# CHILD WELFARE CASELAW

# JULY 2024 – DECEMBER 2024

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# Introduction

These cases represent the child welfare related cases that we found between July 1, 2024 and December 31, 2024 from review of the Slip Opinions for the Court of Appeals and Appellate Division posted on the OCA website. There are some trial court level cases included at the end of the compilation.

Although we hope that we found all relevant cases, do not assume that this collection is completely comprehensive.

Also, we have placed each case into a category, but any given case might involve more than one legal issue.

The materials have the full cases as found in the NY Reports, except for the appearances of counsel.

Because this program covers cases reported up to December 31, 2024, and the program is given on January 30, 2025, the official citations have not been issued for some of the cases. If you need the official citation, please check the court website for those, or your legal research website (Westlaw, LEXIS, etc.)

# Preliminary Proceedings

**Matter of Emmanuel C.F.**, 230 AD3d 997 (1st Dept., 2024)

Order, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about March 14, 2024, which denied respondent mother's application for an order expediting a hearing under Family Court Act § 1028, unanimously reversed, on the law, without costs, the application granted, and an expedited hearing directed, with no further adjournments except for good cause shown.

In this child protective proceeding pursuant to article 10 of the Family Court Act, the mother filed an application on January 31, 2024, requesting the return of her children, or alternatively, for a hearing pursuant to Family Court Act § 1028 (1028 hearing). Family Court commenced a 1028 hearing with a combined fact-finding hearing within three court days, on February 6, 2024. However, after several weeks of piecemeal adjournments and only one hour of testimony from one witness, the mother moved in March 2024 to expedite the 1028 hearing. She requested an order (1) "[s]cheduling the 1028 hearing to proceed expeditiously with at least 5 hours per week of hearing time," or (2) "[s]cheduling the 1028 hearing expeditiously such that it concludes by May 1, 2024." Family Court denied the application and held that the court complied with Family Court Act § 1028 by commencing the 1028 hearing with a combined fact-finding hearing within three court days of the mother's application. In support of its decision, the court cited to CPLR 4011 which provides general authority to trial judges to "otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue, in a setting of proper decorum," but Family Court Act § 1028 clearly imposes time constraints on this type of hearing.

Family Court Act § 1028 "provides for an expedited hearing to determine whether a child who has been temporarily removed from a parent's care and custody should be reunited with that parent pending the ultimate determination of the child protective proceeding" (*Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 202 [2d Dept 2017]). Upon an application of a parent whose child has been temporarily removed, "[e]xcept for good cause shown, such hearing shall be held within three court days of the application and shall not be adjourned" (Family Court Act § 1028[a]).

Here, although the 1028 hearing commenced within three court days of the mother's application, it did not proceed expeditiously. It is currently calendared with continued hearing dates through late October 2024, at which time the infant subject children will have spent more than half their lives in foster care. Although Family Court has discretion to regulate proceedings and streamline hearings, it does not have unfettered authority to adjourn a 1028 hearing in piecemeal fashion over the course of months as

happened here. The plain language of the statute requires expediency. Family Court Act § 1028 is distinguishable from other sections of article 10 wherein those sections call for hearings to be conducted [*2]within the Family Court's discretion (*see Matter of Elizabeth C.,* 156 AD3d at 209). No such discretion is provided by the plain language of Family Court Act § 1028.

Under the specific time constraints detailed by the plain language of Family Court Act § 1028 and given the potential and persistent harms of family separation, the mother is entitled to prompt judicial review of the children's removal "measured in hours and days, not weeks and months" (*Matter of F.W. [Monroe W.]*, 183 AD3d 276, 280 [1st Dept 2020] [internal quotation marks omitted]). Conducting this 1028 hearing over a period of 30 minutes of hearing time scheduled in March, four hours scheduled in April, three hours in May, and four hours in June cannot be deemed prompt or expeditious judicial review.

In light of the practical constraints on Family Court, including extensive caseloads, often involving urgent matters, we decline to set a specific deadline for completion of the hearing. However, the court is directed to conduct and complete the hearing expeditiously, with no further adjournments except for good cause shown, as required by the statute, and to issue its decision promptly thereafter. We caution that this decision relates solely to the 1028 hearing and the mother's application therefor and should not be construed as relating to the substance or disposition of the originating petition.

Motion granted to the extent it seeks leave to file an amicus curiae brief and the six copies of the proposed brief submitted with the motion papers deemed filed, and otherwise denied as moot.

**Matter of Brycyn W.**, 230 AD3d 589 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Westchester County (Mary Anne Scattaretico-Naber, J.), dated June 12, 2023. The order, after a hearing, granted the petitioner's application pursuant to Family Court Act § 1027 to remove the subject child from the custody of the mother and place the child in the custody of the petitioner pending the outcome of the proceeding.
ORDERED that the order is affirmed, without costs or disbursements.

The petitioner commenced this neglect proceeding pursuant to Family Court Act article 10 against the parents of the subject child and made an application pursuant to Family

Court Act § 1027 to remove the child from the custody of the mother and place the child in the custody of the petitioner pending the outcome of the proceeding. After a hearing, the Family Court granted the application and placed the child in the custody of the petitioner pending the outcome of the neglect proceeding. The mother appeals.

Although it is undisputed that the child has been returned to the mother's care, the mother's appeal is not academic. The child's removal created a permanent and significant stigma (*see Matter of Emmanuela B. [Jean E.B.]*, 147 AD3d 935; *Matter of Jesse J.*, 64 AD3d 598; *Matter of C. Children*, 249 AD2d 540).

The Family Court properly granted the petitioner's application for the temporary removal of the child from the custody of the mother and placed him in the custody of the petitioner pursuant to Family Court Act § 1027. "[O]nce a child protective petition has been filed, Family Court Act § 1027(a)(iii) authorizes the court to conduct a hearing to determine whether the child's interests require protection, including whether the child should be removed from his or her parent" [*2](*Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 204 [internal quotation marks omitted]). Following such a hearing, temporary removal is authorized only where the court finds it necessary "to avoid imminent risk to the child's life or health" (*Nicholson v Scoppetta*, 3 NY3d 357, 376; *see* Family Ct Act § 1027[b][i]). In determining a temporary removal application, "[the] court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal," and it must "balance that risk against the harm removal might bring, and . . . determine . . . which course is in the child's best interests" (*Nicholson v Scoppetta*, 3 NY3d at 378; *see Matter of Jorge T. [Christine S.]*, 157 AD3d 800, 800-801). Since the court has the advantage of viewing the witnesses and assessing their character and credibility, its determination in this regard should not be disturbed unless it lacks a sound and substantial basis in the record (*see Matter of Jorge T. [Christine S.]*, 157 AD3d at 801; *Matter of David Edward D.*, 35 AD3d 856; *Matter of Jennifer R.*, 29 AD3d 1003, 1004).

Here, there is a sound and substantial basis in the record supporting the finding of the Family Court that the child would be subject to imminent risk if he were to remain in the mother's care and that the risk could not be mitigated by actions other than removal (*see Matter of Riley P. [Raymond S.]*, 171 AD3d 757, 758-759; *Matter of Luna V. [Natasha V.]*, 163 AD3d 689; *Matter of Sara A. [Ashik A.]*, 141 AD3d 646; *see also Matter of Grace F. [Nicole F.]*, 144 AD3d 680).

The mother's remaining contention is without merit.

**Matter of Logan M.**, 231 AD3d 955 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Suffolk County (Caren Loguerico, J.), dated May 11, 2023. The order, insofar as appealed from, after a hearing, upon granting the mother's application pursuant to Family Court Act § 1028 for the return of the subject child during the pendency of the proceeding to the extent of returning the subject child to the custody of the maternal aunt, in effect, directed the issuance of a temporary order of protection requiring the mother to stay away from the subject child's home.
ORDERED that the order is reversed insofar as appealed from, on the law and the facts, without costs or disbursements.

In December 2022, the Family Court issued an order directing the temporary removal of the subject child pursuant to Family Court Act § 1022. Thereafter, the petitioner commenced this proceeding pursuant to Family Court Act article 10 against the mother and a related proceeding against the father, alleging, inter alia, that they abused the child and that they "failed to ensure that the child receives proper and necessary medical care" for his seizures. On January 6, 2023, the court, upon consent, placed the child in the custody of his maternal aunt. The mother was permitted to reside in the child's home, but all interactions with the child had to be supervised by the maternal aunt. The maternal aunt was responsible for the child's medical care.

On April 27, 2023, the petitioner filed an application pursuant to Family Court Act § 1061 seeking to remove the child from the maternal aunt's custody and to place him in foster care. The Family Court granted the petitioner's application. The mother thereafter filed an application pursuant to Family Court Act § 1028 for the return of the child during the pendency of the proceeding. After a hearing, the court granted the mother's application to the extent of returning the child to the custody of the maternal aunt, but, in effect, directed the issuance of a temporary order of protection requiring the mother to stay away from the child's home. The mother appeals from so [*2]much of the order as, in effect, directed the issuance of a temporary order of protection requiring her to stay away from the child's home.

"'An application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed shall be granted unless the court finds that the return presents an imminent risk to the child's life or health'" (*Matter of Chase P. [Maureen Q.]*, 199 AD3d 807, 808, quoting *Matter of Audrey L. [Marina L.]*, 147 AD3d 838, 839 [internal quotation marks omitted]). "'The court's determination will not be disturbed if it is supported by a sound and substantial basis in the record'" (*Matter of Chase P. [Maureen Q.]*, 199 AD3d at 808, quoting *Matter of Tatih E. [Keisha T.]*, 168 AD3d 935, 935; *see Matter of Esscence R. [Ebony B.R.]*, 158 AD3d 806, 806; *Matter of Julissia B.*

*[Navasia J.]*, 128 AD3d 690, 691). "In making its determination, the court 'must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal'" (*Matter of Chase P. [Maureen Q.]*, 199 AD3d at 808, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 378; *see Matter of Romeo O. [Sita P.-M.]*, 163 AD3d 574, 575). "The court 'must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests'" (*Matter of Chase P. [Maureen Q.]*, 199 AD3d at 808, quoting *Nicholson v Scoppetta*, 3 NY3d at 378; *see Matter of Romeo O. [Sita P.-M.]*, 163 AD3d at 575).

As an initial matter, contrary to the petitioner's contention, the mother's challenge to so much of the order as, in effect, directed the issuance of a temporary order of protection requiring her to stay away from the child's home is preserved for appellate review (*see Ramrattan v Resorts World Casino*, 221 AD3d 629, 629).

The Family Court's determination that allowing the mother to reside with the child would present an imminent risk to the child lacked a sound and substantial basis in the record (*see Matter of Chloe-Elizabeth A.T. [Albert T.]*, 167 AD3d 910, 912; *Matter of David Edward D.*, 35 AD3d 856, 857). Testimony adduced at the hearing established that the mother interfered with the child's medical care by attending a medical appointment with the child unsupervised and by making an appointment for the child's blood work. However, testimony also established that, while the mother was residing with the child and the maternal aunt, the child attended all of his medical appointments and did not have any seizures.

Accordingly, the Family Court should not have, in effect, directed the issuance of a temporary order of protection requiring the mother to stay away from the child's home.

The petitioner's remaining contention is without merit.

**Matter of Amira C.**, 232 AD3d 599 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Kings County (Linda M. Capitti, J.), dated December 1, 2023. The order, insofar as appealed from, after a hearing, granted those branches of the petitioner's motion which were to vacate an order of the same court (Elizabeth Barnett, J.) dated November 17, 2020, inter alia, releasing the subject child Ahmed L. M. to the custody of the mother, and to issue a full stay-away order of protection in favor of the subject child Ahmed L. M. and against the mother and, in effect, denied the mother's application pursuant to Family Court Act § 1028 for the return of the subject child Ahmed L. M. to the mother's custody.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject child Ahmed L. M. by failing to provide proper supervision and guardianship. The petitioner temporarily removed the child from the mother's custody. The petitioner moved, among other things, to vacate an order dated November 17, 2020, inter alia, releasing the child to the custody of the mother, and to issue a full stay-away [*2]order of protection in favor of the child and against the mother. The mother made an application pursuant to Family Court Act § 1028 for the return of the child to her custody. After a hearing, the Family Court, among other things, granted those branches of the petitioner's motion which were to vacate the order dated November 17, 2020, and to issue a full stay-away order of protection in favor of the child and against the mother and, in effect, denied the mother's application. The mother appeals.

A parent's application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed "shall" be granted unless the Family Court finds that "the return presents an imminent risk to the child's life or health" (*Matter of Nyomi P. [Imeisha P.]*, 224 AD3d 906, 906; *Matter of Mikayla T. [Jyranda R.]*, 199 AD3d 1009, 1010). The court's determination will not be disturbed if it is supported by a sound and substantial basis in the record (*see Matter of Junny B. [Homere B.]*, 200 AD3d 687, 688; *Matter of Zaniyah R.-T. [Wanda R.]*, 196 AD3d 584, 585). In making its determination, the court "must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" and "must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interest" (*Nicholson v Scoppetta*, 3 NY3d 357, 378; *see Matter of Nyomi P. [Imeisha P.]*, 224 AD3d at 907). The child protective services agency bears the burden of establishing that the child would be at imminent risk and therefore should remain in its custody (*see Matter of Skkyy M.R. [Justin R.—Desanta C.]*, 206 AD3d 660, 661; *Matter of Chase P. [Maureen Q.]*, 199 AD3d 807, 809).

Here, there is a sound and substantial basis in the record for the Family Court's determination that the return of the child to the mother would present an imminent risk to the child and that the risk could not be mitigated by reasonable efforts to avoid removal (*see Matter of Tymik R. [Tamika J.]*, 214 AD3d 737, 738; *Matter of Solai J. [Kadesha J.]*, 190 AD3d 973, 974).

Accordingly, the Family Court properly granted those branches of the petitioner's motion which were to vacate the order dated November 17, 2020, and to issue a full stay-away order of protection in favor of the child and against the mother and, in effect, denied the

mother's application pursuant to Family Court Act § 1028 for the return of the child to her custody.

**Matter of Ayanna O.**, AD3d 2024 NY Slip Op 06642 (3rd Dept., 2024)

Appeals from four amended orders of the Family Court of St. Lawrence County (Andrew S. Moses, J.), entered June 21, 2024, which, in four proceedings pursuant to Family Ct Act article 10, temporarily removed the subject children from respondent's custody.

Respondent (hereinafter the mother) is the mother of the five subject children (born in 2009, 2013, 2014, 2015 and 2018). Following reports that the children had missed a significant number of school days in the 2023-2024 school year, among other things, petitioner filed four neglect petitions against the mother, alleging educational neglect and lack of supervision.[FN1] Upon the mother's initial appearance on February 26, 2024, Family Court issued temporary orders of supervision which, as relevant to this appeal, required the mother to undergo a mental health evaluation and cooperate with any recommended treatment. In May 2024, based on information contained in the mother's mental health evaluation and the children's school progress reports, petitioner sought to temporarily remove the children from the home pursuant to Family Ct Act § 1027. Following a hearing, Family Court found that removal was necessary to avoid imminent risk to the children's lives or health, removed the children from the mother's home and placed them in the care and custody of petitioner. The mother appeals.[FN2]

At any time after a petition pursuant to Family Ct Act article 10 is filed, either the petitioner or the attorney for the children may apply for, or Family Court may sua sponte order, a hearing to determine whether judicial intervention is required to protect the children's best interests, including a consideration of whether the children should be removed from the care of their parent (*see* Family Ct Act § 1027 [a] [iii]). If, upon such a hearing, the court determines "that removal is necessary to avoid imminent risk to the child[ren]'s li[ves] or health, it shall remove or continue the removal of the child[ren]" (Family Ct Act § 1027 [b] [i]). In considering a removal application, Family Court "must engage in a balancing test of the imminent risk with the best interests of the child[ren] and, where appropriate, the reasonable efforts made to avoid removal or continuing removal" (*Nicholson v Scoppetta*, 3 NY3d 357, 380 [2004]; *see* Family Ct Act § 1027 [b] [i], [ii]; *Matter of Lily A. [Tenise ZZ.]*, 227 AD3d 1205, 1206 [3d Dept 2024]). On appeal, we defer to Family Court's factual and credibility determinations, and its decision to direct the removal or continued removal of children will be upheld if it is supported by a

sound and substantial basis in the record (*see Matter of Lily A. [Tenise ZZ.]*, 227 AD3d at 1207; *Matter of Tyler Y. [Katrina Y.]*, 202 AD3d 1327, 1329 [3d Dept 2022]).

Here, at the mother's initial appearance, Family Court issued temporary orders of supervision requiring, among other things, that the mother undergo a mental health evaluation and cooperate with recommended treatment. The mother underwent said [*2]evaluation, where she reported various conspiratorial ideations that led her to believe that the children would be trafficked or harmed at school.[FN3] The evaluator lacked information to suggest that the mother would intentionally harm the children, but the mother's affect and delusions led him to opine that the mother was "unstable psychiatrically" and that she was likely suffering from delusional disorder, persecutory type.[FN4] The evaluator thus recommended that the mother engage in mental health treatment and that she be closely monitored, as he feared that she may inadvertently harm the children. The harm posed by the mother was most readily present in the children's schooling, as the five subject children continued to miss approximately 50% of school days and were all failing their respective classes. The record also reflects that petitioner engaged in reasonable efforts to avoid the need for a removal. Although the mother agreed to engage with mental health treatment, she declined her primary caseworker's assistance to enroll and, as of the hearing, had not done so on her own. Further, the mother refused to engage in other recommended services, among them a substance abuse evaluation and treatment,[FN5] parenting education or homemaker services, asserting that she had no need for them. The caseworkers also checked on the children's school progress, followed up with the mother and, on at least two occasions, arranged for a school bus to return to pick up the children after the school day had started. Upon removal, the children were placed with family members. Deferring to Family Court's credibility assessments, a sound and substantial basis in the record supports its determination that, despite petitioner's reasonable efforts to avoid removal, removing the children from the mother's care was in their best interests, as it was necessary to avoid imminent risk to their lives or health [FN6] (*see Matter of Lily A. [Tenise ZZ.]*, 227 AD3d at 1206-1207; *Matter of Renezmae X. [Kimberly X.]*, 161 AD3d 1247, 1248 [3d Dept 2018], *lv dismissed* 31 NY3d 1140 [2018]; *Matter of Julissia B. [Navasia J.]*, 128 AD3d 690, 691 [2d Dept 2015]; *compare Matter of David J.*, 205 AD2d 881, 884 [3d Dept 1994], *appeal dismissed* 84 NY2d 905 [1994]).[FN7]

As to the mother's assertion that the notice of the removal hearing was deficient, we note that petitioner's application comports with the statutory requirements (*see* Family Ct Act §§ 1023; 1027 [a] [iv]). Further, the removal hearing was held in accordance with the statute and, at said hearing, the mother was represented by counsel and had a full opportunity to be heard (*see* Family Ct Act §§ 1023; 1027 [a] [iii]). To the extent not expressly addressed herein, the mother's remaining arguments have been reviewed and lack merit.[FN8]

ORDERED that the amended orders are affirmed, without costs.

**Footnotes**

**Footnote 1:** Where the information was known, each petition named the father of the corresponding child or children as a nonrespondent parent.

**Footnote 2:** The mother filed five notices of appeal — one for each child — from a temporary order, entered May 22, 2024, which granted petitioner's application to temporarily remove the five subject children from the mother's care during the pendency of the proceedings; said order also reflected that amended orders would follow. Thereafter, Family Court issued four amended temporary orders of removal, entered June 21, 2024; three of the amended orders pertained to one subject child each, while the last amended order corresponded to the two remaining children. Although the mother's appeal from the May 2024 order was superseded by the issuance of the June 2024 amended orders, "we exercise our discretion to treat the appeal[s] as having been taken from the amended order[s]" (*Matter of C.M. v Z.N.*, 230 AD3d 1409, 1410 n 2 [3d Dept 2024]; *see* CPLR 5520 [c]). We denied the mother's motion for a stay of the order during the pendency of her appeals (2024 NY Slip Op 72496[U] [3d Dept 2024]).

**Footnote 3:** The neglect petitions allege that the mother believed that a school employee was a sex offender, as he resembled an individual she had seen on that registry, and that some of the children reported carrying knives to school to defend themselves against potential kidnapping.

**Footnote 4:** The evaluator lacked sufficient information but also suspected bipolar disorder, schizophrenia or other related disorders as possible diagnoses.

**Footnote 5:** According to the primary caseworker, the mother declined substance abuse treatment because she was "past [90] days sober."

**Footnote 6:** Following oral argument, the mother made certain concerning allegations about the senior caseworker — not the primary caseworker — involved in this matter, and petitioner and the attorney for the children provided responsive letters. Inasmuch as these allegations are outside the record, which is sufficient for our review, we decline to consider them (*see* CPLR 5526; *Matter of Cori XX. [Michael XX.-Katherine XX.]*, 155 AD3d 113, 117 [3d Dept 2017]; *Matter of Thomas X. [Megan X.]*, 80 AD3d 832, 834 n [3d Dept 2011], *lv denied* 16 NY3d 710 [2011]; *compare Matter of Michael B.*, 80 NY2d 299, 318 [1992]).

**Footnote 7:** We share the mother's concern about the use of a negative inference against a parent who declines to testify at a removal hearing. "Unlike the fact-finding hearing, which represents a culmination of the adjudicatory process, a [removal] hearing occurs at the very beginning of the case, indeed prior to discovery, interviews,

investigation by the parent's attorney, or comprehensive case record analysis. In short, counsel cannot be well prepared, and lacks the ability needed to weigh the pros and cons of client testimony" (Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1028; *contra Matter of Jacob P.*, 37 AD3d 836, 838 [2d Dept 2007]). Nevertheless, in light of our determination — which we have reached *without* the use of such inference — we need not reach the mother's contention.

**Footnote 8:** The attorney for the children opposed removal at the Family Ct Act § 1027 hearing, but the appellate attorney for the children supports affirmance of Family Court's decision.

# Evidentiary Rulings in Article 10 Proceedings

**Matter of E. Y. A.-G., v S.B.**, 232 AD3d 463 (1st Dept., 2024)

Order, Family Court, New York County (Gail A. Adams, Ref.), entered on or about May 18, 2023, which, after an inquest brought under article 8 of the Family Court Act, dismissed the petitions for violation of an order of protection dated February 25, 2019 and for an order of protection, and vacated all prior orders of protection, unanimously modified, on the law, to reinstate the prior orders of protection, and otherwise affirmed, without costs.

Family Court properly dismissed the violation petition because petitioner failed to make a showing of good cause under Family Court Act § 842 to extend the February 25, 2019 order of protection. At the inquest, petitioner did not show that an extension was necessary to prevent a recurrence of domestic violence, as she did not testify about incidents that would support specific claims of continued violence against her, nor did she testify that respondent violated any of the prior orders of protection (*see Matter of Ironelys A. v Jose A.*, 140 AD3d 473, 474 [1st Dept 2016], *lv dismissed* 28 NY3d 953 [2016]). Rather, she testified that respondent had not telephoned her and she had no idea how to contact him until his counsel responded to the appeal she filed regarding the dismissal of the Washington State divorce proceeding.

Family Court also properly dismissed the petition for an order of protection, as petitioner failed to establish prima facie that respondent's actions against her constituted, at the

very least, the family offense of identity theft in the third degree. Petitioner's testimony failed to establish by a preponderance of the evidence that respondent, knowingly and with the intent to defraud, assumed petitioner's identity and obtained goods, money, property, or services; used credit in petitioner's name; caused petitioner or anyone else a financial loss; or committed a class A misdemeanor while using petitioner's identity (*see* Family Court Act § 832; Penal Law § 190.78).

Because petitioner failed to establish a prima facie case that respondent committed the family offense of identity theft, the court was not required to draw a negative inference against respondent for failing to appear and testify (*see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141 [1983]; *cf. Matter of Heaven C.E. [Tiara C.]*, 164 AD3d 1177, 1178 [1st Dept 2018]). Family court's credibility determination is entitled to deference and we find no basis to disturb it (*see Matter of Bridgette B.E. v Lisandro R.C.*, 208 AD3d 1094, 1094-1095 [1st Dept 2022]; *Matter of F.B. v W.B.*, 248 AD2d 119, 119 [1st Dept 1998]).

However, Family Court should not have sua sponte vacated the prior orders of protection, including a three-year February 25, 2019 order of protection respondent consented to. Respondent did not seek such relief or even appear at the proceeding, which in any event was not focused on the validity of the prior orders of protection.

**Matter of I.L.A.**, AD3d 2024 NY Slip Op 06113 (1st Dept., 2024)

Order of fact-finding, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about August 21, 2023, which, after a hearing, found that the respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the mother neglected the child (Family Court Act § 1046[b][1]). The admissible evidence, including 911 calls placed by the mother's adult son support the finding that the child's emotional and mental condition was impaired or in imminent danger of being impaired when the mother, while intoxicated, engaged in an act of domestic violence against the adult son in the presence of the child (*see Matter of Jermaine K.R. [Jermaine R.]*, 176 AD3d 648, 649 [1st Dept 2019]). In addition, the adult son's 911 call, as well as statements made by the child to a caseworker, support the finding that the mother neglected the child by regularly drinking to excess without participating in or completing an alcohol treatment program (*see* Family Court Act § 1046 [a][iii]; *Matter of Melanie J.A. [Ramon J.]*, 221 AD3d 421, 422 [1st Dept 2023]).

The 911 calls from the adult son in which he reported that the mother hit him in the face and chased him with a pocketknife were properly admitted into evidence as excited

utterances, which do not require corroboration (*see Matter of Taveon J. [Selina T.]*, 209 AD3d 417, 418 [1st Dept 2022], *lv denied*, 39 NY3d 904 [2022]). The mother does not deny that the recording of her own 911 call, in which she repeatedly stated that she would beat the adult son if he did not leave, was properly admitted into evidence. The court also properly considered the child's initial statements to the caseworker that the mother slapped the adult son and drank alcohol to the point that she forgot things and needed help walking (*id.*). To the extent the child's later statements to ACS were inconsistent with her initial statements, the credibility issues were properly resolved by Family Court (*see Matter of Rahmel G. [Carlene G.]*, 201 AD3d 567, 568 [1st Dept 2022]). Family Court's finding that the mother's testimony, in which she denied that she hit the adult son during the recent incident or in the past, or that she drank alcohol in the child's presence, was not credible, is entitled to deference on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]).

Contrary to the mother's contention, the court properly admitted into evidence orders issued in prior neglect proceedings in which Family Court found that the mother neglected the adult son by inflicting excessive corporal punishment (*Matter of Ricardo M. J. [Kiomara A.]*, 143 AD3d 503 [1st Dept 2016]). Proof of neglect as to one child is admissible evidence of neglect as to another child (*see* Family Court Act § 1046[a][i]). Although petitioner did not seek to establish that the child was derivatively neglected based on the mother's prior neglect of [*2]the adult son, the prior orders were relevant to show the history of the mother's use of violence against him, and they support Family Court's determination that the mother's testimony lacked credibility.

We have considered the mother's remaining contentions and find them unavailing.

# NEGLECT

# General and Mixed Neglect

**Matter of E.R.**, AD3d 2024 NY Slip Op 06172 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (E. Grace Park, J.), entered on or about January 29, 2024, which, after a hearing, found that

respondent mother neglected the subject children, and placed the children in the custody of the Administration for Children's Services until the next permanency hearing scheduled for February 16, 2024, and directed, among other things, that respondent shall continue to have supervised visits with the children, unanimously affirmed, without costs.

The finding of neglect against respondent is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Gelani M. [Paul M.]*, 222 AD3d 484, 485 [1st Dept 2023]). The evidence adduced at the fact-finding hearing showed that the mother engaged in a violent physical altercation with the building superintendent in the children's presence and caused injuries to his neck. During the confrontation, she encouraged her then six-year-old son to hit the superintendent with a metal pipe by demonstrating how he should swing it. Respondent's actions also put the children at direct risk of harm because the youngest child's stroller was knocked to the ground during the incident, resulting in the child suffering abrasions to the side of her face. When the police officers arrived at the scene, respondent cursed at them, kicked at and hit them in front of all three children. The court properly concluded that the record demonstrated that the children's emotional and mental condition had been impaired, or was in imminent danger of becoming impaired, as a result of witnessing respondent physically attack the superintendent and the officers and that the harm to the children was a consequence of respondent's failure to exercise a minimum degree of care (*see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The court properly drew a negative inference against respondent for failing to testify, even though her refusal was due to the pending criminal charges against her (*see Matter of Ayanna P. [Darryl B.]*, 184 AD3d 542, 543 [1st Dept 2020]).

Even a single incident is sufficient to support a finding of neglect because respondent's judgment was strongly impaired, exposing the children to a substantial risk of harm (*see Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563, 564 [1st Dept 2018]). Furthermore, the court properly relied on the 2021 neglect finding against respondent in connection with her stabbing her ex-boyfriend with a knife in the children's presence because the prior findings were sufficiently close in time to the instant petition and also involved respondent physically attacking another individual (*see Matter of Baby Girl L. [Mark Dunald B.]*, 147 AD3d 683, 684 [1st Dept 2017]).

Respondent's challenge to the dispositional part of the order has been rendered moot by the expiration of the terms of the order (*see Matter of Adam T. [Artut T.]*, 186 AD3d 1179, 1180 [1st Dept 2020]). On the merits, the court providently [*2]directed that the visits between respondent and children be supervised because there was no evidence that she had made any positive strides in overcoming the behavior that led to two separate neglect findings, such as committing acts of violence in the children's presence (*see Matter of Romeo C. [Perla P.]*, 222 AD3d 473, 474 [1st Dept 2023]).

**Matter of Alayah K.**, 231 AD3d 951 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Ben Darvil, Jr., J.), dated February 3, 2023, and (2) an order of disposition of the same court dated March 3, 2023. The order of fact-finding, after a fact-finding hearing, found that the father neglected the subject child. The order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, placed the subject child in the custody of the maternal grandmother.

ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the order of disposition is reversed, on the facts, without costs or disbursements, the order of fact-finding is vacated, the petition is denied, and the proceeding is dismissed.

In October 2018, the petitioner commenced this proceeding against the father, alleging that he neglected the subject child by, inter alia, permitting the child to have contact with the nonrespondent mother in violation of a temporary order of protection dated September 25, 2018. After a fact-finding hearing, in an order of fact-finding dated February 3, 2023, the Family Court found that the father neglected the child by leaving the child overnight with the nonrespondent mother at the home of the maternal grandmother while the temporary order of protection was in effect. After a dispositional hearing, in an order of disposition dated March 3, 2023, the court, among other things, placed the child in the custody of the maternal grandmother. The father appeals.

"In a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence" (*Matter of Janiyah S. [Pedro H.]*, 226 AD3d 909, 910; *see* Family Ct Act § 1046[b][i]). "[A] party seeking to establish [*2]neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Leah S. [Barnett V.]*, 228 AD3d 667, 668 [internal quotation marks omitted]; *see* Family Ct Act § 1046[b][i]). "[A] violation of an order of protection, standing alone, is insufficient to establish neglect" (*Matter of Janiyah S. [Pedro H.]*, 226 AD3d at 911-912).

Here, the petitioner failed to establish, by a preponderance of the evidence, that the child's physical, mental, or emotional condition had become impaired or was in imminent danger of becoming impaired as a result of her contact with the nonrespondent mother during an overnight stay at the maternal grandmother's home (*see Matter of Abbygail H.M.G. [Christine Y.]*, 129 AD3d 722, 723; *Matter of Jada K.E. [Richard D.E.]*, 96 AD3d 744, 745; *cf. Matter of Janiyah S. [Pedro H.]*, 226 AD3d at 911).

The father's remaining contentions need not be reached in light of our determination.

**Matter of Luna O.**, 232 AD3d 799 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the father appeals from an order of disposition of the Family Court, Kings County (Robert D. Hettleman, J.), dated July 21, 2023. The order of disposition, upon an order of fact-finding of the same court (Michael R. Milsap, J.) dated June 30, 2023, made after a fact-finding hearing, finding that the father neglected the subject child, and after a dispositional hearing, placed the child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing.
ORDERED that the appeal from so much of the order of disposition as placed the child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

In June 2022, the petitioner commenced this proceeding pursuant to Family Court Act article 10 alleging, inter alia, that the father neglected the subject child by misusing drugs and perpetrating an act of domestic violence against the mother in close proximity to the child. After a fact-finding hearing, the Family Court found that the father neglected the child and adjourned the matter for a dispositional hearing. After a dispositional hearing, the court issued an order of disposition dated July 21, 2023, which, among other things, placed the child in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing. The father appeals.

The appeal from so much of the order of disposition as placed the child in the custody of the Commissioner of Social Services of Kings County until the completion of the next

permanency hearing must be dismissed as academic, as that portion of the order has expired by its [*2]own terms (*see Matter of Alisha S. [Carine S.-K.]*, 223 AD3d 827, 828). However, the appeal from so much of the order of disposition as brings up for review the finding that the father neglected the child is not academic, as the adjudication of neglect constitutes a permanent and significant stigma which might indirectly affect the father's status in future proceedings (*see Matter of Hanah A. [Kristy M.]*, 194 AD3d 922, 923).

"[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [citation omitted]; *see* Family Ct Act §§ 1012[f][i]; 1046[b][i]). "A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Kiara C. [David C.]*, 85 AD3d 1025, 1026; *see Matter of Bronx S. [Denzel J.]*, 217 AD3d 956, 957). "Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Jermaine T. [Jairam T.]*, 193 AD3d 943, 945; *see Matter of Jayce W. [Lucinda J.]*, 224 AD3d 916, 917). "Furthermore, impairment or imminent danger of physical impairment should also be inferred from the subject children's proximity to violence directed against a family member, 'even absent evidence that they were aware of or emotionally impacted by the violence'" (*Matter of Najaie C. [Niger C.]*, 173 AD3d 1011, 1012, quoting *Matter of Andru G. [Jasmine C.]*, 156 AD3d 456, 457).

Here, the evidence presented during the fact-finding hearing demonstrated that the father, while intoxicated and under the influence of ecstasy, perpetrated acts of domestic violence against the mother in close proximity to the child and that there was a history of physical altercations that took place in the presence of the child. Thus, a preponderance of the evidence supports the Family Court's finding that the child's physical, mental, or emotional condition was in imminent danger of impairment by the father's commission of acts of domestic violence in close proximity to the child (*see Matter of Xierra N. [Lewis N.]*, 226 AD3d 790, 791; *Matter of Abdul R. [Abdul G.]*, 225 AD3d 881, 882; *Matter of Jermaine T. [Jairam T.]*, 193 AD3d at 945-946). Although the father denied committing acts of domestic violence against the mother, the court's determination to credit the testimony of the mother and the petitioner's caseworker over the testimony of the father at the fact-finding hearing was supported by the record (*see*

*Matter of Skyli V. [Jamol V.—Shaneka E.]*, 224 AD3d 913, 915; *Matter of Cacique R.O. [Alejandro O.]*, 196 AD3d 487, 488).

The father's remaining contentions are without merit.

**Matter of Nicholas M.**, AD3d 2024 NY Slip Op 06344 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding and disposition of the Family Court, Suffolk County (Caren Loguercio, J.), dated March 13, 2023. The order of fact-finding and disposition, after fact-finding and dispositional hearings, and upon a decision of the same court dated June 27, 2022, inter alia, found that the mother neglected the subject child, placed the subject child in the custody of a relative until the completion of the next permanency hearing, and directed that the mother undergo a forensic parenting evaluation.

ORDERED that the order of fact-finding and disposition is affirmed, without costs or disbursements.

The petitioner commenced this proceeding against the mother and a related proceeding against the father, both pursuant to Family Court Act article 10, alleging that they neglected the subject child, in that, among other things, they failed to provide the child with proper care, supervision, and guardianship (*see Matter of Nicholas M. [Robert M.]*, 224 AD3d 689, 690). In an order of fact-finding and disposition dated March 13, 2023, the Family Court, after fact-finding and dispositional hearings, and upon a decision dated June 27, 2022, inter alia, found that the mother neglected the child, placed the child in the custody of a relative until the completion of the next permanency hearing, and directed that the mother undergo a forensic parenting evaluation. The mother appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing that the subject child has been abused or neglected by a preponderance of the evidence" (*Matter of Kamaya S. [Zephaniah S.]*, 218 AD3d 590, 592 [internal quotation marks omitted]). "To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise [*2]a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784 [internal quotation marks

omitted]; *see* Family Ct Act §§ 1012[f][i]; 1046[b][i]). "Courts must evaluate parental behavior objectively by considering whether a reasonable and prudent parent would have so acted, or failed to act, under the circumstances then and there existing" (*Matter of Kaira K. [Karam S.]*, 226 AD3d 900, 902 [internal quotation marks omitted]). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Nicholas M. [Robert M.]*, 224 AD3d at 691 [internal quotation marks omitted]).

Here, the petitioner established by a preponderance of the evidence that the mother neglected the child (*see id.*). For example, "[t]he evidence adduced at the fact-finding hearing established that the mother maintained the child's home in a deplorable and unsanitary condition" (*Matter of Justyn H. [Laverne H.]*, 191 AD3d 876, 877 [alterations omitted]; *see Matter of Kaira K. [Karam S.]*, 226 AD3d at 903) and that the mother failed to provide "the child with appropriate hygiene and dental care" (*Matter of Nicholas M. [Robert M.]*, 224 AD3d at 691; *see Matter of Tarahji N. [Bryan N.—Divequa C.]*, 197 AD3d 1317, 1320; *Matter of Antonio T. [Franklin T.]*, 169 AD3d 699, 701). The evidence also demonstrated that the mother did not provide the child with adequate supervision at the family home (*see Matter of Nicholas M. [Robert M.]*, 224 AD3d at 691; *Matter of Olivia R. [Kaila G.]*, 138 AD3d 1122, 1123; *Matter of Debraun M.*, 34 AD3d 587, 587). Contrary to the mother's contention, the evidence was sufficient to establish that her failures to exercise the minimum degree of care "impaired, or created an imminent danger of impairing, [the child's] physical, mental, or emotional condition" (*Matter of Eugene S. [Priscilla E.]*, 114 AD3d 691, 691).

Moreover, contrary to the mother's contention, the Family Court providently exercised its discretion in directing her to undergo a forensic parenting evaluation (*see* Family Ct Act § 251; *Matter of Fernandez v Saunders*, 174 AD3d 531, 532; *Matter of Cristella B.*, 65 AD3d 1037, 1040).

**Matter of Kimberly J.-G.**, 232 AD3d 605 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding and disposition of the Family Court, Westchester County (Joan O. Cooney, J.), dated August 24, 2005. The order of fact-finding and disposition, upon the mother's failure to appear at fact-finding and dispositional hearings, and after fact-

finding and dispositional inquests, found that the mother neglected the subject children and placed them in the custody of the Commissioner of Social Services of Westchester County until completion of the next permanency hearing.

ORDERED that appeal is dismissed, without costs or disbursements.

In 2005, the Department of Social Services of Westchester County (hereinafter the petitioner) commenced these proceedings pursuant to Family Court Act article 10, alleging that the mother neglected the subject children by failing to provide adequate guardianship. The petitioner alleged that the mother left two of the children in the family home alone without sufficient food, clothing, money, medication, or adult supervision, while she and the youngest child traveled to Chicago, Illinois, where the mother attempted suicide by ingesting sleeping pills. The mother failed to appear at the fact-finding and dispositional hearings on the petitions, which were heard on inquest. In an order of fact-finding and disposition dated August 24, 2005, the Family Court found that the mother neglected the children and placed them in the petitioner's custody until completion of the next permanency hearing. In a subsequent order dated April 9, 2008, the court determined that the mother permanently neglected the two youngest children, terminated her parental rights, and transferred guardianship of those children to the petitioner for the purpose of adoption (*see Matter of Kimberly J.G.*, 123 AD3d 928). The eldest child had reached the age of 21 and was not the subject of the permanent neglect proceeding. In October 2011, the mother filed a petition pursuant to Family Court Act §§ § 635, 636, and 637 for modification of those orders so as to restore her parental rights. In an order entered October 18, 2012, the court dismissed the mother's petition to restore her parental rights, which order this Court affirmed (*see Matter of Kimberly J.G.*, 123 AD3d 928, 929). The mother appeals from the order dated August 24, 2005.

The mother's appeal must be dismissed, as the order was issued upon the mother's failure to appear at the fact-finding and dispositional hearings, and no appeal lies from an order made on default of the appealing party (*see* CPLR 5511; *Matter of Divinity H.*, 215 AD3d 838; *Matter of Aurora B. [Eric H.]*, 212 AD3d 806, 807-808; *Matter of Ward v Saporito*, 160 AD3d 653, 654).

The petitioner's request for certain affirmative relief is not properly before this Court, since the petitioner did not cross-appeal from the order appealed from (*see Kruter v United Parcel Service General Services Co.*, 210 AD3d 671, 673).

**Matter of John O.**, 230 AD3d 1385 (3rd Dept., 2024)

Appeal from a modified order of the Family Court of Otsego County (John F. Lambert, J.), entered October 5, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected. Respondent Cassandra P. (hereinafter the mother) is the mother of three children (two daughters born in 2006 and 2008 [hereinafter the older children] and a son born in 2011 [hereinafter the youngest child]). Robert P. (hereinafter the father) is the biological father of the older children, but not of the youngest child. Pursuant to prior custody orders, the mother had sole legal and physical custody of the youngest child, and the father had joint legal and primary physical custody of the older children, with the mother having certain parenting time on weekends. In September 2020, petitioner received two hotline reports alleging excessive absenteeism from virtual school during the COVID-19 pandemic by all three children. A caseworker for petitioner investigating the reports subsequently learned of a domestic violence incident involving the mother and a boyfriend, and alleged substance abuse by the mother.

In January 2021, petitioner filed a neglect petition against the mother and the father alleging that all three children were neglected due to educational neglect, domestic violence and substance abuse by the mother. Following a fact-finding hearing in August 2021, Family Court issued a decision entered in October 2021 that found the children to be neglected due to educational neglect and exposure to domestic violence by the mother.[FN1] A dispositional hearing was held in December 2021, and Family Court ordered that the youngest child be placed with the maternal grandparents until the next permanency hearing. In March 2022, the grandparents filed a petition for custody of the youngest child. Another hearing was held in August 2022 on multiple article 10 petitions and the grandparents' custody petition, during which the mother ultimately consented to the grandparents having custody of the youngest child. Family Court's order entered in October 2022, labeled as a "modified order of fact-finding and disposition" on the neglect petition, granted permanent custody of the youngest child to the grandparents and terminated the court's supervision. The mother appeals from the modified order, challenging only the finding of neglect.

Initially, contrary to petitioner's contentions, the mother's appeal is properly before us. Although the mother did not take an appeal from the finding of neglect entered in October 2021, her timely appeal of the subsequently issued dispositional order entered in October 2022 "brings up for review the issues raised in the fact-finding decision" (*Matter of Tyler I. [Shawn I.]*, 219 AD3d 1097, 1098 n 3 [3d Dept 2023]; *see Matter of Aiden XX. [Jesse XX.]*, 104 AD3d 1094, 1095 n 3 [3d Dept 2013]). The mother is also an aggrieved party because, even though she is not aggrieved by [*2]the dispositional portion of the order by virtue of her consent granting the grandparents custody of the

youngest child, that does not bar her appeal from the part of the order finding neglect after the fact-finding hearing (*see Matter of Jack S. [Franklin O.S.]*, 173 AD3d 1842, 1842 [4th Dept 2019]; *Matter of Ariel B. [Christine C.]*, 85 AD3d 1224, 1224 [3d Dept 2011]). Nor does her consent to the dispositional order render her appeal moot, given the potential impact of a neglect finding in future proceedings against her (*see Matter of Nina VV. [Wendy VV.]*, 216 AD3d 1215, 1215 n 2 [3d Dept 2023]).

Turning to the merits, "to establish neglect, a petitioner must demonstrate, by a preponderance of the evidence, that the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired due to the failure of the parent to exercise a minimum degree of care" (*Matter of Kaleb LL. [Bradley MM.]*, 218 AD3d 846, 850 [3d Dept 2023] [internal quotation marks, ellipsis and citations omitted]). A claim for educational neglect "may be premised upon a parent's failure to supply a child with an adequate education . . . , so long as the child has been impaired thereby or is in imminent danger of so becoming" (*Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d 1224, 1226 [3d Dept 2023]). An impairment may be inferred "[w]here the number of absences is extreme and the absenteeism continues for an extended time without appropriate action by the parent" (*Matter of Regina HH. [Lenore HH.]*, 79 AD3d 1205, 1205 [3d Dept 2010]). To this point, "unrebutted evidence of excessive school absences is sufficient to establish educational neglect" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1244 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]). In undertaking our review, "[w]e accord great deference to Family Court's findings and credibility determinations and we will not disturb them, unless they are unsupported by a sound and substantial basis in the record" (*Matter of Joseph GG. [Chrystal FF.]*, 227 AD3d 1238, 1239 [3d Dept 2024] [internal quotation marks and citations omitted]).

Here, the certified educational records stipulated into evidence at the fact-finding hearing revealed that, for the time period between September 2020 through December 2020, each child had at least 31 unexcused absences; the oldest child had 42 unexcused absences and was failing school.**[FN2]** Notes from the children's teachers generally indicated that each child's absenteeism was affecting their grades, and specifically that the youngest child struggled to keep up with grade-level understanding of various topics "due to his extreme absenteeism." The mother largely attributed the youngest child's absences to his ADHD diagnosis; she testified that, even when he took his medication, she was unable to maintain his attention for virtual classes on his laptop. For the older children, the mother testified that she would have to walk over to the [*3]father's residence a few doors down to get them logged onto their computers and monitor them. However, the mother contended that she could not sit with all three children and monitor them because they would fight, meaning that she would need to go between her residence with the youngest child and walk to the father's residence where

the older children were supposed to be logged onto their computers. Although the mother testified as to other efforts she had made, a caseworker for petitioner testified that the mother had only indicated to her that she would call the older children to make sure they were awake and logged on but did not outline what further steps she would take to ensure their attendance. According to the caseworker, the school had exhausted its options trying to get the children to attend virtual classes with minimal cooperation from the mother. Notably, the mother conceded during the fact-finding hearing that she was not working at the time and that nothing else prevented her from ensuring the children were logged on for school; she offered no excuse for the children's significant absences. Based on the foregoing, when deferring to Family Court's factual findings and credibility determinations, we conclude that there is a sound and substantial basis in the record to support the educational neglect finding against the mother (*see Matter of Joseph GG. [Chrystal FF.]*, 227 AD3d at 1240-1241; *Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d at 1245; *Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d at 1227-1228; *Matter of Regina HH. [Lenore HH.]*, 79 AD3d at 1205-1206).

We reach a different conclusion as to the finding of neglect against the mother based on exposing the children to domestic violence. The record makes it clear that there was an altercation between the mother and her boyfriend that resulted in personal injuries to both of them — including a stab wound to the boyfriend. Although "even a single act of domestic violence may be sufficient to establish neglect if the child[ren are] present for such violence and [are] visibly upset and frightened by it" (*Matter of R.E. [S.F.]*, 212 AD3d 1009, 1010 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; *see Matter of Ja'Sire FF. [Jalyssa GG.]*, 206 AD3d 1076, 1077 [3d Dept 2022], *lv denied* 38 NY3d 912 [2022]), the record demonstrates that the incident occurred in a private vehicle and the children were not present. The mother further testified that there were never any incidents of domestic violence perpetrated in the presence of the children and, when her disagreements with the boyfriend began to escalate, the children were either sleeping or he would leave the premises. Despite the caseworker's testimony that the children were generally aware of arguments between the mother and the boyfriend, she failed to offer any testimony as to the impact such arguments had on the children's physical, mental or emotional conditions, or whether such exposure placed the children at imminent [*4]risk of impairment (*see Matter of Lexie CC. [Liane CC.]*, 190 AD3d 1165, 1166 [3d Dept 2021]; *Matter of Scott QQ. v Stephanie RR.*, 75 AD3d 798, 799-800 [3d Dept 2010]). Therefore, since there is not a sound and substantial basis in the record to sustain the finding of neglect against the mother for exposing the children to domestic violence, we reverse that portion of Family Court's order and dismiss such claim in the petition. We have examined the parties' remaining contentions and have found them to be without merit or rendered academic.

Garry, P.J., Egan Jr., Clark and McShan, JJ., concur.

ORDERED that the modified order is modified, without costs, by reversing so much thereof as found neglect based on allegations of domestic violence; and, as so modified, affirmed.

**Footnote 1:** Such finding was not against the father, who had been granted an adjournment in contemplation of dismissal before the fact-finding hearing.

**Footnote 2:** We reject the contentions by the mother and the appellate attorney for the older children that Family Court erred in admitting certain evidence or testimony relating to the children's educational records, as the mother stipulated such records into evidence and did not otherwise raise an objection, and therefore such claims are unpreserved (*see Matter of Elaysia GG. [Amber HH.]*, 221 AD3d 1338, 1340 n [3d Dept 2023]). Regardless, inasmuch as the testimony from the caseworkers is supported by certified school records prepared in the ordinary course of business, the records are otherwise admissible (*see Matter of Samantha K.*, 61 AD3d 1322, 1323-1324 [3d Dept 2009]; *compare Matter of Abel XX. [Jennifer XX.]*, 182 AD3d 632, 634 n 1 [3d Dept 2020]).

**Matter of Astilla BB.**, AD3d 2024 NY Slip Op 06401 (3rd Dept., 2034)

Appeal from an order of the Family Court of Schenectady County (Mark W. Blanchfield, J.), entered June 7, 2023, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected. Respondent (hereinafter the father) is the father of two children (born in 2020 and 2021). In August 2021, the father and the children's mother lived in an apartment in the City of Schenectady and owned a house — that they were renovating — in the Town of Petersburgh, Rensselaer County. On August 25, 2021, the children's mother filed a Family Ct Act article 8 family offense petition alleging that the father verbally and physically abused her and the children. The mother specifically alleged that on August 23, 2021, while at the Petersburgh home, respondent placed a loaded gun to her head in front of the children. She further alleged that in the past he had threatened to kill both her and the children. Thereafter, the Schenectady County Family Court issued a temporary order of protection requiring respondent to stay away from the mother and the children. Based on this order of protection and the receipt of a hotline report, petitioner engaged in a protective removal of the children and placed them in foster care. On August 31, 2021, petitioner filed a neglect petition under Family Ct Act article 10.

In early September 2021, the children were allowed to stay with their mother — on a trial basis — at a YWCA safe shelter. Approximately two weeks later, petitioner learned that the mother and the children left the shelter and returned to the Schenectady apartment. When petitioner's caseworkers arrived at the Schenectady apartment, they found the apartment to be in a deplorable condition and returned the children to foster care. Petitioner thereafter filed amended petitions against the father and the mother alleging, among other things, that the children were neglected for failure to maintain a safe and sanitary home for the children. The allegations in the amended petition were limited to the conditions in the Petersburg property, which it alleged was uninhabitable in that it was unsafe and unsanitary and, as such, both the father and the mother placed the children's physical, mental and emotional conditions in imminent threat of injury or impairment.

In October 2021, the mother withdrew her family offense petition, and the order of protection was vacated. Thereafter, petitioner sought to remove the children from both parents' care. Following a Family Ct Act §§ 1027 and 1028 hearing, Family Court granted the temporary removal of the children. A subsequent fact-finding hearing on the amended neglect petitions ensued. On the second day of the hearing, the mother entered an admission to neglect of the children and the hearing continued solely against the father. At the conclusion of the hearing, at which the father did not testify and did not present any witnesses, Family Court adjudged the children [*2]to be neglected by him for failing to provide them with a safe and sanitary home environment. The father appeals, and we affirm.

"A party seeking to establish neglect must show, by a preponderance of the evidence, first, that [the] child[ren]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Matter of Caylin T. [Christine T.]*, 229 AD3d 859, 861 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d 1224, 1226 [3d Dept 2023]). "A finding of neglect requires only an imminent threat of injury or impairment, not actual injury or impairment, and such threat may be established through a single incident or circumstance" (*Matter of Aerobella T. [Bartolomeo V.]*, 170 AD3d 1453, 1453-1454 [3d Dept 2019] [internal quotation marks and citations omitted]; *accord Matter of Jarrett SS. [Jade TT.-Scott SS.]*, 183 AD3d 1031, 1032 [3d Dept 2020])."Family Court's factual findings and credibility determinations are accorded great weight in such a proceeding and will not be disturbed on appeal unless they lack a sound and substantial basis"(*Matter of Caylin T. [Christine T.]*, 229 AD3d at 861 [internal quotation marks and citations omitted]; *see Matter of*

*Winter II. [Kerriann II.]*, 227 AD3d 1142, 1145 [3d Dept 2024], *lv denied* 42 NY3d 903 [2024]).

The evidence presented by petitioner at the fact-finding hearing established that one of petitioner's caseworkers arrived at the Petersburg house in response to Family Court's order of protection and a hotline report regarding domestic violence perpetrated by the father against the mother and the children. The caseworker testified to the deplorable condition of the house, stating that the ceiling of the porch was falling down, there were exposed electrical wires inside the house and that the condition of the floor was such that her coworker actually fell through it. She went on to state that, among other things, there were no clear pathways in the home due to the detritus, and a foul odor permeated the property. She further testified that the sleeping arrangements for the children consisted of a mattress on the floor in the living room with a pillow and some blankets.

A second caseworker testified to, among other things, the condition of the Schenectady apartment. Her testimony, with reference to the apartment, was admitted without objection, and the attendant photographic evidence was submitted into evidence. Both supported the description of the Schenectady apartment as being similarly unsanitary, deplorable and unsafe. Specifically, she testified to and presented photographs of, an apartment that lacked clear pathways and was blighted by significant clutter.**[FN1]** The caseworker further [*3]testified that the children, aged approximately 14 months and two months at the time, were not sleeping in a crib or the like, but rather were sleeping on an adult bed, which presented a dangerous condition in that they could fall out onto the floor or roll on top of each other. Family Court found that each home was so deplorable as to establish neglect and that consideration of the totality of the evidence demonstrated a long-standing pattern in which the father subjected the children to unsafe and deplorable housing conditions at both locations. This finding has a sound and substantial basis in the record and supports Family Court's further conclusion that the physical, mental and emotional conditions of these young children were placed at risk of injury or impairment by the father's failure to maintain safe, hygienic and sanitary living conditions for the children (*see Matter of Rosalynne AA. [Bridget AA.]*, 219 AD3d 1024, 1028 [3d Dept 2023]; *Matter of Jack NN. [Sarah OO.]*, 173 AD3d 1499, 1502 [3d Dept 2019], *lv denied* 34 NY3d 904 [2019]; *Matter of Aerobella T. [Bartolomeo V.]*, 170 AD3d at 1456; *Matter of Natalee M. [Nathan M.]*, 155 AD3d 1466, 1469-1470 [3d Dept 2017], *lv denied* 31 NY3d 904 [2018]). Moreover, the court was entitled to draw a strong adverse inference against the father based on his failure to testify at the fact-finding hearing (*see Matter of Jack NN. [Sarah OO.*], 173 AD3d at 1503; *Matter of Heyden Y. [Miranda W.]*, 119 AD3d 1012, 1014 [3d Dept 2014]).

Contrary to the father's contention, Family Court did not abuse its discretion in sua sponte amending the pleadings to include the deplorable conditions of the Schenectady apartment, so as to conform the pleadings to reflect the proof presented at the hearing. Family Ct Act § 1051 (b) allows such amendment so long as the respondent has a reasonable time to prepare and answer. Here, the father was fully familiar with the facts and issues in this matter as he actively participated in numerous conferences and a two-day removal hearing which included the same caseworker testifying as to the conditions of the Schenectady apartment. Moreover, the fact-finding hearing took place on four separate days over the course of approximately nine months. There was extensive testimony that both the father and the mother reported to caseworkers that the Schenectady apartment was their main residence and that the Petersburg house was under construction. There was ample testimony regarding the uninhabitable condition of both properties and the father had ample and repeated opportunities to cross-examine the witnesses. Furthermore, the mother resolved the neglect petition against her by admitting, on the record in the father's presence, that the condition of the Schenectady apartment was unsanitary and unsafe for the children. Accordingly, our review of the record discloses that the father had reasonable advanced notice of the proof of the conditions of the Schenectady apartment and an opportunity to [*4]respond and has failed to demonstrate that he was either surprised or prejudiced as a result of the amendment of the pleadings (*see Matter of Rosalynne AA. [Bridget AA.]*, 219 AD3d at 1028 n 2; *Matter of Alexander Z. [Melissa Z.]*, 129 AD3d 1160, 1162 [3d Dept 2015], *lv denied* 25 NY3d 914 [2015]; *Matter of Hailey XX. [Angel XX.]*, 127 AD3d 1266, 1267 [3d Dept 2015]; *Matter of Thomas JJ.*, 14 AD3d 953, 954 [3d Dept 2005]). The father's remaining assertion has been examined and found to lack merit.

ORDERED that the order is affirmed, without costs.

**Footnotes**

**Footnote 1:** Said clutter consisted of personal objects, cleaning supplies, clothing, dirty and unsanitary dishes and numerous personal belongings throughout the home.

**Matter of Harper W.**, 230 AD3d 1578 (4th Dept., 2024)

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), dated December 11, 2023, in a proceeding pursuant to Family Court Act article 10. The order granted respondent a suspended judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that imposed a suspended judgment with conditions, including, inter alia, that she submit to random drug screens immediately upon request. Initially, we note that the mother's appeal brings up for review the corrected order of fact-finding in which Family Court found that the mother neglected two of her children (*see Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258 [4th Dept 2012]).

Contrary to the mother's contention, petitioner met its burden of establishing by a preponderance of the evidence that the mother neglected the two children (*see* Family Ct Act § 1046 [b] [i]). "It is well established that a finding of neglect may be appropriate even when a child has not been actually impaired, in order to protect that child and prevent impairment . . . , and that [a] single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1855-1856 [4th Dept 2010] [internal quotation marks omitted]). Here, the court properly found that the two children, ages three and five, were in imminent risk of harm when the mother left them unattended in an unlocked, running vehicle for at least 30 minutes while she went shopping (*see id*. at 1856; *Matter of Samuel D.-C.*, 40 AD3d 853, 854 [2d Dept 2007]).

Contrary to the mother's further contention, the court properly ordered, as a condition of the suspended judgment, that the mother submit to random drug screens immediately upon request (*see generally* Family Ct Act § 1053 [a]; 22 NYCRR 205.83 [a] [3]; *Matter of Anoushka G. [Cyntra M.]*, 132 AD3d 867, 868 [2d Dept 2015]).

**Matter of Maverick V.**, AD3d 2024 NY Slip Op 06437 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), dated November 1, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 2 from an order of fact-finding and disposition that, inter

alia, determined that she neglected her older child. In appeal No. 1, the mother appeals from an order of fact-finding and disposition that, inter alia, determined that she derivatively neglected her younger child.

We reject the mother's contention in appeal No. 2 that the finding that she neglected her older child is against the weight of the evidence. A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Ct Act § 1012 [f] [i] [B]). Here, petitioner established by a preponderance of the evidence that the older child was in imminent danger of physical, mental, or emotional impairment based on the testimony of the mother and petitioner's senior caseworker about the mother's history with Child Protective Services, her untreated mental illness, and her threats of physical violence, including one instance where she allegedly threatened the older child with a knife (*see Matter of Jasmine L. [Montu L.]*, 228 AD3d 1306, 1307 [4th Dept 2024], *lv denied* 42 NY3d 907 [2024]). "Actual impairment or injury is not required but, rather, only 'near or impending' injury or impairment is required" (*Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680 [4th Dept 2011], *lv denied* 18 NY3d 810 [2012]).

The mother's contention in appeal No. 2 that Family Court erred in considering certain hearsay evidence is not preserved for our review (*see Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]).

Contrary to the mother's contention in appeal No. 1, we further conclude that petitioner established by a preponderance of the evidence that the younger child was derivatively neglected (*see generally* Family Ct Act § 1046 [b] [i]). Proof of neglect of one child shall be admissible on the issue of the neglect of any other child of the respondent parent (*see* § 1046 [a] [i]). "A finding of derivative neglect may be made where the evidence with respect to the child found to [*2]be abused or neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care" (*Matter of Jovon J.*, 51 AD3d 1395, 1396 [4th Dept 2008] [internal quotation marks omitted]). Here, the evidence "demonstrate[d] such an impaired level of parental judgment as to create a substantial risk of harm" to the younger child (*id.* [internal quotation marks omitted]).

We have reviewed the mother's remaining contentions in both appeals and conclude that none warrants modification or reversal of the orders.

# Child Medical Care

**Matter of Kal-El F.**, 232 AD3d 1277 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 3, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.
It is hereby ORDERED that the appeal insofar as it concerns the disposition except with respect to visitation is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding brought pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, placed the father under the supervision of petitioner, suspended his visitation with the child, and continued the child's placement with petitioner. As an initial matter, we dismiss the appeal insofar as it concerns the disposition—except with respect to the suspension of visitation—inasmuch as the father consented thereto (*see* CPLR 5511; *Matter of Landen S. [Timothy S.]*, 227 AD3d 1465, 1465 [4th Dept 2024]; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]). The appeal, however, brings up for review the order of fact-finding determining that he neglected the child (*see Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1335 [4th Dept 2023], *appeal dismissed* 39 NY3d 1177 [2023]; *Noah C.*, 192 AD3d at 1676).

Contrary to the father's contention, Family Court did not err in determining that petitioner established that the father neglected the child. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015] [internal quotation marks omitted]; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]; *Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

We conclude that a sound and substantial basis in the record supports the court's finding that the child was "in imminent danger of impairment as a result of [the father's] failure to exercise a minimum degree of care" in providing the child with adequate medical care and guardianship (*Jeromy J.*, 122 AD3d at 1399 [internal quotation marks omitted]; *see Matter of Ahren B.-N. [Gary B.-N.]*, 222 AD3d 1403, 1404 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]; *see generally Matter of Hofbauer*, 47 NY2d 648, 655 [1979]). Petitioner's evidence established that the child was born with a genetic disorder that caused him to have a severely [*2]compromised immune system that placed him at risk of death from even commonplace infections and illnesses. When the child was discharged from the hospital, in mid-March 2020, the father was given instructions on how to keep the child safe from infections and on the numerous follow-up appointments with medical specialists that would help manage the child's illness. Despite the father's awareness of the child's serious medical condition, he did not follow through on the instructions he was given, did not seem to appreciate the need to keep the child away from possible exposure to infection, and missed the child's first follow-up appointment with an immunology specialist (*see Matter of Adam M. [Susan M.]*, 195 AD3d 1560, 1561 [4th Dept 2021]; *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1494 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]). In short, the father's "failure to follow through with necessary treatment for the child's serious medical condition supported the finding of medical neglect on his part" (*Matter of Notorious YY.*, 33 AD3d 1097, 1098 [3d Dept 2006]). Consequently, petitioner thereby established that the father "knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly" (*Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278 [4th Dept 2014] [internal quotation marks omitted]; *see Ahren B.-N.*, 222 AD3d at 1405).

With respect to the suspension of the father's visitation, a matter expressly contested by the father despite his consent to the remainder of the disposition (*see generally Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019]; *Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004]), we conclude that the court's determination in that regard is supported by the record (*see generally Matter of*

*Roseman v Sierant*, 142 AD3d 1323, 1326 [4th Dept 2016]; *Matter of Mallory v Mashack*, 266 AD2d 907, 907 [4th Dept 1999]).

# Parental Mental Health

**Matter of M.M.**, 232 AD3d 419 (1st Dept., 2024)

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 14, 2023, which, after a hearing, found that respondent mother neglected the subject children, unanimously affirmed, without costs.
Petitioner proved by a preponderance of the evidence that the mother had neglected the children by reason of her untreated mental illness and her failure to provide adequate supervision and guardianship, thus placing the children's physical, mental, and emotional condition at imminent risk of harm (Family Court Act § 1046 [b] [i]; *see Matter of C.B. [Tiffany S.],* 225 AD3d 415, 416 [1st Dept 2024]). The evidence showed that the younger child was in such distress that she took pills in a suicide attempt and both children reported that the mother, who has been diagnosed with an unspecified psychotic disorder, had been staying awake all night for days, resulting in their being kept awake because they were afraid of what she would do while they were asleep (*see Matter of Shanai W. [Sherry P.]*, 212 AD3d 447, 448 [1st Dept 2023]; *Matter of Angelos F. [Leonidas F.]*, 156 AD3d 506, 506 [1st Dept 2017]). Whether or not the admissible evidence established that the mother had previously been diagnosed with bipolar disorder is not dispositive, as a definitive diagnosis is not required where, as here, the evidence supports a finding that the mother suffers from a mental illness that impedes her ability to care for the children (*see Matter of Ariel A.T.R.*, 222 AD3d 565, 566 [1st Dept 2023]).

The children's out-of-court statements concerning the mother's paranoid delusions were properly admitted into evidence because they cross-corroborated each other and were partly corroborated by other evidence, including the observations of the responding police detective and the certified hospital records (Family Court Act § 1046 [a] [vi]; *see Matter of Antonio S. [Antonio S., Sr.]*, 154 AD3d 420, 420 [1st Dept 2017]).

Contrary to the mother's contention, the court did not find neglect based on the cluttered condition of the home. Rather, the court found that the unhealthy condition of the home was a consequence of the mother's psychotic condition.

**Matter of Wynter,** 230 AD3d 505 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of the Family Court, Queens County (Monica D. Shulman, J.), dated December 16, 2022. The order, (1) after a fact-finding hearing, found that the mother neglected the subject child, and (2) after a hearing, denied the mother's application pursuant to Family Court Act § 1028 for the return of the subject child to her custody during the pendency of the proceeding.
ORDERED that the order is affirmed, without costs or disbursements.

By petition dated March 9, 2022, the Administration for Children's Services (hereinafter ACS) commenced this Family Court Act article 10 proceeding, alleging, inter alia, that the mother neglected the subject child due to mental illness. The child was removed from the mother's care, placed in the custody of ACS, and placed in foster care. In November 2022, after a fact-finding hearing on the petition had commenced, the mother made an application pursuant to Family Court Act § 1028 for the return of the child to her care during the pendency of the proceeding. The Family Court conducted a combined fact-finding hearing on the petition and hearing pursuant to Family Court Act § 1028. After the combined hearing, in an order dated December 16, 2022, the court found that the mother neglected the child, denied the mother's application pursuant to Family Court Act § 1028, and adjourned the matter for a dispositional hearing. The mother appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing by a preponderance of evidence that the subject child has been abused or neglected" (*Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161; *see* Family Ct Act §§ 1012[f][i]; 1046[b][i]). "Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child" (*Matter of Maurice M. [*2][Suzanne H.]*, 158 AD3d 689, 690-691; *see Matter of Kamaya S. [Zephaniah S.]*, 218 AD3d 590, 592).

Here, contrary to the mother's contention, ACS established by a preponderance of the evidence that the mother neglected the child. ACS's evidence showed that the mother's untreated mental illness caused the child to be placed at imminent risk of harm, including an incident where the mother's erratic behavior in the presence of the child resulted in a three-week involuntary hospitalization (*see Matter of Hanah A. [Kristy M.]*, 194 AD3d 922, 923). The mother continued to display erratic and paranoid behavior after her hospitalization, including during supervised visits, and also continued to lack insight into her ongoing and untreated mental illness (*see Matter of Precise M. [Tawana M.]*, 215 AD3d 680, 681; *Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d at

1161; *Matter of Christian G. [Alexis G.]*, 192 AD3d 1027, 1029; *Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056).

Further, there is a sound and substantial basis in the record for the Family Court's determination that the child would be at imminent risk if returned to the mother's care during the pendency of the proceeding (*see Matter of Daniella G. [Margarita K.]*, 206 AD3d 730, 731-732; *Matter of Solai J. [Kadesha J.]*, 190 AD3d 973, 974; *Matter of Gavin G. [Carla G.]*, 165 AD3d 1258, 1259). Accordingly, the court properly denied the mother's application pursuant to Family Court Act § 1028 for the return of the child to her care during the pendency of the proceeding.

The parties' remaining contentions are without merit.

**Matter of Caia N.**, 231 AD3d 1033 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the petitioner appeals, and the subject child separately appeals, from an order of fact-finding of the Family Court, Kings County (Melody Glover, J.), dated May 23, 2023. The order of fact-finding, after a hearing, dismissed the petition.
ORDERED that the order is reversed, on the facts, without costs or disbursements, the petition is reinstated, a finding is made that the mother neglected the subject child, and the matter is remitted to the Family Court, Kings County, for a dispositional hearing and a determination thereafter.

The petitioner, Administration for Children's Services (hereinafter ACS), filed a petition (hereinafter the neglect petition) pursuant to Family Court Act article 10 alleging that the mother had neglected the subject child in that the mother had failed to provide the child with proper supervision and guardianship by perpetrating acts of violence against the maternal grandmother in the presence of the child. At a fact-finding hearing, ACS presented evidence that the mother had an untreated mental illness. After the hearing, the Family Court dismissed the neglect petition. ACS and the child separately appeal.

Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child (*see Matter of Kamaya S. [Zephaniah S.]*, 218 AD3d 590, 592; *Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d 1160, 1161). A finding of neglect is appropriate to prevent imminent impairment and the court

is not required to wait until a child has already been harmed before it enters a neglect finding (*see Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d at 1160; *Matter of Peter T. [Shay S.P.]*, 173 AD3d 1043, 1045; *Matter of Joseph L. [Cyanne W.]*, [*2]168 AD3d 1055, 1056). Proof of a parent's ongoing mental illness and failure to follow through with aftercare medication is a sufficient basis for a finding of neglect where such failure results in a parent's inability to care for their child in the foreseeable future (*see Matter of Sonja R. [Victor R.]*, 216 AD3d 1096, 1098; *Matter of Precise M. [Tawana M.]*, 215 AD3d 680, 681; *Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d at 1161).

Here, contrary to the Family Court's determination, ACS established by a preponderance of the evidence that the mother neglected the child. The evidence showed that the mother's largely untreated mental illness caused the child to be placed at imminent risk of harm (*see Matter of Khaleef M.S.-P. [Khaleeda M.S.]*, 203 AD3d at 1161). The mother admitted that she struck the grandmother in the child's presence. Further, ACS established that the mother had a history of threatening behavior toward ACS staff. The evidence presented demonstrated that the mother's willingness to engage in and threaten violence in the presence of the child, and the mother's failure to address her mental illness, placed the child at imminent risk of physical, mental, or emotional harm (*see id.*; *Matter of Christian G. [Alexis G.]*, 192 AD3d 1027, 1029).

Here, the Family Court should have found that the mother neglected the child by putting her at imminent risk of physical, mental, or emotional harm due to the mother's untreated mental illness and acts of domestic violence in the child's presence.

**Matter of Ester K.**, AD3d 2024 NY Slip Op 06340 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of disposition of the Family Court, Kings County (Michael R. Milsap, J.), dated May 18, 2023. The order of disposition, insofar as appealed from, was entered upon an order of fact-finding of the same court (Diane Costanzo, J.) dated August 29, 2022, made after a fact-finding hearing, finding that the mother neglected the subject child.

ORDERED that on the Court's own motion, the notice of appeal from a decision dated August 29, 2022, is deemed to be a premature notice of appeal from the order of disposition (*see* CPLR 5520[c]); and it is further,

ORDERED that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother neglected the subject child, Ester K., based upon the conclusions of the child's treating physicians, who, upon a review of the child's medical records and an evaluation of the child, determined that Ester K. was a victim of Pediatric Falsification Syndrome or Munchausen by Proxy (hereinafter MBP) while in the mother's care. Ester K.'s treating physicians further concluded that, as a result of years of neglect of the child by the mother, Ester K.'s mental health was significantly affected and that the child should be admitted to an inpatient psychiatric care facility to "de-program" her from the effects the mother had on the child. After a fact-finding hearing, the Family Court found that the mother neglected Ester K. The mother appeals.

At a fact-finding hearing in a proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected (*see id.* § 1046[b][i]; *Matter of Tammie Z.*, 66 NY2d 1, 3; *Matter of Nash D. [Daniel D.]*, 224 AD3d 749, 750; *Matter of Brianna M. [Corbert G.]*, 152 AD3d 600, 601). Family Court Act § 1046(a)(ii) provides that a prima facie case of child abuse or neglect may be established by (1) evidence of an injury to a child which would ordinarily not occur absent an act or omission of the respondents, and (2) evidence that the respondents were the caretakers of the child [*2]at the time the injury occurred (*see Matter of Philip M.*, 82 NY2d 238). "'Although the burden of proving child abuse or neglect always remains with the petitioner, once a prima facie case has been established, a presumption of parental responsibility arises, and the burden of going forward to rebut the presumption shifts to the respondents'" (*Matter of Nash D. [Daniel D.]*, 224 AD3d at 751, quoting *Matter of Peter R.*, 8 AD3d 576, 577, citing *Matter of Philip M.*, 82 NY2d at 244). This analysis has been applied in neglect proceedings based on allegations of MBP where "the circumstantial evidence is cumulative and the dramatic abatement of illness upon removal from the parent speaks for itself" (*Matter of Aaron S.*, 163 Misc 2d 967, 971 [Fam Ct, Suffolk County], *affd sub nom. Matter of Suffolk County Dept. of Social Servs. [Ellen S.]*, 215 AD2d 395; *see Matter of Jessica Z.*, 135 Misc 2d 520, 532 [Fam Ct, Westchester County]). The Family Court's findings with respect to credibility are entitled to great weight (see *Matter of Desiree P. [Michael H.]*, 149 AD3d 841, 841).

Here, the petitioner established, prima facie, that the mother neglected Ester K. by presenting evidence that the impairment Ester K. sustained would not ordinarily occur absent an act or omission of the caregiver and that the mother was a caregiver of the child during the relevant time period (*see Matter of Kamryn R. [Natalie R.]*, 187 AD3d 1192, 1194; *Matter of Davion E. [Latoya E.]*, 139 AD3d 944, 946). The petitioner

provided overwhelming evidence that the mother subjected Ester K. to unnecessary medical treatment by reason of MBP (*see Matter of Andrew B.*, 49 AD3d 638, 639; *Matter of Suffolk County Dept. of Social Servs. [Ellen S.]*, 215 AD2d at 395-396).

Contrary to the mother's contention, she failed to rebut the presumption of parental culpability by proving that Ester K. was not in her care when the impairment occurred, that a reasonable explanation existed for Ester K.'s impairment, or that Ester K. did not have the condition which was the basis for the finding of the injury (*see Matter of Philip M.*, 82 NY2d 238, 244-245; *Matter of Jaiden T.G. [Shavonna D.-F.]*, 89 AD3d 1021, 1022). Moreover, the Family Court's assessment of the conflicting expert testimony, which is entitled to deference by this Court, was supported by the record, and we find no reason to disturb the court's determination (*see Matter of Nash D. [Daniel D.]*, 224 AD3d 749, 751; *Matter of Kamryn R. [Natalie R.]*, 187 AD3d at 1195).

**Matter of Baylee F.**, 231 AD3d 1318 (3rd Dept., 2024)

Appeal from an order of the Family Court of Clinton County (Timothy J. Lawliss, J.), entered December 2, 2022, which granted petitioner's applications, in two proceedings pursuant to Family Ct Act article 10, to adjudicate the subject child to be neglected. Respondent Jeanette E. (hereinafter the mother) and respondent Michael F. (hereinafter the father) are the parents of the subject child (born in 2022). The parents also had two other children together; the first was found to be neglected by both parents in 2014 and the second was found to be neglected in 2019.**[FN1]** Both parents eventually surrendered their parental rights to each of these children. Additionally, the mother had two other children apart from her relationship with the father. In 2013, Family Court found that she had neglected the first child and, in 2015, the court found that she had neglected the second child. The mother surrendered her parental rights to each of these children. The father also had another child with a different mother, and Family Court determined in 2011 that he had neglected that child. The father's parental rights to that child were terminated in 2013.

Shortly after the subject child was born, petitioner removed the child from the care and custody of the parents on an emergency basis.**[FN2]** Petitioner thereafter filed petitions alleging that the parents had neglected and derivatively neglected the child. A fact-finding hearing was subsequently held over the course of four days, at the conclusion of which Family Court determined that petitioner met its burden of proving that the child had been neglected and derivatively neglected by both parents. Both the mother and the father appeal, and we affirm.

Turning first to the finding of neglect, "petitioner bears the burden of establishing, by a preponderance of the evidence, that the child[ ]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the child[ ] results from the parent's failure to exercise a minimum degree of care in providing the child[ ] with proper supervision or guardianship" (*Matter of Hakeem S. [Sarah U.]*, 206 AD3d 1537, 1538 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 39 NY3d 904 [2022]; *see Matter of Nina VV. [Wendy VV.]*, 216 AD3d 1215, 1216 [3d Dept 2023]). As relevant here, although "evidence of [a parent's] intellectual disabilities, alone, will not support a finding of neglect, said disabilities may properly form the basis of such a finding when coupled with other factors tending to show imminent danger to the child's well-being" (*Matter of Joseph MM. [Clifford MM.]*, 91 AD3d 1077, 1079 [3d Dept 2012] [citations omitted], *lvs denied* 18 NY3d 809 [2012], 18 NY3d 809 [2012]; *see Matter of Wynter V. [Felitta V.]*, 230 AD3d 505, 506 [2d Dept 2024]; *Matter of Anna Marie SS.*, 306 AD2d 659, 660 [3d Dept 2003], *lv denied* 100 NY2d 516 [2003]). "Indeed, even when a child has not been actually [*2]impaired, a finding of neglect is appropriate to prevent imminent impairment, which is an independent and separate ground on which a neglect finding may be based. In such cases, the court is not required to wait until a child has already been harmed before it enters a finding of neglect" (*Matter of Joseph L. [Cyanne W.]*, 168 AD3d 1055, 1056 [2d Dept 2019] [internal quotation marks and citations omitted], *lv denied* 33 NY3d 902 [2019]). In assessing Family Court's determination in a neglect proceeding, we accord great deference to its factual findings and assessment of credibility and will not disturb such findings if they are supported by a sound and substantial basis (*see Matter of Leo RR. [Joshua RR.]*, 213 AD3d 1190, 1191-1192 [3d Dept 2023]).

At the hearing, Jacob Hadden, a psychologist, provided testimony about the parental capacity evaluations he conducted with the mother in 2013 and 2019. Hadden diagnosed the mother with, among other mental health conditions, an intellectual disability that manifested in various adaptive deficits, such as her inability to manage basic tasks necessary to her own self-care, including the inability to work, manage her finances and maintain her home. Relative to her ability to parent the child, Hadden testified that he did not believe she possessed the ability to do so without extensive daily support, such as a live-in aide, to help her care for herself and the child. Psychologist Richard Liotta testified to his evaluations of the mother in January 2015 and December 2015, and substantively echoed Hadden's conclusions relative to the mother's inability to effectively parent at that time and for the foreseeable future.

As to the father, Liotta conducted evaluations in 2012 and 2015 and in both instances diagnosed him with antisocial personality disorder, an impulse control disorder and an intellectual disability that manifested in, among other things, various deficits in his

adaptive functioning. Although Liotta acknowledged that antisocial personality disorders can occasionally improve with treatment or age, Liotta noted that the father's condition was unlikely to be amenable to treatment due to his refusal or inability to recognize that he has a disorder. Consistent with that premise, the record reflects that the father's anger issues continued to manifest themselves in recent interactions with petitioner's employees and an incident involving law enforcement. Overall, Liotta concluded that the father's impulsivity and anger control issues, along with his intellectual limitations, "would significantly impact his capacity to parent adequately and appropriately" and that "his potential risk to any child in his care was substantial."

Although the record reflects the passage of a moderate amount of time between the dates of their respective evaluations of the parents and the hearing, both experts emphasized that the intellectual impairments afflicting both parents are relatively stable and would not meaningfully improve [*3]with time absent significant intervention. Moreover, both experts noted that the parents' respective intellectual limitations contributed to their inability to perceive or accept that they had any underlying conditions that limited their ability to parent. These conclusions were buttressed by the testimony of both parents, which reflected their lack of insight into their impairments, as both of them continued to deny their intellectual limitations or need for any services, believing that they already possessed all the parenting skills required to provide adequate care to the child. All told, paying the appropriate deference to Family Court's findings, we find that the record adequately supports the determination that the child's placement in the care of either parent would subject the child to imminent, not just possible, danger of injury or impairment, thus supporting the finding of neglect (*see Matter of Caylin T. [Christine T.]*, 229 AD3d 859, 861 [3d Dept 2024]; *Matter of Hakeem S. [Sarah U.]*, 206 AD3d at 1538; *Matter of Johnathan Q. [James Q.]*, 166 AD3d 1417, 1419 [3d Dept 2018]).

For similar reasons, we find that Family Court's determination that the child was derivatively neglected is sufficiently supported. "Derivative neglect is established where the evidence demonstrates an impairment of parental judgment to the point that it creates a substantial risk of harm for any child left in that parent's care, and the prior neglect determination is sufficiently proximate in time to reasonably conclude that the problematic conditions continue to exist" (*Matter of Renezmae X. [Kimberly X.-Chad W.]*, 173 AD3d 1289, 1290 [3d Dept 2019] [internal quotation marks and citations omitted], *lv dismissed* 34 NY3d 990 [2019]; *see Matter of Jade F. [Ashley H.]*, 149 AD3d 1180, 1181-1182 [3d Dept 2017]). Initially, we reject respondents' contentions that the prior finding of neglect in 2019 was not sufficiently proximate to serve as a basis for a derivative finding in this proceeding. There is no bright-line temporal limitation that would exclude prior neglect findings from serving as the predicate of a later determination of derivative neglect (*see Matter Iryanna I. [Benjamin K.]*, 132 AD3d

1096, 1097 [3d Dept 2015]). In this instance, the three-year gap between the most recent adjudication, and the pattern of conduct evidenced in the prior determinations dating back to 2013, are not so attenuated as to foreclose an assessment of whether the impairment in parental judgment continued to exist at the time of the hearing (*see Matter of Michael N. [James M.]*, 79 AD3d 1165, 1168 [3d Dept 2010]; *Matter of Paige WW. [Charles XX.]*, 71 AD3d 1200, 1203 [3d Dept 2010]).

On that inquiry, the most recent neglect findings from 2019 stemmed from, among other things, the parents' respective intellectual disabilities and adaptive deficits, alongside other related mental health concerns. As we have already noted, the record reflects that the parents continuously deny or minimize [*4]those conditions and demonstrate no inclination to address them in a meaningful way. Although each parent had engaged in limited mental health counseling to address their other mental health diagnoses and had recently attended parenting classes as recommended by petitioner, the record, as well as their testimony, reflect marginal participation in those interventions and their lack of insight into the need to do so (*see Matter of Wynter V. [Felitta V.]*, 230 AD3d at 506; *Matter of C'D.K.J. [Kamesha D.L.]*, 220 AD3d 418, 419-420 [1st Dept 2023]; *Matter of Landon W.*, 35 AD3d 1139, 1141 [3d Dept 2006]). Altogether, we find that the record amply supports Family Court's determination that both parents derivatively neglected the child by virtue of the persistence of the conditions that formed the basis of the current and prior neglect findings (*see Matter of Juliet W. [Amy W.]*, 216 AD3d 1424, 1425-1426 [4th Dept 2023], *lv denied* 40 NY3d 1059 [2023]; *Matter of Warren RR. [Brittany Q.]*, 143 AD3d 1072, 1075 [3d Dept 2016], *lvs denied* 29 NY3d 905 [2017], 29 NY3d 905 [2017]; *Matter of Alexander Z. [Melissa Z.]*, 129 AD3d 1160, 1164 [3d Dept 2015], *lv denied* 25 NY3d 914 [2015]; *Matter of Neveah AA. [Alia CC.]*, 124 AD3d 938, 939-940 [3d Dept 2015]; *Matter of Xiomara D. [Madelyn D.]*, 96 AD3d 1239, 1241 [3d Dept 2012]).

ORDERED that the order is affirmed, without costs.

**Footnote 1:** Family Court also determined that the father had derivatively neglected the child that was the subject of the 2019 order.

**Footnote 2:** Both parents sought return of the child several days after the removal. As a result, a hearing was held pursuant to Family Ct Act § 1028. Although Family Court found that the child's initial removal from the hospital was improper, the court ultimately ordered that the child remain in petitioner's custody while neglect proceedings were pending, "to avoid imminent risk to the subject child's life or health."

# Parental Substance Abuse

**Matter of Mykel B.**, 232 AD3d 781 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Kings County (Erik S. Pitchal, J.), dated September 15, 2023. The order, after a fact-finding hearing, dismissed the petitions.
ORDERED that the order is affirmed, without costs or disbursements.

In November 2022, during treatment for an illness at a hospital, the mother informed hospital staff that she self-medicated with cocaine, beer, and marijuana. Thereafter, the petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging that the mother neglected the subject children due to, inter alia, repeated misuse of a drug or drugs. The Family Court thereafter conducted a fact-finding hearing over the course of two days, beginning in June 2023 and ending in September 2023. In an order dated September 15, 2023, the court found that the petitioner did not prove by a preponderance of evidence that the mother neglected the children and dismissed the petitions. The petitioner appeals.

In a neglect proceeding pursuant to Family Court Act article 10, a petitioner must prove neglect by "a preponderance of evidence" (Family Ct Act § 1046[b][i]). "'To establish neglect [*2]of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship"' (*Matter of Kaira K [Karam S.]*, 226 AD3d 900, 902, quoting *Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784).

A neglected child includes a child "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent or other person legally responsible for his [or her] care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, . . . by misusing a drug or drugs" (Family Ct Act § 1012[f][i][B]). "[P]roof that a person repeatedly misuses a drug or drugs . . . to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of . . . such person is a neglected child except that

such drug . . . misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program" (*id.* § 1046[a][iii]; *see Matter of Kaira K [Karam S.]*, 226 AD3d at 903; *Matter of Jesse W. [Jesse W.]*, 189 AD3d 848, 849).

Here, the petitioner failed to establish neglect (*see* Family Ct Act § 1046[b][i]). Although it is uncontested that the mother used cocaine, the petitioner did not provide evidence that established the mother's use was "to the extent that it has or would ordinarily have the effect of producing . . . a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgement, or a substantial manifestation of irrationality" (*id.* § 1046[a][iii]; *see Matter of Anastasia G.*, 52 AD3d at 832; *Matter of Cameron D. [Lavon D.]*, 154 AD3d at 850).

Moreover, absent evidence of repetitive drug use to the extent required by Family Court Act § 1046(a)(iii), the petitioner failed to proffer any evidence that the children's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired (*see id.* § 1012[f][i][B]; *Matter of Anastasia G.*, 52 AD3d at 832). In the absence of any evidence of repeated drug use to the extent required by Family Court Act § 1046 (a)(iii) or that the children had been impaired or were in imminent danger of impairment, the fact that the mother was not enrolled in a drug treatment program is insufficient to establish a prima facie case of neglect (*see id.* §§ 1012[f][i][B]; 1046[a][iii]; *Matter of Anastasia G.*, 52 AD3d at 832; *cf. Matter of Kaira K [Karam S.]*, 226 AD3d at 904). Accordingly, the record was insufficient to support a finding of neglect pursuant to Family Court Act § 1012(f)(i)(B) (*see Matter of Anastasia G.*, 52 AD3d at 832).

# Domestic Violence

**Matter of V.B.**, 231 AD3d 527 (1st Dept., 2024)

Order of disposition, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about April 3, 2023, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 31, 2023, which, after a hearing, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.

The finding that the mother neglected the child on December 15, 2020 by engaging in an altercation with the father while the child was present is supported by a

preponderance of the evidence. The police officer's fact-finding testimony establishes that when he arrived at the train station within 10 minutes of being assigned to respond to the mother's 911 call that day, the mother and the child's father accused each other of hitting the other. Both were arrested for domestic violence, requiring the police to remove the then three-year-old child to the hospital to ensure the child's safety. That the domestic violence occurred near the child, who was awake at the time, and crying in the stroller, permits an inference of impairment or imminent danger of impairment (*see Matter of Athena M. [Manuel M.T.]*, 190 AD3d 644, 644 [1st Dept 2021]; *Matter of Madison M. [Nathan M.]*, 123 AD3d 616, 617 [1st Dept 2014]). Contrary to the mother's contention, the record does not show that Family Court relied on documents from her dismissed criminal case in finding she neglected the child. Instead, the record indicates that Family Court credited the police officer's testimony, which was based upon his personal recollection.

Furthermore, a preponderance of the evidence showed that the mother failed to provide the child with adequate dental hygiene and care. The child's medical records establish that the child was found with "severe dental caries" after being examined at the hospital on December 15, 2020 (*see Matter of Michael P. [Orthensia H.]*, 137 AD3d 499, 500 [1st Dept 2016]). Although the mother appeared for the fact-finding hearing, she failed to testify or submit any evidence demonstrating how she was maintaining the child's dental hygiene and providing the child with appropriate dental care before the petition was filed against her. Family Court properly drew the strongest negative inference from the mother's failure to testify at the fact-finding hearing (*see Matter of Jaiden M. [Jeffrey R.]*, 165 AD3d 571, 572 [1st Dept 2018]). There is no basis for disturbing the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

**Matter of A.A.**, 232 AD3d 507 (1st Dept., 2024)

Order of fact-finding and disposition (one paper) of the Family Court, New York County (Maria Arias, J.), entered on or about August 28, 2023, which, after a fact-finding hearing, found that appellant Carlos B. neglected A.A., a child for whom he was legally responsible, and his children J.B. and R.Z.B., by committing acts of domestic violence against the children's mother in their presence, unanimously affirmed, without costs.
A preponderance of the evidence supports the court's finding of neglect based on domestic violence against the children's mother (*see* Family Court Act §§ 1012[e][iii], 1046[b][i]; *Matter of Tammie Z.*, 66 NY2d 1, 3 [1985]). The mother testified that there was a history of escalating physical altercations between her and appellant, with the

worst incident occurring in April 2020. On the day of that incident, appellant pushed the mother with enough force that she crashed into a sheetrock wall and fell heavily to the floor, landing hard on her right ankle and breaking three toes. The two younger children were present during the encounter, holding onto the mother's legs as she fell, and the older child witnessed the aftermath, after the mother had fallen. These circumstances are sufficient to support a neglect finding, as they established that the appellant's acts of domestic violence posed an imminent danger to the children's physical, mental, or emotional well-being (*see Matter of G.B. [Gary B.]*, 227 AD3d 581, 582 [1st Dept 2024]; *Matter of Athena M [Manuel M.T.].*, 190 AD3d 644, 644-645 [1st Dept 2021]). We find no basis in the record to disturb the court's credibility determinations (*see Matter of Heily A. [Flor F.—Gustavo A.]* , 165 AD3d 457, 457 [1st Dept 2018]).

The mother's account of the events was corroborated by A.A.'s out-of-court statements to the caseworker about the incident (*see Matter of Isaiah D. [Mark D.]*, 159 AD3d 534, 535 [1st Dept 2018]). Despite appellant's position otherwise, A.A.'s statements to the caseworker do not cast doubt on the mother's account, as there is no dispute that A.A. was in the room only during the aftermath of the incident but not during the incident itself. Furthermore, the father chose not to testify during the hearing, and the court properly credited the mother's version of events in making its findings (*see Matter of Heily A.*, 165 AD3d at 457).

To the extent the order appealed could be interpreted as limiting parenting access time, any such effect was removed by the subsequent order in December 2023, which expanded access time. Thus, the appeal from that portion of the order is moot (*see Matter of Moona C. [Charlotte K.]*, 107 AD3d 466, 466 [1st Dept 2013]). In any event, in light of the findings of neglect, the imposition of supervised virtual visitation was in the children's best interests (*see Matter of Ni'Kia C. [Dominique J.]*, 118 AD3d 515, 516 [1st Dept 2014]).

Appellant's remaining arguments are unpreserved and we decline to review them in the interest of justice (*see Matter [*2]of D.P.*, 227 AD3d 549, 549-550 [1st Dept 2024]).

**Matter of E. L.**, 232 AD3d 546 (1st Dept., 2024)

Order, Family Court, New York County (Anna R. Lewis, J.), entered on or about November 13, 2023, which found, after a fact-finding hearing, that respondent father neglected the subject child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence. The evidence established that the father, by committing domestic violence against the child's mother on May 31, 2022, posed an imminent danger to the then seven-month-old child's physical, mental or emotional well-being (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of J.A.W. [Lance W.]*, 216 AD3d 480, 481 [1st Dept 2023]). Although the father contends that Family Court erred in concluding that the mother's testimony was more credible than his, there exists no basis to disturb the court's evaluation of the evidence, including its credibility findings (*see Matter of Y.H. [Mohamed H.]*, 219 AD3d 1247, 1248 [1st Dept 2023]; *Matter of Ilene M.*, 19 AD3d 106, 106-107 [1st Dept 2005]).

Contrary to the father's contention, the evidence shows that the child's emotional and mental conditions were impaired or in imminent danger of being impaired by her exposure to the domestic violence he perpetrated against the mother. The mother's testimony establishes that the child was on her lap when the father punched the mother in the jaw, notwithstanding the absence of evidence that the child was aware of the incident or emotionally affected by it (*see Matter of Athena M. [Manuel M.T.]*, 190 AD3d 644, 644 [1st Dept 2021]; *Matter of Isabella S. [Robert T.]*, 154 AD3d 606, 607 [1st Dept 2017]).

The father's argument concerning petitioner's purported failure to have the maternal grandmother testify at the fact-finding hearing is unpreserved and unavailing. The father never sought a missing witness charge during the fact-finding hearing, and there is no evidence that the grandmother witnessed the incident (*see Matter of Ethan M. [Miguel M.]*, 223 AD3d 471, 471-472 [1st Dept 2024]).

**Matter of J.A.**, AD3d 2024 NY Slip Op 06114 (1st Dept., 2024)

Order of disposition, Family Court, New York County (Grace Oboma-Layat, J.), entered on or about December 21, 2023, to the extent it brings up for review a fact-finding order, same court (Keith E. Brown, J.), entered on or about October 19, 2023, which found that respondent father neglected the three subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.
The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B], 1046[b][i]). The evidence established that the children's mental and emotional condition were impaired or in imminent danger of becoming impaired as a result of their exposure to the domestic violence committed by the father against the mother (*see Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]). The fact that the domestic violence occurred in close proximity to the children, who were in

the living room, permits an inference of impairment or imminent danger of impairment even in the absence of direct evidence that they were aware of it or emotionally affected by it (*see Matter of Athena M. [Manuel M.T.]*, 190 AD3d 644, 644 [1st Dept 2021]; *Matter of Isabella S. [Robert T.]*, 154 AD3d 606, 606-607 [1st Dept 2017]).

Contrary to the father's contention, the finding that he committed an act of domestic violence against the mother, including dragging her down the hall and then choking her and repeatedly slapping her in the face, is not against the weight of the evidence. Family Court was in the best position to observe and assess the demeanor of the witnesses and there is no basis to disturb its credibility determinations (*see Matter of J.R.M.-C. [Antonio M.]*, 176 AD3d 623, 624 [1st Dept 2019]; *Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]), including its finding that the father's testimony that the mother banged her own head against the wall was incredible. The inconsistencies in the mother's testimony as to whether the father dragged her back to her apartment by her T-shirt or ankle were peripheral and did not render her testimony unworthy of belief as to the dispositive issues (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]). Furthermore, the court did not err in crediting the caseworker's testimony as her inability to recall the exact date she was assigned to the family or describe the bruises she saw on the mother's neck the day after the incident were minor and similarly peripheral (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]).

**Matter of Asani J.**, 229 AD3d 551 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Suffolk County (Frank A. Tantone, J.), dated November 15, 2023. The order, upon granting the mother's motion, made at the close of the petitioner's case at a fact-finding hearing, to dismiss the petition for failure to establish a prima facie case, dismissed the petition.
ORDERED that the order is reversed, on the law, without costs or disbursements, the mother's motion to dismiss the petition is denied, the petition is reinstated, and the matter is remitted to the Family Court, Suffolk County, for further proceedings consistent herewith.

The petitioner commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother neglected the subject child by committing acts of domestic violence against the child's father in the presence of the child. After the close of the petitioner's case at a fact-finding hearing, the Family Court granted the mother's motion to dismiss the petition for failure to establish a prima facie case and dismissed the petition. The petitioner appeals.

"To establish neglect, [a] petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is due to the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Chaim R. [Keturah Ponce R.]*, 94 AD3d 1127, 1130; *see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368). Although the exposure of a child to domestic violence between parents may form the basis for a finding of neglect (*see e.g. Matter of Jihad H. [Fawaz H.]*, 151 AD3d 1063, 1064), "exposing a child to domestic violence is not presumptively neglectful. Not every child exposed to domestic violence is at risk of impairment" (*Nicholson v Scoppetta*, 3 NY3d at 375 [emphasis omitted]; *see Matter of Kiana M.-M. [Robert M.]*, 123 AD3d 720, 721).

At the fact-finding hearing, the petitioner offered, among other things, a recording [*2]of a 911 call placed by the father during the incident and the testimony of a caseworker and a responding police detective. Contrary to the Family Court's determination, viewing the evidence in the light most favorable to the petitioner and affording it the benefit of every inference which could be reasonably drawn from the evidence (*see Matter of Isiah L. [Terry C.]*, 154 AD3d 697), the petitioner presented a prima facie case of neglect against the mother. Accordingly, the court erred in granting the mother's motion to dismiss the petition for failure to establish a prima facie case (*see Matter of John M.M. [Michael M.]*, 160 AD3d 646, 647).

Since the Family Court terminated the proceeding after the close of the petitioner's case upon an erroneous determination that a prima facie case had not been established, we remit the matter to the Family Court, Suffolk County, to complete the fact-finding hearing and to determine the petition on the merits (*see id.*).

**Matter of Legend C.-F. F.**, 231 AD3d 1022 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the father appeals from an order of fact-finding of the Family Court, Kings County (Michael R. Milsap, J.), dated

June 30, 2023. The order of fact-finding, after a fact-finding hearing, found that the father neglected the subject child.
ORDERED that the order of fact-finding is affirmed, without costs or disbursements.

In April 2022, the Administration for Children's Services commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the father neglected the subject child. In an order of fact-finding dated June 30, 2023, made after a fact-finding hearing, the Family Court found that the father neglected the child. The father appeals.

"In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected" (*Matter of Andrew M. [Brenda M.]*, 225 AD3d 764, 765; *see* Family Ct Act § 1046[b][i]). "To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784 [internal quotation marks omitted]).

Here, the Family Court properly found that the father neglected the child by putting the child's physical, mental, or emotional condition in imminent danger of impairment by the commission of acts of domestic violence against the mother in close proximity to the child (*see Matter of Xierra N. [Lewis N.]*, 226 AD3d 790, 791; *Matter of Abdul R. [Abdul G.]*, 225 AD3d 881, 882; *Matter of Jayce W. [Lucinda J.]*, 224 AD3d 916, 917; *Matter of Najaie C. [Niger C.]*, 173 [*2]AD3d 1011, 1012). Additionally, the court providently exercised its discretion in drawing a negative inference against the father for his failure to testify (*see Matter of Nyla S. [Jason B.]*, 224 AD3d 691, 693; *Matter of Mirianne A. [George A.]*, 214 AD3d 864, 865).

Under the circumstances of this case, the mother's statements in a domestic incident report were admissible as to the incident in issue under the excited utterance exception to the hearsay rule, with an added assurance of reliability, since she was a witness at the hearing subject to cross-examination (*see People v Ortiz*, 198 AD3d 924, 927). In any event, any error in admitting the mother's statements was harmless, as there was sufficient evidence of neglect without considering those statements (*see Matter of Angelina J.W. [Tanya J.W.]*, 217 AD3d 773, 774-775; *Matter of Jaylen S. [Richard S.]*, 214 AD3d 885, 886).

**Matter of Caylin T.**, 229 AD3d 859 (3rd Dept., 2024)

Appeal from an order of the Family Court of Otsego County (Michael F. Getman, J.), entered August 26, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected. Respondent (hereinafter the mother) is the mother of twins (born in 2006) and was married to the children's father, who is now deceased. On September 27, 2021, during an argument with the father, the mother punched a hole in the wall while the children, who were 15 years old at the time of the alleged incident, were present. The next day, the father filed a family offense petition and was granted a temporary order of protection benefiting himself and the children. The temporary order of protection required the mother to vacate the family's residence and she was not granted visitation.**[FN1]**

On January 21, 2022, the father passed away at the family home and, before his body was taken from the premises, the mother went to the house and demanded to see his body. After being refused entry to the home by the children's maternal grandmother, the mother forced her way into the home, where the children were present and had armed themselves with a baseball bat and metal pipe. The grandmother called 911 and law enforcement responded. On January 26, 2022, petitioner commenced this proceeding alleging that the mother neglected the children and requesting that the children be removed from the mother's custody and placed with family friends. At the same time, the attorney for the children commenced a separate family offense proceeding against the mother on behalf of the children and a temporary order of protection was entered on January 27, 2022 directing the mother to stay away from the children.**[FN2]** On February 25, 2022, after a hearing on the issue of the children's temporary removal, Family Court issued an order, among other things, directing the temporary removal of the children. In July 2022, following a lengthy fact-finding hearing, Family Court adjudicated the children to be neglected. It held a dispositional hearing on August 18, 2022, after which the court continued the children's placement with family friends, and placed the mother under an order of supervision. Family Court declined to order visitation between the mother and the children in light of the outstanding order of protection. The mother appeals from the order of disposition.

The children are now over the age of 18 and are no longer subject to the custody and visitation provisions of the order of disposition (*see* Family Ct Act § 119 [c]; *Matter of Daniel QQ. v Tanya RR.,* 217 AD3d 1080, 1081 [3d Dept 2023]). Thus, the appeal from so much of the order of disposition as relates to custody and visitation is moot. However, the appeal from so much of the order of disposition as determined that the mother neglected the children is not moot as "the finding of neglect could be used against the mother in the future" (*Matter of Nina VV. [Wendy VV.]*, 216 AD3d [*2]1215, 1215 n 2 [3d Dept 2023] [internal quotation marks, brackets and citation omitted]).

"A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1243-1244 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Hazelee DD. [Nicholas EE.]*, 222 AD3d 1223, 1225 [3d Dept 2023]). "To put it differently, neglect occurs when an individual behaves in a manner at odds with that of a reasonable and prudent parent under the circumstances, and that behavior results in actual harm or an imminent threat of danger to the children that is near or impending, not merely possible" (*Matter of Hazelee DD. [Nicholas EE.]*, 222 AD3d at 1224 [internal quotation marks, brackets and citations omitted]; *see Matter of Hakeem S. [Sarah U.]*, 206 AD3d 1537, 1538 [3d Dept 2022], *lv denied* 39 NY3d 904 [2022]). "Such a threat may well be found to have resulted from a single incident or circumstance" (*Matter of Aiden L.*, 47 AD3d 1089, 1090 [3d Dept 2008] [citations omitted]). "Family Court's factual findings and credibility determinations are accorded great weight in such a proceeding and will not be disturbed on appeal unless they lack a sound and substantial basis" (*Matter of Leo RR. [Joshua RR.]*, 213 AD3d 1190, 1191-1192 [3d Dept 2023][internal quotation marks and citations omitted]; *see Matter of Messiah RR. [Christina RR.]*, 190 AD3d 1055, 1057 [3d Dept 2021]).

Here, the mother's behavior was at odds with that of a reasonable and prudent parent when she argued with the father and punched a hole through the wall with her fist. Notably, when speaking about her argument with the father, the mother expressed her regret in commencing a discussion with the father rather than her regret in yelling and punching the wall. The mother's focus remained on her emotions at the time of the incident and minimized that of the children. As to the incident on the day of the father's death, we are mindful that the events of the day would lead to a heightened emotional state in any parent. However, her actions fell far below reasonable parental behavior in that she violated the order of protection in arriving at the home, yelled at and threatened to harm the grandmother and placed her children in fear, compelling them to arm themselves with a pipe and bat to protect themselves. Family Court characterized the mother as "selfish, erratic and frightening," noting that "there was nothing reasonable or prudent about" her actions. Additionally, testimony was elicited that the mother's use of yelling and name-calling created a tense living situation that was harmful [*3]to the children. Accordingly, when deferring to Family Court's creditability determinations, we conclude that there is a sound and substantial basis in the record to support the finding that the children's mental states had been impaired by the mother's behavior (*see*

*Matter of Ja'Sire FF. [Jalyssa GG.]*, 206 AD3d 1076, 1080 [3d Dept 2022], *lv denied* 38 NY3d 912 [2022]; *compare Matter of Hakeem S. [Sarah U.]*, 206 AD3d at 1539).

Aarons, J.P., Pritzker, Lynch and Ceresia, JJ., concur.

ORDERED that the order is affirmed, without costs.

**Footnote 1:** The temporary order of protection was not made a part of the record on appeal before this Court, so the only understanding of the contents is gleaned from the parties' submissions.

**Footnote 2:** The order of protection was extended by Family Court on July 11, 2022. In September 2022, the attorney for the children voluntarily discontinued the family offense petition filed against the mother.

# Excessive Corporal Punishment

**Matter of Veronica M.**, 229 AD3d 626 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding of the Family Court, Kings County (Jacqueline B. Deane, J.), dated June 1, 2022. The order of fact-finding, insofar as appealed from, after a fact-finding hearing, found that the mother neglected the subject children.

ORDERED that the order of fact-finding is modified, on the law and the facts, by deleting the provision thereof determining that the mother neglected the subject children by having an untreated and undiagnosed mental illness; as so modified, the order of fact-finding is affirmed insofar as appealed from, without costs or disbursements.

In February 2021, the Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject children. In an order of fact-finding dated June 1, 2022, made [*2]after a fact-finding hearing, the Family Court found, among other things, that the mother neglected the children. The mother appeals.

"In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected"

(*Matter of Andrew M. [Brenda M.]*, 225 AD3d 764, 765; *see* Family Ct Act § 1046[b][i]). "To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784 [internal quotation marks omitted]).

"Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect" (*Matter of Raveena B. [Khrisend R.]*, 209 AD3d 640, 641 [internal quotation marks omitted]; *see Matter of Sama A. [Safaa S.]*, 224 AD3d 677, 679). Proof that a respondent neglected one child is admissible on the issue of neglect of any other child of the respondent (*see* Family Ct Act § 1046[a][i]).

"In a child protective proceeding, a child's prior out-of-court statements relating to the alleged neglect may serve as the basis for a finding of neglect 'provided that these hearsay statements are corroborated, so as to ensure their reliability'" (*Matter of David B. [Stacy T.]*, 171 AD3d 1041, 1042, quoting *Matter of Alexis S. [Edward S.]*, 115 AD3d 866, 866). The rule requiring corroboration is flexible, and any other evidence tending to support the reliability of the child's statements may be sufficient corroboration (*see Matter of Nicole V.*, 71 NY2d 112, 119; *Matter of David B. [Stacy T.]*, 171 AD3d at 1042).

Here, the Family Court properly found that the mother neglected the children by inflicting excessive corporal punishment. On that issue, the independent out-of-court statements of two of the children were adequately corroborated by one another, as well as by the personal observations of injuries on two of the children made by the assigned caseworker, photographs of those injuries, and audio recordings of incidents of alleged excessive corporal punishment (*see Matter of Alven V. [Ketly M.]*, 194 AD3d 725, 726). Moreover, the record supports the court's finding that the in-court recantation of one of the children's allegations was not credible (*see Matter of Mariliz G. [Jamie G.]*, 207 AD3d 627, 629; *Matter of Destiny B. [Anthony R.]*, 203 AD3d 1042, 1042). The evidence that the mother had used excessive corporal punishment to discipline the children, together with the negative inference drawn from the mother's failure to testify at the fact-finding hearing (*see Matter of Andrew M. [Brenda M.]*, 225 AD3d at 765; *Matter of Nash D. [Daniel D.]*, 224 AD3d 749, 751), was sufficient under the circumstances to support the court's finding that the mother neglected the children (*see Matter of Sama A. [Safaa S.]*, 224 AD3d at 679; *Matter of Maya B. [Muke B.]*, 156 AD3d 784, 786).

However, ACS did not prove by a preponderance of the evidence that the mother neglected the subject children based on an untreated and undiagnosed mental illness. While a parent's untreated mental illness or condition that results in an imminent risk of harm to the child may support a finding of neglect (*see Matter of Hannah T.R. [Saya R.]*, 179 AD3d 700, 701), the evidence at the hearing was insufficient to establish that the mother's alleged untreated and undiagnosed mental illness or condition placed the children at imminent risk of harm to their physical, mental, or emotional condition (*see Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d at 784-785; *Matter of Justin L. [Sandra L.]*, 144 AD3d 915, 915; *see also* Family Ct Act § 1012[h]; *Matter of Alexandra R.-M. [Sonia R.]*, 179 AD3d 809, 811). Accordingly, the Family Court should not have determined that the mother neglected the children by having an untreated and undiagnosed mental illness.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

**Matter of Jazlynn K.**, 231 AD3d 952 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from (1) three orders of fact-finding of the Family Court, Orange County (Christine P. Krahulik, J.), all dated May 8, 2023, (2) two orders of disposition of the same court dated May 8, 2023, and (3) [*2]an order of disposition of the same court dated May 9, 2023. The first order of fact-finding, after a fact-finding hearing, found that the mother neglected the child Jazlynn K. The second order of fact-finding, after a fact-finding hearing, found that the mother neglected the children Ray S., Jr., and Angelique S. The third order of fact-finding, after a fact-finding hearing, found that the mother neglected the child Jamaralyse W. The first order of disposition dated May 8, 2023, upon the first order of fact-finding and after a dispositional hearing, inter alia, placed the mother and the child Jazlynn K. under the supervision of the petitioner for a period of 12 months. The second order of disposition dated May 8, 2023, upon the second order of fact-finding and after a dispositional hearing, inter alia, placed the mother and the children Ray S., Jr., and Angelique S. under the supervision of the petitioner for a period of 12 months. The order of disposition dated May 9, 2023, upon the third order of fact-finding and after a dispositional hearing, inter alia, placed the mother and the child Jamaralyse W. under the supervision of the petitioner for a period of 12 months.
ORDERED that the appeals from the orders of fact-finding are dismissed, without costs or disbursements, as the orders of fact-finding were superseded by the orders of

disposition and are brought up for review on the appeals from the orders of disposition; and it is further,

ORDERED that the appeals from so much of the orders of disposition as placed the mother and the subject children under the supervision of the petitioner for a period of 12 months are dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the orders of disposition are affirmed insofar as reviewed, without costs or disbursements.

The petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging that the mother neglected the subject children. After a fact-finding hearing, the Family Court found that the mother neglected the children by inflicting excessive corporal punishment. The mother appeals.

The appeals from so much of the orders of disposition as placed the mother and the subject children under the supervision of the petitioner for a period of 12 months must be dismissed as academic, as the period of supervision has expired by its own terms (*see Matter of Leah S. [Barnett V.]*, 228 AD3d 667, 668). However, since the adjudication of neglect constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings, the appeals from so much of the orders of disposition as bring up for review the findings of neglect are not academic (*see Matter of Janiyah S. [Pedro H.]*, 226 AD3d 909, 910).

"In a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence" (*id.*; *see* Family Ct Act § 1046[b][i]). "'[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship'" (*Matter of Leah S. [Barnett V.]*, 228 AD3d at 668, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368).

"'In neglect proceedings, [u]nsworn out-of-court statements of the [children] may be received and, if properly corroborated, will support a finding of abuse or neglect'" (*Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d 806, 807, quoting *Matter of Mariliz G. [Jamie G.]*, 207 AD3d 627, 629; *see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118). "'Corroboration means any other evidence tending to support the reliability of the previous statements'" (*Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d at 807, quoting *Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 909). "Siblings' out-of-court statements may cross-corroborate each other when they independently and consistently describe similar incidents of abuse or neglect" (*Matter of Alexander S.*

*[Gabriel H.]*, 224 AD3d at 909). "Moreover, the Family Court may disregard a child's recantation of a prior allegation if the court determines that the recantation is not credible" (*Matter of Mariliz G. [Jamie G.]*, 207 AD3d at 629). "'Great deference is given to [*3]the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor'" (*Matter of Leah S. [Barnett V.]*, 228 AD3d at 668, quoting *Matter of Kishanda S. [Stephan S.]*, 190 AD3d 747, 748).

Here, the petitioner established by a preponderance of the evidence that the mother neglected the children by inflicting excessive corporal punishment on one of the children in the presence of two of the other children (*see Matter of Sama A. [Safaa S.]*, 224 AD3d 677, 679; *Matter of Zaniah T. [Deshaun T.]*, 216 AD3d 1173, 1175). "'Although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect'" (*Matter of Leah S. [Barnett V.]*, 228 AD3d at 668-669, quoting *Matter of Kishanda S. [Stephan S.]*, 190 AD3d at 748). "'A single incident of excessive corporal punishment may suffice to sustain a finding of neglect'" (*id.* at 669, quoting *Matter of Kishanda S. [Stephan S.]*, 190 AD3d at 748). Contrary to the mother's contention, the Family Court providently exercised its discretion in determining that the children's out-of-court statements to the petitioner's caseworker were adequately corroborated (*see Matter of Logan P. [Kendell P.]*, 228 AD3d 867, 869; *Matter of Alexander S. [Gabriel H.]*, 224 AD3d at 909). The court's determination that the in-court recantation of one of the children was unreliable is supported by the record and entitled to deference (*see Matter of Elisa V. [Hung V.]*, 159 AD3d 827, 828-829).

The mother's remaining contentions are without merit.

**Matter of Elina M.**, AD3d 2024 NY Slip Op 06574 (2nd Dept., 2024)

APPEAL by the father, in a proceeding pursuant to Family Court Act article 10, from an order of disposition of the Family Court, Kings County (Ilana Gruebel, J.), dated June 27, 2023, and entered in Kings County. The order of disposition, upon an order of fact-finding of the same court dated May 5, 2023, made after a fact-finding hearing, finding that the father neglected the subject child, and after a dispositional hearing, inter alia, released the subject child to the custody of the nonrespondent mother under the petitioner's supervision.

This appeal concerns a finding of neglect against a parent in a proceeding pursuant to Family Court Act article 10, based upon an alleged incident of excessive corporal

punishment. This appeal does not present us with an opportunity to resolve a novel legal question. It does, however, provide us with an opportunity to provide some guidance with regard to when a single incident of excessive corporal punishment may be sufficient to support a finding of neglect. This appeal also presents us with the opportunity to emphasize that a finding of neglect must be based on evidence establishing the allegations set forth in the petition before the court. Absent additional allegations set forth in an amended petition that conforms to the proof with notice to the respondent, the court must not base a finding of neglect on allegations not set forth in the petition.

*I. Factual and Procedural Background*

The appellant, Leonard M. (hereinafter the father), is the father of Elina M., born in 2012, who is the subject of this proceeding. The child's mother, Diana R., and the father separated when the child was less than one year old. The parents were engaged in a custody battle over the child for many years. Eventually, the parents had joint legal custody of the child, and each parent had equal parental access with the child that was split between the parent's homes.

In June 2021, the petitioner, Administration for Children's Services (hereinafter ACS), filed a petition pursuant to Family Court Act article 10 against the father, alleging that he had neglected the child by inflicting excessive corporal punishment on her. The petition alleged, more specifically, that on or about June 7, 2021, the father had grabbed the child's arm and squeezed it "really, really hard," leaving "three circular, dark green marks" on the child's shoulder, which [*2]"appeared to be the size of finger prints." The petition did not contain any allegations that the father had engaged in any other acts of aggression toward the child or regarding any misuse of alcohol.

A fact-finding hearing commenced in February 2022. ACS called two witnesses: an ACS caseworker and the child's mother. The ACS caseworker testified that while visiting the child on June 10, 2021, she noticed a bruise on her arm. When the ACS caseworker asked the child about the bruise, the child reported that while she was at the father's home a day or two days earlier, he became aggressive when she attempted to walk away from him while he was speaking, and he "pulled her rough, tightly, and forced her" to sit on a sofa. The child also had reported to the ACS caseworker that she believed that the father had been drinking alcohol because he was "walking funny." The child indicated that her next visit with the father would be the following day and that she felt safe continuing to visit with him. The ACS caseworker also testified that she had biweekly meetings with the child since April 2021, and that the child had not previously reported any excessive corporal punishment, but the child had previously reported that the father "often drank and . . . behaved oddly."

The mother testified that after the child returned from a visit with her father on June 10, 2021, she had observed a line of "four or five bruises" on the child's arm. The mother asked the child about the bruises, and the child stated that she was sitting in the living room watching a movie on her laptop and that the father was arguing with someone on the phone. The mother testified that the child told her that the father then threw the phone, took the laptop, threw the laptop on the floor, grabbed the child "hardly," screamed at her, "this is my apartment, this is my rules," and then took the child into another room.

On the July 19, 2022 hearing date, the mother was questioned by ACS counsel as to whether the subject incident was the first one that the child had reported in which the father had become angry and grabbed her. The father's counsel objected to the question as leading, and the Family Court asked if "it [is] in the petition." ACS counsel argued that petitions are pleaded generally. The court advised ACS counsel that the petition required allegations of specific facts and that if ACS wanted to conform the pleadings to the proof to add allegations other than the subject incident, the petition would have to be amended. ACS counsel stated that she intended to amend the petition, and the court ordered that conformed pleadings were to be submitted with notice to all counsel by July 21, 2022, at 5:00 p.m.

On the next hearing date, August 4, 2022, the Family Court stated that it had not received any conformed pleadings and asked ACS counsel whether she had served conformed pleadings by the deadline that the court had imposed. ACS counsel confirmed that she had not served or filed conformed pleadings, and the court then stated that its findings would be "based only on the original allegations [that are] contained in the petition."

On the August 4, 2022 hearing date, the mother testified that over the last three years, the child had reported to her that the father used alcohol during the child's visits and that he was drunk and/or drinking on the day of the incident. These allegations were not contained in the petition.

The father testified at the fact-finding hearing. He denied having any verbal argument with the child and denied that the subject incident ever happened. He stated that there was no need for him to discipline the child because she was a "good girl" and that they would "talk things through." The father further testified that on a couple of occasions, he had taken away the child's cell phone, but he had never used physical discipline with any of his children. The father also denied throwing the child's laptop. He submitted photographs of the laptop, which he took on the date of his testimony, and the photographs were admitted into evidence. The father testified that he did not drink any alcohol on June 7, 2021, or at any time during his parental access with the child from June 7, 2021 to June 9, 2021. He further testified that he did not typically keep alcohol

in his home and that he did not drink any alcoholic beverages while caring for the child. He testified that he drank alcohol occasionally during social gatherings, such as parties or holidays.

On May 5, 2023, following the close of the fact-finding hearing, the Family Court issued an order of fact-finding, upon a decision of the same court, also dated May 5, 2023. The court found that the father neglected the child. In its decision, the court stated that:

"[T]he totality of the evidence establishes that the [father] neglected the child by causing her emotional harm and physical harm and putting her at risk of further physical harm by his *misuse of alcohol* [and] that although there are some discrepancies amongst the [*3]witnesses['] testimony, there is sufficient consistency concerning the father's *aggressive approach towards the child*, and his *misuse of alcohol* in her presence to support a finding of neglect.

. . .

"[T]he Court finds that the totality of the evidence establishes by a preponderance of the evidence that the [father] has caused the child emotional harm by his *aggressive behaviors and outbursts towards her, and his misuse of alcohol*, which makes her anxious and nervous. It is this in combination with the bruise, not the bruise itself, which establishes by a preponderance of the evidence that the [father] neglected the child" (emphasis added).

On June 23, 2023, the Family Court held a dispositional hearing and, on June 27, 2023, the court issued an order of disposition. The order of disposition, upon the order of fact-finding, inter alia, released the child to the custody of the nonrespondent mother under the petitioner's supervision. The father appeals.

*II. Legal Analysis*

Family Court Act § 1012(f)(i)(B) provides, in relevant part, that:

"'Neglected child'" means a child that is less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment . . . or by misusing alcoholic beverages to the extent that he [or she] loses self-control of his [or her] actions . . . ."

In a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of proving neglect by a preponderance of the evidence (*see id.* §

1046[b][i]; *Matter of Nyla S. [Jason B.]*, 224 AD3d 691, 692; *Matter of Myiasha K.D. [Marcus R.]*, 193 AD3d 850, 851-852). Only competent, material, and relevant evidence may be admitted into evidence at a fact-finding hearing (*see* Family Ct Act § 1046[b][iii]).

We recognize that the Family Courts are tasked with making difficult decisions every day in child protective proceedings pursuant to Family Court Act article 10, the purpose of which is "to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being" (*id.* § 1011). Family Court Act article 10 "is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his [or her] needs are properly met" (*id*.). The Court of Appeals has noted, however, that "[t]he drafters of article 10 were deeply concerned that an imprecise definition of child neglect might result in unwarranted state intervention into private family life" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [internal quotation marks omitted]). Under the circumstances presented here, we agree with the father that the Family Court erroneously found that ACS established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporate punishment.

As we have often stated, "[a]lthough parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect" (*Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 910 [internal quotation marks omitted]; *see Matter of Tarahji N. [Bryan N.—Divequa C.]*, 197 AD3d 1317, 1320).

Parenting and discipline methods have changed significantly in recent years, and the use of any physical force against children has been frowned upon in society as an acceptable means of discipline. It is less acceptable today to see parents discipline their child physically through corporal punishment by means such as grabbing, spanking, or smacking in public or even at home. Until recently, corporal punishment was an acceptable use of discipline in some schools in New [*4]York. As of October 2023, the use of corporal punishment has been prohibited in all schools in New York (*see* Education Law §§ 305[60], as added by L 2023, c 551, § 2; *id.* § 1125[1], as added by L 2023, c 551, § 1). Under today's societal norms, parents are encouraged to speak to their children and use other methods of discipline without any form of aggression whatsoever. However, that is not to say that the methods of discipline through reasonable physical force as corporal punishment are not permitted. As such, we must be guided by our jurisprudence. There are some facts that so obviously support a finding of excessive physical force, but others require some reflection as to whether the

act itself in the context of parenting was reasonable, or at least not excessive, so as to support a finding of neglect.

This Court has held that a single incident of excessive corporal punishment can constitute neglect (*see Matter of Lea E.P. [Jason J.P.]*, 176 AD3d 715, 716; *Matter of Elisa V. [Hung V.]*, 159 AD3d 827, 828). However, we find that the facts of the present case do not rise to a level supporting a finding of neglect under Family Court Act article 10. A review and comparison of prior holdings must serve as a guide to the courts in making the proper determination in each case before them. For example, in *Matter of Eliora B. (Kennedy B.)* (146 AD3d 772), the evidence at the fact-finding hearing established that the father became enraged and locked the mother out of the house when she left for the evening without cooking dinner for the subject children. The father blocked the door and instructed the children not to allow the mother back in the house. When the father discovered that one of the children had helped the mother reenter the house, he struck the child with a chair, bruising the arm that the child had raised to protect herself. When the child tried to stand, the father grabbed her by the throat and threw her down. The facts in that case supported the Family Court's conclusion that the father neglected the child by inflicting excessive corporal punishment (*id.* at 774).

In *Matter of Elisa V. (Hung V.)* (159 AD3d at 828-829), this Court affirmed the Family Court's determination that there was ample evidence, which included the father's own admissions to a police detective, for a finding of neglect based on the infliction of excessive corporal punishment. The father had beat his 15- and 17-year old daughters with a softball bat because the 15-year old daughter had refused to give him access to her cell phone and laptop after the daughters' mother had found flyers about sexually-transmitted disease testing in their bedroom (*id.* at 827-828).

We have often affirmed the Family Court's finding of neglect based on a single incident of excessive corporal punishment (*see Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d 806, 807 [the mother pushed the child and restricted his breathing, leaving scratches on the child's eyelid and shoulder, which were visible to the ACS caseworker]; *Matter of Thaddeus R. [Gabrielle V.]*, 198 AD3d 901, 902 [the mother punched, hit, and scratched the child, leaving a red mark on the child's knee, which was visible to a caseworker three days after the incident]; *Matter of Tarahji N. [Bryan N.—Divequa C.]*, 197 AD3d at 1320 [the mother struck the child with her hands multiple times and bit the child's finger, leaving marks and injuries observed by caseworkers and necessitating medical treatment]; *Matter of Alivia F. [John F.]*, 194 AD3d 709, 712 [the father choked the child and pushed him into a dresser]; *Matter of Nah-Ki B. [Nakia B.]*, 143 AD3d 703, 706 [the father choked the child, and the child's out-of-court statements that the father had choked her were corroborated, inter alia, by medical records]; *Matter of Dalia G. [Frank*

*B.]*, 128 AD3d 821, 823 [the father choked both children and slammed one of them to the floor]).

This Court has also held that a single incident of excessive corporal punishment was not sufficient to sustain a finding of neglect under Family Court Act article 10, under the particular circumstances of a given case, even where the use of physical force was inappropriate (*see Matter of Myiasha K.D. [Marcus R.]*, 193 AD3d at 851; *Matter of Anastasia L.-D. [Ronald D.]*, 113 AD3d 685, 686-687). Thus, even where the use of physical force could be deemed inappropriate under the circumstances, it nevertheless might not be sufficient to support a finding of neglect under Family Court Act article 10 (*see Matter of Myiasha K.D. [Marcus R.]*, 193 AD3d at 851-852).

In *Matter of Myiasha K.D. (Marcus R.)* (193 AD3d at 851-852), ACS filed petitions alleging neglect by the paternal uncle as a person legally responsible for the care of the subject children, Myiasha K.D. and Amiya J.D., based on Myiasha's claim, inter alia, that after she made fun of another adult in the household, the paternal uncle struck her on the arm, leaving a bruise. At a fact-finding hearing, Myiasha's school guidance counselor testified that Myiasha told him that her paternal uncle had struck her on the arm, and the notes of the investigating ACS caseworker indicated that Myiasha provided her with a similar statement. The caseworker also observed some bruising on Myiasha's upper arm. The paternal uncle and the paternal grandmother denied that [*5]Myiasha was ever hit by the paternal uncle. No other marks or bruises were observed on Myiasha, and there was no evidence presented that the other child, Amiya, was ever struck by the paternal uncle. At the conclusion of the fact-finding hearing, the Family Court determined that the paternal uncle neglected Myiasha and derivatively neglected Amiya.

We reversed, holding that, under the circumstances presented, "ACS failed to establish by a preponderance of the evidence that the paternal uncle's action in inappropriately striking the child rose to the level of neglect, or that he intended to hurt Myiasha, or exhibited a pattern of excessive corporal punishment" (*id.* at 852). Similarly, in this case, the evidence presented failed to establish by a preponderance of the evidence that the father's inappropriate grabbing or holding of the child's arm or shoulder rose to the level of neglect, or that he intended to hurt the child or that he exhibited a pattern of excessive corporal punishment.

In *Matter of Anastasia L.-D. (Ronald D.)* (113 AD3d at 686-687), we affirmed the Family Court's dismissal, after a fact-finding hearing, of the petitions filed by ACS against the father alleging that he had neglected the subject children, Anastasia and Amethyst, through the infliction of excessive corporal punishment upon Anastasia and his own use of marijuana. The father allegedly hit 14-year-old Anastasia with a belt several times when she refused to give him her cell phone upon his request, causing bruises to her

body. Also, the children had allegedly observed the father smoking marijuana on prior occasions. The father testified at a fact-finding hearing that he was attempting to discipline Anastasia for cutting school by taking away her cell phone, and that he hit her with the belt when she refused to give him the phone and charged at him. He testified that corporal punishment was not his normal mode of discipline. He also testified that he had smoked marijuana, but did not smoke it regularly, and that he never used or was under the influence of marijuana in the children's presence. After the fact-finding hearing, the Family Court dismissed the petitions (*id.* at 687). In affirming, we held that, under the circumstances presented, "the Family Court correctly found that ACS failed to establish by a preponderance of the evidence that the father neglected Anastasia by virtue of his infliction of excessive corporal punishment upon her. ACS failed to establish that the father intended to hurt Anastasia, or that his conduct demonstrated a pattern of excessive corporal punishment" (*id.*; *see Matter of Tarahji N. [Bryan N.—Divequa C.]*, 197 AD3d at 1319-1320 [the Family Court's finding of neglect based on excessive corporal punishment was reversed where ACS had offered evidence of a single instance in which the mother hit the child's arm with a belt to discipline him after he was caught shoplifting]; *Matter of Laequise P. [Brian C.]*, 119 AD3d 801, 802 [the Family Court's finding of neglect based on excessive corporal punishment was reversed, and we held that "[t]he father's open-handed spanking of the child as a form of discipline after he heard the child curse at an adult was a reasonable use of force, and, under circumstances presented . . . , did not constitute excessive corporal punishment"]). Under the circumstances presented here, we agree with the father that the Family Court erroneously found that ACS established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporate punishment. ACS failed to establish that the father's act of grabbing or holding the child's arm or shoulder rose to the level of neglect or that he intended to hurt the child or exhibited a pattern of excessive corporal punishment (*see Matter of Myiasha K.D. [Marcus R.]*, 193 AD3d at 851-852; *Matter of Anastasia L.-D. [Ronald D.]*, 113 AD3d at 687; *Matter of Alexander J.S. [David S.]*, 72 AD3d 829, 830). In so holding, we are not deviating from our prior decisional law so as to suggest that a single incident of excessive corporal punishment cannot support a finding of neglect under Family Court Act article 10. We emphasize that each case is fact specific, and we hold that under the particular circumstances in the present case, the single incident of the father grabbing the child's arm or shoulder did not rise to the level of neglect under Family Court Act article 10.

Next, we find merit to the father's contention that the Family Court improperly based its finding of neglect, at least, in part, upon allegations that were not included in the petition, to wit, that the father had previously engaged in unspecified acts of aggression toward the child and that he misused alcohol in the child's presence. The petition does not contain any allegations of misuse of alcohol or of acts of aggression toward the child

other than the incident that occurred on or about June 7, 2021. Specifically, it is alleged in the petition that on or about June 7, 2021, the father grabbed the child's arm and squeezed her "really, really hard," and that on or about June 10, 2021, the ACS caseworker observed "three circular, dark green marks" on the child's shoulder, which "appeared to be the size of fingerprints."

Family Court Act § 1051(b) provides that "[i]f the proof does not conform to the [*6]specific allegations of the petition, the court may amend the allegations to conform to the proof; provided, however, that in such case the respondent shall be given reasonable time to prepare to answer the amended allegations." We have held that it is improper for the Family Court to rely upon evidence relating to claims not alleged in the petition (*see Matter of Amier H. [Shellyann C.H.]*, 106 AD3d 1086, 1087; *Matter of Crystal S. [Elaine S.]*, 74 AD3d 823, 825). Here, it is clear from the court's decision that the court improperly relied on evidence relating to the father's alleged "misuse of alcohol" and alleged "aggressive behaviors and outbursts towards the child," which were not alleged in the petition (*see Matter of Amier H. [Shellyann C.H.]*, 106 AD3d at 1087; *Matter of Crystal S. [Elaine S.]*, 74 AD3d 823 at 825). Indeed, the court had afforded ACS an opportunity to conform the pleadings to the proof by a certain date, and after ACS failed to do so, the court made a ruling on the record that its findings would "be based only on the original allegations contained in the petition." Ultimately, the court failed to adhere to its own ruling.

Furthermore, the only evidence relating to the father's alleged misuse of alcohol were the child's statements to the mother and the ACS caseworker. A child's prior out-of-court statements relating to abuse or neglect are admissible in evidence, but if uncorroborated, such statements are not sufficient to support a finding of neglect (*see* Family Ct Act § 1046 [a][vi]; *Matter of Kashai E. [Kashif R.E.]*, 218 AD3d 574, 575; *Matter of Treyvone A. [Manuel R.]*, 188 AD3d 1182, 1183). Mere "repetition of an accusation by a child does not corroborate the child's prior account of it" (*Matter of Nicole V.*, 71 NY2d 112, 124). Here, there was no corroborating evidence regarding the father's alleged misuse of alcohol. In fact, the ACS caseworker testified that during her visits to the father's home prior to the date of the incident, she had never observed any alcohol in the home or the father under the influence of alcohol, and that the child reported that she did not observe any alcohol in the home and that she did not actually see the father drinking alcohol.

Accordingly, the order of disposition dated June 27, 2023, is reversed, on the law and the facts, the order of fact-finding dated May 5, 2023, is vacated, the petition is denied, and the proceeding is dismissed.

CONNOLLY, J.P., MILLER and WARHIT, JJ., concur.

ORDERED that the order of disposition dated June 27, 2023, is reversed, on the law and the facts, without costs or disbursements, the order of fact-finding dated May 5, 2023, is vacated, the petition is denied, and the proceeding is dismissed.

**Matter of Damiek TT.**, 232 AD3d 1157 (3rd Dept., 2024)

Appeal from an order of the Family Court of Schenectady County (Kevin A. Burke, J.), entered March 2, 2023, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected. Respondent (hereinafter the father) is the father of the subject children (born in 2014 and 2019). Petitioner commenced this neglect proceeding in November 2020, alleging that the father had neglected the subject children in numerous respects. An extensive fact-finding hearing ensued. Family Court thereafter issued an order in which it found that the father had neglected the older child by subjecting him to excessive corporal punishment and that such behavior constituted derivative neglect of the younger child.**[FN1]** The father appeals.

We affirm. "Neglect is established when a preponderance of the evidence shows that the children's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and that the actual or threatened harm to the children results from the parent's failure to exercise a minimum degree of care in providing the children with proper supervision or guardianship" (*Matter of Aiden J. [Armando K.]*, 197 AD3d 798, 798-799 [3d Dept 2021] [internal quotation marks and citations omitted]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *Matter of Caylin T. [Christine T.]*, 229 AD3d 859, 861 [3d Dept 2024]). Notably, while out-of-court statements by a child are insufficient to support a finding of neglect by themselves, they will suffice if corroborated by "[a]ny other evidence tending to support [their] reliability" (Family Ct Act § 1046 [a] [vi]). There need only be "[a] relatively low degree of corroborative evidence . . . to meet this threshold, and the reliability of the corroboration, as well as issues of credibility, are matters entrusted to the sound discretion of Family Court and will not be disturbed" so long as they are supported by a sound and substantial basis in the record (*Matter of Justin CC. [Tina CC.]*, 77 AD3d 1056, 1057 [3d Dept 2010] [internal citations omitted], *lv*

*denied* 16 NY3d 702 [2011]; *see Matter of Olivia RR. [Paul RR.]*, 207 AD3d 822, 824 [3d Dept 2022]).

Here, a caseworker employed by petitioner testified as to how she interviewed several individuals, including the older child, during the course of an investigation in 2020. During those interviews, the older child told her that the father "smack[ed] him frequently," including in the face. The older child showed the caseworker several marks on his face that he claimed were scars from the father striking him, and he further described an incident in which the father hit him in the face so hard that he began bleeding from his nose or lip. Two other children who spent time with the subject children and the father also spoke to the caseworker and confirmed that they had seen the father strike the older child. One of those children [*2]described an incident in which the father hit the older child's face and arm hard enough to leave red marks; the other detailed one incident in which the father punched the older child in the face and another in which the father "threw [the older child] into a chair" with sufficient force to break a vase sitting nearby, prompting the paternal grandmother to tell the father not to hit the older child "in the face because he might pass out." Beyond those accounts provided to the caseworker, the mother of the younger child testified regarding an incident in which the older child came to her "screaming" and wiping blood off his face with a blanket that the father later told her to get rid of. She initially testified that she did not see the father draw blood from the older child "in [her] presence" during that incident, but later acknowledged during cross-examination that the father had "popped [the older child] and . . . sensed that he was bleeding."

The father now argues that the foregoing proof was deficient in various respects but, notwithstanding his contentions, the accounts of others who had witnessed incidents of corporal punishment severe enough to leave marks, break furniture and draw blood were more than adequate to corroborate the older child's out-of-court claims (*see Matter of Bonnie FF. [Marie VV.]*, 220 AD3d 1078, 1082 [3d Dept 2023]; *Matter of Stephanie RR. [Pedro RR.]*, 140 AD3d 1237, 1239-1240 [3d Dept 2016]; *Matter of Dylynn V. [Bradley W.]*, 136 AD3d 1160, 1163-1164 [3d Dept 2016]; *Matter of Dylan TT. [Kenneth UU.]*, 75 AD3d 783, 783-784 [3d Dept 2010]). Family Court credited that proof over the father's denials in his own testimony and, according deference to that assessment of credibility, we are satisfied that a sound and substantial basis exists in the record for Family Court's determination that the father had neglected the older child by subjecting him to excessive corporal punishment (*see Matter of Jakob Z. [Matthew Z.-Mare AA.]*, 156 AD3d 1170, 1171-1172 [3d Dept 2017]; *Matter of Dylynn V. [Bradley W.]*, 136 AD3d at 1163-1164; *Matter of Aaliyah Q.*, 55 AD3d 969, 970-971 [3d Dept 2008]).

Finally, as the father's behavior toward the older child revealed such an impaired level of parental judgment that any child in his care would be at substantial risk of harm,

Family Court properly determined that he had derivatively neglected the younger child (*see Matter of Dylynn V. [Bradley W.]*, 136 AD3d at 1164; *Matter of Dylan TT. [Kenneth UU.]*, 75 AD3d at 784). To the extent that they are not addressed above, the father's remaining contentions have been examined and found to lack merit.

ORDERED that the order is affirmed, without costs.

**Footnotes**

**Footnote 1:** Although the parties reference other alleged incidents of neglect at length in their briefs, our review of the appealed-from order reflects that Family Court made no findings regarding those allegations and premised the findings of neglect upon the ground that the father had subjected the older child to excessive corporal punishment. As a result, we limit our discussion to that issue.

# ABUSE

# Sexual Abuse

**Matter of K. A.**, 231 AD3d 608 (1st Dept., 2024)

Order of disposition, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about January 12, 2024, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about the same date, which found that respondent-appellant abused and neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's determination that appellant, whom the child considered to be a stepfather, sexually abused and neglected the child (Family Court Act §§ 1012[e][iii], 1046[b]; *see Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]). The child's sworn testimony at the fact-finding hearing constituted competent evidence that appellant sexually abused her on five occasions between December 2021 and April 2022. The fact that the child did not have a physical injury or that there was no corroboration of her testimony does not affect our evaluation of the testimony (*see Matter of Alijah S. [Daniel S.]*, 133 AD3d 555, 556 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]; *Matter of Christina G. [Vladimir G.]*, 100 AD3d 454, 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). Furthermore, the court could

properly infer appellant's intent to gain sexual gratification from touching the child's breasts from the acts themselves (*see Matter of Maria S. [Angel A.]*, 185 AD3d 437, 437 [1st Dept 2020]).

We find no basis for disturbing Family Court's determinations, which are entitled to deference on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]).

We have considered appellant's remaining arguments and find them unavailing.

**Matter of K.B.**, 232 AD3d 508 (1st Dept., 2024)

Order of disposition, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about August 23, 2023, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 26, 2023, which found that respondent grandfather abused the subject child, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports the court's determination that the grandfather abused the child by committing the offense of forcible touching under Penal Law § 130.52 (*see* Family Court Act §§ 1012 [e][iii][A]; 1046[b][i]). The child credibly testified that the grandfather had smacked and caressed the child's buttocks on numerous occasions, that he asked the child to take a shower with him, and that he was asked by the child to stop his unwanted contact and did not. An intent to "gratify[ ] the actor's sexual desire" under Penal Law § 130.52 can be inferred, as here, from the conduct itself and his refusal to stop when asked (*see Matter of Lesli R. [Luis R.]*, 138 AD3d 488, 489 [1st Dept 2016]).

Although the grandfather maintains that his conduct was intended to be a joke, Family Court did not find this explanation credible**,** and we accord deference to its credibility determinations (*see Matter of Brittney B. [Marcelo B.]*, 211 AD3d 426, 426-427 [1st Dept 2022]). Contrary to the grandfather's contention, his status as a person legally responsible for the child and their close relationship provide no basis to disturb the court's findings, particularly since the grandfather was the only person who engaged in the forcible touching, negating his assertion the smacking and caressing of the child's buttocks was a family joke (*id.*).

**Matter of M.R.**. AD3d 2024 NY Slip Op 06137 (1st Dept., 2024)

Order of fact-finding, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about November 14, 2022, insofar as it determined, after a hearing, that respondent Manuel R. sexually abused the subject child and derivatively abused the younger child, and that respondent mother neglected the subject child and derivatively neglected the younger child, unanimously affirmed, without costs.

Family Court's determination that Manuel R., a person legally responsible for the subject child, sexually abused the child was supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[e][iii]; 1046[b][i]; *see also Matter of Alexis W. [Efrain V.]*, 159 AD3d 547, 547 [1st Dept 2018]).

The court properly determined that the subject child's statements made to their treating therapist were independently admissible and did not require corroboration because they were relevant to the subject child's treatment, diagnosis, and discharge (*see Matter of E.H. [M.H.]*, 209 AD3d 582, 583 [1st Dept 2022]).

The subject child's out-of-court statements were amply corroborated by the witnesses who testified to the subject child's detailed account of sexual abuse (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]; *Matter of Jolieanna G. [Jennifer G.]*, 202 AD3d 622, 623 [1st Dept 2022]). The caseworker and treating therapist testified how the subject child described a pattern of behavior by Manuel R., which escalated from touching to more severe forms of abuse, coupled with favors to elicit the subject child's compliance. The subject child's statements were further corroborated by the expert testimony of the supervisor of the subject child's therapist, that the subject child suffered from anxiety and major depressive disorder consistent with the subject child being a victim of sexual abuse and trauma (*see Jaylyn Z. [Jesus O.]*, 170 AD3d 516, 517 [1st Dept 2019]; *Matter of Dorlis B. [Dorge B.]*, 132 AD3d 578, 579 [1st Dept 2015]; *Matter of Estefania S. [Orlando S.]*, 114 AD3d 453, 453 [1st Dept 2014]). The testimony of the ACS caseworker and therapist regarding the subject child's change in demeanor and behavior when discussing the abuse provided further corroboration (*see Matter of Jason Alexander B. [Antonio G.]*, 195 AD3d 566, 567 [1st Dept 2021]). Moreover, the absence of physical injury to the subject child is not fatal to a finding of sexual abuse (*see Matter of Skylean A.P. [Jeremiah S.]*, 136 AD3d 515, 515 [1st Dept 2016], *lv denied* 27 NY3d 907 [2016]).

Family Court properly discounted the subject child's later out-of-court recantations of the allegations of sexual abuse, particularly in light of evidence of pressure on the subject child by the mother to retract the allegations (*see e.g. Matter of James L.H. [Lisa H.]*, 182 AD3d 990, 991-992 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *Matter of*

*Melody H. [Dwayne H.]*, 121 AD3d 686, 687 [2d Dept 2014]; *Matter of Harrhae Y. [Shy-Macca Ernestine B.]*, 112 AD3d 512, 513 [1st Dept 2013]).

Manuel R.'s sexual abuse [*2]of the subject child demonstrated a fundamental defect in understanding of his parental obligations, supporting a derivative abuse finding of the younger child (*see Matter of M.S. [Andrew S.]*, 198 AD3d 547, 548 [1st Dept 2021]).

Family Court properly found that the mother neglected the child because, despite being faced with the allegations of sexual abuse, she failed to meaningfully and appropriately respond to the subject child's disclosure and created an environment detrimental to the subject child's mental health (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *see also Matter of T.S. [K.A.]*, 200 AD3d 569, 570 [1st Dept 2021], *lv denied* 38 NY3d 904 [2022]). Moreover, the mother repeatedly dismissed the subject child's allegations and continued to side with Manuel R. without any concern for the subject child (*see Matter of David R. [Carmen R.]*, 123 AD3d 483, 485 [1st Dept 2014]).

The findings of derivative neglect against the mother with respect to the younger child were appropriate since her failure to respond appropriately following the subject child's disclosures evinced such an impaired level of judgment as to create a substantial risk of harm to the younger child (*see* Family Ct Act § 1046[a][i]; *see also Matter of Derrick GG. [Jennifer GG.]*, 177 AD3d 1124, 1126 [3d Dept 2019], *lv denied* 35 NY3d 902 [2020]).

We have reviewed the parties' remaining arguments and find them unavailing.

**Matter of A.M.**, AD3d  2024 NY Slip Op 06157 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Gigi N. Parris, J.), entered on or about November 16, 2023, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent-appellant, a person legally responsible for the subject children, sexually abused the subject child A.M. and derivatively abused the other two subject children, unanimously affirmed, without costs.

A preponderance of the evidence supported the finding that appellant sexually abused A.M. (Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118 [1987]). A.M.'s statements to medical personnel at St. Barnabas Hospital and Metropolitan Hospital were independently admissible and did not require corroboration because they were relevant to the child's treatment, diagnosis, and discharge and therefore constituted an exception to the rule against hearsay (*see Matter C.L. of E.H. [M.H.]*, 209 AD3d 582, 583 [1st Dept 2022]). Similarly, Family Court providently exercised its discretion in

determining that A.M.'s specific and consistent out-of-court statements to the agency caseworker detailing the sexual abuse were sufficiently corroborated by the medical records and by her sibling's out-of-court statements to the caseworker (*see Matter of Samantha F. [Edwin F.],* 169 AD3d 549, 549 [1st Dept 2019], *lv dismissed* 33 NY3d 1042 [2019]; *Matter of Milagros C. [Rosa R.]*, 121 AD3d 481, 482 [1st Dept 2014]). The medical records admitted into evidence, without objection from appellant, which evidenced the presence of "male DNA" found on A.M. during her medical examination along with other biological evidence recovered therefrom further corroborated A.M.'s statements. The record also contains numerous observations by the caseworker, medical personnel, A.M.'s mother, and A.M.'s sibling that after A.M. reported the incident of sexual abuse, she demonstrated fear, anxiety, distress, and trauma. These observations further corroborate A.M.'s account (*see Matter of Jolieanna G. [Jennifer G.]*, 202 AD3d 622, 623 [1st Dept 2022]). Thus, the record as a whole supported a finding of sexual abuse (*see Matter of Corey J. [Corey J.]*, 157 AD3d 449, 450 [1st Dept 2018]).

The court did not deprive appellant of an opportunity to cross-examine the caseworker regarding testimony in which she recounted a statement by J.M. regarding appellant's conduct. On the contrary, the court invited appellant's counsel to cross-examine the caseworker as to the basis for the testimony, yet counsel chose not to do so. Nor did the court otherwise restrict appellant from establishing his defense. Furthermore, the court was entitled to draw the strongest adverse inference against appellant for his failure to testify and present evidence of an alternative version of events (*see Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

Based upon appellant's behavior which "evinced such an impaired level of judgment as to create a substantial risk of harm" [*2]to the children, Family Court properly entered a derivative abuse finding against appellant as to J.G. and J.M., who were living in the home where appellant stayed (*see Matter of S.T.B. [Gerald C.]*, 225 AD3d 414, 415 [1st Dept 2024]; *Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563, 564 [1st Dept 2018]). The evidence that appellant sexually abused A.M. demonstrated, by a preponderance of the evidence, a fundamental defect in his understanding of the duties of parenthood (*see Matter of Ashley M. V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]; *Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]).

We have considered appellant's remaining arguments and find them unavailing.

**Matter of J.M.** AD3d 2024 NY Slip Op 06541 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about June 29, 2023, which, to the extent appealed from as limited by the briefs, found that respondent-appellant sexually abused the child A.M. and derivatively abused the three other children, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's determination that appellant sexually abused A.M., his stepchild, and derivatively abused the three younger children (*see* Family Court Act §§ 1012[e][iii]; 1046[b]; *Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]). The finding of sexual abuse was supported by the child's sworn testimony, which the court found to be credible, as well as the child's records from New York-Presbyterian Hospital, which included her statements similarly describing the incidents of sexual abuse (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 440 [1st Dept 2017]; *Matter of Alijah S. [Daniel S.]*, 133 AD3d 555, 556 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]). Family Court properly determined that the child's out-of-court statements in the hospital records were independently admissible and did not require corroboration because they were relevant to her treatment, diagnosis, and discharge (*see Matter of E.H. [M.H.]*, 209 AD3d 582, 583 [1st Dept 2022]).

Furthermore, appellant's intent to gain sexual gratification from placing the child's hand on his genitals, pressing his genitals against the child's while they were wrestling, repeatedly slapping the child's posterior, and watching the child while she showered, was properly inferred from the acts themselves (*see Matter of Maria S. [Angel A.]*, 185 AD3d 437, 437 [1st Dept 2020]).

There is no basis for disturbing Family Court's credibility determinations, including its evaluation of the child's testimony and its finding that much of appellant's testimony was not credible (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of C.F. [Carlos F.]*, 220 AD3d 506, 506-507 [1st Dept 2023], *lv denied* 41 NY3d 901 [2024]; *Matter of Keydra R. [Robert R.]*, 105 AD3d 588, 589 [1st Dept 2013]). Appellant's testimony confirmed certain details of his interactions with the child, including that he frequently slapped her posterior, wrestled with her while other family members were present, and used the bathroom while the children were showering (*see Matter of M.S. [Andrew S.]*, 198 AD3d 547, 548 [1st Dept 2021]).

The finding that appellant sexually abused the child demonstrated a fundamental defect in his understanding of the responsibilities of parenthood and placed the younger children, who were in the home during the incidents of the abuse, at imminent risk of abuse (*see Matter of Xzandria B. [Nasheen B.],* 183 AD3d 408, 409 [1st Dept 2020]). A finding of derivative abuse is appropriate regardless of whether the younger children were aware of the abuse (*see Matter of Karime R.*, 147 AD3d at 441). Although two of the [*2]younger children were appellant's biological children and the third child was a boy, those distinctions do not undermine the finding of derivative abuse based on

appellant's impaired level of parental judgment (*see Matter of Krystal N. [Juan R.]*, 193 AD3d 602, 602 [1st Dept 2021], *lv denied* 37 NY3d 906 [2021]; *Matter of Lesli R. [Luis R.],* 138 AD3d 488, 489 [1st Dept 2016])

**Matter of I.M.**, AD3d 2024 NY Slip Op 06304 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about April 28, 2023, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that appellant sexually abused the subject child I.M. and derivatively abused the other two subject children, unanimously affirmed, without costs.

Family Court's finding that appellant was a person legally responsible for his niece, I.M., within the meaning of Family Ct Act § 1012(g) is supported by the evidence establishing that, for a period of several years, appellant lived with I.M. and her family, picked I.M. up from school, along with his own daughter, and often watched her until her stepfather returned home from work (*see Matter of Keniya G. [Avery P.],* 144 AD3d 532, 533 [1st Dept 2016]; *Matter of Jayline R. [Jose M.]*, 110 AD3d 419, 420 [1st Dept 2013]).

A preponderance of the evidence supports the finding that appellant sexually abused I.M. several times over a period of several years (*see* Family Ct Act § 1046[a][vi]; [b][i]). I.M.'s statements to her therapist were independently admissible and did not require corroboration because they were relevant to I.M's diagnosis and treatment and therefore constituted an exception to the rule against hearsay (*see Matter of E.H. [M.H.]*, 209 AD3d 582, 583 [1st Dept 2022]).

Family Court also providently exercised its discretion in determining that I.M's out-of-court statements made on separate occasions to the agency caseworker, her stepfather, and the forensic interviewer in which she detailed the sexual abuse were sufficiently corroborated by the mental health records and by the record as a whole (*see Matter of Corey J. [Corey J.]*, 157 AD3d 449, 450 [1st Dept 2018]). The record contains observations, including by I.M's therapist and stepfather, that, after I.M. disclosed the sexual abuse, she demonstrated fear, anxiety, distress, and trauma. These observations further corroborate I.M.'s account (*see Matter of Jolieanna G. [Jennifer G.],* 202 AD3d 622, 623 [1st Dept 2022]). Additional corroboration is provided by the facts that I.M.'s account included specific details (*see Matter of Milagros C. [Rosa R.]*, 121 AD3d 481, 482 [1st Dept 2014]) and reflected "age-inappropriate knowledge of sexual behavior" (*see Matter of Cerenity F. [Jennifer W.]*, 160 AD3d 540, 541 [1st Dept 2018] [internal quotation marks omitted]). Furthermore, the court was entitled to draw the strongest negative inference against appellant for his failure to testify (*see Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

The court properly entered a derivative abuse finding against appellant as to his two biological children. One of the children lived in the same home with I.M. during the period that appellant was abusing her (*see Matter of Cristalyn G. [Elvis S.]*, 158 AD3d 563, 564 [1st Dept 2018]). The evidence that appellant sexually abused I.M. while their families were living in the same residence [*2]demonstrated a fundamental defect in his understanding of the duties of parenthood (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]).

We have considered appellant's remaining arguments and find them unavailing.

**Matter of Kenyana D.**, 229 AD3d 544 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, the petitioner appeals, and the subject child separately appeals, from an order of the Family Court, Kings County (Ilana Gruebel, J.), dated December 22, 2022. The order, after a reopened fact-finding hearing, dismissed the petition.
ORDERED that the order is reversed, on the law and the facts, without costs or disbursements, the petition is reinstated, a finding is made that the father abused the subject child, and the matter is remitted to the Family Court, Kings County, for a dispositional hearing and a determination thereafter.

The petitioner commenced this proceeding pursuant to Family Court Act article 10, alleging that the father sexually abused the subject child. After a fact-finding hearing, in an order of fact-finding dated May 24, 2022, the Family Court found that the father abused the child. Thereafter, the father moved to vacate the order of fact-finding and to reopen the fact-finding hearing, identifying purportedly newly discovered evidence that the child had allegedly recanted her allegations against him. The court granted the father's motion. After a reopened fact-finding hearing, in an order dated December 22, 2022, the court found, in effect, that the father successfully rebutted the petitioner's prima facie showing of sexual abuse and dismissed the petition. The petitioner and the child separately appeal.

At a fact-finding hearing pursuant to Family Court Act article 10, "the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954,

955; *see* Family Ct Act § 1046[b][i]). "The Family Court Act defines an abused child as, inter alia, a child whose parent commits against him or her a sex offense as defined in article 130 of the Penal Law, or allows such an offense to be committed against the child" (*Matter of Vered L. [Yoshi S.]*, 205 AD3d 1028, 1029; *[*2]see* Family Ct Act § 1012[e][iii][A]). While a child's out-of-court statements are insufficient to support a finding of abuse unless they are corroborated, a child's in-court testimony alone is sufficient to support a finding of abuse (*see* Family Ct Act § 1046[a][vi]; *Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 955). "Although deference is to be given to the hearing court's determinations as to credibility, where that court's credibility determination is not supported by the record, 'this Court is free to make its own credibility assessments and overturn the determination of the hearing court'" (*Matter of Tazya B. [Curtis B.]*, 180 AD3d 1039, 1040 [citation omitted], quoting *Matter of Serenity S. [Tyesha A.]*, 89 AD3d 737, 739; *see Matter of Bronx S. [Denzel J.]*, 217 AD3d 956, 957).

Here, the petitioner established by a preponderance of the evidence that the father sexually abused the child. The child's testimony during the fact-finding hearing was consistent and detailed, and any minor inconsistencies "did not render such testimony unworthy of belief" (*Matter of Jose E. [Jose M.]*, 176 AD3d 1201, 1203; *see Matter of Lauryn H. [William A.]*, 73 AD3d 1175, 1176-1177). The child's testimony was sufficient to establish a finding of sexual abuse pursuant to Family Court Act § 1046(b)(i) (*see Matter of Naima E. [Daryl M.]*, ___ AD3d ___, 2024 NY Slip Op 02703 [2d Dept]; *Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 955).

At the reopened fact-finding hearing, the mother of the father's other children (hereinafter the witness) testified that the child recanted her allegations of abuse. The child did not testify at the reopened fact-finding hearing. "[A] child's recantation of allegations of abuse does not necessarily require [the] Family Court to accept the later statements as true because it is accepted that such a reaction is common among abused children" (*Matter of Dayannie I.M. [Roger I.M.]*, 138 AD3d 747, 749 [internal quotation marks omitted]). "Rather, recantation of a party's initial statement simply creates a credibility issue which the trial court must resolve" (*id.* [internal quotation marks omitted]). Here, even assuming that the witness's testimony was credible, it was insufficient to warrant dismissal of the petition. The witness testified that she overheard the child telling other children that the child missed the father. After the witness confronted the child, the child told the witness that "she wished that she never lied . . . by saying that [the father] did those things." The witness did not specify what "things" the child was referring to. During cross-examination, the witness testified that immediately after she asked the child "what did she mean by she lied," the child indicated that "she never said that." The witness also testified on cross-examination that she had previously confronted the child about the allegations against the father, and the child told the witness that "she was sure . . . that these things took place." The alleged

recantation as described by the witness was vague, and the witness's testimony was insufficient to rebut the finding of abuse (*see Matter of Tarahji N. [Bryan N.—Divequa C.]*, 197 AD3d 1317, 1319; *Matter of Brittany K.*, 308 AD2d 585, 586).

Accordingly, the Family Court's determination, in effect, that the father rebutted the petitioner's prima facie showing of sexual abuse is not supported by the record.

The father's remaining contention is unpreserved for appellate review and, in any event, without merit.

**Matter of Jahmere W.**, 230 AD3d 1325 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (Linda M. Capitti, J.), dated January 18, 2023, and (2) an order of disposition of the same court, also dated January 18, 2023. The order of fact-finding, after a fact-finding hearing, found that the father sexually abused the child Jahmere W. and derivatively abused the child Sincere W. The order of disposition, after a dispositional hearing, and upon the father's failure to appear at the dispositional hearing, inter alia, released the children to the custody of their respective mothers.
ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the appeal from the order of disposition is dismissed, without costs or disbursements, except with respect to matters which were the subject of contest (*see* CPLR 5511; *Matter of Joseph Bruce I. [Joseph A.I.]*, 185 AD3d 930, 931); and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

Since the order of disposition appealed from was made upon the father's default, review is limited to matters which were the subject of contest in the Family Court (*see Matter of Joseph Bruce I. [Joseph A.I.]*, 185 AD3d at 931; *Matter of Kieara N. [Shasha F.]*, 167 AD3d 620, 621). Accordingly, on these appeals, review is limited to the court's denial of the father's attorney's application to adjourn the continued fact-finding hearing and the court's finding that the father sexually abused Jahmere W. and derivatively abused Sincere W.

The petitioner commenced these proceedings pursuant to Family Court Act article 10, alleging that the father sexually abused the child Jahmere W. and derivatively abused the child Sincere W. Following a fact-finding hearing, in an order of fact-finding dated January 18, 2023, the Family Court found that the father sexually abused Jahmere W. and derivatively abused Sincere W. After a dispositional hearing, at which the father failed to appear, the court issued an order of disposition dated January 18, 2023, inter alia, releasing the children to the custody of their respective mothers. The father appeals.

Contrary to the father's contention, the Family Court providently exercised its discretion in denying his attorney's application for an adjournment of the continued fact-finding hearing. "The granting of an adjournment rests in the sound discretion of the hearing court upon a balanced consideration of all relevant factors" (*Matter of Sacks v Abraham*, 114 AD3d 799, 800; *see Matter of Angie N.W. [Melvin A.W.]*, 107 AD3d 907, 908). Here, in light of the father's actual knowledge of the date of the continued hearing and his failure to contact his attorney and advise his attorney regarding his failure to appear, the court providently exercised its discretion in denying the father's attorney's application for an adjournment (*see Matter of N. [Fania D.-Alice T.]*, 108 AD3d 551, 552-553).

In a child protective proceeding pursuant to Family Court Act article 10, "the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Emily R. [Magali M.C.]*, 226 AD3d 794, 795). A child's out-of-court statements may provide the basis for a finding of abuse if the statements are sufficiently corroborated by other evidence tending to support the reliability of the child's statements (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118). "Any other evidence tending to support the reliability of the previous statements" may be sufficient corroboration (Family Ct Act § 1046[a][vi]). The out-of-court statements of siblings may properly be used to cross-corroborate one another (*see Matter of Emily R. [Magali M.C.]*, 226 AD3d at 795). "Whether or not proffered corroborative testimony actually 'tend[s] to support the reliability of the previous statements' in a particular case is a fine judgment entrusted in the first instance to the Trial Judges who hear and see the witnesses. In individual cases, 'Family Court Judges presented with the issue have considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated and whether the record as a whole supports a finding of abuse'" (*Matter of Christina F.*, 74 NY2d 532, 536, quoting *Matter of Nicole V.*, 71 NY2d 112, 119). Here, the Family Court's finding that the father sexually abused Jahmere W. is supported by a preponderance of the evidence. We conclude that the court providently exercised its discretion in determining that Jahmere W.'s out-of-court statements were sufficiently corroborated by the evidence of Sincere W.'s out-of-court

statements and that the record as a whole supported a finding of sexual abuse (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d at 117-118).

The Family Court also properly found that the father derivatively abused Sincere W. "Where a [parent's] conduct toward one child demonstrates a fundamental defect in the parent's understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in his or her care, an adjudication of derivative abuse with respect to the other children is warranted" (*Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955). Here, the evidence that the father sexually abused Jahmere W. demonstrated, by a preponderance of the evidence, a fundamental defect in the father's understanding of the duties of parenthood (*see Matter of Kaley G. [William G.]*, 214 AD3d 869, 871).

Accordingly, the Family Court properly found that the father sexually abused Jahmere W. and derivatively abused Sincere W.

**Matter of Oscar P.**, 231 AD3d 731 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Romulo M. appeals from (1) an order of fact-finding of the Family Court, Queens County (Joan L. Piccirillo, J.), dated June 1, 2023, and (2) an order of disposition of the same court dated July 5, 2023. The order of fact-finding, after a fact-finding hearing, found that Romulo M. sexually abused the child Adrianna G. and derivatively abused the children Oscar P. and Leah P. The order of disposition, upon the order of fact-finding and after a dispositional hearing, inter alia, directed Romulo M. to comply with the terms of an order of protection of the same court dated July 5, 2023, and to complete a sex offender treatment program.

ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the order of disposition is affirmed, without costs or disbursements.

In July 2021, the Administration for Children's Services (hereinafter ACS) commenced these proceedings pursuant to Family Court Act article 10, alleging that Romulo M. (hereinafter the appellant) sexually abused the child Adrianna G. and derivatively abused the children Oscar P. and Leah P. Following a fact-finding hearing, the Family Court found that the appellant was a person legally responsible for the care of the

subject children, who are his stepgrandchildren, that he sexually abused the child Adrianna G., and that he derivatively abused the children Oscar P. and Leah P. After a dispositional hearing, the court, inter alia, directed the appellant to complete a sex offender treatment program and to comply with an order of protection in favor of the children and against him.

"'At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected'" (*Matter of Tony C. [Kristine S.—Jadiel L.]*, 226 AD3d 1008, 1010, quoting *Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955; *see* Family Ct Act § 1046[b][i]; *Matter of Katherine L. [Adrian L.]*, 209 AD3d 737, 739). "'Unsworn out-of-court statements of the victim may be received and, if properly corroborated, will support a finding of abuse or neglect'" (*Matter of Tony C. [Kristine S.—Jadiel L.]*, 226 AD3d at 1010-1011, quoting *Matter of Nicole V.*, 71 NY2d 112, 117-118; *see Matter of Janiyah S. [Pedro H.]*, 226 AD3d 909, 911). "In Family Court Act article 10 proceedings, the Family Court has 'considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated and whether the record as a whole supports a finding of abuse'" (*Matter of Kaley G. [William G.]*, 214 AD3d 869, 870-871, quoting *Matter of Christina F.*, 74 NY2d 532, 536). "'[A]lthough the mere repetition of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found in the consistency of the out-of-court repetitions'" (*Matter of Osher W. [Moshe W.]*, 198 AD3d 904, 907, quoting *Matter of Lily BB. [Stephen BB.]*, 191 AD3d 1126, 1127).

Here, the Family Court's finding that the appellant sexually abused the child Adrianna G. is supported by a preponderance of the evidence. Adrianna G.'s out-of-court statements to a mental health professional, her mother, and an ACS caseworker were consistent and detailed about the appellant's sexual abuse of her. In addition, Adrianna G.'s statements were further corroborated by her mother's testimony recounting Adrianna G.'s changed demeanor after the abuse occurred, and the testimony of Adrianna G.'s treating mental health professional that Adrianna G. displayed behaviors consistent with sexual abuse (*see Matter of Jada W. [Fanatay W.]*, 219 AD3d 732, 740; *Matter of Osher W. [Moshe W.]*, 198 AD3d at 907; *Matter of Amberlyn H.P. [Jose H.C.]*, 187 AD3d 920, 921; *Matter of Tazya B. [Curtis B.]*, 180 AD3d 1039, 1040). The appellant's contention that he was not a person legally responsible for the children is without merit (*see Matter of Ariah L. [Jascinta F.]*, 198 AD3d 647, 648).

**Matter of Cherli Q.**, 231 AD3d 833 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Mauricio C. appeals from (1) an order of fact-finding of the Family Court, Kings County (Alicea Elloras-Ally, J.), dated November 21, 2022, and (2) an order of disposition of the same court dated August 8, 2023. The order of fact-finding, after a fact-finding hearing, found that Mauricio C. abused the child Cherli Q. and derivatively neglected the child Alejandro C. The order of disposition, upon the order of fact-finding and after a dispositional hearing, released the child Alejandro C. to the custody of the nonrespondent mother with supervision by the petitioner for a period of three months, and directed Mauricio C. to comply with certain conditions.

ORDERED that the appeal from so much of the order of fact-finding as found that Mauricio C. derivatively neglected Alejandro C. is dismissed, without costs or disbursements, as that portion of the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the order of fact-finding is affirmed insofar as reviewed, without costs or disbursements; and it is further,

ORDERED that the appeal from so much of the order of disposition as released the [*2]child Alejandro C. to the custody of the nonrespondent mother with supervision by the petitioner for a period of three months is dismissed as academic, without costs or disbursements, as the period of supervision has expired; and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The petitioner, the Administration for Children's Services (hereinafter ACS), commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the appellant sexually abused the child Cherli Q. and derivatively neglected the child Alejandro C. After a fact-finding hearing, the Family Court found that the appellant abused Cherli Q. and derivatively neglected Alejandro C. After a dispositional hearing, the court released Alejandro C. to the custody of the nonrespondent mother with supervision by ACS for a period of three months, and directed the appellant to comply with certain conditions. These appeals ensued.

The appeal from so much of the order of disposition as released Alejandro C. to the custody of the nonrespondent mother with supervision by ACS for a period of three months has been rendered academic, since the period of supervision has expired by its own terms (*see Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 856; *Matter of Aliyah T. [Jaivon T.]*, 174 AD3d 722, 723). However, since the adjudication of derivative neglect constitutes a permanent and significant stigma that might indirectly affect the

appellant's status in future proceedings, the appeal from so much of the order of disposition as brings up for review the finding of derivative neglect is not academic (*see Matter of Serenity R. [Truman C.]*, 215 AD3d at 855-856).

Contrary to the appellant's contention, the evidence adduced at the fact-finding hearing was sufficient to prove, by a preponderance of the evidence, that the appellant sexually abused Cherli Q. (*see id.* at 856-857; *Matter of Destiny R. [Rene G.]*, 212 AD3d 629, 631). The Family Court's credibility determinations are supported by the record and will not be disturbed on appeal (*see Matter of Serenity R. [Truman C.]*, 215 AD3d at 857; *Matter of Adebayo J. [Eniola J.]*, 176 AD3d 1209, 1211).

Further, the Family Court correctly concluded that the appellant derivatively neglected Alejandro C. "Where a person's conduct toward one child demonstrates a fundamental defect in the parent's understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in his or her care, an adjudication of derivative neglect with respect to the other children is warranted" (*Matter of Serenity R. [Truman C.]*, 215 AD3d at 857 [internal quotation marks omitted]; *see Matter of Anthony M.-B. [Anthony B.]*, 208 AD3d 1327, 1328-1329). Contrary to the appellant's contention, the court correctly found that, given the seriousness of his conduct in sexually abusing Cherli Q., the risk to Alejandro C. remained (*see Matter of Serenity R. [Truman C.]*, 215 AD3d at 857; *Matter of Anthony M.-B. [Anthony B.]*, 208 AD3d at 1329).

The appellant's remaining contentions are without merit.

**Matter of Davena A.**, 232 AD3d 595 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Richmond County (Peter F. DeLizzo, J.), dated August 16, 2023. The order, after a fact-finding hearing, and upon a finding that the petitioner failed to establish that the father derivatively abused and neglected the subject children, Davena A. and Daenerys A., based on his sexual abuse of the child Hannah D., dismissed the petitions.
ORDERED that the order is reversed, on the law and the facts, without costs or disbursements, the petitions are reinstated, a finding is made that the father derivatively abused and neglected the subject children, Davena A. and Daenerys A., based on his sexual abuse of the child Hannah D., and the matters are remitted to the Family Court, Richmond County, for a dispositional hearing and a determination thereafter.

The petitioner, Administration for Children's Services (hereinafter ACS), commenced these related proceedings pursuant to Family Court Act article 10 alleging that the father derivatively abused and neglected his daughters (hereinafter the subject children) based upon his sexual abuse of his niece, Hannah D. After a fact-finding hearing, the Family Court determined that Hannah D. credibly testified to multiple instances of sexual abuse by the father, but the court dismissed the petitions alleging derivative abuse and neglect as to the subject children. In so doing, the court found that ACS had failed to establish a nexus between the father's abuse of Hannah D. and the alleged [*2]derivative abuse and neglect, as one of his daughters was not in proximity to the sexual abuse and the other daughter was not yet born at the time of the sexual abuse. ACS appeals. We reverse.

A finding of derivative abuse of one child does not, by itself, establish that other children in the household have been derivatively abused or neglected (*see Matter of David P. [Elisa P.]*, 130 AD3d 739; *Matter of Harmony M.E. [Andre C.]*, 121 AD3d 677; *Matter of Jeremiah I.W. [Roger H.W.]*, 115 AD3d 967). In determining whether such a child should be adjudicated abused or neglected, the "determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceedings that it can reasonably be concluded that the condition still exists" (*Matter of Elijah O. [Marilyn O.]*, 83 AD3d 1076, 1077 [internal quotations marks omitted]). In such a case, "the condition is presumed to exist currently and the respondent has the burden of proving that the conduct or condition cannot reasonably be expected to exist currently or in the foreseeable future" (*Matter of Jeremiah I.W. [Roger H.W.]*, 115 AD3d at 969 [internal quotation marks omitted]; *see Matter of Jamarra S. [Jessica S.]*, 85 AD3d 803; *Matter of Cruz*, 121 AD2d 901).

In this case, a preponderance of the evidence supported a finding of derivative abuse and neglect. The nature of the father's direct abuse of Hannah D., the frequency of the father's acts, and the circumstances of the father's commission of the acts evidence fundamental flaws in the father's understanding of the duties of parenthood. In addition, the father's actions affirmatively created a substantial risk of physical injury which would likely cause impairment of the subject children's health within the meaning of Family Court Act § 1012 (e)(ii), thus requiring a finding that the subject children have been derivatively abused and neglected (*see Matter of Lluvia G. [Bolivar G.G.]*, 183 AD3d 642; *Matter of Daniel W.*, 37 AD3d 842; *Matter of Amanda LL.*, 195 AD2d 708). The finding of derivative abuse and neglect is not undermined by the fact that at the time of the father's abuse of Hannah D., one of the subject children was an infant and the other had not yet been born (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439). The evidence demonstrates that the father's parental judgment and impulse control are so defective as to create a substantial risk to any child in his care (*see Matter of Kylani R.*

*[Kyreem B.]*, 93 AD3d 556). Moreover, the father failed to establish by a preponderance of the evidence that the condition cannot reasonably be expected to exist currently or in the foreseeable future (*see Matter of Aryelle F. [Esperanza F.]*, 148 AD3d 1014; *Matter of Dayyan J.L. [Autumn M.]*, 131 AD3d 1243). Accordingly, the Family Court should not have dismissed the petitions.

**Matter of Esther R.-M. D.**, 232 AD3d 738 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, Carry Q. appeals from an order of disposition of the Family Court, Queens County (Margaret Morgan, J.), dated June 7, 2023. The order of disposition, upon an order of fact-finding of the same court dated February 9, 2023, made after a fact-finding hearing, finding that Carry Q. abused and neglected the child Jovanni A. O. C. and derivatively abused and neglected the child Esther R.-M. D., and after a dispositional hearing, inter alia, placed the child Jovanni A. O. C. in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing, released the child Esther R.-M. D. to the custody of that child's nonrespondent mother until completion of the next permanency hearing, and directed Carry Q. to submit to a mental health evaluation, complete a sex offender treatment program, and comply with the terms of an order of protection of the same court dated June 5, 2023, directing her to stay away from the subject children until and including October 25, 2023.
ORDERED that the appeal from so much of the order of disposition as placed the child Jovanni A. O. C. in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing and released the child Esther R.-M. D. to the custody of that child's nonrespondent mother until completion of the next permanency hearing is dismissed as academic, without costs or disbursements, as the periods of placement have expired; and it is further,

ORDERED that the appeal from so much of the order of disposition as directed Carry Q. to comply with the terms of an order of protection of the same court dated June 5, 2023, is dismissed as academic, as the order of protection has expired by its own terms; and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

In December 2018, the petitioner commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that Carry Q. (hereinafter the grandmother) sexually abused and neglected the child Jovanni A. O. C. and derivatively

abused and neglected the child Esther R.-M. D., who are her grandchildren. Following a fact-finding hearing, the Family Court found that the petitioner established by a preponderance of the evidence that the grandmother abused and neglected Jovanni A. O.C. and derivatively abused and neglected Esther R.-M. D. In an order of disposition dated June 7, 2023, the court, among other things, placed Jovanni A. O. C. in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing, released Esther R.-M. D. to the custody of that child's nonrespondent mother until the completion of the next permanency hearing, and directed the grandmother to submit to a mental health evaluation, complete a sex offender treatment program, and comply with the terms of an order of protection dated June 5, 2023, directing her to stay away from the children until and including October 25, 2023. The grandmother appeals.

The appeal from so much of the order of disposition as placed Jovanni A. O. C. in the custody of the Commissioner of Social Services of the City of New York until the completion of the next permanency hearing and released Esther R.-M. D. to the custody of that child's nonrespondent mother until the completion of the next permanency hearing must be dismissed as academic, as the periods of placement have expired (*see Matter of Zana C. [Dana F.]*, 171 AD3d 1045, 1046; *Matter of Michael G. [Marie S.F.]*, 152 AD3d 590, 590). The appeal from so much of the order of disposition as directed the grandmother to comply with the order of protection dated June 5, 2023, must also be dismissed as academic, because that order of protection expired by its own terms, and the determination of the appeal as to that order would have no direct effect on the parties (*see Matter of Janiyah S. [Pedro H.]*, 226 AD3d 909, 910; *Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 856). However, because the findings of abuse and neglect constitute a permanent and significant stigma that might indirectly affect the grandmother's status in future proceedings, the appeal from so much of the order of disposition as brings up for review the findings of abuse and neglect and derivative abuse and neglect is not academic (*see Matter of Janiyah S. [Pedro H.]*, 226 AD3d at 910; *Matter of Alisha S. [Carine S.-K.]*, 223 AD3d 827, 828).

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Vered L. [Yoshi S.]*, 205 AD3d 1028, 1029; *see* Family Ct Act § 1046[b][i]; *Matter of Ciniya P. [Omar S.W.]*, 217 AD3d 954, 955). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Amberlyn H.P. [Jose H.C.]*, 187 AD3d 920, 920 [internal quotation marks omitted]; *Matter of M.W. [Mohammad W.]*, 172 AD3d 879, 880 [internal quotation marks omitted]).

Here, contrary to the grandmother's contentions, the evidence adduced at the fact-finding hearing, including the testimony of Jovanni A. O. C., was sufficient to prove by a preponderance of the evidence that the grandmother sexually abused Jovanni A. O. C. (*see* Family Ct Act § 1012[e][iii][A]; Penal Law §§ 130.35, 130.50 [former], 130.52[1], 130.60, 130.65; *Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 955; *Matter of Vered L. [Yoshi S.]*, 205 AD3d at 1029) and neglected Jovanni A. O. C. by inflicting excessive corporal punishment on him (*see* Family Ct Act § 1012[f][i][B]; *Matter of Nathaniel I.G. [Marilyn A.P.]*, 227 AD3d 806, 807; *Matter of Sahyir F. [Jalessa F.]*, 212 AD3d 808, 810; *Matter of M.W. [Mohammad W.]*, 172 AD3d at 881). "[W]here, as here, the Family Court is primarily confronted with issues of credibility, its findings must be accorded deference on appeal, as they were supported by the record" (*Matter of Jada A. [Robert W.]*, [*2]116 AD3d 769, 770; *see Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 955).

Moreover, contrary to the grandmother's contention, the Family Court's finding that she derivatively abused and neglected Esther R.-M. D. was supported by a preponderance of the evidence. "'[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent'" (*Matter of Nyla S. [Jason B.]*, 224 AD3d 691, 692, quoting Family Ct Act § 1046[a][ii]). "The focus of the inquiry with respect to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for the other child or children in the [respondent's] care" (*Matter of Janiyah S. [Pedro H.]*, 226 AD3d at 912; *see Matter of Nyla S. [Jason B.]*, 224 AD3d at 693). Here, the evidence adduced at the fact-finding hearing demonstrated, by a preponderance of the evidence, a fundamental defect in the grandmother's understanding of the duties of a person with legal responsibility for the care of children and such an impaired level of judgment as to create a substantial risk of harm for any child in her care (*see Matter of Ciniya P. [Omar S.W.]*, 217 AD3d at 956; *Matter of Vered L. [Yoshi S.]*, 205 AD3d at 1029; *Matter of Jose E. [Jose M.]*, 176 AD3d 1201, 1203).

The grandmother's remaining contentions are without merit.

**Matter of Gabriella X.**, 232 AD3d 1083 (3rd Dept., 2024)

Appeal from an order of the Family Court of Ulster County (Sarah Rakov, J.), entered June 13, 2023, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected and/or abused.

Respondent Erick Y. (hereinafter the father) is the father of three children (born in 2004, 2007 and 2016). In July 2021, petitioner commenced this abuse/neglect proceeding against the father, alleging that he subjected the oldest child to sexual contact nine years earlier — between the years 2007 through 2014 — when the child was two to eight years of age; and that the father had sexual contact with the middle child.[FN1] At a fact-finding hearing, at the close of petitioner's case-in-chief, the father moved to dismiss the petition for failure to establish a prima facie case, arguing that the oldest child's out-of-court statements were insufficiently corroborated. Family Court denied the father's motion and, following the hearing, issued an order concluding that the father had sexually abused and neglected the oldest child and had derivatively abused and neglected the two younger children. The father appeals.

The father contends that Family Court erred in denying his motion to dismiss the petition at the conclusion of petitioner's case-in-chief because there was insufficient evidence to corroborate the oldest child's out-of-court statements. "Where a motion is made by the respondent at the close of the petitioner's case to dismiss a neglect petition, Family Court must determine whether the petitioner presented a prima facie case of neglect, viewing the evidence in a light most favorable to the petitioner and affording it the benefit of every inference which could be reasonably drawn from the proof presented" (*Matter of Christian Q.*, 32 AD3d 669, 670 [3d Dept 2006] [internal citations omitted]; *see Matter of Carmellah Z. [Casey V.]*, 177 AD3d 1364, 1365-1366 [4th Dept 2019]). "To establish sexual abuse in a Family Ct Act article 10 proceeding, the petitioner is required to prove by a preponderance of the evidence that the respondent committed or allowed another to commit acts constituting crimes under Penal Law article 130" (*Matter of Kaleb LL. [Bradley MM.]*, 218 AD3d 846, 848 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Chloe L. [Samantha L.]* 200 AD3d 1234, 1235 [3d Dept 2021]). "A child's prior out-of-court allegations of abuse or neglect are admissible in evidence if such statements are sufficiently corroborated by other evidence tending to establish their reliability" (*Matter of Charles Q. [Pamela Q.]*, 182 AD3d 639, 640 [3d Dept 2020] [internal quotation marks and citations omitted]; *see Matter of Lee-Ann W. [James U.]*, 151 AD3d 1288, 1290 [3d Dept 2017], *lv denied* 31 NY3d 908 [2018]). "The corroboration requirement is not demanding and may be satisfied by any other evidence tending to support the reliability of the child's previous statements, including medical [*2]indications of abuse, expert validation testimony, cross-corroboration by another child's similar statements, marked changes in a child's behavior, and sexual behavior or knowledge beyond a child's years" (*Matter of Kaleb LL. [Bradley MM.]*, 218 AD3d at 848 [internal quotation marks, emphasis and citations omitted]; *see Matter of Lee-Ann W. [James U.]*, 151 AD3d at 1292).

At the hearing, petitioner offered the testimony of the children's mother, two caseworkers,[FN2] and the video recording of the oldest child's interview with the Orange

County Department of Social Services caseworker and a State Police investigator. The mother testified that when the oldest child was 17 years of age, she first disclosed the allegations of sexual contact to her. Thereafter, each caseworker testified that the oldest child told them that her father had sexual contact with her from approximately two years of age until she was eight. The caseworkers further testified that the oldest child explained that her memory of the abuse was triggered when she overheard her youngest sister make reference to a secret that she held with her father. The record also reveals that there was no additional evidence of any kind presented by petitioner that corroborated the oldest child's out-of-court statements. For example, there was no medical evidence of any sort, nor did the mother or anyone else point to any change in the oldest child's behavior, or indications of inappropriate sexual knowledge or behavior, nor was there any expert testimony to validate the oldest child's account of sexual abuse, or to explain the nine-year gap between the cessation of the sexual contact and the allegations of same. While there was some testimony by the mother that the child has had nightmares since she was very young and has been diagnosed with anxiety, there was no testimony, expert or otherwise, linking the nightmares or diagnosis to the alleged sexual contact. While Family Court correctly noted that a child's out-of-court allegations of sexual abuse — as testified to by the caseworkers — can be sufficiently corroborated by the child's detailed in-court testimony (*see Matter of Kaydence O. [Destene P.]*, 162 AD3d 1131, 1133 [3d Dept 2018]), petitioner did not present the oldest child as a sworn witness.[FN3] Finally, there was no cross-corroboration of the oldest child's statements by her siblings as the two younger children did not disclose any sexual abuse to their mother or during the initial interview. The younger two children did not give sworn testimony at the fact-finding hearing nor were the video recordings of their interviews with the caseworker admitted into evidence.

As petitioner tendered insufficient proof to corroborate the oldest child's out-of-court statements (*see Matter of Katrina CC. [Andrew CC.]*, 118 AD3d at 1066; *Matter of Kayla F.*, 39 AD3d 983, 985 [3d Dept 2007]; *Matter of Sasha R.*, 24 AD3d 902, 903 [3d Dept 2005]; *Matter of Douglas NN.*, 277 AD2d 749, 750 [3d Dept 2000]), Family Court [*3]erred in denying the father's motion to dismiss the petition. Accordingly, Family Court's adjudication that the oldest child was abused and neglected and that the younger children were derivatively abused and neglected must be reversed (*see Matter of Katrina CC. [Andrew CC.]*, 118 AD3d at 1066). The father's remaining contentions have been rendered academic.

ORDERED that the order is reversed, on the law, without costs, and petition dismissed.

**Footnotes**

**Footnote 1:** The record reveals that there was limited testimony by the caseworker as to the middle child's out-of-court statement regarding the father's alleged sexual contact.

This allegation was unaddressed by Family Court.

**Footnote 2:** This matter was initially investigated by the Orange County Department of Social Services and was subsequently transferred to the Ulster County Department of Social Services. Both an Orange County caseworker and an Ulster County caseworker testified.

**Footnote 3:** The oldest child subsequently testified; however, it was after petitioner had rested and the father moved to dismiss the petition. Therefore, the oldest child's testimony is not relevant to our review (*compare Matter of Alivia F. [John F.]*, 194 AD3d 709, 711 [2d Dept 2021]).

**Matter of Mekayla S.**, 229 AD3d 1040 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 15, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused the subject child.
It is hereby ORDERED that the order so appealed from is affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 1 from an order of fact-finding and disposition that, inter alia, adjudged that she abused her daughter. In appeal No. 2, the mother appeals from an order of fact-finding and disposition that, inter alia, adjudged that she derivatively abused her son. The adjudications arose from allegations that the mother's boyfriend sexually abused the daughter on multiple occasions.

The mother contends in both appeals that Family Court erred in admitting in evidence home surveillance videos depicting the abuse inasmuch as petitioner failed to establish the authenticity of the videos. Under the circumstances of this case, we conclude that the videos were sufficiently authenticated through testimony regarding their source and how they were discovered in conjunction with testimony supporting the conclusion that the videos depicted the area and individuals they purported to depict (*see People v Goldman*, 35 NY3d 582, 595-596 [2020]; *see generally People v Jordan*, 181 AD3d 1248, 1249-1250 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]).

The videos were discovered by the Federal Bureau of Investigation (FBI) during an unrelated investigation in late January 2022 into the trading of child pornography. The FBI executed a search warrant upon a person (suspect) who was a subject of their investigation. The suspect admitted to an FBI special agent that he had been hacking into security web cameras and that, in 2019, he had hacked into a security camera and observed what he believed was an adult male sexually abusing a teenage girl. Following the suspect's directions, the FBI was able to obtain from the suspect's computer three videos and, from there, details regarding the security camera login information, including an email address. Through the FBI's investigative work, together with the assistance of the New York State Police, it was determined that the videos came from a camera in the house in which the mother resided with the subject children and her boyfriend. The FBI agent explained how he copied the videos from the suspect's computer onto a DVD, and he testified that the videos on the DVD that was admitted in evidence at the fact-finding hearing were true and accurate copies of the videos he viewed on the suspect's computer. He testified that he did not make any observations that led him to believe that the video footage had been tampered with or altered in any way. The videos were date-stamped from May, June, and July 2019.

In the course of the investigation, the State Police obtained a New York State driver's license of the male occupant of the house and also a student school identification card of the teenage girl who lived in the house. The identification cards portrayed the individuals in the videos. A detective with the State Police testified that he showed screenshots from the videos to the mother, who identified the female in one image as her daughter and the male in another as her boyfriend. The mother refused to view the videos.

The mother contends that petitioner failed to authenticate the videos through the testimony of a person who witnessed the events, made the videos, or had sufficient knowledge of the surveillance system to show that it accurately recorded the events. She further contends that petitioner failed to establish that the videos were not fabricated by the suspect. We reject those contentions.

The admissibility of video evidence rests within the sound discretion of the trial court so long as a sufficient foundation for its admissibility has been proffered (*see People v Patterson*, 93 NY2d 80, 84 [1999]). In determining whether a proper foundation has been laid, the accuracy of the object itself is the focus of inquiry (*see People v McGee*, 49 NY2d 48, 59 [1979], *cert denied* 446 US 942 [1980]). "Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it" (*id.*; *see People v Price*, 29 NY3d 472, 476 [2017]). A video "may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the video[ ] accurately represents the

subject matter depicted" (*Patterson*, 93 NY2d at 84). A video may also be authenticated, however, by "[t]estimony, expert, or *otherwise* . . . establish[ing] that [the] video[ ] 'truly and accurately represents what was before the camera' " (*id*. [emphasis added]). "[T]he foundation necessary to establish [authenticity] may differ according to the nature of the evidence sought to be admitted" (*Goldman*, 35 NY3d at 595 [internal quotation marks omitted]).

We agree with the court that the videos were sufficiently authenticated and that "any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility" (*People v Houston*, 181 AD3d 477, 478 [1st Dept 2020], *lv denied* 35 NY3d 1027 [2020] [internal quotation marks omitted]). The video came into police possession through unusual circumstances, and through the investigation, the police were able to corroborate much of what was depicted in the video. The testimony of the FBI agent and the State Police detective authenticated the videos through circumstantial evidence of their "appearance, contents, substance, internal patterns, and other distinctive characteristics" (*People v Franzese*, 154 AD3d 706, 707 [2d Dept 2017], *lv denied* 30 NY3d 1105 [2018]; *see* Guide to NY Evid rule 9.05 [6], Methods of Authentication and Identification, https://nycourts.gov/judges/evidence/9-AUTHENTICITY/9.05_METHODS.pdf [last accessed May 16, 2024]; *see also Jordan*, 181 AD3d at 1249-1250; *see generally Goldman*, 35 NY3d at 595-596). The testimony at the fact-finding hearing established that the videos depicted the living room of the home in which the mother, the subject children, and the boyfriend lived. The State Police detective testified that the mother identified her daughter and boyfriend in screenshots taken from the videos; that he observed cameras in the house, including in the living room; and that he observed that the living room and its furnishings matched what was shown in the videos. As the court noted, the same couch, afghan, end table, and lamp were all visible in the videos and photographs. Other particularly specific items the police recovered from the home were also seen in the videos. In addition, the mother, the children, and the boyfriend were all easily identifiable in the videos. The court determined that the "actions, dialogue, and behavior shown in the videos show no indication of any tampering." In other words, there were "distinctive identifying characteristics" in the videos themselves (*Goldman*, 35 NY3d at 595). There was also the "significant fact" that the mother did not dispute that (*id*.). Rather, the mother confirmed through the screenshots from the videos that the individuals shown were her children and boyfriend. In addition, the FBI agent testified that he primarily investigated child pornography and performed digital forensic work and that he saw no signs of alteration or tampering with the videos. We therefore conclude that petitioner established that the videos "accurately represent[ed] the subject matter depicted" (*id*. [internal quotation marks omitted]), and we further conclude that the court acted within its "founded discretion" (*Patterson*, 93 NY2d at 84) in admitting them in evidence.

Contrary to the mother's further contention in appeal No. 1, the court's finding of abuse is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). Because the mother failed to testify, the court was permitted to "draw the strongest inference that the [*2]opposing evidence permit[ed]" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *see Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1442 [4th Dept 2022]; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1678 [4th Dept 2021]). Although the mother did not directly participate in the boyfriend's sexual abuse of the daughter, the evidence permitted the court to infer that the mother knew or should have known about the abuse and did nothing to prevent it (*see Matter of Lynelle W.*, 177 AD2d 1008, 1008 [4th Dept 1991]; *see also Matter of Peter C.*, 278 AD2d 911, 911 [4th Dept 2000]).

The court afforded the videos great weight based on clear evidence of their reliability, including that the room depicted in the videos was the same room that was shown on photographs taken by the police when they searched the home where the mother, her children, and her boyfriend lived. We note that the mother refused to view the videos of the abuse; that she returned to the home with her children even though the State Police asked her not to do so; and that she chose not to refute any of petitioner's evidence.

Contrary to the mother's contention in appeal No. 2, we conclude that the facts surrounding the abuse of the daughter were "so closely connected with the care of" the son so as to justify the finding of derivative abuse (*Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of Alyssa C.M.*, 17 AD3d 1023, 1024 [4th Dept 2005], *lv denied* 5 NY3d 706 [2005]).

Contrary to the mother's further contention in appeal No. 2, the dispositional provisions of the court's order, including those requiring her to engage in domestic violence counseling, attend a sexual abuse prevention program, and admit that the sexual abuse had occurred, were "consistent with the best interests of [her son] after consideration of all relevant facts and circumstances, and [were] supported by a sound and substantial basis in the record" (*Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part & denied in part* 26 NY3d 941 [2015] [internal quotation marks omitted]; *see generally Matter of Derrick C.*, 52 AD3d 1325, 1326-1327 [4th Dept 2008], *lv denied* 11 NY3d 705 [2008]).

All concur except Whalen, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and, for the reasons set forth below, I would reverse the order and dismiss the petition in each appeal.

As noted by the majority, the digital video files at issue in this case were obtained in 2022 by the Federal Bureau of Investigation (FBI) from an individual (suspect) who was under investigation for possession of child pornography. Following further investigation,

law enforcement came to believe that the files contained home surveillance video recorded in May, June, and July 2019 inside respondent mother's home, where the mother lived together with her boyfriend and the children who are the subject of these proceedings.

The majority concludes that "the videos were sufficiently authenticated through testimony [at the fact-finding hearing] regarding their source and how they were discovered in conjunction with testimony supporting the conclusion that the videos depicted the area and individuals they purported to depict." I disagree with that conclusion and instead conclude that the facts of this case are materially indistinguishable from those in *People v Patterson* (93 NY2d 80, 84 [1999]).

In *Patterson*, the trial court admitted in evidence a surveillance video that purported to show a crime that took place inside a shop. There was no authentication testimony from the parties who witnessed the events or from the shop owner who maintained the surveillance system; instead, the trial court relied on testimony from police officers who identified one of the individuals shown on the video and confirmed that the video accurately depicted the "physical layout" of the area where the purported crime had taken place (*People v Patterson*, 242 AD2d 740, 741 [2d Dept 1997], *revd* 93 NY2d 80 [1999]). The trial court further relied on evidence of chain of custody, specifically that officers "obtained the videotape directly from [the shop owner] approximately two weeks after the crime and kept it in their possession, unaltered, until the trial" (*id.*). Although the Court of Appeals reversed the conviction on other grounds, it nevertheless addressed the "inadequate basis for admissibility" of the video, noting that "the trial record . . . lack[ed] authentication to justify" admission of the video due to the "foundational vacuum" and failure to provide a full chain of custody (*Patterson*, 93 NY2d at 85).

Here, as in *Patterson*, there was no testimony from a party who witnessed the events depicted in the videos or from a person who controlled or maintained the system that made the recording. Instead, as in *Patterson*, petitioner offered testimony as to the identity of the subjects of the video and testimony verifying the location where the video took place. Moreover, the chain of custody evidence offered here was significantly weaker than what was offered in *Patterson* inasmuch as petitioner did not submit any testimony from the suspect who purportedly recorded the videos in 2019, only from the FBI agent who transferred the videos from the suspect's computer more than two years later. The agent testified that he had experience "perform[ing] digital forensic work," but did not elaborate on how that experience trained him to identify alterations to videos. Although he further testified "that, based on his technical experience and expertise, the video showed no signs of being manipulated or altered," he provided no explanation or basis for this belief. "[G]iven the inability of the witness to testify regarding" the accuracy

or possible editing of the videos, as well as "his lack of personal knowledge as to the creation of the proffered [videos] and how [they] came into the possession of the" suspect, I conclude that the agent's testimony did not, on its own, provide a sufficient basis for their authentication (*Torres v Hickman*, 162 AD3d 821, 823 [2d Dept 2018]).

Although the Court of Appeals in *People v Goldman* (35 NY3d 582 [2020]) applied a less stringent authenticity standard with respect to the admission of a music video file uploaded to YouTube, the Court noted that the video "was introduced for its relevance to defendant's motive related to territorial gang activity—which is not an element of the offense—rather than specifically offered for its truth" (*id.* at 595). Here, inasmuch as the daughter denied that the abuse took place and inasmuch as the boyfriend did not testify at the fact-finding hearing, the videos are the only evidence that would support a finding of abuse.

Because petitioner failed to provide a sufficient legal foundation establishing that the videos "accurately represent[ed] the subject matter depicted" (*id.*; *see Patterson*, 93 NY2d at 85), I conclude that the videos should not have been admitted. Without the videos, there is no evidence to sustain the petitions, and I would therefore dismiss them.

Even assuming arguendo that the videos were properly admitted, I further disagree with the majority that petitioner established by a preponderance of the evidence that the mother abused the daughter, and I conclude that petitioner also failed to establish that the mother derivatively abused the son. The court determined that the mother abused the daughter because the mother "knew or should have known" that the boyfriend was sexually abusing the daughter, "but did nothing, allowing the abuse to continue." I acknowledge this Court's precedent in some cases that both abuse and neglect may be shown where a parent knew or should have known of abuse and failed to stop it (*see Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322 [4th Dept 2010]; *see also Matter of Lynell W.*, 177 AD2d 1008, 1008 [4th Dept 1991]). To the extent that those cases stand for the proposition that a finding of *neglect* may be made against such a parent, that proposition meets the standard set forth in the statute inasmuch as a parent who knew or should have known that a child was being abused but failed to intervene may be found to have failed "to exercise a minimum degree of care" and to have acted "unreasonably" under the circumstances (Family Ct Act § 1012 [f] [i] [B]; *see generally Matter of Angelina M. [Marilyn O.]*, 224 AD3d 1223, 1223-1224 [4th Dept 2024], *lv denied* — NY3d — [2024]; *Matter of Boryana D. [Victoria D.]*, 157 AD3d 1011, 1012 [3d Dept 2018]; *Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411, 412 [1st Dept 2012]). However, to the extent that those cases stand for the proposition that a finding of *abuse* may be sustained on an identical basis, or indeed on any basis less than actual knowledge, I respectfully conclude that they were wrongly decided and should no

longer be followed (*see Dayanara V.*, 101 AD3d at 412; *Matter of Jose Y. [Georgina Y.]*, 177 AD2d 580, 581 [2d Dept 1991]; *see generally* Family Ct Act § 1012 [e] [iii] [A]).

Here, even taking into account the adverse inference against the mother, I conclude that "the record does not support a finding of actual knowledge that would constitute abuse" of the daughter (*Jose Y.*, 177 AD2d at 581). Inasmuch as there is no evidence that the mother had actual knowledge of the abuse of the daughter and, moreover, no evidence that the son was abused or was aware of any abuse, I further conclude that the derivative abuse finding as to the son was not supported by the record (*see Matter of T.S. [K.A.]*, 200 AD3d 569, 570 [1st Dept 2021], *lv denied* 38 NY3d 904 [2022]; *see generally Matter of Cleophus M.B. [Erika B.]*, 90 AD3d 1512, 1512 [4th Dept 2011]).

Finally, even if there had been a proper determination of derivative abuse, I conclude that the dispositional provisions of the order in appeal No. 2 did not reflect a resolution consistent with the son's best interests under the unusual circumstances of this case (*see generally Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part & denied in part* 26 NY3d 941 [2015]). After the children were removed, the mother found employment and moved into new housing without the boyfriend. She also completed a parenting class and attended all visits with the children. The sexual abuse alleged in the petitions did not involve the son, who denied knowledge of any inappropriate behavior in the house. Further, because the daughter consistently maintained that no abuse had taken place, the court's requirement that the mother admit that the sexual abuse had occurred was, in effect, a requirement that the mother reject the word of her daughter and instead rely solely on the disputed video evidence. Taking the unusual provenance of the videos into account, and weighing the damage that might be done to the son through the mother's failure to admit that another child had been sexually abused against the damage that might be done through a foster-care or group-home placement, I submit that return to the mother is in the child's best interests. For all of those reasons, I would reverse the order and dismiss the petition in each appeal.

# Physical Abuse

**Matter of Jaycob S.**, 229 AD3d 1058 (4th Dept., 2024)

Appeals from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered December 27, 2021, in a proceeding pursuant to Family Court Act article 10.

The order, among other things, placed the subject children in the custody of petitioner and issued "a complete stay-away order of protection" on behalf of the subject children against both respondents.
It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the order of protection against respondent Robert M.M., II, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondents maternal grandfather and his stepsister appeal, in appeal No. 1, from an order that, inter alia, placed Jaymes S. and Jaycob S. in the custody of petitioner. In appeal No. 2, respondents appeal from an order that, inter alia, placed Jaylynn J. in the custody of petitioner. In each order, Family Court issued "a complete stay-away order of protection . . . on behalf of the children" against respondents.

"Family Court Act § 1046 (a) (ii) provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondents, and (2) that [the] respondents were the caretakers of the child at the time the injury occurred" (*Matter of Grayson R.V. [Jessica D.]*, 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022] [internal quotation marks omitted]; *see Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Contrary to respondents' contention in appeal No. 2, petitioner established that Jaylynn J. suffered numerous injuries that "would ordinarily not occur absent an act or omission of respondents" (*Philip M.*, 82 NY2d at 243). Section 1046 (a) (ii) "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" (*Philip M.*, 82 NY2d at 244). Although the burden of proving child abuse or neglect rests with the petitioner (*see id.*; *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]), once the petitioner "has established a prima facie case, the burden of going forward shifts to [the] respondents to rebut the evidence of . . . culpability" (*Philip M.*, 82 NY2d at 244; *see generally Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). Not only did petitioner elicit medical testimony of Jaylynn J.'s injuries to establish its prima facie case, but it also elicited testimony of the children's disclosures of physical abuse inflicted on Jaylynn J. at the hands of respondents. Petitioner further established that Jaylynn J. failed to receive adequate nutrition in respondents' care (*see Matter of Ahren B.-N. [Gary B.-N.]*, 222 AD3d 1403, 1405 [4th Dept 2023]; *Matter of Dustin B.*, 24 AD3d 1280, 1281 [4th Dept [*2]2005]). Respondents failed to rebut the evidence of culpability.

Contrary to respondents' further contention, we conclude that the court did not impermissibly place the burden of proof on them. Rather, the court's decision reflects

that it properly considered whether respondents had rebutted the evidence of their culpability (*see Philip M.*, 82 NY2d at 244).

Contrary to respondents' contention in appeal No. 1, the court properly determined that respondents derivatively neglected Jaymes S. and Jaycob S. Pursuant to Family Court Act § 1046 (a) (i), "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, [a] respondent." "In order [t]o sustain a finding of derivative neglect, the prior finding must be so proximate in time to the derivative proceeding so as to enable the factfinder to reasonably conclude that the condition still exists . . . ; however, there is no bright-line, temporal rule beyond which [this Court] will not consider older child protective determinations" (*Matter of Sean P. [Sean P.]*, 162 AD3d 1520, 1520 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]). We conclude that the evidence adduced at the fact-finding hearing concerning Jaylynn J. indicates that Jaymes S. and Jaycob S. were "equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]).

We agree with respondent grandfather, however, in appeal Nos. 1 and 2, that the court erred in imposing orders of protection against him pursuant to Family Court Act § 1056 (4). "Subdivision (4) of [Family Court Act] section 1056 allows a court to issue an independent order of protection . . . , but only against a person . . . who is not related by blood or marriage to the child" (*Matter of Kayla K. [Emma P.-T.]*, 204 AD3d 1412, 1414 [4th Dept 2022] [internal quotation marks omitted]). We therefore modify the order in each appeal accordingly.

**Matter of Kevin V.**, 229 AD3d 1159 (4th Dept., 2024)

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered March 20, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had abused the subject child and placed respondents under the supervision of petitioner.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, although now expired, brings up for review the underlying corrected fact-finding order wherein Family Court found that respondents abused the subject child (*see Matter of Deseante L.R. [Femi R.]*, 159 AD3d

1534, 1535 [4th Dept 2018]; *Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1552 [4th Dept 2010]). The mother contends that the court erred in determining that the child was abused by her within the meaning of Family Court Act §§ 1012 (e) and 1046 (a) (ii) because the child had multiple caregivers during the relevant time period. We reject that contention.

As relevant here, the Family Court Act defines an abused child as a child less than 18 years old "whose parent or other person legally responsible for [the child's] care . . . inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (Family Ct Act § 1012 [e] [i]). Section 1046 (a) (ii) "provides that a prima facie case of child abuse . . . may be established by evidence . . . (1) [of] an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents were the caretakers of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]). Although the petitioner bears the burden of proving child abuse by "a preponderance of evidence" (§ 1046 [b] [i]), the statute "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" and, therefore, once the petitioner "has established a prima facie case, the burden of going forward shifts to [the] respondents to rebut the evidence of parental culpability" (*Philip M.*, 82 NY2d at 244; *see Grayson R.V.*, 200 AD3d at 1648).

Here, we conclude that petitioner established that the child suffered multiple injuries that "would ordinarily not occur absent an act or omission of respondents" (*Philip M.*, 82 NY2d at [*2]243; *see Grayson R.V.*, 200 AD3d at 1648). Specifically, when the child was almost six months old, he was diagnosed with acute on chronic subdural hematoma, ruptured bridging veins, bulging fontanel, retinal hemorrhages, and bruising on the back (*see Matter of Leonard P. [Patricia M.]*, 222 AD3d 1443, 1444 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; *Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551 [4th Dept 2010]). Petitioner presented the unrebutted testimony of the attending physician and the child abuse specialist pediatrician who examined the child at the pediatric emergency department and reviewed the child's medical records, each of whom concluded that the child sustained non-accidental, inflicted trauma not consistent with routine activities of daily living, self-inflicted injury, or accidental injury (*see Leonard P.*, 222 AD3d at 1444; *Grayson R.V.*, 200 AD3d at 1648). Additionally, the child abuse specialist pediatrician opined that the child had "suffered multiple traumas" rather than only one (*see Grayson R.V.*, 200 AD3d at 1648; *Jezekiah R.-A.*, 78 AD3d at 1551).

We further conclude that petitioner established that "respondents were the caretakers of the child at the time the injur[ies] occurred" (*Philip M.*, 82 NY2d at 243). Contrary to the mother's contention, petitioner's "inability . . . to pinpoint the time and date of each injury and link it to an individual respondent [is not] fatal to the establishment of a prima facie case" of abuse (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 73 [1st Dept 2012]; *see Grayson R.V.*, 200 AD3d at 1648-1649; *Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]). Instead, "[t]he 'presumption of culpability [created by section 1046 (a) (ii)] extends to all of a child's caregivers, especially when they are few and well defined, as in the instant case' " (*Avianna M.-G.*, 167 AD3d at 1524). Petitioner established in this case that respondents " 'shared responsibility for [the child's] care' during the time period in which the injuries were sustained . . . , and the 'presumption of culpability extends' " to all three of them (*Grayson R.V.*, 200 AD3d at 1649; *see Leonard P.*, 222 AD3d at 1444; *Matthew O.*, 103 AD3d at 74-75).

In response to petitioner's prima facie case of child abuse, respondents " 'fail[ed] to offer any explanation for the child's injuries' and simply denied inflicting them" (*Grayson R.V.*, 200 AD3d at 1649, quoting *Philip M.*, 82 NY2d at 246). We therefore conclude that, as the court properly determined, the mother failed to rebut the presumption of culpability (*see Leonard P.*, 222 AD3d at 1444; *Grayson R.V.*, 200 AD3d at 1649; *Avianna M.-G.*, 167 AD3d at 1524).

**Matter of Daniel D.**, 232 AD3d 1220 (4th Dept., 2024)

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents abused the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother appeals from an order adjudging that respondents abused their four-month-old son, Daniel, who was found to have nondisplaced fractures in six ribs and both legs. Following an evidentiary hearing, Family Court determined that petitioner established by a preponderance of the evidence that respondents caused the injuries and thereby abused Daniel within the meaning of Family Court Act § 1012 (e) (i). Although respondent father also filed a notice of appeal, he failed to perfect his appeal. The mother contends that the evidence is legally insufficient to support the court's finding of abuse and that there is no sound and substantial basis in the record for the court's finding of parental culpability. We reject both of those contentions.

Petitioner presented evidence that, once Daniel was discharged from the neonatal intensive care unit, respondents were the sole caretakers of Daniel, with the exception of two nights in July and August when other relatives cared for him. On September 11, 2021, when Daniel was four months old, the mother took him to the doctor because Daniel had been exhibiting "extreme fussiness" for three days and appeared unable to put any weight on his legs. Imaging conducted at the hospital established that Daniel had a fracture of his right distal femur, which is the thigh bone near the knee, and another fracture of the left proximal tibia, which is the shin bone. He also had fractures in two ribs on the left side as well as several older fractures of ribs on the right side.

While at the hospital, Daniel was examined by a doctor who was board certified in child abuse pediatrics. She determined that the fractures were of the hairline variety and that the rib fractures had "callus around them," suggesting that they were at least 7 to 14 days old. There was no callus forming in the legs and, as a result, the doctor could not provide a timeline for those injuries. Blood tests showed that Daniel had a normal level of calcium, magnesium, phosphorous, parathyroid hormone, and vitamin D, indicating that there was nothing wrong with his bones. The tests also showed mildly elevated liver enzymes. Because respondents offered no explanation for how the injuries occurred, the doctor suspected child abuse and reported respondents. Petitioner thereafter filed a petition against respondents alleging abuse and neglect.

At the evidentiary hearing, the doctor testified regarding her findings, and petitioner's investigator also testified regarding petitioner's investigation into the case, i.e., that there was no evidence of any accidental cause for the injuries and no evidence of any bone disorder that could have been a cause of the injuries.

Respondents, testifying on their own behalf, provided hypothetical explanations for the injuries, such as that they were caused by visits to a chiropractor, and admitted that they were Daniel's only caretakers, except for two days, one of which did not coincide with the onset of most of the injuries. Neither respondent sought to blame the other for the injuries. Respondents also called an out-of-state pediatrician as an expert witness. The expert witness opined that Daniel's injuries were more likely caused by a metabolic bone disease, the fact that the mother had diabetes during her pregnancy and took magnesium for her preeclampsia, or the fact that Daniel was born several weeks premature and was taking Pepcid**.** According to the expert, any or all of those issues would explain why Daniel was likely born with lower bone density and therefore lower bone strength, which could have resulted in injury due to minimal force. He thus opined that the fractures were the result of Daniel having fragile bones. Notably, however, Daniel did not sustain any additional fractures after he was placed with a relative, and respondents stated that Daniel had not exhibited any symptoms of pain until the days before the mother took him to the doctor.

The primary issue at the evidentiary hearing was causation, i.e., whether respondents caused Daniel's injuries or whether there was some innocent explanation for the fractures. The court credited petitioner's expert inasmuch as there was no evidence that Daniel did, in fact, have a bone disorder and there was no evidence of additional injuries after Daniel was removed from respondents' home, as one would have expected if he had a bone disorder or other basis for fragile bones.

Family Court Act § 1012 (e) (i) provides that a child is abused when the parent or other legally responsible adult "inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or *creates* a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (emphasis added). The mother contends that, inasmuch as Daniel recovered quickly, the injuries that were inflicted did not constitute the requisite serious physical injuries. The mother, however, failed to preserve that contention for our review inasmuch as she failed to raise that contention before the court (*see Matter of Adonnis M. [Kenyetta M.]*, 194 AD3d 1048, 1052 [2d Dept 2021], *appeal dismissed* 37 NY3d 1128 [2021]; *Matter of Lea E.P. [Jason J.P.]*, 176 AD3d 715, 716 [2d Dept 2019]; *Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

In any event, we conclude that the contention lacks merit inasmuch as the "injuries were 'clearly inflicted and not accidental' " (*Matter of Jonah B. [Ferida B.]*, 165 AD3d 787, 789 [2d Dept 2018]), and those injuries "*create[d] a substantial risk"* of much more serious injuries (Family Ct Act § 1012 (e) (i) [emphasis added]; *see Matter of Addison M. [Bridgette M.]*, 173 AD3d 1735, 1736-1737 [4th Dept 2019]; *Jonah B.*, 165 AD3d at 789). "[U]nder the Family Court Act, a 'child need not sustain a serious injury for a finding of abuse as long as the evidence demonstrates that the parent sufficiently endangered the child by creating a substantial risk of serious injury' " (*Jonah B.*, 165 AD3d at 789).

The mother further contends that the evidence is legally insufficient to establish that she inflicted or allowed to be inflicted those injuries to Daniel. We have repeatedly upheld abuse findings in similar situations (*see e.g. Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]). Where, as here, petitioner submits " 'proof of injuries sustained by [the] child . . . of such nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent,' i.e., multiple fractured ribs [and legs] in various stages of healing," that constitutes a prima facie case of abuse (*Avianna M.-G.*, 167 AD3d at 1523, quoting Family Ct Act § 1046 [a] [ii]). The " 'presumption of culpability [created by section 1046 (a) (ii)] extends to all of a child's caregivers, especially when they are few and well defined, as in the instant

case' " (*id.* at 1524). We agree with the court that the mother failed to rebut the presumption that she and the father, as Daniel's parents and sole caregivers, were [*2]responsible for his injuries (*see id.*).

For the same reasons, we reject the mother's contention that the finding that she caused the injuries is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Zakiyyah T. [Lamar R.]*, 221 AD3d 1443, 1445 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]). With respect to that issue, the court was presented with a battle of medical experts, one called by each side. Petitioner's expert testified that Daniel's numerous bone fractures could have been caused only by non-accidental trauma, while the mother's expert testified that the fractures were more likely caused by metabolic bone disease. Based on our review of the record, it cannot be said that the court erred in crediting the testimony of petitioner's expert, especially considering the fact that Daniel did not sustain any more fractures after he was removed from respondents' home and placed with a relative pending trial, which commenced more than nine months following removal.

**Matter of Dorian C.**, AD3d 2024 NY Slip Op 06486 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 18, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 3 from an order of fact-finding and disposition that, inter alia, adjudged that she abused one of her children (middle child) who, when he was seven months old, was found to have sustained fractures in both arms, both legs, and several ribs. In appeal Nos. 1 and 2, the mother appeals from orders of fact-finding and disposition that, inter alia, adjudged that she derivatively abused her other two children. Following an evidentiary hearing, Family Court determined that petitioner established by a preponderance of the evidence that the mother caused the middle child's injuries, and thereby abused him and derivatively abused the other two children (*see* Family Ct Act § 1046 [a] [i], [ii]). The court further found that the mother had not satisfactorily rebutted petitioner's prima facie case of abuse. We affirm in each appeal.

Family Court Act § 1012 (e) (i) provides that a child is abused when the parent or other legally responsible adult "inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or *creates* a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (emphasis added). Initially, to the extent the mother raises contentions in each appeal concerning the legal sufficiency of the evidence supporting the court's finding of abuse with respect to the middle child, her contentions are unpreserved for our review inasmuch as she failed to move to dismiss the petitions on that basis (*see Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1435-1436 [4th Dept 2011]; *Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1553 [4th Dept 2010]; *see also Matter of Daniel D. [Tara D.]*, — AD3d —, 2024 NY Slip Op 05665, *1 [4th Dept 2024]).

In any event, we conclude that the mother's contentions with respect to the legal sufficiency of the evidence lack merit. Here, the evidence established that the middle child's "injuries were 'clearly inflicted and not accidental' " (*Matter of Jonah B. [Ferida B.]*, 165 AD3d 787, 789 [2d Dept 2018]; *see Daniel D.*, — AD3d at —, 2024 NY Slip Op 05665, *1), and that his injuries "*create[d] a substantial risk*" of much more serious injuries (Family Ct Act § 1012 [e] [i] [emphasis added]; *see Daniel D.*, — AD3d at —, 2024 NY Slip Op 05665, *1; *Matter of Addison M. [Bridgette M.]*, 173 AD3d 1735, 1736-1737 [4th Dept 2019]). "[U]nder the Family [*2]Court Act, a 'child need not sustain a serious injury for a finding of abuse as long as the evidence demonstrates that the parent sufficiently endangered the child by creating a substantial risk of serious injury' " (*Jonah B.*, 165 AD3d at 789).

In addition, we conclude that there is legally sufficient evidence establishing that she inflicted or allowed to be inflicted the injuries to the middle child. Indeed, we have repeatedly upheld abuse determinations under similar circumstances (*see e.g. Daniel D.*, — AD3d at —, 2024 NY Slip Op 05665, *1; *Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]). Here, petitioner established a prima facie case of abuse by submitting " 'proof of injuries sustained by [the middle] child . . . of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent,' " i.e., fractures in both arms and both legs, and several fractured ribs, all in various stages of healing, which evidence suggests that the mother did not promptly seek medical attention for the child while in her care (*Avianna M.-G.*, 167 AD3d at 1523, quoting Family Ct Act § 1046 [a] [ii]). Moreover, we conclude that the mother failed to rebut the presumption that she, as the middle child's parent, was responsible for his injuries (*see id.* at 1524).

For the same reasons, we reject the mother's contention in each appeal that the finding that she abused the middle child is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Zakiyyah T. [Lamar R.]*, 221 AD3d 1443, 1445 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]). Petitioner presented expert medical testimony establishing that the constellation of injuries sustained by the middle child—i.e., the multiple fractures to his limbs and ribs—along with the forces and mechanisms necessary to cause those injuries, could only have been caused by nonaccidental trauma. The mother offered no testimony to rebut the expert opinion. Based on our review of the record, we cannot say that the court erred in crediting the testimony of petitioner's expert and in declining to credit the testimony offered by the mother (*see generally Zakiyyah T.*, 221 AD3d at 1445).

Finally, we conclude in appeal Nos. 1 and 2 that the court's finding of derivative abuse with respect to the mother's other two children based on evidence that she abused the middle child is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]). The abuse of the middle child "is so closely connected with the care [of his siblings] as to indicate that [those children are] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). The abuse "demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150 [2d Dept 2009]; *see Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]).

# Disposition of Art. 10s

# Permanency Hearings

**Matter of AL.C.**, 229 AD3d 418 (1st Dept., 2024)

Order, Family Court, Bronx County (Lauren T. Broderick, J.), entered on or about December 6, 2023, which, to the extent appealed from, denied the application of

petitioner Administration for Children's Services (ACS) to discontinue supervised visits between the former foster mother and the subject children, modified, on the law and the facts, to specify that such visits shall be supervised by ACS, the foster care agency, or an approved resource and that the former foster mother's partner, Manuel R., shall not be present at visits, and otherwise affirmed, without costs.

As an initial matter, we reject the argument raised by the attorney for the children that the appeal should be dismissed because the permanency hearing order on appeal is a nonfinal order. Under the Family Court Act, this Court has jurisdiction to hear this appeal because "[a]n appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right" (*see* Family Court Act § 1112[a]; *see also Matter of Cristy C. [Roberto C.],* 77 AD3d 563, 563 [1st Dept 2010], *lv denied* 16 NY3d 712 [2011]).

The order, dated November 30, 2023, and signed on December 6, 2023, was issued after a four-day permanency hearing, which commenced on August 4, 2023. It concerns four siblings who have been in foster care since 2016. It sets out the permanency goals, placement arrangements and visitation plans for the children "until the completion of the next permanency hearing or pending further orders of this Court."[FN1] In analyzing the order, we defer as we must to the factual determinations of the Family Court judge, who had the opportunity to observe and listen to the witnesses (*Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]; *Matter of Kimberly J. v Benjamin G*., 227 AD3d 471 [1st Dept 2024]). Upon doing so, we find that the order is supported by a sound and substantial basis in the record (*see Matter of Victoria B.,* 164 AD3d 578, 580, 581 [2d Dept 2018]). Specifically, under the particular circumstances of this case, we find that Family Court's continuation of the children's visitation with the former foster mother was an appropriate exercise of its obligation to direct a disposition which advanced the goal of finalizing the children's placement for adoption and was in accordance with the children's best interests (Family Court Act § 1089[d]).

Therefore**,** we affirm the order but modify to specify that the children's visits with the former foster mother shall be supervised, and that her partner, Manuel R., may not be present at visits. This modification is consistent with prior orders directing that the visits be supervised by ACS, the agency, or an approved resource and with the parties' apparent understanding that supervision would continue. No one disputed that the former foster mother's partner was not to be present at the visits.

Family Court Act § 1089, which governs permanency hearings, is part of article 10-A of the Family Court Act. The purpose of article 10-A is "to [*2]provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (Family Court Act § 1086). As this Court has previously

held, "the law makes clear . . . that the agencies' efforts towards a permanency plan must be tailored to the particular circumstances and individuals in a given case" (*Matter of Lacee L. [Stephanie L.]*, 153 AD3d 1151, 1152 [1st Dept 2017] [internal quotation marks omitted], *affd* 32 NY3d 219 [2018]).

At a permanency hearing, Family Court considers the permanency hearing report which, as relevant to this appeal, includes "the visitation plan," which sets forth "the persons with whom the child visits" and "the frequency, duration and quality of the visits" (Family Court Act § 1089[c][2][iv]). Family Court is required to consider the children's wishes, and children age 10 and above are entitled to participate in the permanency hearing (Family Court Act §§ 1089[b][1-a], [d]). Here, the children expressed, through their attorney, a strong desire to continue to visit with the former foster mother. As is required by statute, following the hearing, the court issued a permanency hearing order which directed a disposition in accordance with the children's best interests and safety (Family Court Act § 1089[d]). Since foster care placement was extended, the permanency hearing order included, as required, "a description of the visitation plan or plans" (Family Court Act § 1089[d][2][vii][A])**,** which continued visits with the former foster mother.

It is undisputed that the children were suffering from PTSD and other mental health and educational difficulties when they were placed with the former foster mother. During the nearly six years she cared for them, they improved markedly and became strongly bonded with her. It is also undisputed that removal from the former foster mother's home in or about December 2021 and placement in a series of different foster homes was traumatic for the children. Recognizing this, ACS concedes that, following removal from the former foster mother's home, "ACS and the foster care agency . . . consented to and facilitated" visitation between the former foster mother and the children because it had a "positive and stabilizing influence on the children" and was thus an appropriate aspect of the required "reasonable efforts . . . to effectuate the child's permanency plan" (Family Court Act § 1089[d][2][iii]). Contrary to the dissent's statement, Family Court did not "award" visitation to the former foster mother. Rather, the court ordered visitation in response to the children's request for it, and in order to advance the permanency plan and the children's well-being. This visitation was set forth in prior permanency hearing orders and continued on consent through the immediately previous permanency hearing order dated March 8, 2023.

At the permanency hearing that resulted in the order, the parties agreed that the goal for these children [*3]remained adoption and the court approved that goal, which had been established in a prior permanency hearing order. At the time of the hearing, the children were not yet in an identified pre-adoptive placement, but the agency had identified potential adoption resources which included the current foster family and the former

foster mother's brother.[FN2] Family Court determined that it was in the children's best interests to continue weekly supervised visits with the former foster mother and that doing so advanced the goal of adoption. That determination was based largely on its credibility determinations, to which we give great deference (*see e.g. Eschbach*, 56 NY2d at 173; *Kimberly J.*, 227 AD3d at 471; *Matter of Andrew R.*, 146 AD3d 709, 710 [1st Dept 2017]).

ACS argues that the evidence establishes that the former foster mother was "undermining" the children's "pre-adoptive placement." However, the children's current foster mother testified that she did "not mind having a relationship with" the former foster mother. In addition, ACS did not adduce any expert testimony to support its position that the visits were preventing the children from adjusting to the current foster home or to demonstrate that severing their undisputedly close relationship with the former foster mother would not be harmful to the children. Moreover, as Family Court noted in its order, the children had been freed for adoption, "but not yet placed in a pre-adoptive home." Additionally, at the time of the hearing, the biological father of two of the foster children had filed a petition challenging his conditional surrender of his parental rights on the basis that the condition—adoption by the former foster mother—had failed.

In support of its argument that continued visitation with the former foster mother was "no longer" a "positive and stabilizing influence on the children," and that continued visitation with her was now not in their best interest, ACS noted that the former foster mother lacked standing to seek visitation, and was not entitled to the same "solicitude" as a parent in determining a visitation plan in the order. We agree with ACS and the thoughtful dissent that the former foster mother does not have standing to seek visitation. However, the former foster mother did not seek visitation.[FN3]Family Court continued the pre-existing order of supervised visitation with the former foster mother because the court determined that, contrary to ACS's arguments, and based on the evidence presented at the hearing, doing so was in the children's best interests and would advance the goal of finalizing the children's placement for adoption (Family Court Act § 1089[d]).

The dissent argues that Family Court may only direct visitation with certain persons in a permanency hearing order, citing to and relying on Domestic Relations Law §§ 70, 71, and 72 and Family Court Act §§ 1030 and 1081. Those statutes are not applicable here. Domestic Relations Law § 70 sets forth the procedure for [*4]a parent to seek the return of a child wrongfully detained by another parent. Domestic Relations Law §§ 71 and 72 define standing for siblings and grandparents to seek visitation or custody. Family Court Act § 1030 concerns the standing of respondents to seek visitation during child protective proceedings. Family Court Act § 1081 concerns the rights of noncustodial

parents and grandparents previously awarded visitation rights to enforce those rights during child protective proceedings and establishes standing to seek sibling visitation for children in foster care. In contrast, Family Court Act § 1089, which governs permanency hearings for children in foster care, places no limitation on who may be included in a visitation plan as part of a permanency hearing order (Family Court Act §§ 1089[c][2][iv], 1089[d][2][vii][A]).**[FN4]**

As discussed above, we agree with our colleague that the former foster mother in this case, like the non-parents in the cases cited in the dissenting opinion, lacks standing to petition for visitation (*Matter of Katrina E.*, 223 AD2d 363 [1st Dept 1996], *lv denied* 88 NY2d 809 [1996] [aunt and uncle lacked standing to seek visitation of children in foster care]; *Matter of Brian H*., 25 AD3d 739 [2d Dept 2006] [in child protective proceeding, boyfriend of child's mother lacked standing to seek visitation and visitation would be contrary to the child's best interests]; *Matter of Jessica F*., 7 AD3d 708 [2d Dept 2004] [great-grandmother lacked standing to petition for visitation of children in foster care]; *Matter of Joseph*, 286 AD2d 995 [4th Dept 2001] [former foster parents who petitioned for visitation lacked standing]; *Matter of Bessette v Saratoga County Comm'r of Social Servs*., 209 AD2d 838 [3d Dept 1994] [former foster parents lacked standing to petition for visitation after children had been returned to biological parent, who did not consent to visitation]). Accordingly, and because Family Court's order was appropriately tailored to the facts of this case and based on the court's determination of what was in the children's best interests, we strongly disagree with the dissent's argument that our holding could somehow create standing for legal strangers to seek visitation in foster care cases. We do not so hold.

Commonly, visitation plans for children in foster care involve parents, grandparents or siblings, all of whom have standing to commence visitation proceedings. However, in this case, there was no visitation petition or proceeding before the court at the time of the permanency hearing. Rather, the court ordered visitation between the children and the former foster mother in order to advance the children's "well-being" as it is required to do under Family Court Act § 1086. To accomplish that, the court gave special attention to the unique, undisputed circumstances of these children: (1) the children suffered from PTSD and other mental health issues following removal from their biological mother in 2016; (2) they each improved [*5]remarkably during the nearly six years they were cared for by the former foster mother; (3) removal from her care in December 2021 was traumatic for them; (4) at the time of the order, the children had only been in their current foster home for a few months; (5) ACS and the foster care agency had previously consented to and facilitated visits with the former foster mother for approximately two years; and (6) the children remained strongly bonded to her as the only adult who had been a consistent positive presence in their lives at the time of the 2023 permanency hearing that resulted in the order.

It is undisputed that, as Family Court explained on the record, "there is no legal path where the children end up in [the] care" of the former foster mother. However, the court expressed concern that discontinuing all contact with her at this time would be contrary to their well-being. The court noted that it was troubled "that we didn't have more details [presented at the hearing] about the children's therapy and medication" and that there was no testimony that "cutting off all contact with [the former foster mother] . . . is therapeutically beneficial." Under these circumstances, Family Court's continuation of visitation with the former foster mother was an appropriate exercise of its authority under Family Court Act § 1089, was tailored to the particular circumstances of these children, and was in keeping with the legislative goal of ensuring foster children's well-being.

Our dissenting colleague also cites *Matter of Emanuel S. v Joseph E*. (78 NY2d 178 [1991]), which involved a petition for grandparent visitation over the parents' objection and is thus not applicable here. To the extent that our colleague cites it in support of her argument that our holding is inconsistent with our obligation to respectparents' constitutional rights, that issue is not relevant in this case since the parents' rights had been terminated at the time of the order.**[FN5]** Rather, this case involves Family Court's exercise of its parens patriae obligation to make orders in the best interests of the children and in furtherance of their permanency plan. We find that it exercised that obligation appropriately here.

Finally, we note that our dissenting colleague's argument that Family Court lacked authority to continue visitation with the former foster mother was not raised or addressed by either party. While ACS sought, at the hearing and on appeal, termination of the children's visits with the former foster mother based on its claim that continued visitation does not serve the permanency goal of adoption and is no longer in the children's best interests, it does not argue that Family Court did not have authority to continue visits with the former foster mother at all. Indeed, ACS concedes that it consented to inclusion of those visits in prior permanency hearing orders. Moreover, on appeal, ACS argues in the alternative that Family Court should have granted ACS "discretion to [*6]begin the process of gradually bringing visits with the former foster mother to an end with therapeutic input," further indicating its understanding that Family Court could properly have included continued visitation with the former foster mother as an element of the permanency plan, as it had done previously, upon a finding that doing so is in their best interests.

To the extent that the April 2024 permanency hearing order did not address visitation, based on its understanding of this court's order granting a stay, we direct that the next permanency hearing order do so.

All concur except Rosado, J. who concurs in part and dissents in part in a memorandum as follows:

ROSADO, J. (concurring in part, and dissenting in part)

I respectfully concur in part, and dissent in part.

This Court is ultimately presented with two questions in the instant case: (i) whether this Court has jurisdiction to hear an appeal from an intermediate order in a case involving abuse or neglect; and (ii) whether this Court has the power to order visitation between the subject children and a person who has no legal, or blood relation to them, alternatively referred to as a "legal stranger."

As to the first question, whether this Court has jurisdiction to entertain an appeal from an intermediate order in a case involving abuse or neglect, I concur with my esteemed colleagues in the majority that this court does have jurisdiction to hear the appeal. It is well-established law in this jurisdiction that "[a]n appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right" (*see* Family Ct Act § 1112[a]; *see also Matter of Christy C*. [*Roberto C*.], 77 AD3d 563 [1st Dept 2010], *lv denied* 16 NY3d 712 [2011]). As this issue is explored more fully by the majority, no further inquiry or analysis is necessary as to this question.

As to the second question, whether this Court has the power to order visitation between the subject children and a legal stranger, the answer is unequivocally no. The dangerous precedent being proffered by the majority in today's decision is neither supported by black-letter law, or by the decades of decisions rendered in this state on the matter. I, therefore, vehemently dissent.

It is my belief, that this Court is not endowed with the power to award visitation between the subject children and their former foster mother, as she is a legal stranger to the children and has no affirmative rights under the law to have court-ordered visitation with them. Thus, the Family Court order should be modified, and the provision ordering visitation between the children and their former foster mother should be stricken.

*Background*

In the instant appeal, the Administration for Children's Services (the agency) appeals from a permanency hearing order of the Family Court, which denied its application to discontinue supervised visits between the former foster mother Regina F., and the subject children. The agency [*7]argues, inter alia, that Regina F. lacks standing to receive visitation with the subject children under the jurisdiction of the Family Court. **[FN6]** Prior to the children's removal from Regina F.'s care due to a finding of neglect against her (in connection with her biological children), the subject children had

lived with her continuously for nearly six years. The record is replete with references to the warm and loving bond shared by and between Regina F., and the subject children. Indeed, it is undisputed by all parties that the children deeply love Regina F., and that she has been the only consistent caregiver they have known in their lives. The agency removed the subject children from Regina F.'s care on December 29, 2021, after which they were placed in three subsequent foster homes. Upon removing the subject children from her home, the agency informed Regina F., that she would never be allowed to adopt the subject children. Following the children's removal from Regina F.'s care the Family Court determined it would be in the best interests of the children to maintain a relationship with Regina F. and ordered regular supervised visitation to take place between Regina F., and the children. In February 2023, the Family Court continued the visitation order between Regina F., and the children. During the permanency hearings conducted on August 4, September 3, 14, and November 30, 2023, the agency argued to discontinue supervised visitation between Regina F., and the subject children. By orders dated November 30, 2023, and December 6, 2023, the court continued the weekly supervised visits with Regina F. It is the latter order that the agency appeals from.

It is undisputed by all parties that Regina F., is a legal stranger to these children, as she shares no blood relation to the subject children, nor is she their foster mother, or adoptive mother (indeed the record is clear that she is precluded from ever adopting the subject children).

*Argument & Analysis*

*Standing and Restrictions on the Court's Power to Award Visitation*

The esteemed members of the majority opine that Regina F. lacks the standing to seek visitation with the subject children. In that belief, the majority and I are united.**[FN7]** The majority however, takes the position that the agency's argument that Regina F. lacks standing to seek visitation with the children is inapposite because: (i) Regina F. did not seek the visitation, rather the Family Court continued a pre-existing order which *awarded* her supervised visitation; (ii) such visitation order was an appropriate exercise of the Family Court's obligation to a direct disposition which advanced the goal of finalizing the subject children's placement for adoption in accordance with Family Court Act § 1089[d]; and (iii) the Family Court determined that the visitation was in the children's best interests. The Majority points to the Family Court Act §§ 1089 [c][2][iv] and [d] to support its affirmation of the Family Court order.

I respectfully disagree with that position. I would contend that this holding fails to contemplate two important and well-established considerations. First, in *Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 183 [1991], the court held that that the issue of

standing must be resolved *before* the issue of the best interests of the child can be considered. Secondly, it is well-established doctrine in this state that the court is bound by an extremely circumscribed list of individuals to whom they may order visitation, a doctrine which is neither affirmatively rebutted nor contradicted by the statutes or case law proffered by the majority.

*Standing*

It is settled law that standing is a threshold issue that must be addressed and satisfied *before* a court may even contemplate whether [such visitation] would be in the child's best interests (*see Matter of Joseph*, 286 AD2d 995, 996 [4th Dept 2001] ["[s]tanding issue must be resolved. . . before the issue of the best interest of the child can be considered."]; *see also Matter of Katrina E.,* 223 AD2d 363 [1st Dept 1996]; *Matter of Brian H*., 25 AD3d 739, 740 [2d Dept 2006]; *Matter of Jessica F*., 7 AD3d 708, 710 [2d Dept 2004]; *Matter of Bessette v Saratoga County Commr. of Social Servs*., 209 AD2d 838, 839 [3d Dept 1994]). Here, the majority affirms the Family Court's circumvention of this mandated threshold issue, without explanation beyond that the Family Court deemed that the visitation would be in the children's best interests; and that it is within the Family Court's power to issue such visitation orders and plans pursuant to Family Court Act §§ 1089[c][2][iv], [d]. The majority decision is silent as to any reference to statutes or judicial holdings which demonstrate that the power given to the Court to order visitation under the above-named provisions of the Family Court Act are impervious to, or somehow can be read to override the Court's requirement to conduct a standing determination before proceeding to a best interests determination. In furtherance of their argument, my esteemed colleagues in the majority explore the general purpose of article 10-A of the Family Court Act which governs permanency hearings, arguing that this Court has previously held that "the law makes clear. . . that the agencies' efforts towards a permanency plan must be tailored to the particular circumstances and individuals in a given case" (*Matter of Lacee L. [Stephanie L.]*, 153 AD3d 1151, 1152 [1st Dept 2017] [internal quotation marks omitted], *affd* 32 NY3d 219 [2018]); however, in my opinion respectfully, neither the facts of the case nor its holding are applicable here; and most certainly I see no way that this holding can be read as providing the Court carte blanche authority to circumvent a required standing analysis. Indeed, the holding cited to support the majority's contention fails to specifically touch upon the issue of standing (and whether it can be bypassed or overlooked), nor does it suggest generally that [*8]the Court has plenary power to overlook threshold analysis requirements in the furtherance of the best interests of the child and/or in order to "effectuate the child's permanency plan" (Family Court Act § 1089[d][2][iii]). Nor, in my estimation does the plain language of the statute cited by the majority elucidate that orders issued in accordance with Family Court Act § 1089 are somehow insulated from, or not beholden to the well-established standing analysis requirement. Family Court Act

§ 1089 simply cannot be read or interpreted in a way which would authorize the Court to override or skip the standing analysis prong and focus solely on the best interests determination.

It is my belief that it is beyond the purview of this Court to amend or disregard, (or to permit through affirmance, the lower court to amend or disregard) a well-established prong of the law absent a thoroughly reasoned explanation supported by the jurisprudence of this jurisdiction, or amendment or modification to the law passed by the Legislature.

Whether or not Regina F., has "sought," or was "awarded" visitation at the behest of another party, in my opinion is an exercise of semantics that does not, and cannot ameliorate the necessity of this Court to conduct a standing analysis, nor does it permit the Court to circumvent a standing analysis. Nor would the fact that the request or petition for visitation with Regina F., came from the subject children, or the agency, or both. No matter the party that requested (or acquiesced) to the visitation, nothing in any statute cited, or case law of this state justifies the obviation of this Court's obligation to employ a standing analysis *before* it entertains a best interests analysis. Indeed, no case law has been proffered rebutting the standard set forth in *Matter of Joseph* or the subsequent cases which reaffirm that standard. In my estimation, this decision, which holds that the Court may skip a standing analysis if it is in furtherance of effectuating a child's permanency plan, exceeds the role of judicial power by impermissibly assuming the role of the Legislature, and erroneously gives the Court unbridled parens patriae power over the families of this jurisdiction.

The majority also seems to contend that because the order being appealed is merely a continuation of a prior existing order the question of standing is inapposite. I do not agree. Any orders that contain an impairment, mistake, or defect affecting a substantial right of a party should necessarily be cured (s*ee* CPLR § 5019[a]; s*ee also Kiker v Nassau County* 85 NY2d 879 [1995]).

In its decision, the majority thoughtfully argues: (i) that visitation between the children and Regina F. is in the subject children's best interests, (ii) notes that the subject children wish to continue contact with Regina F., and (iii) correctly notes that the Family Court Act §§ 1089[b][1-a], [d] obliges the Court to consider the wishes of the subject children in making its [*9]determinations regarding visitation. However, as this Court is precluded from awarding Regina F. visitation it must stop its analysis there, and cannot, and should not proceed to the second prong of analysis in *Matter of Emanuel S. v Joseph E.,* to determine whether visitation between Regina F., and the children would be in their best interests.

*Restrictions on the Court's Power to Award Visitation*

It is well-established doctrine in this state that the court is bound by an extremely circumscribed list of individuals to whom they may order visitation. Family Court Act § 1081 limits visitation rights with a child remanded or placed in the care of social services officials, as in the instant case before the Court, to the child's grandparent, non-custodial parent, and the child's siblings (including half-siblings) **[FN8]** (*see Matter of Jessica F*., 7 AD3d 708, 710 [which held "that Family Court Act § 1081(1) only permits a noncustodial parent or grandparent to seek visitation"]; (s*ee also Matter of Brian H*., 25 AD3d at 740; *Bessette v Saratoga County Comm'r of Social Servs*., 209 AD2d at 839). There is no statutory provision in this state which expressly provides former foster parents the right to be awarded visitation (s*ee Matter of Joseph*, 286 AD2d at 995 [which held, "there is no statute that expressly gives former foster parents the right to maintain a proceeding for visitation"] [internal quotation marks omitted]). There is only one known statutory authority which gives broader discretion to the Court in determining to whom they may award visitation (*see* Family Ct Act§ 1030), however it restricts the Court to award visitation only to those individuals who are currently respondents in child protective cases, who have been deemed to have been acting in loco parentis of the children; and the ability to award visitation to those individuals ends with the close of the child protective proceeding (*see Matter of Commissioner of Social Serv. on Behalf of RS Children*, 168 Misc 2d 11 [1995]). As none of those conditions have been met in the instant case with Regina F., it cannot be relied upon as authority for this Court to order visitation with the subject children.

The majority argues that because the Family Court acted in compliance with the black letter language set forth specifically in Family Court Act § 1089[c][2][iv], [d], by ensuring that it issued orders generally, which it deems to advance the goal of finalizing the children's placement for adoption, and that the permanency report included a "description of the visitation plan," which sets forth "the persons with whom the child visits" and "the frequency, duration and quality of the visits," and then issued a permanency hearing order directing supervised visitation between Regina F., and the children, that the visitation ordered is valid or permissible. In other words, it is argued that because the Court has the power to order visitation under Family Court Act § 1089[c][2][iv], and [d], the [*10]Court has carte blanche power to order visitation with whomever they deem appropriate if it is in the best interest of the children, as long as it deems those orders to be advancing the goal of finalizing the children's placement adoption. I respectfully disagree. The majority's interpretation of those two clauses, in isolation from the remainder of the statute, does not comport with the meaning or intent of the rest of the statute from which it has been quoted, nor does it comport with the historic holdings of this jurisdiction. These provisions cannot be read in insolation from the rest of the statute. (*See Matt of Purcell v New York State Tax Appeals Tribunal*, 167 AD3d 1101 [3d Dept 2018] [holding "when engaging in statutory interpretation "all

provisions of the statute must be read and construed together."]; s*ee also King v Burwell*,576 US 473, 485 [2015]).

Let us look at Family Court Act § 1089; while it does not list out the types of individuals who may not have visitation with the children, it does affirmatively provide a list of individuals visitation with whom the court may order. Family Court Act § 1089 [d][2][viii][F], permits the court to encourage and order visitation between the subject children, and their parents, siblings, and grandparents. Family Ct Act § 1089 [d][2][viii][F], additionally references both the Family Court Act § 1081, and section 71 of the Domestic Relations Law, which clearly enumerate the specific individuals that the Court may order visitation to. It is my contention that this qualifying language is imperative in analyzing the statutory meaning and intent of § 1089, particularly Family Court Act § 1089[c][2][iv] and [d]. These citations further emphasize the idea that the Court may only award visitation to a group of individuals specifically enumerated in the statutes. Indeed, the language in all of the above referenced statutes demonstrates the legislative intent that there is a circumscribed list of individuals to whom this Court may order visitation. It is not, I believe, and as the majority contends, language that is meant to apply specifically to children whose parents' rights have been terminated, but rather serves to reaffirm the broad statutory scheme in which a circumscribed group of individuals is permitted to have court ordered visitation. To wit, there exists no statute, or indeed caselaw known to this Court which demonstrates or establishes that the language of Family Court Act § 1089[c][2][iv], [d] empowers the Court to order visitation between the children and persons not specifically contemplated by Family Court Act § 1081, 1030, Domestic Relations Law §§ 70, 71, and 72; nor does it suggest that it provides courts with the ability to override the specifications of those above referenced statutes.

The majority contends that "commonly visitation plans for children in foster care involve parents, grandparents, or siblings." To be sure, the jurisprudence in this jurisdiction is replete with [*11]cases which uphold and affirm this contention. However, I know of no case affirmed in the higher courts of this jurisdiction, nor have my esteemed colleagues provided any cases, in which visitation between children (whether in foster care or without) with a legal stranger has been affirmed. Thus, in my opinion, today's decision constitutes an erroneous, and extreme departure from the case law of this State.

While this Court cannot affirmatively award Regina F. visitation with the subject children, I find nothing in the record prohibiting Regina F. and the children's current foster mother from arranging for contact between Regina F., and the subject children on their own. As noted, the record is replete with credible testimony that the children and Regina F. share a warm and loving bond with each other, and it is clear the children wish to continue to have a relationship with her.

*Public Policy Consideration*

I am of the opinion that the majority's holding poses a significant adverse risk to public policy. Firstly, it effectively creates a "back door" for *any* legal strangers to circumvent the well-established standing requirements necessary for being awarded visitation. This would result in turmoil for countless families who will have to defend themselves (often at great emotional, and financial cost) against an innumerable pool of persons who are trying, over objection, to gain access to children. Not only would this destabilize the lives of families throughout this jurisdiction, but it would undoubtedly inundate the already overburdened courts with a deluge of cases.

The majority contends that because the Family Court's order was tailored to the facts of the instant case it does not create standing for legal strangers to "seek" visitation in foster care cases. I agree, in part, with that statement. This precedent would not merely give standing for legal strangers to "seek" visitation in foster care cases; rather based on the holding today all that would be required to have visitation awarded to a legal stranger is if any of the parties ask the court for such, a premise which is concerning indeed. If it is the majority's contention that its holding will not create a precedent in this jurisdiction as it is applicable only to the instant case before us, I see no language to that effect, and still, on principle, am compelled to dissent.

Secondly, this decision imperils the long-protected right enshrined in the Constitution of the United States of a parent to decide how to parent their child, whilst endowing the Court with an unqualified and overbroad plenary role of parens patriae to intervene in the daily lives of families in this jurisdiction (*see Matter of Marie B.,* 62 NY2d 352, 358 [1984] [which holds "fundamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child. . ."]; s*ee also Stanley v Illinois,* 405 US 645 [1971]; *Pierce [*12]v Society of Sisters*, 268 US 510 [1925]).

Even in those cases where termination of parental rights has been effectuated, and therefore no constitutional rights of parents are necessarily implicated, the very notion that an individual, who is a legal stranger to the children would be able, as of today's decision, to circumvent a cornerstone of due process in order to gain access to our jurisdiction's most vulnerable population is a distressing thought indeed.

*Conclusion*

For all of the reasons described herein, I concur in part, and dissent in part.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: July 11, 2024

**Footnotes**

**Footnote 1:** In the order, the court scheduled the next permanency hearing to take place on April 10, 2024. Based on statements made by counsel at argument, it appears that the order has not been rendered moot by a subsequent permanency hearing order (*see Matter of Victoria B*., 164 AD3d 578, 580 [2d Dept 2018]).

**Footnote 2:** To the extent that ACS argues that this Court should consider the fact that the former foster mother's brother's application for an interstate adoption was ultimately denied, we may not do so, since that occurred after issuance of the order appealed from. Family Court may consider that fact at the next permanency hearing.

**Footnote 3:** Accordingly, the only standing relevant in this case is that of ACS and the foster children.

**Footnote 4:** Similarly, Family Court Act § 1089(d)(2)(viii)(F), cited by the dissent, is not applicable here since that provision applies where parental rights have not been terminated and there is a finding that "diligent efforts to encourage and strengthen the parental relationship" are not detrimental to the child. Here, the children's parents' rights had been terminated at the time of the order.

**Footnote 5:** Moreover, even if the children's parents were in a position to assert their constitutional rights - and we do not find that they were — the biological father of two of the children had made adoption by the former foster mother a condition of his surrender of his parental rights.

**Footnote 6:** The majority opines that the parties to this action failed to argue that the Family Court did not have the authority to continue visits with Regina F., however, the agency's motion papers clearly address and argue: "that the Family Court's Order granting weekly visitation over the agency's objection was an abuse of discretion of the Family Court and not supported by any statutory provision or case law."

**Footnote 7:** The majority contends that the only standing relevant in this case is that of the agency and the subject children. "Standing" as defined by Black's Law Dictionary, states that "standing to sue means that party has a sufficient stake in an otherwise justiciable controversy. . . plaintiff must have a legally protectable and tangible interest at stake in the litigation." As discussed further in this dissent, because courts may not award legal strangers visitation, it cannot be argued that either the agency, or the subject children have standing in this matter to request the Court to order visitation with Regina F. However, as neither the agency nor the attorney for the children raised the

issue of whether they had standing in this matter no further inquiry into that matter is required.

**Footnote 8:** Sections §§ 70, 71, and 72 of the Domestic Relations Law likewise provide that the court may only issue orders of visitation to the following individuals: the parent of the subject child, a sibling of the subject child and/or a grandparent of the subject child.

# 1061 Applications

**Matter of Sanai T.**, 232 AD3d 619 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, Michael A. appeals from an order of the Family Court, Kings County (Elizabeth Barnett, J.), dated September 16, 2021. The order denied the motion of Michael A., inter alia, to vacate so much of an order of fact-finding of the same court (Ilana Gruebel, J.) dated February 14, 2017, as found that he neglected the subject child.

ORDERED that the order is affirmed, without costs or disbursements.

In May 2014, the subject child was removed from the home of Michael A. (hereinafter the appellant). In an amended petition, the Administration for Children's Services alleged, inter alia, that the appellant, the romantic partner of the mother of the child, neglected the child. In an order of fact-finding dated February 14, 2017, the Family Court found, among other things, that the appellant neglected the child (hereinafter the February 2017 order).

In September 2020, the appellant moved, inter alia, to vacate so much of the February 2017 order as found that he neglected the child. In an order dated September 16, 2021, the Family Court denied the appellant's motion. This appeal ensued.

"'Pursuant to Family Court Act § 1061, the Family Court may set aside, modify, or vacate any order issued in the course of a child protective proceeding for good cause shown"' (*Matter of Jveya J. [Ebony W.]*, 194 AD3d 937, 938, quoting *Matter of Shreesta R. [Biblop R.]*, 173 AD3d 1039, 1040 [alterations and internal quotation marks omitted]; *see Matter of Arielle A.D. [Keith D.]*, 192 AD3d 1019, 1020). "'The statute expresses the strong Legislative policy in favor of continuing Family Court jurisdiction over the child and family so that the court can do what is necessary in the furtherance of

the child's welfare'" (*Matter of Alisah H. [Syed H.]*, 168 AD3d 842, 844, quoting *Matter of Jacob P.E. [Gustavo P.S.]*, 162 AD3d 1017, 1018 [internal quotation marks omitted]; *see Matter of Nila S. [Priscilla S.]*, 202 AD3d 695, 696). "'As with an initial order, the [*2]modified order must reflect a resolution consistent with the best interests of the child[ ] after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record'" (*Matter of Sophia W. [Tiffany P.]*, 176 AD3d 723, 724, quoting *Matter of Jacob P.E. [Gustavo P.S.]*, 162 AD3d at 1018 [internal quotation marks omitted]; *see Matter of Jveya J. [Ebony W.]*, 194 AD3d at 938). A hearing pursuant to Family Court Act § 1061 is not required where "'the material facts underlying the motion were not in dispute'" (*Matter of Sebastian P. [Lovette H.]*, 204 AD3d 803, 804, quoting *Matter of Jaheim G. [Lisa G.]*, 187 AD3d 1015, 1016). "Where the court possesses information sufficient to afford a comprehensive, independent review, a hearing is not required" (*Matter of Sutton S. [Abigail E.S.]*, 152 AD3d 608, 609; *see Matter of Jamel V.D.C. [Charlene M.]*, 227 AD3d 713, 715).

Here, the record demonstrates that the appellant failed to establish good cause to vacate the finding of neglect against him (*see Matter of Alisah H. [Syed H.]*, 168 AD3d at 844; *cf. Matter of Nila S. [Priscilla S.]*, 202 AD3d at 697). Moreover, the appellant failed to demonstrate that vacating the finding of neglect would be in the best interests of the child (*see Matter of Zyirr J. [Michael A.]*, 191 AD3d 784, 784-785; *Matter of Shreesta R. [Biblop R.]*, 173 AD3d at 1040; *Matter of Aaliyah B. [Althea R.]*, 170 AD3d 712, 713).

The appellant's remaining contention need not be reached in light of our determination.

Accordingly, the Family Court properly denied the appellant's motion, among other things, to vacate so much of the February 2017 order as found that he neglected the child.

# Discontinuance of Article 10

# Modification of Placement

# Counsel

# TERMINATION of PARENTAL RIGHTS

# General

**Matter of Pandora S.D.**, 231 AD3d 575 (1st Dept., 2024)

Order of fact-finding and disposition (one paper), Family Court, New York County (Maria Arias, J.), entered on or about July 28, 2023, which, upon findings of permanent neglect and abandonment by respondents mother and father, terminated their parental rights to the subject child and transferred custody of the child to petitioner agency and the Administration for Children's Services, unanimously affirmed, without costs.
The finding of abandonment is supported by clear and convincing evidence that for a period in excess of six months immediately prior to the filing of the petition, between December 2019 and October 2020, the mother and father did not visit the child and had minimal contacts with the agency (*see* Social Services Law § 384-b[4][b]; [5][a]; *Matter of Jahnel B. [Carlene Elizabeth B.]*, 143 AD3d 416, 417 [1st Dept 2016]; *Matter of Messiah C.T. [Eusebio C.T.]*, 180 AD3d 544, 544 [1st Dept 2020]). Contrary to the father's contention, although the abandonment cause of action was not pleaded in the petition, as the evidence established a cause of action for abandonment, Family Court has the authority to conform the pleadings to the proof, sua sponte (*see Matter of Melinda B. v. Jonathan L. P.*, 187 AD3d 631, 631-632 [1st Dept 2020]).

The finding of permanent neglect also was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The agency met its obligations to make diligent efforts as to both parents. As to the mother, the agency scheduled regular visits and made referrals for mental health and related services (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573, 574 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]), visited her residence on a regular basis, invited her to conferences at the agency and the child's medical appointments, and communicated regularly with her service providers, notwithstanding that, beginning in August 2019, the mother indicated that she was considering a conditional surrender. The father was also offered visitation and invited to

participate in conferences at the agency and attend the child's medical appointments, and while the agency planned to implement a service plan for him, he told the agency that he did not intend to plan for the child.

Despite the agency's diligent efforts, the parents permanently neglected the child. Beginning December 2019, neither parent visited the child, and the mother was neither complying with mental health treatment nor maintaining contact with the agency (*see Matter of Tashameeka Valerie P. [Priscilla P.]*, 102 AD3d 614, 615 [1st Dept 2013], *lv denied* 21 NY3d 852 [2013]; *Matter of Isis M. [Deeanna C.]*, 114 AD3d 480, 480-481 [1st Dept 2014]).

Contrary to the father's argument, he provides no authority to suggest that the court, having terminated his parental rights under Social Services Law § 384-b, was required to address the alternative cause of action pleaded in the petition under Domestic Relations Law § 111.

We have considered the remaining arguments [*2]and find them unavailing.

**Matter of Sa'Nai F. B. M. A.**, 232 AD3d 597 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Kings County (Elizabeth Barnett, J.), dated October 22, 2021. The order of fact-finding and disposition, upon a decision of the same court (Ilana Gruebel, J.) dated July 9, 2020, made after a fact-finding hearing, and upon a decision of the same court (Elizabeth Barnett, J.), dated September 16, 2021, made after a dispositional hearing, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. ORDERED that the order of fact-finding and disposition is reversed, on the law, with costs, and the matter is remitted to the Family Court, Kings County, for further proceedings in accordance herewith.

In May 2014, the Administration for Children's Services commenced a child protective proceeding pursuant to Family Court Act article 10 (hereinafter the child protective proceeding), alleging, inter alia, that the mother had neglected the subject child. In February 2017, the Family Court entered an order of fact-finding in the child protective proceeding, determining that the mother had neglected the child.

In March 2017, the petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the child on the ground that she had permanently neglected the child. In April and May 2017, the Family Court granted the mother's applications to discharge two attorneys she had privately retained to represent her. In June 2017, the court assigned counsel to represent the mother. In November 2017, the court denied the assigned counsel's application to be relieved, and the assigned counsel continued to represent the mother at [*2]multiple court appearances from November 2017 through February 2019.

In April 2019, in the midst of the fact-finding hearing on the petition to terminate the mother's parental rights, the Family Court granted a second application by the mother's assigned counsel to be relieved and determined that the mother had forfeited her right to be assigned new counsel. The court's determination was based upon, among other things, "suspicions" that the mother had been "involved" in a recent security compromise of the assigned counsel's computer. The court also cited as a basis for its determination the fact that, over the course of the child protective proceeding and this proceeding, the mother had a total of three attorneys assigned to represent her or to act as her legal advisor. The record on appeal does not reflect how long the prior assigned attorneys represented the mother or why they ceased representing her.

In November 2019, the Family Court directed, over the mother's objection, that the mother was required to proceed pro se if she was unable to retain counsel. On March 4, 2020, the mother appeared pro se and was unprepared to call the remaining witnesses she intended to have testify on her behalf, and the court found the mother's direct case to be completed, over the mother's objection. In a decision dated July 9, 2020, the court determined, inter alia, that the mother had permanently neglected the child.

Upon the judge's recusal in November 2020 from further proceedings involving the mother, the dispositional phase of the proceeding was conducted before a different judge between January and July 2021. After the dispositional hearing, in an order of fact-finding and disposition dated October 22, 2021, upon a decision dated September 16, 2021, the Family Court found that the mother permanently neglected the child, terminated the mother's parental rights, and transferred custody of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (*see* Family Ct Act § 262[a][iv]; *Matter of Deanna E.R. [Latisha M.]*, 169 AD3d 691, 692). A party may forfeit the fundamental right to counsel by engaging in "'egregious conduct,'" but only as a matter of "'extreme, last resort'" (*People v Shanks*, 37 NY3d 244, 253, quoting *People v Smith*, 92 NY2d 516, 521). Here, the record fails to clearly reflect that the mother engaged in the sort of egregious

conduct that would justify a finding that she forfeited her right to assigned counsel (*see id.* at 254; *People v Isaac*, 121 AD3d 816, 817; *cf. People v Wilkerson*, 294 AD2d 298, 298).

The deprivation of the mother's right to counsel requires reversal without regard to the merits of her position (*see Matter of Pugh v Pugh*, 125 AD3d 663, 664). Accordingly, we reverse the order of fact-finding and disposition, and remit the matter to the Family Court, Kings County, for a determination as to whether the mother currently qualifies for assigned counsel and, thereafter, a new fact-finding hearing after the mother has been assigned counsel or permitted an opportunity to retain counsel.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

**Matter of Parker J.**, 232 AD3d 1244 (4th Dept., 2024)
Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered May 4, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject children on the ground of permanent neglect. We affirm.

We reject the mother's contention that she received ineffective assistance of counsel. We conclude that "the record, viewed in totality, reveals that [the mother] received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]) during the time that counsel represented her.

The mother relatedly contends that she did not knowingly, intelligently, and voluntarily waive her right to counsel (*see generally Matter of Danyel J. [LeeAnn B.]*, 227 AD3d 1484, 1485 [4th Dept 2024], *lv denied* 42 NY3d 906 [2024]). We reject that contention. Here, Family Court, by asking the mother about her "age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 386 [2011]), engaged in the requisite "searching inquiry" to ensure "that the [mother] was aware of the dangers and disadvantages of proceeding without counsel" (*Matter of Storelli v Storelli*, 101 AD3d 1787, 1788 [4th Dept 2012] [internal quotation marks omitted]).

We also reject the mother's contention that the court erred in denying her request for a suspended judgment (*see Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1567 [4th Dept 2023], *lv denied* 40 NY3d 905 [2023]). The court's lone concern at the dispositional phase is "the best interests of the children . . . and its determination is entitled to great deference" (*id*. [internal quotation marks omitted]). It is well settled that "[a] suspended judgment is a brief grace period designed to prepare the parent to be reunited with the child . . . , and may be warranted where the parent has made sufficient progress in addressing the issues that led to the child's removal from custody" (*Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017] [internal quotation marks omitted]). Here, we conclude that the court properly determined that a suspended judgment was unwarranted (*see generally Matter of James P. [*2][Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]).

We have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the order.

# Abandonment

**Matter of Cherie D. R.,** 230 AD3d 1076 (1st Dept., 2024)

Order, Family Court, New York County (Grace Oboma-Layat, J.), entered on or about December 11, 2023, which denied respondent father's motion for summary judgment dismissing the petition for termination of his parental rights, unanimously affirmed, without costs.

In support of his motion to dismiss the petition, which was based on abandonment (Social Services Law § 384-b[4][b]) and permanent neglect (Social Services Law § 387-b[7][a]), the father submitted an affidavit with some supporting evidence to show that the reason he was not in communication or contact with the child or agency during the six months preceding the filing of the petition was that she had been wrongfully abducted by her mother from the United Kingdom in September 2018. As a result, the father asserted, he had been unable to locate the child despite his persistent efforts, including contacting the local police, searching social media, and seeking legal advice.

A parent can rebut the inference of abandonment arising from the parent's failure to communicate with the child by proving that he was "unable to maintain contact with the child" because he could not determine her whereabouts with diligent efforts (*see Matter*

*of Michael T.J.K. [Alicia R.],* 168 AD3d 545, 545 [1st Dept 2019]; *Matter of Anthony M.,* 195 AD2d 315, 316 [1st Dept 1993]). Similarly, the statutory requirements of permanent neglect can be rebutted by a showing that the parent's lack of contact and planning for the child's future was due to an inability to ascertain the physical location of the child (*see* Social Services Law § 387-b[7][a]).

The affidavit and limited documentation submitted by the father raised a defense to the petition which appears valid. Nevertheless, summary judgment dismissing the petition was not warranted, as questions of fact exist as to whether, despite his diligent efforts, the father was unable to communicate with or plan for the child's future (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Matter of Michael T.J.K.*, 168 AD3d at 545; *Matter of Anthony M.*, 195 AD2d at 316).

**Matter of Alexi P.**, 230 AD3d 792 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of fact-finding and disposition of the Family Court, Suffolk County (Victoria Gumbs-Moore, J.), dated April 21, 2023. The order of fact-finding and disposition, after a fact-finding hearing, found that the father abandoned the subject child, terminated his parental rights, and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738), in which he moves for leave to withdraw as counsel for the appellant.
ORDERED that the motion of Thomas J. Butler for leave to withdraw as counsel for the appellant is granted, and he is directed to turn over all papers in his possession to new counsel assigned herein; and it is further,

ORDERED that Darla A. Filiberto, 1770 Motor Parkway, Suite 300, Hauppauge, New York 11749, is assigned as counsel to prosecute the appeal; and it is further,

ORDERED that the respondent is directed to furnish a copy of the certified transcript of the proceedings to the appellant's new assigned counsel; and it is further,

ORDERED that new counsel shall serve and file a brief on behalf of the appellant within 90 days of the date of this decision and order on motion, and the respondent and the attorney for the child shall serve and file their briefs within 30 days after the brief on behalf of the appellant is served and filed. By order on certification of this Court dated June 12, 2023, the appellant was granted leave to prosecute the appeal as a poor person, with the appeal to be heard on the original papers, including a certified transcript of the proceedings, and on the briefs of the parties. The parties and the

attorney for the child are directed to upload, through the digital portal on this Court's website, digital copies of their respective briefs, with proof of service of one hard copy on each other (*see* 22 NYCRR 670.9[a]).

In March 2021, the petitioner, Suffolk County Department of Social Services, filed a petition pursuant to Social Services Law § 384-b to terminate the father's parental rights to the subject child on the ground of abandonment. After a fact-finding hearing, at which the father appeared and testified, in an order of fact-finding and disposition dated April 21, 2023, the Family Court found that the father abandoned the child, terminated his parental rights to the child, and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. The father appeals.

The brief submitted by the father's assigned counsel pursuant to *Anders v California* (386 US 738) is deficient because it fails to contain an adequate statement of facts and fails to analyze potential appellate issues or highlight facts in the record that might arguably support the appeal (*see People v Wright*, 209 AD3d 1046, 1047; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252, 256). The statement of facts does not discuss, in any detail, the majority of the father's testimony elicited at the hearing. Among other things, the statement of facts does not mention the father's testimony that he was "homeless" for a period of time after his in-person visits with the child ceased due to the COVID-19 pandemic or that he contacted a caseworker to request in-person visits and was unable to access Zoom to conduct a virtual visit. Moreover, rather than acting as an advocate and evaluating whether there were any nonfrivolous issues to raise on appeal, assigned counsel has acted as "a mere advisor to the court," opining on the merits of the appeal (*Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 256; *see Anders v California*, 386 US at 744-745; *Matter of Thomas v Mobley*, 195 AD3d 933). Since the brief does not demonstrate that assigned counsel fulfilled his obligations under *Anders v California*, we must assign new counsel to represent the father (*see Matter of Thomas v Mobley*, 195 AD3d at 934; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258).

**Matter of Jayce G.**, 229 AD3d 857 (3rd Dept., 2024)

Appeal from an order of the Family Court of St. Lawrence County (Andrew S. Moses, J.), entered September 23, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be abandoned, and terminated respondent's parental rights.
Respondent (hereinafter the father) is the father of the subject child (born in 2020). When the child was approximately one week old, he was placed in petitioner's custody.

In June 2021, petitioner commenced this proceeding to terminate the father's parental rights based upon abandonment. Following a fact-finding hearing, Family Court determined that the father had abandoned the child and terminated his parental rights. The father appeals.[FN1]

Termination of parental rights on the ground of abandonment is authorized by Social Services Law § 384-b (4) (b). "A finding of abandonment is warranted when it is established by clear and convincing evidence that, during the six-month period immediately prior to the date of the filing of the petition, a parent evinces an intent to [forgo] his or her parental rights as manifested by his or her failure to visit or communicate with the child or the petitioner, although able to do so and not prevented or discouraged from doing so by that petitioner" (*Matter of Jaxon UU. [Tammy I.-Nicole H.]*, 193 AD3d 1269, 1271 [3d Dept 2021] [internal quotation marks, brackets and citations omitted]; *accord Matter of Syri'annah PP. [Sayyid PP.]*, 212 AD3d 1005, 1007 [3d Dept 2023]). "If the petitioning agency satisfies its burden of proving that the [father] failed to maintain sufficient contact for the statutory period, the burden shifts to the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by the petitioning agency" (*Matter of Taj'ier W. [Joseph W.]*, 209 AD3d 1203, 1204 [3d Dept 2022] [internal quotation marks and citations omitted]; *see Matter of Bradyen ZZ. [Robert A.]*, 216 AD3d 1229, 1230 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]).

The relevant six-month time period for this abandonment petition is December 10, 2020 through June 10, 2021 (*see* Social Services Law § 384-b [4] [b]). It is undisputed that during this six-month period, the father did not visit with the child, call him, send any letters, gifts or cards, or financially support the child. A case planner for Fostering Futures of St. Lawrence County testified that the father contacted her once in January 2021 to relay his concerns regarding the child's mother, and that during this phone call the father stated that he was facing homelessness. Importantly, prior to, during and subsequent to this telephone call, the father did not inquire as to the child's well-being or schedule any visitations. The father's sporadic and insubstantial contact was "insufficient to preclude a finding of abandonment and the burden, therefore, shifted to [the father] to demonstrate that he was unable to maintain contact with [*2]the child or, if able, was prevented or discouraged from doing so by petitioner" (*Matter of Joseph D. [Joseph PP.]*, 193 AD3d 1290, 1292 [3d Dept 2021]) [internal quotation marks and citations omitted]; *see Matter of Micah L. [Rachel L.]*, 192 AD3d 1344, 1345 [3d Dept 2021]).

The father asserts that he did not intend to forgo his parental rights; rather his lack of contact and communication with the child were consequences of his poverty and lack of sophistication. The father's unsubstantiated allegations are insufficient to rebut the

presumption that he was able to communicate with petitioner or his child. The father testified that after he and the child's mother broke up, she kicked him out of their residence. As he had no family in the area, he left St. Lawrence County in January 2021 and moved back to his former hometown in Chautauqua County, drifting from place to place and working under the table. Within two months he began residing consistently at his mother's home, but he conceded that he never advised petitioner of his mother's address. This concession belies the father's contention that he was waiting for petitioner to schedule visitations. Furthermore, while the father avers that he did not know how to contact petitioner, he testified that after moving, he applied for services from the Chautauqua County Department of Social Services, but never asked that agency to provide petitioner's contact information, nor did he ask that entity to correspond with petitioner on his behalf. In view of the foregoing record evidence, there was clear and convincing evidence that the father failed to maintain sufficient contact with petitioner and we discern no basis upon which to disturb Family Court's determination to terminate the father's parental rights to the child on the ground of abandonment (*see Matter of Darius L. [Daniel L.]*, 222 AD3d 1259, 1261 [3d Dept 2023]; *Matter of Richard JJ. [Jennifer II.]*, 218 AD3d 875, 877 [3d Dept 2023], *lv denied* 40 NY3d 906 [2023]; *Matter of Kyle K.*,13 AD3d 1162, 1163 [4th Dept 2004]).**[FN2]**

Egan Jr., J.P., Clark, McShan and Powers, JJ., concur.

ORDERED that the order is affirmed, without costs.

**Footnotes**

**Footnote 1:** The father's notice of appeal incorrectly sets forth that the order was entered in August 2022. As there is no confusion with respect to the order that is being appealed from, which was entered in September 2022, we exercise our discretion to deem the premature notice of appeal as valid (*see* CPLR 5520 [c]; *Matter of Jamie UU. v Dametrius VV.*, 196 AD3d 759, 760 n 1 [3d Dept 2021]).

**Footnote 2:** Although not determinative, both the trial and appellate attorneys for the child advocate to terminate the father's parental rights.

**Matter of Tiyani AA.** 232 AD3d 1147 (3rd Dept., 2024)

Appeals from two orders of the Family Court of Schenectady County (Kevin A. Burke, J.), entered December 20, 2022 and January 23, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject child to be abandoned, and terminated respondent's parental rights.

Respondent (hereinafter the mother) is the mother of the subject child (born in 2019), who was removed from her care by petitioner in 2019. Petitioner commenced this abandonment proceeding to terminate the mother's parental rights in January 2022, alleging that the mother had not seen or had any other meaningful contact with the child in the preceding six months. Family Court scheduled a September 2022 fact-finding hearing on the petition and made clear to the mother, who had participated in court appearances via telephone or videoconferencing up to that point, that the hearing would be in person. The mother was not present on the day of the hearing because she had purportedly been unable to obtain a ride from New York City to Schenectady County. Family Court proceeded to conduct the hearing in the mother's absence, but permitted her to observe the hearing virtually. The mother did observe the bulk of the hearing, and her counsel actively participated in it.

Family Court issued a decision and order in December 2022 in which it determined that the mother had abandoned the child and ordered that her parental rights be terminated. Family Court then issued an order in January 2023 which, among other things, made additional findings of fact and reiterated that the mother's parental rights were terminated. The mother appeals from both orders.

We begin by briefly noting that both appeals are properly before us. First, although the December 2022 order states that Family Court found the mother to be in default, both orders arose out of a hearing that the mother observed and that her counsel fully participated in. As such, we do not view the orders as having been entered on default so as to prevent the mother from taking a direct appeal from them (*see* CPLR 5511; *Matter of Dakota W. [Kimberly X.]*, 189 AD3d 2004, 2004 n 2 [3d Dept 2020], *lv denied* 36 NY3d 911 [2021]). Second, while the attorney for the child suggests that the mother did not timely appeal from the January 2023 order, the record does not reflect when the order was served upon the mother so as to start the time in which to take an appeal (*see* Family Ct Act § 1113). Accordingly, dismissal of that appeal is not warranted (*see Matter of Mark M.L. [Shantia B.]*, 210 AD3d 1093, 1094 [2d Dept 2022]).

Turning to the mother's arguments, she first contends that, despite her failure to appear for what Family Court and her own counsel advised her would be an in-person hearing, Family Court deprived her of due process by only allowing her to observe the hearing. Neither she nor her trial counsel raised that issue before Family Court by registering an objection to the court's ruling or [*2]seeking an adjournment so that the mother could appear in person, however, and the argument is therefore unpreserved for our review (*see Matter of Bella S. [Alice Y.-S.]*, 225 AD3d 883, 884 [2d Dept 2024]; *Matter of Jemar H. v Nevada I.*, 182 AD3d 805, 808-809 [3d Dept 2020]). We would not, in any event, be persuaded of a due process violation because Family Court afforded the mother the

opportunity to be virtually present for the hearing and her counsel capably advanced her interests throughout it (*see Matter of Jemar H. v Nevada I.*, 182 AD3d at 809).

As for the merits of Family Court's determination, abandonment will warrant the termination of parental rights where a petitioner demonstrates "by clear and convincing evidence that, during the six months preceding the petition's filing, the parent 'evince[d] an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by' " the petitioner (*Matter of Micah L. [Rachel L.]*, 192 AD3d 1344, 1344 [3d Dept 2021], quoting Social Services Law § 384-b [5] [a]; *see Matter of Jayce G. [Daniel H.]*, 229 AD3d 857, 858 [3d Dept 2024]; *Matter of Kamariana SS. [Anthony SS.]*, 227 AD3d 1166, 1167 [3d Dept 2024], *lv denied* 42 NY3d 903 [2024]). Once that showing is made, "the burden shifts to the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by" the petitioner (*Matter of Taj'ier W. [Joseph W.]*, 209 AD3d 1203, 1204 [3d Dept. 2022] [internal quotation marks and citation omitted]; *accord Matter of Jayce G. [Daniel H.]*, 229 AD3d at 858; *see* Social Services Law § 384-b [5] [a]).

Petitioner here presented the testimony of its caseworker and one of the child's foster parents, and that testimony reflected that the mother had no contact with the child in the six months leading up to the filing of the petition in January 2022. The mother's interactions with petitioner during that period amounted to a telephone call to the caseworker in which she requested a virtual visit with the child. Upon being advised that virtual visits were only a temporary substitute for in-person visits during the COVID-19 pandemic and were no longer occurring, the mother refused to do an in-person visit because there was an active warrant for her arrest and she did not want to go to petitioner's office. The mother now suggests that petitioner should have facilitated visitation by offering her alternatives to in-person visits at its office given her fear of arrest. It suffices to say that there is no proof that petitioner prevented or discouraged the mother from seeing the child because of that concern — to the contrary, the caseworker testified that she had no intention of arranging for the mother's arrest if she came to visit the child and had never threatened to do so — and petitioner was under no obligation to go further and [*3]make diligent efforts to encourage visits and/or communications between the mother and the child (*see* Social Services Law § 384-b [5]; *Matter of Julius P.*, 63 NY2d 477, 481 [1984]; *Matter of Kamariana SS. [Anthony SS.]*, 227 AD3d at 1167). As a result, "there is no basis upon which to disturb Family Court's decision to terminate the mother's parental rights to the child on the ground of abandonment" (*Matter of Quannie T. [Miayjah R.]*, 226 AD3d 1119, 1122 [3d Dept 2024]; *see Matter of Dimitris J. [Sarah J.]*, 141 AD3d 768, 770-771 [3d Dept 2016]).

Finally, although the findings of fact in both orders regarding abandonment are fully supported by the record, we agree with the mother and the attorney for the child that the January 2023 order improperly includes findings of fact as to matters that were alleged in the petition but that petitioner made no effort to prove at the hearing.[FN1] We accordingly remit so that Family Court may "strike portions of the [January 2023] order containing the improper" findings (*Matter of Bonnie FF. [Marie VV.]*, 220 AD3d 1078, 1083 [3d Dept 2023]).

Garry, P.J., Aarons, Lynch and Ceresia, JJ., concur.

ORDERED that the order entered December 20, 2022 is affirmed, without costs.

ORDERED that the order entered January 23, 2023 is reversed, on the facts, without costs, and matter remitted to the Family Court of Schenectady County to strike findings of fact regarding unproven allegations in the petition.

**Footnotes**

**Footnote 1:** Petitioner suggests that this issue is unpreserved for our review, but the preservation requirement assumes a missed opportunity to object, and the record does not reveal that the mother was placed on notice of the January 2023 order and its contents before it was executed (*see* CPLR 5501 [a] [3]; Family Ct Act § 1118).

**Matter of Eva'Lyn F.**, 230 AD3d 1549 (4th Dept., 2024)

Appeals from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), entered November 10, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and respondent father each appeal from an order that, inter alia, determined that they had abandoned the subject child and terminated their parental rights with respect to that child. We affirm.

The mother and the father each contend that they were denied procedural due process because Family Court failed to advise them, in both the instant proceeding and the underlying Family Court Act article 10 derivative neglect proceeding, of their rights pursuant to, inter alia, Family Court Act § 1033-b (1) (b) and (d). Contrary to the

contentions of the mother and the father, the court's failure to strictly comply with the notice requirements set forth in Family Court Act article 10 does not require reversal here inasmuch as the mother and the father—who were each served with both the petition in the derivative neglect proceeding and the petition in this proceeding and who were represented at all times by appointed counsel—"suffered no prejudice as [a] result" of any failure by the court (*Matter of Stephanie A.*, 224 AD2d 1027, 1028 [4th Dept 1996], *lv denied* 88 NY2d 814 [1996]; *see Matter of Julia R.*, 52 AD3d 1310, 1311 [4th Dept 2008], *lv denied* 11 NY3d 709 [2008]; *Matter of Shawndalaya II.*, 31 AD3d 823, 825 [3d Dept 2006], *lv denied* 7 NY3d 714 [2006]).

We also reject the mother's contention that petitioner failed to establish that it made reasonable efforts to reunite her with the subject child or that she intended to forgo her parental rights during the period in which she had no contact with the child or petitioner. "In the abandonment context, 'the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in' " Social Services Law § 384-b (5) (a) (*Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003], quoting § 384-b [5] [b]; *see Matter of Najuan W. [Stephon W.]*, 184 AD3d 1111, 1112 [4th Dept 2020]). "For the purposes of [that] section, a child is 'abandoned' by [their] parent if such parent evinces an intent to [forgo their] parental rights and obligations as manifested by [their] failure to visit the child and communicate with the child or agency, although able to do so and not prevented or [*2]discouraged from doing so by the agency" (§ 384-b [5] [a]). "In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed" (*id.*), and the burden shifts to the parent "to establish that circumstances existed that prevented [the parent's] contact with the child or agency or that the agency discouraged such contact" (*Najuan W.*, 184 AD3d at 1112; *see Matter of Madelynn T. [Rebecca M.]*, 148 AD3d 1784, 1785 [4th Dept 2017]). Here, petitioner established that the mother failed to maintain contact for the statutory period, and the mother "failed to demonstrate that 'there were circumstances rendering contact with the child or [petitioner] infeasible, or that [she] was discouraged from doing so by [petitioner]' " (*Matter of Armani W. [Adifah W.]*, 167 AD3d 1569, 1570 [4th Dept 2018]; *see Matter of Annette B.*, 4 NY3d 509, 514 [2005], *rearg denied* 5 NY3d 783 [2005]).

We have reviewed the remaining contentions of the mother and the father and conclude that they lack merit.

**Matter of Lillyana M.**, 230 AD3d 1568 (4th Dept., 2024)

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered June 23, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of abandonment. We affirm.

Social Services Law § 384-b (5) (a) provides that "a child is 'abandoned' by [their] parent if such parent evinces an intent to forego [their] parental rights and obligations as manifested by [their] failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." A petition for termination of parental rights on the ground of abandonment may be granted when the parent engages in such behavior "for the period of six months immediately prior to the date on which the petition is filed" (§ 384-b [4] [b]). "In the absence of evidence to the contrary, [the parent's] ability to visit and communicate shall be presumed" (§ 384-b [5] [a]). Here, the evidence at the hearing established that, during the relevant six-month period, the father did not visit with the child, send her cards or gifts, pay any support for her, or communicate with the child's caretakers. The father's sporadic and insubstantial contact with petitioner's caseworkers, which we note was initiated almost entirely by the caseworkers rather than the father, did not preclude the finding of abandonment (*see Matter of Tonasia K.*, 49 AD3d 1247, 1248 [4th Dept 2008]).

We reject the father's contention that petitioner failed to establish abandonment because it discouraged him from having a relationship with the child by not accommodating his request to visit the child in Onondaga County, where he lived, instead of Oswego County, where the child lived; by not suggesting to him that he send the child letters, cards, or gifts; and by never requesting that he pay child support. "In the abandonment context, '[a] court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in [Social Services Law § 384-b (5) (a)]' " (*Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003], quoting Social Services Law § 384-b [5] [b]; *see Matter of Lundyn S. [Al-Rahim S.]*, 128 AD3d 1406, 1407 [4th Dept 2015]). Rather, it was the father's burden, which he failed to meet, "to show that there were circumstances rendering contact with the child or agency infeasible, or that he was discouraged from doing so by the agency" (*Matter of Regina A.*, 43 AD3d 725, 725 [1st Dept 2007]; *see Matter of Najuan W. [Stephon W.]*, 184 AD3d 1111, 1112 [4th Dept 2020]; *Matter of Miranda J. [Jeromy J.]*, 118 AD3d 1469,

1470 [4th Dept 2014]). [*2]Although the father indicated to a caseworker that he had a medical reason why he could not travel to Oswego County, the documentation he provided in support of that claim was over a year old, and the father was unable, when asked, to provide updated documentation. The evidence at the trial also established that the father was able to travel to Oswego County for court proceedings.

The father's contention that Family Court was biased against him and impermissibly acted as an advocate for petitioner is not preserved for our review (*see Matter of Anthony J. [Siobvan M.]*, 224 AD3d 1319, 1319 [4th Dept 2024]; *Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]; *Matter of Dominique M.*, 85 AD3d 1626, 1626 [4th Dept 2011], *lv denied* 17 NY3d 709 [2011]) and is without merit in any event. The fact that the court reserved decision on petitioner's motion to withdraw a prior petition for termination of the father's parental rights does not demonstrate bias (*see generally Melish*, 221 AD3d at 1561). Moreover, "a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial" so long as the court does not "take on the function or appearance of an advocate" (*Matter of Yadiel Roque C.*, 17 AD3d 1168, 1169 [4th Dept 2005] [internal quotation marks omitted]). Here, the court questioned one witness, and the questioning was nonadversarial and served to clarify the witness's testimony (*see Dominique M.*, 85 AD3d at 1626; *Capodiferro v Capodiferro*, 77 AD3d 1449, 1450 [4th Dept 2010]).

We reject the father's contention that he was denied effective assistance of counsel. "It is axiomatic that, because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (*Matter of Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140 [4th Dept 2014], *lv denied* 22 NY3d 866 [2014] [internal quotation marks omitted]). Here, we conclude that "the record, viewed in totality, reveals that the father received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]; *see Matter of Mirah J.P. [Marquis P.]*, 213 AD3d 1219, 1220 [4th Dept 2023]; *Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1165 [4th Dept 2020]).

# Permanent Neglect

**Matter of Jaden S.**, 232 AD3d 559 (1st Dept., 2024)

Orders of fact finding and disposition (one paper), Family Court, New York County (Maria Arias, J.), entered on or about October 27, 2023, which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear and convincing evidence. The record shows that the agency expended diligent efforts by offering the mother frequent visitation, attempting to engage her in planning, discussing with her the importance of compliance with her service plan, referring her for random toxicology screens and providing her with transportation, referring her to free therapy through the agency, and repeatedly attempting home visits of her apartment (*see Matter of Messiah G. [Giselle F.]*, 168 AD3d 420, 421 [1st Dept 2019], *lv dismissed in part, denied in part*, 32 NY3d 1212 [2019]).

Despite these diligent efforts, the mother repeatedly failed to submit to toxicology screens, instead offering a multitude of excuses, despite understanding that her refusal was a barrier to the children's return (*see Matter of Aniya Evelyn R. [Yolanda R.]*, 77 AD3d 593, 593-594 [1st Dept 2010]). The mother also refused to allow the agency to visit her home, last allowing the agency access in 2020, despite understanding her refusal was an issue. Moreover, the mother continued to consume alcohol, on and off, and failed to visit the children consistently, despite understanding what was expected of her (*see Matter of Alexis Alexandra G. [Brandy H.]*, 134 AD3d 547, 548 [1st Dept 2015]; *Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562, 562 [1st Dept 2013])

A preponderance of the evidence supported Family Court's determination that it was in the children's best interests to terminate the mother's parental rights and free them for adoption by their respective, long-term foster parents, who wish to adopt them, and have been providing appropriate care and meeting their special needs (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [1st Dept 2006]). A suspended judgment was not appropriate here because there was no evidence that further delay would result in family reunification, and the children deserved permanency (*see Matter of Felicia Malon Rogue J. [Lena J.]*, 146 AD3d 725, 726 [1st Dept 2017]).

Furthermore, to the extent the mother takes issue with the agency's presentation of its case by introduction of the case record, her argument is both unpreserved and unavailing. Even if the agency relied solely on its progress notes, instead of offering the testimony of the agency caseworker, the progress notes were not the sole evidence supporting the permanent neglect finding, which was amply supported by the mother's

testimony (*see Matter of Elizabeth E.R.T. [Alicia T.]*, 168 AD3d 448, 449 [1st Dept 2019]).

We have considered the mother's [*2]remaining arguments and find them unavailing.

**Matter of Hazelselena S. M.** AD3d 2024 NY Slip Op 06010 (1st Dept., 2024)

Order, Family Court, New York County (Grace Oboma-Layat, J.), entered on or about February 28, 2024, which, to the extent appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence showing that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the mother failed to plan for the child's return because she gained no insight into the reasons for the child's placement during the relevant statutory period (*see* Social Services Law § 384-b[7][a]; *see Matter of Jeremiah C. [Kim C.]*, 211 AD3d 598, 599 [1st Dept 2022], *lv denied* 39 NY3d 910 [2023]). The agency fulfilled its statutory duty to exert diligent efforts to encourage and strengthen the parental relationships by developing a service plan to address the problems that led to the child's removal, maintaining frequent contact with the mother, supporting her participation in scheduled services, and facilitating her visits and contact with the child (*see Matter of N.S. [M.H.]*, 228 AD3d 471, 472 [1st Dept 2024]; *Matter of De'Lyn D.W. [Liza Carmen T.]*, 150 AD3d 599, 600 [1st Dept 2017]). Despite these efforts by the agency, the mother failed to complete the required evaluations and services. The mother's testimony that the services intended to help her to care for the child were "pointless" and unnecessary demonstrates that the agency's efforts failed because of the mother's refusal to cooperate (*see Matter of La'Vetta Danile S.F.*, 194 AD2d 384, 385 [1st Dept 1993]).

To the extent that the mother received anger management services and mental health treatment for bipolar disorder, the record shows that she did not gain insight into her behavior or otherwise benefit from therapy (*see Matter of Faith J. [Kimberly J.]*, 200 AD3d 611, 612 [1st Dept 2021]; *Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]), and she exhibited an inability to control her anger when faced with circumstances she did not like (*see Matter of Ebonee Annastasha F. [Crystal Arlene F.]*, 116 AD3d 576, 577 [1st Dept 2014], *lv*

*denied* 23 NY3d 906 [2014]; *Matter of Imani Elizabeth W.*, 56 AD3d 318, 319 [1st Dept 2008]). There were concerns about the mother's "erratic behaviors" and chronic lateness for visits, and she ultimately terminated her therapy, stating that she did not need medication or services. For that reason, the mother's visits with the child were suspended. Although the mother reported that she completed an intake appointment for mental health services at another provider, she presented no evidence concerning that treatment before the termination petition was [*2]filed (*see Matter of Amanda M.T. [Charles Franklin T.]*, 189 AD3d 470, 471 [1st Dept 2020], *lv denied* 36 NY3d 907 [2021]).

Additionally, a preponderance of the evidence demonstrates that it was in the child's best interest to be freed for adoption (*see Matter of Leroy Simpson M. [Joanne M.]*, 122 AD3d 480, 481 [1st Dept 2014]). A suspended judgment was not warranted because the child, who has been in foster care since May 2017, was living in a loving foster home where her needs were being met, and her foster mother wanted to adopt her (*see Matter of Angelica D. [Deborah D.]*, 157 AD3d 587, 588 [1st Dept 2018]). Furthermore, the mother failed to show that she was able to properly care for the child or would be able to do so in the future (*see Matter of Raul R. [III] [Raul R.—Cinthia R.]*, 199 AD3d 594, 595 [1st Dept 2021], *lv denied* 38 NY3d 944 [2022]).

**Matter of Naijah-S. G. B.**, 230 AD3d 1314 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of fact-finding and disposition of the Family Court, Kings County (Melody Glover, J.), dated October 27, 2021. The order of fact-finding and disposition, after fact-finding and dispositional hearings, inter alia, found that the father permanently neglected the subject child, terminated the father's parental rights, and transferred custody and guardianship of the subject child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.

ORDERED that the order of fact-finding and disposition is affirmed, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the father's parental rights on the ground that he had permanently neglected the subject child. Following a fact-finding hearing, the Family Court found, among other things, that the father permanently neglected the child. Following a

dispositional hearing, the court terminated the father's parental rights and transferred custody and guardianship of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The father appeals.

"'When a foster care agency brings a proceeding to terminate parental rights on the ground of permanent neglect, it must, as a threshold matter, prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship'" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733, quoting *Matter of Geddiah S.R. [Seljeana P.]*, 195 AD3d 725, 725). "Those efforts must include counseling, making suitable arrangements for [parental access], providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development" (*id.* [internal quotation marks omitted]). "Once the petitioner establishes that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's [*2]future, although physically and financially able to do so" (*id.* [internal quotation marks omitted]). "'[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time'" (*id.*, quoting *Matter of Star Leslie W.*, 63 NY2d 136, 143).

Here, the petitioner met its burden of establishing that the father permanently neglected the child. Contrary to the father's contention, the petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the father's parental relationship with the child (*see* Social Services Law § 384-b[3][g][i]; [7][a]; *Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429; *Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 681). Those efforts included the development of a service plan for the father that included random drug testing, employment training, individual therapy, parenting skills classes, and regular visits with the child (*see Matter of Abbygail H.M.G. [Eddie G.]*, 205 AD3d 913, 914). Despite those efforts, the father failed to plan for the return of the child by failing to attend any meeting with the caseworker to discuss his service plan, failing to take steps to acquire appropriate housing, and failing to attend and complete the services to which he was referred (*see* Social Services Law § 384-b[7][a]; *Matter of Marina M. [Krista M.]*, 215 AD3d 845, 846; *Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730).

In light of our determination, we need not reach the father's remaining contention.

**Matter of Destiny B.-R.**, 231 AD3d 944 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of disposition of the Family Court, Dutchess County (Tracy C. MacKenzie, J.), dated September 28, 2023. The order of disposition, upon an order of fact-finding of the same court dated May 4, 2023, made after a fact-finding hearing, finding that the father permanently neglected the subject child, and after a dispositional hearing, terminated the father's parental rights and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption.

ORDERED that the order of disposition is affirmed, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the father's parental rights to the subject child on the ground of permanent neglect. After fact-finding and dispositional hearings, the Family Court found that the father permanently neglected the child, terminated his parental rights, and transferred guardianship and custody of the child to the petitioner for the purpose of adoption.

"The granting of an adjournment rests in the sound discretion of the hearing court" (*Matter of Sacks v Abraham*, 114 AD3d 799, 800; *see Matter of Jahnya [Cozbi C.—Camesha B.]*, 189 AD3d 824, 825). Contrary to the father's contention, under the circumstances, the Family Court did not improvidently exercise its discretion in denying his request for an adjournment of the fact-finding hearing, which the father made on the date of the hearing (*see Matter of Ryan [Jessica D.—Timothy A.]*, 215 AD3d 857, 858; *Matter of Samida v Samida*, 116 AD3d 779, 780).

The petitioner established, by clear and convincing evidence, that the father permanently neglected the child (*see* Social Services Law § 384-b[7][a]), despite its diligent efforts to strengthen the parent-child relationship. Despite these efforts, the father failed to plan for the child's future, as he did not complete any of the required services (*see Matter of S.E.M. [Elizabeth A.M.]*, 213 AD3d 667, 668). Accordingly, the Family Court properly found that the father permanently neglected the child.

Moreover, the evidence supported the Family Court's determination that it was in the best interests of the child to terminate the father's parental rights and free the child for adoption (*see id.* at 669; Family Ct Act § 631). Contrary to the father's contention, "a suspended judgment would not be in the best interests of the child, as such a disposition would only prolong the delay of stability and permanenc[y] in the child's life" (*Matter of S.E.M. [Elizabeth A.M.]*, 213 AD3d at 669 [internal quotation marks omitted]).

**Matter of Mehuljit F.**, 231 AD3d 949 (2ND Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of disposition of the Family Court, Queens County (Joan L. Piccirillo, J.), dated April 28, 2023. The order of disposition, upon an order of fact-finding of the same court dated November 8, 2021, entered upon the mother's failure to appear at a fact-finding hearing, finding that the mother permanently neglected the subject child, and after a dispositional hearing, terminated the mother's parental rights and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

ORDERED that the appeal is dismissed, without costs or disbursements, except with respect to matters which were the subject of contest (*see* CPLR 5511; *Matter of Donaisha B. [Lisa G.]*, 218 AD3d 565); and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the ground of permanent neglect. The mother failed to appear at a fact-finding hearing, and her attorney did not participate after the Family Court denied her attorney's request for an adjournment. After the fact-finding hearing, the court found that the mother permanently neglected the child. After a dispositional hearing, the court terminated the mother's parental rights and transferred guardianship and custody of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

The appeal from so much of the order of disposition as brings up for review the Family Court's finding of permanent neglect of the child by the mother must be dismissed. The mother failed to appear at the fact-finding hearing, and although her attorney was present at the [*2]hearing, her attorney did not participate. Since no appeal lies from an order that is entered on the default of the appealing party, the finding of permanent neglect cannot be reviewed (*see* CPLR 5511; *Matter of Donaisha B. [Lisa G.]*, 218 AD3d 565, 566; *Matter of Devon W. [Lavern D.]*, 127 AD3d 1098, 1099).

The Family Court properly found, by a preponderance of the evidence adduced at the dispositional hearing, that it was in the best interests of the child to free him for adoption. The child had been in his foster home for a prolonged period of time, had developed a positive and nurturing relationship with his foster mother, and did not indicate any desire to return to the mother's care (*see Matter of Donaisha B. [Lisa G.]*,

218 AD3d at 566; *Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 955). Moreover, a suspended judgment was not appropriate under the circumstances presented (*see Matter of Camila G.C. [Matthew C.]*, 229 AD3d 461, 462; *Matter of Jaaliyah M.R.E. [Jennifer A.]*, 188 AD3d 673, 674).

**Matter of Jaden M. O.**, 231 AD3d 958 (2nd Dept., 2024)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from two orders of fact-finding and disposition of the Family Court, Kings County (Michael R. Milsap, J.) (one as to each child), both dated June 30, 2023. The orders of fact-finding and disposition, after fact-finding and dispositional hearings, found that the mother permanently neglected the subject children, terminated her parental rights, and transferred guardianship and custody of the subject children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

ORDERED that the orders of fact-finding and disposition are affirmed, without costs or disbursements.

The subject children have been in foster care since 2017. In 2021, the petitioner commenced these proceedings pursuant to Social Services Law § 384-b to terminate the mother's parental rights. Following fact-finding and dispositional hearings, the Family Court found that the mother permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother appeals.

Upon the mother's request, her counsel was relieved during the fact-finding hearing on March 14, 2022. During the proceedings that day, the mother told the Family Court that she had hired a new attorney but refused to disclose the name of the new attorney. The mother did not [*2]indicate that she intended to represent herself, and she was advised of the next hearing date and given the contact information for the petitioner's attorney. Thus, contrary to the mother's contention, "the record does not facially demonstrate unequivocal and timely applications for self-representation that would have triggered a 'searching inquiry'" (*see Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 386).

The petitioner established, by clear and convincing evidence, that the mother permanently neglected the children (*see* Social Services Law § 384-b[7][a]), notwithstanding the petitioner's diligent efforts to strengthen the parent-child

relationships. Despite those efforts, the mother failed to plan for the return of the children, as she did not complete all of the required services and failed to gain any insight from the services she did complete (*see Matter of Ricardo T., Jr. [Ricardo T., Sr.]*, 191 AD3d 890). Further, the evidence adduced at the dispositional hearing established that termination of the mother's parental rights was in the children's best interests (*see Matter of Malazah W. [Antoinette W.]*, 206 AD3d 1003, 1005).

The contention of the mother and the attorney for the children that the Family Court should have granted a suspended judgment is unpreserved for appellate review (*see Matter of Mathew B.C. [Sue-Ann L.C.]*, 200 AD3d 689, 690). In any event, the contention is without merit. A suspended judgment was not in the children's best interests, as the mother failed to demonstrate progress in overcoming the issue that led to the children's removal (*see Matter of Malazah W. [Antoinette W.]*, 206 AD3d at 1004). In addition, the mother failed to benefit from those portions of the service plan that she had completed (*see Matter of Jayda M.L. [Diane L.]*, 182 AD3d 601, 602), and a suspended judgment would serve only to prolong the delay of stability and permanence in the children's living situation (*see Matter of Vincent N.B. [Gregory B.]*, 173 AD3d 855, 856).

Contrary to the contention of the mother and the attorney for the children, the Family Court did not improvidently exercise its discretion in failing to consider the wishes of the child Nylah R. O., who was 14 years old at the time of the dispositional hearing. While a child more than 14 years old generally must consent to adoption (*see* Domestic Relations Law § 111[a]), such a child's desire is but one factor that the Family Court may consider in determining whether termination of parental rights is in that child's best interests (*see* Social Services Law § 384-b[3][k]). Here, under the circumstances of this case, the termination of the mother's parental rights was in the children's best interests, notwithstanding the hesitancy of Nylah R. O. toward adoption (*see Matter of Teshana Tracey T. [Janet T.]*, 71 AD3d 1032, 1034).

**Matter of Kasey R. L. R.**, AD3d 2024 NY Slip Op 06346 (2nd Dept., 2024)

In related proceedings pursuant to Social Services Law § 384-b, the mother appeals from three orders of fact-finding and disposition of the Family Court, Kings County (Ilana Gruebel, J.) (one as to each child), all dated November 21, 2023. The orders of fact-finding and disposition, after fact-finding and dispositional hearings, found that the

mother permanently neglected the subject children, terminated the mother's parental rights, and transferred custody and guardianship of the subject children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.

ORDERED that the orders of fact-finding and disposition are affirmed, without costs or disbursements.

The children Shanessa B. and Kayla B. have been in kinship foster care with their great-aunt since 2011, and the child Kasey R. L. has been in kinship foster care with the great-aunt since 2012, six days after he was born. In October 2019, the petitioner commenced these proceedings to terminate the mother's parental rights to the children on the ground of permanent [*2]neglect. After fact-finding and dispositional hearings, the Family Court found that the mother permanently neglected the children, terminated her parental rights, and transferred guardianship and custody of the children to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appeals.

"In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate 'by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship'" (*Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680, quoting *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960 [internal quotation marks omitted]). "'Those efforts must include counseling, making suitable arrangements for parental access, providing assistance to the parents to resolve the problems preventing the child's discharge, and advising the parents of the child's progress and development'" (*Matter of Angelina J.W. [Tanya J.W.]*, 217 AD3d 773, 774-775, quoting *Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733 [alteration omitted]; *see Matter of Kamiah J.N.H. [Katrina H.]*, 220 AD3d 861, 862). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although physically and financially able to do so" (*Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961).

Here, the petitioner established that it made referrals for the mother to Mental Illness and Controlled-Substance Abuse programs, drug treatment services, drug screenings, and mental health treatment, as well as facilitated supervised parental access between the mother and the children. Thus, the petitioner made diligent efforts to strengthen the parent-child relationship (*see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680). However, the mother did not take advantage of those referrals before the petitions were filed, did not cooperate with and failed drug screenings, and cancelled or missed more

than half of the supervised parental access sessions. The record shows that, despite the petitioner's efforts, the mother failed to establish that she maintained contact with the children or planned for the children's future (*see id.* at 681).

"At the dispositional stage of a proceeding to terminate parental rights, the court focuses solely on the best interests of the child, and there is no presumption that those interests will be served best by any particular disposition" (*Matter of Camila G.C. [Matthew C.]*, 229 AD3d 461, 461). "'The factors to be considered in making the determination include the parent or caretaker's capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect'" (*Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 955, quoting *Matter of William S.L. [Julio A.L.]*, 195 AD3d 839, 843; *see Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d 754, 756).

Here, the evidence adduced at the dispositional hearing established that termination of the mother's parental rights was in the best interests of the children (*see Matter of Camila G.C. [Matthew C.]*, 229 AD3d at 462). Further, the record supports the Family Court's determination that the children's best interests would be served by freeing the children for adoption by their great-aunt, with whom the children have bonded and have resided over a prolonged period of time (*see Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 659; *Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d 875, 877).

**Matter of Daimeon MM**, 230 AD3d 1416 (3rd Dept., 2024)

Appeal from an order of the Family Court of Delaware County (Gary A. Rosa, J.), entered August 18, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondent's parental rights.
Respondent (hereinafter the mother) is the mother of the three subject children (born in 2015, 2017 and 2020) who were removed from the mother's care and placed in foster care in June 2021. Thereafter, the mother consented to a finding of neglect, and the children's placement was continued. In September 2022, petitioner commenced the instant petition alleging that the mother had permanently neglected the children and seeking to terminate her parental rights. Following a fact-finding hearing and a dispositional hearing, Family Court adjudicated the children to be permanently neglected and terminated the mother's parental rights. The mother appeals.

"As relevant here, a permanently neglected child is one who is in the care of an authorized agency and whose parent has failed, for at least one year after the child came into the agency's care, to substantially and continuously or repeatedly 'plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship' " (*Matter of Jason O. [Stephanie O.]*, 188 AD3d 1463, 1464 [3d Dept 2020], *lv denied* 36 NY3d 908 [2021], quoting Social Services Law § 384-b [7] [a]). "To make the threshold showing of diligent efforts, the petitioning agency must establish, by clear and convincing evidence, that it made practical and reasonable efforts to ameliorate the problems preventing reunification and strengthen the family relationship by such means as assisting the parent with visitation, providing information on the child[ren]'s progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Asiah S. [Nancy S.]*, 228 AD3d 1034, 1035 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Drey L. [Katrina M.]*, 227 AD3d 1134, 1135-1136 [3d Dept 2024]). "In assessing whether petitioner has demonstrated permanent neglect, we accord great weight to the factual findings and credibility determinations of Family Court, and its findings will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Ryan J. [Taylor J.]*, 222 AD3d 1207, 1209 [3d Dept 2023] [citations omitted], *lv denied* 41 NY3d 909 [2024]; *accord Matter of Nikole V. [Norman V.]*, 224 AD3d 1102, 1103 [3d Dept 2024], *lv denied* 41 NY3d 909 [2024]).

On appeal, the mother argues that Family Court's determination that petitioner engaged in diligent efforts lacks a sound and substantial basis in the record.**[FN1]** Upon the children's removal, petitioner's caseworkers recommended that the mother undergo a substance abuse evaluation and a mental [*2]health evaluation and that she follow any resulting treatment recommendations, and they scheduled appointments for the mother to obtain said evaluations. Petitioner also facilitated regular supervised visitation with the children and offered the mother parenting education, caseworker counseling and transportation services. Although the mother asserts that these services were not tailored to her particular circumstances, we disagree, as she admitted to a history of substance abuse and that she suffered from certain mental health issues that were untreated during the relevant time period. Accordingly, Family Court properly found that petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the mother's relationship with the subject children (*see Matter of Nikole V. [Norman V.]*, 224 AD3d at 1104; *Matter of Nevaeh N. [Heidi O.]*, 220 AD3d 1070, 1071 [3d Dept 2023], *lv denied* 41 NY3d 903 [2024]; *Matter of Paige J. [Jeffrey K.]*, 155 AD3d 1470, 1472-1473 [3d Dept 2017]; *compare Matter of Willow K. [Victoria L.]*, 218 AD3d 851, 853-854 [3d Dept 2023]).

Next, the mother argues that she substantially planned for the children's future. "Petitioner has the burden of establishing, by clear and convincing evidence, that a parent has failed to make a realistic and feasible plan and taken meaningful steps to correct the conditions that led to the child[ren]'s removal" (*Matter of Asiah S. [Nancy S.]*, 228 AD3d at 1036 [internal quotation marks, brackets and citations omitted]; *see Matter of Harmony F. [William F.]*, 212 AD3d 1028, 1031 [3d Dept 2023]). "In determining whether a parent has adequately planned in such a manner, Family Court 'may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent' " (*Matter of Logan C. [John C.]*, 169 AD3d 1240, 1243 [3d Dept 2019], quoting Social Services Law § 384-b [7] [c]). Family Court found that the mother lacked credibility, and our review of the record supports such finding. For example, the mother denied that she hid a pregnancy from petitioner during the pendency of the original neglect proceedings, but her assertions were contradicted by her fiancÉ's testimony and her own medical records. In addition, the mother was unable to accept responsibility for her role in the children's removal and placement, and she failed to engage in the offered services. She testified that she prohibited caseworkers from conducting unannounced visits at her apartment as it triggered posttraumatic stress disorder symptoms, but she denied needing any mental health treatment. The mother also failed to recognize that she may need substance abuse treatment, asserting that she had been sober since 2012, but she also admitted that she used marihuana regularly throughout her most recent pregnancy. Although the mother attended many visits with the children, she was often on [*3]her cell phone and did not respond to suggestions about how to redirect the children's behavior when they would behave aggressively toward each other. She also did not consistently meet with her caseworker or with her parenting educator. Based on the foregoing, petitioner established, by clear and convincing evidence, that the mother failed to substantially plan for the children's future for at least one year, and, thus, Family Court properly adjudicated the subject children to be permanently neglected (*see Matter of Dustin D. [Paul D.]*, 222 AD3d 1250, 1253 [3d Dept 2023], *lv denied* 41 NY3d 904 [2024]; *Matter of Ryan J. [Taylor J.]*, 222 AD3d at 1210-1212; *Matter of Makayla I. [Sheena K.]*, 201 AD3d 1145, 1148-1149 [3d Dept 2022], *lvs denied* 38 NY3d 903 [2022], 38 NY3d 903 [2022]).

Lastly, to the extent that the mother argues that Family Court should have granted her a suspended judgment, such outcome is only appropriate where a parent has clearly demonstrated that a brief grace period would allow him or her to demonstrate the ability to be a fit parent and such brief delay is consistent with the best interests of the children (*see Matter of Drey L. [Katrina M.]*, 227 AD3d at 1137-1138; *Matter of Corey MM. [Cassandra LL.]*, 177 AD3d 1119, 1122 [3d Dept 2019]). Indeed, "[f]ollowing an adjudication of permanent neglect, the sole concern at a dispositional hearing is the

best interests of the children and there is no presumption that any particular disposition, including the return of the children to the parent, promotes such interests" (*Matter of Makayla I. [Sheena K.]*, 201 AD3d at 1151-1152 [internal quotation marks and citations omitted]; *see Matter of Asiah S. [Nancy S.]*, 228 AD3d at 1037). At the dispositional hearing, the mother testified that she completed a parenting class in Pennsylvania, but neither the certificate of completion nor the mother's testimony provided any information as to any skill that the mother had learned. Additionally, the mother's testimony that she engaged in counseling through a mobile mental health crisis unit fell short of the requirement to complete an evaluation, especially as she showed no interest in such treatment. Although the mother expressed love for the children, she had not made any significant progress toward reunification. The children, meanwhile, were well-adjusted in their respective foster homes. The youngest child had been placed with a paternal aunt, who testified to having a close bond with the child and expressed an interest in adopting that child. The foster parent with whom the older two children were placed testified that the children initially had a lot of aggression but had learned to manage and communicate their emotions, and she expressed an interest in adopting both children.[FN2] Both the aunt and the foster parent testified that the children became dysregulated following visits with the mother, and each described the children's behaviors following a recent visit where the police were called. Under [*4]these circumstances, where a suspended judgment would have unnecessarily delayed the children's permanency, a sound and substantial basis exists to support Family Court's determination to terminate the mother's parental rights (*see Matter of Edrick PP. [Alexis QQ.]*, 221 AD3d 1307, 1309-1310 [3d Dept 2023]; *Matter of Corey MM. [Cassandra LL.]*, 177 AD3d at 1123-1124; *Matter of Isabella M. [Kristine N.]*, 168 AD3d 1234, 1235-1236 [3d Dept 2019]). The mother's remaining contentions, to the extent not expressly addressed herein, have been examined and found to lack merit.

ORDERED that the order is affirmed, without costs.

**Footnote 1:** Petitioner and the attorney for the children assert that the record supports the order on appeal, and both argue in favor of affirmance.

**Footnote 2:** The father of the subject children judicially surrendered his parental rights in February 2023.

**Matter of Carrie X.**, 230 AD3d 1397 (3rd Dept., 2024)

Appeal from an order of the Family Court of Broome County (Hollie S. Levine, J.), entered December 23, 2022, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondents' parental rights.
Respondent Amber Y. (hereinafter the mother) and respondent Brett Z. (hereinafter the father) are the parents of three children (born in 2016, 2017 and 2019) who, in August 2019, were adjudicated as neglected children. In April 2021, petitioner filed a permanent neglect petition alleging, among other things, that respondents failed to make plans for the future of the children although physically and financially able to do so and had failed to take advantage of the diligent efforts made by petitioner to strengthen and encourage the parental relationship. Following a fact-finding hearing and a dispositional hearing, Family Court adjudicated the children to be permanently neglected and terminated respondents' parental rights. The mother appeals.

As argued by petitioner and the attorney for the children, the mother's appeal must be dismissed as untimely. Pursuant to Family Ct Act § 1113, the mother was required to file her notice of appeal, as relevant here, within "[35] days from the mailing of the order to the appellant by the clerk of the court." The record reflects that the Family Court Clerk's office emailed the order to the mother's counsel and mailed the order to the mother via regular mail on the same day it was entered — December 23, 2022. The mother, in a self-represented capacity, filed a notice of appeal on February 23, 2023, well beyond the 35-day period. Accordingly, the mother's "appeal is untimely and, as the applicable statutory time bar is absolute and not subject to extension, this Court lacks jurisdiction to entertain it" (*Matter of Benjamin GG. v Alexa II.*, 198 AD3d 1194, 1195 [3d Dept 2021]; *see* Family Ct Act § 1113; *Matter of Washington County Dept. of Social Servs. v Oudekerk*, 205 AD3d 1108, 1108-1109 [3d Dept 2022]; *Matter of Ucci v Ucci*, 93 AD3d 1110, 1111 [3d Dept 2012], *lv dismissed* 19 NY3d 941 [2012]). Petitioner's alternative contention directed at the mother's failure to effectuate service of the notice of appeal (*see* Family Ct Act § 1115) has been rendered academic.

Garry, P.J., Egan Jr., Clark and Fisher, JJ., concur.

ORDERED that the appeal is dismissed, without costs.

**Matter of Gabriel J.**, 232 AD3d 1093 (3rd Dept., 2024)

Appeal from an order of the Family Court of Essex County (Richard B. Meyer, J.), entered July 6, 2023, which granted petitioner's application, in a proceeding pursuant to Social Services Law § 384-b, to adjudicate the child to be permanently neglected, and terminated respondent's parental rights.

Respondent (hereinafter the mother) is the mother of the subject child (born in 2015).[FN1] In February 2020, the mother was caught stealing from a Wal-Mart, and law enforcement officials learned that she had left the child alone at a nearby store while engaging in the theft. Then, in April 2021, the child sustained various facial injuries which she asserted were inflicted by the mother's paramour (hereinafter the paramour), who resided in the same household as the mother and the child. As a result of that incident, petitioner filed a neglect petition against the mother. The child was removed from the mother's care in May 2021 and has remained in foster care since. In September 2022, the mother admitted that she left the child alone at a store in February 2020, and she consented to a finding of neglect on that basis.[FN2] Petitioner filed the instant permanent neglect petition in March 2023, seeking to terminate the mother's parental rights. Following a fact-finding hearing, Family Court adjudicated the child to be a permanently neglected child and, after a dispositional hearing, terminated the mother's parental rights and freed the child for adoption. The mother appeals.

A permanently neglected child is one who is in the care of an authorized agency and whose parent has failed, for at least one year or for 15 out of the most recent 22 months, to substantially and continuously or repeatedly "plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child" (Social Services Law § 384-b [7] [a]; *see Matter of Desirea F. [Angela H.]*, 217 AD3d 1064, 1065-1066 [3d Dept 2023], *lv denied* 40 NY3d 908 [2023]; *Matter of Frank Q. [Laurie R.]*, 204 AD3d 1331, 1333 [3d Dept 2022]). "To make the threshold showing of diligent efforts, the petitioning agency must establish, by clear and convincing evidence, that it made practical and reasonable efforts to ameliorate the problems preventing reunification and strengthen the family relationship by such means as assisting the parent with visitation, providing information on the child's progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Asiah S. [Nancy S.]*, 228 AD3d 1034, 1035 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Jace N. [Jessica N.]*, 168 AD3d 1236, 1237 [3d Dept 2019], *lv denied* 32 NY3d 918 [2019]). On appeal, we defer to Family Court's credibility determinations (*see Matter of Bayley W. [Patrick K.]*, 146 AD3d 1097, [*2]1099 [3d Dept 2017], *lv denied* 29 NY3d 907 [2017]; *Matter of Victoria XX. [Thomas XX.]*, 110 AD3d 1168, 1170-1171 [3d Dept 2013]).

Here, the child, who was six years old at the time of the removal, consistently blamed the paramour for causing her facial injuries, and she displayed a trauma response whenever she saw the paramour or heard her name. The child was diagnosed with trauma stress disorder and attended regular mental health counseling. Petitioner provided the mother with updates about the child's progress in counseling and offered the mother regular supervised phone calls and visitation with the child, until such contact was deemed contrary to the child's mental health. Petitioner conducted service plan review meetings and recommended that the mother engage in mental health counseling, substance abuse treatment and parenting classes; petitioner also offered assistance for the mother to engage in such services. Additionally, in light of the child's reaction to the paramour and the issuance of an order of protection requiring the paramour to stay away from the child, petitioner repeatedly recommended that the mother obtain housing separate from the paramour. Petitioner's witnesses explained that this presented the biggest barrier to reunification and that they had provided the mother with housing applications to help her achieve that goal. Under these circumstances, we find that Family Court properly determined that petitioner met its burden of establishing diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Asiah S. [Nancy S.]*, 228 AD3d at 1036; *Matter of Nevaeh N. [Heidi O.]*, 220 AD3d 1070, 1071 [3d Dept 2023], *lv denied* 41 NY3d 903 [2024]; *Matter of Everett H. [Nicole H.]*, 129 AD3d 1123, 1125 [3d Dept 2015]).

Next, a petitioning agency is required to "demonstrate, through clear and convincing evidence, that [a parent] failed to substantially plan for the future of the child for the requisite period of time, which requires the parent to take meaningful steps to correct the conditions that led to the child's removal" (*Matter of Desirea F. [Angela H.]*, 217 AD3d at 1066 [internal quotation marks, brackets and citation omitted]; *see* Social Services Law § 384-b [7] [c]; *Matter of Leon YY. [Christopher ZZ.]*, 206 AD3d 1093, 1096 [3d Dept 2022]). The mother's visits with the child were generally positive, and she attended these regularly until approximately August 2022, when her attendance became inconsistent. During a visit, the mother showed the child a picture of the facial injuries she sustained in April 2021 and accused the child of lying about their source.**[FN3]** The mother admitted that she believed the injuries were self-inflicted. Further, although the mother acknowledged that the child had certain trauma responses to the paramour and that an order of protection was in place, she continued to live with the paramour even after the instant petition was filed. According to the mother, as of the fact[*3]-finding hearing, she had obtained her own apartment and was living separately from the paramour. As to the parenting classes, the mother asserted that she previously completed such a class, but she refused to provide a release for those records or to complete another class. Although the mother attended medication management, her engagement with mental health counseling was inconsistent.**[FN4]** In December 2022,

the mother was arrested for driving while ability impaired due to being under the influence of drugs; however, she maintained that she did not need substance abuse treatment. Throughout the hearing, the mother refused to accept any responsibility for the circumstances that kept the child in foster care, placing blame with the child and petitioner instead. Based upon these circumstances, and deferring to Family Court's credibility determinations, petitioner met its burden of establishing, by clear and convincing evidence, that the mother failed to substantially plan for the child's future for at least one year before the filing of the permanent neglect petition and, consequently, the court properly adjudicated the child to be permanently neglected (*see Matter of Asiah S. [Nancy S.]*, 228 AD3d at 1036-1037; *Matter of Paige J. [Jeffrey K.]*, 155 AD3d 1470, 1474-1474 [3d Dept 2017]; *Matter of Jessica U. [Stephanie U.]*, 152 AD3d 1001, 1004-1005 [3d Dept 2017]).**[FN5]**

Turning to the disposition, we disagree with the mother's contention that Family Court should have granted her a suspended judgment. At a dispositional hearing, Family Court's only concern is the best interests of the child, without any presumption in favor of reunification, and "[a] suspended judgment is only appropriate where a parent has made significant progress such that a brief grace period would allow him or her to demonstrate the ability to be a fit parent, and such delay is consistent with the child's best interests" (*Matter of Asiah S. [Nancy S.]*, 228 AD3d at 1037; *see Matter of Leon YY. [Christopher ZZ.]*, 206 AD3d at 1096; *Matter of Landon U. [Amanda U.]*, 132 AD3d 1081, 1085 [3d Dept 2015]). The mother did not appear at the July 2023 dispositional hearing, despite being informed of the scheduled date during the prior court appearance. Petitioner proffered testimony from the property manager for the mother's current landlord, which testimony contradicted the mother's earlier assertion that she was living apart from the paramour. The property manager explained that the paramour was in the mother's apartment nearly every day, including overnights, and that the paramour's sons were often present in that apartment. According to the property manager, the paramour reported that the mother needed her, as she could not be alone due to a health issue.

At the time of the dispositional hearing, the mother had not had any contact with the child since March 2023, when visits were suspended as a result of the mother's conduct during visits and due to threats that she made against petitioner's caseworkers[*4]. The child had been doing well in foster care, and she was engaged in various sports and other enriching activities. Petitioner's caseworker testified that the foster parents resided near the mother and the paramour and that this led to chance encounters that the child found very upsetting. As a result, the child's then-current foster parents were assisting in acquainting different, pre-adoptive foster parents with the child, her history and her needs. According to the caseworker, the child had been spending time with the pre-adoptive foster parents in the preceding months and, as she was becoming more

comfortable with them, petitioner planned to relocate the child in the coming weeks. Giving the appropriate deference to Family Court's factual findings and credibility determinations, we agree that the mother failed to make any meaningful progress in overcoming the barriers preventing reunification and that a suspended judgment is not in the child's best interests. Rather, Family Court's decision to terminate the mother's parental rights and free the child for adoption serves the best interests of the child and is supported by a sound and substantial basis in the record (*see Matter of Nevaeh N. [Heidi O.]*, 220 AD3d at 1072-1073; *Matter of Jason O. [Stephanie O.]*, 188 AD3d 1463, 1468 [3d Dept 2020], *lv denied* 36 NY3d 908 [2021]; *Matter of Angelica VV.*, 53 AD3d 732, 733 [3d Dept 2008]). To the extent not expressly addressed herein, the mother's remaining contentions have been considered and found to lack merit.

ORDERED that the order is affirmed, without costs.

**Footnote 1:** The child's birth father is deceased.

**Footnote 2:** The mother also pleaded guilty to one count of endangering the welfare of a child as a result of that incident.

**Footnote 3:** As a result of this incident, and due to threats made by the mother against petitioner's caseworkers, Family Court suspended the mother's visits with the child in March 2023.

**Footnote 4:** The mother would not sign releases for her treatment providers except that she signed a limited release to allow petitioner to access her medication management and mental health treatment records between August 2022 and January 2023.

**Footnote 5:** To the extent that the mother complains that Family Court improperly incorporated testimony from a March 2023 permanency planning hearing into the fact-finding hearing for the instant permanent neglect proceeding, we note that such testimony was incorporated with her consent and, as such, the issue is unpreserved for appellate review (*see Matter of B. Mc. [Dawn Mc.]*, 99 AD3d 713, 713 [2d Dept 2012]; *see also Matter of Elaysia GG. [Amber HH.]*, 221 AD3d 1338, 1340 n [3d Dept 2023]). Nevertheless, we note that Family Court premised its decision only on evidence that was properly admissible at the fact-finding hearing (*compare* Family Ct Act § 1046 [c], *with* Family Ct Act § 624). Therefore, any such error was harmless (*see Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 n 5 [3d Dept 2022], *lvs denied* 39 NY3d 911 [2023], 39 NY3d 911 [2023]; *Matter of Nicholas R. [Jason S.]*, 82 AD3d 1526, 1528 n [3d Dept 2011], *lvs denied* 17 NY3d 706 [2011], 17 NY3d 706 [2011]).

**Matter of Carmela D.**, 232 AD3d 1126 (3rd Dept., 2024)

Appeal from an order of the Family Court of Schenectady County (Mark W. Blanchfield, J.), entered July 5, 2022, which granted petitioner's applications, in two proceedings pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondents' parental rights.

Respondent Shameeka G. (hereinafter the mother) is the mother of the subject children (born in 2007 and 2017) and respondent Tristen F. (hereinafter the father) is the father of the older child.[FN1] Petitioner filed a neglect petition against the mother and removed both of the children from her care on an emergency basis in June 2019 after they were found unattended in the mother's home, which was in a deplorable condition.[FN2] In July 2019, Family Court issued an order directing the mother to abide by a number of conditions under petitioner's supervision, including participating in mental health treatment and completing a parenting class. Family Court subsequently, in August 2019, adjudicated the children neglected and placed them in petitioner's custody. They have remained in foster care ever since.

For several months, petitioner and the mother conducted settlement discussions concerning the issues that had been raised in the neglect petition, which ultimately proved unsuccessful. In November 2020, petitioner commenced the first of these permanent neglect proceedings against the mother, seeking to terminate her parental rights to the children, and in February 2021, petitioner commenced the second of these proceedings against the father, for the purpose of terminating his parental rights as to the older child. Following separate fact-finding hearings, Family Court determined that petitioner had demonstrated that it engaged in diligent efforts to reunify the children with respondents, but that they failed to properly plan for the children's future, thus establishing permanent neglect. After a combined dispositional hearing, the court terminated respondents' parental rights. Respondents appeal, and we affirm.

Turning first to Family Court's adjudications of permanent neglect, as relevant here, a permanently neglected child is one who is in the care of an authorized agency and whose parent has failed, for a period of 15 of the most recent 22 months, to "substantially and continuously or repeatedly . . . plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship" (Social Services Law § 384-b [7] [a]). Thus, in a permanent neglect proceeding, the petitioner bears the burden of proving by clear and convincing evidence, first, that it made such diligent efforts, and, second, that the respondent failed to plan for the child's future (*see Matter of Nevaeh N. [Heidi O.]*, 220 AD3d 1070, 1070-1071 [3d Dept 2023], *lv denied* 41 NY3d 903 [2024]).

Diligent efforts on the part of the agency entail "develop[ing] a plan that is [*2]realistic and tailored to fit the respondent's individual situation" (*Matter of Willow K. [Victoria L.]*, 218 AD3d 851, 852 [3d Dept 2023] [internal quotation marks, brackets and citation omitted]; *see Matter of Austin A.*, 243 AD2d 895, 896-897 [3d Dept 1997]). Notably, diligent efforts will be found where "appropriate services are offered but the parent refuses to engage in them or does not progress" (*Matter of Desirea F. [Angela H.]*, 217 AD3d 1064, 1066 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 40 NY3d 908 [2023]). As for the parent's obligation to substantially plan for the child's future, this "requires the parent to take meaningful steps to correct the conditions that led to the child's removal" (*id.* [internal quotation marks and citation omitted]). "In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent" (Social Services Law § 384-b [7] [c]; *accord Matter of Issac Q. [Kimberly R.]*, 212 AD3d 1049, 1051 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]).

The evidence at the fact-finding hearing concerning the petition against the mother revealed that, when the children were removed from her care, police officers and petitioner's caseworkers found the children alone in the home, which was in a highly unsanitary condition. The older child did not know where the mother was or how to reach her, while the younger child was found with her diaper and mattress soaked in urine. After the children were removed, petitioner's caseworker provided the mother with a list of mental health providers and sought releases from the mother to ascertain any treatment she had previously obtained for her mental health issues, which the mother admitted included anxiety, depression and posttraumatic stress disorder. The caseworker also offered the mother a referral to parenting classes that were specifically tailored to the ages of the children, as well as housing services, coached visitation with the children, and taxi fares and bus tokens to facilitate these visits.

The mother largely failed to avail herself of these resources. While she claimed that she had secured alternative mental health treatment, records from this treatment revealed that she attended sessions only sporadically, did not disclose to her counselors the circumstances surrounding the children's removal from her care and failed to acknowledge her role in that removal, instead focusing on other topics of her choosing. In interactions with the caseworker, the mother was combative, declined services and refused to share her current address or any details about her employment or finances. While the mother attended a number of supervised visits with the children, she often exhibited erratic and aggressive behavior toward service providers in front of the children, with [*3]the older child flinching and appearing uncomfortable and fearful of the mother on these occasions. Commendably, the mother provided evidence that she had taken parenting classes, but appeared to struggle to put some of the skills she learned,

including anger management, into practice during her visits with the children. The mother also caused upheaval in the children's foster care placements, accusing one foster parent of kidnapping the children and falsely alleging that the younger child had been abused.

We find that the hearing evidence furnished a sound and substantial basis for Family Court's ruling that the mother permanently neglected the children, in that petitioner made reasonable, diligent efforts to strengthen the relationship between the mother and the children, the mother either refused the proffered services or failed to make meaningful progress, and the mother did not substantially plan for the children's future (*see Matter of Nikole V. [Norman V.]*, 224 AD3d 1102, 1104-1105 [3d Dept 2024], *lv denied* 41 NY3d 909 [2024]; *Matter of Chloe B. [Sareena B.]*, 189 AD3d 2011, 2013-2014 [3d Dept 2020]). In that regard, the mother's failure to acknowledge and correct the conditions that led to the removal of the children contributed to her inability to plan for their future (*see Matter of Makayla I. [Sheena K.]*, 201 AD3d 1145, 1149 [3d Dept 2022], *lv denied* 38 NY3d 903 [2022]). Although the caseworker and the mother provided testimony that at times differed strongly, we defer to Family Court's credibility determinations (*see Matter of Issac Q. [Kimberly R.]*, 212 AD3d at 1053-1054).

With respect to the petition against the father, there was proof at the fact-finding hearing that the older child had never lived with him and, despite having visitation rights, the father had very few interactions with the older child for the first 12 years of her life, at times going years without seeing her at all. After the older child entered foster care, petitioner's caseworker attempted to provide information to the father relative to her special needs and serious allergies, including an allergy to dogs, but the father responded with skepticism and expressed that he had no plans to rehome the two dogs currently living with him. The caseworker also provided the father with supervised calls and visits, but he did not attend the majority of these, often blaming his work schedule yet declining the caseworker's offer to speak to his supervisor. Further, records received in evidence appeared to contradict the father's claims that he worked long and/or irregular hours. When the older child refused telephone contact with the father after a gap of several months, he accused the caseworker of brainwashing the older child. The father characterized the caseworker's attempts to facilitate visits and calls with the older child as demands that he do so, and refused multiple offers of transportation assistance. In addition, the caseworker offered the father case planning meetings[*4], but he did not participate in any meaningful way and instead became belligerent. The father denied that the older child needed him to be a consistent presence in her life because, as he stated, he had a "special understanding" with her.

The caseworker testified that the father exhibited concerning behaviors including paranoia and anger, and struggled with basic comprehension of the details of the case.

Although the father suffered a traumatic brain injury as a child, he acknowledged that the only long-term effects were seizures, which he managed through medication. Nevertheless, the caseworker requested a release from the father in order to review a prior mental health evaluation, which the father refused, and also sought to have the father complete another mental health evaluation and any recommended treatment, which he resisted, calling the caseworker racist and denying that he needed such treatment. After the fact-finding hearing commenced, the father obtained what appeared to be a limited mental health evaluation, but there was no evidence that he attended any treatment. Considering the above evidence and again deferring to Family Court's credibility determinations, the court's conclusion that petitioner made diligent efforts toward strengthening the father's bond with the older child, and that the father refused to partake in these efforts and failed to substantially plan for the older child's future, resulting in permanent neglect, finds sufficient support in the record (*see Matter of Chloe B. [Sareena B.]*, 189 AD3d at 2014; *Matter of Jason O. [Stephanie O.]*, 188 AD3d 1463, 1467 [3d Dept 2020]).

As for the disposition rendered by Family Court, "[f]ollowing an adjudication of permanent neglect, the sole concern at a dispositional hearing is the best interests of the child, and there is no presumption that any particular disposition, including the return of a child to a parent, promotes such interests" (*Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1355 [3d Dept 2022] [internal quotation marks, brackets and citations omitted], *lvs denied* 39 NY3d 911 [2023], 39 NY3d 911 [2023]; *see Matter of Leon YY. [Christopher ZZ.]*, 206 AD3d 1093, 1096-1097 [3d Dept 2022]). While the court may decide to issue a suspended judgment rather than terminating parental rights, "[a] suspended judgment is only appropriate where a parent has made significant progress such that a brief grace period would allow him or her to demonstrate the ability to be a fit parent, and such delay is consistent with the child's best interests" (*Matter of Asiah S. [Nancy S.]*, 228 AD3d 1034, 1037 [3d Dept 2024], *lv denied* ___ NY3d ___ [Nov. 21, 2024]).

By the time of the dispositional hearing, there was evidence that each of the respondents had secured housing and employment. However, they had not made significant progress in utilizing the supports and services offered to them, and the quality of their visits with the children had not improved. According to the caseworker, the older [*5]child became upset at the suggestion of a phone call with the mother, and professed discomfort and anxiety at the thought of speaking with the father, while the younger child refused to speak with the mother. Both children expressed that they wished to remain in their foster care placement and be adopted by their foster parent.[FN3] Under the circumstances presented herein, we conclude that Family Court's determination that the best interests of the children would be served by termination of respondents' parental rights, rather than a suspended judgment, is supported by a

sound and substantial basis in the record (*see Matter of Drey L. [Katrina M.]*, 227 AD3d 1134, 1138 [3d Dept 2024]; *Matter of Makayla I. [Sheena K.]*, 201 AD3d at 1152). Respondents' remaining contentions, to the extent not specifically addressed herein, have been considered and determined to be without merit.

ORDERED that the order is affirmed, without costs.

**Footnotes**

**Footnote 1:** The younger child's father, whose parental rights have been terminated, is not a party to these proceedings.

**Footnote 2:** Respondents did not reside together following the birth of the older child.

**Footnote 3:** According to a subsequent order entered by Family Court during the pendency of this appeal, the children have been freed for adoption by the foster parent.

**Matter of Albina H.**, 229 AD3d 1169 (4th Dept. 2024)

Motion for reargument be and the same hereby is granted and, upon reargument, the order entered March 15, 2024 (225 AD3d 1171 [4th Dept 2024]) is vacated and the following memorandum and order is substituted therefor:
Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered June 21, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, terminated respondent John H.'s parental rights with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject children. Contrary to the father's contention, we conclude that petitioner met its burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the father's relationship with the children (*see* § 384-b [7] [a]; *Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]).

We reject the father's further contention that petitioner failed to establish, by clear and convincing evidence, that he permanently neglected the children. Permanent neglect

"may be found only after it is established that the parent has failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child[ren] although physically and financially able to do so" (*Star Leslie W.*, 63 NY2d at 142; *see* Social Services Law § 384-b [7] [a]). Here, the father's refusal to cooperate with petitioner and its service plan "demonstrated his unwillingness to plan for the future of his children" (*Matter of Cheyenne C. [James M.]* [appeal No. 2], 185 AD3d 1517, 1520 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]). Although the father eventually completed the services offered by petitioner, he failed to "progress meaningfully" to overcome the issues which led to the children's removal, which continued to prevent the children's safe return (*Matter of Aric D.B. [Carrie B.]*, 221 AD3d 1502, 1503 [4th Dept 2023]). " '[A] parent is required to not only attend . . . classes, but to benefit from the services offered and utilize the tools or lessons learned in those classes in order to successfully plan for the child[ren's] future' " (*Matter of Abraham C.*, 55 AD3d 1442, 1444 [4th Dept 2008], *lv denied* 12 NY3d 701 [2009]).

Finally, the father failed to preserve for our review his contention that Family Court abused its discretion in failing to issue a suspended judgment (*see Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1764 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]). In any event, we reject the father's contention. The court at the dispositional hearing is concerned only with the best interests of the children (*see* Family Ct Act § 631; *Star Leslie W.*, 63 NY2d at 147), and its determination is entitled to great deference (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]).

**Matter of Steven S.**, 229 AD3d 1207 (4th Dept., 2024)

Appeal from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), dated November 14, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.
It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition with respect to the older child is unanimously dismissed and the order is affirmed without costs.

Memorandum: In appeal Nos. 1 and 2, respondent mother appeals from orders of fact-finding and disposition adjudicating the subject children in those appeals to be permanently neglected and ordering that the children be placed in the custody of an authorized agency and the maternal grandmother, who had filed a petition for custody pursuant to Family Court Act article 6 during the pendency of the permanent neglect proceeding.

Initially, the mother's appeal from the order in appeal No. 2 insofar as it concerns the disposition with respect to the older child in that appeal must be dismissed as moot because that child has reached the age of 18 (*see Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d 875, 876 [2d Dept 2024]). "Nevertheless, the [mother's] challenge[ ] to the Family Court's finding[ ] that [she] permanently neglected the [older] child[ ] [is] not academic, since a finding of permanent neglect constitutes a permanent and significant stigma that might indirectly affect the [mother's] status in future proceedings" (*id.* [internal quotation marks omitted]; *see Matter of Nikole V. [Norman V.]*, 224 AD3d 1102, 1102 [3d Dept 2024], *lv denied* 41 NY3d 909 [2024]; *Matter of Desirea F. [Angela H.]*, 217 AD3d 1064, 1065 n 4 [3d Dept 2023], *lv denied* 40 NY3d 908 [2023]; *see also Matter of Cameron J.S. [Elizabeth F.]*, 214 AD3d 1355, 1356 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]).

The mother contends in both appeals that the court erred in ordering that the children be placed in the custody of the maternal grandmother pursuant to Family Court Act § 1055, which addresses the placement of a child following an adjudication of neglect (*see* § 1052 [a] [iii]), rather than Family Court Act article 6, which addresses custody determinations in custody and permanent neglect proceedings. Although the court erroneously stated in its oral decision that it was "plac[ing] the children in the maternal grandmother's care pursuant to Family Court Act § 1055," it clarified in both its oral decision and in the orders that it was granting the maternal grandmother's article 6 petition.

In addition, we reject the mother's contention in both appeals that her due process rights [*2]were violated because she was not provided with sufficient notice that petitioner sought to terminate her parental rights. That contention is belied by the record, which contains repeated instances in which the mother was notified that petitioner sought to terminate her parental rights and supported the maternal grandmother's custody petition.

The mother further contends in both appeals that petitioner was required to change the permanency goal to adoption prior to petitioning to terminate her parental rights in order to avoid concurrent permanency goals that were inherently contradictory. Even assuming, arguendo, that this contention is preserved, we conclude that it is without merit. Under the Family Court Act, "[a]t the conclusion of each permanency hearing, the court shall . . . determine and issue its findings, and enter an order of disposition in writing: (1) directing that the placement of the child be terminated and the child returned to the parent . . . ; or (2) where the child is not returned to the parent . . . : (i) whether the permanency goal for the child should be approved or modified and the anticipated date for achieving the goal. The permanency goal may be determined to be: (A) return to parent; (B) placement for adoption with the local social services official filing a petition

for termination of parental rights; (C) referral for legal guardianship; (D) permanent placement with a fit and willing relative; or (E) placement in another planned permanent living arrangement" (§ 1089 [d]).

Here, the court did not impose concurrent permanency goals (*cf*. *Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1098-1099 [3d Dept 2012]). Rather, the goal remained return to parent. Additionally, an agency "is permitted to evaluate and plan for other potential future goals where reunification with a parent is unlikely . . . , and [s]imultaneously considering adoption and working with a parent is not necessarily inappropriate" (*Matter of Anastasia S. [Michael S.]*, 121 AD3d 1543, 1544 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014] [internal quotation marks omitted]; *see Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1763 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Maryann Ellen F.*, 154 AD2d 167, 170 [4th Dept 1990], *appeal dismissed* 76 NY2d 773 [1990]).

The mother contends in both appeals that petitioner failed to establish that it exercised the requisite diligent efforts to encourage and strengthen the parent-child relationship (*see* Social Services Law § 384-b [7] [a]). We reject that contention. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parents to overcome problems that prevent the discharge of the child[ren] into their care, and informing the parents of their child[ren]'s progress" (*Matter of Briana S.-S. [Emily S.]* [appeal No. 2], 210 AD3d 1390, 1391 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023] [internal quotation marks omitted]; *see Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). "An agency which has tried diligently to reunite a [parent] with [their] child but which is confronted by an uncooperative or indifferent parent is deemed to have fulfilled its duty" (*Star Leslie W.*, 63 NY2d at 144; *see Matter of Cheyenne C. [James M.]* [appeal No. 2], 185 AD3d 1517, 1519 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *Matter of Nassau County Dept. of Social Servs. v Diana T.*, 207 AD2d 399, 401 [2d Dept 1994]). "Petitioner is not required to guarantee that the parent succeed in overcoming his or her predicaments . . . , and the parent must assume a measure of initiative and responsibility" (*Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018] [internal quotation marks omitted]). Here, the record establishes "by clear and convincing evidence that, although petitioner made affirmative, repeated, and meaningful efforts to assist [the mother], its efforts were fruitless because [the mother] was utterly uncooperative" (*Cheyenne C.*, 185 AD3d at 1519 [internal quotation marks omitted]). Indeed, the testimony and the exhibits submitted by petitioner demonstrate that, although petitioner attempted to maintain contact with the mother and to work with her toward her service plan goals, the mother failed to cooperate in any meaningful manner.

Finally, we have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the orders.

**Matter of Tyshawn P., Jr.**, 230 AD3d 1578 (4th Dept., 2024)

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered November 1, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect. We affirm.

Initially, we conclude that the father's contention that the petition against him must be dismissed on the ground that it was filed prematurely is unpreserved for our review. The father failed to move pursuant to CPLR 4401 for judgment as a matter of law on that ground at the close of evidence in the permanent neglect hearing held with respect to the petition against him (*see Matter of Zahrada S.M.R. [Wanda C.R.]*, 140 AD3d 969, 969-970 [2d Dept 2016]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). The father could not preserve his contention in that regard merely by joining the mother's motion to dismiss the petition in the separate permanent neglect hearing held with respect to a petition against the mother.

We also reject the father's contention that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parent-child relationship while the father was incarcerated, as required by Social Services Law § 384-b (7) (a) (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012]; *Matter of Sheila G.*, 61 NY2d 368, 373, 380-381 [1984]). Where, as here, a parent is incarcerated during the relevant period of time, petitioner's duty to engage in diligent efforts to strengthen the parent-child relationship "may be satisfied by informing the parent of the child['s] well-being and progress, responding to the parent's inquiries, investigating relatives suggested by the parent as placement resources, and facilitating communication between the child[ ] and the parent" (*Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1694 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019] [internal quotation marks omitted]; *see* § 384-b [7] [f]). Here, we conclude that petitioner exercised diligent efforts inasmuch as its caseworker

facilitated monthly in-person visits between the father and the child, repeatedly provided him with updates about the child, provided him with the opportunity to participate in service provider reviews, and investigated the relatives suggested by the father as potential placement resources.

We also conclude that, contrary to the father's contention, petitioner established that, [*2]despite its diligent efforts, the father failed substantially and continuously or repeatedly to plan appropriately for the future of the child (*see Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1776-1777 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]). The record shows that the father's "failure . . . to provide any realistic and feasible alternative to having the child[ ] remain in foster care until [his] release from prison . . . supports a finding of permanent neglect" (*Matter of Davianna L. [David R.]*, 128 AD3d 1365, 1365 [4th Dept 2015], *lv denied* 25 NY3d 914 [2015] [internal quotation marks omitted]; *see Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1164 [4th Dept 2020]).

Finally, we conclude that the evidence supports Family Court's determination that termination of the father's parental rights is in the best interests of the child (*see Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]). Among other things, the steps taken by the father to address the issues that led to the child's removal were "not sufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Zackery S. [Christa P.]*, 224 AD3d 1336, 1337 [4th Dept 2024], *lv denied* 41 NY3d 909 [2024]).

**Matter of Jacob A.**, 231 AD3d 1485 (4th Dept., 2024)

Appeals from an order of the Family Court, Wayne County (Arthur B. Williams, J.), entered May 18, 2023, in proceedings pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject children.
It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent mother and respondent father each appeal from an order that, among other things, terminated their parental rights with respect to the subject children on the ground of permanent neglect, committed the custody and guardianship of the children to petitioner, and freed the children for adoption. Contrary to respondents' contentions, petitioner met its burden with respect to permanent neglect by establishing that, despite

its diligent efforts to encourage and strengthen respondents' relationship with the children, respondents failed to plan for the future of the children (*see Matter of Patience E. [Victoria E.]*, 225 AD3d 1181, 1182 [4th Dept 2024], *lv denied* — NY3d — [2024]; *see generally* Social Services Law § 384-b [7] [a]).

Permanent neglect requires a determination that, although a parent is "physically and financially able" to plan for the child, the parent has not "successfully address[ed] or gain[ed] insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see Matter of Alexander S. [David S.]*, 130 AD3d 1463, 1463 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015], *appeal dismissed & lv denied* 26 NY3d 1030 [2015], *rearg denied* 26 NY3d 1132 [2016]; *see generally* Social Services Law § 384-b [7] [a]). Here, although [*2]respondents engaged in regular visitation and participated to some extent in parenting classes, they failed to address the problems that caused the removal of the children (*see Matter of Leon RR*, 48 NY2d 117, 125 [1979]).

The children were removed due to the deplorable conditions of the home, and those conditions remained even four years after petitioner became involved with respondents. Despite the efforts of petitioner's personnel, police, and relatives to ameliorate those conditions, respondents' situation did not significantly improve over time. Respondents were capable of cleaning the residence, as was evident from the condition of the residence during announced visits, but on unannounced visits that took place within days of an announced visit, caseworkers repeatedly found that the residence had been allowed to revert to its prior state.

In addition to failing to maintain the residence in a safe and sanitary condition, the father failed to engage meaningfully in mental health treatment. The mother, however, engaged in treatment and was generally compliant with that treatment. Both parents engaged to some extent in parenting classes. Nevertheless, "[a]ttendance at the myriad programs and visits arranged for respondents clearly does not signal the necessary change, nor does their desire for return of the children. Of singular importance in reaching a determination as to whether respondents have actually *learned to accept responsibility and modify their behavior* must be an evaluation of respondents' own testimony, particularly their credibility, as well as the evidence of witnesses (professional and nonprofessional) who have dealt with them in the various programs and observed them and the children" (*Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986] [emphasis added]). We thus conclude that petitioner established that, despite any minimal progress, respondents did not actually learn to accept responsibility and modify their behavior (*see id.*; *cf. Matter of Nicole H.*, 24 AD3d 1054, 1056 [3d Dept 2005]).

Respondents further contend that Family Court erred in refusing to address a custody petition filed by the paternal grandmother before entering the dispositional order. We note that respondents lack standing to challenge any actual determination of the grandmother's petition (*see Matter of Ty'Shawn B. [Cassandra B.]*, 209 AD3d 1280, 1281 [4th Dept 2022]; *see e.g. Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022]; *Matter of Terrance M. [Terrance M.*, *Sr.]*, 75 AD3d 1147, 1147 [4th Dept 2010]). Nevertheless, to the extent that respondents each contend that the court's failure to address that petition affected the underlying order terminating their parental rights, we conclude that those contentions lack merit. Where, as here, a nonparent relative has filed a petition for custody of the children, "the proper procedural course would have been for the [court] to consider her custody petition in the context of a dispositional hearing in the underlying termination proceedings, wherein the court would determine the best interests of the child" (*Matter of Weiss v Weiss*, 142 AD3d 507, 508 [2d Dept 2016]; *see Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1275 [4th Dept 2005]). We nevertheless conclude that "the record supports the [court's] conclusion that the child[ren]'s best interests required continuing custody with [petitioner], so that [they] could be made available for adoption by [their] foster parents" (*Matter of Violetta K. v Mary K.*, 306 AD2d 480, 481 [2d Dept 2003]). The only issue at a dispositional hearing is the best interests of the children, and "a nonparent relative takes no precedence for custody over the adoptive parents selected by an authorized agency" (*id.*). In this case, the record from the hearing, at which the paternal grandmother testified, establishes that it was in the children's best interests to remain with the pre-adoptive parents.

**Matter of Kiara F.**, 231 AD3d 1489 (4th Dept., 2024)

Appeal from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), entered November 10, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, adjudicated the subject child to be permanently neglected.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent father appeals from an order of fact-finding and disposition adjudicating the subject child to be permanently neglected and ordering that the child be placed in the custody of an authorized agency and the maternal grandmother, who had filed a petition for custody pursuant to Family Court Act article 6 during the pendency of the permanent neglect proceeding.

The father contends that petitioner was required to change the permanency goal to adoption prior to petitioning to terminate his parental rights in order to avoid concurrent

permanency goals that were inherently contradictory. Even assuming, arguendo, that this contention is preserved, we conclude that it is without merit. Under the Family Court Act, "[a]t the conclusion of each permanency hearing, the court shall . . . determine and issue its findings, and enter an order of disposition in writing: (1) directing that the placement of the child be terminated and the child returned to the parent . . . ; or (2) where the child is not returned to the parent . . . : (i) whether the permanency goal for the child should be approved or modified and the anticipated date for achieving the goal. The permanency goal may be determined to be: (A) return to parent; (B) placement for adoption with the local social services official filing a petition for termination of parental rights; (C) referral for legal guardianship; (D) permanent placement with a fit and willing relative; or (E) placement in another planned permanent living arrangement" (§ 1089 [d]).

Here, Family Court did not impose concurrent permanency goals (*cf*. *Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1098-1099 [3d Dept 2012]). Rather, the goal remained return to parent. Additionally, an agency "is permitted to evaluate and plan for other potential future goals where reunification with a parent is unlikely . . . , and [s]imultaneously considering adoption and working with a parent is not necessarily inappropriate" (*Matter of Anastasia S. [Michael S.]*, 121 AD3d 1543, 1544 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014] [internal quotation marks omitted]; *see Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1763 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Maryann Ellen F.*, 154 AD2d 167, 170 [4th Dept 1990], *appeal dismissed* 76 NY2d 773 [1990]).

In addition, we reject the father's contention that his due process rights were violated [*2]because he was not provided with sufficient notice that petitioner sought to terminate his parental rights. That contention is belied by the record, which contains repeated instances in which the father was notified that petitioner sought to terminate his parental rights and supported the maternal grandmother's custody petition.

The father further contends that petitioner failed to establish that it exercised the requisite diligent efforts to encourage and strengthen the parent-child relationship (*see* Social Services Law § 384-b [7] [a]). We reject that contention. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ ], providing services to the parents to overcome problems that prevent the discharge of the child[ ] into their care, and informing the parents of their child[ ]'s progress" (*Matter of Briana S.-S. [Emily S.]* [appeal No. 2], 210 AD3d 1390, 1391 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023] [internal quotation marks omitted]; *see Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). "An agency which has tried diligently to reunite a [parent] with [their] child but which is confronted by an uncooperative or indifferent parent is deemed to have fulfilled its duty" (*Star Leslie W.*, 63 NY2d at

144; *see Matter of Cheyenne C. [James M.]* [appeal No. 2], 185 AD3d 1517, 1519 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *Matter of Nassau County Dept. of Social Servs. v Diana T.*, 207 AD2d 399, 401 [2d Dept 1994]). "Petitioner is not required to guarantee that the parent succeed in overcoming his or her predicaments . . . , and the parent must assume a measure of initiative and responsibility" (*Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018] [internal quotation marks omitted]). Here, the record establishes "by clear and convincing evidence that, although petitioner made affirmative, repeated, and meaningful efforts to assist [the father], its efforts were fruitless because [the father] was utterly uncooperative" (*Cheyenne C.*, 185 AD3d at 1519 [internal quotation marks omitted]). Indeed, the testimony and the exhibits submitted by petitioner demonstrate that, although petitioner attempted to maintain contact with the father and to work with him toward his service plan goals, the father failed to cooperate in any meaningful manner.

# TPR Mental Illness

**Matter of R.F.**, 231 AD3d 476 (1st Dept., 2024)

Order, Family Court, Bronx County (Ashley B. Black, J.), entered on or about June 29, 2023, which, upon a finding that respondent father is intellectually disabled, as defined by Social Services Law § 384-b, terminated his parental rights to the subject child for the purpose of freeing the child for adoption, unanimously affirmed, without costs.
The court's finding that the father's intellectual disability left him unable to care for the child properly and adequately, presently and for the foreseeable future, was supported by clear and convincing evidence (*see* Social Services Law § 384-b[4][c]; *Matter of Noel R. [LaQueenia S.]*, 167 AD3d 553 [1st Dept 2018], *lv denied* 32 NY3d 918 [2019]). The court-appointed psychologist who evaluated the father concluded that his intellectual functioning was sub-average, originating in the developmental period, and he has associated impairments in adaptive functioning such that the child, if returned to his care, now or in the foreseeable future would be at risk of neglect. Moreover, the services and interventions the father had received failed to improve his parenting abilities, and available interventions would not make a difference in terms of his ability to independently care for the child (*see Matter of Noel R.,* 167 AD3d 553).

Although the court-appointed expert did not conduct a parent-child observation, his interviews and testing of the father, as well as his review of the relevant records and evaluations, were sufficient to draw his conclusions with a reasonable degree of professional certainty (*see Matter of J.C. [Joycelyn L.]*, 221 AD3d 561, 562 [1st Dept 2023], *lv denied* 41 NY3d 903 [2024]). Moreover, the court did not rely solely on the father's IQ in making its determination, as the testimony showed that the father also lacked the adaptive functioning, intellectual functioning, and cognitive functioning sufficient to parent the child.

The father failed to present evidence to contradict these findings (*see Matter of Faith D.A. [Natasha A.]*, 99 AD3d 641 [1st Dept 2012]). His expert conducted a peer review of the court-appointed expert's evaluation, but offered no independent assessment. Moreover, the court credited the testimony of the court-appointed expert over the father's expert, who failed to disclose prior involvement with the father's case, and its credibility determination is entitled to deference (*see Matter of Paulidia Antonis R. [Lidia R.]*, 93 AD3d 502 [1st Dept 2012]).

We have considered the father's remaining arguments and find them unavailing.

**Matter of Juliet W.**, 232 AD3d 1259 (4th Dept., 2024)

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered January 27, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion dated July 22, 2022, is denied, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding in March 2021 seeking to terminate respondent mother's parental rights with respect to the subject child on the grounds of, inter alia, mental illness and intellectual disability (*see* Social Services Law § 384-b [4] [c]). In appeal No. 1, the mother appeals from an intermediate order that granted petitioner's motion dated July 22, 2022, for summary judgment on the petition. In appeal No. 2, the mother appeals from a dispositional order that, inter alia, terminated the mother's parental rights, granted petitioner guardianship of the subject child, and freed that child for adoption. We dismiss the appeal in appeal No. 1 inasmuch as the intermediate order is not appealable as of right (*see* Family Ct Act § 1112 [a]). We note, however, that the mother's appeal from the dispositional order in appeal No. 2 brings up for review the propriety of the intermediate order in appeal No. 1 (*see Matter of Roman E.A. [Danielle M.]* [appeal No. 2], 107 AD3d 1455, 1455-1456 [4th Dept 2013]).

We agree with the mother that Family Court erred in granting petitioner's July 22, 2022 motion, and we therefore reverse the order in appeal No. 2, deny that motion, and remit the matter to Family Court for further proceedings on the petition. The motion was premised solely on the ground that the mother was collaterally estopped from relitigating the issue whether she was "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for [the subject] child" (Social Services Law § 384-b [4] [c]). "Collateral estoppel permits the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 649 [1993]; *see Matter of Clarissa F. [Rex O.]*, 222 AD3d 1434, 1435 [4th Dept 2023]). Although collateral estoppel may be an appropriate ground on which to grant summary judgment in a Family Court proceeding under certain circumstances (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182-183 [1994]), such circumstances are not present here (*cf. Matter of Yeshua G. [Anthony G.]*, 162 AD3d 1470, 1470 [4th Dept 2018], *lv denied* 32 NY3d 903 [2018]).

In moving for summary judgment, petitioner did not submit any evidence of the current state of the mother's mental health and intellectual disability issues. Instead, petitioner relied [*2]solely on its argument that the mother was collaterally estopped from relitigating a 2018 judicial determination, in connection with a prior proceeding concerning certain of the mother's other children, that the mother was "presently and for the foreseeable future unable, due to [her] mental illness and intellectual disability . . . , to provide adequate care for the children [at issue in that proceeding]." Neither the relied-upon 2018 order of disposition nor its supporting decision, however, contains a finding of fact or conclusion of law that the mother's mental illness or intellectual disability permanently impaired the mother's ability to provide adequate care for a child (*see Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]; *see generally Matter of Trina Marie H.*, 48 NY2d 742, 743 [1979]). Instead, the prior judicial determination that the mother was "presently and for the foreseeable future" unable to provide adequate care was premised upon evaluations of the mother conducted in 2012 and 2017**.** Further, that determination was issued a year prior to the birth of the subject child in the present proceeding and, although the subject child was ordered into petitioner's care almost immediately following her birth, the instant petition was nonetheless not filed for yet another two years. Thus, the 2018 judicial determination, premised on three- to eight-year-old evidence, is insufficient to establish by clear and convincing evidence, as a matter of law, that the mother was, at the time of this proceeding, "*presently* and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for [the subject] child" (Social Services Law § 384-b [4] [c] [emphasis added]; *see Matter of*

*Dochingozi B.*, 57 NY2d 641, 642-643 [1982]). We therefore conclude that the mother has not yet had a full and fair opportunity to litigate that issue (*see generally Clarissa F.*, 222 AD3d at 1435-1436).

A different result is not required by our determination in *Yeshua G.* that a respondent father was collaterally estopped from relitigating the issue whether he was " 'presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for a child' " (162 AD3d at 1470). Although not specifically stated in our memorandum decision in that case, *Yeshua G.* concerned one of several separate but contemporaneous termination proceedings pertaining to multiple children of the respondent father. There, the petitioning agency moved for summary judgment on the termination petition for the subject child within weeks of the prior judicial determination on which the agency relied. Thus, the respondent father in *Yeshua G.* had been afforded a full and fair opportunity to litigate the effect of his mental illness on his "present[ ]" ability to provide proper and adequate care for the subject child in that case (Social Services Law § 384-b [4] [c]; *see James M.*, 83 NY2d at 183). Under the circumstances presented here, however, the doctrine of collateral estoppel does not apply and the court should have denied the motion regardless of the mother's opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Clarissa F.*, 222 AD3d at 1435).

**Matter of Noemi C.**, AD3d 2024 NY Slip Op 06440 (4th Dept., 2024)

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 29, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

Contrary to the mother's contention, we conclude that petitioner established "by clear and convincing evidence that [the mother], by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for [the] child" (*Matter of Lil' Brian J.Z. [Jessica J.]*, 221 AD3d 1580, 1581 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024] [internal quotation marks omitted]; *see* Social Services Law § 384-b

[4] [c]). Testimony from petitioner's expert witness, a psychologist, established that the mother suffered from mental illness, as defined in Social Services Law § 384-b (6) (a), such that the child "would be in danger of being neglected if [she] were returned to [the mother's] care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Matter of Evalynn R.B. [Kelli B.]*, 217 AD3d 1430, 1431 [4th Dept 2023]; *Matter of Dylan K.*, 269 AD2d 826, 826-827 [4th Dept 2000], *lv denied* 95 NY2d 766 [2000]).

The mother also contends that reversal is required because petitioner's case consisted almost entirely of inadmissible hearsay. We reject that contention. Even assuming, arguendo, that her contention is fully preserved (*see generally Matter of Raymond H. [Dana C.]*, 186 AD3d 1125, 1126 [4th Dept 2020]) and that Family Court improperly admitted hearsay into evidence at the fact-finding hearing (*see generally Matter of Leon RR*, 48 NY2d 117, 123 [1979]), we conclude that any error by the court in admitting the challenged testimony is harmless (*see Matter of Meyah F. [Shelby L.]*, 203 AD3d 1558, 1560 [4th Dept 2022]; *Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]).

The mother further contends that petitioner's evidence of the mother's mental illness is [*2]unreliable because much of the psychological evaluation was conducted in English and without the benefit of a Spanish interpreter. The mother did not object to the testimony or report of the psychologist on that ground, however, and thus failed to preserve that contention for our review (*see Matter of Nadya S. [Brauna S.]*, 133 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]; *see generally Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1648 [4th Dept 2012], *lv denied* 21 NY3d 852 [2013]). In any event, the record establishes that the psychologist testified repeatedly that there was no indication that the mother's test scores were impacted by a language barrier. Further, the psychologist gave the mother a Spanish-language version of the Minnesota Multiphasic Personality Inventory test (MMPI-2) and, before she began, he "had [the mother] read some of the questions" to ensure that she understood them before she proceeded. In addition, the mother's answers were consistent, which the psychologist testified would not have occurred if the score were "due to confusion or poor reading ability." The psychologist further testified that "it was clear from the way she was responding to [his] questions that [the mother] understood what [he] was asking," and that the mother "was able to express herself coherently and intelligently in English." It is also worth noting that the mother interacted with the child in English during their supervised visit**.** We conclude that the mother's contention that a language barrier rendered the test results and, therefore, the psychologist's opinion, unreliable is not supported by the record (*see Matter of Olivia G. [Olivar I.-G.]*, 173 AD3d 1688, 1688

[4th Dept 2019]; *Matter of James U. v Catalina V.*, 151 AD3d 1285, 1286-1287 [3d Dept 2017]; *Nadya S.*, 133 AD3d at 1244).

# TPR Severe Abuse

# TPR DISPOSITIONS

**Matter of Sonayah M.**, AD3d 2024 NY Slip Op 06277 (1st Dept., 2024)

Order of disposition, Family Court, New York County (Valerie Pels, J.), entered December 23, 2021, which, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed the custody of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's determination that the child's best interests would be served by terminating the father's parental rights (*see Matter of Anissa Jaquanna Aishah H. [Gregory C.]*, 159 AD3d 516, 516 [1st Dept 2018]; *see also Matter of Mykle Andrew P.*, 55 AD3d 305, 306 [1st Dept 2008]). The child has lived with her foster mother for over 10 years, and the two have developed a strong bond (*see Matter of Heaveah-Nise Stephania Jannah H.*, 132 AD3d 458, 459 [1st Dept 2015]). Although the child has a loving relationship with the father, his refusal to acknowledge his need for mental health treatment demonstrated a lack of insight into the conditions that led to the child's removal, and he has failed to address the fact that his lack of consistent mental health treatment constitutes a barrier to reunification (*see Matter of Messiah G. [Giselle F.]*, 168 AD3d 420, 421 [1st Dept 2019]; *Matter of Joaquin Enrique C., III*, 79 AD3d 548, 549 [1st Dept 2010]).

A suspended judgment was not warranted here. Although the father faced legitimate challenges in attending his visits with the child, he was inconsistent in visiting her even when he had stable housing and employment, and he acknowledged that fact (*see e.g.*

*Matter of Malcolm M.L. [Ruby C.]*, 177 AD3d 442, 443 [1st Dept 2019], *lv denied* 35 NY3d 903 [2020]). Moreover, the foster mother has provided for all of the child's needs and wishes to adopt her (*see Matter of Mykle Andrew P.*, 55 AD3d at 306).

**Matter of Allyana J.**, 232 AD3d 896 (2ND Dept., 2024)

In related proceedings pursuant to Family Court Act article 10 and Social Services Law § 384-b, the mother appeals from (1) an order of fact-finding and disposition of the Family Court, Orange County (Christine P. Krahulik, J.), dated October 30, 2023, concerning the proceedings pursuant to Family Court Act article 10, and (2) an order of the same court also dated October 30, 2023, concerning the proceedings pursuant to Social Services Law § 384-b. The order of fact-finding and disposition and the order, insofar as appealed from, in effect, denied posttermination visitation between the mother and the children Michael J. and Edward J.
ORDERED that the order of fact-finding and disposition and the order are affirmed insofar as appealed from, without costs or disbursements.

The mother and the father of the subject children have been the subject of multiple neglect and abuse petitions filed by the Orange County Department of Social Services (hereinafter DSS) dating back to 2010. On or around March 8, 2021, the Family Court, inter alia, found that the mother and the father permanently neglected the children and terminated their parental rights but entered a suspended judgment, which was extended pursuant to Family Court Act § 633(b) on or around July 19, 2022. Subsequently, as relevant here, DSS moved, among other things, to lift the suspended judgment based on the mother's noncompliance with its terms and terminate her parental rights pursuant to Social Services Law § 384-b. DSS also filed a companion neglect petition pursuant to Family Court Act article 10.

The matters proceeded to a hearing, during which the parties reached a global settlement agreement, whereby the mother, inter alia, consented to the entry of a finding of neglect without admission pursuant to Family Court Act § 1051(a), as well as a finding that she violated the terms of the suspended judgment and to the termination of her parental rights to the children. In an order of fact-finding and disposition dated October 30, 2023, the Family Court, among other things, authorized sibling visitation between the children Michael J. and Edward J. and their siblings but did not award the mother posttermination visitation with Michael J. and Edward J. An order also dated October 30, 2023, lifting the suspended judgment incorporates by reference the order of fact-finding and disposition and expressly references the sibling visitation therein. The mother appeals from the order of fact-finding and disposition and the order.

A court may order posttermination parental visitation when the termination of parental rights results from a voluntary surrender under Social Services Law § 383-c, but an adversarial proceeding pursuant to Social Services Law § 384-b does not offer such option (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 437-438; *Matter of Destiney D.M.L. [Jose L.]*, 170 AD3d 838, 839). Since these were adversarial proceedings pursuant to Social Services Law § 384-b, the Family Court properly denied posttermination visitation between the mother and the Michael J. and Edward J.

The parties' remaining contentions either are without merit or need not be considered in light of our determination.

**Matter of Orazio R.**, AD3d 2024 NY Slip Op 06049 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals from an order of fact-finding and disposition of the Family Court, Richmond County (Peter F. DeLizzo, J.), dated April 5, 2023. The order of fact-finding and disposition, after fact-finding and dispositional hearings, and upon an order of the same court dated March 10, 2023, denying the mother's motion to reopen the dispositional hearing, found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred custody and guardianship of the subject child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.

ORDERED that the order of fact-finding and disposition is affirmed, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the ground of permanent neglect. Following fact-finding and dispositional hearings, the mother moved to reopen the dispositional hearing. In an order dated March 10, 2023, the Family Court denied the mother's motion. By order of fact-finding and disposition dated April 5, 2023, the court found that the mother permanently neglected the subject child, terminated the mother's parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The mother appeals.

"In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680 [internal quotation marks omitted]; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 960). "Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child's future, although [*2]physically and financially able to do so" (*Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 680; *see Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d at 961). "A parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child's future" (*Matter of Shimon G. [Batsheva G.]*, 206 AD3d 732, 733; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d at 681).

Here, the petitioner established, by clear and convincing evidence, that the mother permanently neglected the child (*see* Social Services Law § 384-b[7][a]). Despite the petitioner's diligent efforts to strengthen the mother's relationship with the child, the mother failed to plan for the return of the child, as she did not complete all of the required services (*see Matter of S.E.M. [Elizabeth A.M.]*, 213 AD3d 667, 668; *Matter of Jamayla C.M. [Marcela A.C.]*, 163 AD3d 820, 821; *Matter of David O.C.*, 57 AD3d 775, 776). Accordingly, the Family Court properly found that the mother permanently neglected the child.

At the dispositional stage of a proceeding to terminate parental rights, the court focuses solely on the best interests of the child, and there is no presumption that those interests will be served best by any particular disposition (*see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148). "The factors to be considered in making the determination include the [parent's] capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect" (*Matter of William S.L. [Julio A.L.]*, 195 AD3d 839, 843 [internal quotation marks omitted]). At disposition, there is no presumption that the child's best interests will be served best by a return to the biological parent (*see Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 955; *Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d 754, 756).

The evidence adduced at the dispositional hearing established that the child was at risk of future neglect due to, inter alia, the mother's failure to meaningfully address her substance abuse issues (*see Matter of Elizabeth M.G.C. [Maria L.G.C.]*, 190 AD3d 730, 731; *Matter of Jonathan B. [Linda S.]*, 84 AD3d 1078, 1080). Therefore, the Family Court properly determined that it was in the child's best interests to terminate the mother's parental rights and free the child for adoption.

The Family Court did not err in denying the mother's motion to reopen the dispositional hearing, as that motion was not supported by nonhearsay evidence relevant to the determination (*see Matter of Alize Lee D. [April Veronica W.]*, 73 AD3d 767, 768; *see also Matter of Cecile D. [Kassia D.]*, 189 AD3d 1036, 1039).

**Matter of Camila G. C.**, 229 AD3d 459 (2nd Dept., 2024)

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from (1) an order of fact-finding of the Family Court, Rockland County (Rachel E. Tanguay, J.), dated May 22, 2023, and (2) an order of disposition of the same court dated August 28, 2023. The order of fact-finding, after a hearing, found that the father permanently neglected the subject child. The order of disposition, upon the order of fact-finding and after a dispositional hearing, terminated the father's parental rights and transferred guardianship and custody of the subject child to the petitioner for the purpose of adoption.

ORDERED that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

ORDERED that the order of disposition is affirmed, without costs or disbursements.

The petitioner commenced this proceeding to terminate the father's parental rights to the subject child on the ground of permanent neglect. After a fact-finding hearing, the Family Court found that the father permanently neglected the child. After a dispositional hearing, the court terminated the father's parental rights and transferred guardianship and custody of the child to the petitioner for the purpose of adoption. The father appeals.

The petitioner established, by clear and convincing evidence, that the father permanently neglected the child (*see* Social Services Law § 384-b[7][a]), despite its diligent efforts to strengthen the parent-child relationship. Despite the petitioner's diligent efforts, the father failed to plan for the return of the child, as he did not complete all of the required services and failed to gain any insight from the services he did utilize (*see Matter of S.E.M. [Elizabeth A.M.]*, 213 AD3d 667, 668). Accordingly, the Family Court properly found that the father permanently neglected the [*2]child.

At the dispositional stage of a proceeding to terminate parental rights, the court focuses solely on the best interests of the child, and there is no presumption that those interests will be served best by any particular disposition (*see* Family Ct Act § 631; *Matter of Star*

*Leslie W.*, 63 NY2d 136, 147-148). "The factors to be considered in making the determination include the [parent's] capacity to properly supervise the child, based on current information and the potential threat of future abuse and neglect" (*Matter of William S.L. [Julio A.L.]*, 195 AD3d 839, 843 [internal quotation marks omitted]). At disposition, there is no presumption that the child's best interests will be served best by a return to the biological parent (*see Matter of Alonso S.C.O. [Angela O.M.]*, 211 AD3d 952, 955; *Matter of Kasimir Lee D. [Jasmaine D.]*, 198 AD3d 754, 756). Here, the evidence showed that the child was at risk of future neglect, due to the father's failure to address his substance abuse issues. Therefore, the Family Court properly determined that it was in the child's best interests to terminate the father's parental rights and free the child for adoption.

The father's contention that the Family Court should have granted him a suspended judgment, rather than terminate his parental rights, is unpreserved for appellate review and, in any event, without merit. A suspended judgment is not appropriate where, as here, a parent has failed to gain insight into their problems and failed to address the issues which led to the child's removal in the first instance (*see Matter of Jeremiah W.T. [Shaunta K.J.—William T.]*, 206 AD3d 662, 664; *Matter of Mathew B.C. [Sue-Ann L.C.]*, 200 AD3d 689, 690).

# CUSTODY

**Matter of Camila G. C.**, AD3d 2024 NY Slip Op 03687 (2nd Dept., 2024)

In a proceeding pursuant to Family Court Act article 10, and a related proceeding pursuant to Family Court Act article 6, the father appeals, and the paternal grandmother separately appeals, from an order of the Family Court, Rockland County (Rachel E. Tanguay, J.), dated September 28, 2022. The order, after a hearing, denied the paternal grandmother's petition for guardianship of the subject child and placed the subject child in the care and custody of the Commissioner of Social Services of Rockland County. ORDERED that the order is affirmed, without costs or disbursements.

The paternal grandmother (hereinafter the grandmother) filed a petition to be appointed the guardian of the subject child, which the father supported. After a hearing, the Family Court, in an order dated September 28, 2022, denied the grandmother's petition and

placed the child in the care and custody of the Commissioner of Social Services of Rockland County. The grandmother and the father separately appeal.

The Family Court did not err in denying the grandmother's petition for guardianship of the child, as she failed to establish that it was in the child's best interests for guardianship to be awarded to her (*see Eschbach v Eschbach*, 56 NY2d 167, 171; *Matter of Lisa S. v Deloris K.J.*, 207 AD3d 549, 550). In determining the best interests of the child, there is no presumption that the child's best interests will be better served by a return to a family member (*see Matter of Tabitha T.S.M. [Tracee L.M.—Candace E.]*, 159 AD3d 703, 705). Indeed, Social Services Law § 383(3) [*2]gives preference for adoption to a foster parent who has cared for a child continuously for a period of 12 months or more, while members of the child's extended biological family are given no special preference with regard to custody (*see Matter of Tabitha T.S.M. [Tracee L.M.—Candace E.]*, 159 AD3d at 705; *Matter of El v Administration for Children's Servs.-Queens*, 159 AD3d 700, 701; *Matter of Patricia I.H. v ACS-Kings*, 140 AD3d 1165, 1166). Thus, a nonparent relative takes no precedence for custody over the adoptive parents selected by an authorized agency (*see Matter of Carter v Administration for Children's Servs.*, 176 AD3d 696, 697; *Matter of El v Administration for Children's Servs.-Queens*, 159 AD3d at 701; *Matter of Seasia D. [Kareem W.]*, 75 AD3d 548, 552).

At the time the grandmother filed her petition in January 2022, the child had been in a foster home for the first 22 months of her life. The child was thriving in the care of the foster parents in the only home she had ever known (*see Matter of Lisa S. v Deloris K.J.*, 207 AD3d at 550; *Matter of Luz Maria V.*, 23 AD3d 192, 194). She had strongly and lovingly bonded with the foster parents and the other children in the home (*see Matter of El v Administration for Children's Servs.-Queens*, 159 AD3d at 701-702). Under these circumstances, it would not have been in the child's best interests to award guardianship to the grandmother and to remove the child from the foster home where she had spent her entire life. The fact that the grandmother would be a good caretaker was not a sufficient reason to remove the child from the only home she had ever known and from the family with whom she had bonded (*see Matter of Guardianship of D. Children*, 177 AD2d 393, 394; *Matter of Lundyn S. [Al-Rahim S.]*, 128 AD3d 1406, 1407-1408).

The grandmother, having no precedence over the foster parents, was required to demonstrate not only that she would make a suitable adoptive parent, but that she would provide a better adoptive home than that planned by the agency (*see Matter of Peter L.*, 59 NY2d 513, 520). The grandmother failed to make a such a showing.

# Adjournment

# Conforming Pleadings to the Proof

**Matter of Shayla G.**, AD3d 2024 NY Slip Op 06042 (2nd Dept., 2024)

In related proceedings pursuant to Family Court Act article 10, the mother appeals from an order of fact-finding of the Family Court, Richmond County (Karen B. Wolff, J.), dated November 29, 2023. The order of fact-finding, after a fact-finding hearing, found that the mother neglected the child Shayla G. and derivatively neglected the child Josiah T.

ORDERED that the order of fact-finding is affirmed, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject children by failing to provide proper supervision or guardianship "by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment" on the child Shayla G. Following a fact-finding hearing, the Family Court found that the mother neglected Shayla G. by committing acts of domestic violence against an adult sibling, resulting in Shayla G.'s intervention, and that the mother derivatively neglected the child Josiah T. The mother appeals.

Pursuant to Family Court Act § 1051(b), the Family Court "may amend the allegations to conform to the proof; provided, however, that in such case the respondent shall be given reasonable time to prepare to answer the amended allegations" (*see Matter of Autumn M. [Sita [*2]P.M.]*, 213 AD3d 852, 853-854; *Matter of Richard S. [Lacey P.]*, 130 AD3d 630, 632). Here, the petitions alleged that the mother neglected Shayla G. by inflicting excessive corporal punishment when Shayla G. intervened in a physical altercation between the mother and an adult sibling. The record and the evidence adduced during the fact-finding hearing demonstrated that the mother was not prejudiced by the Family Court's determination to conform the pleadings to the proof (*see Matter of Autumn M. [Sita P.M.]*, 213 AD3d at 854; *Matter of Jada W. [Ketanya B.]*, 104 AD3d 861, 861). Moreover, the mother testified to the events alleged in the petitions (*see Matter of N.R. [D.W.]*, 227 AD3d 596, 596; *Matter of Fatima Mc.*, 292

AD2d 532, 533), and in her written summation after the conclusion of the fact-finding hearing, the mother stated that she acted in self-defense during the altercation with the adult sibling (*see Matter of Autumn M. [Sita P.M.]*, 213 AD3d at 854). The attorney for Shayla G. also acknowledged in her written summation that the case involved neglect of Shayla G. by the commission of acts of domestic violence. Thus, contrary to the mother's contention, under the circumstances of this case, the court's determination to conform the pleadings to the proof was not an improvident exercise of discretion (*see id.*; *cf. Matter of Amier H. [Shellyann C.H.]*, 106 AD3d 1086, 1087).

"In a child neglect proceeding pursuant to Family Court Act article 10, the petitioner must establish by a preponderance of the evidence that the subject child is neglected" (*Matter of Andrew M. [Brenda M.]*, 225 AD3d 764, 765; *see* Family Ct Act § 1046[b][i]). "'To establish neglect of a child, the petitioner must demonstrate, by a preponderance of the evidence, (1) that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship'" (*Matter of Veronica M. [Ana M.]*, 229 AD3d 626, 627, quoting *Matter of Chloe P.-M. [Martinique P.]*, 220 AD3d 783, 784; *see Nicholson v Scoppetta*, 3 NY3d 357, 368). "'Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor'" (*Matter of Ashlyn M. [Robert J.]*, 228 AD3d 939, 941, quoting *Matter of Amberlyn H.P. [Jose H.C.]*, 187 AD3d 920, 920).

Here, the Family Court properly found that ACS established by a preponderance of the evidence that the mother neglected Shayla G. by failing to provide her with proper supervision or guardianship and that, as a result, Shayla G.'s physical, mental, or emotional condition was impaired or was in imminent danger of becoming impaired by engaging in acts of domestic violence against the adult sibling (*see Matter of James L. [Zong H.L.]*, 226 AD3d 1022, 1023-1024; *Matter of Davasha T. [David T.]*, 218 AD3d 475, 477). "'A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'" (*Matter of Logan P. [Kendell P.]*, 228 AD3d 867, 868, quoting *Matter of Bronx S. [Denzel J.]*, 217 AD3d 956, 957 [internal quotation marks omitted]; *see Matter of Ariella S. [Krystal C.]*, 89 AD3d 1092, 1093). Among other things, the testimony presented at the fact-finding hearing showed that the mother engaged in two physical altercations with the adult sibling and that Shayla G. intervened in both altercations to defend the adult sibling.

Furthermore, the mother's neglect of Shayla G. evinced a flawed understanding of her duties as a person legally responsible for a child and impaired judgment sufficient to support a finding of derivative neglect as to Josiah T. (*see Matter of Saphire R. [Christopher R.]*, 219 AD3d 730, 732; *Matter of Madeleine B. [Peter B.]*, 198 AD3d 641, 643). In the absence of evidence that the circumstances giving rise to the neglect of Shayla G. no longer existed, a finding of derivative neglect as to Josiah T. was proper (*see Matter of Alexander S. [Gabriel H.]*, 224 AD3d 907, 911).

The mother's remaining contentions either need not be reached in light of the foregoing or are improperly raised for the first time in her reply brief.

# Ethics

**Matter of Kala Y. v Quinn Z.**, 232 AD3d 1103 (3rd Dept., 2024)

Appeal from an order of the Family Court of Saratoga County (Michael J. Hartnett, J.), entered March 13, 2024, which, among other things, in a proceeding pursuant to Family Ct Act article 6, granted petitioner's motion to disqualify respondent's counsel and denied respondent's cross-motion for sanctions and counsel fees.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of one child (born in 2020). The parties stipulated to a detailed custody and parenting time arrangement in August 2022, which, among other things, granted the parties joint legal and physical custody and required that the child receive speech therapy services in Washington County. The parties agreed that any change in provider must be approved by both parties in advance. Shortly after the custody agreement went into effect, the mother had the child's speech therapy services transferred from Washington County to Saratoga County. The father then moved by order to show cause to have such services returned to Washington County, and this relief was granted by Family Court. In the interim, the child missed three weeks of speech therapy.

Each party thereafter filed modification and enforcement petitions. During a fact-finding hearing on these petitions, the mother testified on direct examination that the father had consented to moving the child's speech therapy services to Saratoga County, but that the father's attorney "told the county to switch it back." The mother made similar assertions during cross-examination, blaming the father's attorney for interjecting

herself into the case, resulting in the three lost weeks of speech therapy. The mother subsequently moved to disqualify the father's attorney under the advocate-witness rule, and the father opposed and cross-moved for sanctions and counsel fees. At oral argument on the motions, the father also made an oral application for a mistrial. Family Court granted the mother's motion, denied the father's cross-motion and declared a mistrial. The father appeals.

Turning first to the mother's motion to disqualify the father's attorney,[FN1] the advocate-witness rule provides that, in general, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" (Rules of Prof Conduct [22 NYCRR 1200.0] rule 3.7 [a]). The movant bears "the burden of demonstrating that the testimony of the opposing party's counsel is necessary to his or her case, and that such testimony would be prejudicial to the opposing party" (*Van Ryn v Goland*, 189 AD3d 1749, 1755 [3d Dept 2020] [internal quotation marks and citations omitted]; *see People v Ortiz*, 26 NY3d 430, 437-438 [2015]; *Lilley v Greene Cent. Sch. Dist.*, 168 AD3d 1180, 1183 [3d Dept 2019]). "When considering a motion to disqualify counsel, the court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing [*2]against the other party's right to be free from possible prejudice due to the questioned representation" (*Lilley v Greene Cent. School Dist.*, 168 AD3d at 1183 [internal quotation marks and citations omitted]). Significantly, while disqualification is a matter that rests within the trial court's discretion, "[a] party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Greenberg v Grace Plaza Nursing & Rehabilitation Ctr.*, 174 AD3d 510, 510 [2d Dept 2019] [internal quotation marks and citation omitted]).

We find that the mother failed to meet her burden of demonstrating that disqualification was warranted. To begin with, even assuming that the father's attorney made herself a witness in the first place, we disagree with Family Court's conclusion that her testimony was necessary. The relevant issue before the court was whether the mother violated the parties' agreement by moving the child's speech therapy services from Washington County to Saratoga County without the father's consent. This question can be resolved through testimony from the mother and the father, as well as certain Washington County employees who appear to have knowledge concerning the transfer of services, such that any potential testimony by the father's attorney would be cumulative and thus unnecessary (*see ODS Opt. Disc Serv. GmbH v Toshiba Corp.*, 41 AD3d 166, 166 [1st Dept 2007]). As to the issue of prejudice, we note that Family Court did not rule upon this, as required. That said, the mother made no showing that the father's attorney's

testimony would be prejudicial to the father. Given the foregoing, the mother's motion for disqualification should have been denied.

Turning to the father's cross-motion for sanctions, we discern no basis upon which to disturb Family Court's denial thereof.[FN2] The record does not demonstrate that the mother's disqualification motion, albeit without merit, was frivolous (*see* 22 NYCRR 130-1.1 [c]; *Graziano v Andzel-Graziano*, 196 AD3d 879, 883 [3d Dept 2021]).
ORDERED that the order is modified, without costs, by reversing so much thereof as granted petitioner's motion to disqualify respondent's counsel; motion denied; and, as so modified, affirmed.

Footnote 1: Both the trial and appellate attorneys for the child are supportive of the mother's position.

Footnote 2: Family Court correctly found that the cross-motion was untimely, as it was not served within the time demanded in the mother's notice of motion (*see* CPLR 2214 [b], CPLR 2215 [b]), and the father provided no explanation for the delay (*see Levy v Deer Trans. Corp*., 27 AD3d 279, 279 [1st Dept 2006]). Nevertheless, on the record before us, we find that the court providently exercised its discretion to consider the merits of the cross-motion (*see* CPLR 2214 [c]; *Perez v Perez*, 131 AD2d 451, 451 [2d Dept 1987]).

# Fair Hearing

**Matter of Jeter v Poole**, NY3d 2024 NY Slip Op 05868 (2024)

Petitioner contends that her indicated report on the State Central Register of Child Abuse and Maltreatment should be expunged. We disagree and affirm the order of the Appellate Division.

In June of 2019, petitioner's daughter, T.,**[FN1]** who was then 13 years old, disclosed to a friend that petitioner had struck her with an extension cord the previous day. T. then made the same disclosure to a teacher, a police officer, and a caseworker from the New York City Administration for Children's Services (ACS). The ACS caseworker took photographs of the cuts and bruises on T.'s arms and torso. T. was later taken to an

emergency room, and the treating physician opined that her injuries were consistent with being struck with an extension cord.

ACS commenced a Family Court article 10 neglect proceeding [FN2] against petitioner and her husband, who had custody of T. and her younger sisters. Family Court authorized an adjournment in contemplation of dismissal (ACD), which allows the court to adjourn the proceedings for a period not exceeding one year "with a view to ultimate dismissal of the petition in furtherance of justice" (Family Court Act § 1039 [b]). In February of 2020, Family Court dismissed the article 10 proceeding upon the expiration of the adjournment period based on petitioner's satisfactory compliance with Family Court's conditions, including completion of parenting and anger management classes.

Meanwhile, the police officer who interviewed T. made a report to the Statewide Central Register of Child Abuse and Maltreatment (SCR). One of the SCR's primary purposes is to inform child care providers and agencies that a person has a substantiated report of child abuse or maltreatment "for the purpose of regulating their future employment or licensure" (*Matter of Lee TT. v Dowling*, 87 NY2d 699, 702 [1996]). In July of 2019, ACS determined that the report against petitioner was indicated (*see* Social Services Law §§ 422 [5]; 424 [7]), and petitioner challenged that determination (*see id.* § 422 [8] [a] [i]). After an internal administrative review, the New York State Office of Children and Family Services (OCFS) concluded that a fair preponderance of the evidence supported a determination that petitioner had maltreated T. and that the maltreatment was relevant and reasonably related to employment, licensure, or certification in the child care field (*see id.* § 422 [8] [a] [ii], [v])[FN3]. OCFS then scheduled a fair hearing for petitioner (*see id.* § 422 [8] [a] [iv]-[v]; [b] [i]; *see also Lee TT.*, 87 NY2d at 704).

Petitioner's fair hearing was held in August of 2020, at which ACS had the burden of proof (Social Services Law § 422 [8] [b] [ii], [c] [ii]). Petitioner represented herself. At the time of petitioner's fair hearing, the Social Services Law provided that "the fact that there is a family court finding of abuse or neglect against the subject in regard to an allegation contained in the report shall create an irrebuttable presumption that said allegation is substantiated" (former Social Services Law § 422 [8] [b] [ii] [2019]). Before 2020, no contrary presumption applied if the Family Court article 10 proceedings were dismissed or resolved on the merits in favor of the respondent.

In April of 2020, however, the legislature enacted substantial changes to the statutes governing the SCR. One such change provided that OCFS's administrative review in SCR proceedings should be stayed until any pending Family Court article 10 proceedings regarding the same allegations are resolved (*see* Social Services Law § 422 [8] [a] [ii]). Another change, particularly relevant here, provided a statutory presumption regarding the dismissal of Family Court article 10 proceedings, such that the relevant statutory language now provides with respect to SCR fair hearings:

"In such a hearing, where a family court proceeding pursuant to article ten of the family court act has occurred and where the petition for such proceeding alleges that a respondent in that proceeding committed abuse or neglect against the subject child in regard to an allegation contained in a report indicated pursuant to this section: (A) where the court finds that such respondent did commit abuse or neglect there shall be an irrebuttable presumption in a fair hearing held pursuant to this subdivision that said allegation is substantiated by a fair preponderance of the evidence as to that respondent on that allegation; and (B) where such child protective service withdraws such petition with prejudice, where the family court dismisses such petition, or where the family court finds on the merits in favor of the respondent, there shall be an irrebuttable presumption in a fair hearing held pursuant to this subdivision that said allegation as to [*2]that respondent has not been proven by a fair preponderance of the evidence" (Social Services Law § 422 [8] [b] [ii]).

The legislature enacted these statutory changes on April 3, 2020, but provided that the relevant provisions, including the new "irrebuttable presumption" applicable when a Family Court article 10 petition is dismissed, "shall take effect January 1, 2022" (L 2020, ch 56, part R, § 11). Thus, at the time of petitioner's fair hearing in August of 2020, these statutory changes were enacted but not yet effective.

After the hearing, OCFS issued a decision dated September 22, 2020, in which it concluded that ACS proved the allegations by a fair preponderance of the evidence and that petitioner's actions were relevant and reasonably related to child care employment. OCFS concluded that there was "no other credible explanation" for T.'s injuries, and that petitioner's "denial and blaming the incident on the subject child was not credible." The decision further stated that "[a] review of the photos and location of the marks seem difficult for the child to inflict upon herself and there is no evidence to suggest that anyone else would have reason to hit the child with an extension cord."**[FN4]**

Petitioner thereafter commenced this CPLR article 78 proceeding against ACS and OCFS, seeking to challenge OCFS's determination (*see Lee TT.*, 87 NY2d at 705 ["(I)f the report is not expunged after the hearing, the subject of the report may commence a proceeding pursuant to CPLR article 78 to challenge the decision"]). Supreme Court transferred the proceeding to the Appellate Division (*see* CPLR 7804 [g]). In an amended petition filed October 28, 2021, petitioner, by then represented by counsel, contended that she had a constitutional right to assigned counsel during the SCR hearing. Petitioner also contended before the Appellate Division that the "irrebuttable presumption" for Family Court article 10 dismissals should be applied to her on appeal.

The Appellate Division unanimously confirmed OCFS's determination, denied the petition, and dismissed the CPLR article 78 proceeding (206 AD3d 556 [1st Dept 2022]). The Court held that petitioner had no constitutional right to assigned counsel

and that the changes to Social Services Law § 422 did not apply retroactively to SCR fair hearings held before the January 1, 2022 effective date (*see id.* at 557-558). The Appellate Division further concluded that OCFS's determination was supported by substantial evidence and that the hearing officer did not abuse her discretion in refusing to consider a letter purportedly authored by T. (*see id.* at 557). This Court granted petitioner leave to appeal (39 NY3d 911 [2023]). We now affirm.

II.

The Appellate Division properly concluded that petitioner had no constitutional right to assigned counsel during her SCR administrative hearing (*see also Matter of Mangus v Niagara County Dept. of Social Servs*., 68 AD3d 1774, 1775 [4th Dept 2009], *lv denied* 15 NY3d 705 [2010]; *Matter of Gell v Carrion*, 81 AD3d 953, 954 [2d Dept 2011]). Although petitioner has a protected interest in her reputation and ability to secure employment in her chosen field (*Lee TT.*, 87 NY2d at 708-710), those interests alone are not enough to give rise to a constitutional right to the assistance of counsel. Inclusion on the SCR—unlike Family Court article 10 proceedings—does not impact rights that we have concluded warrant recognition of a constitutional right to assigned counsel in civil proceedings, such as physical liberty, bodily autonomy, or care and custody of one's children (*cf. Matter of Ella B.*, 30 NY2d 352, 356-357 [1972]; *People ex rel. Menechino v Warden, Green Haven State Prison*, 27 NY2d 376, 383-385 [1971]). Property interests typically do not give rise to a constitutional right to assigned counsel (*see Matter of Brown v Lavine*, 37 NY2d 317, 320-322 [1975]), including the kind of property interests at stake in administrative hearings to address professional licenses or certifications (*see e.g. Matter of Watson v Fiala*, 101 AD3d 1649, 1650-1651 [4th Dept 2012]). "Due process considerations in such cases require only that a party to an administrative hearing be afforded the opportunity to be represented by counsel" (*Matter of Baywood Elec. Corp. v New York State Dept. of Labor*, 232 AD2d 553, 554 [2d Dept 1996]). Petitioner was provided with that opportunity here. Moreover, the existing [*3]statutory procedures are sufficient to ensure petitioner's due process rights are protected, such that "[w]e cannot say that fairness can only be achieved for the indigent with the aid of assigned counsel, however desirable that assistance might be" (*Brown*, 37 NY2d at 321).

Petitioner likens inclusion on the SCR to inclusion on the state's sex offender registry. But the right to counsel at sex offender registration (SORA) hearings is statutory, not constitutional (*see* Correction Law § 168-n [3]). Appellate Division cases recognizing a right to effective assistance of counsel at SORA hearings have done so on the basis that "the statutory right to counsel in such proceedings . . . would otherwise be rendered meaningless" (*People v VonRapacki*, 204 AD3d 41, 43 [3d Dept 2022], citing *People v Bowles*, 89 AD3d 171, 177-178 [2d Dept 2011]). If counsel is to be provided during SCR

proceedings, "it is for the Legislature to say so, for constitutional due process does not command it" (*Brown*, 37 NY2d at 321).[FN5]

III.

The Appellate Division also properly concluded that the statutory amendments to Social Services Law § 422 (8) (b) (ii) do not apply retroactively to OCFS determinations rendered before the effective date the legislature provided for the amendments, i.e., January 1, 2022.

" 'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature' " (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998], quoting *Patrolmen's Benevolent Assn. v City of New York*, 41 NY2d 205, 208 [1976]). "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*id.* at 584). Here, petitioner's fair hearing was held in August of 2020, and OCFS rendered its determination on September 22, 2020. When the legislature enacted the amendments to Social Services Law § 422 in 2020, it specifically provided that those amendments—including the addition of the irrebuttable presumption at issue here—would not take effect until January 1, 2022 (L 2020, ch 56, part R, § 11). Thus, it is clear that the legislature intended that the statutory amendments would not apply until January 1, 2022—well after petitioner's SCR hearing was held and OCFS's determination was rendered.

Petitioner and the dissent assert that because the statutory amendments became effective while her appeal was pending, the Appellate Division and this Court should apply it as existing law. Cases which state that the Court should simply apply the law as it exists at the time of appeal without considering the legislature's intent are cases that predate this Court's more recent precedent acknowledging that the intent of the legislature is controlling (*see* dissenting op at 8-10, citing, inter alia, *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28-29 [1984], and *Matter of Asman v Ambach*, 64 NY2d 989 [1985])[FN6]. In more recent cases, we have not reflexively applied statutory amendments simply because they were effective by the time the appeal was heard, but instead have analyzed what effect, if any, the legislature intended the statutory amendments to have on proceedings already commenced (*see e.g. People v King*, — NY3d —, 2024 NY Slip Op 03322, *1-2 [June 18, 2024]; *People v Pastrana*, 41 NY3d 23, 29-30 [2023]; *Gottwald v Sebert*, 40 NY3d 240, 256-260 [2023]; *People v Galindo*, 38 NY3d 199, 207-208 [2022]). We have observed that even where the legislature instructs that statutory amendments should apply immediately, that instruction is "equivocal in an analysis of retroactivity," because "the date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights

then in existence" (*Majewski*, 91 NY2d [*4]at 583 [internal quotation marks omitted]), and that this legislative instruction is not enough to require the application of the statutory amendments to pending litigation (*see Gottwald*, 40 NY3d at 259).

In *Galindo*, for example, the legislature enacted statutory amendments while the defendant's direct appeal was pending (*see Galindo*, 38 NY3d at 202). We did not apply those statutory amendments on appeal simply because they were by then effective. Instead, we concluded that the legislature intended those statutory amendments to "apply to criminal actions commenced on or after the effective date of the amendment" (*id.*). We reasoned that neither the statutory text nor the legislative history supported retroactive application of the statute, noting that the legislature delayed the effective date of the amendment for eight months from its enactment (*see id.* at 207). We stated that "[t]his lengthy lapse in time weighs against immediate application of the amendment and suggests a policy choice to effect a future change in the law," evincing the legislature's intent *not* to impact pending matters or to apply the amendment retroactively (*id.*).

The same logic applies here. The legislature enacted the relevant statutory changes in 2020 but delayed their effective date for over 18 months. The legislature certainly could have instructed that these amendments should apply to pending SCR proceedings, but it did not (*cf. Gottwald*, 40 NY3d at 259-260 [legislature provided that statutory amendments would apply to pending cases insofar as they have been continued after the effective date]; *Asman*, 64 NY2d at 990 [legislature provided that statutory amendments would apply to proceedings in which a notice of hearing had been served prior to the effective date]). Nothing contained within the statutory text or legislative history evinces a legislative intent to apply the amendments to OCFS determinations rendered before the effective date.

Petitioner's assertions that the statutory amendments should be applied retroactively to her OCFS determination because they are "procedural" or "remedial" are also unpersuasive. We have instructed that such classifications do not "automatically overcome the strong presumption of prospectivity" and that general principles regarding statutory classifications "may serve as guides in the search for the intention of the Legislature in a particular case but only where better guides are not available" (*Majewski*, 91 NY2d at 584 [internal quotation marks omitted]). Here, the legislature specifically instructed that the statutory amendments to Social Services Law § 422 (8) would not take effect until January 1, 2022, after petitioner's SCR proceedings had concluded.

Finally, petitioner's assertion, accepted by the dissent, that the application of the statutory amendments to cases pending on direct appeal from OCFS determinations rendered before the effective date of the amendments would have no retroactive impact

is without merit. As the cases discussed above demonstrate, the application of a statutory amendment to cases pending on direct appeal may result in retroactive effect (*see e.g. King*, 2024 NY Slip Op 03322, *1-2; *Galindo*, 38 NY3d at 207; *see also Matter of Regina Metro Co., LLC v New York State Div. of Housing & Community Renewal*, 35 NY3d 332, 363-367 [2020]). The existence of these cases is part of the "decisional law background" of which the dissent insists the legislature must be presumed aware (*see* dissenting op at 13). "A statute has retroactive effect . . . if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" (*American Economy Ins. Co. v State*, 30 NY3d 136, 147 [2017] [internal quotation marks omitted]).

Application of the new irrebuttable presumption to OCFS's SCR determinations rendered before the effective date would have such retroactive effect by imposing new duties with respect to Family Court proceedings and OCFS determinations already completed. ACS asserts that it might not have offered, and Family Court might not have granted, an adjournment in contemplation of dismissal (ACD) to petitioner if the impact of that ACD would be that petitioner's indicated report would not appear on the SCR. ACS notes that this is particularly true where, as here, the allegations did not involve poverty-related neglect, which was a primary concern of the legislature (*see* Senate Introducer's Mem in Support of 2019 Senate Bill 6427A, Veto Jacket, Veto 232 of 2019, at 9 ["The vast majority of allegations made to the SCR involve poverty-related neglect and not child abuse"]), but rather a physical attack on the subject child.

It is undisputed that the state has "a strong interest" in protecting children from abuse (*Lee TT.*, 87 NY2d at 710). ACS and OCFS were entitled to rely on the law as it existed at the time in order to make their determinations, in the absence of any indication of legislative intent to the contrary **[FN7]**. In so holding, we do not attempt to "find a [*5]'manifest injustice' " to "justify [our] determination" (dissenting op at 18), but instead attempt to effectuate the intent of the legislature.

IV.

The Appellate Division correctly held that OCFS's determination is supported by substantial evidence in the record. Substantial evidence is a "minimal standard" that is "less than a preponderance of the evidence" and requires only that "a given inference is reasonable and plausible" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046 [2018] [internal quotation marks omitted]). "Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently" (*id.* at 1046). "Where substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions" (*id.* [internal quotation marks

omitted]; *see also Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d 131, 145 [2023]).

The Appellate Division correctly concluded that OCFS's determination was supported by substantial evidence. T. consistently recounted her version of events to a teacher, police officer, and ACS. A treating physician opined that T.'s visible and documented injuries were consistent with being struck by an extension cord. Although petitioner asserted that T.'s allegations were false, petitioner never offered an alternative explanation for T.'s injuries. OCFS determined that there was no other credible explanation for T.'s injuries and that petitioner's "denial and blaming the incident on the subject child was not credible." For the same reasons, the hearing officer did not abuse her discretion in refusing to consider an undated note, purportedly written by T., asserting that petitioner did not abuse her but providing no alternative explanation for her documented injuries (*see Matter of Charlotte MM. v Commissioner of Children & Family Servs.*, 159 AD3d 1081, 1082-1083 [3d Dept 2018]; *Matter of R.B. v New York State Off. of Children & Family Servs.*, 199 AD3d 429, 430-431 [1st Dept 2021]).

Although the dissent would not address the substantial evidence issue (*see* dissenting op at 18), the dissent adopts petitioner's view of the facts (dissenting op at 3-4)[FN8]. This is antithetical to our substantial evidence standard of [*6]review. On this record, Family Court did not "determine" anything regarding the ultimate merits of T.'s allegations (*see* dissenting op at 18), i.e., that T.'s allegations were false or her subsequent alleged recantation was credible. Rather, Family Court dismissed the article 10 proceedings against petitioner after the expiration of the adjournment period in accordance with the adjournment in contemplation of dismissal.

An ACD is not a determination that allegations of abuse or neglect were fabricated, unfounded, or unsubstantiated. It is not a determination on the merits of the allegations at all, but rather "leaves the question unanswered" (*Matter of Marie B.*, 62 NY2d 352, 359 [1984]). An ACD constitutes a determination by the parties and Family Court that the ends of justice and the needs of the child would be best served by allowing the Family Court respondent to comply with certain conditions, and, so long as those conditions are met, the proceeding will be dismissed (*see e.g. Matter of R.B.*, 199 AD3d at 430, citing *Matter of Stephen FF. v Johnson*, 23 AD3d 977, 978 [3d Dept 2005]).

Accordingly, the order of the Appellate Division should be affirmed, without costs.

WILSON, Chief Judge (dissenting):

Family Court dismissed charges of child abuse levelled at Shani Jeter and her husband by their teenage daughter. The legislature determined that in such situations, the Office of Children and Family Services (OCFS) could not continue to list their names on New

York's Statewide Central Register, which identifies persons charged with abuse or neglect of children. Both Ms. Jeter and her husband brought administrative proceedings to change their designations in the Register from "Indicated" to "Unfounded," at which only Ms. Jeter's husband was represented by counsel. OCFS granted Ms. Jeter's husband's request but not hers, leaving her listed as "Indicated" for having abused or neglected a child. The majority concludes that this result is warranted because the legislature did not intend the new law to apply retroactively. But this case has nothing to do with retroactivity; instead, it rests on a long-settled doctrine that courts [*7]apply changes in law that take effect when a case is pending. Because Ms. Jeter's case was pending before the Appellate Division when the new legislation took effect, it is governed by that legislation.

Here, applying the new legislation to pending cases furthers the legislature's stated goal to address disparities in outcomes for poor people and across racial lines. The legislature determined that the best way to do this was by ensuring that the Family Court determination was binding on whether the report was "indicated" or "unfounded" in the Register. Despite the majority's contention that "it is clear that the legislature intended" that these amendments would not apply to someone in Ms. Jeter's position (majority op at 9), the legislature did nothing to displace the longstanding, universal rule that changes in law apply to cases pending on appeal. Instead, the majority undermines the law's purpose by misconstruing the relevant doctrine, pointing to the legislature's silence, and inventing reasons to call this law retroactive.

I.

After school one day in June 2019, 13-year-old T. disappeared. Her mother, Shani Jeter, filed a missing person's report with the police **[FN9]**. T. had been diagnosed with oppositional defiant disorder and saw a therapist. T. turned up later that day at a different school with a person she refused to identify and went to the police, displaying marks on her arms and upper body. She told the police that her mother had beaten her with an electrical cord the day before. T. also accused her father of beating her in the past and said that the parents often beat her and her two younger sisters with extension cords and belts.

Inconsistently with her account of abuse, T. had left for school with no marks on her arms and her teachers confirmed that she had no marks on her arms when she was at school that day. T. told the Administration for Children's Services (ACS), the New York City children's protective services agency, that Ms. Jeter beat her because two days earlier T. had defaced a computer monitor by etching a smiley face and a curse word onto it; she had actually defaced the monitor a month earlier. Within two weeks, T. recanted her entire story, a piece at a time. T. first retracted her statements that her younger sisters had been beaten, and the older of the two (10 years old) told ACS that

her parents had never hit any of the sisters. T. next retracted her own statement; she said she had never been beaten with any object, saying that she had only been hit on one prior occasion. Finally, she signed a document saying she had made up the accusations, which her lawyer (not her parents' lawyers) tendered to Family Court. T. told her therapist that she had lied about her mother beating her because her mother had removed some of T.'s privileges.

The Family Court ordered the children returned to their parents and dismissed the charges against Mr. Lang. Shortly thereafter, in September 2019, the District Attorney dropped the criminal charges against Ms. Jeter; and in February 2020, Family Court dismissed the case against Ms. Jeter after an adjournment in contemplation of dismissal (ACD). But, as a result of T.'s accusations, her parents' names remained listed as "indicated" for child abuse or neglect on the Register. Under the statutory scheme in place when the Family Court dismissed the charges, the court's determination did not bind OCFS, which often listed names as "Indicated" on the Register even after Family Court had dismissed all proceedings against them. Under the law at the time, persons in that position could request a name-clearing hearing before an administrative law judge within OCFS.

T.'s parents requested name-clearing hearings. Ms. Jeter had been suspended from her job because she was listed on the Register. Her listing on the Register also barred her from finding another job in her field: working with developmentally disabled children and adults. Neither of T.'s parents could afford counsel; they had been represented by court-appointed counsel in Family Court. On August 27, 2020, an ALJ heard Ms. Jeter's request to [*8]clear her name; she had to represent herself because she had no lawyer. ACS was represented by counsel; it presented no witnesses but moved into evidence the entire investigative record.

II.

Under prior and current law, a finding of abuse or neglect by the Family Court creates an irrebuttable presumption that the allegations are supported by a preponderance of the evidence, precluding all challenges to maintaining the related Register record (Social Services Law § 422 [8]).

However, under prior law, even when charges in the Family Court were determined to be unfounded, the finding created no presumption relating to the Register record (8 NYCRR 434.10 [f] ["[D]ismissal or withdrawal of a Family Court petition does not create a presumption that there is a lack of a fair preponderance of the evidence to prove that a child has been abused or maltreated for purposes of this Part"]). OCFS could maintain the "indicated" designation on the Register even if the Family Court determined that the charges were baseless. Persons wishing to have their names removed from the Central

Register were required to relitigate allegations they prevailed on in the Family Court; they sometimes obtained inconsistent outcomes in the Family Court and administrative proceedings on identical allegations (*see, e.g.*, *Gwen Y. v OCFS*, 132 AD3d 1091, 1092 n 1 [3d Dept 2015]; *Stephen FF. v Johnson*, 23 AD3d 977 [3d Dept 2005]).

In April 2020, the legislature passed and the Governor signed a new law ensuring that Family Court's determinations and dismissal are binding on OCFS. Under current law, if the Family Court dismisses charges of abuse, OCFS must remove the alleged abuser's name from the Register. The legislature altered the law to "reduce the harsh and disproportionate consequences of having an indicated case on the" Register, which "will ultimately relieve individuals from the prospect of being persecuted for the 'crime' of being poor" (Sponsors' Letter to Governor, Veto Jacket, 2019 NY Assembly Bill 8060 at 6). The sponsors noted "widespread agreement that a system meant to help children is actually hurting some families by blocking job opportunities" *(id*., quoting Yasmeen Khan, *Changes Proposed for a System that Stigmatizes Parents Accused of Child Neglect*, WNYC, June 12, 2019, available at https: www.wnyc.org/story/state-system-meant-keep-children-safe-actually-hinders-family-stability-advocates-say/). The legislature determined that the best way to do this was by ensuring that the Family Court dismissal of charges required removal of the accused's name from the Register.

OCFS described the purpose of the legislation in the same terms: to "address[ ] the disproportionality and disparity in race and income for families engaged with [Child Protective Services]" (Office of Children and Family Services, *Change in Standard of Evidence for Child Protective Services Investigations*, 21-OCFS-ADM-26 at 2 [Nov. 4, 2021], https://ocfs.ny.gov/main/policies/external/ocfs_2021/ADM/21-OCFS-ADM-26.pdf; *see also* Suzanne Miles Gustave, Acting Commissioner of Office of Children and Family Services, *Letter in Response to New York State Citizen Review Panels for Child Protective Services 2022 Annual Report* [June 23, 2023], https://ocfs.ny.gov/main/reports/cfsp/2024-NYS-APSR-AttB.pdf ["The primary purpose of SCR Reform is to address racial, socioeconomic, and other disparities in the [children's protective services] system while improving outcomes for families and promoting child safety"]).

The 2020 legislation had an effective date of January 1, 2022 (2020 NY Laws Ch. 56 Part R § 11). The effective date was deferred to address the need for the courts and OCFS to put in place the various mechanisms needed to effectuate the automatic removal of names of those vindicated in family court. Then-Governor Andrew Cuomo had vetoed a virtually identical version of the law in 2019, citing the "immediate effective date, which would not allow for adequate time to implement necessary systems changes" (Governor's Veto Mem, Veto Jacket, 2019 NY Assembly Bill 8060 at 5).

The amendment requires that the irrebuttable presumption is reciprocal: acquittal in Family Court creates an irrebuttable presumption that the parent did not commit abuse and therefore cannot be listed on the Register. The irrebuttable presumption favoring the parent exists "where [the] child protective service withdraws such petition with prejudice, where the family court dismisses such petition, or where the family court finds on the merits in favor of the respondent" (Social Services Law § 422 [8] [b] [ii]; Social Services Law § 424-a [1] [e] [vi]). A parent who obtains any of those outcomes is entitled to an "Unfounded" designation in the Register (*id*.).

The legislature changed whether an irrebuttable presumption applies to Family Court determinations in name-clearing hearings to eliminate a variety enumerated injuries resulting from persons who prevailed in Family Court—including people like Ms. Jeter who had counsel in Family Court but not in administrative proceedings. Now, Sections 422 (8) and 424-a (1) (e) provide that the state's interest in the public identification of child abusers is determined solely by Family Court, where—unlike the administrative proceedings before OCFS—the parties have the right to counsel, the rules of evidence apply, and a Family Court Judge decides the case instead of an employee of OCFS. Family Court's decision automatically determines placement on the Register.

After Family Court dismissed the charges against Ms. Jeter, she challenged her "Indicated" report before an ALJ for OCFS. Her hearing took place in August 2020, four months after the new law was enacted but almost sixteen months before it was scheduled to take effect. The next month, the ALJ denied her request. Ms. Jeter challenged that determination in an article 78 proceeding timely filed in January 2021 in Supreme Court. Supreme Court transferred the case to the Appellate Division, which decided Ms. Jeter's case on June 28, 2022—over five months after the new legislation took effect.

III.

A.

Among the several arguments Ms. Jeter advances, one is patently correct: because her case was pending when the new legislation took effect, it applies to her case and she is therefore entitled to have her designation on the Register changed to "Unfounded." Chief Justice John Marshall stated the general rule: "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied" (*United States v Schooner Peggy*, 5 US 103, 110 [1801]). The Supreme Court has continued to follow that rule. In *Thorpe v Housing Auth. of Durham*, the Supreme Court reaffirmed that "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision" (393 US 268, 281 [1969]).

We have unfailingly followed that same rule: "a court applies the law as it exists at the time of appeal, not as it existed at the time of original determination" (*Matter of Asman v Ambach*, 64 NY2d 989, 990 [1985], citing *Matter of Alscot Investing Corp. v Board of Trustees*, 64 NY2d 921 [1985], *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28—29 [1984], *Mayer v City Rent Agency*, 46 NY2d 139, 149 [1978], *Matter of Tartaglia v McLaughlin*, 297 NY 419 [1948], and *Quaker Oats Co. v City of New York*, 295 NY 527, 536 [1946]; *see also* Arthur Karger, Powers of the New York Court of Appeals, § 17:7 2023 ed [Westlaw], citing *In re Kahn's Application*, 284 NY 515, 523 [1940], *Demisay, Inc. v Petito*, 31 NY2d 896, 897 [1972], *Asman*, 62 NY2d at 990, and *Alscot Investing Corp.*, 64 NY2d at 922]).

The case before us is an article 78 proceeding challenging an administrative decision made under preexisting law. The ALJ did not err in applying old law, because that was the law in force at the time. The new law took effect only later, when the article 78 action challenging the ALJ's determination was pending. In those exact circumstances, we and the Appellate Division have consistently applied the new law on appeal, not the old law that was in effect when the administrative decision was made (*see, e.g.*, *Alscot Investing Corp.*, 64 NY2d; *Matter of Scism v Fiala*, 122 AD3d 1197 [3d Dept 2014]; *Matter of Jamaica Recycling Corp v City of NY*, 38 AD3d 398 [1st Dept 2007]; *Matter of Trifaro v Town of Colonie*, 31 AD3d 821 [3d Dept 2006]; *D'Agostino Bros Enters v Vecchio*, 13 AD3d 369 [2d Dept 2004]; *Linder v Schneider*, 176 AD2d 319 [2d Dept 1991]).

Courts around the country, from the Founding until now, have held that when the law changes in this way the change in law can be raised for the first time on appeal, even before a court of last resort. (*See, e.g.*, *United States v Chambers*, 291 US 217, 226 [1934]; *Hamling v United States*, 418 US 87, 101—102 [1974]; *Henderson v United States*, 568 US 266, 271—277 [2013]; *Demars v First Service Bank for Savings*, 907 F2d 1237 [1st Cir 1990]; *EEOC v Westinghouse Elec Corp*, 765 F2d 389 [3rd Cir 1985]; *Alexander S. v Boyd*, 113 F3d 1373, 1388 [4th Cir 1997]; *Deck v Peter Romein's Sons, Inc.*, 109 F3d 383, 386 [7th Cir 1997]; *Ex parte L.J.*, 176 So 3d 186, 194 [Ala 2014]; *Fresneda v State*, 458 P2d 134, 143 [Alaska 1969]; *People v Bank of San Luis Obispo*, 159 Cal 65, 68—69 [1910]; *Nevada D.H.H.S. Div. of Welfare v Lizama*, 2016-SCC-0031-FAM, 2017 WL 6547070, at *4 [N Mariana Is., Dec. 21, 2017].) Several of our cases speak to that very point. (*See, e.g., Post v 120 E. End Ave. Corp.*, 62 NY2d at 28—29 ["new questions of law may be raised for the first time on appeal if they could not have been presented to the trial [*9]court"], citing Cohen & Karger, Powers of the New York Court of Appeals, §§ 161, 162, now Karger, Powers of the New York Court of Appeals, § 17:7; *Regina Metropolitan Co, LLC v NYS Division of Housing and Community Renewal*, 35 NY3d 332, 362—363 [2020], quoting *In re Gleason*, 96 NY2d 117, 121 n [2001].) Although the State argues that we cannot reach Ms. Jeter's

argument because her failure to alert the ALJ to the not-yet-effective amendment renders the issue unpreserved, the majority correctly rejects that argument by reaching the merits of Ms. Jeter's claim.[FN10]

When addressing the merits, however, the majority abandons the settled law in Ms. Jeter's favor by mischaracterizing the legal issue at stake. The question is not whether the law applies "retroactively to OCFS determinations rendered before the effective date" (majority op at 8); the question is whether once the changed statute became the law, its new "rule of decision" applies to Ms. Jeter's appeal (*Schooner Peggy*, 5 US at 110). This case is not about the retroactive impact of a law: the majority's analysis is addressed to someone whose appeals were exhausted before January 1, 2022. That is not Ms. Jeter.

A law has "genuinely retroactive effect" where "it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed" (*Landgraf v USI Film Products*, 511 U.S. 244, 277, 280 [1994]). But the new Social Services Law § 422 (8) does none of those things. The majority's argument to the contrary is based not on law or fact, but on conjecture. "A statute does not operate 'retrospectively' merely because it applied in a case arising from conduct antedating the statute's enactment" (*Gottwald v Sebert*, 40 NY3d 240, 258 [2023]). When a law impugns no previous rights, imposes no new liability, or unsettles final matters (such as lawsuits that have exhausted their appeals) "the law as it exists at the time a decision is rendered on appeal is controlling" (*Alscot Invest. Corp.*, 64 NY2d at 922). The majority can point to no circumstance here that defeats the U.S. Supreme Court's recitation of settled law: "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary" (*Bradley v School Bd. of City of Richmond*, 416 US 696, 711 [1974)]). The majority ignores those cases—instead it manufactures statutory guidance where there is none and fabricates an interest for OCFS to create the appearance of retroactivity.

B.

The majority claims "it is clear that the legislature intended that the statutory amendments would not apply until January 1, 2022." The first problem is that there is a difference between the law changing on a date and the law applying before that date. The law that courts apply to a pending case when a statute or decisional law changes is the law as it is on that day. Had Ms. Jeter's name clearing hearing happened on January 2, 2022 instead of before the effective date of the new Social Services Law § 422 (8) (b) (ii), no one could dispute that the ALJ would have had to apply the irrebuttable presumption. The ALJ would have applied the law as it was that day. The

same is true for the Appellate Division—and should be for this Court. That does nothing to undercut the law's effective date.

The second problem with the majority's rationale is that we assume the legislature understands the law—including this Court's decisions. "The Legislature is . . . presumed to be aware of the decisional and statute law in existence at the time of an enactment" (*Arbegast v Board of Educ. of S. New Berlin Cent. Sch.*, 65 NY2d 161, 169 [1985])]; "Ascertainment of the legislative intent behind [an] enactment . . . requires consideration of the decisional law background . . . of which it may be presumed the Legislature was aware and, to the extent it left it unchanged, that it accepted" (*Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 588 [1981]).

When the law became effective on January 1, 2022, Ms. Jeter's appeal was pending. Courts, including ours and the U.S. Supreme Court, uniformly hold that a law that becomes effective while an appeal is pending applies to [*10]that case. If the legislature had any doubt about whether *Schooner Peggy*, *Thorpe*, *Bradley*, *Landgraf*, *Asman*, *Alscot Invest. Corp.*, *Post*, *Mayer*, *Matter of Tartaglia*, *Quaker Oats Co.*, *In re Kahn's Application*, *Demisay, Inc.* or *Regina* would apply, it could have said so. It would have been very easy to include in the amended Social Services Law Sec. 422 that the irrebuttable presumption would not apply to cases on appeal on the effective date. The legislature said nothing of the kind here.

The 2020 amendments themselves show that the legislature chose to make that distinction when it wanted to.. The statutory text distinguishes between investigations commenced prior to the January 1, 2022 effective date that determine whether evidence was "credible," and investigations begun after the effective date backed by a "fair preponderance" (Social Services Law § 412 [6]-[7] and Social Services Law § 422 [5] [a]). Those date-specific amendments also change rules of decision. But when it came to the irrebuttable presumption, the legislature did not put in parallel text circumscribing its impact on name clearing hearings after January 1, 2022: neither sections 422 (8) and 424-a (1) (e) have any language circumscribing their application once codified.

The third problem is where the majority's logic then takes it: to a faulty interpretation of the delayed effective date. " '[T]he date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence' " (*People v Pastrana*, 41 NY3d 23, 30 [2023], quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). Although a delayed effective date may be relevant to a retroactivity analysis, it is not so in a change in law analysis. The majority cites *People v Galindo* to try to demonstrate that a delayed effective date should be dispositive here (38 NY3d 199, 202 [2022]; majority op at 10). There, we considered whether the new speedy trial obligations in CPL 30.30 (1) could apply to a case that was on appeal after the change in law took effect; we found it could not because to

apply it would require the appellate court to "reach back" and entirely redo the entire pre-judgment period (*id*. at 207). Doing so would have imposed new duties on the prosecution—duties that the prosecution argued did not even apply to the kind of traffic case at bar in *Galindo*. The additional speedy trial duties of CPL 30.30 (1) in Mr. Galindo's case gave that law a genuine retroactive effect. The dispositive issue in *Galindo* was not whether the law took effect while the case was on appeal—it was whether the law took effect before the duties it imposed on the prosecution and rights it granted defendants was before or after the criminal action began.

Fourth, the majority disregards the legislature's intent. With no basis, it claims that this Court only just recently began to consider the legislature's intent in change of law cases. And then carrying the mantle of legislative intent, it cites *Majewski*'s maxim that "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (91 NY2d at 583), only to disregard the intent of the legislature here: to render Family Court's decisions determinative of whether a person would be listed on the Register and remove that function from OCFS ALJs. The legislature reworked the 2020 amendments with a delayed effective date in apparent response to Governor Cuomo's objection that OCFS needed time to implement the changes. After giving the agency 18 months, the irrebuttable presumption had to be in place for all dismissals. The majority creates an exception for pending cases that the legislature did not write.

C.

To transform the new Social Services Law Sec. 422 (8) (b) (ii) into one with retroactive effect, the majority dreams up a new duty for OCFS. Perhaps, the majority supposes, ACS "*might* not have offered, and Family Court *might* not have granted" an ACD "*if* the impact of that ACD would be that [Ms. Jeter's] report would not appear on the SCR"—because *then* the law would "impos[e] new duties" on ACS (majority op at 12, emphasis added). The majority wonders how a law that took effect in 2022 after being passed in 2020 might have shaped ACS's ACD negotiating strategy in 2019—but a hypothetical impact on negotiating strategy is not a new duty. Unsupported conjecture is not supposed to be the basis for appellate decisionmaking.

Its hypothesis about how ACS's approach to the ACD would have differed—even were it supported by the record—is immaterial. To start, we do not know here whether ACS consented to or even opposed Ms. Jeter's ACD and dismissal—we only know that Family Court granted it. The amendment did not alter ACS's rights to oppose or support an ACD, nor did it alter ACS's duties to protect children. Those remain unchanged regardless of whether the result in Family Court would have led to the irrebuttable presumption for the SCR entry. Most importantly, the [*11]legislature did not write the law with any consideration of ACS's position on a dismissal or ACD. The law requires

the irrebuttable presumption whenever "the family court dismisses such petition" with no distinction for whether it was dismissed after an ACD, on the initiative of ACS or sua sponte by Family Court (Social Services Law § 422 [8] [b] [ii]). Nor would the new law have imposed new liability on ACS if the irrebuttable presumption had applied to ACDs. It certainly did not create a new duty for ACS.

The majority elevates OCFS over the actual legislators in New York State. Because ACS and OCFS "were entitled to rely on the law as it existed at the time" of Ms. Jeter's Family Court proceeding (majority op at 12), the legislature's decision to remove OCFS from the picture in favor of automatic results based solely on Family Court proceedings does not matter: under the majority's view, those governmental agencies had a legally protectible interest in the law and policy of the State not changing. But a public agency cannot claim to have an interest in not abiding by the public policy or law made by the legislature. No one, and surely not an arm of the executive branch, is "entitled" to any reliance on the law remaining the same (*see J. B. Preston Co v Funkhouser*, 261 NY 140, 144 [1933] affd, 290 US 163 [1933] ["Nor has a person a vested interest in any rule of law entitling him to have the rule remain unaltered"]). Moreover, even if ACS could be said to have had relied on Ms. Jeter's remaining on the SCR, the legislature extinguished any public interest in a SCR independent of Family Court determinations.

The majority cannot create retroactive impact in a law that merely changes how an administrative record works. Its mistakes illustrate a prudential reason why courts apply new rules of decision on appeal where they do not have genuine retroactive effect—we cannot know whether ACS or Family Court would have thought about Ms. Jeter's ACD differently if her case had been before them three years in the future. When a change in law would materially affect the rights, liabilities or duties of the parties, we might conclude that applying a law before its effective date imposes a retroactive effect. But because the new law does none of those, and instead provides a different "rule of decision," we should follow Chief Justice Marshall and over two centuries of jurisprudence to apply the law as it is today.

Ms. Jeter's position is both legally correct and practically sensible. Until the statute took effect, there was no legal basis for the ALJ or a court to apply it. Ms. Jeter raised the application of the new legislation to her case before the Appellate Division, which was her first opportunity to do so. Because the law simply changes the rule of decision without creating new duties or liabilities, it has no retroactive effect; the change in law that took effect while her legal claim was pending must apply to Ms. Jeter's case.

IV.

Because I would reverse on the above grounds, I would not reach any of Ms. Jeter's other claims. I note, however, that although the majority does not acknowledge it, the

strength of her facial due process claim as to the denial of counsel is difficult to assess because the application of the new legislation should radically decrease and alter the nature of name-clearing hearings going forward. The majority does, however, silently and correctly concede that Ms. Jeter did not need to preserve her right to counsel claim.

There is a sharp irony in Ms. Jeter's case. Her chosen career is aiding developmentally disabled persons. She first fostered and then adopted her grand-nieces. She later lost her job and profession because of a recanted accusation. When represented by a lawyer, all charges against her were dismissed by a Family Court Judge, but when she was subsequently unrepresented, an ALJ concluded Ms. Jeter did not meet her burden to prove what Family Court already determined.

Perhaps even more ironic is the majority's decision to mischaracterize a change in law as a retroactive law. In seeking to find a "manifest injustice" that would justify its determination that the law has retroactive effect, the majority would continue to lock Ms. Jeter out of her chosen career of serving others. The legislature has displaced the agency's determination with Family Court's, but the majority ignores the language and entire purpose of that amendment. Our job is to follow settled law and the legislature's command. Here, that requires us to reverse and remit to ensure Ms. Jeter has the benefit of the legislature's judgment that Family Court's processes and orders are superior to those of an administrative law judge.

Order affirmed, without costs. Opinion by Judge Troutman. Judges Garcia, Singas and Cannataro concur. Chief Judge Wilson dissents in an opinion, in which Judges Rivera and Halligan concur.

Decided November 25, 2024

**Footnote 1:** Petitioner is T.'s biological great aunt and adoptive mother.

**Footnote 2:** Family Court Act § 1012 (f) (i) (B) defines a "[n]eglected child" to include a child who is subject to "excessive corporal punishment." T. told the ACS caseworker that petitioner beat her with an extension cord as punishment for perceived misbehavior.

**Footnote 3:** Pursuant to the statutory definitions applicable to the SCR, a "maltreated child" is a child who is "defined as a neglected child by the family court act" or a child "who has had serious physical injury inflicted upon him or her by other than accidental means" (Social Services Law § 412 [2]).

**Footnote 4:** As a result of OCFS's determination, an employer "must inquire of the [SCR] whether there is an indicated report" on petitioner if she sought "employment in a

job that would involve 'regular and substantial contact with children' " (*Lee TT*., 87 NY2d at 705, citing Social Services Law § 424-a [1] [b] [i]). Petitioner would be prohibited from employment in such a position unless the employer maintained a written record regarding the reasons for approval (*see* Social Services Law § 424-a [2] [a]). With the exception of permitted disclosures to certain child care agencies and law enforcement, SCR reports are confidential and unlawful disclosure constitutes a misdemeanor (*see generally Lee TT*., 87 NY2d at 705; Social Services Law §§ 422 [4]; 424-a).

**Footnote 5:** Petitioner also relies on the fact that her husband, who was represented by counsel during his SCR proceeding, was successful, attributing his success to the representation. OCFS explains, however, that the allegations against petitioner's husband were based upon his alleged beating of T. with an extension cord in May of 2019, after which she told no one and had no marks that were still visible when ACS's investigation commenced in June of 2019. ACS chose not to present evidence at the SCR hearing for petitioner's husband, requiring dismissal regardless of whether he was represented by counsel.

**Footnote 6:** The dissent relies heavily on United States Supreme Court and federal case law, but "[i]f no Federal constitutional principles are involved, the question of retroactivity is one of State law" (*People v Martello*, 93 NY2d 645, 650 [1999]). *Asman* is also distinguishable. There, the legislature specifically provided that the statutory amendments at issue there would apply to proceedings in which a notice of hearing had been served prior to the effective date of the statutory amendments (*see* 64 NY2d at 990).

**Footnote 7:** Counsel for OCFS has also asserted that the new irrebuttable presumption is not automatically applied to Family Court article 10 dismissals, but rather, in order to determine whether the presumption applies, the relevant local child protective agency must review all the relevant Family Court records and any findings made by Family Court in order to confirm that the Family Court disposition qualifies for the irrebuttable presumption (*see* Office of Children and Family Services, Administrative Directive 33, 21-OCFS-ADM-33, at 9 [Dec. 23, 2021], available at https://ocfs.ny.gov/main/policies/external/ocfs_2021/ADM/21-OCFS-ADM-33.pdf [last accessed 11/18/2024] [stating that an ACD in Family Court "may or may not" result in an irrebuttable presumption in the SCR proceeding, depending in part upon whether a "finding of abuse or neglect was made" during the Family Court proceeding]). Although the dissent concludes that the ACD petitioner received in Family Court would qualify for the statutory presumption (*see* dissenting op at 16), in light of our holding that the statutory amendments do not apply to OCFS's fair hearing determinations rendered before the January 1, 2022 effective date, we express no opinion on that issue.

**Footnote 8:** For example, the dissent asserts that T.'s teachers "confirmed that she had no marks on her arms when she was at school that day" (dissenting op at 3). This appears to be based upon petitioner's assertion that petitioner did not see any bruising before T. left for school, and that none of T.'s teachers called ACS to report bruising. Of course, the fact that T.'s teachers did not call ACS to report any injuries before a different teacher called the police does not mean that T.'s injuries did not exist, particularly where T.'s injuries were observed and photographed. The record does not state that T. told her therapist that she had lied "about her mother beating her" (dissenting op at 4). Rather, T.'s therapist stated in a letter that T. had admitted that she "lied on her aunt about various things because her aunt took away some of her privileges," something OCFS determined that T. also told ACS as an explanation for why petitioner had beaten her in the first place. Petitioner further asserted that T.'s purported recantation should be considered credible because, according to petitioner, it was offered to Family Court by the attorney for the child (*see* dissenting op at 3-4). The full record of the Family Court proceedings is not before us, and the record does not demonstrate whether Family Court found this letter credible, found that it had any bearing on whether the incident actually occurred, or considered it relevant to whether T.'s best interests would be served by returning to her home provided that petitioner received adequate parenting supports. Ultimately, where, as here, there are facts in the record supporting OCFS's determination, we are bound to apply the substantial evidence standard and uphold the administrative determination, even if there is evidence in the record supporting a contrary conclusion (*see Haug*, 32 NY3d at 1046).

**Footnote 9:** Jeter and Lang are T.'s great aunt and great uncle; they first fostered T. and her two younger sisters and later adopted them.

**Footnote 10:** Lack of preservation is a threshold issue that prevents us from addressing a question on the merits (*see Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003], citing *Telaro v Telaro*, 25 NY2d 433, 439 [1969]). The majority's merits resolution of Ms. Jeter's argument about right to counsel, like its merits resolution of Ms. Jeter's claim as to the amendment's applicability, necessarily rejects the State's argument that a claim to the constitutional right to counsel must be preserved.

**Matter of Naomi NN. V New York State Office of Children & Family Services**, AD3d 2024 NY Slip Op 06635 (3rd Dept., 2024)

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Ulster County) to review a determination of respondents partially denying petitioners' application to have a report maintained by the Statewide Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged.

Petitioners were the foster parents of two children in April 2019, one of whom was in second grade at the time and is at issue here. On April 3, 2019, the Statewide Central Register of Child Abuse and Maltreatment received a report alleging that petitioner Naomi NN. (hereinafter the foster mother) had become frustrated with the subject child as she struggled to complete her math homework the night before and repeatedly slammed the child's face down on the table as punishment. The report further alleged that petitioner Anthony NN. (hereinafter the foster father) witnessed the foster mother's outburst and did not intervene. The Ulster County Department of Social Services (hereinafter DSS) investigated and marked the report as "indicated," finding that the foster mother had engaged in maltreatment due to inadequate guardianship, excessive corporal punishment and the infliction of lacerations, bruises and/or welts and that the foster father had engaged in maltreatment due to inadequate guardianship.

Respondent Office of Children and Family Services conducted an administrative review and declined petitioners' request to amend the report to be unfounded. The matter was accordingly set down for a hearing that, after several adjournments, occurred in April 2021. The Administrative Law Judge (hereinafter ALJ) who presided over that hearing **[FN1]** subsequently determined that, although DSS had not established by a fair preponderance of the evidence that the foster father had committed the alleged maltreatment, it did establish maltreatment on the part of the foster mother. The ALJ accordingly granted petitioners' request to amend the report to "unfounded" with regard to the foster father and denied it with regard to the foster mother. The ALJ further concluded that the report was relevant and reasonably related to childcare issues involving the foster mother, warranting disclosure of the indicated report's existence to provider and licensing agencies making inquiry about her in the future. Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination with respect to the foster mother, and Supreme Court transferred the matter to this Court (*see* CPLR 7804 [g]).

In order to establish maltreatment, DSS was obliged to demonstrate, by a preponderance of the evidence, that the physical, mental or emotional condition of the subject child either had been or would be in imminent danger of being impaired because the foster mother had failed to exercise a minimum degree of care in providing the subject child with appropriate supervision or guardianship or that she used excessive corporal punishment (*see Matter of [*2]Kristen DD. v New York State Cent. Register of*

*Child Abuse & Maltreatment*, 220 AD3d 1129, 1130 [3d Dept 2023]; *Matter of Destiny Q. v Poole*, 214 AD3d 1183, 1185 [3d Dept 2023]; *Matter of Jeffrey O. v New York State Off. of Children & Family Servs.*, 207 AD3d 900, 901 [3d Dept 2022]). Our review of the ALJ's determination that DSS made that showing involves an assessment of whether the determination is supported by substantial evidence, a minimal standard demanding "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see Matter of Kristen DD. v New York State Cent. Register of Child Abuse & Maltreatment*, 220 AD3d at 1131; *Matter of Raymond I. v New York State Off. of Children & Family Servs.*, 214 AD3d 1147, 1148 [3d Dept 2023]). Of particular note here, "hearsay is admissible in expungement hearings and, if sufficiently relevant and probative, may constitute substantial evidence to support the underlying determination" (*Matter of Destiny Q. v Poole*, 214 AD3d at 1185 [internal quotation marks and citations omitted]; *see Matter of Kristen DD. v New York State Cent. Register of Child Abuse & Maltreatment*, 220 AD3d at 1131).

Here, the hearing evidence against petitioners consisted of the "connections stage summary," the investigation progress notes prepared by the assigned DSS caseworker or her coworkers, and photographs of the subject child taken in April 2019. The caseworker herself no longer worked for DSS by the time of the hearing and did not testify.**[FN2]** The progress notes nevertheless reflected that the subject child repeatedly and consistently described — to the caseworker as well as childcare workers — an incident in which the foster mother became angry when she had trouble doing her homework and "banged her head on the table." The caseworker and staff members at the subject child's daycare observed injuries on the subject child's face in the wake of that incident, and photographs taken of the subject child on April 4, 2019 clearly show bruising on the left side of her face, under her left eye and on her upper left ear. Moreover, petitioners' biological child was interviewed by the caseworker and confirmed that they used corporal punishment on the subject child, relating, among other things, how the subject child would "get[ ] a smack" whenever she did not do her homework correctly and how petitioners sometimes used a wooden "whipping" spoon on her. The subject child was removed from the care of petitioners shortly after that interview and, when the caseworker asked the subject child about discipline by petitioners about two weeks later, she also described how petitioners would use a wooden spoon to spank her.

Petitioners did testify. The foster mother stated that she never slammed the subject child's face onto a table or otherwise struck the child, while the foster father stated that he was not in the room when [*3]the alleged incident occurred but that neither he nor the foster mother used corporal punishment. The foster mother further described how the subject child "had a habit of lying" and suggested that she may have sustained

injuries when she threw herself onto the floor on the evening of the alleged incident. Both she and the foster father further testified that their biological child was lying when he described corporal punishment with a wooden spoon.

The ALJ credited the subject child's hearsay statements to the caseworker over petitioners' testimony, pointing out, among other things, the lack of any explanation from petitioners as to why both their biological child and the subject child would give consistent stories about corporal punishment with a wooden spoon if it had not occurred and noting that the injuries documented in photographs of the subject child were "more consistent" with having her face slammed into a table than falling onto the floor. The ALJ went on to find that, especially in view of the undisputed special needs of the subject child and the fact that corporal punishment by foster parents is impermissible (*see* 18 NYCRR 441.9 [c]), the punishment meted out by the foster mother constituted maltreatment in that it was inappropriate, excessive and impaired the subject child's physical and emotional health. We accord deference to the ALJ's assessments of credibility and are satisfied that the "sufficiently relevant and probative" hearsay evidence presented by DSS, particularly when coupled with the photographic evidence of the subject child's injuries, constituted substantial evidence for the ALJ's determination (*Matter of Ribya BB. v Wing*, 243 AD2d 1013, 1014 [3d Dept 1997] [internal quotation marks and citation omitted]; *see Matter of Morales v Velez*, 147 AD3d 559, 559 [1st Dept 2017]; *Matter of Vincent KK. v State of N.Y. Off. of Children & Family Servs.*, 284 AD2d 777, 777-778 [3d Dept 2001]; *compare Matter of Theresa WW. v New York State Off. of Children & Family Servs.*, 123 AD3d 1174, 1176 [3d Dept 2014]).

Finally, in view of the foster mother's refusal to take responsibility for her maltreatment of the subject child or otherwise recognize the damage such behavior might cause to a particularly vulnerable foster child, substantial evidence also exists "for the ALJ's finding that the maltreatment is relevant and reasonably related to any future child care employment, adoption or foster care decisions regarding [the foster mother] so as to warrant disclosing the existence of the indicated report to inquiring agencies" (*Matter of Destiny Q. v Poole*, 214 AD3d at 1186 [internal quotation marks and citation omitted]; *see* Social Services Law § 422 [8] [c] [ii]; *Matter of Ribya BB. v Wing*, 243 AD2d at 1015). To the extent that they are not addressed above, we have examined petitioners' remaining arguments and found them to be meritless.

ADJUDGED that the determination is confirmed[*4], without costs, and petition dismissed.

**Footnote 1:** The ALJ's determination also notes that she had been designated by respondent Commissioner to make such decisions on the Commissioner's behalf.

**Footnote 2:** The ALJ raised the possibility of issuing a subpoena for the caseworker to

obtain her testimony, but the record gives no reason to believe that petitioners attempted to avail themselves of that opportunity.

# Record on Appeal

**Matter of Ahnna N.**, 229 AD3d 882 (3rd Dept., 2024)

Appeal from an order of the Family Court of Chemung County (Mary M. Tarantelli, J.), entered November 6, 2023, which, among other things, in a proceeding pursuant to Social Services Law § 384-b, denied respondent's motion to settle the record on appeal. Respondent Rosa M. (hereinafter the mother) and Michael N. (hereinafter the father) are the parents of the two subject children (born in 2012 and 2015). Petitioner commenced a permanent neglect proceeding against the mother and an abandonment proceeding against the father, seeking to terminate their parental rights. Following a combined fact-finding hearing, the subject children were adjudicated as permanently neglected by the mother and abandoned by the father. Upon petitioner's consent, Family Court issued both parents one-year suspended judgments and assigned Court Appointed Special Advocates (hereinafter CASA) to, among other things, report on the parents' compliance with court orders. Thereafter, petitioner and the attorney for the children moved to revoke the parents' suspended judgments and to terminate their parental rights. Following a subsequent fact-finding hearing, the court, finding that the parents had violated the terms of the suspended judgments, revoked the suspended judgments and terminated their parental rights.

In preparation for an appeal, the mother moved before Family Court to settle the record, including in her proposed record several CASA reports generated after the suspended judgment. Petitioner opposed, arguing that the reports should not be included in the record because they had not been offered into evidence at the fact-finding hearing and Family Court had not referenced the reports in its final decision.**[FN1]** The court, among other things, denied the mother's motion in a November 2023 order, and the mother appeals.**[FN2]**

We affirm. CPLR 5526 states that "[t]he record on appeal from a final judgment shall consist of the notice of appeal, the judgment-roll, the corrected transcript of the proceedings . . . , any relevant exhibits, . . . any other reviewable order, and any opinions in the case" (CPLR 5526; *see Matter of Christopher RR. v St. Lawrence*

*County Dept. of Social Servs.*, 113 AD3d 899, 899 [3d Dept 2014]). "The judgment-roll shall contain the summons, pleadings, admissions, each judgment and each order involving the merits or necessarily affecting the final judgment" (CPLR 5017 [b]). To that end, a document shall not be included in the record on appeal where it was not submitted to the court on any pretrial motion, offered as an exhibit at trial or where the court did not consider the document when making its decision (*see Xiaoling Shirley He v Xiaokang Xu*, 130 AD3d 1386, 1387-1388 [3d Dept 2015], *lv denied* 26 NY3d 904 [2015]; *Cramer v Englert*, 283 AD2d 871, 871 [3d Dept 2001]; *Balch v Balch*, 193 AD2d 1080, 1080 [4th Dept 1993]; *Matter of Yanoff v Commissioner of Educ. of State of N.Y.*, 64 AD2d 763, 763 [3d Dept 1978]). Significantly, "[t]he trial court is the final arbiter [*2]of the record and its settlement of the record should not be disturbed absent an abuse of discretion" (*Antokol & Coffin v Myers*, 86 AD3d 876, 878 [3d Dept 2011] [internal quotation marks and citation omitted]).

Here, there is no dispute that the CASA reports in question were not offered as evidence during the revocation hearing, which renders them beyond consideration by this Court on appeal (*see* CPLR 5017 [b]; *Matter of Wind Power Ethics Group [WPEG] v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d 1282, 1283 [4th Dept 2009]; *Shuler v Dupree*, 14 AD3d 548, 549 [2d Dept 2005], *lv dismissed* 5 NY3d 730 [2005]; *Matter of De Cotis v Malinoski*, 252 AD2d 646, 647 [3d Dept 1998]).**[FN3]** Moreover, there is no indication that Family Court relied upon those CASA reports or that such reports necessarily affected the court's final judgment (*see Matter of Wheeler v Wheeler*, 162 AD3d 1517, 1518 [4th Dept 2018]; *Matter of Cicardi v Cicardi*, 263 AD2d 686, 687 [3d Dept 1999]; *Balch v Balch*, 193 AD2d 1080, 1080 [4th Dept 1993]; *compare Matter of Andreija N. [Michael N.]*, 177 AD3d 1236, 1238 n 2 [3d Dept 2019]; *Taylor v Casolo*, 144 AD3d 1209, 1211 [3d Dept 2016], *lv dismissed* 30 NY3d 962 [2017]). Although the advocate who authored the CASA reports in question testified during the hearing, her testimony was limited to acknowledging the preparation of the reports and the efforts expended in that respect. To that end, the advocate did not testify directly about the content of the reports at any point during the court's examination and Family Court did not reference the CASA reports in its decision revoking the suspended judgments. Altogether, we find that the court did not abuse its discretion in denying the mother's motion to include the reports in the record on appeal (*see Matter of Nataylia C.B. [Christopher B.]*, 150 AD3d 1657, 1658 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]; *Antokol & Coffin v Myers*, 86 AD3d at 878; *see also Matter of Dyno v Village of Johnson City*, 255 AD2d 737, 737 [3d Dept 1998]). The mother's remaining contentions have been considered and found unavailing.

Clark, J.P., Aarons, Reynolds Fitzgerald and Powers, JJ., concur.

ORDERED that the order is affirmed, without costs.

**Footnotes**

**Footnote 1:** Petitioner also cross-moved to include a transcript in the record. The mother does not raise any contention pertaining to that part of Family Court's order granting such relief, rendering any argument on that point abandoned.

**Footnote 2:** The attorney for the children supports the mother's position.

**Footnote 3:** Several CASA reports were introduced as evidence at the revocation hearing. However, those reports are separate from the ones the mother now seeks to include in the record on appeal.

# MISCELLANEOUS TRIAL LEVEL CASES

## 1017 HEARINGS

**Matter of C.F. (K.S.)**, 84 Misc3d 1248(A) (Family Court, New York County, 2024)

Yael Wilkofsky, J.

On or about November 29, 2024, the petitioner, Administration for Children's Services ("ACS"), filed Family Court Act ("FCA") Article 10 neglect petitions on behalf of the subject children C.F. and M.L. against the respondent mother K.S. ("respondent mother" or "K.S."). The petitions allege that the respondent mother fails to provide the subject children with proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment, on the subject child C.F. Specifically, the petitions allege that the respondent mother hit C.F. with a belt, which resulted in a bruise on C.F.'s shoulder, that C.F. was scared to go home to his mother, that the maternal grandmother heard C.F. yelling and screaming, saw the respondent mother hit C.F. with a belt, and that when the maternal grandmother tried to stop the respondent mother from hitting C.F. with the belt, the respondent mother told the maternal grandmother to "mind her fucking [*2]business." The petitions also allege that based on such actions, the child M.L. is derivatively neglected.

At intake on the neglect petitions, the petitioner made an application for the remand of the subject children pursuant to FCA § 1027 based on the allegations in the petition. The respondent mother opposed the remand and requested a hearing. The Court

commenced the FCA § 1027 hearing at intake, temporarily removed the subject children from the respondent mother and directly placed them with the maternal grandmother during the pendency of the hearing. The Court also issued a full stay away temporary order of protection against the respondent mother on behalf of the subject children with a carve out for agency supervised in-person visitation and virtual visitation supervised by the maternal grandmother.

Pursuant to FCA § 1027, after a hearing, the court may remove a subject child from the care of the respondent parent only if the petitioner can establish, by a preponderance of the evidence, that release of the subject child to the respondent parent's care presents an imminent risk to the child's life or health. As part of its assessment, "a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" (*see Nicholson v Scoppetta*, 3 NY3d 357, 378 [2004]). "It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Id.*).

After a full hearing, the court denies the petitioner's application pursuant to FCA § 1027 as petitioner has not established, by a preponderance of the evidence, that releasing the subject children to the respondent mother presents an imminent risk to the subject children's life or health that could not be mitigated with the issuance of certain court orders. In making its determination, the Court relies on the following documentary evidence offered at the hearing: photographs of the subject child C.F. showing bruises on his shoulder; an Oral Transmittal Report ("ORT") dated November 20, 2024, which established that a report was called in to the State Central Register ("SCR") on November 20, 2024 by a mandated reporter, alleging that the subject child was hit by the respondent mother and that he was scared to go home; a prior order of the Family Court, Bronx County, dated September 15, 2023, under docket numbers NN-xxxxx-23 and NN-xxxxx-23, releasing the subject children to the respondent mother, who was a non-respondent in that case, under ACS supervision; a prior order of fact-finding and disposition issued by the Family Court, Bronx County, dated February 14, 2024, under the same docket numbers, which entered a finding of neglect against B.L., the respondent in that matter, because he perpetrated acts of domestic violence against the respondent mother in the presence of the subject children and caused injury to C.F., and, inter alia, released the subject children to the custody of the respondent mother under six months of supervision, until August 14, 2024; and a Certificate of Completion from the National Alliance on Mental Illness ("NAMI"), stating that "[K.S.] has completed the NAMI Basics OnDemand Education Program — 15 hours." Additionally, the Court relies on the testimony of an ACS Child Protective Specialist ("CPS"), the respondent mother and a Legal Aid Society Social Worker ("SW").

CPS credibly testified as follows. The case was called in to the SCR on November 20, 2024 by C.F.'s school guidance counselor. As part of his child protective investigation, CPS first spoke to C.F.'s school guidance counselor, who reported that C.F.'s teacher said he was sleeping in class and when she asked if he was okay, C.F. said his shoulder hurt because the respondent mother hit him with a belt. C.F.'s school guidance counselor also reported that he spoke to C.F., who also told him that the respondent mother hit him with a belt and that he was scared to go [*3]home. C.F. was interviewed at the Child Advocacy Center and the interview was recorded. During the interview, C.F. stated that he got the bruise on his shoulder after he fell off his bunk bed. He also stated to the interviewer that he had something else to say but not while being recorded. Thereafter, C.F. was interviewed a second time and that interview was not recorded. At the second interview, C.F. stated that the respondent mother hit him with a belt and other objects, including a hanger, and that the maternal grandmother told him to lie about what happened. C.F. further stated that he wanted to be home with his mother and that he was not afraid of her. CPS also spoke with the maternal grandmother about C.F.'s injury. The maternal grandmother initially stated that C.F. fell off the bed and hit his shoulder. However, the maternal grandmother then told CPS that she heard C.F. yelling and screaming, that she went to his room and tried to intervene to stop the respondent mother from hitting C.F., and that the respondent mother told the maternal grandmother to "mind her fucking business." CPS also spoke with the respondent mother, who reported that the school had called her because C.F. was falling asleep in class. She stated that she initially attempted to discipline C.F. for that behavior by taking away his electronic devices because she believed the electronic devices were playing a role in C.F. falling asleep in class. However, she admitted that she did hit C.F. with a belt, that she felt sorry for doing it, that it was the first time she had ever used a belt to discipline C.F. and that it would be the last time she would ever do so. The respondent mother also told CPS that she was willing to engage in services.

The respondent mother also credibly testified as follows. Prior to the filing of this case, she lived with the subject children and her mother, the maternal grandmother, and that since this case was filed, she has been staying at hotels and the homes of different family members and friends. C.F. has behavioral issues, both at home and at school, and with the help of her counsel, the respondent mother enrolled in, and completed, a 15-hour parenting course with NAMI. The parenting course is a program for parents who provide care for children who are experiencing mental health symptoms. The program helped respondent mother learn how to treat C.F. based on his own mental health issues and provides resources for both the respondent mother and C.F. The respondent mother learned a lot in the program about mental illness, medication and therapy, how to speak to a child with a mental illness, that it is okay for her to express herself with C.F. even if he is having a hard time and that instead of discipline, the

respondent mother could use a reward-based system with C.F. where he feels like he is earning the things that he wants. The respondent mother stated that she is willing to engage in individual therapy to heal from the traumas she experienced in her own life and wants to enroll in family therapy for herself and C.F. ACS was involved with the family most recently as the summer of 2024 after a neglect case was filed against M.L.'s father based on allegations that he perpetrated acts of domestic violence against the respondent mother in the presence of the children. During the pendency of that case, ACS frequently visited the respondent mother's home to check on the subject children and never saw any marks or bruises on the subject children or had any concerns about the respondent mother's care of the subject children.

At the hearing, when asked whether she hit C.F. with a belt as a form of discipline, the respondent mother invoked her right against self-incrimination pursuant to the Fifth Amendment of the United States Constitution. However, the respondent mother credibly testified about how she would discipline C.F. in the future. She testified that she would not use corporal punishment, as she knows that it is wrong and illegal, that using corporal punishment is not fair to the child because "it does not solve anything," that using corporal punishment makes an existing problem [*4]worse and that "it is not the right way to go about things." She testified that instead, she would continue to discipline C.F. by taking away his electronics, including video games and his cell phone, by limiting sweets and providing C.F. with healthier snacks so that he has to earn the things he wants, and most importantly, she would speak with C.F. and explain that she is there to help him. She testified that she has learned from her parenting course that going forward, she must discipline C.F. in a way that keeps his feelings as the main focus so that C.F. knows she is trying her best. The respondent mother also testified that if she needs help or is feeling overwhelmed, she has resources and a support system she could reach out to, which includes the maternal grandmother, the subject children's maternal grandfather, C.F.'s father and the respondent mother's godmother. The respondent mother credibly testified that she would abide by court orders, including a limited temporary order of protection requiring her to refrain from using corporal punishment on the subject children, as well as ACS supervision. The respondent mother stressed the importance of being able to show the Court that she is a good mother and is willing to do whatever it takes to do that, including continuing in services to work on her own trauma and to learn other disciplinary strategies so that she can be a better mother. Finally, when asked whether she would have done anything differently during the alleged incident, the respondent mother testified that she would change ever making C.F. feel unsafe or that he did not want to come home, that she feels both remorse and regret, and that she does not want to make him feel that way ever again.

The subject children's maternal grandmother also testified at the hearing, although she was not entirely credible. She testified that the respondent mother generally disciplines

C.F. by taking away his electronics and that she never saw her discipline him with a belt. She also testified that she was unaware of the bruise on C.F.'s shoulder, that she only became aware of it when ACS became involved and that she had no idea how it happened. She testified that she never told C.F. to lie about the incident but rather asked him whether he got the bruise by falling off his bed. She also testified that she would enforce a temporary order of protection issued against the respondent mother on behalf of C.F. to protect C.F.'s safety and comply with court orders. However, she gave conflicting testimony which undermined her credibility. Indeed, at one point during the hearing, she testified that she was never informed about the allegations against the respondent mother or why she was asked to come to C.F.'s school to wait for ACS but at a later point in the hearing, she testified that she *was* informed of the allegations against the respondent mother, specifically, that ACS believed the respondent mother had hit C.F. with a belt which caused the bruise on his shoulder.

The Legal Aid Social Worker credibly testified at the hearing as follows. The Legal Aid Social Worker spoke with C.F.'s school guidance counselor and asked how C.F. has been doing in school since his separation from the respondent mother. C.F.'s school guidance counselor told the Legal Aid Social Worker that C.F. is doing okay but misses the respondent mother and wants to be reunited with her. C.F.'s school social guidance counselor further told the Legal Aid Social Worker that in his opinion, it would be good for C.F. to be reunited with the respondent mother if preventive services were in place and that C.F. would benefit from therapy to allow him to release his feelings and explore more effective ways of coping with life's frustrations.

As required by the Court of Appeals in *Nicholson*, this Court has balanced the risk of harm from removal of the subject children from their mother against any risk of harm if they are returned. In considering such a balance, this Court finds that the harm of removal of the subject children from the respondent mother outweighs the risk of harm to the subject children if they [*5]were to be returned to the respondent mother's care. Although the respondent mother declined to testify about whether she did indeed hit C.F. with a belt as the petition alleges, the testimony at the hearing, as well as the documentary evidence, established that any risk that exists in returning the subject children to the respondent mother could be mitigated with court orders in place. Indeed, the evidence established that the respondent mother loves her children and adequately provides for their needs, that she has insight into what kinds of discipline are appropriate and inappropriate and that she wants to learn how to more appropriately cope with frustration she might feel when interacting with C.F. The evidence also established that the respondent mother is a survivor of domestic violence, which was perpetrated against her in the presence of the subject children, and she testified that she wants to engage in services to address her own trauma and how that affects her interactions with her children. The evidence established that the respondent mother

would engage in preventive services as she has already engaged in a parenting course, which has provided her with knowledge and guidance on how to interact with C.F. going forward. The evidence further established that the respondent mother would abide by court orders requiring her to refrain from using any corporal punishment on the subject children. Indeed, the respondent mother has been fully compliant with the full stay away temporary order of protection issued against her since the case was filed on November 29, 2024. Finally, the Court notes that the release of the subject children to the respondent mother was strongly supported by the attorney for the children, precisely because the harm of removal of the subject children from their mother's care outweighs the harm of any risk to the subject children if they were released to their mother's care and that there are orders that can be put in place to mitigate any such risk.

Therefore, it is hereby

ORDERED that the subject children are released to the respondent mother under the following conditions and orders:

• The respondent mother is not to use corporal punishment of any kind on the subject children;

• The respondent mother is to abide by a usual terms limited order of protection on behalf of the subject children;

• The respondent mother is to comply with preventive services;

• The respondent mother is to comply with ACS supervision, including announced and unannounced visits;

• The respondent mother is to sign all HIPAAs for herself and the subject children;

• The respondent mother is to comply with all reasonable referrals for herself and the subject children, on notice to counsel;

• The respondent mother is to make the subject children available for interviews and meetings with their attorney; and

• ACS is to make a minimum of one visit to the case address per week.

This constitutes the decision and order of the court.

**1028 HEARING**

**Matter of M.A.**, 84 Misc3d 1215(A) (Family Court, New York County, 2024)

Yael Wilkofsky, J.

The respondent mother R.A.'s application, pursuant to Family Court Act (FCA) § 1028, for the release of the subject child M.A. to her care and custody is granted as the court finds that the subject child would not be at imminent risk to her life or health if returned to R.A. with certain court orders in place. This determination is based on the testimony of witnesses and evidence presented at the hearing, including R.A.'s own testimony.

On January 23, 2024, the petitioner, the Administration for Children's Services ("ACS"), brought a neglect petition against R.A. The petition alleges that R.A. fails to provide the subject child (M.A.) with proper supervision and guardianship in that she suffers from a mental illness which impairs her ability to care for M.A. Specifically, the petition alleges that on January 14, 2024, a bystander witnessed R.A. out in the cold with the subject child, who was not properly dressed for the weather, and called the police. The petition further alleges that R.A. and the subject child were transported to the hospital where R.A. reported that there were cameras in her room and microwave and that "they" are hacking into her phone. The petition alleges that R.A. [*2]was thereafter admitted to the hospital's psychiatric ward on January 17, 2024, having been diagnosed with non-specified psychosis, with no estimated discharge date, and leaving no one to care for the subject child.

At the initial intake appearance on January 23, 2024, the subject child was remanded to the care and custody of the Commissioner of ACS. At the next court appearance on February 21, 2024, the Court was made aware that R.A. had been released from the hospital on February 20, 2024. On June 17, 2024, R.A. requested a hearing pursuant to FCA § 1028. Based on the allegations in this case, the Court ordered an imminent risk assessment of R.A. to be conducted by Family Court Mental Health Services ("MHS") pursuant to FCA § 251, to occur while the 1028 hearing was ongoing. After the clinicians met with R.A., observed a visit between R.A. and the subject child and spoke with R.A.'s therapist, MHS prepared a report for the Court.

Pursuant to FCA § 1028, after a hearing, the court shall release a subject child to the care of the moving respondent parent unless the petitioner can establish, by a preponderance of the evidence, that returning the subject child to the respondent parent's care presents an imminent risk to the child's life or health. As part of its assessment, "a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" (*see Nicholson v Scoppetta*, 3 NY3d 357, 378 [2004]). "It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Id.*).

After a full hearing, the court grants R.A.'s application pursuant to FCA § 1028 as ACS has not established, by a preponderance of the evidence, that releasing the subject child to R.A. presents an imminent risk to the subject child's life or health that could not be mitigated with the issuance of certain court orders. At the hearing, the ACS Child Protective Specialist ("CPS") credibly testified about the concerns that led to ACS filing the neglect petition against R.A. These concerns stem from the incident alleged in the petition, that R.A. and the subject child were observed outside in January, dressed inappropriately for the cold weather. R.A. and the subject child were subsequently transported to the hospital, where R.A. exhibited bizarre behaviors and spoke incoherently. R.A. was then psychiatrically evaluated and hospitalized for approximately one month, while the subject child was placed in the care of the Commissioner of ACS. CPS testified in detail about conversations with hospital staff, including a social worker, who informed her that R.A. was diagnosed with non-specified psychosis and prescribed medication to treat her symptoms.

The Graham Windham case planner credibly testified about the mental health treatment R.A. has been receiving upon release from her psychiatric hospitalization. The case planner testified that R.A.'s service plan is focused on R.A.'s mental health, and includes psychiatric evaluations, therapy and medication management. The case planner testified that R.A. has enrolled in outpatient treatment at Samaritan Village, where she received a diagnosis of adjustment disorder. At Samaritan Village, R.A. attends weekly therapy. The case planner further testified that following R.A.'s intake assessment at Samaritan Village, continued medication was not recommended. Most notably, the case planner testified that the only current barrier to reunification of R.A. and the subject child was R.A.'s lack of steady housing, not her mental health.

The respondent mother R.A. also credibly testified at the hearing. The Court credits R.A.'s testimony and insight into the situation that led to the filing of the neglect petition, as well as her demonstrated commitment to treating and better understanding her own mental health. [*3]During her testimony, R.A. appeared coherent, focused, eloquent and thoughtful. She candidly shared with the Court that at the time of the underlying incident in January 2024, she was going through what she now recognizes as a mental health crisis. At the time of the January 2024 incident, she had limited family support, no support from the subject child's father, had very recently given birth, and had also recently entered the shelter system. R.A. acknowledged that she felt alone and did not fully understand the customs and various systems of her community. R.A. acknowledged her psychiatric hospitalization and stated that she was prescribed Lithium while hospitalized. She further testified that upon being evaluated at Samaritan Village as part of her intake assessment for outpatient services following her hospital discharge, her psychiatrist did not recommend that she continue the medication. R.A. credits her weekly therapy sessions at Samaritan Village with helping her to better

understand her mental health and how to manage her stress, noting that she has learned to recognize the signs that her mental health is deteriorating. R.A. shared that she now understands how to address these concerns, unlike in the past when she did not fully understand what she was going through or how to deal with it, and has worked to develop coping mechanisms. She testified that she now has a network of support, including family members, her therapist and a psychiatrist, that she did not have before and that she no longer feels so alone. R.A.'s testimony demonstrated profound insight into her mental health issues and that, with assistance, she is equipped to cope with mental health challenges in the future.

Finally, the Court is in receipt of the clinical report provided by MHS. The MHS report highlights R.A.'s gained insight in detail and speaks to the progress she has made since the filing of this case. In particular, the MHS report notes the many risk factors that came together at the time of the January 2024 incident that likely contributed to R.A.'s mental state at that time. The clinicians opine in the report that due to R.A.'s lack of history of mental health symptoms and the outside factors present in her life at the time, the January 2024 incident was likely an isolated one. The MHS report also includes collateral input from R.A.'s therapist, who describes R.A.'s regular therapy attendance as "amazing" and noted that R.A. has been able to apply strategies learned through therapy during visitation with the subject child. She also confirmed that R.A. is re-evaluated monthly by a psychiatrist at Samaritan Village, in case her need for medication changes. The therapist also reported that R.A. is "a self-advocate who is reaching out to secure the support she needs to ensure the subject child's safety and care." In addition to interviews with R.A. and collateral contacts, MHS observed a visit between R.A. and the subject child. As noted in the report, throughout the visit, R.A. and the subject child's bond and attachment was apparent and R.A.'s behavior toward the subject child was appropriate, safe and loving. Finally, the MHS report notes that R.A. has complied with all services and orders of the court and finds that it is highly likely that she will continue to do so in the future.

As required by the Court of Appeals in *Nicholson*, this Court has balanced the risk of harm from removal of the subject child from her mother against any risk of harm if she is returned. In considering such a balance, this Court finds that the harm of removal of the subject child, a nine-month-old baby, from R.A. outweighs the risk of harm to the subject child if she were to be returned to R.A.'s care. The MHS report addresses this balance directly and offers the opinion that, "given R.A.'s demonstrated commitment to complying with the programs and services to ensure the return of her daughter [and] her present engagement in mental health services, the risks are low at this time. This is especially notable given the high risks to the subject child's ability to attach and bond with her mother should she remain for an extended [*4]period of time outside of her mother's care." The MHS report further states that R.A.'s proactive approach toward

addressing her mental health symptoms has lowered the risk posed to the subject child. Further, because of the dedication and hard work she has put into prioritizing her mental health, R.A. is now equipped with her own newly-gained understanding, and recognition, of her mental health symptoms. Finally, the Court notes that throughout the case, the visits between R.A. and the subject child have been consistent, and have gone very well, without any safety concerns. Additionally, during the pendency of the hearing, the Court permitted R.A. to have one overnight visit a week with the subject child at a hotel nearby to the foster home, in case any issues arose. The weekly overnight visits occurred without any incident and when R.A. requested an expansion to consecutive overnight visits each week, neither ACS nor the attorney for the child opposed the application. It is the Court's view that a release of the subject child conditioned on R.A.'s continued compliance with her mental health services as well as cooperation with ACS supervision would mitigate any risk to the subject child.

It is hereby ORDERED that the subject child is released to the respondent mother R.A. under the following conditions:

• The respondent mother is to continue her engagement in mental health services, including weekly therapy and monthly psychiatric assessments, and follow all recommendations therefrom, including medication management if clinically indicated;

• The respondent mother is to comply with preventive services;

• The respondent mother is to comply with ACS supervision, including announced and unannounced visits;

• The respondent mother is to sign all HIPAAs;

• The respondent mother is to comply with all reasonable referrals, on notice to counsel;

• ACS is to expeditiously clear resources for child care for the respondent mother;

• ACS is to offer the respondent mother a child care voucher;

• ACS is to make a referral for the respondent mother to the GABI program and follow through with that referral;

• ACS is to accompany the respondent mother to PATH in Manhattan on September 5, 2024 and advocate for a placement for her in specific boroughs;

• ACS is to explore the respondent mother's eligibility for a foster care discharge grant and if ineligible, help the respondent mother to secure the follow supplies: pack and play, bedspread, highchair, car seat, educational toys, baby food, diapers, wipes and seasonally appropriate clothing, specifically, a winter jumpsuit.

This constitutes the decision and order of the court.

## ARTICLE 10- VISITATION

**Matter of A.F.G.**, Misc3d 2024 NY Slip Op 51722(U) (Family Court, New York County, 2024)

Yael Wilkofsky, J.

On or about December 29, 2023, the petitioner the Administration for Children's Services (hereinafter referred to as "ACS") filed Family Court Act ("FCA") Article 10 abuse petitions on behalf of the subject children A.F.G. and L.V. (hereinafter referred to as the "subject children" or "A.F.G." and "L.V.") against the respondent mother S.A. (hereinafter referred to as the "respondent mother" or "S.A.") and the respondent father/person legally responsible D.V. (hereinafter referred to as the "respondent father" or "D.V."). The respondent mother now moves [*2]for an Order permitting her unsupervised visitation with the subject children. The respondent father separately moves for an Order permitting him unsupervised visitation with L.V. For the reasons set forth below, the respondent mother's motion is granted in part and denied in part and the respondent father's motion is denied.

The abuse petitions in this case allege as follows. D.V. is the father of L.V. and a person legally responsible for A.F.G. On or about December 10, 2023 and December 11, 2023, the respondents were the only adults providing care for L.V., who was four months old at that time. On or about December 11, 2023, L.V. arrived at the hospital vomiting blood. Thereafter, L.V. was discharged to the care of the respondents. On or about December 20, 2023, L.V. returned to the hospital with multiple injuries, including fractures to her sixth, seventh, eighth and ninth posterior left side ribs, a subdural hematoma acute and subacute on each side of her brain and an abrasion on the back of her mouth. L.V. was diagnosed with abusive head trauma most likely from being shaken. According to the hospital records, L.V.'s doctor opined that three of the four fractures were displaced and could not have been caused by burping, by regular handling of the subject child or by non-accidental means, that the rib fractures are signs of physical abuse and can be dated to December 10, 2023 or December 11, 2023, that the lesion found in the back of L.V.'s mouth near her tonsils was caused by non-accidental means and could not have been caused by L.V. putting her finger in her mouth as the injury was further back than L.V. could reach, and that L.V.'s subdural hematomas could only be caused by someone shaking L.V. Additionally, according to

L.V.'s doctor, the various explanations given by the respondents as to how L.V. might have sustained her injuries were not consistent with the medical findings and the respondents were not able to provide any plausible explanation for how L.V. sustained her injuries. The abuse petitions also allege that based on the alleged abuse of L.V., A.F.G., who was eleven years old at the time of the filing of the petition, is derivatively abused.

At intake on the abuse petitions, the Court granted ACS's application for a remand of the subject children pursuant to FCA § 1027 and they were placed in the kinship foster home of their maternal grandmother. The Court permitted the respondent mother to have visitation with A.F.G. supervised by the maternal grandmother and permitted both respondents to have visitation with L.V. supervised by the foster care agency only. At the next court appearances, upon applications made by the respondents, the Court permitted the respondents to have visitation with L.V. supervised by the maternal grandmother instead of the petitioner. The respondent mother now moves for an Order permitting her unsupervised visitation with both subject children. The respondent father separately moves for an Order permitting him unsupervised visitation with L.V.

Pursuant to FCA § 1030(c),

"A respondent shall be granted reasonable and regularly scheduled visitation unless the court finds that the child's life or health would be endangered thereby, but the court may order visitation under the supervision of an employee of a local social services department upon a finding that such supervised visitation is in the best interest of the child."

"[T]he presumption that parental visitation is in the best interests of a child [may be] overcome by . . . evidence showing that visitation with respondent would not be in [the child's] best interests." *In re Giovanni H.B.*, 172 AD3d 489 (1st Dept 2019). Generally, in cases where serious allegations of abuse are made against a respondent, the Court must hold a full fact-[*3]finding hearing prior to ordering unsupervised visitation. *See Matter of Daniel O. (Jaquan O.)*, 141 AD3d 434, 435 (1st Dept 2016) ("Given the serious allegations of abuse committed against the eldest child, it was an improvident exercise of discretion for Family Court, without the benefit of a full fact-finding hearing, to order unsupervised visitation.") This is particularly true where, despite engaging in services, the respondent parent continues to refuse to admit to any wrongdoing and fails to offer a plausible explanation for injuries sustained by the child while in the respondent's care, which establishes a continued risk to the child. *See Matter of Abass D. (Mamadou D.)*, 166 AD3d 517, 517 (1st Dept 2018) (holding that the Family Court abused its discretion in ordering unsupervised visitation because "although [the parents] ostensibly had participated in various services and counseling, the parents continued to

offer implausible explanations for the children's medical condition" which "compels the conclusion that the parents will not acknowledge their role in the children's [condition] . . . and thus that they continue to pose a risk to the children.")

As an initial matter, the portion of the respondent mother's motion for an Order permitting her unsupervised visitation with L.V., and the respondent father's motion also seeking unsupervised visitation with L.V. are denied as the Court finds that it would not be in L.V.'s best interests to have unsupervised visitation with the respondents. In this case, serious allegations of abuse have been made against the respondents regarding their treatment of L.V. when she was an infant in their exclusive care and a fact-finding hearing has not yet been held. Although the respondents are engaged in services and counseling, it is not clear whether their services are addressing the allegations in the petitions. Moreover, since the filing of the petitions, the respondents have failed to offer any plausible explanation for how L.V.'s injuries could have occurred and they have not acknowledged any role they might have played in L.V.'s injuries. Therefore, based on the allegations in the petitions that L.V.'s injuries could not have been caused by accidental means, that L.V.'s injuries occurred while she was in the exclusive care of the respondents, and the respondents' continued failure to acknowledge any wrongdoing or provide a plausible explanation for L.V.'s injuries, the Court finds that the respondents continue to pose a risk to L.V. such that unsupervised visitation is not in LV.'s best interests.

However, the portion of the respondent mother's motion for an Order permitting her unsupervised visitation with A.F.G. is granted as the Court finds that unsupervised visitation with the respondent mother would not place A.F.G.'s life or health in danger and would be in his best interests. Initially, A.F.G. is differently situated than his much younger sister as he is currently 12 years old and, unlike his sister, A.F.G. has the ability to communicate with his grandmother, petitioner's case workers and his attorney about visits with the respondent mother and any specific safety concerns he might have. Further, A.F.G. has been having resource supervised visitation with the respondent mother for almost one year and there have been no concerning incidents or any safety issues reported. Moreover, A.F.G.'s attorney strongly supports the respondent mother's request for unsupervised visitation with A.F.G. and affirms that A.F.G. loves spending time with the respondent mother, that he very much wants to have unsupervised visitation with her and that A.F.G. has never expressed any safety concern about visiting with the respondent mother or about the respondent mother's behavior toward him when he was in her care. However, the initial three unsupervised visits between the respondent mother and A.F.G. are to be sandwich visits, with the beginning and end of each visit supervised by the maternal grandmother, to ensure that there are no safety concerns at the visits.

Based on the foregoing, the respondent mother's motion for unsupervised visitation with [*4]the subject children is granted only to the extent that she is permitted to have unsupervised visitation with A.F.G. but is otherwise denied, and the respondent father's motion for unsupervised visitation with L.V. is denied. This constitutes the decision and order of the Court.

## AUTHORITY OF AFC TO FILE ARTICLE 10 PETITION

## CASEWORKER LIABILITY

**N.C. v Westchester County Child Protective Servs.**, 84 Misc3d 1236(A) (Supreme Court, Westchester County, 2024)

Damaris E. Torrent, J.

The following papers numbered 1 to 43 were read on the motion by defendant Yonkers Board of Education [FN1] (the City) (Seq. No. 3) for an order dismissing the complaint pursuant to CPLR 3211(a)(7) and granting summary judgment dismissing the complaint against it; and the motion by defendants Westchester County Child Protective Services, Westchester County Department of Social Services and Naydeen Wilkins (collectively, the County) (Seq. No. 4) for an order dismissing the complaint and cross-claim against them pursuant to CPLR 3211(a)(7) and granting summary judgment dismissing the complaint and cross-claim:

PAPERS NUMBERED

(Seq. No. 4) Notice of Motion / Affirmation (Redmond) / Exhibits A — D1 — 6
Affirmation in Opposition (Kuczinski) / Memorandum of Law 7 — 8
Reply Affirmation (Redmond) 9
(Seq. No. 4) Notice of Motion / Affirmation (Mountain) / Exhibits A — BB
Memorandum of Law 10 — 40
Affirmation in Opposition (Kuczinski) / Memorandum of Law 41
Reply Affirmation (Mountain) / Memorandum of Law 42 — 43

Upon the foregoing papers, the City's motion (Seq. No. 3) is denied, and the County's motion (Seq. No. 4) is granted.

This action arises out of the alleged failure to protect the infant plaintiffs from abuse and neglect at the hands of their mother and her former husband, now deceased. Plaintiffs allege that the City, despite numerous warning signs and despite its raising concerns regarding the children to their father, W.C., knowingly and wilfully failed to report suspected abuse and neglect as required by Social Services Law § 413. Plaintiffs further allege that the County, having received multiple reports of suspected abuse and neglect of the infant plaintiffs from their father and their maternal grandmother, failed to properly investigate those reports, allowing the infant plaintiffs to suffer continuing harm.

By Notice of Motion filed on June 24, 2024, the City seeks an order granting summary judgment dismissing the complaint against it. By Notice of Motion also filed on June 24, 2024, the County seeks an order granting summary judgment dismissing the complaint and the City's cross-claim for contribution. Plaintiffs oppose both motions. The City does not oppose the branch of the County's motion seeking summary judgment dismissing the cross-claim.

The Court has fully considered the submissions of the parties.

The court's function on these motions for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material [*2]issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). As stated in *Scott v Long Island Power Auth*. (294 AD2d 348, 348 [2d Dept. 2002]):

"It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North*

*Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366)."

Seq. No. 3: Yonkers Board of Education

The City failed to make a prima facie showing of its entitlement to judgment as a matter of law dismissing the complaint against it. The City's motion relies on the testimony of two teachers who were familiar with the infant plaintiffs, who both testified, in sum and substance, that the infant plaintiffs did not have attendance issues, that they came to school appropriately dressed and displaying appropriate hygiene, that there were no changes observed during the relevant times, and that they do not recall W.C. ever raising any concerns with them.

However, annexed to the moving papers as Exhibit A is the transcript of W.C.'s 50-h hearing in connection with the claims against the County.[FN2] W.C. testified that he received phone calls from the infant plaintiffs' school indicating that the children were always tired and hungry (Exh. A at 30), and that he had at least three meetings with school personnel which the school initiated, at which school personnel expressed concerns relating to the children's academics and their appearing to be tired and hungry (*id.* at 35, 51-55). In addition, W.C. testified at his deposition that he was informed by school personnel that cafeteria staff were preparing food for one of the children "on the side" (NYSCEF Doc. No. 105 at 131), and that at another meeting, school personnel gave him a bag of clothes and told him that for the past couple of weeks the children had been coming to school not dressed property (*id*. at 93) and indicated to him that the bag contained clothing from the children's teachers (*id.* at 140).

Viewing the evidence in the light most favorable to the non-moving party, the differing testimony of W.C. and the two teachers who testified on behalf of the City present a credibility issue which precludes summary judgment. The conflicting testimony presents triable issues of fact as to whether school personnel had "reasonable cause to suspect" that the infant plaintiffs were "abused or maltreated" children (*Rine v Chase*, 309 AD2d 796, 797 [2d Dept 2003]) and [*3]whether their failure to report suspected abuse or maltreatment was knowing and willful as required to give rise to liability pursuant to Social Services Law § 420(2). Furthermore, the City's assertion that any report from the City would not have changed the outcome for the infant plaintiffs, and thus that the failure to report was not the proximate cause of their injuries, is purely speculative.

The branch of the City's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is likewise denied, as the complaint sufficiently pleads that the City was on notice of the

infant plaintiffs' living situation, which the City was mandated to report, and that it failed to do so.

Seq. No. 4: Child Protective Services, Department of Social Services, and Naydeen Wilkins

The County in its moving papers demonstrated its entitlement to dismissal of the complaint and cross-claim for failure to state a cause of action pursuant to CPLR 3211(a)(7) and to judgment as a matter of law dismissing the complaint and the cross-claim. As plaintiffs' opposition sets forth no basis upon which the Court can deny the motion, and the City does not oppose the branch of the motion seeking dismissal of the cross-claim, the motion is granted.

New York does not recognize a private right of action for money damages for an alleged negligent investigation of a complaint made to Child Protective Services (*Mark G. v Sabol*, 93 NY2d 710 [1999]). The plaintiffs in *Mark G.* asserted that a private right of action for money damages for the defendants' alleged violations of Social Services Law § 424 was implied in section 419, which granted immunity from civil or criminal liability to "any person, official, or institution participating in good faith in the providing of a service pursuant to section [424 of the Social Services Law], the making of a report, the taking of photographs, or the removal or keeping of a child pursuant to this title" (*id*. at 721-722).

The Court of Appeals, in evaluating the plaintiffs' claim of an implied private right of action, noted that section 419 "was intended to provide immunity only with respect to civil or criminal liability that would *otherwise result* from acts taken by persons, officials or institutions in a good faith effort to comply with specific provisions of the Social Services Law. There is no indication that section 419 was intended to apply to failures to provide the services required by the Social Services Law" (*id.* at 722 [emphasis in original]). As the Court further noted, "Indeed, the Legislature specifically created a private right of action in the very next section" (*id.*, *citing* Social Services Law § 420 [imposing criminal and civil liability for willful failure of persons, officials or institutions to report suspected abuse or maltreatment as required]). The Court thus held that "a private right of action for money damages cannot be fairly implied from title 6 of the Social Services Law" (*id.*, *citing Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]).

Plaintiffs' opposition asserts that errors in logic led to the Court's holding in *Mark G.* Plaintiffs, citing *Sheehy*, contend that application of the Court of Appeals' three-part test for determining whether a private right of action exists weighs in their favor in this matter, as (1) the plaintiffs are members of the class for whose benefit the statute was

enacted, (2) recognition of a private right of action would promote the legislative purpose, and (3) creation of such a right would be consistent with the legislative scheme. The Court of Appeals, presented with this same argument in *Mark G.*, determined that the first two factors were satisfied, but held that recognition of a private right of action would not be consistent with the legislative scheme. Plaintiffs' opposition thus, in essence, asks this Court to determine that recognition of a private right of action for money damages for an alleged negligent investigation of reported abuse and maltreatment would be consistent with the legislative scheme of title 6.

Plaintiffs assert that "the legislative scheme of § 419 and its references to a civil cause of action for services in § 424 would be superfluous if no private cause of action whatsoever was permitted for these" (Opp. Mem. at 13). However, a brief review of cases evaluating the application of the immunity provision in section 419 reveals the sorts of acts which, in the absence of such immunity, may result in civil liability [*see e.g. Biondo v Ossining Union Free School Dist.*, 66 AD3d 725 [negligence and defamation claims against school district for reporting of suspected abuse]; *Goldberg v Edson*, 41 AD3d 429 [medical malpractice claim against physician participating in investigation of abuse]; *Goldberg v Edson*, 41 AD3d 428 [reporting of abuse and removal of subject child by social services worker]; *Zornberg v North Shore Univ. Hosp.*, 29 AD3d 986 [defamation claim against hospital for filing false report of abuse]; *Hachmann v County of Nassau*, 29 AD3d 952 [defamation claim against school district for filing false report of abuse]; *Rine*, 309 AD2d 796 [defamation and malicious prosecution claims against social worker reporting abuse]; *Straton v Orange County Dept. of Social Servs.*, 217 AD2d 576 [medical malpractice and false imprisonment claims against hospital treating patient in custody of Department of Social Services]).

Plaintiffs' assertion that the failure to recognize a cause of action for negligent investigation under section 424 renders the immunity provision in section 419 superfluous thus is not persuasive. Similarly unpersuasive is plaintiffs' contention that recognizing such a cause of action would be consistent with the legislative scheme. As noted in *Mark G.*, the Legislature saw fit to specifically create a private right of action for a mandated reporter's willful failure to report suspected abuse or maltreatment in section 420, and if it "had intended for liability to attach for failures to comply with other provisions of title 6, it would likely have arranged for it as well" (93 NY2d at 722). Indeed, the contention that a private right of action is implied by section 419 was recently raised and rejected in *Estate of M.D. v State of New York*, when the Second Department noted that "subsequent statutory modifications to the provisions of article 6, title 6 of the Social Services Law have not abrogated the holding that 'a private right of action cannot be fairly implied from title 6 of the Social Services Law'" (199 AD3d 754, 757 [2d Dept 2021]; *quoting Mark G.*, 93 NY2d at 722).

In short, this Court is bound by the holding of the Court of Appeals in *Mark G.*, which plainly requires dismissal of all claims asserted against the County in this matter.

Accordingly, it is hereby

ORDERED that the motion of defendant Yonkers Board of Education (Seq. No. 3) is denied; and it is further

ORDERED that the motion of defendants Westchester County Child Protective Services, Westchester County Department of Social Services and Naydeen Wilkins is granted, and the said defendants shall have judgment dismissing the complaint against them; and it is further

ORDERED that, within ten (10) days of the date hereof, plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon defendants, and shall file proof of said service via NYSCEF; and it is further

ORDERED that the remaining parties shall appear for settlement conference on January 8, 2025 at 10:30 a.m. in Courtroom 800.

The foregoing constitutes the Decision and Order of the Court.

November 22, 2024
**E N T E R:**
White Plains, New York
HON. DAMARIS E. TORRENT, A.J.S.C.

**Footnotes**

**Footnote 1:**This defendant was also incorrectly sued herein as Patricia A. DiChiaro School.

**Footnote 2:**Although the City references W.C.'s deposition in their moving papers, the transcript is conspicuously missing from the Exhibits thereto. As the transcript is filed on NYSCEF and referenced in the Affirmation in Support of the City's motion, the Court considers W.C.'s deposition testimony in determining whether the City met its prima facie burden on its motion.

## DNA TEST IN ARTICLE 10 CASE

**Matter of A.R.**, 84 Misc3d 1225(A) (Family Court, New York County, 2024)

On or about November 5, 2021, the petitioner the Administration for Children's Services (hereinafter referred to as "petitioner" or "ACS") filed Family Court Act ("FCA") Article 10 abuse petitions on behalf of the subject children J.R., K.R., R.R. and A.R. (hereinafter referred to as the "subject children" or "J.R.," "K.R.," "R.R." and "A.R.") against the respondents Ms. S.R. and Mr. C.M. ACS now moves for an Order compelling C.M. to submit to DNA paternity testing. For the reasons set forth below, the motion is granted. The abuse petitions in this case allege, inter alia, that the respondent C.M. committed, or allowed to be committed, acts against the subject child R.R. defined in the Penal Law, including but not limited to, Sections 130.20, 130.25, 130.30, 130.35, 130.55, 130.65, 255.25, 255.26 and 255.27. Specifically, the abuse petitions allege that the respondent C.M. is the biological father of the subject child R.R., that the subject child R.R. became pregnant when she was 13 years old [*2]and that she gave birth to the subject child J.R. on or about XX/XX/2021. Relying on hospital records, the abuse petitions further allege that the subject child J.R. was born with abnormal facial features, that genetic testing was conducted to determine if J.R. had any genetic disorders and that the results of the genetic testing found that J.R.'s biological father was within a first- or second-degree relation to J.R and was either J.R.'s maternal grandfather, C.M., or one of J.R.'s maternal uncles.

A fact-finding in this matter began in December 2022 but never concluded due to the retirement of the prior Jurist assigned to the case. In March 2024, this Court granted the parties' application for a mistrial and began the fact-finding anew on June 25, 2024. On that date, J.R.'s medical records and the Certified Court Transcript of the testimony of Dr. M.B., a pediatrician and geneticist, from the prior fact-finding was entered into evidence. As is relevant here, the medical records and Dr. M.B.'s testimony establish that based on the genetic testing performed on J.R., his biological father is either a maternal uncle or his maternal grandfather, C.M.

ACS now moves for an Order compelling the respondent C.M. to submit to DNA paternity testing. At argument on the motion, the attorney for the children stated on the record that she is in support of the relief sought by ACS. Pursuant to FCA § 1038-a,

"Upon motion of a petitioner or attorney for the child, the court may order a respondent to provide nontestimonial evidence, only if the court finds probable cause that the evidence is reasonably related to establishing the allegations in a petition filed pursuant to this article. Such order may include, but not be limited to, provision for the taking of samples of blood, urine, hair or other materials from the respondent's body in a manner not involving an unreasonable intrusion or risk of serious physical injury to the respondent."

ACS's motion is granted as the Court finds probable cause that the DNA evidence sought from respondent C.M. is reasonably related to establishing the allegations in the

abuse petitions filed pursuant to FCA Article 10. The allegations in those petitions are that the C.M. is the biological father of the subject child R.R., that R.R. became pregnant when she was 13 years old and gave birth to the subject child J.R., and that, based on genetic testing performed on J.R. after his birth, J.R.'s biological father is either C.M. or a maternal uncle. Additionally, the medical records and testimony of Dr. M.B. demonstrate that J.R.'s biological father is either C.M. or a maternal uncle. Therefore, DNA evidence received from C.M. is reasonably related to establishing the allegations in the abuse petitions.

C.M.'s assertion that the motion should be denied because his DNA evidence is not reasonably related to establishing the allegations in the petition and that a DNA test would therefore be a fishing expedition is without merit. Specifically, C.M. asserts that he should not be required to submit to DNA paternity testing as there are multiple family members who could possibly be J.R.'s biological father. However, in this case, the results of the DNA testing would establish that C.M. either is, or is not, J.R.'s biological father and is therefore, reasonably related to establishing the allegations that C.M. impregnated his 13 year old daughter R.R. and that J.R. is the result of such pregnancy.

C.M.'s assertion that the motion should be denied because of the petitioner's delay in seeking the DNA paternity testing is without merit. Initially, the Court notes that although it has been three years since the case was filed, ACS has been trying for some time to obtain the DNA evidence from the District Attorney's office and was ultimately unable to do so. In any event, [*3]C.M. has not demonstrated how he is prejudiced by any delay in seeking the DNA evidence.

Finally, C.M.'s assertion that the motion should be denied because requiring him to submit to DNA paternity testing would constitute "an unreasonable intrusion" under the statute based on the facts that he is no longer residing in New York, he does not wish to be present at the fact-finding, he does not wish to work with ACS and he has not had contact with the subject children since the case was filed in November 2021, is without merit. The reasons proffered by C.M. fail to demonstrate that an order requiring him to submit to DNA paternity testing would constitute an unreasonable intrusion.

Based on the foregoing, the motion is granted. C.M. is to submit to DNA paternity testing, either by blood test or buccal swab, by November 27, 2024. This constitutes the decision and order of the Court.

## EXCESSIVE CORPORAL PUNISHMENT, AND EMOTIONAL NEGLECT

**Matter of Isaiah D.**, 83 Misc3d 1263(A) (Family Court, Kings County, 2024)

Robert Hettleman, J.

## I. INTRODUCTION

For the reasons described in this decision, I find that the Administration for Children's Services ("ACS") has proven by the preponderance of the evidence that the respondent parents, Chinelle D. ("Ms. D.W.")[FN1] and Renison W. ("Mr. W."), neglected their then-13-year-old son.

## II. PROCEDURAL POSTURE

On April 14, 2023, ACS filed this neglect petition, alleging that (1) on or about April 6, 2023,[FN2] the parents used excessive corporal punishment on the child Isaiah; (2) more than a week later, after Isaiah had been hospitalized but was ready to be released, the parents refused to pick him up from the hospital or make appropriate plans for his care; and (3) this conduct amounted to derivative neglect of their younger children, Elijah and Malia.

The case was filed before another Judge, and on April 14, 2023, that Judge released Elijah and Malia to the parents with various conditions, but she remanded Isaiah (who was still hospitalized at the time) to the care and custody of ACS. The case was assigned to me in mid-August of 2023. During the pre-trial phase of the case, the parents were very cooperative with ACS and foster care agency supervision with respect to Elijah and Malia, who were doing fine at home. On December 7, 2023, ACS offered the parents an Adjournment in Contemplation of Dismissal ("ACD") for those two children for a period of four months, which the parents accepted. The ACD for those children successfully expired on April 6, 2024, and thus that part of the case was dismissed.

In contrast, Isaiah remained in foster care and has not wanted contact with his parents. Likewise, the parents did not want him back in their care unless they felt he got the help he needed to ensure that there would be no violence in the home.

The trial began on February 2, 2024, and it continued on March 11, March 13, April 5, and May 2. On May 2, all parties rested and gave summations. At trial, ACS called one witness, ACS Child Protective Specialist ("CPS") Ms. Lyn, and introduced into evidence the following:

- ACS's Exhibit ("Pet's") 1-3: pictures of injuries to Isaiah taken on April 12, 2023
- Pet's 4: Selected Medical Records for Isaiah from Brookdale Hospital

Ms. D.W. and Mr. W. each testified, and Ms. D.W. called as a witness Betty C., a therapist who had worked with the family in the Spring of 2023. Ms. D.W. introduced into evidence, as Respondent Mother's ("RM's") A, additional selected portions of Isaiah's medical records from Brookdale Hospital. In addition, all counsel stipulated that (1) Ms. D.W. went to a police precinct on April 5, 2023, at approximately 9:51pm to make a report; and (2) Ms. D.W. filed a police report on December 29, 2022.

The Attorney for the Child ("AFC") supported a finding of neglect but did not introduce any evidence at trial.

## III. THE EVIDENCE AT TRIAL

*1. CPS Lyn*

I found CPS Lyn credible. Her testimony was limited in its scope and not disputed in any significant way. She was detailed and corroborated by the records and other evidence in the case. Notably, as described below, in response to different questions and types of questions from counsel at different points in her testimony, Ms. Lyn attributed various statements to Isaiah and each of the parents. This did not appear to be the result of Ms. Lyn trying to favor one side or the other, but neither CPS Lyn nor counsel attempted to reconcile or integrate these statements into a timeline or narrative. As a result, particularly with respect to statements made by Isaiah and his mother, it is hard to know if each gave internally inconsistent statements to CPS Lyn or if CPS Lyn simply described different pieces of their statements at different times in her testimony.

CPS Lyn was assigned to investigate the case, and on April 12, 2023, she spoke to Isaiah at Brookdale Hospital. On direct examination, she testified that Isaiah told her the following: on April 5, 2023, he came home later than his curfew, and he and his mother started arguing. The argument became physical, and Ms. D.W. dragged Isaiah off his bed. Mr. W. intervened and began punching and kicking Isaiah, and then Isaiah fled to the living room. Next, his mother pinned him to the ground, his father choked him while he was on the floor, and at some point, Ms. D.W. threw a scooter at the child, hitting his leg. Isaiah also stated that at some point during the incident, Ms. D.W. called her own mother on the phone.

In response to questioning by other counsel, CPS Lyn provided additional details described by Isaiah. Isaiah stated that he broke his curfew because he was at a park making TikTok videos. When he got home, his mother asked where he was and lectured him about the world being dangerous. Isaiah told his mother to "shut the fuck up," and his father asked why he was speaking to his mother that way. Isaiah then said that he punched at his father, and at some point, he pulled his mother's braids and told

her she would lose her job for beating him up. Ultimately, his mother called 911, and he was taken to the hospital.

CPS Lyn observed injuries to Isaiah, and she took the pictures that are Pet's 1-3. These pictures show a small mark to Isaiah's shin and scrapes to his forearm. Isaiah attributed these injuries to the April 5 incident, including that the mark to his leg was from being hit by the [*2]scooter.

CPS Lyn then testified that Isaiah went on to describe that the dynamic in the home had been deteriorating since he identified himself as gay. He said that his parents do not support that type of lifestyle: they had locked him out of the home in the past, and Ms. D.W. brought a "spiritual woman" to come to their home to perform a "ritual" that involved blowing smoke in Isaiah's face, throwing eggs, and cursing at him. Isaiah said that he wished his parents would not be so strict with his curfew, and he had spoken to them about it. In fact, they had moved his curfew back — to 5:00pm — but Isaiah still wanted it to be later.

On April 13, 2023, CPS Lyn spoke with both parents. On direct examination, CPS Lyn testified that Ms. D.W. described that Isaiah was regularly breaking his curfew, and she confirmed that an altercation happened between them on April 5, resulting in Isaiah being hospitalized. She said she called her mother in Guyana during that incident. Ms. D.W. complained that Isaiah's current school is "selecting boys" to be in a gay cult. She acknowledged that the hospital advised the parents that Isaiah was ready to leave the hospital, but she refused to take him home because she felt he needed more time in the hospital.

On questioning by other counsel, CPS Lyn testified to additional statements made by Ms. D.W. The mother said that Isaiah had come home after curfew, and she asked him where he was. Then he cursed at her and pulled her braids, whereupon Mr. W. intervened. Then Isaiah got a push pin or thumb tack and tried to scratch Mr. W. Mr. W. then "contained" Isaiah in the living room while Ms. D.W. called the police. She said that Isaiah's injuries were from him butting himself against a wall and hitting himself with the scooter. At some point, she called her mother in Guyana to show her what was happening. She denied ever using corporal punishment on her children, describing that she was a mandated reporter of child abuse through her work and would not want to jeopardize her job. Ms. D.W. said that their family does not believe in homosexuality and that she believed "demonic spirits" were taking over her son. She said that she was not ready to have Isaiah come home from the hospital, even though he had been hospitalized for over a week and was deemed safe and ready for discharge. She claimed that she was working on finding a different school or residential treatment program for him.

CPS Lyn testified that Mr. W. also confirmed that the incident took place after Isaiah broke curfew, and he said that Isaiah started it. Mr. W. echoed Ms. D.W.'s statements about Isaiah being in a gay cult.

Also on April 13, CPS Lyn went to the home and interviewed the younger children, Elijah and Malia. Both children appeared healthy and well, and CPS Lyn observed no injuries to either child. Elijah, who was 10 years old at the time, described that the April 5 argument took place, and that Isaiah was pulling Ms. D.W.'s hair and screaming "do you want to fight?" Mr. W. came into the room and pinned Isaiah down while Ms. D.W. called the police. When EMS came, Isaiah was kicking a wall. Elijah said that his parents do not use corporal punishment; rather, they take away the children's tablets or television time. Elijah said he likes his family but does not like it when Isaiah misbehaves and causes problems.

Malia, nine years old at the time, said she was asleep but awoke to noise in the home. When she came out of her room, she saw Isaiah on the floor trying to grab their mother's hair. An ambulance came and took Isaiah away, and Malia was mad at Isaiah for fighting with their mother. She, too, denied any corporal punishment in the home, and she felt safe with her parents.

*2. Petitioner's 4 and RM's A: Brookdale Hospital Records*

The records describe that Isaiah was brought to the hospital by EMS on April 5, 2023. He had dried blood on his face, and he was calm. In RM's A, a medical note from April 5, Isaiah described that he had a history of mental health issues. "The patient described" hitting his head and having scratches on him, he said he would kill his whole family, and he made suicidal statements as well. The record notes that Isaiah had been seen in the emergency room "several times" for similar issues. In that note, Ms. D.W. said that Isaiah struck her multiple times with closed fists and that Mr. W. restrained him. The parents said that the incident started with the child acting out, banging his head on a wall, using a pin to prick himself, and threatening to shoot them. They described a prior incident where Isaiah grabbed a knife and threatened them, and they said they had difficulty handling his behavior. At some point, the hospital held a "family meeting," and Ms. D.W. said they were overwhelmed by Isaiah's behavior and threats. She said she had reached out the Board of Education for help but that they did not take her seriously.

In different notes from April 6, the hospital described various statements by Isaiah. In one note, Isaiah said he came home late, his parents questioned him about it, the argument escalated, and his parents and his siblings started to beat him up. In another note, the hospital documented injuries to his forehead and cheeks, and Isaiah said his

mother hit him with a phone, that the argument escalated, he hit his father with a calendar, and a fight ensued. Isaiah told them that he threatened to slap his mother. In a note from April 8, Isaiah said he was doing okay and wanted to go home. He reiterated that the incident began with an argument about his curfew, and he said he got upset because his mother was hitting him. He hit her back and called her names, and he said that she called him a gay slur during the fight.

The notes document that Isaiah has a history of adjustment disorder, disturbance of conduct, and ADHD. Isaiah said that prescribed medication had helped him in the past, but he stopped taking it in January because of issues with the family's insurance coverage. He said that therapy helps, including family therapy, but that it was not resulting in changes in the family's relationships. He acknowledged that there is less conflict in the family when he follows his curfew and takes his medication. He said he was suspended from school in March for fighting. Isaiah said that his family wants him not to be gay, and his mother performed a ritual on him with candles, coconuts, eggs, coffee, and other items. He said he wants to be with his family, but he wants them to ask better questions, support him, and think more about how to do so. Finally, he agreed to change his own behavior to reduce conflict in the home.

On April 6, Ms. D.W. told hospital staff that Isaiah's behavior had been deteriorating since September of 2022. She said he stole a laptop, lied to family, has outbursts, threatened to get a gun and kill everyone, bangs his head against the wall, scratches his face with a pen, and [*3]has been threatening towards his parents with knives. She acknowledged that his medication had been effective and helped the situation, but she had insurance issues which resulted in Isaiah not being able to stay on the medication. On April 12, the hospital informed Ms. D.W. that Isaiah had made progress and was ready for discharge, but she said she wanted him to be in a residential treatment facility. She said that, among other things, she was concerned about the safety of her other children. On April 13, she again refused to take him home.

*3. Betty C.*

Overall, Ms. C.'s testimony was not disputed in any meaningful way. However, her testimony also changed a bit from direct to cross, and she did appear to be supportive of the parents.

Ms. C. is a family therapist at the Arab-American Family Support Center ("AAFSC"). Her agency was assigned to provide preventive services to this family, and she worked with them from around March/April to June/July of 2023. Before Isaiah was placed into foster care — on April 14, 2023 — she said she provided family therapy three times per month. She said she had no concerns about Isaiah's behavior; he was calm, and she

discussed his lack of communication skills and being unable to verbalize things in a healthy manner. She said that she is trained in cultural competency, and she testified that the family is Caribbean, but that Isaiah is American. She counseled the parents that Isaiah took his parents' responses to heart, and she wanted to help them find the right "emotional balance" to adapt to "American standards." She said that Caribbean women can "become very aggressive," in a style that is very different from Americans. She recommended that the parents learn how to speak in a healthy manner without hurting others' emotions, as well as when to walk away if things become unbalanced and calming down before they say something they will regret. In response, the parents agreed to work on this because the situation with Isaiah was hard for them and they wanted to improve the family's relationship. Likewise, Isaiah said he works on this with his school guidance counselor and social worker.

Ms. C. testified that Ms. D.W. expressed concerns about the gay cult at the school. The mother worried about Isaiah's safety because "a lot of things happen" in the gay community, and she feared that he might be assaulted, get into fights, or get hurt because of his sexuality. Ms. C. tried to work with the parents about this issue, educating them about different culture and sexualities. She described that she had never seen marks or bruises on the child.

At one point in her testimony, Ms. C. described that "the family" never missed a session, and she implied that these sessions and conversations were with everyone present. On cross, she acknowledged that she never met with the entire family together and that Isaiah was never present for these sessions. Rather, she met Isaiah individually at his school on two or three occasions, and she also saw him at the ACS Children's Center after the parents refused to take him home from the hospital. She always described his demeanor to be "calm."

Ms. C. testified that when Isaiah was in the hospital, she collaborated with a hospital social worker on appropriate services for the child. Further, she described that Ms. D.W. was [*4]involved in these efforts. Finally, Ms. C. confirmed that Ms. D.W. refused to bring Isaiah home from the hospital, expressing fear that there would be safety issues.

*4. Ms. D.W.*

I found Ms. D.W.'s testimony to be credible in parts but not credible in others. She presented as an accomplished and intelligent woman who plainly cares about her children and her family. She was detailed in describing some of the issues and struggles involving Isaiah, and she was corroborated about some of the parents' efforts to deal with his behavior. At other times, Ms. D.W. was vague and evasive, not answering questions directly and frequently changing the subject. Almost every time

she was asked about the April 5 incident — in the records, to CPS Lyn, and in court — she gave a different version of events and a changing timeline, and she repeatedly added new allegations as her testimony progressed. She expressed considerable hostility towards Isaiah, taking multiple opportunities to reiterate how out-of-control and bad he is, while praising her own efforts and constantly restating that her career is a top priority in her life, perhaps even over the wellbeing of Isaiah. And she greatly minimized the central role of Isaiah's sexuality in this entire situation. In addition, much of her testimony was not corroborated by the other evidence in the case.

In her first in-court narrative about the incident on April 5, Ms. D.W. described that Isaiah came home at 8:00pm. When she asked him where he was, she said he responded, "Bitch, I am home now." She said that he gave an explanation that she did not believe, and then when she turned, Isaiah grabbed her by her braids. Mr. W. then came to where they were, and Isaiah yelled, "I will destroy this bitch." She told Isaiah not to call her that and to show respect, and then she turned to go to the bathroom. At that point, she said Isaiah grabbed her and tried to hold her down. Then Isaiah ran to the bedroom and started to cut himself with a pushpin, stating to her that a friend told him to do this so that Ms. D.W. would lose her job. She testified that Isaiah started throwing things around the house, and then they called the police. As noted earlier, all counsel stipulated that at some point that evening, Ms. D.W. went into a police precinct and made a report.

When shown the pictures in Pet's 1-3, she said she first saw these injuries when the hospital brought them to her attention. She then said that during the incident, Isaiah had broken glass, picture frames, and other things around the home, and then he took some glass and started cutting up his own leg. As for the injuries to his arm, she said that Isaiah had "marked" his arm with glass well before the April 5 incident.

When asked on direct about the scooter, she said that the scooter was "right there" but denied hitting him with it. She then added, curiously, that it would have been "too heavy" and "time-consuming" to hit the child with it, and that Isaiah was on the floor for a period of time "doing stuff that wasn't making sense." She then volunteered that she was a teacher, and that Isaiah did not want her to graduate with her Master's Degree. She said that Isaiah threatened to call her college to make sure she did not graduate.

Still on direct, Ms. D.W. described a prior incident where, after Mr. W. had left for work, [*5]Isaiah threatened to kill her, Elijah, and Malia, including killing her in her sleep. No additional information was provided about this allegation. She described how in December of 2022, Isaiah was hospitalized due to behavioral problems, including coming home at 10:00pm or later and breaking things in the home. She said they called the police, and all stipulated that she filed a police report on December 29, 2022. After that approximately two-week hospitalization, Ms. D.W. said that the mother of a friend of

Isaiah called ACS on her, and that is when AAFSC got involved to provide preventive services and family therapy. She testified that she enrolled Isaiah in therapy and that he went for a while. She described that she reached out to his school due his suspensions, and she said the school advised her to take him out of "the environment."

When asked about how they disciplined Isaiah, Ms. D.W. said that in the past, they would take away his games or phone, reinstate his curfew, and talk with him about the dangers of the streets. When asked specifically whether they used corporal punishment on him, she denied it and reiterated that she is a teacher and a mandated reporter and that she would never destroy her own career.

She next testified that Isaiah never said anything to the parents about his sexuality. Rather, she saw something in his text messages where friends were talking about "religion" and saying that "only gays" go on cruises with their families. She admitted regularly using an anti-gay slur — "anti-man" — but said it was never directed towards Isaiah. She said that in the U.S., people say "gay," but in her culture, they use "anti-man." She claims she did not use it in a derogatory way and that Isaiah never told her that he perceived that term negatively. In addition, at this point in her direct exam, she declared that before Isaiah was removed from their care, she never had any concerns at all about his sexuality and she never discussed with him what she saw on his phone. Yet in other testimony — as well as in the hospital records and other evidence at trial — she said that she had numerous conversations with school staff about how the school tells children how to get involved with "gay and lesbian thoughts" and the children creating a cult about being gay and lesbian. When asked about her comment that "demonic spirits" took over Isaiah, she said she was referring to thinking that Isaiah was on drugs, breaking things in the home, and behaving in other ways that were not like him.

She also described that in late December of 2022 and early 2023, she spoke to Isaiah about his suspensions for fighting, counseling him that he could have hurt someone and could have been arrested, and she asked why he was doing this and why he was "putting me through this." She testified that Isaiah said that he did not like living in the projects, that his mother was too strict, and that he wanted food other than Guyanese food.

In response to questioning from Mr. W.'s attorney, Ms. D.W. stated that during the April 5 incident, the younger children were trying to pull Isaiah off of her. She then said that Isaiah was breaking things at the beginning of the incident, causing Mr. W. to wake up, and that at that point Isaiah was holding a hammer and "aiming" it at her. Then Isaiah was "cuffing," fighting, and trying to cut Mr. W. with broken glass. Upon more pointed questioning, she said that Isaiah brandished a knife during the incident — holding it,

"flicking" it, and saying he would kill her and his siblings. She said he had also done this in December of 2022.

In response to questioning from ACS' attorney, Ms. D.W. said that Isaiah began the physical part of the April 5 incident by grabbing her hair and punching her in the face. Mr. W. then came into the room, and that is when Isaiah started breaking a vase and items in the kitchen, as well as "anything he could put his hands on," and this lasted for approximately 30 minutes before she called the police. She testified that at various points during the incident, Mr. W. wrestled Isaiah to the ground, but Isaiah tried again to attack her and started breaking things again. That is when Isaiah went to pick up a knife, but Mr. W. took him to the ground. Then, she added that at some point, Isaiah got loose from Mr. W. and went into a bedroom, and that is when Isaiah marked his own skin with the pushpin "until you see blood" and made the comments about making her lose her job.

When asked if anyone hit Isaiah in the face, she denied doing so intentionally but said that "so much was going on" that maybe she did. When asked about what she meant on direct exam about the scooter being "too time consuming," she said that it is very heavy, picking it up would make "no sense," that she puts her "career ahead of me," and if she had picked up the scooter, the "child would not be alive today." When asked about Isaiah having weapons on April 5, Ms. D.W. described a knife but not a hammer (or any other weapons). When asked about using the term "anti-man," she said she used it frequently, including described people on social media and television who are gay, but she never used that term about Isaiah in his presence. She denied performing any rituals in her home, saying she "grew up Christian," but then she rambled about how this case had been going on for a year and that if she had "intermingled" with voodoo, "we would not be here."

In response to questions by the AFC, Ms. D.W. stated that she delivered a "healthy baby boy" — this is not "a belief . . . he is a boy." She acknowledged that she does not believe in homosexuality, since the bible says that "God created male and female," and she does not want her children to follow that path. She said that if she thought he was "taking on traits," she would ask an elder or pastor to communicate with Isaiah, and then she stated that she did do this *before* April 5, 2023. Then, not directly in response to any question, Ms. D.W. said that she puts her "career first," that it is very important to her, and that she was worried that this case would impact her career. She said that others are jealous of her because she is an immigrant who has had success, whereas others — seeming to refer to the families of Isaiah's friends — are on public assistance, scream and curse at "us," and "do not know us." She described that she repeatedly told Isaiah that an ACS case would have ramifications for her career. When asked if she felt

any remorse, she said she would not feel remorse for "correcting" her son, putting him on the right path, and being a caring mother.

*5. Mr. W.*

I found Mr. W. credible in part and less credible in others. His testimony was far shorter and less detailed than that of Ms. D.W. He offered very little information other than describing the April 5 incident, and he was asked very little about his role in Isaiah's life. He was clear and concise and answered questions directly, and he did not try to evade or over-explain in his responses. However, his description of the incident changed in response to different questions, and some of his testimony was at odds with the other evidence in the case.

On direct examination, Mr. W. said that he was in bed and heard a commotion. He got up and came to the dining room, where he saw Ms. D.W. ask Isaiah why he was out so late. Isaiah responded, "shut the fuck up, bitch," and Mr. W. asked him why he was speaking that way to his mother. Mr. W. reminded Isaiah that he is supposed to be home on time, and Isaiah responded, "why don't you shut the fuck up." Then he testified that he and Isaiah had a conversation about the child being disrespectful, and then Isaiah started to mark his own skin with a pushpin. Mr. W. tried to pull and carry the child to the dining room, and during this struggle, Isaiah punched Mr. W. in the forehead, and the punch "connected." He then described Isaiah getting a hammer and starting to break things in the home, including the tables, a vase, and other things. Mr. W. took the hammer away from Isaiah and held him down. Isaiah was able to get up, and he attacked his mother by pulling her hair, "cuffing" and punching her. This went on "for an hour or so," and then Mr. W. got Isaiah back on the ground and waited for the police to come. He denied ever choking Isaiah, that the other children got involved, or that anything happened with the scooter.

On cross examination by ACS' attorney, Mr. W. said that he did not see any injuries to Isaiah and that Isaiah was wearing long pants and a long-sleeve hoodie the entire time. Mr. W. described that when he first awoke and came out of his room, nothing was broken yet. He said that after he started pulling Isaiah from the bedroom, Isaiah had the pushpin in his hand, and Mr. W. took it from him. At some point after the incident, but not in the four-hour period immediately afterwards, the family cleaned up the house. Mr. W. did not observe anything broken other than a glass table. He testified that he had an injury to his forehead where Isaiah had punched him and that he took a photograph of that injury. However, he could not produce the photograph for trial because he had changed phones and was "not sure" if the picture was still on his phone.

On questioning by the AFC, Mr. W. said that Isaiah had gone to the kitchen at some point during the incident to get the hammer.

## IV. LEGAL DISCUSSION AND ANALYSIS

*1. Causes of Action and Constructive Amendment of the Petition*

The specific allegations in the petition were (1) excessive corporal punishment of Isaiah on April 5, 2023; (2) refusing to pick up the child from the hospital after the incident; and (3) derivative neglect of the other children. As noted above, the action for derivative neglect was resolved with ACDs for the children Elijah and Malia. In addition, over the course of the trial, the evidence reflected issues about the parents failing to emotionally support Isaiah, particularly with respect to his sexual orientation. On several occasions during the trial, I clarified with all counsel as to what the causes of action were, and ACS and the AFC stated that they sought a finding for emotional neglect. On April 5, 2024, towards the end of the trial, I again clarified the causes of action with all counsel, including seeking case law submissions or legal briefs about all three issues: (1) excessive corporal punishment; (2) refusing to take the child home; and (3) emotional neglect relating to Isaiah's sexual orientation.

Under FCA §1051(b), "the court may amend the allegations to conform to the proof; provided, however, that in such case the respondent shall be given reasonable time to prepare to [*6]answer the amended allegations." In this case, the issue of emotional neglect was raised early on and addressed by all counsel in their preparation, questioning, and factual and legal arguments, and counsel for the parents raised no objection. Accordingly, I will consider that cause of action in this decision.

*2. Excessive Corporal Punishment*

Parents have a right to use physical force with their children to maintain discipline or to promote the children's welfare. *See Matter of Elisa V. (Hung V.)*, 159 AD3d 827, 828 (2nd Dept. 2018); *Matter of Paul M. (Tina H.)*, 146 AD3d 961 (2nd Dept. 2017). However, the amount of force must be reasonable, and excessive corporal punishment can be the basis for a finding of neglect. *Matter of Janiya T. (Johnas M.)*, 191 AD3d 681, 683 (2nd Dept. 2021) (citing *Elisa V.*). Whether corporal punishment is excessive is a product of many factors and the totality of circumstances, including the nature of the force used, the age of the child involved, the nature of injuries, and whether or not the conduct was an isolated incident. *Id*.; *Matter of Anastasia L.-D (Ronald D.)*, 113 AD3d 685 (2nd Dept. 2014); *Matter of Michele S. (Yi S.)*, 157 AD3d 551, 552 (1st Dept. 2018).

Even if the child initiates an encounter, a parent's use of force in response must still be reasonable. *Janiya T.*, 191 AD3d at 681 (mother's actions were unreasonable response to child's provocation); *Matter of Rahmel G. (Carlene G.)*, 201 AD3d 567 (1st Dept. 2022) (discipline was not appropriate in "form or degree," even if valid reason for discipline). A single incident of excessive corporal punishment can suffice for a finding of neglect. *Janiya T.*, 191 AD3d at 681 (citing cases). On the other hand, an isolated incident of inappropriate discipline, particularly where the child is not of a tender age, need not amount to neglect. *See, e.g.*, *Matter of Amanda E.*, 279 AD2d 917 (3rd Dept. 2001) (father slapped child across the face, leaving a black eye, but did not amount to neglect due to child's age [16 years old] and the circumstances surrounding the incident).

In this case, the evidence at trial provides a fractured and incomplete picture of the events that took place on April 5, 2023. Isaiah did not testify at trial. A subject child's out-of-court statements are admissible in a neglect trial, FCA §1046(a)(iv), although they must be corroborated in order to be the basis for a finding of neglect. *Id*. However, where a child's out-of-court statements are otherwise independently admissible for their truth, they do not require corroboration under the Family Court Act. *See Matter of E.H. (M.H.)*, 209 AD3d 582 (1st Dept. 2022); *Matter of Taveon J. (Selina T.)*, 209 AD3d 417 (1st Dept. 2022). In this case, Isaiah's statements to treatment providers at Brookdale Hospital are germane to his medical treatment — both physical and mental health treatment — and thus they are admissible for their truth. *Matter of E.H.*, 209 AD3d at 583; *People v. Ortega*, 15 NY3d 610 (2010).

In any event, Isaiah's out-of-court statements to the hospital and to CPS Lyn are sufficiently corroborated by the injuries described in the medical records, the pictures in Pet's 1-3, the hospital's observations of Isaiah's behaviors and diagnoses, the parents' acknowledgment and statements about the incident, and the other children's statements.

As noted above, Isaiah's statements were presented in snippets from various sources. His various descriptions of the incident contained differing accounts and allegations at times — who started it, what items were used, etc. Likewise, the parents' statements in the records are recorded in piecemeal fashion, but even their in-court statements changed repeatedly and substantively over the course of their testimony. The statements made by Elijah and Malia are quite limited in scope, and they do not shed significant light on the incident or the credibility of any of the versions of events. Plainly, the incident occurred over a period of time, involved a scuffle between multiple people, and was an emotionally charged and violent situation. It is understandable that every witness had difficulty in accurately describing the exact sequence of events.

In consideration of all of the evidence in the case, I find Isaiah's statements to be credible. As an initial matter, his documented injuries observed by hospital staff corroborate being physically attacked in the manner he described. He had injuries to his forehead, cheeks, arm and leg. Notably, the pictures in Pet's 1-3 were taken on April 12, approximately a week after the incident, suggesting a significant amount of force being used on multiple parts of his body. In addition, the injuries do not align with the parents' description of what happened — specifically, there are no pin-shaped or pin-sized marks or injuries on his arm, nor are there marks that appear to have been the result of being cut by broken glass.

Moreover, there is no demonstrated, strong-enough motive for Isaiah to fabricate these allegations. Ms. D.W. testified that Isaiah regularly evinced motives to harm or get away from his parents: that he did not want her to graduate from her Master's program, that he wanted to harm her career, that he felt she was too strict, and that he wanted to live somewhere else and have more exposure to different food. But there was no significant evidence to support her assertions. In Isaiah's own statements, he appeared fair, balanced, supportive, and understanding of his parents. He acknowledged that he violated his curfew, cursed at his parents, and participated in the physical fight. Importantly, in one of his statements to the hospital, he stated that he was the one who initiated physical contact on April 5.

During his hospitalization, Isaiah freely admitted to his own prior mental health history, suspensions, and disrespectful behavior. Indeed, he noted that he could and should make a better effort to respect his parents and the family's home, that medication had helped him in the past, and that his parents tried to work with him on his issues. He said that he wished that his parents would handle the entire situation differently, and he said he wanted to return home if his parents would "ask better questions" and support him better. In other words, his statements did not appear those of someone out to frame or demonize his parents, but rather a 13-year-old being open and honest and fairly recalling what happened — the good and the bad.

In contrast, the parents' descriptions of the incident were not consistent or credible. As described earlier, the parents' statements and testimony changed the order of events, differed on what weapons allegedly were used, and gave conflicting versions of each person's actions. Ms. D.W.'s testimony was internally inconsistent, and she was also contradicted in important ways by the narrative of Mr. W. and her own out-of-court statements. Moreover, her in-court [*7]testimony about the scooter was evasive and strange, and both parents' testimony **[FN3]** about the scooter was contradicted to Ms. D.W.'s statement to CPS Lyn that Isaiah had hit and injured himself with the scooter. Her testimony about when she was aware of and focused on Isaiah's sexuality was contradicted by other evidence. In contrast to Isaiah's nuanced discussion of his family

situation, Ms. D.W. seemed quite intent on painting Isaiah in a negative light, repeatedly describing — sometimes without being asked — Isaiah's violence, threats, and motive to harm her career. In fact, she made clear that protecting her own career was her highest priority.

Notably, neither parent provided any substantive corroboration for their versions of events. While ACS always has the burden of proof in this trial, the parents presented a case and had the opportunity to provide any admissible evidence they chose. They did not provide pictures of any alleged injury to Mr. W., testimony by the grandmother or any other witness, or any pictures or evidence of broken items or damage to the home.

At the same time, the evidence shows that in many ways, Ms. D.W. is an involved and caring mother in her own way. There are no concerns raised whatsoever about the parents' caretaking of Elijah and Malia, and she was credible that she spends time with her family, attempts to promote strong family bonds and morality, and is involved in the children's education and lives. She participated in preventive services and therapy relating to Isaiah, and she went to the hospital when Isaiah was taken there. It is also undisputed that she is the one who called 911 on April 5, 2023. Likewise, the evidence corroborates her testimony that Isaiah's behavior declined towards the end of 2022, as well as that he regularly broke curfew, was suspended from school, and had behavioral flare-ups that resulted in conflict and hospitalization.

Given all of the statements and evidence at trial, it is not clear who started the physical incident on April 5, 2023. However, I find that the parents' actions — both individually and collectively — were inappropriate and excessive. *Janiya T.*, 191 AD3d 681; *Rahmel G.*, 201 AD3d 567. The evidence proves that they did more than merely restrain Isaiah for his own safety. Rather, these two grown adults used significant force on a 13-year-old child that was not justified, contributing to him being injured physically and emotionally. And although there was no evidence of any prior incidents of excessive corporal punishment, the severity of this incident, the child's age, and the child's injuries are significant enough to warrant a finding of neglect.

*3. Refusal to Take the Child Home from the Hospital*

Case law provides that neglect can be found where parents refuse to take their child home or demonstrate that they want no contact with or responsibility for their child. *See, e.g.*, *Matter of Safiyah T. (Tommie D.T.)*, 133 AD3d 678 (2nd Dept. 2015) (collecting cases). Even where there exists a tumultuous relationship between the family members, this alone does not excuse a parent's refusal to take their children home. *See Matter of Jacklynn BB. (Donna CC.)*, 155 AD3d 1363 (3rd Dept. 2017); *Matter of Jalil McC. v. Denise C*, 84 AD3d 1089 (2nd Dept. 2011); *Matter of Kimberly F. (Maria F.)*, 146 AD3d

562 (1st Dept. 2017). In *Jacklynn BB.*, the subject child struggled with mental health issues and was alleged to have threatened to kill the respondent mother or herself. However, the Third Department held that this did not excuse the mother's refusal to take the child back into the home. 155 AD3d at 1364 (citing cases). Furthermore, even if parents may have a basis to refuse to take the child back home, they must participate in arranging for appropriate care for the child. *Jalil McC.*, 84 AD3d at 1090; *Kimberly F.*, 146 AD3d at 562 (parent's failure to offer a plan for the child other than foster care).

In this case, the parents do not deny that they refused to take Isaiah home from the hospital when he was cleared for release on or around April 13, 2023, more than a week after the April 5 incident. Ms. D.W. said she refused to do so because she feared for the safety of the younger children. She also stated, both to the hospital and in court, that she wanted or was looking for alternative arrangements for Isaiah, including a residential placement or school of some type for him.

However, she provided no proof or compelling evidence of any such effort or attempt. Again, ACS always retains the burden of proof at trial, but there is no corroboration or support for Ms. D.W.'s self-serving statements that she was making meaningful efforts to locate an alternative plan for Isaiah. The statements she did make were vague and did not even purport to reflect any specific steps the parents had taken. Moreover, the parents' position was not reasonable at the time Isaiah was ready for release from Brookdale Hospital. Isaiah had been admitted to the hospital for over a week, received treatment, returned to a stable and safe baseline, and committed to returning home and working more productively and safely with his family. Isaiah and the parents acknowledged that when Isaiah had been taking his medication and in treatment in the past, the situation was markedly improved. Nevertheless, the evidence shows that the parents were made aware of Isaiah's treatment and progress, as well as that the hospital found him fit to return home. Notably, there is no evidence that the hospital recommended any type of residential placement for Isaiah. Even before April 13, the hospital notified the parents that Isaiah was ready to go home, but the parents refused to take him on multiple occasions and did not offer any meaningful alternative resources or plans.

There is no dispute that Isaiah had ongoing behavioral problems and that parents and child had myriad conflicts. Over time, the parents cooperated with preventive services and family counseling (albeit without Isaiah), sought therapy for Isaiah, and took some steps to improve the situation. However, their testimony and all of the evidence in the case reflect that their efforts were insufficient. Ms. D.W. described having Isaiah speak to a church pastor or elder about her concerns about his lifestyle choices; taking him to see someone at her job; speaking to an unnamed staff member at Isaiah's school — the same staff member who warned and advised Ms. D.W. about the "gay cult" in the

school that recruited children — and being told [*8]to take him "out of the environment;" and repeatedly talking to Isaiah and warning him about how his behaviors could be harmful to himself and others. Yet despite his hospitalizations, suspensions, and problems, neither parent described any efforts in substantively working with Isaiah in therapy, school, or the hospital; learning or implementing any strategies; or coming up with any plan for his safety and wellbeing.

Ms. Castellan described some of their work, but the parents did not. Neither parent described adjusting their parenting, reconsidering their communication, or seeking additional comprehensive suggestions or plans for what to do. Indeed, as noted, neither parent offered any concrete evidence of any steps that they took to seek an alternate school, program, or residence for their child. Of course, there is no single route for dealing with a struggling teen, and parents are not required to be mental health experts or to guarantee the success of their own parenting methods. But when their child was ready for discharge from a significant hospitalization, even then Ms. D.W. and Mr. W. did not engage in any meaningful planning or exploration of an alternative. Rather, they simply refused to take him back home. As Ms. D.W. testified, it appears that she "put [her] career first."

*D. Emotional Abuse Relating to Isaiah's Sexual Orientation*

Emotional and/or verbal abuse can constitute neglect under the Family Court Act, where a respondent's actions place the child at imminent risk of emotional or mental harm. *See, e.g.*, *Matter of Kevin M. H. v. Kenneth H.*, 76 AD3d 1015, 1016 (2nd Dept. 2010); *Michele S.*, 157 AD3d at 552 (citing cases); *Matter of Patrice S. v. Karen B.*, 63 AD3d 620, 620-21 (1st Dept. 2009) (citing cases). In such circumstances, contrary to the arguments of counsel, child welfare cases do not violate a parent's right to free speech under the First Amendment. Rather, the very nature of Article 10 cases involves a balance between a parent's fundamental right to parent their children as they see fit against the state's interest in protecting children from parenting that fails to meet a minimum standard of reasonableness. *Nicholson v. Scoppetta*, 3 NY3d 357 (2004).

In this case, Isaiah described that his relationship with his parents had deteriorated since he had identified himself as gay. He stated that his parents did not support that kind of lifestyle, that they had locked him out of the home in the past, and that Ms. D.W. had used a "gay slur" towards him during the incident on April 5. He also said his mother had a ritual performed on him involving candles, coconut, eggs, coffee and other items to rid him of being gay.

In court, Ms. D.W. acknowledged that she did "not believe in homosexuality," that the Bible "told her that," and that "god created male and female." When asked whether she

ever used a "gay slur," Ms. D.W. responded that she regularly used the term "anti-man." She said this is a common term in her community, that she did not mean to use it in a derogatory way, and that she never used it towards Isaiah. On cross-examination by the AFC, however, she admitted that "the term comes up often," like when they saw things on social media or television, or even in conversations with her own mother. In addition, Ms. D.W. was evasive and inconsistent in her testimony about the role of Isaiah's sexuality in the family dynamic. At one point, she said she had no idea about his sexuality before April 5, 2023, but throughout her testimony she described her ongoing concerns about his school recruiting him into a "gay cult." Upon questioning from [*9]the AFC, she testified that she "was not worried that Isaiah might be gay," but she was worried that the gay cult might turn him into being gay. Then, she said that if she had felt that Isaiah had been taking on any gay "traits," she would have wanted to correct that by talking to him and taking him to a church member. Immediately after saying this, however, she said that she did, in fact, take these actions *prior* to the April 5 incident. She denied performing any "ritual" on Isaiah, stating that she is a Christian, but then she rambled on about if she had done "powerful" voodoo, she would not be in court and would be back on her job, "doing what I like." Finally on this topic, she said she "knew" where Isaiah was "getting that from," but she did not elaborate.

Parents are free to choose their own values, beliefs, and religious principles, and they are free to raise their children within those parameters, even if it creates tension or unhappiness. But this does not excuse conduct that rises to the level of neglect. *See, e.g.*, *Prince v. Massachusetts*, 31 U.S. 158 (1944) (child welfare and public safety concerns can outweigh parents' exercise of beliefs); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Matter of Josephine BB. (Rosetta BB.)*, 114 AD3d 1096 (3rd Dept. 2014) (respondent mother refused to permit child to receive recommended medical care); *Matter of Christine M.*, 157 Misc 2d 4, 14 (Fam. Ct., Kings Co., J. Dabiri, 12/21/1992) (father's religious beliefs regarding required vaccinations did not refute a finding of neglect). In *Matter of Ibraheem K. (Jacqueline N.)*, 190 AD3d 643 (1st Dept. 2021), the First Department upheld a finding of neglect where the parent threatened to send the child to the Middle East due to the child's sexual orientation, with the implication that the child would be killed for that reason. 190 AD3d at 644. In *Matter of Shane T.*, 115 Misc 2d 161 (Fam. Ct., Richmond Co., J. Leddy, 8/12/1982), the trial court found that the respondent father neglected the subject child by regularly calling the child a "fag," "queer," "girl," and similar terms. The Judge rejected the parent's explanation that he was trying to "cure" the child of his "girlie behavior." I have not found any other cases in New York State Family Court specifically addressing a parent's beliefs or actions around sexual orientation. Notably, in *Ibraheem K.*, there were also findings that the parent used excessive corporal punishment on the child, which may

have factored into the decision, and the Court in *Shane T.* noted that the child lived in constant physical fear of the respondent.

Returning to the instant matter, I find that the preponderance of the evidence establishes that Ms. D.W. neglected Isaiah by mocking his lifestyle and failing to support him emotionally. Even if her religious beliefs were honestly held and could be considered acceptable parenting, she continued to use anti-gay slurs regularly, including in the presence of the child, and used one directly to him during the April 5 incident. During this entire time period, Ms. D.W. knew that Isaiah was struggling at school, having behavioral issues at home, and had been hospitalized for mental health problems. Yet she continued to denigrate his sexual orientation, took him to church and coworkers to redirect his thinking, and refused to engage in meaningful and productive ways to understand and work with him. Her proclaimed supportiveness of him, including even if he were gay, is belied by all of the other evidence in the case. And the detrimental harm to Isaiah is clear from his hospitalization, struggles, and statements in April of 2023, particularly in combination with the parents' excessive corporal punishment on him and failure to take him back home or making a sufficient plan for his wellbeing. *Cf.*, *Matter of John O. v. Sharon Q.*, 42 AD3d 687 (3rd Dept. 2007) (no finding of neglect for calling child a vulgar name where it was an isolated incident and no showing that child's emotional condition was [*10]linked to this conduct).

However, there is insufficient evidence to establish any actions or omissions by Mr. W. with respect to Isaiah's sexual orientation, and thus ACS has not proven that cause of action against him.

**5. CONCLUSION**

For the reasons described above, ACS has proven by a preponderance of the evidence that Ms. D.W. and Mr. W. neglected the child Isaiah pursuant to FCA §1012 in the following respects: (1) the parents used excessive corporal punishment on Isaiah on April 5, 2023; (2) the parents failed to allow the child to return to the family home after he was cleared for release from the hospital, and the parents failed to provide a meaningful or sufficient alternative plan; and (3) Ms. D.W. emotionally neglected the child by using anti-gay slurs in front of and towards the child, denigrating his lifestyle, and failing to sufficiently support him in the face of her disapproval.

**Footnote 1:**The petition lists her name as W., but in Court, the mother gave her name as D.W. Accordingly, I have used that name in Court and in this decision.

**Footnote 2:**Although the petition uses the date of April 6, 2023, all of the evidence makes clear that the incident occurred on April 5, 2023.

**Footnote 3:**Generally, each parent's out-of-court statements are admissible as admissions only against that parent, unless some other hearsay exception applies that would permit such statements for their truth. In this case, CPS Lyn described that she interviewed both parents together, and each parent responded at times to her questions. Likewise, portions of the hospital records appear to reflect conversations held with both parents at the same time. Accordingly, their statements to CPS Lyn, and those made together at the hospital, are admissible against both parents as joint and/or adoptive admissions.

## SEALING OF POLICE RECORDS

**Matter of N.J. (S.H)**. Misc3d 2024 NY Slip Op 24318 (Family Court, Kings County, 2024)

Robert D. Hettleman, J.

### I. INTRODUCTION

This written decision memorializes the oral decision I gave on the record during the trial in this case. For the reasons described below, I find that New York City Police Department ("NYPD") domestic incident reports ("DIRs") and videos taken from police officers' body-worn cameras ("BWCs") are not subject to the sealing provisions in NY Criminal Procedure Law ("CPL") §160.50(1)(c). When a criminal case ends in a manner favorably to the accused, the sealing of certain records is an important mechanism designed to promote fairness and eliminate the stigma of unproven allegations. In other contexts, however, these records frequently serve as crucial and admissible evidence — particularly in cases involving domestic violence and child welfare proceedings under Article 10 of the Family Court Act. Under the sealing statute and relevant caselaw, the balance of these competing concerns is a delicate one. However, I find that unless such materials are specifically required to be sealed by statute, they should not be precluded from being used in other forums to aid in the truth-seeking process and the administration of justice.

### II. PROCEDURAL HISTORY

The New York City Administration for Children's Services ("ACS") filed this Article 10 petition on April 16, 2024, alleging that the respondents — S.H. and F.D., the mother and stepfather of the child, respectively — neglected the then 16-year-old child by using excessive corporal punishment and/or assaulting her on April 14, 2024. Around that time, both respondents were arrested for the incident, and F.D. was also arrested for

allegedly sexually assaulting the child on a different occasion. By the time the trial in this Family Court case began on August 19, 2024, the assault-related criminal charges had been dismissed against both respondents, but the sexual assault charges against F.D. remained pending in Criminal Court.

At the trial, ACS sought to introduce into evidence, among other things, various records from the NYPD**,** including DIRs, BWCs, and other reports. The defense objected to this evidence on the grounds that the materials should be sealed due to the dismissal of the criminal cases.[FN1] After hearing arguments, I admitted portions of the records, including DIRs and BWCs, [*2]over objection. At the end of the trial, on October 28, 2024, I found that ACS had not proven neglect by a preponderance of the evidence, and this case was dismissed.

## III. THE SEALING STATUTE

### A. CPL §160.50(1)(c) Provides Broad Protection for an Accused in Criminal Cases

CPL §160.50(1)(c) provides broad protections to a defendant when criminal proceedings are terminated in favor of an accused:

> Upon the termination of a criminal action or proceeding against a person in favor of such person . . . all official records and papers, including judgments and orders of a court . . . relating to the arrest or prosecution, including all duplicates and copies thereof, on file with . . . any court [or] police agency . . . shall be sealed and not made available to any person or public or private agency.

CPL §160.50(1)(c). The Court of Appeals has emphasized the policy considerations that underscore CPL §160.50: avoiding the stigma and other consequences that result from a criminal prosecution. *See Harper v. Angiolillo*, 89 NY2d 761, 766 (1997) ("The sealing requirement was designed to lessen the adverse consequences of unsuccessful criminal prosecutions by limiting access to official records and papers in criminal proceedings which terminate in favor of the accused"); *Hynes v. Karassik*, 47 NY2d 659, 662 (1979) ("The statute serves the laudable goal of ensuring that one who is charged but not convicted of an offense suffers no stigma as a result of his having once been the object of an unsustained accusation. That detriment to one's reputation and employment prospects often flows from merely having been subjected to criminal process has long been recognized as a serious and unfortunate by-product of even unsuccessful criminal prosecutions") (citation omitted).

### B. Not All Materials Constitute "Official Records" that Must Be Sealed

At the same time, the Court of Appeals also recognized that not all documents or records constitute "official records . . . relating to the arrest or prosecution" under the

CPL. "[T]he legislature has acknowledged the existence of countervailing considerations [c]onsequently, a former defendant's interest in preventing the disclosure is not absolute." *Harper*, 89 NY2d at 766-767. In analyzing the scope of the statute, the Court noted that "although CPL 160.50 specifies judgments and orders of a court as items 'included' in the category of official records and papers, the statute is otherwise silent on the nature of such 'official' material." *Id*. at 765-766 (citing the statute). Further, the statute's language "[supports] the conclusion that bright line rules are not wholly appropriate in this area. Indeed, such records and papers are not always subject to easy identification and may vary according to the circumstances of a particular case." *Id*. at 766 (citation omitted).

*1. 911 Calls Have Been Found to Not Be Subject to Sealing*

There is no direct appellate authority on whether DIRs or BWCs constitute "official records" within the scope of CPL §160.50(1)(c). However, in an analogous situation, the First Department upheld the admission of 911 recordings — where a related criminal case was dismissed — because they were not "official records relating to respondent's arrest or prosecution and thus were not subject to the sealing statute." *Matter of Krystal N. (Juan R.)*, 193 AD3d 602, 602 (1st Dept.), *lv. den.* 37 NY3d 906 (2021). *See also Matter of Dockery v. New York City Hous. Auth.*, 51 AD3d 575, 575 (1st Dept.), *app. den.* 11 NY3d 705 (2008) (holding 911 recordings not subject to sealing) (citing CPL §160.50 and *Harper*); *Matter of Christal D.M. (Christopher D.M.)*, 63 Misc 3d 802, 804 (Fam. Ct., Kings Co., J. Pitchal, March 29, 2019) (citing *Dockery*).

The rationale underlying these decisions is that 911 calls are different from records that are specified in the statute, such as "judgments and orders of a court." *Harper*, 89 NY2d at 765-766. The 911 system serves a broader purpose than solely relating to criminal arrests or prosecutions: it is used for a variety of emergency calls and conditions. Accordingly, those calls should not be considered official records "relating to arrest or prosecution" for purposes of CPL §160.50, and they should be available for use and as evidence in other matters. *Matter of Estrella G.-C. (Julio B.)*, 63 Misc 3d 1216(A) (Fam. Ct., Kings. Co., J. Pitchal, Apr. 12, 2019); *Krystal N.*, 193 AD3d at 602; *Dockery*, 51 AD3d at 575; *Christal D.M.*, 63 Misc 3d at 804.

*2. Domestic Incident Reports (DIRs)*

An analysis of the use and purposes of DIRs yields the same result. In *Groves v. State Univ. of NY*, 265 AD2d 141 (3rd Dept.), *app. den.* 95 NY2d 758 (2000), the Third Department reviewed the history and uses of DIRs and suggested that they are not automatically subject to sealing. 265 AD2d at 144-145 (although the Court did not specifically rule on sealing because that issue had not been pled, they held that DIRs

serve functions other than arrest and prosecution). In an analogous situation, the Court of Appeals upheld the Third Department's determination that certain police department paperwork — property tags and logs about money seized from arrestees — are general business records and therefore "not official records subject to a CPL 160.50 seal." *Matter of City of Elmira v. Doe*, 11 NY3d 799, 800 (2008). *Cf. Matter of New York Times Co. v. District Attorney of Kings County*, 179 AD3d 115 (2nd Dept. 2019) (DA's Office investigative records *are* subject to sealing).

Applying these principles to the sealing of DIRs, at least one trial court found that DIRs should not be sealed. *See People v. P.D.*, 78 Misc 3d 352 (Crim. Ct., Kings Co., J. Holderness, Jan. 5, 2023). In that case, Judge Holderness reviewed at length these same statutory and policy considerations and held that DIRs are not subject to the sealing statute, given their underlying purposes and uses beyond criminal arrest and prosecutions. *Id*. at 359.

I find *People v. P.D.* persuasive and hold that DIRs are analogous to 911 calls and other business records maintained by the NYPD and should not be sealed under the statute. Like 911 calls, DIRs serve many purposes in addition to potential use in arrests and criminal prosecution. As an initial matter, the creation of a DIR is not dependent on an arrest or a criminal prosecution. Rather, the CPL mandates that a DIR "shall be prepared and filed [regardless of] whether . . . an [*3]arrest is made." CPL §140.10(5). "Despite the fact that it was enacted twenty-nine years after the sealing statute, CPL §140.10(5) specifically requires that *all* DIRs 'be retained by the law enforcement agency for a period of not less than four years.'" *People v. P.D.*, 78 Misc 3d at 356 (quoting statute) (emphasis added). The DIR form captures information that goes beyond arrest and prosecution, including an assessment of risk factors for the parties involved; concerns about the safety of family members, pets, and the suspect him/herself; contact information for hotlines related to child abuse, domestic violence, and sexual abuse; and various other data.

In conclusion, DIRs — like 911 calls — serve broader purposes than "arrest or prosecution," unlike arrest reports, criminal court complaints, DA's Office documents, and court orders in criminal cases. Therefore, they are not "official documents" covered by the sealing statute.[FN2] *Elmira v. Doe*, 11 NY3d at 800.

*3. Body-Worn Camera Recordings (BWCs)*

Like 911 calls and DIRs, BWCs serve many purposes and record various types of information, well beyond situations of arrest and prosecution. According to the NYPD, BWCs are used to "record enforcement, investigative and other encounters between the police and the public. They provide a contemporaneous, objective record of these

encounters, facilitate review of events by supervisors, foster accountability, and encourage lawful and respectful interactions between the public and the police." *Body-Worn Cameras: What you need to know*, New York City Police Department, https://www.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page. *See also U.S. v. Garcia*, 554 F. Supp. 3d 421, 430-431 (E.D.NY), app. dis'd. 2021 U.S.App. LEXIS 39655 (2nd Cir. 2021) (reviewing the nature and purposes of BWCs). Furthermore, the state law governing BWCs provides numerous circumstances where officers are required to record via their BWCs but that are not always related to criminal investigation and arrest. *See* 22 NY Executive Law §234.[FN3]

In *Matter of Patrolmen's Benevolent Assn. of the City of NY v. de Blasio*, 171 AD3d 636 (1st Dept. 2019), the First Department reviewed the "nature and use" of BWCs in determining whether they should be shielded from disclosure in an employment lawsuit. Ultimately, they held that because BWCs are created and used for a variety of purposes, they are general business records of the NYPD rather than specific "personnel records" that would otherwise be covered by confidentiality requirements of Civil Rights Law §50. 171 AD3d at 637-38. In an unpublished decision, a Family Court trial judge found that BWCs were not subject to the sealing statute, finding them to be "more akin to a business record" and not subject to sealing. *Matter of ACS v. C.C.*, Dkt. NN-3285/24 (Fam. Ct., Kings Co., J. Gruebel, Jul. 16, 2024). *See also Elmira v. Doe*, 11 NY3d at 800.

I am persuaded by the rationale of these cases, and I find that, like 911 calls and DIRs, BWCs are not official records relating to "arrest or criminal prosecution" and are not subject to the sealing statute.[FN4]

D. The Criminal Cases in this Case

Finally, a few additional specifics in these cases are relevant and must be addressed. As described above, although the criminal cases against both respondents for the *physical* assault [*4]had been dismissed, F.D.'s criminal case for the alleged *sexual* assault of the child remained open at the time of this trial.

F.D.'s counsel argued that any references in the police records to the sexual abuse are not relevant to the allegations of physical assault, and thus, even if the sexual abuse prosecution remained open, any parts of the records relating to the physical assault should be sealed and inadmissible. As an initial matter, because of my holding that DIRs and BWCs are not subject to sealing at all, parsing through those types of materials is unnecessary.

With respect to other police reports that were admitted — such as complaint reports, follow-up reports and other documents — I find that those should not be sealed either,

at least not yet. First, many of those records — individually, and together as a whole — referenced *both* sets of allegations: the physical and the sexual. Therefore, regardless of whether or not the criminal physical assault cases had been dismissed, these records were still related to the sexual assault allegations and thus would not yet have been subject to sealing.

Second, as noted in *Harper*, "such records and papers are not always subject to easy identification and may vary according to the circumstances of a particular case." *Harper*, 89 NY2d at 766. In this case, it would be difficult to cleanly separate the records relating to the physical assault allegations from those relating to the sexual assault allegations. Nevertheless, even if it were possible, I found that the portions relating to physical assault allegations might still be relevant and admissible with respect to the sexual abuse allegations in Criminal Court, and thus they should not yet be subject to sealing. For example, courts have held that other instances of violence between the accused and the complainant may be relevant to issues such as consent, forcible compulsion, and failure to immediately report the abuse. *See e.g. People v. Baltimore*, 301 AD2d 610 (2nd Dept.), *app. den.* 100 NY2d 592 (2003) (citing *People v. George*, 197 AD2d 588, 589 (2nd Dept. 1993) (prior acts of violence relevant to allegation of forcible compulsion); *People v. Smith*, 224 AD3d 1221 (4th Dept.), *lv. den.* 41 NY3d 985 (2024) (prior use of violence relevant to delay in reporting) (collecting cases). Further, prior statements of the child complainant are important discovery relating to the child's credibility and potentially could even be impeachment material about the child's motive to testify truthfully or falsely. Accordingly, even if the admissibility of these materials turned upon on whether they relate to the physical assault or the sexual assault, I find that all of the records are relevant to the still-pending sexual assault case, and therefore they should not yet be sealed.

## IV. CONCLUSION

For the reasons described in this opinion, I find that CPL §160.50(1)(c) does not require sealing of DIRs and BWCs that may relate to an underlying criminal case that was dismissed and sealed. Accordingly, I permitted the admission of certain DIRs and BWCs at the trial in this case.

Dated: December 11, 2024
Kings County, NY
ENTER:
Hon. Robert Hettleman
New York State Family Court Judge

PURSUANT TO §1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN

WITHIN THIRTY (30) DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, THIRTY-FIVE (35) DAYS FROM THE MAILING OF THE ORDER TO THE APPELLANT BY THE CLERK OF COURT, OR THIRTY-FIVE (30) DAYS AFTER SERVICE BY A PARTY OR ATTORNEY FOR THE CHILD UPON THE APPELLANT, WHICHEVER IS EARLIEST.

**Footnotes**

**Footnote 1:** The defense did not provide a copy of or any information about the dismissal or sealing orders from Criminal Court.

**Footnote 2:** Some cases in Criminal and Family Courts have held otherwise. *See e.g. People v. Anonymous*, 76 Misc 3d 1022, 1025 (Crim. Ct., Bronx Co., J. Licitra, Sep. 20, 2022); *Matter of Joshua F. (Yvelino F.)*, 73 Misc 3d 209, 215 (Fam. Ct., Kings Co., J. Deane, Jun. 30, 2021). I respectfully disagree with those decisions.

**Footnote 3:** 22 NY Executive Law §234 states:

1. There is hereby created within the division of state police a New York state body-worn cameras program. The purpose of the program is to increase accountability and evidence for law enforcement

2. The division of state police shall provide body-worn cameras, to be worn by officers at all times, while on patrol. Such cameras shall record:

(a) immediately before an officer exits a patrol vehicle to interact with a person or situation, even if there is a dash camera inside such vehicle which might also be recording the interaction;

(b) all uses of force, including any physical aggression and use of a non-lethal or lethal weapon;

(c) all arrests and summonses;

(d) all interactions with people suspected of criminal activity;

(e) all searches of persons and property;

(f) any call to a crime in progress;

(g) investigative actions where there are interactions with members of the public;

(h) any interaction with an emotionally disturbed person; and

(i) any instances where officers feel any imminent danger or the need to document their time on duty.

3. The attorney general may investigate any instance where body cameras fail to record an event pursuant to this section.

**Footnote 4:** In *Matter of Joshua F. (Yvelino F.)*, 73 Misc 3d 209 (Fam. Ct., Kings Co., J. Deane, Jun. 30, 2021), my colleague Judge Deane ruled that BWCs should also be sealed in these situations. Again, I respectfully disagree.

## ICPC

**Matter of D.A.**, Misc3d 2024 NY Slip Op 24225 (Family Court, New York County, 2024) Valerie Pels, J.

This matter raises two recurring legal questions in child protective proceedings about the interaction of Articles Ten and Six of the Family Court Act and the applicability of the Interstate Compact on the Placement of Children ("ICPC") to custody petitions filed by an out-of-state relative, other than a parent, when a child protective proceeding is pending, which should be clearly settled in light of statutory amendments to the Family Court Act and the Court of Appeals decision in Matter of D.L. v S.B., 39 NY3d 81 [2022]. The Administration for Children's Services ("ACS") routinely opposes efforts to place children with relatives out of state pursuant to Article Six without an ICPC, whether during or at the conclusion of a child protective proceeding, relying on outdated authority that is no longer good law. Their position is not only legally untenable but unnecessarily harms children.

D.A. (d.o.b. X/X/23) is the subject child of a neglect petition filed December 21, 2023, under docket number NN-XXXXX-23, wherein it is alleged that his mother, Y.A., failed to provide adequate supervision and guardianship after D.A., at three months old, was diagnosed with failure to thrive, Tylenol toxicity and tested positive for amphetamines. D.A. was removed from his mother's care pursuant to this court's order entered December 21, 2023 and is presently in non-kinship foster care in New York.
On February 16, 2024, the Attorney for the Child ("AFC") filed an order to show cause seeking the release of D.A. to his maternal grandparents, L.A. and J.A., in Indiana. At that time, D.A. had been in the hospital for over two months and was ready for discharge. His maternal grandmother was reported to have been visiting with him in the

hospital daily but no other information was available about the grandmother's history or home environment or about other household members in Indiana. ACS, petitioner in the neglect case, opposed the application arguing that an ICPC was required. Interim relief of placement with the maternal grandmother was denied, with the understanding that she would file a petition for custody and that efforts would be made to gather information about her suitability as a resource.

The maternal grandmother filed a petition for custody of D.A. on March 13, 2024. The AFC and respondent mother indicated that they would consent to the immediate entry of a final order of custody of the child to the maternal grandmother, even though the underlying neglect petition has not yet gone to fact-finding. In order to expedite D.A.'s placement with his grandmother, the respondent mother was willing to consent to a final order of supervised visitation, understanding that any future modification of such order would be on notice to ACS [*2]and the AFC and entail consideration of the safety concerns raised in the neglect petition.

Indiana child protective and criminal clearances for the maternal grandmother and all adult household members have been obtained and provided to the court and counsel by the grandmother without resort to an ICPC.[FN1] A home study was also completed by a social worker retained by the maternal grandmother who traveled to Indiana and made an in-person visit to the home. Based on the information provided to the court, there are no current identified safety concerns that would preclude D.A.'s placement in the care of his maternal grandmother.[FN2]

Nevertheless, ACS objects to the placement of D.A. with the maternal grandmother without an ICPC and is opposed to the court entering a temporary or final order of custody prior to the court's adjudication of the underlying neglect matter. For the reasons discussed herein, the court finds that it has the authority to enter a temporary order of custody during the pendency of the neglect case but that a final order may not be entered until the neglect case is adjudicated. The court further finds that the ICPC does not apply in this circumstance and that the best interests of the child would be served by granting a temporary order of custody to the maternal grandmother at this time.[FN3]

Pursuant to Family Court Act ("FCA") § 1017, whenever a court determines that removal of a child from his or her home is necessary, the court must direct ACS to conduct an investigation to determine whether there is a suitable non-respondent parent or other kinship resource that is available to care for the child.[FN4] If a suitable non-respondent parent or other [*3]kinship resource is identified through such investigation, the statute not only permits but requires that the court place the child with such resource, reflecting the legislature's preference for placing children with family when a suitable relative is available to care for the child. Specifically, section two of FCA § 1017 provides that if, after conducting certain registry checks, the court determines that the child may

appropriately reside with a non-respondent parent or kinship resource, the court "shall, upon receipt of the report of the investigation ordered" pursuant to section one of the statute, determine whether there is a suitable parent or kinship resource available to care for the child and, if so, either grant a temporary order of custody or guardianship to such parent or kinship resource pursuant to Article Six, temporarily release the child to the non-respondent parent, temporarily directly place the child with the identified suitable kinship resource (without a temporary order under Article Six) or, if the resource qualifies as a kinship foster parent, remand the child and direct that the child reside in the home of that resource (FCA § 1017(2)(a) [emphasis added]). Placement in non-kinship care is authorized only if there is no suitable kinship resource identified (FCA § 1017(2)(b)).

Family Court Act § 1017(2)(a)(i) expressly authorizes a court to grant a temporary order of custody under Article Six of the Family Court Act to a parent or other kinship resource during the pendency of an Article Ten proceeding. Pursuant to FCA § 1017, a final order of custody to such relative may be entered at disposition pursuant to FCA § 1055-b (id.). Nothing in FCA § 1017 limits the court's authority to issue a temporary or final order of custody only to in-state relatives.

A final order of custody is an authorized disposition in an Article Ten proceeding pursuant to FCA § 1052(a)(vi), where the court finds after a joint disposition and custody hearing held pursuant to FCA § 1055-b and consideration of a number of enumerated factors, that "granting custody or guardianship of the child to such person or persons is in the best interest of the child and that the safety of the child will not be jeopardized if the respondent or respondents under the child protective proceeding are no longer under supervision or receiving services." The language of FCA § 1055-b, somewhat confusingly, provides that whether a fact-finding hearing in the neglect matter has been completed is a factor to be considered in evaluating best interests. However, to the extent that FCA § 1055-b applies to final orders of custody or guardianship entered at the conclusion of the dispositional hearing, the fact-finding would by definition have been completed prior to the entry of the final order of custody.

Reading FCA §§ 1017 and 1055-b together, it would appear that entry of a final order of custody to a relative while a child protective proceeding is pending is not authorized until disposition, unless the Article Ten petition is either withdrawn or dismissed prior to disposition pursuant to FCA § 1051-c. However, it is equally clear that the entry of a temporary order of custody is not only permissible but expressly contemplated by statute, as set forth in FCA § 1017(2)(a)(i).

To the extent that ACS, in its opposition papers, relies on Matter of Tristam K., 25 AD3d 222 [1st Dept 2005] and Matter of Felicity II v Lance RR., 27 AD3d 790 [3d Dept 2006] for the proposition that the court lacks the authority to entertain a custody petition while a child protective proceeding is pending, that reliance is misplaced. Statutory

amendments have superceded those decisions, as subsequent decisions have recognized, since those matters were decided (Matter of Gabriel James Mc., 60AD2d 1066 [2d Dept 2009] [effect of 2005 and 2008 amendments to FCA § 1017 was to overrule prior caselaw, including Tristam K., which imbued a parent charged with neglect or abuse with veto power over the placement of a child with the [*4]non-custodial parent or other relative]; Matter of Crystal A., 13 Misc 3d 235 [Clinton Cty 2006] [Lawliss, J.] [observing that the court in Felicity II appears to have been interpreting statutory law in effect prior to the December 2005 amendments to § 1017 of the Family Court Act to expressly permit the court to enter orders of custody while an Article Ten petition is pending]).

FCA § 1017 has been amended eight times between 2004 and today. The effect of those successive amendments has been to strengthen the rights of non-respondent parents, other relatives and non-kinship resources with an existing connection to the family or the child, to seek placement or custody of a child removed, pursuant to Article Ten from a parent or person legally responsible for the child (see Merril Sobie, 2016 Practice Commentary, McKinney Cons Laws of NY, FCA § 1017). Amendments to FCA § 1017 made in 2005 and 2016, and the addition of FCA § 1052(a)(vi) and § 1055-b in 2009 superseded previous caselaw which limited the court's authority to entertain custody petitions during the pendency of a child protective proceeding. In December 2005, the language of subsection 2(a)(i) was changed from "place the child with such relative and conduct such further investigations as the court deems necessary" to "place the child in the custody of such non-respondent parent, other relative or suitable person pursuant to article six of this act and conduct such other and further investigations as the court deems necessary." This change made clear that an Article Six custody order could be made while an Article Ten case was pending, making formal intervention in the Article Ten proceedings pursuant to FCA § 1035, which is limited to a much narrower category of relatives, and is permitted only with the consent or on the default of the respondent, unnecessary.

The 2009 amendment of FCA § 1052, which lists authorized dispositions after a finding of neglect or abuse is entered in an Article Ten proceeding, made explicit with the addition of subsection (a)(vi) that a final order of custody to a parent or relative pursuant to Article Six is an authorized disposition under Article Ten. FCA § 1055-b, added at the same time, authorizes the court to conduct a combined Article Ten dispositional hearing and Article Six custody hearing and to enter a final order of custody after due consideration of certain enumerated factors. FCA § 1055-b addresses the concern raised in Felicity II that the entry of a final order of custody to a relative could disrupt family and agency efforts to work toward reunification, a central priority of the statutory child protective scheme, by requiring the court to weigh these considerations. It explicitly requires due consideration of the permanency goal established for the child and "whether compelling reasons exist for determining that the return home of the child and the adoption of the child are not in the best interest of the child and are, therefore,

not appropriate permanency options" prior to the entry of a final order of custody which would end ACS's involvement with the family (FCA § 1055-b(a)(ii)).

A subsequent amendment to subsection (2)(a)(1) of FCA § 1017 effective June 18, 2016 clarified that a temporary order of custody could be entered during the pendency of the case, prior to disposition and that a final order court be entered pursuant to FCA § 1055-b. While the standard for granting a temporary order of custody during the pendency of an Article Ten proceeding, as opposed to a final order, is not set forth in the Family Court Act, the same considerations set forth in FCA § 1055-b would apply. While a parent no longer has veto power, prior to adjudication of the merits of the neglect or abuse allegations, particularly if the proposed resource is in a distant state, the impact on the ability of the parent to visit or plan for reunification would be important factors to consider if the parent were not in support of the plan. Here, however, the parent has unequivocally indicated her support for her mother, the child's maternal grandmother, being awarded not only temporary custody but a final order of custody. The court finds that the ICPC is not applicable here. In reaching this conclusion, the court notes that the ICPC is clearly not applicable to custody proceedings where there is no pending child protective proceeding (ICPC Regulation 3(3), American Public Human Services Association, ICPC Regulations, https://aphsa.org/AAICPC/AAICPC/ICPC_Regulations.aspx). The First Department has also noted, albeit in dicta, that the ICPC does not apply to a final order of custody made pursuant to Article Six of the Family Court Act after a consolidated custody and dispositional hearing on an Article Ten petition (Matter of Louis N., 98 AD3d 918 [1st Dept 2012]). ACS urges the court not to follow the dicta in Louis N., even though that decision is consistent with subsequent binding authority from the Court of Appeals. The Court of Appeals in Matter of D.L. v S.B., 39 NY3d 81 [2022], made clear that the ICPC applies only to foster care and adoptive placements, even where a child protective proceeding is ongoing. The Court of Appeals in that case settled what had been a split in authority between the First and Second Departments as to whether the ICPC applies to out-of-state non-custodial parents whose children are in the care of ACS pursuant to a court order in an ongoing child protective proceeding. Largely adopting the reasoning of the First Department in Matter of Emmanuel B., 175 AD3d 49 [1st Dept 2019], and relying on the plain meaning of the statutory language of the ICPC, the Court of Appeals found that the ICPC applied only to foster parents and adoptive resources, and that the ICPC therefore did not apply to non-custodial parents (Matter of D.L. v S.B., 39 NY3d at 91). While this was a landmark decision that substantially affected the rights of non-custodial, non-respondent parents, the implications of the decision are much broader: indeed, while the Court did not expressly make its ruling applicable to other categories of relatives, as has been recognized in the New York Practice Series treatise, "it appears that the court's holding is also applicable to any parent-custodial or non-custodial, respondent or nonrespondent—and, more generally, to any non-foster care/adoptive placement out of state. Stated simply, this holding should be applicable to any Family Court Article Six or Article Ten out-of-state custody or guardianship or direct

placement issued at any stage of a proceeding" (Gary Solomon & Merril Sobie, New York Family Court Practice § 2.98 [NY Prac Series Jan 2024 update]).

As the Court of Appeals noted in Matter of D.L. v S.B., the ICPC is an agreement among the fifty states, the District of Columbia and the U.S. Virgin Islands which governs the interstate placement of children in foster care or for the purpose of adoption. It is a non-federal statute, codified in New York in Social Services Law § 374-a (Id. at 85). The purpose of the statute is to "promote cooperation among [s]tates in providing each child with the maximum opportunity to be placed in a suitable environment with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care" (Matter of Shaida W., 85 NY2d 453 [1995]). The statute was intended to ensure that the sending state would be able to obtain the most complete information possible to evaluate the safety and suitability of the proposed placement (SSL § 374-a[1][Art I][c]) and to give the receiving state a "full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child" (SSL § 374-a[1][Art I][b]).

The ICPC was also designed to prevent states from "dumping" their foster care responsibilities on other jurisdictions (Matter of Shaida W., 85 NY2d at 458). To that end, when a child is placed with a foster care or adoptive resource in another state pursuant to the ICPC, the sending state continues to be financially responsible for the child's care as long as the child remains in foster care (SSL § 374-a[1][Art V][a]). The sending state retains jurisdiction over the [*5]child until the child is "adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state" (SSL § 374-a[1][Art V][a]).

As set forth in Article III of SSL § 374-a, the ICPC is applicable where a state agency seeks to send a child into a receiving state "for placement in foster care or as a preliminary to adoption" (SSL §§ 374-a[1][Art III][a] & [b]). The statute contemplates the promulgation of regulations (SSL § 374-a[1][Art VII]) and a uniform set of forms and regulations has been promulgated by the Association of Administrators of the Interstate Compact on the Placement of Children (AAIPC), to carry out the terms and provisions of the compact.

ICPC Regulation 3, in direct contravention to the plain language of the statute, makes the ICPC applicable to "[p]lacements with parents and relatives when a parent is not making the placement" (ICPC Regulation 3(2)(a)(3)) and specifically states that "where there is court jurisdiction with an open court case for dependency, abandonment abuse and/or neglect, the case is considered a public court jurisdiction case, which requires compliance with ICPC Article III" (ICPC Regulation 3(2)(b)). However, as the Court of Appeals recognized in Matter of D.L. v S.B., Regulation 3, to the extent that it purports to make the ICPC applicable to placements other than foster care or pre-adoptive

placements, cannot be given effect because it is contrary to the express language of the statute (39 NY3d at 89). The Court noted that courts in several other states have reached the same conclusion, citing In re R.S., 470 Md. 404, 412 [2020]; In re Emoni W., 305 Conn. 723, 740-42 [2012]; In re Alexis O., 157 N.H., 781, 787 [2008]; Ark. Dept. of Human Servs., 347 Ark 553, 573 [2002], McComb v Wambaugh, 934 F2d 474, 481-82 [1991].

As noted above, while Matter of D.L. v S.B involved a non-custodial, non-respondent parent seeking custody of their child, placement of a child with a relative pursuant to an order of temporary custody in a separate, parallel Article Six proceeding also does not fall within the purview of the plain language of the ICPC statute. An award of temporary (or final) custody pursuant to Article Six is not a foster care or adoptive placement. It does not implicate foster care funding or require that the resource meet specific foster parent eligibility criteria. This conclusion is supported not only by the statutory construction in Matter of D.L. v S.B., but by the manner in which the Court of Appeals distinguished its prior decision in Shaida W., 85 NY2d 453, supra. The Court in Shaida W. found that the ICPC applied to the placement of children with a grandparent out of state where the grandparent was certified as a kinship foster parent and receiving foster care funding. Significantly, the Court distinguished Shaida W., not on the ground that the resource was not a parent, but that the placement was a foster care placement (Matter of D.L. v S.B., 39 NY3d at 88).

Matter of Tsapora Z. (Tina Z.), 195 AD2d 348 [1st Dept 1993], cited by ACS, is distinguishable inasmuch as the decision indicates that the aunt in that case was seeking a "kinship foster care placement," although this court does also recognize that the facts as recited reflect that the relative in that case had filed a petition for custody and the distinction between a foster care placement and custody pursuant to Article Six of the Family Court Act is not clearly delineated in the decision. Insofar as the decision may be read to apply the ICPC to Article Six custody, it is, in this court's view, no longer good law after Matter of D.L. v S.B.

Further, the statute expressly provides that the compact does not apply to "[t]he sending or bringing of a child into the receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state" (SSL § 374-a[1][Art VIII][a]). The Court of Appeals in Matter of Shaida W., 55 NY2d at 460, held that this exception does not apply where [*6]the child is in the legal custody of a child protective agency at the time of the move since, in such a case, the child is "sent," not by the relative in question but by the child protective agency that has custody of the child at that point. This holding was reaffirmed in the Court of Appeals' recent decision in Matter of D.L. v S.B., 39 NY3d at 88.

Significantly, the subject children in Shaida W. were already in the care of a grandmother who had been certified as a kinship foster parent in New York when the children and grandmother moved to California with ACS's consent, presumably pursuant to an approved ICPC, though the Court of Appeals decision does not spell this out. The children's mother subsequently also moved to California and the issue in that case was whether the court in New York should extend the placement of the children or, essentially, shift the financial and supervisory responsibility for the family to California, where the family had then been residing for over two years. The court determined that, pursuant to the ICPC, New York retained that responsibility and could be relieved of its responsibility only with the concurrence of the receiving state, California (Shaida W., 85 NY2d at 460-61). At no time did the grandmother in Shaida W. seek custody of the children pursuant to Family Court Act Article Six. However, where the relative has been or is awarded custody (temporary or final) and is the legal custodian prior to "sending" the child out of state, the exception would apply.

Indeed ICPC Regulation 3(3)(c) specifically provides that, "[p]ursuant to Article VIII (a), this Compact does not apply to the sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's non-agency guardian and leaving the child with any such parent, relative or non-agency guardian in the receiving state, provided that such person who brings, sends, or causes a child to be sent or brought to a receiving state is a person whose full legal right to plan for the child: (1) has been established by law at a time prior to initiation of the placement arrangement, and (2) has not been voluntarily terminated, or diminished or severed by the action or order of any court." Clearly, this would apply where an out-of-state parent or relative already had custody prior to the commencement of the child protective proceeding. However, nothing in the statute or regulation limits this exception to circumstances in which the court enters an order of custody before the child protective proceedings commence. A temporary order of custody to the maternal grandmother would bring her within the purview of the exception, giving her the authority to "send" the child to Indiana without resort to the ICPC. Thus, this exception provides a second, independent basis for holding that the ICPC does not apply.
To this court's knowledge, the only published decision since Matter of D.L. v S.B. to address the applicability of the ICPC to relatives other than parents is Matter of Peggy RR. v Jenell RR., 80 Misc 3d 714 [Saratoga Cty 2023] [Harnett, J.]. In that case, the court found that the ICPC did not apply to a custody petition filed by a maternal grandmother, relying on the aforementioned exception under Article VIII that applies to parents and other enumerated close relatives. The court noted that the child in that case was never placed in foster care in the first instance and that the child protective agency was therefore never the legal custodian. The court sought to distinguish Dawn N. v Schenectady County Dept of Social Services, 152 AD3d 135 [3d Dept 2017], wherein the Third Department held that the lower court erred in granting custody pursuant to Article Six of the Family Court Act of a child in non-kinship foster care to an out-of-state grandmother after an ICPC had been conducted and the receiving state, after

conducting an investigation, had deemed the grandmother an unsuitable resource and denied the ICPC. While this court understands the trial court's reluctance to contravene appellate authority from the [*7]court's own department which has not been explicitly overruled by the Court of Appeals, in this court's view, to the extent that Dawn N. remains good law after Matter of D.L. v S.B., it should be limited to its facts: that is, to a situation where the sending agency invoked the ICPC where it was not mandatory and, having done so, was arguably bound by the determination made by the receiving state. In finding that the Court of Appeals' reasoning as it relates to the statutory construction of SSL § 374-a in Matter of D.L. v S.B. applies to relatives other than parents who seek custody pursuant to Article Six while an Article Ten case is pending, the court acknowledges that there are constitutional and public policy considerations that make the application of the ICPC to placements with a parent particularly inappropriate that would not apply to other relatives, or would be less compelling as applied to a non-parent. A parent's right to the care, custody and control of their children has long been recognized as a fundamental constitutional liberty interest (see e.g., Meyer v Nebraska, 262 US 390 [1923]; Pierce v Soc'y of Sisters, 268 US 510 [1925]; Prince v Massachusetts, 321 US 158 [1944]; Stanley v Illinois, 405 US 645 [1972]; Santosky v Kramer, 455 US 745 [1982]). The New York Court of Appeals likewise has recognized the Legislature's policy "to structure New York's foster care scheme around the rights of parents 'to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit'" (Matter of D.L. v S.B, 39 NY3d at 89, quoting Matter of Michael B., 80 NY2d 299, 308-09 [1992]). The Family Court Act provides that, prior to fact-finding in a child protective proceeding, a child may be removed from the care of a parent only upon a showing of imminent risk and a parent in a child protective proceeding, whether a respondent or a non-respondent, has a statutory right to a hearing within three days to seek the return of a child (FCA §§ 1027 & 1028). The First Department in Matter of Emmanuel B., considered these factors, in addition to the plain language of the statute, in concluding that the ICPC did not apply to non-custodial parents (175 AD3d at 59-60). The Court of Appeals in Matter of D.L. v S.B. did not rely on any constitutional considerations in arriving at its conclusion. Indeed, it did not even mention them. Rather, it concluded that the statute, as written, was in harmony with New York public policy, which is consistent with those fundamental constitutional principles (D.L. v S.B., 39 NY3d at 88-89).

While certainly taking a back-seat to the primary parental relationship, a liberty interest in extended family relationships has also been recognized (see e.g., Moore v City of East Cleveland, 431 US 494 [1977] [city ordinance excluding one child from family composition because he was a cousin rather than a brother was unconstitutional]; Rivera v Marcus, 696 F2d 1016 [2d Cir 1982] [half-sibling kinship foster parent had a liberty interest in the kinship relationship which entitled her to certain procedural safeguards prior to termination of foster care agreement]; A.C. v Mattingly, 2007 WL 894268 [SDNY 2007] [subject child removed from kinship foster parents had liberty interest in placement with kinship foster family unit]). New York's statutory child

protective scheme prioritizes placement of children with family members when removal from a parent or other person legally responsible is necessary (see FCA §§ 1017 & 1035). Indeed, adherence to ICPC Regulation 3 effectively undermines the purpose of FCA § 1017, which is to facilitate the identification of suitable family placement resources, whether in-state or out-of-state, and to ensure children's placement with family on an expedited basis pending adjudication of the neglect case where a suitable family resource exists.

Even in the absence of constitutional, statutory and policy imperatives favoring placement of children with kinship resources, the plain language of the ICPC statute supersedes [*8]any regulation that purports to expand the reach of the ICPC beyond those categories specified in the enabling legislation. The Court of Appeals' reasoning that Regulation 3 is unenforceable insofar as it is contrary to the plain language of the statute, as set forth in Matter of D.L. v S.B, applies with equal force to parents and non-parent relatives who fall outside the statutory categories covered by the ICPC.
One of ACS' primary practical concerns in taking such placements outside the purview of the ICPC is the challenge that this then creates for ACS to supervise and monitor the well-being of the child during the pendency of the Article Ten proceeding. Indeed, the ICPC provides the only means by which the receiving state may be compelled to monitor the home of an out-of-state relative with whom a child is placed while the Article Ten case remains pending. However, this same argument was made in relation to children released to their parents and rejected by the Court in Matter of D.L. v S.B. (39 NY3d at 90-91). The Court observed that the Family Court Act contains other effective means to ensure the safety of a child before awarding custody to an out-of-state parent, including but not limited to holding hearings, requesting courtesy investigations and reports, and entering temporary orders of custody and requiring the temporary custodian to make the child available for visits with social service officials (39 NY3d at 90-91). All of these safeguards are also available where the proposed temporary custodian is a non-parent. Indeed, FCA § 1017(3) specifically requires that any parent or family resource to whom the child is released or with whom the child is directly placed must submit to the jurisdiction of the court prior to a child's placement with that resource and the court may direct that the resource comply with certain conditions, including but not limited to, producing the child for court-ordered visitation with the respondent or siblings and appointments with and visits by the child protective agency, the AFC, as well as service providers for the child.

In practice, the ICPC has served children poorly. To the extent that ICPC Regulation 7 sets forth timelines for completion of the receiving state's assessment of an out-of-state resource in certain categories of cases where an expedited ICPC may be requested, those timelines are most often honored in the breach. Ministerial errors in the required paperwork and bureaucratic loopholes often contribute to delays in approval of otherwise suitable ICPC placements. As a result, ICPC approvals typically take many

months and often in excess of a year to obtain, during which time children must be placed in non-kinship care if there is no in-state family resource.

Moreover, when the ICPC is invoked, the receiving state's decision whether to approve the ICPC is dispositive and the sending state may not place a child with a resource where the ICPC has not been approved by the receiving state (SSL § 374-a[Art III][d]). This is true even if the reason for the denial is not safety-related or the child protective agency and/or the court in the sending state disagree with the receiving state's determination. Furthermore, the receiving state may demand the return of the child to the sending state, even after approval of the ICPC, and the sending state must take the child back, even if the sending agency or the court presiding over the case disagrees with the reasons given for the return (ICPC Regulations 2(10) & 7(12)).

For more than twenty years, courts and legal scholars have been raising concerns about the deleterious effect of the ICPC on children; even the United States Congress has been aware of its shortcomings (Matter of Marcy RR., 2 AD3d 1199 [3d Dept 2003] [noting that the ICPC process at that time took approximately four to six months]; Matter of Crystal A., 13 Misc 3d 235 [Sup Ct, Clinton Cty 2006] [citing a press release from the United States House of Representatives Committee on Ways and Means dated May 24, 2006 which noted that interstate [*9]placements took an average of one year longer than intrastate placements delaying the safe placement of thousands of children]; Vivek S. Sankran,, Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children, 25 Yale L & Pol'y Rev 63 [2006] [raising constitutional concerns about the application of the ICPC and noting (in fn. 53) that numerous judicial and legal associations including the National Council of Juvenile and Family Court Judges, the American Academy of Adoption Attorneys, and the American Bar Association's Steering Committee on the Unmet Legal Needs of Children, had passed resolutions recognizing the need to address long delays in ICPC approvals]). While the concern that the ICPC was an impediment to children's swift and safe release to a non-respondent parent after removal from the other parent's care was understandably the highest priority for advocates prior to the Court of Appeals decision in Matter of D.L. v S.B., unnecessary barriers to the prompt placement of children with other caring relatives when there is not a suitable parent available to care for the child continue to inure to the detriment of children.

It is well documented in social science literature that trauma associated with changes in placement puts children at risk for negative outcomes including aggression, delinquency and depression, and that multiple placements are associated with delayed permanency, academic problems, and difficulties in forming meaningful attachments (see e.g., Casey Family Programs, Strong Families Issue Brief: What Impacts Placement Stability?, May 12, 2023, available at https://www.casey.org/media/23.07-QFF-SF-Placement-Stability-Impacts.pdf][last accessed Nov. 21, 2023). While kinship placement by no means guarantees stability, children who are initially placed with relatives are more likely to

enjoy placement stability than children who are placed in non-kinship care or group settings (Id. at 3).

In short, an overly broad reading of the ICPC risks depriving children of the opportunity to be placed with a suitable relative out-of-state. Under the best of circumstances, it may unnecessarily and substantially delay such placement. As a result, it exposes children to unnecessary harm by requiring multiple placements, without serving the purpose of the statute: i.e., to ensure that out-of-state resources are properly vetted before children are placed with them and to ensure that the receiving state is not saddled with financial responsibility for a child from another state.

Where, as here, the resource will not be receiving foster care funds and will not be under the supervision of the local social services agency (except to the extent that the receiving state consents to undertake such as a courtesy), the financial burden on the receiving state is no different from a non-ICPC placement with an out-of-state relative made in a custody proceeding where there is no child protective agency involved. Further, while the ICPC provides a formal mechanism through which a sending agency or court can obtain information about the suitability of a resource, in our digital age, that information typically can be, and in this case has been, obtained through other means. In short, an ICPC is not only unnecessary in this case to serve the purposes of the statute but is not required under the plain language of the statute and the recent Court of Appeals decision in Matter of D.L. v S.B.[FN5]

Here, the court has sufficient information to determine the suitability of the maternal grandmother as a resource for the subject child. Having determined that removal of the child from his only identified parent was necessary, and that that parent supports the child's immediate placement with her own mother, the court finds that it would be in the best interest of the child to be placed with the maternal grandmother during the pendency of the child protective proceeding. In making this determination, the court has considered not only the information provided about the resource and the mother's stated wishes, but the AFC's strong support of the grandmother as a resource for the child.

Based on the foregoing, on consent of the respondent mother and the AFC and over the objection of ACS, the maternal grandmother is granted temporary custody of the subject child under docket V-01972-24, on condition that she submit to the jurisdiction of the court. The maternal grandmother shall make the child available for court-ordered visitation and, to the extent that ACS seeks to monitor the well-being of the child virtually or in-person in Indiana, shall cooperate with such monitoring, including by local Indiana child protective authorities if they consent to assist with monitoring as a courtesy. The maternal grandmother shall make the child available to the AFC virtually or in-person in Indiana. In addition, the maternal grandmother shall produce the child in New York when and if ordered to do so by the court and shall comply with any other

conditions set by the court. Insofar as the court, at this time is issuing a temporary and not a final order of custody, the underlying neglect matter may proceed. In the event of a finding, the court can determine at a combined disposition and custody hearing whether a final order of custody to the maternal grandmother, which would end ACS's involvement with the family, is appropriate and consistent with the best interest of the child.

This constitutes the decision and order of the court.

Footnote 1:The maternal grandmother and adult household members requested their own records from the relevant authorities and provided the records to the court. ACS did submit a proposed order to commence an ICPC on February 7, 2024. The court did not sign that proposed order because the court was concerned that, if the court granted a temporary or final order of custody prior to approval of the ICPC, this alone could trigger the denial of the ICPC and a demand by Indiana that the child be returned to New York or make the family ineligible for an expedited Regulation 7 ICPC (SSL § 374-a[art III][d],; ICPC Regulation 2(10)(a); ICPC Regulation 7(4)).

Footnote 2:The social worker, who visited the home and interviewed the grandmother determined that the home was suitable for the subject child. No one in the household has any criminal history. While there is one indicated report from over 21 years ago, the court does not find that the report raises any current safety concerns. The report involved the respondent mother, then a child, being left with a regular babysitter who called in a report after another family member left the child in her care but did not pay her for her services. No further action was taken by Indiana child protective services.

Footnote 3:The temporary order of custody was entered on July 1, 2024 and this decision and order amplifies the court's reasoning.

Footnote 4:FCA § 1017 also requires the investigation of certain resources that may have a significant connection to the child even though not related by blood or marriage and placements with such fictive kin also are given priority over other non-kinship resources not previously known to the child. While the resource in this case is a grandparent, the court uses the term "kinship resource" to include both relatives and fictive kin.

Footnote 5:While Article Six custody determinations are outside the purview of the ICPC, there remains an urgent need to address the chronic delays engendered by the ICPC. Not all suitable and willing family members have the financial means to care for their relative without foster care funding, leaving them no alternative but to go the route of an ICPC. For others, doing so without the financial support to which they would otherwise be entitled may pose a substantial hardship, especially if they become permanent or long-term caregivers.

## SEVERE ABUSE

**Matter of Liam V.**, Misc3d 2024 NY Slip Op 51692(U) (Family Court, Kings County, 2024)

Erik S. Pitchal, J.

By petition dated September 28, 2023, the Administration for Children's Services ("ACS") charged respondent father, Johnson V., and respondent mother, Lafayette B., with severe abuse, abuse, and neglect of their child, Liam V. (age 2 at the time) based on the death of his younger sister, Ella.

At the time of Ella's death, both children were in their parents' care, having been trial discharged following approximately 10 months in kinship foster care on a prior case. The full history of the family's involvement with ACS, beginning in August 2022, is essential background information to understand the current issues before the Court. *See Matter of Liam V.*, 82 Misc 3d 359 (Kings Co. Fam. Ct. 2023).

The undersigned conducted a fact-finding hearing as to the charges against both respondents. The record consisted of testimony from Dr. Ingrid Walker-Descartes, Dr. Amelia Baxter-Stoltzfus, EMS worker, Anthony Tortorici, and case planner, Jolie W. The hearing consisted of documentary evidence as listed below:

P1: Marked portions of Office of the Chief Medical Examiner records for Ella V.

P1A: Photographs from the Office of the Chief Medical Examiner records

P2: Marked portions FDNY records

P3: Marked portions of Kings County Hospital records for Ella V.

P4: Marked portions of SUNY Downstate Hospital records for Ella V.

P5: Marked portions of Maimonides Hospital records for Ella V.

P5A: the CALM report from Dr. Walker-Descartes

P6: marked portions of ACS case records

P7: 911 call

P7A: certification page for the 911 call

P8A and P8B: Body Worn Camera videos against Mr. V. only

P8C: the certification and delegation pages for the body worn camera videos

P9: CV of Dr. Ingrid Walker-Descartes

P10: CV of Dr. Amelia Baxter-Stoltzfus

P11: Oral Report Transmittal dated September 15, 2023

P12: Fact-Finding Order for dockets NN-15241-2/22

P13: Dispositional Order for dockets NN-15241-2/22

P14: Mental Health Services Report for Johnson V.

P15: Mental Health Services Report for Lafayette B.

Respondents presented no evidence at trial.[FN1]

The trial was conducted over the course of three dates, July 29, 2024, July 30, 2024, and December 12, 2024.

For the following reasons, the Court finds that petitioner has proven by clear and convincing evidence that the respondent mother and respondent father severely abused, abused, and neglected the subject child and enters findings against both respondents.

The gravamen of the petition is that the child, Ella V., suffered from severe injuries to her brain and body in September 2023 including brain bleeds, skull fractures, bruising, femur fractures, and a bite mark. which caused her death. The petition also alleges that the child Ella experienced these injuries while in the exclusive care of her parents, who also were exclusively caring for the subject child, Liam, and that the explanation provided by the parents as to how Ella suffered from these injuries is inconsistent with the medical presentation. Additionally, the petition alleges serious injuries to Ella from August 2022 for which both respondents were previously adjudicated neglectful, and a tongue laceration from September 2022. Liam is allegedly derivatively severely abused, abused, and neglected as a result of the actions toward Ella.

*Testimony of Dr. Ingrid Walker-Descartes*

Petitioner first called Dr. Ingrid Walker-Descartes, the head of Maimonides Hospital's child abuse unit. Dr. Walker-Descartes was qualified as an expert in child abuse pediatrics and testified credibly. As a prelude to the more focused testimony, Dr. Walker-Descartes testified about how a normal two-month old child would appear physically and medically. After establishing that baseline, Dr. Walker-Descartes testified about her first consult of Ella V. in August 2022 (at age 25 days) where she conducted a physical exam of Ella and ordered lab tests and imaging including a skeletal survey, MRI, and ophthalmology consultation. As a result, it was discovered Ella had normal and abnormal findings on her body. The abnormal findings consisted of classic bilateral

distal tibial metaphyseal fractures through the growth plate of both ankles, some hemorrhages and a skull fracture. All these findings were considered highly suspicious of physical abuse and Dr. Walker-Descartes described the potential mechanisms that would lead to such injures, including forceful grabbing and twisting of the lower extremities, forceful slamming on a hard surface with extended legs, and tremendous impact to the side of Ella's head.[FN2]

Dr. Walker-Descartes next testified to examining Ella in September 2022, approximately two weeks after a hospitalization at Kings County Hospital in which Ella was treated for a tongue laceration. Upon examination at Maimonides, Dr. Walker-Descartes testified that Ella was observed to have a laceration on her tongue that was in a healing stage at this juncture. To [*2]obtain such an injury, notably to sever the base of the tongue from the musculature, a sharp object such as a knife or scissor would have to be utilized. The only explanation provided was that her injury was sustained from a bulb suction, which did not match the medical presentation. Dr. Walker-Descartes further testified that such injury would also not occur from a fingernail scratch as a fingernail is not sharp enough to sever the tongue as it is pretty rigid.[FN3]

The next interaction Dr. Walker-Descartes had with Ella was in September 2023 when she was transferred from Kings County Hospital for more specialized treatment. At this time, Ella presented in cardiac arrest with spontaneous return of circulation after resuscitation attempts by EMS. At this time, Ella was deemed to be neurologically devastated, or in simpler terms, Ella presented with no activity from the brain. Ella was easily intubated, a process that normally requires anesthesia and her brain was found to not be functioning. A physical examination was conducted, and Ella was found to be small for her age, had swelling to her forehead, a laceration on her scalp, swelling over one eye, overgrown fingernails and extremely matted hair in the back of her head. Furthermore, Ella was observed to have a healed bite mark on the back of her leg, specifically one of her thighs. The matting of the hair was noteworthy as it indicated Ella's beginning to walk and then no longer walking for a significant amount of time. A skeletal survey could not be done as Ella was not stable enough for that, but the imaging done indicated a fracture under the swelling on Ella's head and Ella presented with multiple subdural hematomas, both old and new. Ella further presented with multi-layer hemorrhages in her retina, injuries to her neck, and a fracture to her jaw. Dr. Walker-Descartes concluded that the subdural hematomas, retinal hemorrhages, and neck injuries were caused by the violent shaking of a child. Additionally, the jaw fracture's cause would be hitting a child's head against a hard object or a hard object hitting the child against her face. Ella also presented with bilateral fractures to her femur with bilateral callus formation, which is the body's method to repair the fracture, something that likely would impact a child's ability to crawl and walk.

Dr. Walker-Descartes further went on to date the injuries Ella presented with at Maimonides. As Ella had fractures on both sides of her skull and she also had a hematoma overlying the skull fracture, the medical indication is that the injury occurred approximately 72 hours prior to presentation at Maimonides. None of Ella's injuries could have been accidental. Moreover Dr. Walker-Descartes testified to old subdural hematomas not brought to medical attention, indicating a strong likelihood of multiple shaking incidents. The hip fractures could be dated to approximately two weeks old or even older given the callus formations, and the neurological devastation and cardiac arrest were results from incidents occurring hours before presentation. Choking on milk and care provided by emergency medical services were both ruled out as possible causes of injury. Ella never regained consciousness while at Maimonides in September 2023.

On cross examination, Dr. Walker-Descartes confirmed that the fractures to Ella's tibia and fibula sustained in August 2022 could not be caused by her ankles getting stuck in the slats of a crib. Additionally, Ella's injuries from August 2022 could not have led to her death in 2023 but do speak to the risks to a child. Additionally, more information was provided indicating that there was more than one shaking event as the brain bleeds were in different stages of healing and [*3]prior shaking events do impact subsequent events. Moreover, the testimony elicited indicated the injuries Ella sustained would have been painful for her.

*Testimony of Anthony Tortorici*

Petitioner called Anthony Tortorici, the responding paramedic with the Fire Department of New York City, who testified credibly. Mr. Tortorici testified he responded to a 911 call regarding a pediatric patient in cardiac arrest. Upon arrival to the home, the fire engine company that was already there was running towards the ambulance with a child and they placed her on the stretcher and began assessing immediately. At presentation, there was no pulse or respirations, so they began CPR immediately and after two rounds of CPR, they were able to recover a pulse. Mr. Tortorici indicated his partner placed an intraosseous device, or IO, into the child's tibia to provide medication as needed, but they were unable to intubate the child, despite two attempts. Notice was provided to Kings County Hospital's emergency department that they were coming in with a critical case and upon arrival at the hospital, the emergency room staff was waiting for them and took over care.

In the ambulance the child's mother and a police officer were present. The ride lasted about seven to eight minutes. Mr. Tortorici testified that the child's mother appeared quiet and only spoke when the team was placing the IO and attempting intubation, asking why it needed to be done and stating that she did not believe they were

necessary and could harm the child. Throughout the trip, the child had a heart rate but was not breathing on her own, which is why they continued to ventilate her. Upon questioning about Ella's history, Ms. B. denied the existence of any history.

On cross-examination, Mr. Tortorici clarified what CPR entails, a single round lasts approximately two minutes, around thirty compressions and two respirations. It took about four minutes to recover a pulse for Ella upon her presentation. Furthermore, it was clarified that the intubation failed twice because the EMS team was unable to physically see the inside of Ella's throat and as per Mr. Tororici, going in blind to intubate someone can cause harm. Therefore, they held off on making further attempts until Ella was brought to the hospital.

On redirect, it was clarified that the mask utilized during CPR and the force used to create a seal on the child would not independently cause any injuries in Mr. Tortorici's experience.

*Testimony of Jolie W.*

Petitioner next called to the stand Jolie W., the case planner at Heartshare St. Vincent's Services, whose testimony the Court found credible notwithstanding the Court's grave concerns about the quality of her work in this matter. Ms. W. started her tenure as the case planner for Ella and Liam V. on June 28, 2023. At this time, the children were residing with their parents and her role was to make home visits and reach out to service providers if there were any services for follow up. Home visits occurred twice a month as the children were on trial discharge at the time.

Ms. W. testified that during home visits, the parents would both be present, Ella and Liam would be present, and sometimes the nurse from the agency would also be present. All of the visits were made around 10:00am. The home was described to be a studio apartment that is pretty small, with a bathroom, living area, and kitchen. In describing the size testimony was elicited in relation to the courtroom size which is about twenty-eight by thirty-four feet. Ms. W. testified that the apartment was smaller than the courtroom.

During the time Ms. W. was supervising the family, the children were not in daycare, and [*4]the parents continued to say they did not want the children in daycare as they wished to bond with the children. The parents continued to tell Ms. W. that the children had been out of their care for so long that they wanted the opportunity to get to know the children without other people around.

The agency held a conference by video on August 7, 2023, during which services were discussed and accolades were given to the parents for making it this far in their

services. As to early intervention services, despite being court ordered the parents indicated they did not want the children evaluated because they wanted time with the children without any other people around given how long the children had been in foster care. The parents said they wanted time to bond with the children. Ms. W. also testified that the agency was concerned about the children not being taken to follow up medical appointments, such as Liam's cardiology appointment. Ms. W. could not recall what Ms. B. said when questioned but did indicate there was a point in the conference when she hung up. Mr. V. appeared upset and questioned why they have to take the kids to so many medical appointments. Ms. W. testified that her director, Ms. Chernofsky, explained the importance of attending all the appointments. In the period of Ms. W.'s assignment to the case, the medical appointments were not kept.

The last home visit conducted by the agency occurred two days before Ella was taken to the hospital in September 2023, and Ms. W. provided several details about this visit during her cross-examination. She explained that the case had been assigned to the agency's medical unit, resulting in monthly visits by a nurse in addition to the twice-monthly visits made by the case planner. Often, the nurse conducted her visit during one of the case planner's, which is what happened that day in September 2023. According to Ms. W., she met the nurse, Angela, around 10 a.m. at the parents' home and they conducted the visit together. The visit was similar to others they had conducted. On a normal visit, the case planner talks to the parents about how the children are doing, checks the carbon monoxide alarm, asks if the parents need anything, and asks about medical appointments. Ms. W. testified she also checked the refrigerator that day.

As to interacting with the children, Ms. W. said she likely said something like "hey buddy, what's going on." Ms. W. indicated she did not interact with Ella, just saw her in the pack 'n play drinking her bottle. The visit lasted maybe thirty to forty minutes. Ms. W. testified she did not observe Ella turn or move and spent the bulk of the time conversing with the parents, as did the nurse. Ms. W. testified that at no point did she hold Ella or Liam or pick them up. As part of the assessment of the children, Ms. W. testified that neither she nor the nurse take the children's clothes off, they just observed the body parts visible to the naked eye and neither one of them lifted the children in their assessments. Furthermore, Ms. W. indicated she had never observed Ms. B. holding Ella in any of the visits she conducted.

*Testimony of Dr. Amelia Baxter-Stoltzfus*

The final witness called by Petitioner was Dr. Amelia Baxter-Stoltzfus, an expert in forensic pathology, employed by the Office of the Chief Medical Examiner for three years. Dr. Baxter-Stoltzfus conducted an autopsy of Ella V. on September 23, 2023, and

she testified credibly. As part of her autopsy, Dr. Baxter-Stoltzfus reviewed medical records from Ella's most recent hospitalization and more medical records that were brought to her throughout the course of the next couple of months.

A standard autopsy consists of an external exam in which the body is examined for identifying characteristics and photographs are taken. Next, the body is opened, and each internal organ is examined for evidence of injury or disease. Sometimes additional tests are [*5]ordered depending on what is revealed. In the case of a suspected homicide, additional tests may be ordered. Specific to Ella, and in children, additional testing is done, including full body x-rays and infectious disease testing, as well as removing the brain to get tissue samples examined. Because Ella was a suspected homicide, Dr. Baxter-Stoltzfus also removed all her skin and looked at the subcutaneous tissues for evidence of injury. Ella's eyes were removed and the bones in her neck were removed for further examination by neuropathology. The long bones of Ella's legs and her femurs, and some of her skull bones were removed and sent to the anthropology department for examination. These results were received several months later.

Dr. Baxter-Stoltzfus formed her conclusion regarding the manner of Ella's death, and its cause, on September 23, 2023 and signed her death certificate that day, but the final report regarding Ella's death was completed in March 2024. The results of the tests that came in months later served to further substantiate Dr. Baxter-Stoltzfus' assessment from September 2023.

Ella's physical examination revealed evidence of acute injury, including bruises on her forehead and lower mid back. She had two linear scabs on the left side of her head, one in front and above her ear and one slightly behind and above her ear. Contusions are considered a type of blunt force injury, and the scabs are also consistent with blunt force trauma, especially given the internal findings underneath them. The injuries to Ella's head would be inflicted at or around the time of death.

The internal findings during the autopsy revealed acute and subacute and old injuries. Acutely, Ella had a fracture of that side. he left parietal bone, which had no evidence of healing. The recent fracture had underlying areas of scabbing or laceration of the scalp and was also associated with significant bruising or hemorrhage of the skin and soft tissues under the scalp on the side. Additional hemorrhaging was observed in the soft tissues of the right side of Ella's head as well as some of the muscles on the right side of the head. These are all indicative of multiple impact sites from multiple traumatic events to Ella's head. Ella's head had an acute fracture on the left parietal and a subacute fracture on the right parietal bone, which showed evidence of healing. Given the evidence of healing on the right side, it very likely occurred days prior to the injury on the left side. In examining the brain, Ella had a subdural hemorrhage and a

subarachnoid hemorrhage. Upon removal of the spinal cord, there were hemorrhages along the length of Ella's spinal cord and evidence of old subdural hemorrhage there as well as in the head. More hemorrhaging was observed around the optic nerves. Dr. Baxter-Stoltzfus was able to observe fractures of Ella's femurs and could date them to be weeks to months old.

As part of her testimony, Dr. Baxter-Stoltzfus reviewed a number of photographs taken as part of Ella's autopsy and detailed the injuries observed to further elucidate how and why her conclusions about the injuries were made.

Dr. Baxter-Stoltzfus indicated she could rule out natural causes of death for Ella as there was no evidence of natural disease or congenital abnormalities that could explain Ella's death. Furthermore, none of Ella's injuries are consistent with being sustained by EMS' resuscitating efforts. Nor would any of the injuries be a result of Ella choking.

On cross examination, Dr. Baxter-Stoltzfus testified it is accurate she did not observe a jaw fracture, which appeared in the records. There are many possibilities that could lead to this including sometimes imaging can pick up thin nondisplaced fractures that she may not be able to see grossly with her eyes. Other possibilities include possible misinterpretations, the fracture being older and wouldn't have the soft tissue response of a recent fracture.

Moreover, more information was provided regarding the nature of blunt force trauma to [*6]the head as the etiology of Ella's injuries. Dr. Baxter-Stoltzfus testified that a violent shaking possibly contributed to the injuries, but there is no way to make a distinction of shaking versus some other mechanism based on the presentation of the findings. However, the doctor cannot rule out shaking co-occurring, but knows that blunt force trauma is supported by the findings.

Furthermore, additional clarification regarding the femur fracture and callusing was elicited. Dr. Baxter-Stoltzfus could not date the fracture as the stage of healing indicates at least weeks to months.

On redirect, it was testified to that significant force would be required to cause Ella's injuries, especially with the constellation of acute injuries observed.

*Documentary Evidence*

This Court reviewed the exhibits stated above, most of which supplement and support the testimony. Additionally, the respondents each submitted to mental health evaluations conducted by Health + Hospital Corporation's Family Court Mental Health Services clinic, and the Court carefully reviewed those portions of the evaluations that petitioner offered into evidence without objection.

The clinician who evaluated Ms. B. indicated that Ms. B.'s account of her parenting history is implausible. The doctor had concerns about Ms. B.'s ability to meet Liam's needs. Ms. B. continued to minimize and provide implausible explanations with regard to the injuries sustained by Ella in all three major incidents described in testimony and in the records. The evaluation concluded Ms. B.'s reporting of the reasons for court involvement likely reflects a combination of poor insight and knowing denial.

The Court also reviewed Mr. V.'s mental health evaluation, which clearly indicates Mr. V. believes all the court involvement is based on false allegations. Mr. V. denied any role in Ella's death and said the injuries did not occur when Ella was in his care. In fact, Mr. V. reported to the evaluator that the paramedics and hospital should be investigated. The evaluator raised significant concerns regarding insight into the harms the children have undergone and even stated there appears to be a lack of attunement/empathy and a lack of remorse given the statements made by Mr. V. during the evaluation.

*Decision*

In New York, the relevant statutory scheme stems from the Family Court Act as well as Social Services Law. In relevant part Social Services Law reads

"a child is severely abused by his or her parent if (i) the child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in subdivision 10.00 of the penal law."

SSL § 384-b(8)(a), *Matter of Dashawn W.*, 21 NY3d 36; *In re Amirah L.*, 118 AD3d 792, 793. The agency must establish the severe abuse by clear and convincing evidence. FCA §1051(e). Circumstances which demonstrate a depraved indifference to human life are not the same in cases of severe abuse as they are in penal law. *Dashawn W.* at 49. Where penal law crimes have distinctions based on culpable states of mind, a child can be found severely abused based on reckless or intentional acts of a parent. *Id.*

In conjunction with Social Service Law, the relevant Family Court Act section reads

"'Abused child' means a child less than eighteen years of age whose parent or other person legally responsible for his care

(i) inflicts or allows to be inflicted upon such child physical injury by other than [*7]accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or..."

FCA §1012(e)(i). In the instant case, Petitioner also seeks findings of neglect, which is governed by Family Court Act §1012(f), with the relevant section reading

"'Neglected child' means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care...

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment;...

FCA §1012(f). Additionally, Petitioner's case is predicated on a theory of derivative severe abuse. The New York Court of Appeals has held that a derivative severe abuse finding is appropriate where "the common understanding that a parent whose judgment and impulse control are so defective as to harm one child in his or her care is likely to harm others as well." *In re Marino S.*, 100 NY2d 361, 374 (2003). "It is additionally clear that children who are not themselves the direct targets of abuse may, in accordance with the proof, suffer damage from witnessing the severe abuse of their siblings." *Id.*

This case is further governed by Family Court Act § 1046(a)(ii) using the doctrine of res ipsa loquitor. *Matter of Philip M*., 82 NY2d 238 (1993) teaches that a prima facie case establishes a rebuttable presumption that the respondents abused the child as defined by Family Court Act § 1012(e). The respondents then have the burden to produce evidence to rebut the presumption. Even if the respondents produce no evidence, the petitioner always bears the burden of persuasion.

Here, the evidence overwhelmingly supports a finding of severe and repeated abuse, abuse, and neglect being entered against both Mr. V. and Ms. B. by clear and convincing evidence regarding Ella, and derivative claims regarding Liam. It is uncontroverted that Ella V. suffered unimaginable injuries to her body, head, and brain which were medically deemed to be inflicted and sustained as a result of her parents' actions or inactions through multiple incidents at various points in her short life. There is no doubt in this record that the child, Liam, age two, was present and observed the actions that led to Ella's injuries and death. Ms. W.'s uncontested testimony makes clear that the home was a small studio apartment. However, even if not present, the findings made regarding both respondents' fatal actions or inactions with regard to Ella are so

significant, they evince reckless conduct and a depraved indifference to human life. The fundamental flaw or defect in the respondents' understanding of the role of a parent and impaired judgment is abundantly evident.

Dr. Walker-Descartes and Dr. Baxter-Stoltzfus both testified credibly in support of their medical conclusions. Dr. Walker-Descartes detailed at least three separate but clear incidents of abuse inflicted upon Ella, which highlighted many injuries including skull fractures, brain bleeds, broken bones, and a bite mark, all in various stages of healing, that would cause a small [*8]child significant pain.

Dr. Baxter-Stoltzfus clearly testified that the cause of Ella's death was blunt force trauma to the head. The details and the careful assessment of each injury done by Dr. Baxter-Stoltzfus provide great insight into the pain Ella must have suffered at the hands of her parents, not just one time, but multiple times given the various acute and subacute medical findings.

Mr. V. and Ms. B. failed to rebut any of the evidence presented by Petitioner. Therefore, the facts as presented by the Petitioner are adopted as the factual findings on this case. The explanations provided by the parents, including Ella choking on her milk and EMS causing the injuries that led to Ella's death, are not just impossible in a purely logical sense, but insulting to her death. The Court draws a negative inference from their failure to be present for the majority of the testimony and failure to testify.

Any argument regarding the agency's failure to adequately supervise the children during the trial discharge, which this Court agrees exist as valid concerns, does not mitigate the culpability of Ms. B. and Mr. V. in the roles they each played in Ella's death. While it will not be known who inflicted the final injury that caused Ella's tragic demise in September of 2023, that is not the standard required for findings pursuant to the Family Court Act. Where there are two respondents, the petitioner bears the burden of proving, in a separate analysis of the evidence applied to each one of them, that it is more likely than not that each respondent caused (or allowed someone else to cause) the child's injuries. If there was only one incident of wrongdoing causing the injuries, then for petitioner to meet its burden as to both respondents, it must prove that each one was involved in that incident. Alternatively, the petitioner would have to prove that there were multiple incidents, and that each respondent was responsible for at least one of them in some capacity, either causing or allowing to cause.

Petitioner has done so here. Petitioner has proven at the prima facie stage that Ella suffered multiple incidents of inflicted injuries based on both doctors' dating of her injuries. Neither parent presented any evidence to rebut Petitioner's evidence, and the Court finds that petitioner has carried its ultimate burden of persuasion by clear and convincing evidence. Both parents were responsible for the children's safety and care at

the time of the incident in August 2022 and September 2023, and in fact entrusted with it when the Court ordered a trial discharge in June 2023. Even taking the most generous assumption to each parent, that only one of them inflicted the fatal injuries in September 2023, given the prior findings of this Court dated March 17, 2023, the other parent is just as culpable in recklessly permitting further abuse to occur, including Ella's death. *Matter of Jaiden H.*, 231 AD3d 478 (1st Dep't. 2024).

Furthermore, this Court finds that even if only one parent inflicted all the injuries, the other allowed it in a manner evincing a depraved indifference to human life as is evidenced by the various facts presented at trial. Both parents' complete disregard for the pain and suffering Ella must have felt due to her injuries, including multiple fractures all over her body, brain bleeds, and even a bite mark, shows an immense lack of regard for human life. Moreover, the fact that instead of actually seeking care, the respondent mother tried to prevent EMS from providing medical care to Ella, is further evidence of her lack of care for Ella's severe injuries. Shifting the blame of Ella's death to insist she choked on milk and/or EMS caused her death while trying to save her is especially concerning given that it minimizes the severity of the situation to a degree that is so depraved it is offensive to the children.

Most significantly, despite all the interventions and services done by the parents, the complete lack of remorse, accountability, and insight into the events that led to Ella's death and [*9]the injuries sustained in the thirteen months prior to Ella's death, especially highlighted in the mental health evaluations, are further evidence of the respondents' depraved indifference to human life. *See Matter of Amirah L.*, 118 AD3d 792 (2d Dep't. 2014). This evidence also supports a determination, pursuant to SSL § 384-b(8)(a)(iv), that efforts by the agency since Ella's death to encourage and strengthen the parents' relationship with Liam, and to rehabilitate the parents, have not been required, as such efforts would have been and presently are detrimental to Liam's best interests. It is amply evident, by clear and convincing evidence, that efforts made prior to Ella's death in this regard were not successful, and that additional efforts are likely to be unsuccessful for the foreseeable future.

*Order*

For the foregoing reasons, the Court hereby finds by clear and convincing evidence:

1. The respondent father, Johnson V.:

a. Severely abused Ella as per Social Services Law 384-b(8)(a)(i) and (iv)

b. Derivatively severely abused Liam

2. The respondent mother, Lafayette B.:

a. Severely abused Ella as per Social Services Law 384-b(8)(a)(i) and (iv)

b. Derivatively severely abused Liam

3. The respondent father, Johnson V.:

a. Abused Ella pursuant to Family Court Act 1012(e)

b. Derivatively abused Liam

4. The respondent mother, Lafayette B.:

a. Abused Ella pursuant to Family Court Act 1012(e)

b. Derivatively abused Liam

5. The respondent father, Johnson V.:

a. Neglected Ella pursuant to Family Court Act 1012(f)

b. Derivatively neglected Liam

6. The respondent mother, Lafayette B.:

a. Neglected Ella pursuant to Family Court Act 1012(f)

b. Derivatively neglected Liam

Dated: December 12, 2024
ENTER
Hon. Erik S. Pitchal, J.F.C.

**Footnotes**

**Footnote 1:**Both parents were present for the initial part of the trial, including the testimony of Dr. Walker-Descartes; however, they did not appear for any other witness or subsequent trial dates. Their attorneys participated fully in their absence.

**Footnote 2:**The injuries to Ella in August 2022 were the basis of a finding of neglect only, ACS having consented in March 2023 to not pursue an abuse finding. Dr. Walker-Descartes' opinion about Ella's August 2022 presentation was not presented to the Court until after Ella died. *Matter of Liam V.*, 82 Misc 3d at 369-70.

**Footnote 3:**This allegation, and Dr. Walker-Descartes' opinion about it was also not presented to the Court until after Ella died. *Liam V.* at 381 n.16.

## VISITATION- ARTICLE 10

**Matter of L.D.**, 84 Misc3d 1233(A) (Family Court, New York County)

On or about June 14, 2024, the petitioner the Administration for Children's Services (hereinafter referred to as "ACS") filed Family Court Act ("FCA") Article 10 neglect petitions on behalf of the subject children L.D., I.D. and J.D. (hereinafter referred to as the "subject children" or "L.D." "I.D." and "J.D.") against the respondent Mr. K.D. (hereinafter referred to as the "respondent father" or "K.D."). The respondent father now moves for an Order permitting [*2]him to have once a week supervised virtual visitation with the subject children while he is incarcerated. For the reasons set forth below, the motion is denied.

The neglect petitions in this case assert, inter alia, that the respondent K.D. failed to provide the subject children with proper supervision and guardianship based on allegations of excessive corporal punishment on the subject child J.D., who is two years old, and allegations of perpetrating acts of domestic violence against the non-respondent mother Ms. A.M. (hereinafter referred to as the "non-respondent mother" or "A.M.") in the presence of the children. Specifically, the petitions allege that on or about March 20, 2024, the respondent father slapped J.D. across the face, causing redness, swelling and bruises; that on or about April 5, 2024, the respondent father accused the non-respondent mother of cheating and then proceeded to strangle her, punch her in the face, menaced a metal stick at her while in the presence of the subject children and that the non-respondent mother sustained strangulation marks to her neck and bruises to her leg and arms; that on or about April 7, 2024, the respondent father threatened to kill the non-respondent mother with a sledgehammer, while in the presence of the subject children, causing the non-respondent mother to fear for her safety and run out of the home seeking police assistance; that on April 8, 2024, a full stay away order of protection was issued against the respondent father on behalf of the non-respondent mother and the subject children in Criminal Court; that on or about June 10, 2024, the respondent father entered the non-respondent mother's apartment, without the consent of the non-respondent mother and in violation of the Order of Protection, strangled the non-respondent mother and physically assaulted her using a sledgehammer and a razor in the presence of the subject children, specifically attacking her with a sledgehammer and repeatedly hitting her all over her body causing the non-respondent mother to sustain scratches and bruises to her neck, arm and leg; that on June 10, 2024, once the subject children went to sleep, the respondent father entered the non-respondent mother's bedroom and raped her, after which the respondent father went to bed and the

non-respondent mother called 911 to report the physical and sexual assault; that on or about June 13, 2024, the subject child I.D., who is five years old, disclosed that "my mommy was hurt all over her body and daddy left when it was bedtime," that the respondent father had a flat thing in his hand when he attacked the non-respondent mother and choked her, that the respondent father broke the television with a hammer and that there was a lot of arguing, screaming and yelling; that on or about June 13, 2024, the subject children disclosed that they were fearful of the respondent father and that they would feel more comfortable moving to a new home so "daddy won't beat up mommy; " and that on or about June 13, 2024, the subject child L.D., who is six years old, disclosed that she was scared during the June 10, 2024 incident.

On June 14, 2024, at intake on the neglect petitions, the Court temporarily released the subject children to the non-respondent mother, assigned her counsel and issued a full stay away temporary order of protection against the respondent father on behalf of the non-respondent mother and the subject children, with no carve out for visitation. At the next court appearance on June 20, 2024, the respondent father appeared, he was assigned counsel and he requested visitation with the subject children. Based on the nature of the allegations in the petitions, opposition to the application from ACS based on the allegations in the petitions and the request made by the attorney for the children that she be given time to speak with the subject children about their position on visitation with the respondent father, the Court denied the visitation application.

Thereafter, at a court appearance on July 3, 2024, the respondent father again requested [*3]visitation with the subject children. ACS, the non-respondent mother and the attorney for the children vehemently opposed the application. Specifically, the attorney for the children asserted that she had spoken with the two older subject children, I.D. and L.D., who stated that they love their father and do want to see him, but that they are scared to see him, that they expressed concern that the respondent father was going to hurt them like he hurt their mother and that they were still very focused on the alleged brutal attack on their mother by the respondent father with a hammer that they allegedly witnessed. The attorney for the children also requested that ACS make a referral for mental health services for the subject children. The Court denied the respondent father's visitation application on the ground that there would be an emotional safety risk to the subject children if visitation were to occur. The Court also ordered ACS to make referrals for mental health services for the subject children and stated that it would reassess visitation after hearing from the subject children's mental health provider as to their emotional well-being as it relates to visitation with their father.

The respondent father now moves for an Order that he be granted once a week supervised virtual visitation with the subject children while he is incarcerated. He argues that under the FCA, he is entitled to visitation with the subject children as a respondent

parent, that he has not had visitation with the subject children since the neglect case was initiated in June 2024 and that as virtual supervised visitation is the most restrictive type of visitation a respondent can have, such visitation should be ordered.

The respondent father's motion for an Order that he be granted once a week supervised virtual visitation with the subject children while he is incarcerated is denied. Pursuant to FCA 1030(c),

"A respondent shall be granted reasonable and regularly scheduled visitation unless the court finds that the child's life or health would be endangered thereby, but the court may order visitation under the supervision of an employee of a local social services department upon a finding that such supervised visitation is in the best interest of the child."

"[T]he presumption that parental visitation is in the best interests of a child [may be] overcome by . . . evidence showing that visitation with respondent would not be in [the child's] best interests" (*In re Giovanni H.B.*, 172 AD3d 489 [1st Dept 2019]).

The respondent father's motion is denied as the Court finds that visitation with the respondent father is not in the subject children's best interest at this time as it would pose a risk to the subject children's emotional health and well-being. At argument on the motion, the Court received a letter from the subject children's psychotherapist. Specifically, the subject children's psychotherapist states in her letter, in pertinent part, as follows:

"The main goal of [Child-Parent Psychotherapy] CPP is to support and strengthen the relationships between young children and their caregivers, and to help them heal from stressful and traumatic events. There are three phases of CPP: Foundational, Core Intervention, and Termination. [the non-respondent mother] and her three children are still in the foundational phase, the focus of which is to complete assessments with the family to assess the extent of everyone's trauma and identify any trauma related symptoms . . . .The family is expected to complete the foundational phase by the end of November 2024.

Once this phase is completed, the family will begin the core intervention phase where [*4]play therapy will begin. At this time, as I have only completed five sessions with the family, I cannot provide an accurate assessment of the children's readiness to have visits with their father. I would like to be able to fully assess the children's trauma by completing all assessments needed and then beginning the core intervention phase of treatment with the family, which includes play therapy. Through play therapy, I would like to explore with the children their relationship with their father, [K.D.]. As well as begin to address the children's emotions, feelings and thoughts of experiencing and

witnessing many violent acts by their father against their mother. I will be able to give a more accurate report on the children's readiness for visits with their father by the end of December 2024."

In addition, the Court heard testimony from the subject children's psychotherapist that during her sessions with the family, the subject children have exhibited symptoms of trauma which need to be explored in order to properly evaluate any risk that visitation with the respondent father might pose. The Court also heard from the attorney for the children, who stated that she spoke to the two older subject children again about their position on visiting with the respondent father and that while the subject children express desire to see their father, they also express apprehension and fear about seeing him based on what they allegedly witnessed their father do to their mother and worry about whether the respondent father will hurt them too. The attorney for the children also argued that due to the young ages of the subject children, specifically, six, five and two years old, the Court should wait for further information and assessment from the subject children's psychotherapist, before granting visitation. ACS also opposed the motion based on the very young ages of the subject children, the allegations in the petition and the subject children's fear about seeing the respondent father.

Based on the foregoing and given the young ages of the subject children and the evidence that their emotional health would be at risk, the Court finds that it is not in the subject children's best interest to have visitation with the respondent father at this time. As the subject children continue in their mental health treatment with their psychotherapist, the Court will reassess whether the respondent father may be permitted to have visitation with the subject children, based on progress reports from the subject children's psychotherapist as well as hearing from the attorney for the children. If the respondent wishes to do so, he is permitted to write letters to the subject children, which shall be reviewed by ACS prior to being given, or read, to the subject children, until such time as agency supervised visitation begins. The matter is adjourned until November 19, 2024 at 11:00 AM for a conference before the Court at which time the respondent father may renew his application for visitation with the subject children.

This constitutes the decision and order of the Court.