were terminated and it was affirmed on appeal. The agency offered diligent efforts consisting of referrals to mental health treatment, parenting classes and housing services. The agency workers followed up on the programs, encouraged compliance and facilitated visitation. These efforts were tailored to the parents' situations. However the mother failed to take her meds, was hospitalized in a psychiatric hospital and both parents did not complete the parenting program. They refused drug screenings, and failed to attend the visits consistently. They did not gain any insight into their issues. Partial compliance with some of the service plan is insufficient. Their failure to acknowledge and address the issues that had resulted in the child's placement means a suspended judgment would be inappropriate. The child had been in foster care since his birth ten years earlier.

Matter of Nekia C., 155 AD3d 431 (1st Dept. 2017)

The First Department agreed with Bronx County Family Court that a father had permanently neglected his child. Although he had completed services, he was not able to demonstrate parenting skills learned and was not able to separate from the child's mother. The mother was an untreated alcoholic and the father did not acknowledge that he failed to protect the child from the mother.

Matter of Angelicah U., 155AD3d 455 (1st Dept. 2017)

A New York County father permanently neglected his 3 oldest children. The agency referred him to parenting classes, domestic violence services, mental health services and set up case planning meetings and visitation. The father refused to speak to anyone at the agency and would not answer the door when they came to his home. He did not answer letters sent to him about referrals for series and did

not return phone messages. He never followed up on even one referral and engaged in no services. The father argued that his mental illness precluded a finding of permanent neglect as he was too mentally ill to plan for his children's future. However, the agency encouraged and referred him for mental health services and he failed to avail himself of those services or any others. He cannot blame the agency for his failure to engage with any of the resources he was offered.

Matter of Isaiah T.F.-C., 155 AD3d 950 (2nd Dept. 2017)

Kings County Family Court was affirmed in its termination of an incarcerated father's rights to his son. The father's long term incarceration was one of the reasons the child was in foster care and the father's suggested resource for the child was not viable as it would have only extended the time the child was in care. It was in the best interests of the child to be freed for adoption by his foster parents. The child had been in care for 10 years.

Matter of Yamira Empress S., 155 AD3d 961 (2nd Dept. 2017)

The Second Department found that a mother's rights should be terminated on both permanent neglect and intellectual disability grounds. As to the permanent neglect grounds, the court agreed that diligent efforts had been offered for reunification. Regular visitation and the services of a visit coach were provided as well as referrals for mental health services and parenting skills training and the agency attempted to place the mother in supportive housing. The mother did not plan for the child's future.

Matter of James M.B., 155AD3d 1027 (2nd Dept. 2017)

A Queens County mother's rights to her 5 children were terminated and the children were freed for adoption. The mother did participate in classes and programs but she did not benefit from them and did not utilize the lessons learned in order to plan for the children's future. She did not gain insight into her issues and seemed unaware of how her actions affected her children. She failed to acknowledge the problems that resulted in the children's placement and she did not obtain suitable housing. The Appellate Court found that the admission of portions

of the caseworkers' records into evidence as a business record was appropriate. A proper foundation was laid by the testimony of an agency supervisor who was familiar with the agency's record keeping practices. Each person was acting within their course of regular business conduct when providing information and the lower court properly excluded those portions of the record where the entries were not made contemporaneously within a "reasonable time" thereafter.

Matter of Miguel Angel S. 155 AD3d 587(1st Dept. 2017)

Bronx County Family Court was affirmed regarding the adjudication of permanent neglect as to the mother of a child. The agency offered diligent efforts by referring the mother to parenting programs, mental health services, domestic violence counseling and provided random drug testing and visitation. The mother did not attend services, failed to submit to the drug testing, did not get a mental health evaluation or domestic violence counseling and failed to obtain suitable housing. The child was bonded with his foster father and foster brothers and wanted to stay in the foster home and be adopted. He attends school, receives services and his behavior is improved. A suspended judgment is not warranted.

Matter of Paige J., 155 AD3d 1470 (3rd Dept. 2017)

The Third Department affirmed the termination of a Tompkins County father's rights to his children. Diligent efforts were offered to the father. A detailed individualized service plan provided a range of services to the father – referrals for substance abuse evaluations, psychological evaluations, drug and alcohol counseling, mental health services, anger management classes, parenting programs and counseling as well as supervised visitation. The caseworkers met with the father on a face to face basis regularly, worked with him on parenting strategies and conducted numerous service plan reviews and family team meetings. The children had gone into care primarily because the father did not keep the children away from the substance abusing mother as the court had ordered. It was stressed to the father that establishing an independent residence apart from the mother was key for reunification. The mother continued to abuse drugs and the father was counseled that if he resided with the mother, this would be a barrier to any reunification. The caseworker repeatedly encouraged the father to apply for public assistance in order to obtain a separate residence and offered to help with the public assistance application and offered other resources to aid in establishing a separate residence. The father acknowledged the mother's drug use and

repeatedly asserted that he would establish a separate home but never did so. He did engage in substance abuse treatment and completed parenting programs and met with the caseworkers. He had appropriate visitation with the children but this was not sufficient. He did not remedy the specific problem that had resulted in the removal. He did not recognize the danger that the mother presented in the children's well being and he choose loyalty to the mother over the well being of his children.

Matter of Legend S., __AD3d__, dec'd 12/7/17 (1st Dept. 2017)

The First Department affirmed the dismissal of a permanent neglect petition regarding the New York County parents of a son. The child was placed in foster care from the hospital after being born prematurely. Some 7 year later, the agency filed a TPR petition against both parents. The agency did not specify what year period they allege that the parents failed to plan for the child's return. The agency alleged that the parents failed to participate in random drug testing and that the father did not complete counseling but the alleged noncompliance time frame was shorter than one year required by statute. The agency also claimed that during the time that the parents were complaint, the failed to gain insights into their own behavior but the agency did not prove this claim clearly and convincingly. The mother completed all her services and even sought out more services on her own. The fact that the father said "I just wanted to comply" was not enough proof that he clearly and convincingly failed to gain insight into the issues. Further, no record was not made as to why the child had been removed in the first place so it is not clear if the parent's alleged failure to acknowledge mental health issues meant that they lacked insight into the reasons for the removal. Lastly, the agency did not show that the failure to obtain adequate housing was the parents fault. There was not adequate evidence about how various strict shelter rules – such as maximum occupancy played a role in the housing problem. There was not sufficient evidence as to why the parent's applications for housing were denied and if there were other housing subsidies that are available. Although this now 9 year old child has never lived with his parents and spend his entire life in foster care – that alone is not sufficient to terminate parental rights.

Matter of Sarah J.A., __AD3d___, dec'd 12/13/17 (2nd Dept. 2017)

The Second Department affirmed the termination of a Putnam County father's rights to his child. The father argued that his request to represent himself should

not have been denied by the lower court. However this request was untimely as it was asserted after the hearing had begun. Only under "compelling circumstances" should such a request be granted after testimony has started. Here no such compelling circumstances were provided. Further there was clear and convincing evidence of diligent efforts. The DSS offered caseworker counseling, referred the father for mental health therapy, psychological evaluations, parenting programs, anger managements programs and encouraged compliance with all these programs. DSS checked on the father's progress and assisted with supervised visitation. The father however did not gain insight into his issues, did not overcome his personal and familial problems. His partial compliance with some aspects of the service plan was not sufficient. Termination was in the child's best interest as a suspended judgment was not appropriate given his lack of insight and failure to acknowledge the issues.

Matter of Antonio James L., ___AD3d___, dec'd 12/28/17 (1st Dept. 2017)

The First Department affirmed New York County Family Court's termination of a father's and a mother's rights to their children. There was clear and convincing evidence that the agency made diligent efforts with the father by setting up visitation, referring him for mental health services, parenting classes and random drug screenings. He was also referred to sex offender treatment. The father claimed such referral was inappropriate as there had been no finding of sexual abuse. However, the lower court had determined in the neglect proceeding 2 years earlier that that one of the children the father had been legally responsible for had seen child porn on the father's computer. The lower court had determined that the father was a participant in chat rooms where child porn was discussed. The mother was offered visitation, mental health treatment and random drug testing. The parents did regularly visit the children but did not comply with referrals for serves or complete their programs and failed to gain any insight. The mother would not separate from the father even though she was informed that this would reduce the likelihood that the children could be returned. Neither parent was close to completing a service plan nor did they have a realistic plan to care for the children. The children had been with the foster mother since they were very young. An aunt and uncle had filed for custody and the parents argued that this was an alternative to freeing the children for adoption. However, the children were in a stable and loving home and have been for almost 5 years. The aunt and uncle have never had foster parent training and do not believe the father was sexually abusive.

MENTAL ILLNESS and INTELLECTUAL DISABILITY TPR

Matter of Dieurison T., 152 AD3d 609 (2nd Dept. 2017)

The Westchester County Family Court's termination of both parents' rights on mental illness grounds was affirmed by the Second Department. The mother has schizoaffective disorder and post-traumatic stress. She has a history of mental illness as well as noncompliance with medications. The court appointed expert opined that the mother cannot provide adequate care for the child. The expert who examined the father determined that he suffered from paranoid schizophrenia. He lacked insight and had a poor prognosis. There was clear and convincing evidence that both parents are presently and for the foreseeable future unable to safely care for the child.

Matter of Jackie Ann W., 154AD3d 459 (1st Dept. 2017)

The First Department affirmed New York County Family Court's termination of a mother's rights to her child on multiple grounds – abandonment, mental illness and permanent neglect. As to the mental illness ground, the First Department agreed that the court appointed psychologist testified that the mother has schizophrenia and refuses treatment. Although at the time of the hearing, she was in remission, the expert opined that her prognosis was poor and her symptoms would likely reoccur. The mother lacks insight into her issues. When she is non compliant with treatment and then decompensates. She had lost her parental rights to two older children.

Matter of Eliyah I.M., 154 AD3d 696 (2nd Dept. 2017)

The Second Department agreed with Queens County Family Court that a mother's mental illness meant she could not safely parent the child for the foreseeable future. The appointed psychiatrist evaluated the mother and reviewed ten years worth of her extensive mental health records. The mother was diagnosed with schizophrenia spectrum, mood disorders, depressive disorders and other psychotic

disorders. She also had neurological impairments due to her epilepsy and borderline intellectual functioning. The mother did not comply with medication or treatment consistently, was hospitalized on a recurrent basis and had only limited insight into her condition. The mother also had virtually no understanding of the child's health problems and the child would be at risk of neglect if in her care. There was clear and convincing evidence that her mental illness meant she could not presently and for the foreseeable future safely care for this child.

Matter of Jason B., 155 AD3d 1575 (4th Dept. 2017)

The Fourth Department affirmed the termination of a father's rights on mental illness grounds. Clear and convincing evidence was provided that the father suffered from delusional disorder, paranoid type and that as a result, he was unable to safely parent the children. The court appointed psychologist performed a recent and extensive examination of the father. The expert's reliance on some older records of the father's was not inappropriate. A separate dispo hearing is not required in a mental illness termination

Matter of Yamira Empress S., 155AD3d 961 (2nd Dept. 2017)

The Second Department found that a mother's rights should be terminated on both permanent neglect and intellectual disability grounds. As to the intellectual disability grounds, a court appointed psychologist evaluated the mother and testified that her IQ was 65, that she was "mildly mentally retarded" and her intellectual functioning was in the extremely low range and that this had originated in her childhood. Her adaptive functioning was 'significantly compromised". The mother was motived to parent and would be capable of assisting someone who was parenting the child but she lacked the intellectual ability to parent herself independently such that the child would be at risk of neglect if in her care. This expert testimony was not challenged.

Matter of Ayden W., ___AD3d___, dec'd 12/22/17 (4th Dept. 2017)

Erie County Family Court's termination of a father's rights on mental illness and intellectual disability grounds was affirmed on appeal. There was clear and

convincing evidence that he was presently and for the foreseeable future unable to care for the children due to his mental illness and his intellectual disability. The expert psychologist opined that the father had limited intellectual functioning and an antisocial personality disorder and that these conditions were not amenable to treatment. The father did not preserve for review a request for a *Frye* hearing regarding the psychologist's methods and he also did not preserve any argument regarding the admissibility of the case worker notes. In any event, that error was harmless.

Matter of Neveah G., ___AD3d___, dec'd 12/22/17 (4th Dept. 2017)

An Erie County mother's rights were properly terminated on mental illness grounds. The expert interviewed the mother, observed her interactions with the children, reviewed extensive background information and spoke with the interested parties. The psychologist testified that the mother had an antisocial personality disorder and a lack on internalization of societal norms and appropriate moral development. She was reckless and impulsive and prioritized her own desires over others. Any child in her care would be at imminent risk of harm for the foreseeable future. In fact there had been several serious incidents. One child had suffocated to death while in her and the father's care due to a dangerous sleeping arrangement even though they had been warned not to use the sleeping arrangement. The mother and father also failed to obtain medical treatment promptly for another child who fell down the stairs and fractured his skull. Improperly admitted hearsay was harmless given the overwhelming evidence of the mother's mental illness and her inability to safely parent her children.

TERMINATION DISPOSITIONS

Matter of Rebecca B. v Michael B. 152 AD3d 675 (2nd Dept. 2017)

The Second Department reversed Orange County Family Court. After 4 children had been freed for adoption, the maternal grandparents and a maternal aunt filed for guardianship of the children and the lower court granted the petition. The Appellate Division reversed ruling that it was in fact in the best interests of the children to be adopted by their foster parents. Once children have been freed for adoption, there is no presumption favoring relatives over adoptive parents that DSS

supports. Two of the children have been with their foster home since June of 2015 and the other two children have been in their foster home since November 2015. The children are bonded with their respective foster families and are happy, healthy and well provided for where they are.

Matter of Hailey B., 152 AD3d 677 (2nd Dept. 2017)

An Orange County mother consented to a permanent neglect finding and a suspended judgment. DSS then filed motions to revoke the order of suspended judgment alleging that the mother had violated the terms of the order. There was a preponderance of evidence that the mother had violated the terms. The DSS is not required to prove that it made diligent efforts during this period as the respondent had already admitted to permanent neglect.

Matter of Amaya A., 153 AD3d 1160 (1st Dept. 2017)

The First Department affirmed a New York County mother's termination of her parental rights as opposed to a placing the children in the custody of a grandmother. It was not in the children's best interests to be removed from their stable foster home where they have spent most of their lives. The foster home wished to adopt, they have a close bond with the foster mother who they call "mommy". A suspended judgment was not appropriate either since the children had not seen the mother in years. The mother claimed her due process rights were violated due to the lengthy proceedings but in fact the matter went to a hearing within a month of the TPR petition being filed and the court's decision was made within 3 months of the TPR petition being filed.

Matter of Ireisha P., 154 AD3d 1340 (4th Dept. 2017)

An Erie County mother violated her suspended judgment as she failed to comply with the term including repeated positive tests for cocaine use. Given the preponderance of the evidence of her violation and that it was in the children's best interests to be freed for adoption, the termination of the mother's rights was affirmed.

Matter of Illion RR., 154 AD3d 1126 (3rd Dept. 2017)

The Fourth Department affirmed Chemung County Family Court's decision to terminate a mother's rights to her child and to not order a suspended judgment. The mother had admitted to permanent neglect but argued for a suspended judgment. The mother had however never competed any of the services that had been ordered – not mental health counseling, not substance abuse treatment, not parenting classes nor domestic violence. She had also moved to NYC in violation of the court's order to remain in the county. Further she had stopped visiting the child since the move - except for 2 visits. The mother conceded most of this but did testify that she called the child about once a week. On one occasion the mother had been in the area and had not sought contact with the child but accidently saw the child with the foster mother in a grocery store parking lot. There was no evidence that the mother attempted to plan for the child's future and it was in the child's best interests to be freed for adoption.

Matter of Ashanti T.P., 155 AD3d 869 (2nd Dept. 2017)

The Second Department concurred with Kings County Family Court that a mother had violated the terms of the suspended judgment regarding her 4 children and that they should be freed for adoption. The mother had failed to attend mental health services and did not follow up on recommendations, she did not obtain a legal source of income and told the agency it was "none of their business" . She failed to obtain stable housing and owed arrears on her rent. She did not meet with the agency on a regular basis and she was not consistent in participating in appointments that related to the child. She used profanity and threatened the child at visits. She did not participate in meetings on the service plan or about visitation and she was explosive and aggressive toward the agency staff. By a preponderance of the evidence, she failed to comply with the conditions of the suspended judgment and it was in the best interests of the children to be freed for adoption.

Matter of Kh'Niayah D., 155AD3d 1649 (4th Dept. 2017)

Onondaga County Family Court properly revoked a mother's suspended judgment and terminated her rights to her child. There is some evidence that she attempted to comply with the literal terms of the suspended judgment but she was unable to overcome the specific problems that led to the original removal.

Matter of Miguel Angel S. 155AD3d 587(1st Dept. 2017)

Neither a suspended judgment nor custody to a grandmother were in a Bronx child's best interests. The child is bonded with his foster father and 2 foster brothers and wants to remain in the foster home where they wish to adopt him. The child goes to school on a regular basis and is provided with services that have improved his school performance and his behavior. The child had been in the care of the maternal grandmother for a time in the past for about a year and the grandmother allowed unsupervised contact with the mother. The mother disappeared with the child for 2 days and the child's arm was broken during that time. After the child was moved to a foster home, the grandmother treated the child inappropriately to the extent that visitation had to be discontinued. The child did not even want to resume visitation with the grandmother and at the time of the dispositional hearing the child had not seen the mother or the grandmother for 2 years.

Matter of Andrea L.P., __AD3d__, dec'd 12/5/17 (1st Dept. 2017)

New York County Family Court was affirmed regarding not granting a mother a suspended judgment. She did not have a realistic and feasible plan to provide an adequate and stable home for her special needs children. Further delay would not result in a different outcome. The children have been in foster care for 5 years and deserve permanency. It did appear that the mother was going to continue to have contact with the children in any event.

Matter of Deysanni H., __AD3d___, dec'd 12/13/17 (2nd Dept. 2017)

The Second Department affirmed Orange County Family Court's revocation of a suspended judgment. The mother made some efforts to comply but the order was that she had to maintain a 100% compliance with her substance abuse program and the Family Support Program. She was in fact discharged from the substance abuse program for non compliance and she did not consistently attend or benefit from the Family Support Program. Also, the mother failed to understand why the children were originally removed and why they remained in care.

Matter of Ethan A.R., __AD3d__, dec'd 12/20/17 (2nd Dept. 2017)

A Queens County mother violated her suspended judgment order that had required that she cooperate with mental health treatment and medication. A preponderance of the evidence showed that was involuntarily hospitalized because she did not inform her therapist of symptoms. She also missed 3 appointments with the child's health care providers.

Matter of Dah'Marii G., __AD3d___, dec'd 12/22/17 (4th Dept. 2017)

Erie County Family Court correctly ruled that a mother had violated her suspended judgment and terminated her rights. The mother was repeatedly discharged from substance abuse treatment and failed multiple drug tests. The suspended judgment was revoked after 4 months but it is not necessary to wait until the end of the period of suspended judgment to revoke the suspension.

UNWED FATHER'S RIGHTS

Matter of Commissioner of SS v Dorian E.L., 152 AD3d 582 (2nd Dept. 2017)

The Second Department reversed Orange County Family Court in a paternity matter. The lower court had issued an order of filiation regarding an 8 year old without granting the respondent's request for a DNA test. The respondent was not estopped from contesting paternity and seeking a DNA test as there was no relationship between the child and the respondent. The child would suffer no harm if the DNA test revealed that he was not the biological father.

Matter of Hudson LL 152 AD3d 906 (3rd Dept. 2017)

A Clinton County unwed father was not a person whose consent was needed in a private adoption. Although the father acknowledged his paternity when he learned of the mother's pregnancy and he may have accompanied her to a few prenatal doctor appointments, purchased some prenatal vitamins and given the mother a few hundred dollars, he ceased any help or support when the mother was about 2 months along. He engaged in criminal activities and was incarcerated and

thereafter did not contact the mother or offer any money toward birth expenses in the 6 months before the child was born and placed for adoption.

Matter of Marshall P. v Latifah H., 154 AD3d 709 (2nd Dept. 2017)

Orange County Family Court correctly determined that a petitioner was the father of a child out of wedlock even though another man had signed an acknowledgment of paternity, some five years earlier shortly after the child was born. Although the time frame for the acknowledged man to vacate his acknowledgement had run and he could not seek a vacation of the acknowledgement, another man could be adjudicated under the circumstances in this matter. Here the petitioner proved that had been told by the mother that he was the actual father, that he had taken care and supported the child for years since being told that he was the father and had even cared for the child when the mother was incarcerated. The existence of an acknowledgement of paternity does not bar a stranger to the acknowledgment to bring a proceeding and argue equitable estoppel based on his actions.

Matter of Aniyah G., 154AD3d 536 (1st Dept. 2017)

An unwed Bronx County father was not a consent father under DRL §111(1)(d) as clear and convincing evidence proved that he had failed to maintain contact with the child. He was only a notice father. His claims to have provided support were unsubstantiated and not credible. Even he admitted that his contact with the child had been minimal for years.

Matter of Jayvon Jose R., 154 AD3d 600 (1st Dept. 2017)

The First Department concurred with Bronx County Family Court that an unwed father was not a consent father. The father claimed that he had paid child support for a few years pursuant to a court order but he also testified that he had not paid child support for the last 2 years. This was not sufficient to show that he was a consistent source of support for the child. Even if he was a consent father, the lower court properly found in the alternative that he had abandoned the child. Both the foster mother and his own testimony demonstrated that he had not attempted to contact the child or the agency in the relevant time period. The agency did not

discourage or prevent him from contact and he did not have any severe hardship that meant contact was not feasible. The agency has no requirement to prove diligent efforts and a dispositional hearing is not mandated and was not necessary given that the father admitted he had not seen the child in years.

Matter of Angela H.F., 155 AD3d 624 (2nd Dept. 2017)

A Queens County child was placed in foster care when she was 6 months old. Three years later a TPR was filed against the mother and after 3 years, the mother's rights were terminated. A man had been listed in the agency file as the child's father but he had not been adjudicated. Fifteen months after the child was freed from the mother, Family Court determined that the father was not a consent father. However, the father then filed a paternity proceeding and while that was pending, an adoption position was filed. One year and 7 months after the court had determined that the father was not a notice father and while the adoption petition was pending, he was adjudicated as the child's father. The court then held a hearing to determine if the father's consent was needed for the adoption and the lower court determined that it was not. The father then appealed to the Second Department. The Appellate Court concurred that the father's consent was not required by clear and convincing evidence. The father failed to show that he had maintained substantial or continuous contact with the child by payment of child support and either regular visitation or other communication. At the time of the Second Department decision, the child would have been in foster care 11 years and 1 month.

Matter of James M.B., 155 AD3d 1027 (2nd Dept. 2017)

The Queens County father of 3 children born out of wedlock was not a father whose consent was required to have the children adopted by clear and convincing evidence under DRL § 111 (1)(d) . A TPR against him was not required. The father was incarcerated for much of the children's placement in foster care but this did not absolve him of the responsibility to support them. Being incarcerated does not mean that he did not have the means to provide them some financial support and he admitted to not supporting them both while incarcerated and when he was out. Although he claimed to have called the agency numerous times to inquire about the children, the lower court did not credit this testimony.

Matter of Jayden N. H., __AD3d__, dec'd 12/21/17 (1st Dept. 2017)

The First Department affirmed Bronx County Family Court's determination that an unwed father's consent was not needed for an adoption. The father did not prove that he had a substantial and continuous or repeated contact with the child. In fact there was no proof that he ever had any contact with the child. He claimed to have written letters and sent cards to the child but he had no copies of them and the foster care agency indicated they had never received any communication. The father was unable to describe any details of the child's life, including the fact that the child had multiple hospitalizations. When the father was not incarcerated, he was employed but he did not provide meaningful support for the child. He claimed that he bought the child things but this was unsubstantiated. There also was no evidence that the father gave the mother a $2,700 debit card when he was about to be incarcerated as he claimed. The father failed for over 10 years to legalize his relationship as the father and only did so when the termination petition was filed. Even if he was a consent father, he abandoned the child. While in prison, he could have, but did not write to the child or the foster care agency. Although the foster care agency sought to expedite the child's adoption, an adoption petition cannot be filed regarding a foster child when an appeal is pending. 18 NYCRR 421.19(i)(5)(I) , 22 NYCRR 205.53(b)(10).

SURRENDERS and ADOPTIONS

Matter of Lydia AC v Gregroy ES., 155AD3d 1680 (4th Dept. 2017)

A Jefferson County father and his wife filed a stepmother adoption of his child and the mother opposed. The lower court correctly dismissed the adoption petition and ordered that the mother be allowed visitation with the child. The mother creditably testified that she repeatedly sent messages to the father and his wife about seeing the child and they ignored her messages or insisted that she had to agree to an adoption. As they interfered with her efforts to visit and communicate with the child, abandonment was not proven by clear and convincing evidence.

Matter of Georgianna N., __AD3d__, dec'd 12/21/17 (1st Dept. 2017)

The First Department affirmed the New York County Family Court's dismissal of a maternal grandmother's petition for visitation of 2 children who had been adopted. The adoptive mother had fostered the 2 children since they were one month and 3 years old. The grandmother had not seen the children in over 3 years and had no relationship with them. The children did not ask about her. Further the children had behavioral issues that meant they had special school programs, multiple therapists and needed constant supervision. Reintroducing the grandmother into their lives would disrupt their routines and could be detrimental and might risk their regression. Anyone who visited the children would need extensive training about their special needs. Further, in the past, the grandmother had taken the children to visit the biological parents whose rights had been terminated many years ago. She had told the children that they would live with the biological parents again, which was not true.

Matter of Jayden M.A.-M., __AD3d__, dec'd 12/27/17 (2nd Dept. 2017)

A Queens County mother signed a conditional surrender of her 2 children that allowed her to have 2 visits a year if the children were adopted by a specific couple. The couple adopted the children and 4 years after the surrender, the birth mother sued to enforce her visitation. The Second Department concurred with the lower court that enforcement of the surrender agreement was no longer in the children's best interests.

MISCELLANEOUS

Matter of Attorney for the Children v Barbara N. 152 AD3d 903 (3rd Dept. 2017)

A Broome County AFC brought a petition to suspend visitation with the birth parents of 3 children who had been placed in the custody of a friend of the family. The children had been placed with the friend after the DSS had filed an Art. 10 proceedings and the matter had resolved with the children remaining in the custody of the friend with supervised visitation. Less than 2 years later, the AFC filed to suspend the visitation based on the two daughters having disclosed sexual and physical abuse at the hands of the parents before the placement with the

relative and both children were now being treated for PTSD. The lower court modified the mother's visitation and ordered that is was to be supervised in a public setting and ending the father's visitation completely. The father appealed. The Third Department concurred with the lower court that the uncontroverted expert testimony of the 2 girls' therapists demonstrated that any contact with the father would be detrimental to the children's mental health

Matter of Alexis EE. 153 AD3d 1056 (3rd Dept. 2017)

In a private custody case from Sullivan County, the attorney for the 3 girls filed an Art. 10 abuse and neglect against the mother alleging that she had sexually abused the children. Ultimately, the mother admitted to neglect in that she repeatedly and inappropriately cleaned the genital area of the girls ultimately causing abrasions. The father was given custody and the mother's visitation was terminated. Within a year, the father alleged that the mother had violated the order of protection and the mother sought supervised visitation. After hearing testimony from the mother's therapist and a forensic psychologist who examined everyone in the family, the lower court determined that the mother still failed to understand the significance of what she had done and was not able to demonstrate a change of circumstances. The Third Department agreed.

Matter of Schneiter v NYS OCFS 154 AD3d 1283 (4th Dept. 2017)

The Fourth Department extensively reviewed a fair hearing concerning the removal of a foster child from her foster home by Erie County DSS. The child had been placed with the family in May 2015, slightly more than a year later in June of 2016, Erie County moved the child to another foster home to join a foster family that had the child's siblings. The first foster family sought a fair hearing from OCFS about the removal. The hearing was held in August 2016 when the child would have been out of the home not even 2 months and OCFS issued a decision in October of 2016 ruling that Erie County DSS should not have removed the child, that their decision was arbitrary and capricious, not supported by the evidence and violated the regulations that required that the agency consider the child's bonding with the siblings as well as the original foster family in deciding to move a child to join siblings. However the OCFS order did not state that Erie County DSS was to return the child to the first family immediately but instead remitted the issue to DSS to complete an evaluation of the child's current condition to determine if the child should be returned to the first home. The child would

have been out of the home for 4 months at that point. The first family then brought an Art. 78 proceeding seeking the child's immediate return. Erie County Supreme Court agreed and ordered that the child was to be returned to the first family. Erie County DSS appealed that order to the Fourth Department and the Fourth Department issued a stay that the child was to remain with the sibling's foster family, also stayed the adoption proceeding that the 2nd foster family had filed regarding the child but ordered that the first foster family could have visitation with the child while the appeal was pending.

The Fourth Department, in a decision released in October 2017, agreed with the Supreme Court that OCFS should have ordered the child to be immediately returned to the first family as it had been in the child's best interest to be returned to the family who had been raising her for a year. The appellate court particularly relied on an expert who had testified at the fair hearing that the child would be traumatized in a way that would have a significant impact on all areas of the child's development. However, the Fourth Department talked about the fact that the ongoing litigation had now resulted in "unique difficulties" in that the child had now been out of the first home 16 months – longer than she had been in the first home. The expert at the original fair hearing had said that the child's trauma would be mitigated if the child were returned "swiftly" and "urgently" but that had not happened given the litigation. The Fourth Department ruled that it was not clear if now moving the child back to the first foster home would be in the child's best interest or not. The Fourth Department remitted the matter to OCFS to conduct a hearing "forthwith" to determine what was in the child's best interests. The Fourth Department continued the stay on the second families adoption petition and continued an order that the first family was allowed visitation with the child.

Matter of Lisa T v King E.T., _ Court of Appeals dec'd 12/19/17 (2017)

The Court of Appeals ruled in this private Art. 8 petition that the family court had jurisdiction to issue a permanent order of protection after finding a violation of a properly issued temporary order of protection even though the original Art. 8 petition was dismissed for failure to prove the allegations. There was one Justice who dissented.

Matter of Christy T. v Diana T. ___AD3d___, dec'd 12/21/17 (3rd Dept. 2017)

After a 2011 Cortland County Family Court adjudication of neglect, a child was placed with the maternal grandmother and in 2013 after the mother had not resolved her issues, there was a consent order for joint legal custody with primary physical custody to the grandmother. In 2015, the mother filed a petition to obtain sole custody. The lower court denied the mother's custody petition and she appealed. Among other issues, the Third Department found that the mother was not required to show a "change in circumstances" to seek custody when the prior custody order to the non parent was upon consent and without a finding of extraordinary circumstances.

Matter of Connie VV v Cheryl XX ___AD3d___, dec'd 12/21/17 (3rd Dept. 2017)

The mother of a 13 year old boy filed in Broome County Family Court for physical custody of the child. The child had in fact been living with her but there had been a prior consensual order that the grandmother have physical custody with the mother, father and grandmother having joint legal custody. The father took the position that he could not care for the child, did not want visitation and thought the child would be better off in foster care. The grandmother took the position that she could no longer care for the child and that she had left the child with the mother but also thought the child would be better off in foster care. The lower court refused to grant the mother's petition and continued the prior order. The mother appealed and the Third Department ruled that since the prior order was on consent, there needed to be an assessment of extraordinary circumstances. The appellate court, mindful of mother's "significant and disturbing history with DSS" still found that there in fact was not extraordinary circumstances and reversed the lower court, awarding physical custody to the mother. The mother had been convicted of criminally negligent homicide of a 3 month old in 1996, and been found permanently neglectful of her four other children in 1999 and 2000. There was also a 2001 neglect proceeding on another child. There was one Judge who dissented and who pointed out that the lower court likely did not engage in an extraordinary circumstances analysis as the grandmother clearly no longer wanted custody. The dissent agreed with the lower court that the child had been coached and that there were many problems with the mother's history and current living conditions and that the order should stay with the grandmother having physical custody "pending a more permanent solution".

NOTE: No doubt that the reason the grandmother originally obtained physical custody of the child was primarily based on the mother's lengthy DSS history. This case is an example of the serious problem that does result when an Art. 6 order to a relative is predicated on CPS behavior on the part of the parent and then subsequently the relative no longer wants custody. What is the relative to do? There is no "uncustody" petition the grandmother can file. Should DSS file an Art. 10 petition against the grandmother – that she was neglectful for dumping the child back on the mother? An Art 10 against the mother based on the very old allegations? A relative voluntary placement accepted by the DSS for which there would be no IV-E reimbursement as the grandmother is a custodian? This is a recurrent problem with no good answer and is a reason why there can be reluctance to allow an Art. 6 resolution to an Art. 10 matter.

Matter of Parker v Hennessey __AD3d__, dec'd 12/27/17 (2nd Dept. 2017)

The Second Department affirmed Orange County Family Court's denial of visitation to an incarcerated father. The child had not seen the father in 7 years. He was 12 years old and did not want to see his father. The child did not have a close relationship with the father before the incarceration.