SELECTED CHILD WELFARE CASELAW

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REMOVALS and GENERAL Art 10 EVIDENTIARY RULINGS

Removals

Matter of Luna V., 163 AD3d 689 (2nd Dept. 2018)

ACS removed an 8 year old and a 7 month old from a Richmond County mother. After the FCA §1028 hearing, the lower court returned the children, with an order of protection that ACS supervise by checking on the home on a daily basis. ACS sought and obtained a stay of the return order from the Second Department who then reversed the lower court on the appeal. The family court found that there had only been an isolated instance where the mother had taken some newly prescribed medication that had made her temporarily drowsy but the appellate court saw it differently and said there was imminent risk to the children. The mother was the only adult home with the 2 children when she locked herself in the bathroom for an extended period of time and would not respond to the 8 year old repeatedly knocking on the door. When the mother finally did leave the bathroom, the 8 year old observed that her mother's speech was slurred, she could not hold any food in her hands and was not able to maintain her balance. The child was frightened and called her grandfather who found the mother lying face down on the child's bed. The child shook her mother and the grandfather called to the mother and they were finally able to rouse the mother and the grandfather

called 911. The EMT testified that he found the mother lying in her own saliva. The grandfather told him that the mother had a history of abusing crack cocaine, possibly heroin and turpentine. The mother claimed to the EMT that she had only taken Motrin but the EMT observed her blood shot eyes, constricted pupils and assessed that she needed to go to the ER as she had taken some sort of substance. She was assessed at the ER as needing to be examined immediately and she was diagnosed with opiate ingestion as she had pin point pupils indicative of ingesting a large amount of opiates. At the ER, the mother claimed she had been recently prescribed Percocet at 10 milligrams and that she had taken 2 pills. She was treated for drug intoxication and kept all night as she was deemed not sober enough to be able to get home safely.

The 8 year old child told CPS that on the day of the incident, she had seen a full medicine bottle in the kitchen when she returned home from school that afternoon but by the time the EMT had been called, the bottle was half empty. The child also said that her mother told her not to tell CPS what happened and to lie to them. Further, testimony was offered that the mother had attempted to obtain an increase in her prescription drug dosages. She had recently gotten a prescription from her psychiatrist to double the amount of Valium being prescribed but she had not told the psychiatrist that she also had a prescription for Percocet.

The psychiatrist testified that she had "trusted" the mother and would never have prescribed the Valium if she knew the mother was also taking Percocet. The psychiatrist had not checked the NYS Prescription Management Registry regarding what the mother had been prescribed.

The mother provided no evidence at the 1028. The fact that the lower court ordered daily contact by ACS was indicative of a high degree of concern for the mother's ability to care for the 2 young children but this was not enough to mitigate the imminent risk to them. The Appellate Court continued the children in foster care.

<u>Matter of Ja Niyah M.,</u> 164 AD3d 902(2nd Dept. 2018)

The Kings County Family Court was reversed after ordering the return of a child to her mother. The Second Department found that the newborn child should be removed given that the mother's older son had recently been placed in foster care for excessive corporal punishment. This 6 year old had been in care for less than a month when the new baby was born. The mother had a history of neglect and abuse of the older child, including an indicated report of inadequate guardianship when that child was a year old. The mother had failed to comply with services for the older child and did not cooperate with ACS. The newborn was at imminent risk of neglect.

Matter of Chloe W., 165 AD3d 681 (2nd Dept. 2018)

The Second Department concurred with Queens County Family Court that a 5 year old was at imminent risk and needed to be placed in foster care while the Art. 10 against her mother proceeded. The mother had some mental health issues and she would not apply for public assistance even though she had no source of income. She would not enroll the child in school nor did she maintain any medical insurance for the child. The mother would not acknowledge her mental health issues or obtain any treatment.

Matter of Gavin G., 165 AD3d 1258 (2nd Dept. 2018)

The Second Department affirmed the Queens County Family Court's refusal to return a child after the mothers requested FCA §1028 hearing and the lower court refused to even permit visitation. Return would place the child at imminent risk that could not be mitigated given the mother's untreated and severe mental illness which includes her having delusions about the child. The mother isolates the child and believes that she and the child are in constant danger and exposes the child to this unfounded belief. The mother has no insight into her mental illness and is resistant to any

treatment. Even visitation is not in the child's best interests at this time.

Matter of Tyrell FF., 166 AD3d 1331 (3rd Dept. 2018)

When Schenectady County DSS brought a neglect petition regarding the mother of a young baby, they originally sought and obtained a temporary order of supervision while the Art. 10 was pending. Four months later, DSS filed a violation of the temporary order of supervision and requested that the court order a removal. The lower court removed the child to foster care and began a hearing regarding mother's objection to the removal. The mother offered to consent to the removal but only with no admission that the removal was necessary to avoid imminent risk. The lower court refused to base a removal on such a conditional consent, continued the hearing and ultimately ordered the temporary removal. The mother appealed and argued that the court should have allowed her to consent to a removal without an imminent risk ruling. While the matter was on appeal, the matter was resolved with the parties agreeing to a withdrawal of the violation, an ACD on the underlying neglect and a return of the child to the mother. The Third Department ruled that such a subsequent resolution would normally moot the appeal but also commented that the law was clear that any order of removal must include an imminent risk finding by

the court. There was a dissent by 2 of the Judges who felt that the matter should not be moot as it is one that would evade appeal other wise and also they would have ruled that the court does have authority to accept a consent to a removal without an imminent risk ruling. (The dissent did not address how this would be interpreted by federal law requiring findings that it is contrary to the best interests of the child to remain at home in order to obtain IV-E monies for the foster care placement)

<u>Matter of Saad A.,</u> __ AD3d__ dec'd 12/5/18 (2nd Dept. 2018)

Even though the child had since been returned to the mother's care, the mother's appeal of the Queens County Family Court's denial of her motion under FCA §1028 was not moot as the removal created a permanent and significant stigma. Here the Second Department reversed the family court's refusal to return the child upon the 1028 hearing. The parents made substantial efforts to safety proof this home and to the extent that these efforts were inadequate to protect the child from ingesting a harmful substance, this was not imminent risk that could not be mitigated. ACS had been directed to assist the family in safety proofing the home and failed to do so. After the child was removed, the mother presented evidence of the substantial measures she had

taken and that she had brought the child to the doctor and the dentist.

<u>Matter of Chloe-Elizabeth A.T.,__AD3d__ , dec'd 12/19/18</u> (2nd Dept. 2018)

The Second Department reversed a Kings County Family Court's order to remove a child from her father for "placement" with her mother while an Art. 10 petition against the father proceeded. The father had 2 children living with him and the 2 girls had different mothers. The younger child had alleged that the father had used excessive corporal punishment on her and there was also an allegation that the older child was therefore derivately neglected. The parents had joint legal custody of this older child with primary residential custody to the father. Based on allegations regarding the younger child, this older child was removed and placed in the custody of her mother. The "placement "was reversed on appeal. This older child was not at imminent risk if she remained with the father during the proceeding. At no time were there allegations that the father had inflicted excessive corporal punishment on this child and there was some evidence that this child's mother may have coached the younger half-sister to allege the neglect. The half-sister had also since recanted to several people. (Note - The mother of the older child apparently

had joint legal custody of that child when the Art. 10 was brought against the father. As between parents, if the mother had sought a change in legal residency, there would not have been a requirement of proof of imminent risk. The non-respondent mother is in a worse position due to the respondent father alleged to be neglectful.)

Matter of Avianna M.G., __AD3d__, dec'd 12/21/18 (4th Dept. 2018)

An Onondaga mother and father were alleged to have abused their 4 month old who had multiple fractured ribs in various stages of healing. Ultimately the mother's petition was dismissed upon her rebuttal of the prima facie case but the father was adjudicated. One of the issues on appeal that the father argued was that he was deprived on his right to counsel at the temporary removal hearing. The Fourth Department found that entry of a final order after a fact finding renders any challenges to the temporary removal hearing moot. (See the substance of the allegations below in **Matter of Avianna M. G.,**)

"Persons Legally Responsible"

Matter of Jonah B., 165 AD3d 787 (2nd Dept. 2018)

A Queens's grandmother was a person legally responsible for 3 grandchildren and could therefore be a proper respondent in an Art. 10 proceeding. The grandmother came to the parents' home every day and slept over on a regular basis – sometimes 2 to 3 times in a week. She took care of the baby in particular and changed diapers and clothes and she bathed the baby several times a week. She cared for the baby when the mother played with another child and was alone with the baby when the mother napped or did laundry. Given the frequency of her contact with the baby in particular and the nature of her care – that is was analogous to parenting in a family setting - the grandmother was a person legally responsible. (see the substance of the allegations in **Matter of Jonah B.,** below)

Matter of Jaiden M., 165 AD3d 571 (1st Dept. 2018)

A New York County respondent is a person legally responsible for the eldest child in a family where he knew the mother for over 10 years and was the father of the 2 younger children in the home. He provided financial support for the household and considered the oldest child to be his

son. The child referred to him as "Daddy". This eldest child also often spent weekends at the respondent's home and the respondent occasionally spent the night at the children's home.

Matter of Unity T., 166 AD3d 629 (2nd Dept. 2018)

An Orange County child had been living in a motel for a short time with his mother, his maternal aunt as well as a man and his wife that the aunt had met on line ("Plenty of Fish"). The couple's child also lived in the motel. The 4 adults and 2 children were traveling to Florida for a vacation and staying together in motel rooms along the way. The sole adult male in the group argued that he was not a person legally responsible for the subject child as he had just met the child and his mother only 2 weeks earlier when the mother and the boy moved from South Carolina to the motel in NYS. However the Second Department concurred with the lower court that the male was a person legally responsible as he had assumed parental responsibilities during the 2 week period. The male was a member of the child's household and was acting as the equivalent of a parent. (see the substance of the allegations below in **Matter of Unity T.**)

Matter of Adam C.__AD3d___, dec'd 12/13/18 (1st Dept. 2018)

A Bronx respondent was a person legally responsible for a child where he had been in a 6 year relationship with the child's mother and the child referred to him as a stepfather. The respondent also transported the child from school if the mother worked late. Further the mother and the child visited the respondent's home regularly and sometimes stayed overnight. (see the substance of the allegations in **Matter of Adam C.,** below)

General Art. 10 Evidentiary Rulings

Matter of Priciliyana C., 164 Ad3d 900 (2nd Dept. 2018)

An Orange County AFC filed an appeal on an ACD of a neglect petition. DSS moved to dismiss the appeal as moot after the ACD time frame concluded but the Appellate Division did not dismiss on this motion. Instead after a full appeal, the Second Department then dismissed the appeal as moot, ruling that since the case had now been dismissed, the AFC had obtained what the AFC had sought with the appeal.

Matter of Mishelys R., 165 AD3d 554 (1st Dept. 2018)

Bronx County Family Court correctly denied a respondent father's motion to vacate the default finding of neglect against him. He claimed he had a medical appointment the day of the hearing but he would have had time to both be at the AM hearing and attend the PM medical appointment. Further he did not contact his lawyer about any time conflict. The attorney's refusal to participate in the fact finding was not ineffective assistance of counsel as it was a strategic decision to preserve a motion to reopen the default. Further the father did not allege any meritorious defense other than conclusory denials of the allegations. The evidence at the hearing established that the father was violent toward the mother in multiple incidents in the presence of the children including one is which one child sustained a bruised and cut lip.

Matter of Christian W., 166 AD3d 1530 (4th Dept. 2018)

An Erie County respondent father did not object to the lower court conducting an in camera with the subject child outside of the presence of the father and his counsel. This issue was therefore not preserved for appeal. Further the lower court did not err in permitting the AFC to present additional evidence after the in camera as the AFC had not yet rested.

Even if she had rested, the lower court could exercise its discretion and allow the AFC to reopen her case.

Matter of Daniel K., 166 AD3d 1560 (4th Dept. 2018)

An Onondaga County respondent cannot appeal a derivative adjudication as it was based on the respondent's admission and consent to neglect of one of the children. He also alleged that he did not knowingly consent to the derivative finding but he did not move the lower court to vacate his admission. Also the respondent argued on appeal that the AFC was ineffective and had substituted her judgment for that of the children. However this argument is outside the record as the record contains no information with respect to the AFC having "ignored their wishes".

Matter of Abass D., 166 AD3d 517 (1st Dept. 2018)

The First Department reversed New York County Family Court's order that the parents in this matter have unsupervised visitation. Unsupervised visits are not in the children's' best interest FCA §1030 c in this case where the parents continued to deny that the children had been sexually abused. All of the children tested positive for an STD and the parents continued to offer implausible explanations for this. The parents had participated in

counseling and services but they continued to claim no culpability and so they pose a risk to the children. The father continues to claim that he was out of the country when one of the girls tested positive for an STD but there is no evidence as to when she contacted the STD or when the other children did. Although the father tested negative for the STD, there is no way to determine if the father was treated for an STD before he was tested. Approximately 6 months earlier, in a FCA § 1028 hearing, the lower court refused to return the children to the parents care and nothing has changed since then. It appears that the court ordered the unsupervised visits before the fact finding hearing was completed in order to avoid more delay in the proceeding but that justification is inadequate. The permanency reports and treatment updates clearly show that the parents do not acknowledge the sexual abuse. The updates do not support unsupervised visits.

Matter of Alivia F., _AD3d__, dec'd 12/19/18 (2nd Dept. 2018

The Second Department reversed a Suffolk County Family Court neglect finding against a pro se father based on an inadequate colloquy about his choice to proceed pro se. The lower court did repeatedly ask the father if he wanted to represent himself and told him that he would have to follow

the legal rules of the proceeding and generally cautioned him not to represent himself. However, the lower court erred in not specifically detailing the dangers and disadvantages of proceeding pro se, particularly in a child neglect proceeding where there was also a criminal proceeding pending. The court did not inquire of the father's age, education, occupation, awareness of legal procedures in order to evaluate the father did have the competence and intelligence to voluntarily waive his right to counsel.

NEGLECT

General and Mixed Neglect

Matter of Taylor P., 163 AD3d 678 (2nd Dept. 2018)

The Second Department concurred with Richmond County Family Court that a father neglected his 1 year old infant by committing acts of domestic violence against the child's mother in the baby's presence. He also left the baby alone in the apartment for at least 30 minutes. The appellate court affirmed granting of Art. 6 custody of the child to the mother.

Matter of Benjamin S.S., 163 AD3d 825 (2nd Dept. 2018)

A Queens' father neglected his child by leaving the child alone and unattended in the child's mother's apartment. He also used violence against the mother in the child's presence that placed the child in danger of impairment of his physical condition.

Matter of Carmela H., 164 AD3d 1607 (4th Dept. 2018)

An Onondaga County mother derivatively neglected her child based on prior findings regarding her older children. The older children had been freed for adoption in the fall of 2013 based primarily on the mother's ongoing problems with domestic violence in the home and unsuitable living conditions. This petition was filed approximately 2 years later and conditions had not improved. The summer before the filing of this petition, the mother and father had fought so bitterly at a couples counseling session that the counselors had to physically separate the couple for their own safety. Further, a year before this petition, the father had called the police on the mother alleging that she had punched and scratched him. Seven months before this petition, the mother had sought an order of protection against the father and called the police. The father asked

that she move out and remove her possessions from the home. When visiting the home the month that this petition was filed, the caseworker said there was an "overwhelming smell" of dead animal.

Matter of Daniela P.C., 166 AD3d 423 (1st Dept. 2018)

A New York County mother neglected one of her children. However the First Department reversed the neglect of the second child and substituted an adjudication of derivative neglect. The younger child was neglected medically by the mother who did not make sure the child returned for mental health appointments and take prescribed medication after a hospitalization. This child ended up having 4 readmissions to the hospital. The mother also did not protect this younger child from an adult daughter. The child said the older sister had cut her with a piece of glass and her out of court statements were corroborated by the injury. The caseworkers actually saw a physical altercation between the child and the adult sister that happened even after an order of protection had been issued. The court was permitted to draw a negative inference as the mother failed to testify. It does not matter that she had already testified in a status hearing and a criminal matter.

The appellate court disagreed that an older child was directly neglected and that adjudication was reversed.

There was no evidence that this child was present when the mother engaged in a physical altercation with another person. However based on the neglect of the younger child, the older child was derivatively neglected.

<u>Matter of Majesty M.,</u> 166 AD3d 775 (2nd Dept. 2018)

The Second Department concurred that an Orange County mother neglected her child due to narcotics trafficking in the family home. However the Appellate Division reversed a neglect adjudication based on the alleged unsanitary conditions in the home. It was neglect to have allowed the child to be near narcotics and to be exposed to the very dangerous activity of drug sales. This activity put the child at imminent risk. However the child was not impaired or at imminent risk of impairment due to the conditions in the home. While that evidence did show that the home was in disarray, there was no evidence that this condition impacted the child. The appellate court also ruled that the lower court did not err in refusing to adjourn the Art. 10 proceeding while there were related criminal charges pending. Lastly, the lower court did err in admitting into evidence an SCR report that was from an anonymous source, but it was harmless error as there was other sufficient proof of the neglect.

Matter of Derick L., 166 AD3d 1325 (3rd Dept. 2018)

The Third Department reviewed a matter from Schenectady County Family Court that involved 3 children of a father. As to the younger 2 children, the appellate court concurred that these children were neglected based on the father's failure to provide a suitable home for the children. The home was deplorable and unsanitary with animal excrement and trash on the floors. There was a foul odor in the home, clutter blocking the hallways and unwashed dishes all over the home. The father saw nothing wrong with the conditions. The father also was not taking his medications for his mental health conditions and was abusive to the mother in the children's presence. In the same appeal, the court reviewed the termination of the father's rights (see **Derrick L** below)

Matter of Johnathan Q., 166 AD3d 1417 (3rd Dept. 2018)

The Third Department concurred with Broome County Family Court that a father neglected his 2 year old son. Three child protective workers testified about their visits to the home over the time period since the child's birth. The home was unsanitary, cluttered and dangerous. There were allegations that the 2 year old was able to get out of the apartment on his own and had done so. The father

acknowledged that the child was able to get out of the home although he denied that the child had actually been outside unsupervised. At one point the caseworkers found the apartment door open at the top of the steep stairway to the outside. The mother claimed that she had told the 2 year old that he could go out of the door on his own to visit neighbors on the same floor but could not "cross the line" she drew at the top of the stairs. The mother also indicated that she did not take prescribed meds for her mental health issues as the father smoked marijuana and she needed to "remain sober". The father claimed on appeal that while the conditions in the apartment may have been as the caseworkers described, the child was generally healthy and happy and therefore was not actually neglected. The Third Department found that the conditions created an imminent risk of neglect given the lax supervision, the ongoing dirty and unsafe conditions, the mother's untreated mental illness and the father's "disabling use" of marijuana and a history of domestic violence. The father also argued on appeal that he was not that frequently at the home and therefore should not be held responsible for its conditions. Since he failed to testify, the strongest inference can be drawn of his knowledge of the conditions in the home. Although the caseworkers rarely saw him at the apartment, he clearly lived there with the mother and child and was responsible legally for proper care for the toddler.

The father took no actions to protect the child from the conditions of the apartment.

<u>Matter of Kieara N.,__AD3d___, dec'd 12/5/18 (2nd Dept. 2018)</u>

A Kings County mother neglected her 3 children. The home was in a "deplorable and unsanitary condition". Also one of the children was educationally neglected as she was excessively absent and tardy. The child had failing grades and mother offered no reasonable justification for the child's absences, tardiness or her failing grades.

Parental Mental Health

<u>Matter of Lyndon S.,</u> 163 AD3d 1432 (4th Dept. 2018)

The Fourth Department reviewed and affirmed a neglect adjudication from Erie County Family Court. The lower court did not err in allowing DSS to have access to the mother's mental health records as the mother's mental health was in fact the main issue in the case. The mother refused to authorize access to her records which made it impossible to determine if she was compliant with her treatment which impacted her ability to care for her child

and so allowing DSS to access the records was appropriate. However the records should not have been admitted into evidence at the fact finding as they were certified by someone other than the head of the hospital or agency and were not accompanied by the required signed delegation of authority by the head of the hospital or agency and the employee. This was a harmless error as the adjudication of neglect was supported by the preponderance of the other evidence.

Several witnesses testified that the mother had not been taking her medications and that this resulted in the mother disassociating, becoming non communicative for days at a time and staring off into space. The mother herself testified that she had 2 "nervous breakdowns", had "brain fever" from an STD and had epilepsy type symptoms. The mother testified that at various times she had been prescribed Limbitrol, Xanax, and Klonopin but that she determined that she did not need these drugs and had stopped taking them. She also testified that she had not seen a mental health provider in over 6 months. DSS had become involved when the mother was pounding on the floors of her apartment with a hammer as she felt the child could hear inappropriate things the downstairs neighbors were saying. Her behavior scared the child to the extent that the child hid in a cat crate and pulled a blanket over himself so the mother could not

see him. The mother's mental condition and her failure to treat it caused the child actual or potential harm.

Matter of Nialani T., 164 AD3d 1245 (2nd Dept. 2018)

The Second Department affirmed a Queens County Family Court's determination that a mother's mental illness resulted in the neglect of her children. One of the children had a prior neglect petition that the Second Department dismissed as there had been no evidence of a nexus between the mother's mental illness and a risk to the child (*Matter of Nialani T. 125 AD3d 672m(2nd Dept. 2015).* However this time ACS did show a nexus. The mother lacked insight into her ongoing mental illness and her multiple psychiatric hospitalizations and she refused to follow treatment. The mother also argued on appeal that the family court did not have jurisdiction to order her to comply with medication recommendations as that interfered with her right to make her own medical decisions. The appellate court found that the lower court did not order a forcible administration of medication. However, the appellate court did modify the order's wording and directed that the order say that the mother is to cooperate with medication management as recommended by mental health services providers.

Matter of Chance C., 165 AD3d 1593 (4th Dept. 2018)

The Fourth Department reversed a neglect adjudication form Onondaga County Family Court. The mother was alleged to have a mental illness but the only proof that this affected the children was an out of court uncorroborated statement by one of the children that the mother would forget to feed them. Although the mother had stopped taking her medication, the mother's counselor testified that the mother had been properly weaned of her meds because she was not able to function while on them. The counselor testified that the mother was able to parent better after she stopped her meds. There was no proof that the mother's mental health affected the children by creating any imminent danger of neglect.

Matter of Dominique R., __AD3d__ dec'd 12/4/18 (1st Dept. 2018)

A New York County mother neglected her child. She suffered from a mental illness and had no insight into her conditions and her need to be in treatment. Evidence of actual injury to the child is not needed if there is evidence that the untreated mental illness poses a sufficient imminent risk of harm to the child.

Excessive Corporal Punishment

Matter of Michelle U v NYS SCR 163 AD3d 1236 (3rd Dept. 2018)

An Ulster County day care provider's indicated report should remain indicated. The 4 year old child described being choked when the day care provider grabbed him by the neck and the arm while trying to separate him from other children. The child demonstrated how he had been grabbed and said he could barely breathe. Both the caseworkers and urgent care providers observed bruises on the back of the child's arm and the front of his neck on the day of the incident.

Matter of Alana H., 165 AD3d 663 (2nd Dept. 2018)

The Second Department reversed the neglect adjudications against Dutchess County parents. The mother and father of a child who was just short of 3 years old lived in separate households. The mother left the child and an older child with the mother's boyfriend when she went to work on a Friday. When she returned from work, the boyfriend said the toddler had fallen and had some light bruising on her buttocks. Both children told the mother that the child had fallen. The mother did not think the child needed any

medical attention and brought the child to the father for weekend visitation. The mother told the father about the bruising and the father also agreed that the child did not need to see a doctor but agreed that he would watch the injury over the weekend. The bruising became darker over the weekend and the parents then agreed with each other that the child should see a doctor on Monday. Also the child has started to complain about her ankle. On Monday, the mother could not reach the child's pediatrician and the child was still having trouble with her ankle and so on Tuesday the mother brought the child to the ER. There was nothing wrong with the ankle but the doctors indicated that the bruising on the buttocks was in fact due to a spanking and not a fall.

DSS brought neglect petitions against both parents and the lower court adjudicated neglect on both and both appealed. The Second Department found that the mother had no prior knowledge that her boyfriend was mistreating the children. In fact there was never any prior indication that the child in question had even been neglected or abused in any way. Therefore the mother did not neglect the children by leaving them with the boyfriend. The child was clearly injured before visiting the father and the father had not been the one to leave the child with the boyfriend. The child did not need treatment for the bruising and the parents did bring the child promptly when the child complained of her ankle

hurting, which turned out to be nothing. Lastly both the mother and the father had no reason to think that the bruising had been caused by anything other than a fall – the boyfriend said that was what happened and so did the children. The medical experts said nothing about the bruising would have indicated to a lay person that it could not have happened by a fall. Neither the mother nor the father neglected the child.

Matter of Aiden LL. 166 AD3d 1413 (3rd Dept. 2018)

The Third Department affirmed a neglect finding against a Sullivan County mother of 2. Her boyfriend was also the father of her younger child. The older child was observed at Head Start to have 2 linear marks of bruising on his face. At first the child said he had fallen into a chair but later in the day he said "Daddy hit me". The caseworkers and law enforcement testified about the interviews during the investigation. Photos were entered into evidence that showed "pronounced bruising" around the child's eye consistent with being struck with a belt. The boyfriend admitted to "popping" the child in the face for being rude. The mother admitted that the boyfriend had "swung his arm" which struck the child in the face but also claimed the child had fallen onto a chair and even acted out the falling for the investigators. In court the mother testified that she had

concerns about the boyfriend striking the child and also admitted that she and the boyfriend "hit" the child as discipline, later she said it was more like "tapping" the child. The mother clearly had witnessed the boyfriend hitting the child and had later tried to cover it up. She coached the child to lie and say he had been injured by falling on a chair. A cell phone video was introduced into evidence that depicted the mother instructing the child by saying "you have to let them know you hit your face on the chair" and "Daddy didn't hit you". The mother exposed her child to the use of corporal punishment by the boyfriend and she also used corporal punishment and she directed the child to lie to authorities. The mother failed to be a "protective ally" for her child. This action also appropriately resulted in a derivative neglect finding regarding the younger child.

Parental Substance Abuse

<u>Matter of Alexander Z.,</u> 164 AD3d 446 (1st Dept. 2018)

The First Department affirmed a neglect adjudication against a New York County mother. The lower court relied on the presumption of neglect based on the mother's substance abuse. The mother did not rebut the presumption with proof

of participation in any rehab program. ACS was not required to prove impact on the children. The mother did not appear for the fact finding and so the strongest inference could be taken against her. After the adjudication of neglect, the mother did present letters that she was participating in outpatient therapy and counseling but this information was only properly considered at the disposition. If she had been participating in rehab at the time of the fact finding hearing, this could have been considered if the participation had been timely and substantial.

Matter of Delanie S. 165 AD3d 1639 (4th Dept. 2018)

Cattaraugus County Family Court's adjudication of neglect by 2 respondents was reversed on appeal. Since DSS did not prove the duration of frequency of the respondents' use of drugs, there was no presumption under FCA § 1046 (a)(iii). There was also no proof that the drug use resulted in any impairment or imminent impairment to the children. While the younger child had two accidents, both of which resulted in a broken wrist, there was no evidence that the respondents' innocent explanations of the injuries were not accurate nor was there any evidence that the respondents were using drugs when the accidents happened.

Matter of Bentley C., 165 AD3d 1629 (4th Dept. 2018)

The Fourth Department reversed Yates County Family Court's adjudication of neglect. DSS did offer proof that the father tested positive for THC, oxycodone and opioids but only on one occasion. This is not proof of "repeated misuse" of drugs as is required under FCA § 1046 (a)(iii) and so would require proof of impact on the child which was not offered. Although the father admitted using marijuana, there was no proof in the duration, frequency or repetitiveness of this drug use nor any proof that he used drugs in the presence of the child.

Matter of Camden J., __AD3d__, dec'd 12/27/18 (3rd Dept. 2018)

The Third Department reviewed a matter from Chenango County Family Court on several procedurals issues (see that portion of the decision below under **Matter of Camden J.,**) but as to the substance of the allegation that a father neglected his child, the appellate court affirmed. The father knew that the mother was using drugs while pregnant with this child. He knew the mother was using multiple opiate medications that were not prescribed to her throughout her pregnancy. The child and the mother tested positive at the

birth. The child was exposed to an imminent danger of harm.

Domestic Violence

Matter of Khamari S., 163 AD3d 826 (2nd Dept. 2018)

The Second Department affirmed Westchester County Family Court's adjudication that a child was neglected. The father engaged in physical altercations with the mother in the presence of the child which impaired or created an imminent danger of impairment to the child. The lower court properly limited the father's access to the child to supervised visitation

Matter of Nevin H., 164 AD3d 1090 (4th Dept. 2018)

The Fourth Department reversed a neglect finding from Onondaga County Family Court relative to a mother of 2 children who was herself the victim of domestic violence at the hands of the youngest child's father. The Appellate Division, citing to *Nicholson,* found that DSS had not proven any impact on the children other than that they were present. The Fourth Department did however, affirm the transfer of Art. 6 custody of one of the children to her father

based on the mother's deteriorating financial situation and her lack of suitable housing.

Matter of Malachi M., 164 AD3d 794 (2nd Dept. 2018)

A Kings County father neglected one child but the Second Department reversed the lower court's neglect finding as to a sibling. The father had repeatedly slapped the child's mother in the face in front of the father's biological child and the child became scared. The child's out of court statements about his fear were corroborated by the testimony of both the father and the mother. However as to the child that the respondent was a person legally responsible for, the appellate division reversed the neglect finding. The lower court had found that this child was present when the father verbally abused the mother and this child made out of court statements that he did not feel safe alone with the father. The Second Department found that the verbal abuse and the parental arguments were insufficient to show that this child was impaired or in imminent danger of becoming impaired and that this child's statements were not corroborated. (The court made no comment as to there being derivative neglect based on the other child's neglect)

Matter of Jamya C., 165 AD3d 410 (1st Dept. 2018)

A Bronx County father neglected his children when he engaged in domestic violence with their mother outside of the children's school and in their presence. This subjected them to actual or imminent impairment to their mental and emotional condition.

Matter of Heily A., 165 AD3d 457 (1st Dept. 2018)

The First Department affirmed the New York County Family Court's determination that a mother neglected her child. The mother exposed the child to domestic violence between she and the father by visiting and staying with the father even thought there was an order of protection keeping her away due to a documented history of domestic violence. The mother admitted that she was sometimes the aggressor in the violence and she further admitted that the child was sometimes present when the violence occurred. The child told the caseworker that she knew about the violence between her parents and that she was "mad and scared" after one fight.

Matter of Jaiden M., 165 AD3d 571 (1st Dept. 2018)

A New York County respondent neglected 3 children – 2 of whom were his biological children – by committing an act of violence against the children's' mother in their presence. The mother was choked and bruised. The middle child witnessed the incident and the older and younger children were in imminent danger of physical harm due to their close proximity to "potentially deadly violence". Both the mother and the caseworker testified against the respondent who failed to testify on his behalf. A negative inference can be drawn for his failure to testify regardless of the there being a criminal matter pending against him as well.

Matter of Bobbi B., 165 AD3d 587 (1st Dept. 2018)

Bronx County Family Court was affirmed on appeal. A father neglected his 1 month old child by placing his hands on the mother's neck during a heated argument while the mother was holding the infant. The mother was also heard screaming that the father had bit her finger. This baby was in imminent danger of physical impairment due to her proximity to the violence that the father inflicted on the mother. Further although the father denied any history of domestic violence, he had pled guilty to assault in criminal

court previously and that action had resulted in an order of protection in favor of the mother that was in effect when this incident with the baby happened.

Matter of Elie W., Jr., 166 AD3d 44 (1st Dept. 2018)

The First Department affirmed New York County Family Court's adjudication that a respondent father had neglected the child. The mother testified that she and the father had numerous physical altercations in front of the child. One fight lasted 4 hours. Not only did the child see the fight but as he ran towards his mother, the father thrust out his arm and the child was knocked over and hit his head on the corner of a table. The caseworker testified that she had seen bruises all over the mother's body after the most recent fight.

Matter of Patrick M., 166 AD3d 882 (2nd Dept. 2018)

Four Orange County children were neglected by their father due to his violence toward the mother in their presence. The lower court should not have considered in its decision the mother's testimony in a related Art. 8 proceeding since the court did not rule that the mother was not available to testify as per CPLR § 4517(a)(3). However, there was no objection to the receipt of the testimony by the father's counsel and

the error was harmless as there was sufficient evidence otherwise, including prior orders that the lower court had made in the Art. 8 proceeding.

Matter of Adam C.__AD3d___, dec'd 12/13/18 (1st Dept. 2018)

A Bronx respondent pulled the mother's hair, threw her to the ground and punched her. This occurred in the child's presence and the child, seeing his mother bleeding, called 911 for help. The child was neglected by these actions.

Matter of Meeya P.,__AD3d__, dec'd 12/26/18 (2nd Dept. 2018) and Matter of Carter v Dutchess County Department fo Community and Family Services __AD3d__, dec'd 12/26/18

Dutchess County Family Court dismissed a neglect allegation against a father after a hearing and granted him custody of the child who had been temporally placed in foster care however both orders were reversed on appeal. (The mother admitted to the allegations of neglect against her) Much of the evidence offered at the father's fact finding consisted of out of court statements that the mother had made about

domestic violence. The lower court correctly ruled that the mother's out of court hearsay was not admissible as against the father unless there was an exception to the hearsay rule. While DSS made that argument that the statements were "excited utterances", the lower court correctly ruled that they were not. However, the mother did given an in court admission that she and the father engaged in a physical altercation in front of the child and there was other competent, material and relevant evidence showing a history of domestic violence and that the child was in imminent danger of being impaired by the father's failure to exercise a minimal degree of care. The father neglected the child and the dismissal was reversed and since he had been granted custody, without a hearing based on the dismissal of the petition against him, the appellate court also reversed the custody order.

ABUSE

Sex Abuse

<u>Matter of Kyle C.,</u> 163 AD3d 662 (2nd Dept. 2018)

The AFC for 2 children appealed a Nassau County Family Court's dismissal of sexual abuse and excessive corporal punishment allegations against a father. The older child made out of court statements as to the abuse and the

younger child later repeated the allegations. The lower court found that the older child's out of court allegations were not corroborated and that the younger child, who testified in court, was not credible. The medical evidence offered did not support the allegations either. The Appellate Court concurred and saw no reason to disturb the lower court's determination of the child's credibility.

Matter of Mayra C., 163 AD3d 808 (2nd Dept. 2018)

The Second Department reversed Kings County Family Court's dismissal of a sex abuse petition and adjudicated sex abuse for the target child and derivative abuse as to 3 other children. The matter was remanded for a dispositional hearing. The target child testified to multiple instances of abuse and this was sufficient proof. There also was proof of multiple out of court statements made by this child to a counselor, a therapist, a psychiatrist and an emergency medical technician. Those out of court statements corroborated her in court testimony as did the out of court statements of another of the children that she had seen the respondent in bed with the target child. Any inconsistencies in the target child's testimony were not enough to make her testimony unworthy of belief. The other 3 children were derivatively abused as the respondent's judgment indicated a fundamental defect in the understanding of the duties of a

person responsible for children. He also had sexually abused the target child while the other children were in the home and sleeping in another room.

Matter of Ashley G., 163 AD3d 963 (2nd Dept. 2018)

ACS appealed a Kings County Family Court's dismissal of sex abuse and excessive corporal punishment allegations against a father of 4 but the Second Department affirmed the dismissal. The target child's out of court allegations of sexual abuse were not properly corroborated by the out of court statements of the other children as they merely indicated that the target child had been observed screaming and crying. Another child who alleged excessive corporal punishment by making out of court disclosure was also not corroborated by the siblings who did not provide any detail or description of the alleged punishment. Siblings can cross corroborate each other's out of court statements but they must be describing similar incidents of abuse or neglect and be independent from and consistent with the other siblings out of court statements and the court has considerable discretion to so determine. The lower court's rulings on credibility should be accorded considerable deference. No other evidence was offered to corroborate the out of court statements of the target children.

Matter of Celeste S., 164 AD3d 1605 (4th Dept. 2018)

A Monroe County respondent appealed the family court's summary judgment adjudication of severe abuse, abuse and neglect. The respondent was the mother's boyfriend and he was criminally convicted of rape in the first degree and sexual abuse in the first degree regarding his conduct with the mother's children. The crimes he was convicted of were those alleged in the Art. 10 petition before the lower court and summary judgment was appropriate. The respondent argued on appeal that DSS had not proven that he was a person legally responsible for the children. However, DSS had offered both the out of court statements of the children and the respondent's own admissions that he had been responsible for the care of the children. He did not preserve any argument that the court should have adjourned the Art. 10 matter until his criminal conviction's appeal was resolved. In any event it was not ineffective assistance of counsel for his lawyer to not have argued this point as it would have not been likely to have been a successful argument.

Matter of N.D., 165 AD3d 416 (1st Dept. 2018)

A Bronx County child's in court testimony describing the respondent's sexual abuse of her corroborated her consistent out of court statements. Although there were

peripheral inconsistences in the child's testimony, the lower court found her credible and the respondent's denials not credible. The other children were derivatively neglected based on the respondent's defective understanding of parental obligations. The respondent also argued on appeal that the lower court did not allow him to testify in detail about the custody matter that he claimed motivated the allegations of abuse but in fact the family court did allow such testimony and did not find it persuasive.

Matter of Naphtali A. 165 AD3d 781 (2nd Dept. 2018)

Six children of a Kings County father lived on several floors of the same home. Four of the children lived with their mother on the first floor and 1 child lived with on the second floor with his mother and 1 of his children – a 17 year old girl - lived in the basement. The 17 year old testified that from the age of 5 on, the father had sexually abused her, including inserting is fingers into her vagina, performing oral sex on her, making her perform oral sex on him and raping her anally and vaginally. The father had refused to provide her any food or money to live on since 2015 and the basement where she lived was not safe. It was only partially lit, the refrigerator did not always work, the ceiling of the bathroom was partially collapsed such that she was not able to use the bathtub. The father denied the allegations but

the lower court found the teen credible and on appeal, the Second Department saw no reason to challenge that credibility assessment. The behavior of the father demonstrated such an impaired level of judgment that all of the children were at risk of abuse and neglect and the derivative findings were also affirmed. The children were all released to the care of their respective mothers and the father was put under ACS supervision.

Matter of Philomena V., 165 AD3d 1384 (3rd Dept. 2018)

The Third Department affirmed a Warren County Family Court's summary judgment adjudication of abuse. The respondent was a man, apparently unrelated to the child but had the child in his care after the child's grandmother caretaker had asked him to take the child. The respondent was alleged to have gotten the child intoxicated and forcing her to engage in sex with him in a hotel over the course of a couple of days. He was criminally convicted after a jury trial of, among other charges, sexual abuse in the first degree. DSS claimed the criminal conviction was for the exact same events as alleged in the Art. 10 petition, the lower court agreed and adjudicated abuse on summary judgment. On appeal, the respondent argued that there should be no summary judgment given that his criminal conviction was on appeal or that at least the family court matter should have

been held in abeyance until the outcome of the criminal appeal. The Third Department ruled that is was immaterial that the criminal matter was on appeal, that a summary judgment was warranted by the conviction and by the fact that the respondent did not dispute the factual allegations in the abuse petition. The respondent never sought a stay of the Art. 10 matter below and it was in the child's best interests that the Art. 10 matter be timely resolved as opposed to an indeterminate stay for the criminal appeal. If the respondent is successful on his criminal appeal, he can move the family court to seek relief if he wishes.

Physical Abuse

Matter of Heaven C.E., 164 AD3d 1177 (1st Dept. 2018)

A 3 year old Bronx girl suffered life threatening brain trauma which resulted in permanent brain damage, as well as a fractured pelvis, bruises and scars on her body. A pediatrician with a board certification in child abuse testified that the child's brain trauma was caused by inflicted partial strangulation. Even if the court assumed that the mother's live in boyfriend alone inflicted these injuries, the mother was still properly adjudicated to have committed severe abuse for permitting the injuries to occur. Given how badly

the child was injured and the nature of the injuries, the mother was or should have been aware of the abuse. Further the mother delayed summoning emergency help for 2 hours after the child was found comatose. Also the mother failed to testify and the court can draw the most negative inference against her where ACS had proven a prima facie case of severe abuse. The brother was derivately severely abused given that the mother's actions demonstrated a fundamental defect in her understanding of the responsibility of a parent.

Matter of Jonah B., 165 AD3d 787 (2nd Dept. 2018)

The Second Department reversed Queens County Family Court's dismissal of an abuse petition against a father, mother and grandmother. The lower court found only neglect and ACS and the AFC appealed the dismissal of the abuse allegations. The parents had 2 children when the youngest- at 4 months of age – was found to have sustained 5 separate injuries, including a fracture to her arm. A third child was born during the pendency of the matter and was added to the petition. The expert medical witnesses testified that the 4 month old's injuries were clearly inflicted and not accidental and the parents and maternal grandmother offered no reasonable, plausible or adequate explanation for the baby's injuries. The lower court found neglect but

refused to make a finding of abuse apparently ruling that the 4 month olds injuries were not "serious physical injury". The Second Department found that the FCA § 1012 definition of physical abuse is not the same as the Penal Law definition and in particular, the FCA definition includes the concept of a "substantial risk" of serious injury. Here the baby's fractured arm had to be immobilized for over 2 weeks and this was a "protracted impairment" of her health. Further the break took months to heal and the infant was in pain and discomfort. Lastly, although unlikely, there was a risk that there could be a loss of function in the arm and/ or the loss of growth potential. The lower court erred in not finding abuse as to the target infant and derivative abuse as to the older child and the new baby.

Matter of Liana H., 165 AD3d 1386 (3rd Dept. 2018)

The Third Department reversed an abuse and neglect finding against a Sullivan County father. The father had been the sole caretaker when the youngest child stopped breathing. The child was ultimately diagnosed with clotting in the vein that drains blood from the brain – venous sinus thrombosis – as well as bleeding on the brain and severe retinal hemorrhaging. The child had no bone fractures, bruises or marks. The consulting pediatrician versed in child abuse found no explanation for the child's conditions other than a

non-accidental trauma. The fact that the father was the sole caretaker and that the DSS expert concluded that the child had had a non-accidental trauma did establish a res ipsa prima facie case. But while the lower court concluded that the child had therefore been abused, the Third Department found that the father had in fact rebutted the prima facie case.

There was no proof that the respondent had ever been inappropriate with the child and that the child had no prior symptoms other than some mild fussiness and an unsettled stomach before the day of the incident. The respondent father called a pediatric neurologist and a radiologist to the stand. The neurologist testified that he reviewed the records and scans and that in his opinion the child had venous thrombosis, fluid buildup around the brain, hemorrhages near the brain and behind the eyes and evidence of a cerebellar stroke. He opined that the fluid was present around the child's brain well before the child's collapse and that there had been no obvious symptoms to notice and that this resulted in a stroke, brain and retinal hemorrhages. He testified that it was unlikely that any head trauma caused the condition given there was no evidence of any skull fractures, brain contusions and that trauma would only very rarely cause a stroke. He suspected that the child had undiagnosed thrombophilia that could have been caused in some way other than abuse and that sometimes occurs with no

apparent cause at all and that this clotting then caused the brain and eye conditions. The radiologist offered by the respondent was an expert in intracranial anatomy of children. He also concurred that there was no evidence of trauma to the child and that the venous thrombosis and fluid could have resulted from natural disease and would have then become suddenly symptomatic.

DSS then called an ophthalmologist in rebuttal who opined that the retinal hemorrhaging could not be explained the theory that the respondent's experts advanced. This expert did admit that retinal hemorrhages could occur without trauma and that there were some in the medical community who believed that retinal hemorrhages could be an effect of brain problems and not just trauma.

The lower court found that the respondent's account of the events was questionable and found the DSS experts more compelling than the respondents. However, the Third Department found that the respondent offered a factually based and persuasive explanation as to how the child's condition "could" have reasonably occurred and therefor rebutted the prima facie case. This left to DSS to actually prove more than a prima facie case, which they did not do. Therefore a preponderance of the evidence did not demonstrate the abuse and neglect and the petition must be dismissed.

Matter of Unity T., 166 AD3d 629 (2nd Dept. 2018)

An Orange County 4 year old boy was brought to the hospital by his mother with severe bruising and swelling to his scrotum and penis. He also had bruising on his left torso, right thigh and the tops both of his feet. The injuries were clearly due to abuse. The child had been living in a motel with his mother, his maternal aunt and a man and his wife that the aunt had met on line ("Plenty of Fish") and that couple's child. The 4 adults and 2 children were traveling to Florida for a vacation and staying together in motel rooms along the way. DSS established that the child suffered these injuries while being in the care of the mother and the 3 other adults. This established a res ipsa injury under FCA § 1046(a)(ii). DSS was not required to prove which of the 4 adults was responsible for inflicting the child's injuries. The lower court correctly adjudicated abuse and derivative neglect of the other child.

Matter of Giovanni Z., 166 AD3d 455 (1st Dept. 2018)

Bronx County Family Court was affirmed by the First Department regarding an adjudication of abuse against the mother of 3 children. The youngest child, a 2 year old boy, had a fractured right leg. This injury would not occur

without an abusive act or omission and the mother failed to rebut the prima facie showing. She also failed to seek prompt medical attention for the toddler and had a history of child abuse. The older children had scars and lacerations. A derivative abuse finding on the older children was affirmed as well.

<u>Matter of Avianna M.G., __AD3d__</u>, dec'd 12/21/18 (4th Dept. 2018)

An Onondaga couple were alleged to have abused their 4 month old who had multiple broken ribs. The injuries established a prima facie case of abuse but the mother was able to rebut and her petition was dismissed. The father was not able to do so and appealed. The Fourth Department affirmed. DSS is not obligated to prove each time and date of each of the injuries and link it to a particular parent. The presumption under FCA §1046(a)(ii) extends to all the caretakers where there are only a few and they are well defined as here. The appellate court also found that the father cannot appeal the dismissal of the allegations against the mother as he is not aggrieved by what happened with her matter.

Matter of Akeliah A., __AD3d__dec'd 12/26/18 (2nd Dept. 2018)

ACS appealed the dismissal of a derivative abuse proceeding and the Second Department reversed Queens County Family Court, making a finding of derivative abuse. The lower court found that a mother and her boyfriend abused and neglected her 14 month old infant and the child suffered extensive inflicted injuries while in the boyfriend's care. ACS had also alleged that the boyfriend derivately neglected his biological child who was only a few weeks older than the half sibling but the lower court dismissed that petition. The Second Department reversed. Since the one child suffered such extensive physical injury in the respondent's care, the respondent's other child was at imminent risk of abuse . FCA §1046(a)(i).

Art. 10 Dispos and Permanency Hearings

Matter of Richard HH. V Saratoga County DSS 163 AD3d 1082 (3rd Dept. 2018)

The Third Department reversed Saratoga County Family Court's dismissal of an out of state uncle's custody petition in a case that has been on appeal before. The children were placed in foster care in the fall of 2014 with allegations of

neglect by the father and the mother. Five months later the lower court found that the children were neglected and continued them in foster care. Eight months after that, after the children had been in care for 13 months, the children's maternal uncle who lived out of state filed an Art. 6 custody petition and also sought to intervene under FCA §1935 (f). First the lower court denied his motion to intervene and that was appealed and reversed by the 3rd Dept. in **Matter of Demetria FF. 140 AD3d 1388 (3rd Dept. 2016)** When that matter was remitted, the lower court held a trial on the custody petition along with permanency hearings as to the younger child. (the older child had ultimately aged out of care and this appeal did not concern that child) The lower court dismissed the uncle's custody petition in November of 2016 and the uncle and the mother both appealed.

The Appellate Division was critical of DSS for not complying with FCA §1017 and immediately informing the uncle of the placement of the child in care and most importantly of his right to seek custody of the child when the child first came into care. The uncle testified that he received only 1 call after the children had been in care for about 4 months and that all he was asked was if he would take the children if the mother's rights were terminated and he said yes. He claimed he was never told that he could do anything to seek placement of the children with him at that time, nothing about custody or becoming a foster parent or the ICPC

process, only that he might be able to have them if the mother's rights were terminated. He filed a custody petition on his own after the children had been in care for just over a year and it was only at that time the DSS him a copy of a state booklet on placement options for relatives. DSS agreed on appeal that they had not provided him with the required FCA §1017 information but took the position that he should not have waited until the children had been in care for over 13 months before filing for custody. The Third Department found that the statute did not require the relative to seek placement, instead the statue poses a duty on DSS to explain the options "immediately" to relatives and that this is to hopefully prevent a child from remaining in foster care for longer than necessary if there is family to care for them. The Appellate Division was also critical of DSS and the lower court of then treating the uncle as an "unwelcome interloper" when he did file his custody papers. Given that the lower court and DSS now agree that the uncle and the wife could have provided a good home for the child, the Third Department expressed dismay that the failure to provide the uncle with the required FCA §1017 information was especially egregious.

Since neither the father nor the mother opposed the uncle's custody petition, there is no requirement to find extraordinary circumstances and the test is only best interests of the child. On this point the Third Department

reversed the lower court's dismissal of the custody petition. The uncle is an experienced, mature parent, and his wife supports the custody petition. They both testified and were found to be credible. They are both nurses, are in good health and live in a 5 bedroom home in a neighborhood with many children. They have sufficient income to raise the child and provide for additional travel and educational opportunities. Although the uncle had only met the child once before filing the petition, since filing the petition, the uncle has had contact with the child through phone calls, Skype sessions and a visit at CPS offices. He testified that he has formed a bond with the child and he and his wife took parenting classes to learn how to parent a sexually abused child. He has a pediatrician, a dentist and a therapist lined up for the child and has found a well-regarded private parochial school to send her to and painted a bedroom in her favorite colors. The uncle has 6 grandchildren who live nearby for the child to befriend and is willing to continue contact with the child's adult older sister and with the current foster family. He is also able to provide the child with safe contact with her mother. The Texas ICPC report resulted in a determination that the uncle and his wife and well qualified to care for the child.

The foster parents did not testify and there was no direct evidence about their home environment or their relationship with the child. The child's therapist testified

that the child receives treatment for the sexual abuse she suffered and that she needs to continue in treatment. The therapist also observed a close relationship between the child and her foster mother. The child had been in 2 foster homes and had been to 3 different therapists and although she was "resilient", the therapist believed it was in the child's best interests to not relocate to the uncle and experience yet another transition, particularly to yet another new therapist. The Third Department found that the lower court relied too much on this therapist's opinion which focused primarily on transition issues and not on other significant factors. The therapist admitted she was not experienced in custody evaluations. Although the AFC apparently argued that the child was opposed to living with the aunt and uncle, the Appellate Division indicated that the "record does not support" this. The court reversed the dismissal of the uncle's custody petition and granted custody of the child to the uncle after 4 years of foster care.

Matter of Pison B., 163 AD3d 660 (2nd Dept. 2018)

The Second Department affirmed Westchester County Family Court's determination to authorize the administration of psychotropic medication to a child placed in foster care. The child's treating psychiatrist recommended the treatment but the father objected. A hearing was held

and the psychiatrist, the caseworker and the father testified. There was clear and convincing evidence that that giving the child Risperdal, Abilify or Seroquel was "narrowly tailored to give substantive effect to the child's liberty interests" and took into account the circumstances, the child's best interests, the potential benefits and the possible adverse side effects compared to less intrusive alternative treatments.

Matter of Denise V.E.J., 163 AD3d 667 (2nd Dept. 2018)

Westchester County Family Court proceeded with a permanency hearing in the absence of the child who wished to be present at the hearing. The child was apparently of an age in which her wishes are to be followed on this point. The lower court ruled that the child, who was in a residential treatment facility, could participate by video conference. The child did participate by video conference and the court did order the ongoing disposition that the child wanted. The AFC appealed on behalf of the child, arguing that the child should have been allowed to personally appear at the hearing. There have been several permanency hearings since the one appealed from and the child has been present in person since then and has not appealed those. The Second Department found the appellate argument academic and moot given that there had been permanency hearings since

that had not been appealed and given that the child was not aggrieved by the hearing as she obtained the disposition that she sought. The only relief that could be granted would be to remand the matter for a new hearing with the child present and she has had several such hearings in the time this matter was on appeal.

Matter of Lacee L. Court of Appeals dec'd 10/18/18 (2018)

The Court of Appeals reviewed a matter regarding the applicability of the Americans with Disabilities Act (ADA) in a permanency hearing as it related to the issue of "reasonable efforts". The Court found that all the "reasonable accommodations" that the mother sought under the ADA were in fact ordered by the trial court and ultimately were provided to the mother by ACS. The Court was critical that ACS did not "provide its service eagerly or promptly" but had to be sternly ordered by the court and vigorously followed up on by the mother's counsel but ultimately the services were in fact provided to the mother. The lower court looked to the ADA standards in evaluating the agency's efforts and did rule that ACS made "reasonable efforts" that were tailored to the mother's situation.

The mother is intellectually disabled and it is difficult for her to understand instructions and follow through on required

tasks. This child was removed at birth and placed in kinship care with a paternal grandmother. The mother had not followed through on various mental health and substance abuse treatments that she had been ordered to complete after the birth of another older child. At various hearings, the mother's counsel raised the ADA and requested various services and accommodations for the mother , the lower court did order that these requests be accommodated and took ACS to task when they weren't accommodated adequately but ruled that the ADA itself did not apply to permanency hearings, the standard of "reasonable efforts" applied. On appeal, the Appellate Division, First Department had affirmed the ruling that the ADA was not applicable to a permanency hearing but that "reasonable efforts" are to be tailored to the individuals' situation. Since the efforts provided ultimately to the mother are those her counsel was asking for the Court of Appeals found that "this case does not provide any opportunity or basis for use to decide whether the ADA and New York standards overall are coterminous or distinct in any way" for purposes of a permanency hearing. However, the Court of Appeals ruled that the First Department's comments that the ADA "is not applicable" and that the ADA "has no bearing" are not entirely accurate. While permanency hearings are not an appropriate forum to adjudicate claims under the ADA, the family courts should not be blind to the fact that ADA requirements are in fact

placed on ACS and similar agencies and the courts should look to accommodations ordered in ADA cases to provide guidance on what services and accommodations may be appropriate with certain disabilities. Permanency hearings measure the reasonable efforts made in a 6 month time periods on a particular child's goal and are not a final determination as to the agencies efforts to provide services but are meant to be a periodic checkpoint to make sure children are not failing through the cracks. Even if ACS failed to provide accommodations that might be required on them by the ADA in any particular 6 month period, this would not mean that ACS violated the ADA and would not mean that they had failed to make reasonable efforts under New York law. There was a lengthy dissent by one Judge who would have reversed and found that ACS did not make reasonable efforts. .

Matter of Michael A., 163 AD3d 654 (2nd Dept. 2018)

After a permanency hearing in Kings County Family Court, the mother appealed and argued that the agency had not engaged in reasonable efforts toward the goal of reunification. She also argued that the Americans with Disabilities Act applied to permanency proceedings and was not complied for example that the lower court should have

ordered that the agency had to provide the mother and the mother's attorney with notices in Spanish in advance of all service planning conferences and should have ordered that the agency should prepare supportive housing applications for the mother. The Second Department did modify the lower court's order in some regards. The child has been in care since the spring of 2014 when ACS alleged that the mother had neglected the child and made allegations that the mother was intellectually limited. The lower court did find in the fall of 2015 that the mother had failed to provide food, clothing, shelter or money to the child based on the mother's mental disabilities. The mother had multiple evaluations, conducted in Spanish, that have evaluated her in a variety of ways - in the "extremely low range of moderate" functioning, in the "mild range of intellectual disability" and with adaptive skills in the "low range with severe deficit". A court ordered evaluation found her to be in the "low range of functioning" with "borderline intellectual functioning" but found that she may have a higher level of cognitive functioning than previously thought as some evaluations had been done through an interpreter. This most recent evaluation also diagnosed the mother as suffering from "other specified schizophrenia spectrum and other psychotic disorder with delusions and significant overlapping mood disorders". Yet another evaluation offered at the permanency hearing diagnosed the mother as suffering from

"delusional disorder" but acknowledged that her limited intellectual abilities could also cause delusional thinking. The mother claimed that reasonable efforts were not being made toward reunification as the agency was not tailoring its service plan to accommodate her intellectual disabilities and that the ADA was applicable and violated by the agency not making appropriate service plan arrangements.

The Appellate Court found that there was sufficient proof of reasonable efforts being made. Visitation had been set up until it had to be suspended based on the mother's behavior. Efforts were made to provide services that would accommodate what the agency currently had been told of the mother's issues. For example, the mother was referred to a parenting class that was taught in Spanish and accommodated parents with limited intellectual functioning. She did not attend the class and there was no evidence that this failure to attend was based on any of her cognitive limitations. There continued to be a lack of clarity about the exact nature of the mother's diagnoses and her eligibility or for services for the cognitively impaired was unclear. Therefor the lower court could not issue an order that her services had to be only for those cognitively impaired. To the extent that the mother established that she was a person with qualified disabilities under the ADA, she did not prove that the agency failed to make reasonable accommodations or that she was entitled to any future accommodations.

Further, the lower court had ordered that the mother and her lawyer were to be given written notices in Spanish of all appointments. Since the agency had consented to an order that they would send written notices in Spanish of all service plan reviews and would submit supportive housing applications for the mother, the lower court's order should have reflected the same.

Matter of Victoria B., 164 AD3d 578 (2nd Dept. 2018)

On review from the Westchester County Family Court, the Second Department found that the extension of the child's placement in care upon a permanency hearing was moot as there had been 2 permanency hearing held since the one appealed from. However the changing of the child's goal to adoption and the ordering of the filing of a TPR was not moot as it changed the course of the future for the father and affected his rights. The Appellate Court commented that any prior rulings on goal changes not being appealable should no longer be followed and pointed out that the First and the Third Department had also so ruled. However, the Appellate Division found that the lower court correctly changed the child's goal from reunification to adoption as DSS proved by a preponderance of the evidence that this was in the child's best interests. The father had not fully addressed the issues that had resulted in this child entering care shortly after her

birth some 3 years earlier. The father remained in a problematic relationship with the mother, he had not progressed in parenting counseling and in fact had been dropped from one program due to his lack of progress - and he had never progressed beyond supervised visitation with the child. It was appropriate to order that a TPR be filed.

Matter of Elliot Z., 165 AD3d 682 (2nd Dept. 2018)

The Second Department reversed Kings County Family Court's appointment of a guardian ad litem for a 17 year old foster child. The child had been in foster care since 2010 and he was diagnosed with Down syndrome, hearing loss and other profound disabilities. Since being in care, his AFC had substituted judgment on court issues. Shortly before the child's 18th birthday, the family court, sua sponte, appointed a GAL to provide consent for the child to remain in care. The AFC appealed the order, arguing that a GAL was not necessary as an AFC is empowered to substitute judgment and consent for a child with such disabilities. The Second Department concurred with the AFC that a GAL is not needed and cited FCA §§ 1016, 1087, 1090(a) and 22NYCRR 7.2(d)(3) and permitting an AFC to substitute judgment and provide such consent.

Matter of Caron C.G.G., 165 AD3d 476 (1st Dept. 2018)

New York County Family Court properly awarded kinship guardianship to an aunt over the mother's objection. The aunt foster parent had been caring for the children for 7 years. The mother had been incarcerated for the first 3 years and then only had sporadic contact with the children for the 4 years since. This establishes extraordinary efforts for a non-parent's request for guardianship. It is also in the children's best interests to be placed in their aunt's guardianship given that the one child had lived with the aunt for most of his life and the other child for nearly half of her life. The aunt met the children's needs and even the mother acknowledged that the aunt loves the children and cares about them. The AFCs for the children were zealous advocates and did apprise the court of the children's positions. The one child had indicated that she wanted to remain in the aunt's care and the mother presented no evidence that this was not that child's position. The other child said he was "okay" with remaining in the aunt's care provided he still was able to see his mother and this was also relayed to the court and liberal visitation for the mother was incorporated into the ultimate order.

Matter of Yosepha K., 165 AD3d 932 (2nd Dept. 2018)

Kings County Family Court properly revoked a trial discharge and placed children back in care when the parents were found to have violated the terms of the order. The parents had taken the children out of NYC for approximately a week without informing ACS of their whereabouts and had failed to comply with ACS supervision and therapy for the older child.

Matter of Joseph R. Jr., 165 AD3d 514 (1st Dept. 2018)

An incarcerated New York County father argued on appeal that the lower court had not, in the most recent permanency hearing, found that ACS was making reasonable efforts toward reunification of the child with him. The issue cannot be appealed as the child's goal is placement with a fit and willing relative and so the court is not obligated to find that the agency is making reasonable efforts toward anything but that single goal.

Matter of Alexandria F. 165 AD3d 1108 (2nd Dept. 2018)

The Second Department reviewed the adjudications and dispositions of a Nassau County family and made several modifications. The respondent mother had 3 children – 2

girls and a boy. She was married during the time she had the 3 children and so her husband was the legal father of all three but there was no dispute that her live in boyfriend was the biological father of the younger 2 children. In fact, the DSS Art. 10 petitions alleged that the boyfriend was actually the bio father of the youngest girl and boy. Both she and the boyfriend were alleged to have neglected the children due to domestic violence and drug abuse and that the boyfriend had sexually abused the 2 girls – the younger one being his own bio daughter. The sex abuse allegation was filed as severe abuse against both the boyfriend and the mother. The mother consented to a neglect adjudication and ongoing foster care placement of the children. The boyfriend was found to have severely abused the older girl, derivatively abused the younger girl and to have neglected all 3 children. Ultimately the boyfriend filed a paternity petition regarding the younger 2 children and was found by the Support Magistrate to be the father. At about the same time, the Family Court Judge accepted a surrender of the children by the husband. The boyfriend's mother filed for custody of the 2 younger children. The lower court found that since the boyfriend was not legally the father of any of the 3 children, an 18 year order of protection could be issued.

The Appellate Division made several changes to the disposition. First the appellate court found that at the time of the entry of the order, a person could not be found to have

severely abused a child that was not their child (Note: that statue has since been changed) Since both legally and biologically, the boyfriend was not the father of the oldest girl, his adjudication as to that child could only be a finding of abuse. That child's out of court statements as to sexual abuse were corroborated by her in court unsworn but cross examined testimony. Further this formed the basis of a derivative abuse regarding the younger children. Although the mother was married when she had the two younger children, the presumption of the husband as the father of those children is rebuttable. Here DSS alleged in their petition that the boyfriend was the bio father of those children and although DSS claimed that they had no notice of the paternity proceeding before the Support Magistrate, DSS cannot now argue that he is not the father for purposes of then obtaining an 18 year order of protection. The boyfriend should have been treated as the father of the 2 younger children and an 18 year old of protection should not have been issued as to those children but instead reasonable efforts and services should be offered and/or an order of protection whose term is limited as is appropriate with a parent. The matter was remitted to family court for that purpose. The dismissal of the custody petition by the mother of the boyfriend – essentially the paternal grandmother - was affirmed as not being in the children's best interests.

Matter of Mariah K., 165 AD3d 1379 (3rd Dept. 2018)

A Warren County non respondent father appealed the lower court order that he be given "release" of his child after the neglect adjudication of the mother as opposed his request for Art. 6 custody instead. The Third Department found that the lower court's "release" was the appropriate disposition. The mother's 3 children were the subject of a neglect proceeding in which it was alleged that the mother had substance abuse problems, mental health issues and was in a violent relationship with her boyfriend. The children were removed by DSS. The father of one of the children sought full custody of that child by filing an Art. 6 petition seeking to modify the prior order that gave him joint legal custody of the child with physical custody to the mother. The mother ultimately entered an admission that she had mental health issues and that she was not capable of properly caring for the children. The lower court then held a combined Art. 10 dispositional hearing with the father's custody petition that included a *Lincoln* hearing. The lower court dismissed the Art. 6 petition, granted the father "release" of the child for a one year period and ordered the father to submit to the jurisdiction of the court and to comply with terms that included home visits by DSS and providing visitation to the mother. The father argued on appeal that there was no need for any court supervision over him as a non-

respondent and that he should have been granted full Art. 6 custody and not “release”.

The Third Department concurred that the “release” dispo was in the child’s best interests. It was appropriate to find that there had been a change in circumstances re the earlier Art. 6 order given the mother’s admission to neglect. The child had a warm and loving relationship with the father and enjoyed visiting him even though she had always lived with her mother and her half siblings. The father did have a safe and appropriate home for the child and had been able to make appropriate care arrangements for the hours he would be working. DSS supported the father’s petition for full Art. 6 custody given that this provided for the child to be reunified with a suitable parent. Although the father had joint legal custody with the mother, the child had never lived with the father. The father had not exercised his visitation rights consistently in the past – in fact he did not know the child’s pediatrician or where the child went to school. He had not routinely spoken to the mother about the child but had left visitation arrangements to be set up by his own mother. Further, the father had a 5 year order of protection from 2015 regarding 3 other children he had. Also, the lower court wanted the mother to be supervised such that the child would be protected as it related to the mother and such supervision would not be permitted in a full Art. 6 custody order was issued to the father. FCA §1052 (v), (vii).

The mother was in fact making progress toward reunification and continued supervision by DSS would protect the child as the mother continued to work on her issues. Giving the father sole Art. 6 custody would mean that the child would be at some distance from the half siblings if they returned to the mother's care. Given all these factors, it was in this child's best interests to provide for a temporary release for 1 year to the non-respondent father instead of a full order of final custody. The Appellate Court stated in a foot note that in fact while the appeal was pending the child in question was returned to the mother's care with the half siblings.

Matter of Kimberly RR., 165 AD3d 1428 (3rd Dept. 2018)

An incarcerated non respondent Sullivan County father argued that he was not given an opportunity to be heard at the permanency hearing of his child but the Third Department found his arguments without merit. The father was provided a notice of the hearing and a copy of the report. He appeared via telephone and was represented at the hearing by counsel. The court specifically asked if he had any evidence or witnesses he wished to present at the hearing and the father's counsel answered that he did not. The court found that the child needed to continue to remain

in care and asked again if the father wanted to address any issues before the conclusion of the hearing and again the father's counsel said no. The father was not denied due process. The appellate court noted in a footnote that there was no indication that the lower court had an age appropriate conversation with the child. Further that ther was no indication that the AFC had, as is required, specifically discussed with the child her right to be present at the hearing. Since the child had been in care for some 3 years, the appellate court thought that this was a serious omission. "Steps must be taken in the future to not only abide by these statutory mandates to assume meaningful participation by the child, but also to create a record that facilitates meaningful appellate review".

<u>Matter of Jasir M.,__AD3d__</u>, dec'd 12/26/18 (2nd Dept. 2018)

Queens County Family Court modified its dispositional order that had left 3 children in the care of the mother under ACS supervision to a placement order 6 months later when the mother was found to have violated the terms of the supervision. The Second Department concurred. The mother consented to an adjudication of neglect without an admission and an order of disposition was issued (upon the

mother's default at the dispo – perhaps a clue to her willingness to cooperate!) that left the children in the care of the mother under specific terms. Six months later ACS filed a motion under FCA §1061 alleging that it was in the best interests of the children that the order be modified to place the children in care. The mother brought the children to school late at least 132 times during the school year, did not bring the children for court ordered therapeutic visitation with the father, did not bring the children for psychiatric counseling and did not attend or complete her own services. The court **is not** required, post adjudication, to find imminent risk to the children, only that the placement order was in the children's best interests. FCA § 1055, 1061

Matter of Camden J., __AD3d__, dec'd 12/27/18 (3rd Dept. 2018)

A Chenango County father admitted under oath to neglecting his child based on his knowledge of the mother's use of opiates during her pregnancy. The parties agreed to an ACD with conditions for the father upon this admission. The child remained in the care of the paternal grandparents and the father was to obey certain conditions. As part of the ACD terms, the father waived his right to appeal. Six months later, DSS filed to restore the father's neglect proceeding upon allegations that he was violating the terms and

conditions of the ACD. The lower court held a hearing and found that the father had neglected the child based on his prior admission under oath in court and on caseworker testimony that the child had been positive for opiates at birth and that after the ACD, the father failed to follow up with recommended services, did not attend caseworker visits or allow his home to be checked out, did not attend parenting classes, did not apply for benefits or have stable income or suitable housing. When the father did allow the home to be inspected, there were exposed wires and insulation. The father had also continued to live with the mother who did not stop her drug abuse and in fact gave birth to their 2nd child who was also removed at birth after testing positive for drugs.

The father appealed. First the AFC argued that the appeal should be dismissed given that the father had waived his right to appeal in the original ACD. The Appellate Court found that although the ACD order said he waived his right to appeal, the lower court did not address this issue directly at the time and did not ascertain that the father understood he was waiving appellate rights. The father on appeal did not argue that he had not made admissions at the time of the ACD and did not argue that the terms of the ACD order were inappropriate so enforcing the waiver of appeal of the ACD has no effect on the case in any event.

The father simply argued that there had not been enough evidence in the restored hearing to show that he had neglected the child. The Third Department agreed with the lower court that there was preponderance of evidence that he had neglected the child. First there was the sworn admission that the father made himself where he said that that he knew the mother was using drugs during her pregnancy, then the evidence that the child was born positive for opiates and finally that the father had not been following the terms of the ACD. The fact was that another child had been born to the couple that was also positive for drugs at birth during the period of the ACD. Lastly the father did not testify on his own behalf.

Terminations of Parental Rights

General TPR Issues

<u>Matter of Mia V.O.,</u> 163 AD3d 677 (2nd Dept. 2018)

Queens County Family Court's termination of a mother's rights to her child was affirmed on appeal. The child had been in care since she was 5 months old. Four years later, the agency filed to terminate the mother's rights to the child and 2 years after that the lower court did in fact finally terminate. The appeal process added another year to the

child's stay in foster care. There was clear and convincing evidence that the agency offered diligent efforts toward reunification. The mother however has still not found suitable housing or planned for the child's return. The mother argued on appeal that the lower court should have appointed a guardian ad litem for her. The Second Department said that a GAL was not needed since the mother was "capable of understanding the proceedings, defending her rights, and assisting counsel."

Matter of Jesten J. F., __AD3d__, dec'd 12/21/18 (4th Dept. 2018)

The Fourth Department reversed a TPR of a mother's rights to a Monroe County child and remanded the matter for a hearing on the question of the mother's need for a GAL to be appointed. The DHS filed a permanent neglect petition and the mother took the stand at the fact-finding. In the middle of her testimony, the defense attorney stopped the proceeding and asked for the mother to be taken off the stand and for her testimony to be stricken, apparently in response to the mother's "nonresponsive" and "at times, completely nonsensical" answers to questions. The case then proceeded and the lower court ultimately terminated.

The sole issue mother raised on appeal was if the court should have appointed the mother a Guardian Ad Litem –

particularly as no party asked the court to do so at any point. The Fourth Department ruled that where there is a question as to the competency of a parent, the court should hold a hearing on the issue of the appointment of a GAL. The lower court should have done so sua sponte when the mother's attorney indicated that the mother was unable to assist in her own defense and moved to strike the mother's incoherent testimony. Neither DSS nor the AFC opposed the motion to strike the mother's testimony, although they did not seek a GAL, this lack of opposition was sufficient to alert the court to there being a question of the mother's competence. There was no dispute in this case that the mother had been diagnosed with schizophrenia and had been in and out of psychiatric hospitals throughout her life. In fact when the child had been born 2 years earlier, the mother was in a psychiatric unit because she had been found incompetent to stand trial on a criminal matter. This case had also been adjourned previously as the mother had been institutionalized at the time. The Appellate Court reversed the termination and remanded for a hearing on the need for a GAL to be appointed on a retrial of the TPR.

(Note: Appellate Counsel advises that when asked at oral argument what the "end game" was for mother, defense counsel claimed that if a GAL had been appointed, then the GAL may have been able to assist the defense attorney to negotiate and then sign a conditional surrender for the

mother which may have provided her with some contact with the child as opposed to a termination order which allows no contact to be ordered. While there is no authority to cite that a GAL has the ability to sign a surrender for a parent, some counties report that their court has permitted a GAL to sign a surrender on a parent's behalf. The decision makes no mention of this question. The decision also does not reference the problem that there is no payment structure for a GAL in family court. Further the decision does not provide any detail on how a "GAL hearing" would proceed – who would have the burden of proof for example if no one asked for the hearing.)

Matter of Roberto O., 166 AD3d 435 (1st Dept. 2018)

A Bronx mother was appropriately denied a motion to reopen her default TPR. She failed to provide a reasonable excuse for her failure to appear at the fact-finding. Saying she did not know the date was not reasonable as she, her lawyer and her interpreter were present in court when the date was given. She also did not explain when she did not contact her attorney, her GAL, the court or the agency if she was not sure of the date. Further she waited 11 months after the finding to move to reopen. Lastly she did not provide an allegation of a meritorious defense as she only made a

conclusory statement that she would argue that the agency had not provided diligent efforts.

Abandonment TPR

Matter of Baby Boy N. 163 AD3d 570 (2nd Dept. 2018)

A Queens's father abandoned his 3 children given that for over a year while they were in foster care, he did not inquire of their situation. There was an order of protection which suspended visitation but he was still obligated to maintain contact with the agency regarding the children and to the extent there was any contact, it was minimal, sporadic and insubstantial.

Matter of Aliyah S.P., 163 AD3d 969 (2nd Dept. 2018)

A Dutchess County father abandoned his child. He did not contact the DSS or the child by sending letters, gifts or cards or supporting the child. His incarceration did not relieve him of this responsibility. He only provided vague and uncorroborated claims that he attempted to maintain contact through his mother and this was insufficient. There was no evidence that the DSS prevented or discouraged him

from contact and there was no reason to hold a dispositional hearing.

Matter of Derick L., 166 AD3d 1325 (3rd Dept. 2018)

A Schenectady father abandoned his eldest child. He was offered 2 visits a month for 3 hours each time. In the relevant 6 month period, he only visited once and left after 45 minutes without even telling the child he was leaving. His only other contact was that he attended one medical appointment of the child's. He claimed that he had a medical condition that limited his ability to travel however he did attend his court appearances and admitted to going to an amusement park twice during the same period of time. The DSS had also offered him transportation to the visits.

Matter of Kayson R., 166 AD3d 1346 (3rd Dept. 2018)

The Third Department affirmed Broome County's adjudication of abandonment by a respondent mother and the termination of her parental rights. The child was placed in relative foster care at birth. The caseworker testified that the mother did not communicate or visit with the child or the cousin who was the caretaker for 6 months before the filing of the TPR. The mother did occasionally speak to the caseworker during this period for other purposes, like

asking for bus passes but never asked after the child or requested visits. She missed a service plan review meeting during the 6 months and did not keep the caseworker informed of her address. The mother did visit once with 2 of her older children who were also in care during this period but this child was not present as the foster family was traveling out of state. The caseworker told the mother to call to reschedule to see this child but the mother never did. The mother claimed that she did try to contact the caseworker on multiple occasions but that the caseworker did not return her calls and failed to set up any visits. The lower court found the caseworker more credible especially since the mother did file a visitation petition during this period but then failed to appear on in court to pursue the petition. The lower court did terminate the parental rights of the mother after holding a non-mandated dispositional hearing. During the period of time between the fact finding and the dispositional hearing, DSS set up visits for twice a week and the mother missed 6 of the 18 visits scheduled and was late for 3 visits with this child. She also did the same for her two older children who are also in foster care and a 4th child who had just been born and was also placed in care. During the visits she did attend, there was a lack of bonding between the mother and this subject child. The mother focused on the new born and as time went by, she paid less and less attention to this subject child. The child attempted several

times to leave the visitation room and the mother did not attempt to stop him and she expressed no concern that the child did not interact with her.

Further, again between the fact finding and the dispositional hearing, the mother violated several conditions the court had set. She moved out of county in violation of the court's order that she stay in the county. DSS could not provide several needed services because she left the county. The mother lost her Medicaid coverage due to the move. While she did complete a parenting course and had negative drug screens and was employed, she did not complete substance abuse or mental health evals. She also did not participate in DV counseling or anger management. She refused to let the caseworker in to evaluate her residence but it appeared that it she was living in a trailer in which at least 3 adults and 6 children were living. Although she ultimately located other housing, this newer housing was even farther away. The mother did acknowledge that she had difficulty engaging with the child and that he was not bonded to her. The child was doing well in his placement and they wanted to adopt him.

<u>Matter of Joshua M.,__AD3d__</u> dec'd 12/20/18 (3rd Dept. 2018)

A Schenectady County mother abandoned her 2 children. The children were placed in care when they were observed to be malnourished and failing to thrive while in the father's custody. The mother's whereabouts were unknown at the time the children were placed in are and she was only located after the children had been in care over a month. Just short of 2 years after the placement, a TPR was filed. The mother had only seen the children twice during the relevant 6 months for a total of about 2 hours. The mother became upset in those 2 visits when she heard the children call the foster mother "mommy", and made inappropriate comments to the children and engaged in a verbal argument with the foster mother. She showed up a no other visits during the 6 months period and at least on one occasion the children waited and the mother did not show. During the last 4 months before the filing of the TPR, the lower court had suspended the visitation due to the mother's refusal to complete a mental health evaluation and to sign releases. The lower court clearly advised the mother and her counsel that the suspension would be lifted as soon as the mother complied with the court's order and this was a reasonable "precondition" to the resumption of visitation. This does not preclude a finding of abandonment as obtaining resumed contact with the children was entirely within her control.

Further during the 6 month time frame the mother did not call the children, although she had the phone number to do so, did not send the children any letters, cards or pictures. She did not attend the service plan during the time period and although she had some 12 contacts with the agency during the 6 months, these were mostly about scheduling visits or the mental health eval. She only sought updates on the children a few times. She made no meaningful attempts to keep up to date with the children's medical progress or educational progress. Her contact was sporadic, infrequent and insubstantial. There was no evidence that the mother was unable to maintain contact with the children or prevented or discouraged from doing so.

Matter of Armani W., ___AD3d___, dec'd 12/21/18 (4th Dept. 2018)

Even though an Erie County mother had dropped some items off for the child once and visited the child twice, this was not enough to defeat an abandonment petition as she failed to visit except for these 2 visits even though she was afforded the opportunity to visit 2 times a week. The only other contact she made was to call the caseworker once to cancel a visit. Her behavior was sporadic and insubstantial and evinced an intent to forgo her parental rights.

Mental Illness and Intellectual Disability TPRs

Matter of Elizabeth H., 165 AD3d 402 (1st Dept. 2018)

New York County Family Court's termination of a mother's rights on both mental illness and permanent neglect grounds was affirmed by the First Department. As to the mental illness, the court appointed psychologist testified and offered a report that the mother had both a bipolar disorder and an alcohol abuse disorder which rendered her incapable of caring for the child without a risk of neglect. The expert had examined the mother, had reviewed the mother's long history of pervasive problems and her noncompliance with treatment. The court also properly ruled that the mother had permanently neglected the child given that she failed to take advantage of the diligent efforts of mental health services and substance abuse treatment programs that the agency offered. The mother further failed to consistently visit the child. Lastly, the lower court did not err in limiting the defense counsel's cross examination where the attorney had been repeatedly warned about extensive, duplicative and generalized questions.

Matter of Norah T., 165 AD3d 1644 (4th Dept. 2018)

The Fourth Department affirmed a mental illness termination from Cayuga County but reversed the permanent neglect adjudication. The Fourth Department has ruled multiple times that a parent cannot be terminated on both grounds. There was clear and convincing evidence that the father suffered from an anti-social personality disorder and narcissistic personality disorder. Two psychologists testified about the father's mental illnesses and one expert opined that the father would put the children in immediate jeopardy of neglect or harm if they were in his care. The father did not preserve his argument that the court admitted a report from one of the experts with inadmissible hearsay. He did preserve his hearsay objection to those portions of the reports that had been based on information obtained from another county's DSS. Even if those portions of the reports should not have been admitted, it was harmless error as the result would have been the same if they had been excluded.

Since the lower court properly concluded that the father could not care for the children due to mental illness, the court cannot find permanent neglect as well as he is therefore not be physically capable of properly planning as required in a permanent neglect TPR.

Matter of Michael S., 165 AD3d 1634 (4th Dept. 2018)

Erie County Family Court was affirmed on appeal to the Fourth Department. The mother suffers from antisocial personality disorder. She has a lack of empathy and does not adhere to social norms, is aggressive and impulsive and fails to plan. The children would be in danger of neglect if returned to the mother. A dispositional hearing is not required in a mental illness TPR and there was no reason to hold one in this matter.

Matter of Alicia K., __AD3d___, dec'd 12/19/18 (2nd Dept. 2018)

The Second Department affirmed the termination of a Nassau County father's rights to his 6 children. The children had been removed in the spring of 2015 when they were residing with the mother. The removal was mainly due to housing issues, lack of heat, lack of running water and truancy. The father had been incarcerated when the children were removed. Less than 2 years later, DSS filed a TPR on mental illness grounds regarding the father. Two caseworkers testified that the father was angry and hostile, that he distrusted DSS and would not follow a service plan. The father had 5 different lawyers assigned to him during the proceeding and was defiant in the court room. He left the court room without permission on several occasions and

refused to arrive for court on time. The expert psychologist testified that he had evaluated the father and reviewed the father's extensive mental health records. The father suffers from a long standing diagnoses of bipolar disorder. He was non compliant with medication and therapy and had multiple hospitalizations for his mental health. He had limited insight into his condition and did not see the impact on the children. The father had angry outburst in front of the children and did not see that this would harm the children. The father himself admitted he had an anger management problem and had mood swings although he claimed that he took his meds and was in therapy and was not a physical threat to the children. There was clear and convincing evidence that he was unable for the foreseeable future to provide proper care for the children.

Matter of Noel R., __AD3d__, dec'd 12/27/18 (1st Dept. 2018)

The First Department concurred with the termination of a New York County mother's rights to her child. The mother did have an intellectual disability that the expert psychologist opined significantly impacted her ability to care for the child. While the mother was able to use adaptive skills in certain areas, she could not provide proper care to this child who is autistic and has special needs. There is a

bond between them but that is not sufficient. The mother had been provided with services that did not improve her parenting abilities and the child is also bonded with the foster mother who does meet his special needs.

Permanent Neglect TPR

Matter of Timothy GG., 163 AD3d 1065 (3rd Dept. 2018)

The Third Department reviewed numerous issues in a permanent neglect matter from Warren County Family Court and ultimately affirmed the lower court rulings. The child in this matter had been placed in foster care as a toddler due primarily to the mother's drug use. The mother was incarcerated 3 months after the child was removed. The child's grandmother was also incarcerated and she was provided with phone calls and written contact with the child within months of the child's placement in care. The mother was briefly out of jail less than a year after the child had been placed but soon violated parole and was then sentenced to 6 years in prison. The grandmother was released from prison about a year and a half after the child

had been placed and she filed for custody of the child. DSS brought a TPR petition against the mother within weeks of the grandmother's petition. The grandmother then sought in person visitation with the child which the lower court postponed and ordered the DSS to investigate the grandmother as a resource. One year after the filing of the TPR, the court held a fact-finding and determined that the mother, who was still incarcerated, had permanently neglected the child. The court then held a dispositional hearing in combination with the grandmother's custody petition and ultimately – now some 3 and half years after the child was placed in care - freed the child to be adopted. The grandmother had been incarcerated again before the dispositional hearing had been concluded. Both the mother and the grandmother appealed.

First the Appellate Division noted that the lower court had established 2 goals for the child – both reunification and adoption - and ruled, as they have in the past, that a child cannot have 2 goals but can only have 1 goal. Perhaps a court may wish to order concurrent planning but a court cannot order a second and inconsistent goal. Since no one appealed that issue the court found that it was not an error that required reversal.

The appellate court also heard arguments from the mother and grandmother that the DSS had violated FCA §1017 by failing to timely consider relative resources for the child.

Significantly the court found that FCA § 1017 references the searching of relatives for placement at the time that the child enters care. "The statute does not seem to create a duty for DSS to seek out possible relatives in perpetuity, potentially for years, while a child remains in foster care". When the child was first placed in foster care the DSS did seek out relatives and discovered that the grandmother was at that time incarcerated. They located the mother's aunt who sought and was given visitation but indicated she could not take custody and they located a friend of the mother who also said she could not take custody. The mother never informed DSS about a cousin who did appear over 2 years after the removal, after the TPR had been filed and just a few days before the start of the permanent neglect fact finding.

The appellate court found that DSS did delay in ultimately considering the grandmother as a resource but no one was prejudiced by this delay. The grandmother is responsible for some of the delay as she incorrectly answered questions on her application to be a resource. Further she was unsuitable as she had a history of substance abuse, a criminal history, had indicated child protective reports and was at times in the proceeding either incarcerated or on parole.

The mother clearly permanently neglected the child. DSS made diligent efforts by creating a service plan, arranging visits and advising her of transportations services, giving her bus tokens and talking to her about placement

resources. When the mother was briefly not incarcerated, caseworkers advised her to apply for Medicaid and TA and referred her for drug treatment. She did not follow through on the recommendations and missed over half of her visits before being re-incarcerated. After her incarceration, DSS sent the mother letters about the child's progress, encouraged her to obtain services in the jail that would resolve her parenting issues and advised her of the importance of continuing to parent even while incarcerated. The mother had been using heroin when the child was placed in care and continued to use drugs and has never completed a substance abuse program. Her return to prison was due to drug possession. The mother was incarcerated until at least 2019 and her plan was that the child would live with the grandmother who was unsuitable. She never told the DSS about a cousin who did not come forward until the eve of the TPR fact-finding some 2 years after the child had entered care. Therefore the mother had no viable plan for the child but to remain in foster care while the mother served her sentence, was released and would be able to establish a safe home for the child – not likely to occur even in another year.

The child had been with the same foster family for over 2 years, was bonded with them and doing well and they wished to adopt him. The mother did continue contact with the child and was bonded but it would be well more than a

year before she could possibly parent him. The grandmother was neither an appropriate custodial resource nor even a visitation resource as she had a 15 year history of drug abuse, was on parole for selling drugs, had TA as her only source of income, never had addressed the mother's drug use when the mother was a teen, and had neglected the mother when the mother was a child. The cousin came forward far too late and presented no evidence at the TPR dispo regarding her petition for custody. The child was properly freed for adoption.

Matter of Baby Boy N., 163 AD3d 570 (2nd Dept. 2018)

A Queens's father permanently neglected his children. There was clear and convincing evidence that the agency offered diligent efforts. They provided visitation and encouraged consistent contact with the children. The agency offered the father individual therapy, mental health services, domestic violence counseling and a parenting skills course. The father was aggressive and combative with the agency and did not plan for the children's future.

Matter of Erika G.A., 163 AD3d 653 (2nd Dept. 2018)

Queens County Family Court was affirmed on appeal. The Second Department concurred that a father had

permanently neglected his child. There was clear and convincing proof of the agency's diligent efforts toward reunification. They developed an appropriate service plan, told the father of the importance of complying and scheduled regular visitation. The agency offered anger management, domestic violence, substance abuse and mental health services to the father. The father however failed to complete and services and did not consistently visit the child. It was in the child's best interests to be freed for adoption.

Matter of Jamayla C.M., 163 AD3d 820 (2nd Dept. 2018)

The Second Department affirmed the Queens County Family Court's termination of a mother's rights to her children. The agency offered diligent efforts consisting of scheduling visitation, referring the mother to all the court ordered programs including drug treatment and reminding the mother of the importance of complying with the court's order. The mother repeatedly relapsed and used crack and cocaine, including after completing her rehab program. She clearly had not resolved her substance abuse issue. The mother did complete 2 parenting skills programs and an anger management program but this was only showed partial compliance with the court's order and was not sufficient. Adoption is in the best interests of the children.

Matter of No Given Name D., 165 AD3d 1107 (2nd Dept. 2018)

The Second Department affirmed the Richmond County Family Court's termination of a mother's rights to her child. The agency was excused from having to demonstrate any diligent efforts toward reunification as the lower court had excused those efforts previously under FCA §1039-b and SSL§ 384-b(7)(a). The agency did prove by clear and convincing evidence that the mother failed to plan for the child's future by failing to complete a mental illness and substance abuse program and by not regularly participating in psychotherapy. Partial compliance is insufficient.

Matter of Keadden W. 165 AD3d 1506 (3rd Dept. 2018)

An Albany County mother permanently neglected her 3 children who were then freed for adoption. The children had been in foster care since the fall of 2011. A TPR had been filed in February 2014 and family court freed the children in May 2016 and the mother appealed. (The children would have been in foster care 7 years when the appellate decision came down) DSS proved by clear and convincing evidence that they offered the mother diligent efforts to help resolve her issues. The mother's problems included mental health issues, a lack of safe and stable housing, poor parenting skills including exposing the

children to inappropriate people. The caseworkers created a service plan that included parenting skills, anger management, mental health assistance, individual and family counseling and obtaining an order that the mother not expose the children to people with untreated mental health issues and histories of criminal, violent and/or child protective problems. DSS also provided transportation to services, housing assistance, visitation and access to the children's medical appointments. Finally the caseworkers also held meetings with the mother to encourage progress toward a return of the children.

The mother failed to develop a realistic plan although she initially did make some improvements. A trial home visit was even contemplated but the mother significantly regressed. She failed to find independent and appropriate housing. On one occasion the home was in poor condition as there was a bag of drug residue and a room that smelled of marijuana. Inappropriate persons were allowed in the mother's home and the mother was herself stabbed on one occasion in the home when other children were present. The mother had problems at visitation and could not control the children. She would yell and curse at the children during visits and would curse at service providers when they made suggestions about parenting. Once the mother was texting on her phone as the children were playing unsafely on playground equipment and the caseworker had to intervene.

At the dispo hearing, the evidence was that the mother still had not shown improvement in her parenting at the visits. She still did not have safe and stable housing and had been homeless for a time. She had delayed for a year going to a substance abuse evaluation and was still only sporadically attending mental health treatment. The foster parents wished to adopt and the children's needs were being met, they were bonded and thriving. It was in their best interests to be freed for adoption.

Matter of Janaya T., 165 AD3d 566 (1st Dept. 2018)

A New York County mother permanently neglected her children. The agency offered diligent efforts by developing a service plan tailored to the mother. They referred her for alcohol abuse services, mental health evaluation and domestic violence services and set up regular visitation. The caseworkers met with her to develop the service plan and stressed the need for compliance. The mother failed to plan as she was uncooperative. She failed to follow up on services and only visited sporadically. She failed to promptly allow the caseworker to view her new home when she moved and did not take responsibility for the conditions that had resulted in the children's placement. She did not gain any insight, including into her substance abuse issue. The children have been in the same kinship foster home for

years, where they are well cared for and where the family wishes to adopt them.

Matter of Imani L.J., 166 AD3d 430 (2nd Dept. 2018)

Queens County Family Court dismissed a termination petition regarding the mother of 4 children. The Second Department reversed, found permanent neglect and remitted the matter for a dispositional hearing. The Appellate Division found that the lower court erred in ruling that the agency had not offered diligent efforts. The agency set up visitation, referred the mother to parenting classes, monitored the mother's mental health treatment, reviewed the service plan with the mother and stressed the importance of her compliance with the plan. The mother, however, did not gain insight into her problems. Even though she visited the children regularly, she refused to learn how to parent the children who had special needs and she did not keep her home sanitary and safe for the children.

Matter of Evan J., 166 AD3d 430 (1st Dept. 2018)

The First Department concurred with Bronx County Family Court that a father's rights to his child should be terminated.

The agency provided diligent efforts by referring the father to domestic violence and other counseling, parenting programs, drug treatment programs and advised him of the need to complete these programs. The agency also provided regular visitation. The father did engage in some of the programs and he completed the domestic violence and the parenting program but he failed to meaningfully address his issues. He was arrested and incarcerated for assaulting the mother in violation of an order of protection and he posted threats to the foster mother on social media. He also failed to consistently visit the child. The father's counsel had been denied a request for a continuance to seek the testimony of a former caseworker. This was not an abuse of discretion as the caseworker's notes were placed in evidence and the caseworker had moved out of state and was not amenable to a subpoena. Lastly the child's best interests required that he be freed for adoption by his kinship foster mother who had cared for him since he was 4 months old and where he is thriving. A suspended judgment is not warranted where the father had a lack of insight after several years of services.

Matter of Roberto M., 166 AD3d 777 (2nd Dept. 2018)

DSS made diligent efforts for an Orange County mother of 3 children to reunite with the children. The mother was not provided with visitation because that would have been

detrimental to the children's best interests but she was encouraged to write letters to the children. She was also offered referrals for mental health services, parenting and substance abuse services and she was encouraged to comply and make progress. The mother did not write letters to be given to the children, did not complete the required programs or gain insight. A suspended judgment was not appropriate as she continued to have no insight and would not acknowledge her problems.

Matter of Quadir C.B., 166 AD3d 968 (2nd Dept. 2018)

The agency offered diligent efforts to the father in a Kings County matter. They developed a service plan for him, scheduled regular visitation, referred him to mental health services, domestic violence services, monitored his involvement in the services, visited his home, encouraged him to stick to the service plan and advised him about obtaining suitable housing. The father did not consistently visit the child and did not successfully complete any of his services. A suspended judgment would not be appropriate given that the father failed to address his issues.

<u>Matter of Brielle UU.,__AD3d__</u> dec'd 12/13/18 (3rd Dept. 2018)

A Cortland County child was placed in foster care in early 2015 after the mother failed to follow a court order of supervision. At the time of the placement, the father was incarcerated. A year and a half later, DSS filed to terminate the rights of both parents. The father did permanently neglect the child. He was released from jail just shortly after the child was placed in care but he was under the prior neglect dispo that ordered that he not have unsupervised contact with the child. The agency offered the father diligent efforts in that they referred him of substance abuse evaluations, mental health evaluations, parenting classes, a family educator who supervised his visits and gave him in home parenting education. The agency also helped him with temporary housing in various hotels and helped him with rent money when he located a "somewhat more stable" rooming house. The agency also provided him with public assistance, food stamps and Medicaid. The father was re-incarcerated 7 months later. "Regrettably" the father did not see the child after that re-incarceration given how far the prison was as well as the terms of the stay away order and other complications. However, the caseworker did visit the father in the local jail and the state prison several times and maintained contact by letters as well.

The father failed to plan. He had visited when he was out of jail and he had completed a parenting class however he did not successfully complete mental health and substance abuse programs. He stopped attending the programs or was incarcerated and could not attend the programs. He also lost his public assistance after failing to appear at the recertification. He continued to abuse methamphetamines and was arrested for being with the mother in violation of the order of protection. The mother alleged he had physically assaulted her again. Domestic violence was a key issue in the original placement of the child. The father violated probation and was in prison. He had originally helped to locate the relatives who served as the child's foster parents but once incarcerated, the father testified that his plan was for the child to remain in care for another year or two until he was out of prison.

As to both parents, a suspended judgment was not appropriate. The mother had just completed an inpatient substance abuse program and was on meds for her mental health but she had only been sober for 55 days and was at high statistical ikelihood for relapse. She was in transitional housing and was unemployed. She had recently obtained public assistance but she had not completed required programs to ensure continued public assistance. The father continued to be incarcerated and although he completed a substance abuse program in the prison, any renification with

the child after the incarceration ended would involve a substantial amount of work after he was released. The father would have to successfully and timely obtain public assistance, find suitable housing, continue substance abuse treatment, avoid his prior lifestyle, obtain a GED and employment. The child has been in foster care for 2 years and should not have to wait for all this to possibly occur. The father filed a reply brief claiming that new developments should be considered at this point but the reply brief was filed 15 months after the original termination and 9 months after his appellate brief.

Matter of Jaylen R.B., __AD3d___, dec'd 12/19/18 (2nd Dept. 2018)

The Second Department reversed the termination of a Kings County mother's rights to her two children. The Appellate Division found that the agency did not in fact prove by clear and convincing evidence that the mother failed to maintain contact with the child and plan for their future. The mother testified that she complied with all the requirements of the agency. She testified that she visited regularly, she underwent multiple mental heal evals, she participated in mental health counseling, she underwent drug testing, completed a parenting course and kept up to date with the

children's health and education. The agency introduced portions of its case records and notes but those records generally supported what the mother testified to regarding her compliance. No other evidence was offered as to the reasons for the children's original placement in care, the significance of the mother's mental health issues or the significance of the children's special needs. There was not clear and convincing proof that the mother was failing to take the steps necessary to provide a stable safe home for the children within a reasonable time frame.

<u>Matte of Blake A.M.,__</u>AD3d___, dec'd 12/19/18 (2nd Dept. 2018)

The Second Department affirmed Queens County Family Court's determination that a mother permanently neglected her children. The agency offered visitation, referred the mother to therapy, monitored her participation in the therapy, met with her to review the service plan and encouraged her to complete the plan. The mother's claim that the efforts were not sufficient is unwarranted. She claimed that the agency did not assist her to find a new therapist when her insurance stopped paying. However, in fact the mother chose not to continue therapy and the therapy was terminated due to her not attending. She claimed that the visitation was not at a location convenient

to her but it was near where the children lived and she was able to get there. She also abandoned the children.

<u>Matter of Justin AGM.,</u> AD3d, dec'd 12/26/18 (2nd Dept. 2018)

An incarcerated Queens father permanently neglected his child. The agency offered diligent efforts to the father to plan for the child's future. They set up visitation in the prison, they advised the father as to the child's well-being and they encouraged the father to plan for the child by identifying custodial resources for the child. The father was unable to suggest a resource that was viable for the child other than foster care and therefore he failed to plan for the child. It was in the child's best interests to be adopted by his foster parents.

TPR Dispos

<u>Matter of Cecilia P.,</u> 163 AD3d 1095 (3rd Dept. 2018)

The Third Department concurred with Delaware County Family Court that a mother violated the terms of her suspended judgment regarding a child who had been in care

since 2014 but remanded the matter as the lower court had failed to make a best interest determination. There were numerous violations of the terms but significantly the mother stopped attended mental health treatment, was inconsistent in drug treatment and tested positive 2 times for marijuana. The mother claimed the marijuana was therapeutic even though she had been told that it would interfere with her mental health medication. The mother missed visits with the child, argued with the child's father at the visits which upset the child and did not bring healthy food for the child. She did not maintain a healthy safe residence and at one point was residing in an environment so substandard that would not qualify for housing assistance. These violations were substantive however the lower court failed to make the required best interest assessment as to the proper disposition of the matter given the violations. The Third Department found that the lack of evidence on the issue precluded them from determining the child's current best interests and that they therefore had "little choice" but to remit the matter for another hearing.

Matter of Kaniya D., 164 AD3d 1164 (1st Dept. 2018)

A New York County mother violated the terms of her suspended judgment and her rights were terminated. She failed to attend therapy and claimed she did not need to, she

failed to submit to drug screens, claiming drug screens were not related to the child and she failed to attend the child's medical appointments. The child had severe special needs. The mother was late for her visitation with the child and was not able to progress to unsupervised visits. She failed to understand why visiting the child regularly was important and did not understand the severity of the child's special needs. The mother was unable to understand that the child needed to learn to sign and needed physical therapy and she did not understand why the child needed a one on one caretaker at school. The mother simply put her needs above the child's and left the child in foster care for several years. She has not taken the steps needed to be able to care for the child.

Matter of Aiden T., 164 AD3d 1663 (4th Dept. 2018)

Onondaga County Family Court's termination of two parents' rights was affirmed on appeal. Both parents admitted permanent neglect and accepted suspended judgments. The mother admitted she had not resolved her substance abuse issues and the father admitted that he had not demonstrated an understanding of how the mother's substance abuse issues impacted her ability to parent. During the period of the suspended judgment, the mother relapsed and used

cocaine, her parole was violated and she was imprisoned. The father testified at the violation that the mother was a "very good mother" and kept her addiction issues "out of being a parent". The child was with the same foster mother since his birth, was bonded to her and wanted to continue to live there. The foster mother was a "powerful and significant positive parenting force".

Matter of Jenna D., 165 AD3d 1617 (4th Dept. 2018)

Ontario County Family Court granted a 6 month suspended judgment for a mother after her admission to permanent neglect. The Fourth Department concurred that the mother violated the terms of the suspended judgment. On appeal, the mother claimed she had never been given a copy of the order but that issue was not preserved and the mother admitted in the lower court that she had understood the terms. A preponderance of the evidence demonstrated that the mother violated the terms and that the violations where not inconsequential, isolated or inadvertent. It was not necessary to hold a separate hearing on the child's best interests – only that this issue be specifically considered by the court. The lower court did so during the lengthy hearing that was held. A violation does not require termination of parental rights but it is strong evidence and here any

progress that the mother made was not sufficient to justify continuing the child in limbo.

Matter of A'riana D.N., 165 AD3d 484 (1st Dept. 2018)

The First Department concurred with New York County Family Court that it was not in the child's best interests to allow a suspended judgment after the mother's permanent neglect adjudication. The mother was not close to resolving her issues. She had not sufficiently engaged in domestic violence survivor services or mental health treatment. She was not employed did not have suitable housing and was not able to meet the child's special needs. On the other hand, the child had been living with her foster parents for years and is thriving with them.

Matter of Brandon N., 165 AD3d 1516 (3rd Dept. 2018)

An Albany County mother violated the terms on her suspended judgment and it was in her children's best interest to be freed for adoption. The children would have been about 6 and 7 years old at the time of the appeal, the youngest in foster care for his entire life and the oldest in care since he was 2. The older child had mobility and visual impairments and the youngest child had severe asthma and eczema. The mother had ongoing issues with the cleanliness

and safety of her home. In 2015, DSS filed to TPR the mother and in the spring of 2016 the parties agreed to a 6 month suspended judgment with a variety of terms including that the mother needed to maintain a safe, stable and clean home for the children. The order was specific that she was to discard clutter and eliminate all smoke odors, ashes, dust, mold and mildew and other substances that would affect the one child's asthma. Four months into the suspended judgment the DSS filed a violation and 3 months after that the mother admitted the violation and after a dispo hearing, the court terminated her rights and she appealed the termination. At the dispo hearing, the proof showed that the mother's admission to violating the suspended judgment was very accurate. The caseworkers visited the home and took photos on several occasions during the 4 month period. The home was "overridden by a mass accumulation of items and garbage". The floors were covered and items were stacked high along all the walls such that pathways that did exist through the garbage and debris were blocked making fire hazards as well as dust and dirt that would aggravate the child's asthma. The older child's impairments would make the home and unsafe environment. The mother had been given help and resources to clean up her home but there had been no change. Both a public health nurse and a certified asthma educator visited the home and educated the mother and gave her step by step cleaning instructions about

clearing the floors for the mobility impaired child and cleaning the home of the mold and mildew that would threaten the younger child. Nothing changed during the suspended judgment time frame. The mother did not appreciate the drastic changes she needed to make and giving her more time on the suspended judgment would not help. She has a fundamental lack of understanding about the importance of maintaining a safe and sanitary home for her children. The children's foster mothers wanted to adopt each of the children and had strong bonds with them. It was in the children's best interests to be adopted. In a foot note, the Third Department commented that the mother had not preserved for appeal her argument that she had a "hoarding disorder" and that DSS was required to prove that she was emotionally capable of clearing out her home.

The father, who lived in the home with the mother also had his rights appropriately terminated in the same way and for the same reasons.

Matter of Davian M.J.G., 165 AD3d 606 (1st Dept. 2018)

The First Department affirmed Bronx County Family Court's termination of a mother's rights to her children. Although provided with a suspended judgment, the mother continued to use poor judgment by placing the children in dangerous situations involving domestic violence. She cannot provide a

stable home for the children and did not make sufficient progress after both a 1 year suspended judgment and an extension. The children have been in foster care for most of their lives and the foster parents have a stable, nurturing home and wish to adopt.

Matter of Michaellica W. 166 AD3d 425 (1st Dept. 2018)

A Bronx girl had been in foster care for **12 years**. The appropriate disposition of the TPR matter is to free her for adoption and not to offer a suspended judgment which would further delay her permanency. The child has lived with her foster mother virtually her whole life and is bonded to her, thrives with her and wishes to be adopted. The child is bonded to her father but she last lived with him when she was 2 months old and has not even had overnight visits with him in all the years since. The father has been inconsistent in his visitation with the child over the years, he has not been a reliable presence for her and he does not have appropriate housing.

Matter of Bianca J.N., 166 AD3d 466 (1st Dept. 2018)

A 13 year old New York County child should be freed for adoption. The child had at one point indicated that she opposed being adoption but she currently wishes to be

adopted by her foster mother. Although it is not clear if the foster mother will adopt her, the child should be freed given the **10 years** of failed attempts to reunify the child with the birth mother. During this time, the child has thrived in foster care while the birth mother has continued to fail to address the mental illness problems that had resulted in the child being placed in care. The mother failed to take her meds and this resulted in psychiatric hospitalizations as well as her making threats to burn down the foster home. The mother does not understand the seriousness of her problems, ignores the court's order of protection and any further delay of this matter will not result in a different outcome.

Matter of Asia Lynn S., 166 AD3d 493 (1st Dept. 2018)

A Bronx mother violated the terms of her suspended judgment by failing to visit the child, failing to attend therapy or complete a parenting skills program. The child has been in foster care since she was 2 months old and her foster mother provides for her special needs and wants to adopt her.

Matter of Derick L., 166 AD3d 1325 (3rd Dept. 2018)

The Third Department concurred with Schenectady County Family Court that a father had permanently neglected his younger 2 children. The agency offered the father a "plethora of classes and resources" including parenting services, assistance with homemaking, supervised visitation and mental health counseling. The caseworkers offered reunification assistance and service plans. The appellate court agreed with the lower court that it "would be hard pressed to conclude" that the diligent efforts offered were "less than plenteous". The father missed parenting classes and counseling sessions and did not show any improvement in the state of this home (see the neglect adjudication details above)

Matter of Jasiah T.- V.S.J., 166 AD3d 876 (2nd Dept. 2018)

The Second Department reviewed appeals and cross appeals of a TPR from Kings County and reversed the lower court. The Second Department ruled that the mother's rights should be terminated and also ruled and that the father's rights did not need to be terminated as he was not a consent father. The mother failed to appear for the permanent neglect fact-finding and the lower court adjudicated on an inquest hearing. There was no abuse of discretion to

conduct portions of the dispositional hearing in the mother's absence since she had been repeatedly absent for court appearances with no explanation. A suspended judgment for the mother was not warranted as there was no evidence that the mother had gained any insight into her problems.

However, the lower court ruled that the child should not be freed for adoption but instead that the foster mother should just keep the child as a foster child. This was based primarily on the opinion testimony of a court appointed evaluator who found that the child had a positive relationship with the father that should be allowed to continue – the appellate court disagreed and found that the child should be freed. The evaluator also found that the child had been with the foster mother since he was an infant – **over 10 years** - and had an extremely close bond with her and that she was taking care of the child's special needs. Also the proof showed that the foster mother and the father had "significant distrust" of each other that they gave the child "conflicting information" and that the child "senses their anger and conflict" and the child was stressed and anxious about it. The lower court gave undue weight to the evaluator's opinion that the child should stay in foster care or that the foster mother should only be given custody. This ignored the ongoing exposure to the relationship between the father and the foster mother and deprives the child of a permanent family. The caseworker and the foster mother

both testified that the father allowed contact with the birth mother, repeatedly, in violation of the court's order.

Matter of Destiny M., 166 AD3d 533 (1st Dept. 2018)

New York County parents argued on appeal that the father was a consent father and that the mother should have been given a suspended judgment so that the agency could consider the father as a placement for the child. The First Department concurred that the father's consent to the adoption was not required as he had never paid any child support. The mother's rights should also be terminated as the agency gave her diligent efforts by creating a service plan, making referral for services and setting up visits. The mother in 2013 (that would be **4 years** before the TPR!) told the agency that she no longer wished to plan for the child's return to her but that she wished the child to be given to the father who the child had never met and who until that time was unknown to the agency.

The foster home is the only home the child has ever known where she wants to stay and where she is loved and well cared for by the foster family. There is no reason to give the mother a suspended judgment so that the agency can consider the father as a placement when the father has never participated in the child's care and there is no evidence he intends to do so.

Matter of Baby Boy I., 166 AD3d 975 (2nd Dept. 2018)

Kings County Family Court correctly denied the mother's request for post termination contact with the child after a mental illness termination. Family Court lacks authority to order post termination contact after a contested termination.

Matter of Kadi ___AD3d__, dec'd 12/12/18 (2nd Dept. 2018)

The Second Department affirmed the dismissal of a maternal great aunt's custody petition and agreed that the child should be freed to be adopted by her foster parents. The child has lived most of his life with the foster family and SSL §383(3) gives preference to a foster family to adopt if the child has lived with them for more than 1 year. Members of the child's' extended biological family have no preference for custody over the family selected by the agency at this stage. The child has a strong and loving bond with the foster family and is thriving there. The foster family can provide the child with a permanent, stable home and the child should not be removed from the only home he has ever known. The child's sister has already been adopted by the foster family and

siblings should be kept together particularly where there is a strong bond, as there is here.

Rights of Unwed Fathers

Matter of Amor S. W., 163 AD3d 584 (2nd Dept. 2018)

The Second Department concurred that by clear and convincing evidence. a Queens father's consent was not needed to free a foster child for adoption. The father was unable to establish that he had maintained substantial and continuous or repeated contact with the child by visiting or communicating or by paying support. There is no evidence that the agency attempted to prevent his contact with the child and the agency does not need to show that it made any diligent efforts to encourage the development of the relationship.

Matter of Daiyah D.F.F., 163 AD3d 666 (2nd Dept. 2018)

A Kings County father's consent was not needed to free a child for adoption. The child had been placed in care at 2

days of age and the child's birth certificate had no man's name on it. When the child was 3, the mother surrendered the child to be adopted by the foster parent. At that time, agency records indicated that the man was a putative father and a paternity test had confirmed that he was the bio father. The father failed to prove that he had made substantial and continuous or repeated contact with the child by the payment of child support and regular visitation or communication. The agency is not obligated to inform the father of his child support obligations or of his obligation to maintain contact with the agency or the child. Diligent efforts need not be proven where a man has not established consent rights.

Matter of Andrew E. v Angela N.S. 165 AD3d 658 (2nd Dept. 2018)

Despite the parties having consented to a DNA test, the Second Department concurred with Queens County Family Court that unless a father could prove that his acknowledgement of paternity was fraudulently obtained, he was not allowed to reopen a paternity matter 17 years after the acknowledgment.

Matter of Nitthanean R., 165 AD3d 562 (1st Dept. 2018)

Two New York County children were placed in foster care after the death of their mother on destitute child petition. No father was listed on the children's birth certificates and a check of the putative father registry found no man listed. ACS did serve paternity petitions on a man that the mother had indicated to ACS in oral conversations could be the bio father. The man in question did not appear on the return dates or communicate with ACS in response to petition and the petitions were dismissed by the court. The children were freed for adoption and then the man who the mother had named orally appeared and filed custody petitions for the children. The lower court dismissed his petitions and while the petitioner appealed the dismissal, the children were adopted by their maternal aunt and uncle who had been fostering the children for years.

The First Department affirmed ruling that the petitioner admitted he had received the paternity petitions and admitted that he had been aware of the mother's death. He had virtually no relationship with the children and had not made any effort to build a relationship even after the mother's death. There was no good cause to vacate the destitute child findings based on his claim that he had not been served with those papers and the custody issue is moot now based on the adoption.

Matter of George C.S. v Kerry-Ann B., 165 AD3d 951 (2nd Dept. 2018)

An AFC for the subject child obtained a stay of a Kings County Family Court order for DNA testing. The Second Department reversed the order, ruling that as the AFC had raised the question of equitable estoppel, a hearing on that issue must occur before any consideration of DNA testing.

Matter of Genesis R., 165 AD3d 510 (1st Dept. 2018)

The First Department affirmed New York County Family Court's ruling that an out of wedlock father did not need to consent to the child's adoption. The father had not paid a fair and reasonable sum for child support and did not visit the child monthly. He did not communicate regularly with the child. The 6 year old girl had been in foster care since birth and has spent the last 5 years in the same foster home where she is bonded to the foster mother and the foster mother's adult children. The father is incarcerated, does not have a bond with the child who is in fact very afraid of the father to the extent that she has needed therapy to deal with her extreme anxiety about the father.

Matter of Noah I.T., 165 AD3d 581 (1st Dept. 2018)

The First Department affirmed Bronx County Family Court. The unwed father was not a consent father and even if he was, he abandoned the child. As a notice father, the respondent's rights were limited to a notice of the TPR against the mother and the opportunity to be heard on the issue of the child's best interests. DRL §111-a. He received the notice but did not testify or offer any evidence at the mother's TPR. He was not entitled to a separate dispositional hearing. In any event he had also abandoned the child and a dispositional hearing is not mandated in an abandonment TPR.

Matter of Mikai R., 166 AD3d 624 (2nd Dept. 2018)

A Queens County out of wedlock father of 2 was not a man whose consent was needed for the children to be adopted. He had not maintained contact with the children by paying child support and regularly communicating with the children or their custodian. Further, if he had been a man whose consent was needed, the lower court also appropriately terminated any rights based on abandonment. Being incarcerated during the time frame did not relive him of his responsibility to maintain contact with the children or their caretakers.

Matter of Gabrielle G., 166 AD3d 416 (1st Dept. 2018)

The First Department concurred with New York County Family Court that an unwed father's consent was not needed for the children to be adopted. He admitted that he did not support the children financially after they were placed in foster care. The agency is not required to inform a father of the requirement that he pay support. The father claimed ineffective assistance of counsel on appeal as his attorney did not make a sufficient efforts to show that the father lacked the resources to support the children. However, this could have been a strategic decision and there was no evidence that this line of questioning had a realistic chance of success in any event. Lastly the father did not preserve a constitutional challenge to DRL § 111 (1)(d) and did not notice the AG's office of a constitutional appellate claim.

Surrenders and Adoptions

Matter of Barbara T v Acquinetta M., 164 AD3d 1 (1st Dept. 2018)

The First Department issued a lengthy decision regarding an adoptive mother and the question of her adoption subsidy

and child support responsibilities after the adopted child left the adoptive home. When the child is question was about 10 years old, he was removed from his home and placed in foster care with a non-related foster mother. Less than 4 years later, the foster mother adopted the child and the adoptive mother was provided with an adoption subsidy for the child at the highest level – the exceptional rate. About 20 months after the adoption was finalized, the child's godmother filed a petition for guardianship of the child which was granted with no objection from the adoptive mother. The adoptive mother notified ACS within days of the child residing with the godmother that the child was no longer in her home and that she, the adoptive mother, should no longer receive the subsidy. ACS "suspended" the subsidy which at that point was $1,944.01 a month. The godmother guardian then filed against the adoptive mother for child support. The adoptive mother responded that she no longer was receiving any subsidy for him, that he was in effect emancipated and that her total and only income was a $779 monthly SSI check. The godmother did then obtain public assistance for the child of $91 a week but continued to pursue child support and the AFC took up the appeal.

After a very detailed review of the adoption subsidy laws and regulations, the First Department ruled that while only the adoptive parent could directly receive an adoptive subsidy from the agency, there was no requirement that the

child live with the adoptive parent for the adoptive parent to still be eligible to receive the subsidy. The adoptive mother remains responsible for the support of her legally adopted child and she can meet any ongoing certification requirements in order to continue to receive the subsidy from ACS. Awarding child support in at least the amount of the subsidy that the adoptive mother is still legally entitled to receive as long as the adoptive mother is eligible to receive it is the appropriate child support obligation.

Matter of T., AD3d , dec'd 12/5/18 (2nd Dept. 2018)

A 6 year old Kings County child was adopted by the foster mother that he had lived with since he was 3 days old. About 5 months after the adoption was finalized, the child's former AFC filed a motion to vacate the adoption order and reopen the adoption proceeding under DRL§114. The AFC argued that the adoptive parent made statements before the adoption that she was not able to care for the child and that the adoptive court had not been told about that prior to the finalization and that this was valid grounds to reopen the adoption. The lower court denied the motion and the Second Department affirmed. Although these facts should have been brought to the courts attention before the adoption, the child has been with the adoptive mother since

virtually birth and sees her as the only parent he has ever known. There is a loving relationship and the motion, now made 5 months after the adoption, is not in the child's best interests.

<u>Matter of Phoenix</u>__AD3d___, dec'd 12/5/18 (2nd Dept. 2018)

The Second Department reviewed a Suffolk County Family Court's dismissal of an adoption proceeding. When the child was less than 3 years old, he had been placed in foster care and was ultimately placed with these foster parents when he was 6 years old. The foster parents filed to adopt the child when he was almost 9 years old. The foster parents had previously adopted 2 sisters who were unrelated to this child and these sisters had been severely maltreated before their placement in foster care. One of those sisters died at age 16 due to epilepsy related issues and the other child then 14 years old alleged that the foster father had sexually abused her. This report was investigated and unfounded and the teen adopted girl ultimately recanted the allegations.

During the adoption proceeding for this subject child, the foster father refused to consent to family court reviewing the records of the unfounded report as he took the position that this violated the HIPAA rights of the adopted daughter. The lower court then requested that the foster father engage in

and complete sex offender treatment and allow the court to review those evaluations in order to go forward with this adoption and the foster father refused to do so.

At the subsequent hearing on the adoption, the evidence showed that the child's prior foster family would not adopt him due to behavioral problems and that another family had visited with the child for several months and then also refused to adopt. An expert psychologist testified that the child was "perhaps one of the most severely traumatized and attachment disordered children" she had ever seen in her PTSD attachment therapy program. The child is unable to control his emotions and his behavior. The expert further testified that the foster parents where "perhaps the most skillful parents what we have seen" in dealing with a child with these problems. In particular, the foster father used humor to calm the child down. The child had recently deteriorated due to his disappointment that the adoption had not happened and in fact not being adopted when he expected to had been a "catastrophe" for the child. The child was afraid to go to school in the morning as he feared he would not be allowed to return to the foster home. There was no evidence that the claims that the 14 year old had made about sexual abuse were anything more than a reaction by a troubled child due to the trauma of the death of her sister. Two caseworkers testified that there was a good relationship between the foster parents and the child and

the DSS and the child's AFC were in favor of the adoption. The lower court dismissed the adoption and noted the foster father had refused the court's request that he undergo a sex offender evaluation.

The Second Department reversed finding that the adoption was in the best interests of the child. The family was providing a safe loving and nurturing home environment. The lower court had dismissed the adoption but had not removed the child from that home, therefore the lower court did not have concerns about the child's safety and in fact acknowledged the foster parent's bond with the child. Dismissing the adoption simply left the child in a legal limbo with no permanency.

Miscellaneous

Matter of Leper v NYSOCFS 164 AD3d 1614 (4th Dept. 2018)

In an Art. 78 hearing, the Fourth Department concurred with the ALJ that a mother's indicated reports were reasonably related to employment in the child care field. Twice in 11 years, the mother subjected her children to violent

outbursts. The mother destroyed property and physically assaulted one of the children's care takers in front of the children. She also choked her oldest child. Further the mother admitted abusing marijuana to the point of being unable to care for her children. The mother claimed at the fair hearing that she had been rehabilitated but admitted she had not involved herself in any professional counseling to address her issues. Since she does not recognize the causes of her behaviors, she may continue to engage in them and this is reasonably related to working in the child care field.

<u>Bile v Erie County DSS</u> 61 Misc 3d 1211(A) (Supreme Court, Erie County 2018)

Erie County DSS was sued after the tragic murder of a 10 year old boy at the hands of his stepfather. Erie County had investigated 2 CPS reports concerning the boy prior to the murder. The plaintiffs sought damages for the child's wrongful death and alleged that the CPS investigations were negligent. Erie County Supreme Court dismissed the lawsuit on a motion for summary judgment by the county. CPS is not liable for injuries that result from alleged mistakes by employees in the course of the investigation unless there is a "special relationship" that has been created and that exception does not exist in this matter. Also any action taken by a CPS worker is discretionary and cannot form the

basis for negligence liability. The Court briefly reviewed that 2 CPS calls had been made approximately 2 months apart. In both cases, the mother and the other children in the house denied any abuse was taking place. In the second investigation, the caseworker spoke with the child, the mother, the stepfather, the siblings, the child's principal, reviewed the child's medical records and made an unannounced visit to the home. The story that the child had sustained facial injuries due to an altercation with other children on the school bus was supported by everyone and the report was unfounded. The child was murdered by the stepfather a year later.

Matter of Warren v NYS SCR 164 AD3d 1615 (4th Dept. 2018)

The Fourth Department reviewed an Art. 78 proceeding regarding a fair hearing decision to retain an indicated report on a day care provider. She left 2 infants and a toddler alone upstairs in her home and took older children outside for a 25 minute walk and then remained outside with them for another 25-30 minutes. She claimed she asked a neighbor to listen on a baby monitor but that was contradicted by the investigator. This maltreatment is reasonably related to her employment in the child care field.

Although there was a violation of the regulations regarding the amount of time the investigation into the allegations took, expungement of the indicated report is not a proper remedy for this.

Matter of Michael S. v Christa P. 164 AD3d 1628 (4th Dept. 2018)

A grandfather and his girlfriend filed an Art. 78 proceeding seeking an order that DSS produce children in DSS care and turn the children over to the custody of the grandfather as a suitable relative placement as per FCA §1017. Apparently the grandfather had filed an Art. 6 custody petition in family court but then failed to appear and that petition was dismissed. The grandfather should have filed in family court to intervene in the Art. 10 proceeding or filed a new Art. 6 petition. There is no extraordinary circumstance to justify any other procedure.

Matter of Payne v Montano 166 AD3d 1342 (3rd Dept. 2018)

In reviewing a private custody matter arising out of Broome County, the Third Department found that the trial AFC did not effectively represent his child client and reversed and remanded the matter. The appellate AFC argued that the

AFC at trial did not represent his client's interests adequately. The trial AFC did meet with the child and did tell the court that the child did not want to continue visitation with his father as it had been previously ordered. The trial AFC also sought a *Lincoln* hearing and helped the child to express his wishes to the court. However, the trial AFC did not take an active role in the proceedings by presenting witnesses or by doing a more through cross examination of the mother to bring out the child's position. The trial AFC did not for example question the mother about the child's behavior and demeanor as it related to visits with the father. The lower court had dismissed the mother's petition to modify the visits with the father, ruling that the mother's evidence was "thin" and not persuasive.

Matter of Michael G v Katherine C., __AD3d__ dec'd 12/13/18 (1st Dept. 2018)

In reviewing a private custody proceeding on appeal from New York County Family court, the First Department made 2 comments about CPS records. Apparently an ACS attorney told the lower court that an abuse report filed against the father had been unfounded and that statement by counsel was used to support a temporary order to transfer custody to the father. The Appellate Court had no problem with that. However, the ACS caseworker made statements during a

court conference – not during any testimony – about the prior unfounded matter and the lower court erred in relying on those statements when it made a permanent custody determination without having a formal hearing and subjecting the caseworker to cross examination.