# CHILD WELFARE CASELAW REVIEW

Cases Reported From July- December, 2024

2025 NYPWA Winter Conference- January 30, 2025

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# Introduction

These cases represent the appellate level child welfare related cases between July 1, 2024 and December 31, 2024 from our review of the Slip Opinions posted on the OCA website. There are also a few trial court level cases in this PowerPoint, and those and some other trail court level cases included at the end of the materials.

# Introduction

Although we hope that we found all relevant cases, do not assume that this 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.

# Introduction

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 yet 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) Bronx County- reversed on the law and an expedited hearing directed, with no further adjournments except for good cause shown.

- Mother filed an application on January 31, 2024, requesting the return of her children, or alternatively, for a 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. Family Court denied the application and held that the court complied with 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.
- FCA §1028 provides for an expedited hearing. Upon an application of a parent whose child has been temporarily removed, except for good cause shown, such hearing shall be held within three court days of the application and shall not be adjourned.

Continued…

# Preliminary Proceedings

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

- 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 within the Family Court's discretion. 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. 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.
- The 1st Dept. declined to set a specific deadline for completion of the hearing. However, the court was 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. It also cautioned 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.

# Preliminary Proceedings

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

Mother appealed from an order that granted the application pursuant to FCA §1027 to remove the child from the custody of the mother and place the child in the custody of DSS pending the outcome of the proceeding.

- After a 1027 hearing, Family Court granted the application and placed the child in the custody of the petitioner pending the outcome of the neglect proceeding.
- Although the child had been returned to the mother's care, the mother's appeal was not academic. The child's removal created a permanent and significant stigma.
- There was 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. The decision did not go into the facts- skip

# Preliminary Proceedings

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

- 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.
- In December 2022, the Family Court issued an order directing the temporary removal of the subject child pursuant to Family Court Act §1022. Petitioner commenced an article 10 against the mother and a related proceeding against the father, alleging 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, Suffolk 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. Family Court granted that application. The mother filed a §1028 application, which after a hearing, the court granted 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.
- 2nd Dept. reversed, finding that 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. 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.

# Preliminary Proceedings

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

- ACS commenced an Article 10 proceeding alleging that the mother neglected the subject child Ahmed L. M. by failing to provide proper supervision and guardianship. ACS temporarily removed the child from the mother's custody, and then moved to vacate an order dated November 17, 2020 releasing the child to the custody of the mother, and to issue a full stay-away order of protection in favor of the child and against the mother. Mother made a 1028 application for the return of the child to her custody. After a hearing, Family Court granted ACS's motion.

- There was 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. No discussion of the facts in this decision- Skip

# Preliminary Proceedings

**Matter of Ayanna O.**, AD3d 2024 NY Slip Op 06642 (3rd Dept., 2024) St. Lawrence County- affirmed.

- Following reports that the children had missed a significant number of school days in the 2023-2024 school year, among other things, DSS filed four neglect petitions against the mother, alleging educational neglect and lack of supervision. Upon the mother's initial appearance on February 26, 2024, Family Court issued temporary orders of supervision which required the mother to undergo a MH evaluation and cooperate with any recommended treatment.

- During the evaluation, the mother reported various conspiratorial ideations that led her to believe that the children would be trafficked or harmed at school. 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. 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.

- Based upon information contained in the mother's MH evaluation and the children's school progress reports, DSS sought to temporarily remove the children from the home pursuant to FCA §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 DSS.

Continued…

# Preliminary Proceedings

**Matter of Ayanna O.**, AD3d 2024 NY Slip Op 06642 (3rd Dept., 2024) St. Lawrence County- affirmed.

- As to the mother's assertion that the notice of the removal hearing was deficient, the 3rd Dept. noted that petitioner's application comports with the statutory requirements. Further, the removal hearing was held in accordance with the statute and, at the hearing, the mother was represented by counsel and had a full opportunity to be heard.

- 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, 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.

Continued…

# Preliminary Proceedings

**Matter of Ayanna O.**, AD3d 2024 NY Slip Op 06642 (3rd Dept., 2024) St. Lawrence County- affirmed.

- The 3rd Dept. made some observations in footnotes to the decision:

  - The neglect petitions alleged 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.
  - According to the primary caseworker, the mother declined substance abuse treatment because she was "past [90] days sober."
  - 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 were outside the record, the 3rd Dept. declined to consider them.
  - The 3rd Dept. expressed concern about the use of a negative inference against a parent who declines to testify at a removal hearing, but said that since they reached their determination of the appeal *without* the use of such inference- that it need not reach the mother's contention.

# Evidentiary Rulings in Article 10 Proceedings

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

- Not an Art. 10 case, but, in this Art 8 violation case Family Court was affirmed in finding that 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.

# Evidentiary Rulings in Article 10 Proceedings

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

- The admissible evidence, including 911 calls placed by the mother's adult son supported 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. In addition, the adult son's 911 call, as well as statements made by the child to a caseworker, supported the finding that the mother neglected the child by regularly drinking to excess without participating in or completing an alcohol treatment program.

- 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. The mother did 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. 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. 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, was entitled to deference on appeal.

- 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. Proof of neglect as to one child is admissible evidence of neglect as to another child Although petitioner did not seek to establish that the child was derivatively neglected based on the mother's prior neglect of 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.

# Evidentiary Rulings in Article 10 Proceedings

**Matter of N.J. (S.H)**. Misc3d 2024 NY Slip Op 24318 (Family Court, Kings County, 2024)

- ACS filed an Article 10 alleging that the mother and stepfather of the child 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 the step-father was also arrested for allegedly sexually assaulting the child on a different occasion.
- By the time the trial in the Family Court case began, the assault-related criminal charges had been dismissed against both respondents, but the sexual assault charges against stepfather remained pending in Criminal Court.
- At the trial, ACS sought to introduce into evidence, among other things, various records from the NYPD**,** including Domestic Incident Reports ("DIRs") and Body Worn Camera recordings ("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.
- CPL §160.50(1)(c) does not require sealing of 911 recordings, DIRs and BWCs that may relate to an underlying criminal case that was dismissed and sealed. The Court permitted the admission of certain DIRs and BWCs at the trial.
- With respect to other police reports that were admitted- such as complaint reports, follow-up reports and other documents, the Court found that those should not be sealed either, at least not yet. 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, those records were still related to the sexual assault allegations and thus would not yet have been subject to sealing.

# General and Mixed Neglect

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

- 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.

- Mother'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.

- 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.

- This single incident was sufficient to support a finding of neglect because mother's judgment was strongly impaired, exposing the children to a substantial risk of harm. The court also properly relied on a 2021 neglect finding against the mother in connection with her stabbing her ex-boyfriend with a knife in the children's presence because those prior findings were sufficiently close in time to the instant petition and also involved respondent physically attacking another individual.

# General and Mixed Neglect

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

- ACS alleged that the father neglected the child by permitting the child to have contact with the nonrespondent mother in violation of a temporary order of protection. 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.
- 2nd Dept. held that ACS failed to establish 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.

# General and Mixed Neglect

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

- ACS commenced this proceeding alleging that the father neglected the child by misusing drugs and perpetrating an act of domestic violence against the mother in close proximity to the child.

- 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.

Skip

# General and Mixed Neglect

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

- Suffolk filed against mother and father, alleging they failed to provide the child with proper care, supervision, and guardianship.

- The evidence established that the mother maintained the child's home in a deplorable and unsanitary condition and that the mother failed to provide the child with appropriate hygiene and dental care. The evidence also demonstrated that the mother did not provide the child with adequate supervision at the family home. 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.

- Contrary to the mother's contention, Family Court providently exercised its discretion in directing her to undergo a forensic parenting evaluation.

- This decision did not go into detail on the facts-skip

# General and Mixed Neglect

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

- In 2005 Westchester County DSS filed an Article 10 petition alleging that the mother neglected the subject children. The mother failed to appear at the fact-finding and dispositional hearings on the petitions, which were heard on inquest. Family Court found that the mother neglected the children and placed them in DSS's custody.

- In 2008 the court determined that the mother permanently neglected the two youngest children, terminated her parental rights, and transferred guardianship of those children to DSS for the purpose of adoption. 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 the 2005 neglect 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 the 2nd Dept. affirmed.

- The mother's appeal was 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.

- The decision did not discuss the 19- year delay between the 2005 neglect findings and this appeal.

# General and Mixed Neglect

**Matter of John O.**, 230 AD3d 1385 (3rd Dept., 2024) Otsego County- affirmed, except as to the finding related to domestic violence

- Respondent is the mother of three children. Robert P. 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.
- 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. 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 father's residence a few doors down to get them logged onto their computers and monitor them.

Continued…

# General and Mixed Neglect

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

- 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 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.
- As to the finding of neglect against the mother based on exposing the children to domestic violence, the record made 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. However, the record demonstrated 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 risk of impairment.

# General and Mixed Neglect

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

- In August 2021, the father and the children's mother lived in an apartment in Schenectady and owned a house that they were renovating in Petersburgh, Rensselaer County. The mother filed a family offense petition alleging that the father verbally and physically abused her and the children. She specifically alleged that while at the Petersburgh home, father placed a loaded gun to her head in front of the children. She also alleged that in the past he had threatened to kill both her and the children. Family Court issued a t.o.p. requiring respondent to stay away from mother and children. Based on this order of protection and the receipt of a hotline report, DSS made a protective removal of the children, placed them in foster care, and then filed a neglect petition.

- 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 there, they found it to be in a deplorable condition and returned the children to foster care. DSS 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.

# General and Mixed Neglect

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

- In October 2021, 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 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 found the children to be neglected by him for failing to provide them with a safe and sanitary home environment.

- One 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.

Continued…

# General and Mixed Neglect

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

- 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, consisting of personal objects, cleaning supplies, clothing, dirty and unsanitary dishes and numerous personal belongings throughout the home.

- The caseworker further 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.

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# General and Mixed Neglect

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

- The court was entitled to draw a strong adverse inference against the father based on his failure to testify at the fact-finding hearing.

- Family Court did not abuse its discretion in 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. 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, the record disclosed that the father had reasonable advanced notice of the proof of the conditions of the Schenectady apartment and an opportunity to respond and has failed to demonstrate that he was either surprised or prejudiced as a result of the amendment of the pleadings.

# General and Mixed Neglect

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

- 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. 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. 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.
- 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.

# General and Mixed Neglect

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

- 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. Actual impairment or injury is not required but, rather, only near or impending injury or impairment is required.

- The mother's contention that Family Court erred in considering certain hearsay evidence was not preserved for review.

- DSS also established that the younger child was derivatively neglected- the evidence demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to the younger child.

Skip

# Child Medical Care

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

- 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.

- Petitioner's evidence established that the child was born with a genetic disorder that caused him to have a severely 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. 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. 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.

# Parental Mental Health

**Matter of M.M.**, 232 AD3d 419 (1st Dept., 2024) New York County- affirmed.

- 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.

- 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.

- Whether or not the admissible evidence established that the mother had previously been diagnosed with bipolar disorder was not dispositive, as a definitive diagnosis is not required where, as here, the evidence supported a finding that the mother suffers from a mental illness that impedes her ability to care for the children.

- 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.

- 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.

# Parental Mental Health

**Matter of Wynter,** 230 AD3d 505 (2nd Dept., 2024) Family Court, Queens County- affirmed

- 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.
- 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.
- There was a sound and substantial basis in the record for the determination that the child would be at imminent risk if returned to the mother's care during the pendency of the proceeding. 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.

Skip

# Parental Mental Health

**Matter of Caia N.**, 231 AD3d 1033 (2nd Dept., 2024) Kings County- reversed, a finding made that the mother neglected the child, and remitted to Family Court for a dispositional hearing.

- ACS filed a neglect petition alleging that the mother had neglected the child by perpetrating acts of violence against the maternal grandmother in the presence of the child. At the fact-finding hearing, ACS presented evidence that the mother had an untreated mental illness. After the hearing, the Family Court dismissed the neglect petition.
- 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. 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. 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.
- Contrary to Family Court's determination, ACS established 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. 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.

# Parental Mental Health

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

- ACS alleged 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 (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.

- In an MBP case, prima facie case 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 at the time the injury occurred 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.

- ACS presented 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. ACS provided overwhelming evidence that the mother subjected Ester K. to unnecessary medical treatment by reason of MBP.

- Mother 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.

# Parental Mental Health

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

- Shortly after the subject child was born, DSS removed the child from the care and custody of the parents on an emergency basis. DSS thereafter filed petitions alleging that the parents had neglected and derivatively neglected the child. 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. 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.
- At the hearing, a psychologist, provided testimony about the parental capacity evaluations he conducted with the mother in 2013 and 2019. He had 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, he 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. Another psychologist testified to his evaluations of the mother in January 2015 and December 2015, and substantively echoed the other psychologist's conclusions relative to the mother's inability to effectively parent at that time and for the foreseeable future.

Continued…

# Parental Mental Health

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

- As to the father, a psychologist 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 the psychologist acknowledged that antisocial personality disorders can occasionally improve with treatment or age, he 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 reflected that the father's anger issues continued to manifest themselves in recent interactions with DSS and an incident involving law enforcement. Overall, the psychologist 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 reflected 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 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.

Continued…

# Parental Mental Health

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

- For similar reasons, the 3rd Dept. also found that Family Court's determination that the child was derivatively neglected was sufficiently supported. It rejected 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. 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, were not so attenuated as to foreclose an assessment of whether the impairment in parental judgment continued to exist at the time of the hearing
- On that inquiry, the most recent neglect findings from 2019 stemmed from, among other things, the parents' respective intellectual disabilities and adaptive deficits, along with other related mental health concerns. The record reflected that the parents continuously denied or minimized those conditions and demonstrated 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, reflected marginal participation in those interventions and their lack of insight into the need to do so. Altogether, the record amply supported 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.

# Parental Substance Abuse

**Matter of Mykel B.**, 232 AD3d 781 (2nd Dept., 2024) Kings County- affirmed the order that dismissed the petitions.

- 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, ACS filed an Art. 10 alleging that the mother neglected the children due to repeated misuse of a drug or drugs.

- The 2nd Dept. held that although it was uncontested that the mother used cocaine, that ACS 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.

- Moreover, ACS 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.

- In the absence of any evidence of repeated drug use to the extent required by FCA §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 was insufficient to establish a prima facie case of neglect.

# Domestic Violence

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

- 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. 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.
- The evidence also showed that the mother failed to provide the child with adequate dental hygiene and care. The child's medical records established that the child was found with "severe dental caries" after being examined at the hospital. 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.

# Domestic Violence

**Matter of A.A.**, 232 AD3d 507 (1st Dept., 2024) New York County- affirmed.

- 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 were 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.

- The mother's account of the events was corroborated by A.A.'s out-of-court statements to the caseworker about the incident. Despite appellant's position otherwise, A.A.'s statements to the caseworker did 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.

- The father chose not to testify during the hearing, and the court properly credited the mother's version of events in making its findings.

- 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, rendering the appeal from that portion of the order as moot. In any event, in light of the findings of neglect, the imposition of supervised virtual visitation was in the children's best interests. skip

# Domestic Violence

**Matter of E. L.**, 232 AD3d 546 (1st Dept., 2024) New York County- affirmed.

- Contrary to the father's contention, the evidence showed 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 established 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.**

- The father's argument concerning petitioner's purported failure to have the maternal grandmother testify at the fact-finding hearing was unpreserved and unavailing. The father never sought a missing witness charge during the fact-finding hearing, and there was no evidence that the grandmother witnessed the incident.

# Domestic Violence

**Matter of J.A.**, AD3d 2024 NY Slip Op 06114 (1st Dept., 2024) New York County- affirmed.

- 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.**

- 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, 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.

- 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.**

# Domestic Violence

**Matter of Asani J.**, 229 AD3d 551(2nd Dept., 2024) Suffolk County- reversed and remanded to complete the fact-finding hearing.

- Family Court granted 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 and dismissed the petition.
- At the fact-finding hearing, petitioner offered, among other things, a recording 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, petitioner presented a prima facie case of neglect against the mother.

# Domestic Violence

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

- 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.
- The court providently exercised its discretion in drawing a negative inference against the father for his failure to testify.
- 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. In any event, any error in admitting the mother's statements was harmless, as there was sufficient evidence of neglect without considering those statements.

Skip

# Domestic Violence

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

- Respondent is the mother of twins 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.
- 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 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.
- 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, while the events of the day would lead to a heightened emotional state in any parent, 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 to the children.

# Excessive Corporal Punishment

**Matter of Veronica M.**, 229 AD3d 626 (2nd Dept., 2024) Court, Kings County- affirmed the finding of 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.
- The record supported the court's finding that the in-court recantation of one of the children's allegations was not credible
- Negative inference drawn from the mother's failure to testify. skip

# Excessive Corporal Punishment

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

- A single incident of excessive corporal punishment may suffice to sustain a finding of neglect.
- Siblings' out-of-court statements may cross-corroborate each other when they independently and consistently describe similar incidents of abuse or neglect.
- Family Court may disregard a child's recantation of a prior allegation if the court determines that the recantation is not credible.

Skip

# Excessive Corporal Punishment

**Matter of Elina M.**, AD3d 2024 NY Slip Op 06574 (2nd Dept., 2024) Kings County- reversed and petition dismissed.

- In June 2021 ACS filed a petition 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 "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.“



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# Excessive Corporal Punishment

**Matter of Elina M.**, AD3d 2024 NY Slip Op 06574 (2nd Dept., 2024) Kings County- reversed and petition dismissed.

- 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, 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."

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# Excessive Corporal Punishment

**Matter of Elina M.**, AD3d 2024 NY Slip Op 06574 (2nd Dept., 2024) Kings County- reversed and petition dismissed.

- 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.

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# Excessive Corporal Punishment

**Matter of Elina M.**, AD3d 2024 NY Slip Op 06574 (2nd Dept., 2024) Kings County- reversed and petition dismissed.

- The 2nd Dept. also found 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 was 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.“

- The 2nd Dept. held that although it has held that a single incident of excessive corporal punishment can constitute neglect, that that the facts of the present case did not rise to a level supporting a finding of neglect. The decision reviewed and compared prior holdings and to serve as a guide to the courts in making the proper determination in each case before them.

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# Excessive Corporal Punishment

**Matter of Elina M.**, AD3d 2024 NY Slip Op 06574 (2nd Dept., 2024) Kings County- reversed and petition dismissed.

- 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." The 2nd Dept. held that it was 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. 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. Mere "repetition of an accusation by a child does not corroborate the child's prior account of it." 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.

# Excessive Corporal Punishment

**Matter of Shayla G.**, AD3d 2024 NY Slip Op 06042 (2nd Dept., 2024) Richmond County- affirmed.

- 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 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. The court conformed the pleadings to the proof and made a neglect finding based upon domestic violence.

- The mother was not prejudiced by the Family Court's determination to conform the pleadings to the proof. The mother testified to the events alleged in the petitions, 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. 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.

- 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. 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.

# Excessive Corporal Punishment

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

- Respondent 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 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.

- A caseworker employed by petitioner testified as to how she interviewed several individuals, including the older child. The older child told her that the father "smacked 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 also spoke to the caseworker and said that they had seen the father strike the older child. One of those children 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.“

Continued…

# Excessive Corporal Punishment

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

- Family Court credited that proof over the father's denials in his own testimony and, according deference to that assessment of credibility, the 3rd Dept. was satisfied that a sound and substantial basis existed in the record for Family Court's determination that the father had neglected the older child by subjecting him to excessive corporal punishment.

- 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.

# Sexual Abuse

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

- Respondent, whom the child considered to be a stepfather, was found to have sexually abused and neglected the child.
- 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
- The court could properly infer appellant's intent to gain sexual gratification from touching the child's breasts from the acts themselves.

# Sexual Abuse

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

- The evidence supported Family Court's determination that the grandfather abused the child by committing the offense of forcible touching under Penal Law §130.52. 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.

- The 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.

- The grandfather maintained that his conduct was intended to be a joke, which Family Court did not find to be a credible explanation. His status as a person legally responsible for the child and their close relationship provided 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.

# Sexual Abuse

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

- **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.**

- 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. 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. 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. The absence of physical injury to the subject child is not fatal to a finding of sexual abuse.

- 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.

Continued…

# Sexual Abuse

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

- Manuel R.'s sexual abuse of the subject child demonstrated a fundamental defect in understanding of his parental obligations, supporting a derivative abuse finding of the younger child.

- 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. Moreover, the mother repeatedly dismissed the subject child's allegations and continued to side with Manuel R. without any concern for the subject child. 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.

# Sexual Abuse

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

- 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

- 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. 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 contained 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 corroborated A.M.'s account.

Continued…

# Sexual Abuse

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

- 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.

- Based upon appellant's behavior which evinced such an impaired level of judgment as to create a substantial risk of harm 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. 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.

# Sexual Abuse

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

- The that appellant was a person legally responsible for his niece, I.M. was 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.

- 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.

- 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. The record contained observations, including by I.M's therapist and stepfather, that, after I.M. disclosed the sexual abuse, she demonstrated fear, anxiety, distress, and trauma. Additional corroboration was provided by the facts that I.M.'s account included specific details and reflected "age-inappropriate knowledge of sexual behavior." Furthermore, the court was entitled to draw the strongest negative inference against appellant for his failure to testify.

- 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. The evidence that appellant sexually abused I.M. while their families were living in the same residence demonstrated a fundamental defect in his understanding of the duties of parenthood.

# Sexual Abuse

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

- 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. 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.

- 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.

- There was 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. 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.

- 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. A finding of derivative abuse is appropriate regardless of whether the younger children were aware of the abuse. Although two of the 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.

# Sexual Abuse

**Matter of Kenyana D.**, 229 AD3d 544 (2nd Dept., 2024) Kings County- reversed, petition reinstated, a finding made that the father abused the subject child, and remitted to Family Court for a dispositional hearing.

- After a fact-finding hearing, Family Court found that the father abused the child. 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, and after a reopened fact-finding hearing, it found, in effect, that the father successfully rebutted the petitioner's prima facie showing of sexual abuse and dismissed the petition.
- 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. The child's testimony was sufficient to establish a finding of sexual abuse.
- 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.
- The 2nd Dept. found that 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.

# Sexual Abuse

**Matter of Jahmere W.**, 230 AD3d 1325 (2nd Dept., 2024) Court, Kings County- affirmed

- 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. 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.
- 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. 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.
- Family Court's finding that the father sexually abused Jahmere W. was supported by a preponderance of the evidence. 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.
- The Family Court also properly found that the father derivatively abused Sincere W.. 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. No discussion of the facts.- skip?

# Sexual Abuse

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

- In July 2021, ACS commenced these proceedings pursuant to FCA article 10, alleging that Romulo M. sexually abused the child Adrianna G. and derivatively abused the children Oscar P. and Leah P. Following a fact-finding hearing, Family Court found that the appellant was a person legally responsible for the care of the subject children, who are his step-grandchildren, that he sexually abused the child Adrianna G., and that he derivatively abused the children Oscar P. and Leah P.
- 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.
- The appellant's contention that he was not a person legally responsible for the children was without merit. Note- the decision did not go into the facts of this issue- skip?

# Sexual Abuse

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

- 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. The Family Court's credibility determinations are supported by the record and will not be disturbed on appeal.
- Further, Family Court correctly concluded that the appellant derivatively neglected Alejandro C. 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.

The decision did not go into any detail as to the facts- skip?

# Sexual Abuse

**Matter of Davena A.**, 232 AD3d 595 (2nd Dept., 2024) Richmond County- reversed, the petitions reinstated, a finding 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 remitted to Family Court for a dispositional hearing.

- ACS commenced proceedings alleging that the father derivatively abused and neglected his daughters 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 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.

- In this case 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.

Continued…

# Sexual Abuse

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

- The finding of derivative abuse and neglect was 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. The evidence demonstrated that the father's parental judgment and impulse control were so defective as to create a substantial risk to any child in his care.

- 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.

# Sexual Abuse

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

- The evidence, including the testimony of the child Jovanni A. O. C., was sufficient to prove by a preponderance of the evidence that the grandmother sexually abused Jovanni A. O. C. and neglected Jovanni A. O. C. by inflicting excessive corporal punishment on him.

- The 2nd Dept. also affirmed the finding that the grandmother derivatively abused and neglected Esther R.-M. D. The evidence demonstrated 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. Skip?

# Sexual Abuse

**Matter of Gabriella X.**, 232 AD3d 1083 (3rd Dept., 2024) Ulster County- reversed and the petition dismissed.

- In July 2021, DSS 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. At the fact-finding hearing, at the close of DSS'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.

- At the hearing, DSS offered the testimony of the children's mother, two caseworkers, and the video recording of the oldest child's interview with the Orange County DSS 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.

Continued…

# Sexual Abuse

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

- The record revealed 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, petitioner did not present the oldest child as a sworn witness. 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 was not relevant to the appellate review.

- 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.

# Sexual Abuse

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

- At issue was the admission into evidence of home surveillance videos depicting the abuse.
- 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.

continued…

# Sexual Abuse

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

- 4th Dept. agreed that the videos were sufficiently authenticated and that any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility. 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" 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. There was also the significant fact that the mother did not dispute that. 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. The 4th Dept. concluded that petitioner established that the videos accurately represented the subject matter depicted, and that the court acted within its "founded discretion" in admitting them in evidence.

continued…

# Sexual Abuse

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

- Because the mother failed to testify, the court was permitted to draw the strongest inference that the opposing evidence permitted. 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. 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.
- 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
- The dissent disagreed with the conclusion that the video was properly authenticated, with the finding of abuse against the mother and with the derivative abuse finding regarding the son.

# Physical Abuse

**Matter of Jaycob S.**, 229 AD3d 1058 (4th Dept., 2024) Steuben County- Affirmed the finding of abuse and derivative neglect, but vacated the “complete stay-away order of protection" as against the grandfather.

- The respondents were the maternal grandfather and his stepsister
- Petitioner established that Jaylynn J. suffered numerous injuries that "would ordinarily not occur absent an act or omission of respondents." 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. Respondents failed to rebut the evidence of culpability.
- The court properly determined that respondents derivatively neglected Jaymes S. and Jaycob S. While 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 a court will not consider older child protective determinations. The evidence adduced at the fact-finding hearing concerning Jaylynn J. indicated that Jaymes S. and Jaycob S. were equally at risk.
- The 4th Dept. did agree with respondent grandfather that the court erred in imposing orders of protection against him pursuant to Family Court Act §1056(4), as that section 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.

# Physical Abuse

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

- 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. 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. Additionally, the child abuse specialist pediatrician opined that the child had "suffered multiple traumas" rather than only one.
- Petitioner also established that respondents were the caretakers of the child at the time the injuries occurred. 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 was not fatal to the establishment of a prima facie case of abuse. Instead, the presumption of culpability created extends to all of a child's caregivers, especially when they are few and well defined, as in the instant case. 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 the.
- Respondents failed to offer any explanation for the child's injuries and simply denied inflicting them.

# Physical Abuse

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

- 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.

- A doctor who was board certified in child abuse pediatrics testified that she examined the child at the hospital. 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.

Continued…

# Physical Abuse

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

- Petitioner's investigator also testified 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, testified on their own behalf, and 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.

Continued…

# Physical Abuse

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

- The mother contended on appeal that, because Daniel recovered quickly, the injuries that were inflicted did not constitute the requisite serious physical injuries. mother, however, failed to preserve that contention for review since she failed to raise that contention before the trial court. In any event, the 4th Dept. concluded that the contention lacked merit as the injuries were clearly inflicted and not accidental and those injuries created a substantial risk of much more serious injuries.

- Mother further contended that the evidence was legally insufficient to establish that she inflicted or allowed to be inflicted those injuries to Daniel. The 4th Dept. held that it has repeatedly upheld abuse findings in similar situations. Where, as here, petitioner submits proof of injuries sustained by a 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. The presumption of culpability extends to all of a child's caregivers, especially when they are few and well defined, as in this case. The mother failed to rebut the presumption that she and the father, as Daniel's parents and sole caregivers, were responsible for his injuries.

Continued…

# Physical Abuse

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

- The 4th Dept also rejected the mother's contention that the finding that she caused the injuries is not supported by a sound and substantial basis in the record. 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 its review of the record, The 4th Dept. could not say 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.

# Physical Abuse

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

- DSS 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. 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.

- The abuse of the middle child was so closely connected with the care of his siblings as to indicate that those children are equally at risk. The abuse demonstrated such an impaired level of judgment by the mother as to create a substantial risk of harm for any child in her care.

# Severe Abuse

**Matter of Liam V.**, Misc3d 2024 NY Slip Op 51692(U) (Family Court, Kings County, 2024)

- Family Court made 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 was uncontroverted that Ella V. suffered 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 was no doubt in the 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 made 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 were 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 was abundantly evident.

# Permanency Hearings

**Matter of AL.C.**, 229 AD3d 418 (1st Dept., 2024) Bronx County-affirmed as modified.

- Affirmed the denial of the application of ACS to discontinue supervised visits between the former foster mother and the subject children, but…
- Modified, 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.
- The majority noted that the former foster mother has no right to request visitation, but it held that ACS had permitted visitation in the past, and the Family Court had the authority to continue the visitation to **advance the children's well-being.**
- The dissenting justice felt that this decision, notwithstanding the majority stressing that it was limited to this case, now creates a right for other legal strangers to a child to request visitation.

# 1061

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

- In February 14, 2017, Family Court found, among other things, that the appellant, the romantic partner of the mother of the child, neglected the child.

- In September 2020, appellant moved to vacate so much of the February 2017 order as found that he neglected the child.

- Here, the record demonstrated that the appellant failed to establish good cause to vacate the finding of neglect against him. Moreover, he failed to demonstrate that vacating the finding of neglect would be in the best interests of the child.

- Skip

# TPR’S...
# AND MORE

# General

**Matter of Pandora S.D.**, 231 AD3d 575 (1st Dept., 2024) New York County- affirmed.

- 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. 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 had the authority to conform the pleadings to the proof, *sua sponte*.
- The finding of permanent neglect also was supported by clear and convincing evidence. The agency met its obligations to make diligent efforts as to both parents. 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.
- **Contrary to the father's argument, he provided 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.**

# General

**Matter of Sa'Nai F. B. M. A.**, 232 AD3d 597 (2nd Dept., 2024) Kings County- reversed and remitted to Family Court for further proceedings.

- In March 2017, petitioner commenced this proceeding to terminate the mother's parental rights 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 multiple court appearances from November 2017 through February 2019.

- In April 2019, in the midst of the fact-finding hearing, 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 that the mother had permanently neglected the child.

Continued…

# General

**Matter of Sa'Nai F. B. M. A.**, 232 AD3d 597 (2nd Dept., 2024) Kings County- reversed and remitted to Family Court for further proceedings.

- 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 upon a decision dated September 16, 2021, Family Court found that the mother permanently neglected the child and terminated her parental rights.

- A respondent in a proceeding pursuant to SSL §384-b has the right to the assistance of counsel. A party may forfeit the fundamental right to counsel by engaging in "'egregious conduct,'" but only as a matter of "'extreme, last resort.'" Here, the record failed 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.

- The deprivation of the mother's right to counsel required reversal without regard to the merits of her position. Accordingly, the 2nd Dept. reversed the order of fact-finding and disposition, and remit the matter to the Family Court 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.

# General

**Matter of Parker J.**, 232 AD3d 1244 (4th Dept., 2024) Onondaga County- affirmed.

- The record, viewed in totality, revealed that the mother received meaningful representation during the time that counsel represented her.

- The mother also contended that she did not knowingly, intelligently, and voluntarily waive her right to counsel. 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 engaged in the requisite "searching inquiry" to ensure that the mother was aware of the dangers and disadvantages of proceeding without counsel.

# General

**Matter of Cherie D. R.,** 230 AD3d 1076 (1st Dept., 2024) New York County- affirmed

- Father made a motion for summary judgment to dismiss the petition, which was based on abandonment and permanent neglect. 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.
- 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.
- The affidavit and limited documentation submitted by the father raised a defense to the petition which appeared valid. Nevertheless, summary judgment dismissing the petition was not warranted, as questions of fact existed as to whether, despite his diligent efforts, the father was unable to communicate with or plan for the child's future.

# Abandonment

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

After a fact-finding hearing, Family Court found that the father abandoned the subject child, terminated his parental rights, and transferred guardianship and custody of the subject child to the petitioner. Assigned counsel submitted an *Anders brief* in which he moved for leave to withdraw as counsel for the appellant.

- The motion for leave to withdraw was granted and another attorney was assigned to as counsel to prosecute the appeal.
- The 2nd Dept wrote that the *Anders* brief was deficient because it failed to contain an adequate statement of facts and failed to analyze potential appellate issues or highlight facts in the record that might arguably support the appeal. The statement of facts did not discuss, in any detail, the majority of the father's testimony elicited at the hearing. Among other things, it did 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 acted as "a mere advisor to the court," opining on the merits of the appeal. Since the brief did not demonstrate that assigned counsel fulfilled his obligations under *Anders v California*, the 2nd Dept. felt that it must assign new counsel to represent the father.

# Abandonment

**Matter of Jayce G.**, 229 AD3d 857 (3rd Dept., 2024) St. Lawrence County- affirmed.

- The relevant six-month time period for this abandonment petition was December 10, 2020 through June 10, 2021. It was 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 asserted 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 were 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 said 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.

# Abandonment

**Matter of Tiyani AA.** 232 AD3d 1147 (3rd Dept., 2024) Schenectady County- one order affirmed, one order reversed and remanded.

- 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.

- Although the December 2022 order stated 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, the 3rd Dept. did not view the orders as having been entered on default so as to prevent the mother from taking a direct appeal from them.

- Mother contended 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 objecting to the court's ruling or seeking an adjournment, thus that argument was unpreserved for review. Even if it had been preserved, it was not 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.

Continued…

# Abandonment

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

- As for the merits, DSS 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 DSS's office. The mother suggested on appeal that DSS should have facilitated visitation by offering her alternatives to in-person visits at its office given her fear of arrest. There was no proof that DSS 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 DSS was under no obligation to go further.

- Finally, although the findings of fact in both orders regarding abandonment were fully supported by the record, the January 2023 order improperly included findings of fact as to matters that were alleged in the petition but that petitioner made no effort to prove at the hearing. That order was remitted so that Family Court could strike portions of the order containing the improper findings.

# Abandonment

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

- The mother and the father each contended that they were denied procedural due process because Family Court failed to advise them, in both the TPR proceeding and the underlying FCA article 10 derivative neglect proceeding, of their rights pursuant to Family Court Act §1033-b(1)(b) [a recitation of the allegations in the petition and right to adjournment to obtain counsel] and (d) [right to 1028 hearing]. Contrary to the contentions of the mother and the father, the court's failure to strictly comply with the notice requirements set forth in FCA Art. 10 did 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.
- The 4th Dept. also rejected 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 SSL §384-b(5)(a). 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.

# Abandonment

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

- The 4th Dept. rejected 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)]. 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. 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 was not preserved for review and was 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 did not demonstrate bias. 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. Here, the court questioned one witness, and the questioning was non-adversarial and served to clarify the witness's testimony.

# Permanent Neglect

**Matter of Jaden S.**, 232 AD3d 559 (1st Dept., 2024) New York County- affirmed.

- 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.

- 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 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.

- 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.

- To the extent the mother took issue with the agency's presentation of its case by introduction of the case record, her argument was 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.

# Permanent Neglect

**Matter of Hazelselena S. M.** AD3d 2024 NY Slip Op 06010 (1st Dept., 2024) New York County- affirmed.

- 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. Despite these efforts, 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 demonstrated that the agency's efforts failed because of the mother's refusal to cooperate.

- To the extent that the mother received anger management services and mental health treatment for bipolar disorder, the record showed that she did not gain insight into her behavior or otherwise benefit from therapy, and she exhibited an inability to control her anger when faced with circumstances she did not like. 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 filed.

- 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. 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.

# Permanent Neglect

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

- 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. 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. 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.

Skip

# Permanent Neglect

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

- The granting of an adjournment rests in the sound discretion of the hearing court. 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.
- Father permanently neglected the child, despite DSS's 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.
- 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 permanency in the child's life.

Skip

# Permanent Neglect

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

- 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.
- The appeal from so much of the order as brings up for review the Family Court's finding of permanent neglect of the child by the mother was dismissed. The mother's failure to appear at the fact-finding hearing, and in that her attorney did not participate, although present at the hearing, was a default. Thus, the finding of permanent neglect could be reviewed.
- As to the dispositional hearing, 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.

Skip

# Permanent Neglect

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

- The subject children have been in foster care since 2017. In 2021, the petitioner commenced proceedings to terminate the mother's parental rights.
- 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 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 did not facially demonstrate unequivocal and timely applications for self-representation that would have triggered a “searching inquiry.”
- 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.
- The contention of mother and the AFC that Family Court should have granted a suspended judgment was unpreserved, and in any event, 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. In addition, the mother failed to benefit from those portions of the service plan that she had completed.
- Contrary to the contention of mother and the AFC, Family Court did not improvidently exercise its discretion in failing to consider the wishes of the child Nylah, 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, such a child's desire is but one factor that Family Court may consider in determining whether termination of parental rights is in that child's best interests. 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 toward adoption.

# Permanent Neglect

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

- The children Shanessa B. and Kayla B. had been in kinship foster care with their great-aunt since 2011, and the child Kasey R. L. had been in kinship foster care with the great-aunt since 2012, six days after he was born. In October 2019, petitioner commenced these proceedings to terminate the mother's parental rights to the children on the ground of permanent neglect.

- Petitioner 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. 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 showed 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.

- Termination of the mother's parental rights was in the best interests of the children. 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. Skip

# Permanent Neglect

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

Respondent 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 a petition alleging that the mother had permanently neglected the children.

- Upon the children's removal, the caseworkers recommended that the mother undergo a substance abuse evaluation and a mental health evaluation and that she follow any resulting treatment recommendations, and they scheduled appointments for the mother to obtain said evaluations. DSS also facilitated regular supervised visitation with the children and offered the mother parenting education, caseworker counseling and transportation services. Mother asserted that these services were not tailored to her particular circumstances, however 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.
- Mother also argued that she substantially planned for the children's future. Family Court found that the mother lacked credibility. For example, the mother denied that she hid a pregnancy from DSS during the pendency of the original neglect proceedings, but her assertions were contradicted by her fiance'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.

Continued…

# Permanent Neglect

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

- 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 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.
- The mother also argued that the court should have granted her a suspended judgment. 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. 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.

# Permanent Neglect

**Matter of Carrie X.**, 230 AD3d 1397 (3rd Dept., 2024) Broome County- appeal dismissed

The mother's appeal was dismissed as untimely. Pursuant to FCA §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 reflected 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 was untimely and, as the applicable statutory time bar is absolute and not subject to extension, the 3rd Dept. lacked jurisdiction to entertain it.

# Permanent Neglect

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

- 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. DSS 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. DSS conducted service plan review meetings and recommended that the mother engage in mental health counseling, substance abuse treatment and parenting classes; DSS 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, DSS repeatedly recommended that the mother obtain housing separate from the paramour. DSS'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.

- 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. 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-finding hearing, she had obtained her own apartment and was living separately from the paramour.

Continued…

# Permanent Neglect

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

- Mother asserted that she previously completed a parenting 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. 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 DSS instead.

- Turning to the disposition, the mother did not appear at the dispositional hearing, despite being informed of the scheduled date during the prior court appearance. DSS 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 DSS's caseworkers.

Continued…

# Permanent Neglect

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

- The child had been doing well in foster care, and she was engaged in various sports and other enriching activities. The 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.

- The mother also complained that Family Court improperly incorporated testimony from a March 2023 permanency planning hearing into the fact-finding hearing for the instant permanent neglect proceeding, but the 3rd Dept. noted that such testimony was incorporated with her consent and, as such, the issue was unpreserved for appellate review, and also noted that Family Court premised its decision only on evidence that was properly admissible at the fact-finding hearing.

# Permanent Neglect

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

- Respondent mother is the mother of the subject children (born in 2007 and 2017) and respondent father is the father of the older child. 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.

- 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.

- The 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.

Continued…

# Permanent Neglect

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

- 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 the older child flinching and appearing uncomfortable and fearful of the mother on these occasions. 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.

- With respect to 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.

Continued…

# Permanent Neglect

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

- 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, 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.
- Continued…

# Permanent Neglect

**Matter of Carmela D.**, 232 AD3d 1126 (3rd Dept., 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 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. 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, was supported by a sound and substantial basis in the record.

# Permanent Neglect

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

- The father's refusal to cooperate with petitioner and its service plan demonstrated his unwillingness to plan for the future of his children. 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. 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 children's future.

Skip

# Permanent Neglect

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

- The mother's appeal from the order as it concerns the disposition with respect to the older child in that appeal was dismissed as moot because that child had reached the age of 18, although the challenge to the finding of permanent neglect was not academic.
- Although the court erroneously stated in its oral decision that it was placing 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.
- The mother was provided with sufficient notice that petitioner sought to terminate her parental rights, the record which contained 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's contention 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 was preserved. The 4th Dept. did review this issue and concluded that the court did not impose concurrent permanency goals. 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 simultaneously considering adoption and working with a parent is not necessarily inappropriate.
- Although petitioner made affirmative, repeated, and meaningful efforts to assist the mother, its efforts were fruitless because the mother was utterly uncooperative. The testimony and the exhibits demonstrated that, although petitioner attempted to maintain contact with the mother and to work with her toward her service plan goals, she failed to cooperate in any meaningful manner.

# Permanent Neglect

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

- The father's contention that the petition against him must be dismissed on the ground that it was filed prematurely was unpreserved for 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. 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.
- 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. Here, 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.
- The father's failure to provide any realistic and feasible alternative to having the child remain in foster care until his release from prison supported a finding of permanent neglect.

Skip

# Permanent Neglect

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

- Although 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.
- 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.
- 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, attendance at the myriad programs and visits arranged for respondents clearly did 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. Petitioner established that, despite any minimal progress, respondents did not actually learn to accept responsibility and modify their behavior.

Continued…

# Permanent Neglect

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

- Respondents also contended that Family Court erred in refusing to address a custody petition filed by the paternal grandmother before entering the dispositional order. Respondents lacked standing to challenge any actual determination of the grandmother's petition, although to the extent that respondents each contended that the court's failure to address that petition affected the underlying order terminating their parental rights, the 4th Dept. concluded that those contentions lacked merit.
- The proper procedural course would have been for the court to consider the 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. The 4th Dept. nevertheless concluded that the record supported the court's conclusion that the children's best interests required continuing custody with DSS so that they could be made available for adoption by their foster parents.
- The record from the hearing, at which the paternal grandmother testified, established that it was in the children's best interests to remain with the pre-adoptive parents.

# Permanent Neglect

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

- The father contended 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, it was without merit. Under the Family Court Act, at 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]).
- Family Court did not impose concurrent permanency goals. 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 simultaneously considering adoption and working with a parent is not necessarily inappropriate“.

Continued…

# Permanent Neglect

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

- Also rejected was the father's contention that his due process rights were violated because he was not provided with sufficient notice that petitioner sought to terminate his parental rights. That contention was belied by the record, which contained 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 also contended that petitioner failed to establish that it exercised the requisite diligent efforts to encourage and strengthen the parent-child relationship. However, the testimony and the exhibits submitted by petitioner demonstrated 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) Bronx County- affirmed.

- 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.
- 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. 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. 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.

# TPR Mental Illness

**Matter of Juliet W.**, 232 AD3d 1259 (4th Dept., 2024) Cattaraugus County- reversed on the law and remitted.

- Family Court erred in granting DSS's motion for summary judgment. 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.

- The 4th Dept held that in moving for summary judgment, DSS did not submit any evidence of the current state of the mother's mental health and intellectual disability issues. Instead, it relied 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. However, neither the relied-upon 2018 order of disposition nor its supporting decision, contained 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. 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.



Continued…

# TPR Mental Illness

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

- Thus, the 2018 judicial determination, premised on three- to eight-year-old evidence, was 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. Therefore, the mother has not yet had a full and fair opportunity to litigate that issue.

- The 4th Dept distinguished a previous decision, *Yeshua G.*, in which a respondent father was collaterally estopped from relitigating the same issue. Although not specifically stated in its 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.

# TPR Mental Illness

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

- Testimony from petitioner's expert witness, a psychologist, established that the mother suffered from mental illness 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.

- Mother contended that DSS's evidence of the mother's mental illness was 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 review. In any event, the record established 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**.** Thus, the mother's contention that a language barrier rendered the test results and, therefore, the psychologist's opinion, unreliable was not supported by the record.

# TPR Dispositions

**Matter of Sonayah M.**, AD3d 2024 NY Slip Op 06277 (1st Dept., 2024) New York County- affirmed.

- The child had lived with her foster mother for over 10 years, and the two had developed a strong bond.
- 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 failed to address the fact that his lack of consistent mental health treatment constituted a barrier to reunification.
- A suspended judgment was not warranted. 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. Moreover, the foster mother provided for all of the child's needs and wishes to adopt her.

# TPR Dispositions

**Matter of Allyana J.**, 232 AD3d 896 (2nd Dept., 2024) Orange County-affirmed.

- The mother and the father of the subject children had been the subject of multiple neglect and abuse petitions filed by the Orange County 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 FCAct 633(b) on or around July 19, 2022. Subsequently DSS moved to lift the suspended judgment based on the mother's noncompliance with its terms and terminate her parental rights pursuant to SSL §384-b. DSS also filed a companion neglect petition pursuant to Article 10.

- The matters proceeded to a hearing, during which the parties reached a global settlement agreement, whereby the mother 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. Family Court authorized sibling visitation between the children Michael J. and Edward J. and their siblings but did not award the mother post-termination visitation with Michael J. and Edward J. 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 post TPR parental visitation when the termination of parental rights results from a voluntary surrender under SSL §383-c, but an adversarial proceeding pursuant to 384-b does not offer such option. Since these were adversarial proceedings pursuant to SSL §384-b, Family Court properly denied post TPR visitation between the mother and the Michael J. and Edward J.

# TPR Dispositions

**Matter of Orazio R.**, AD3d 2024 NY Slip Op 06049 (2nd Dept., 2024) Richmond County- affirmed.

- Following fact-finding and dispositional hearings on the permanent neglect petition, respondent mother moved to reopen the dispositional hearing. Family Court denied the motion.

- At the dispositional stage of a proceeding to terminate parental rights, the court focuses solely on the best interests of the child. 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. 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.

- Family Court did not err in denying the mother's motion to reopen the dispositional hearing, as that motion was not supported by non-hearsay evidence relevant to the determination. Note- the decision did not discuss the grounds on which the mother was basing her motion.- Skip

# TPR Dispositions

**Matter of Camila G. C.**, 229 AD3d 459 (2nd Dept., 2024) Rockland County- affirmed.

- 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.
- **The grandmother had also filed for guardianship and custody- her appeal is discussed in the next case.**

# Custody

**Matter of Camila G. C.**, 229 AD3d 549 (2nd Dept., 2024) Rockland County- affirmed.

- 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. 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- indeed, SSL §383(3) 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. Thus, a nonparent relative takes no precedence for custody over the adoptive parents selected by an authorized agency
- At the time the grandmother filed her petition, 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. She had strongly and lovingly bonded with the foster parents and the other children in the home
- 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. 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

# MISCELLANEOUS DECISIONS

# Ethics

**Matter of Kala Y. v Quinn Z.**, 232 AD3d 1103 (3rd Dept., 2024) Saratoga County- reversed.

- In this custody case, the mother moved to disqualify the father's attorney under the advocate-witness rule, and the father opposed and cross-moved for sanctions and counsel fees. The Family Court granted the mother's motion and denied the father's cross-motion.

- 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. 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 against the other party's right to be free from possible prejudice due to the questioned representation. 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.

Continued…

# Ethics

**Matter of Kala Y. v Quinn Z.**, 232 AD3d 1103 (3rd Dept., 2024)

- 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, the 3rd Dept. disagreed 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 could 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. 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.

- The record did not demonstrate that the mother's disqualification motion, even though without merit, was frivolous.

# Fair Hearing

**Matter of Jeter v Poole**, NY3d 2024 NY Slip Op 05868 (2024) Court of Appeals- affirmed.

- The Appellate Division properly concluded that petitioner had no constitutional right to assigned counsel during her SCR administrative hearing.

- 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.

- Jeter'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 was without merit. 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 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, but rather a physical attack on the subject child. It is undisputed that the state has a strong interest in protecting children from abuse. 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.

- The Appellate Division correctly held that OCFS's determination is supported by substantial evidence in the record.

# Fair Hearing

**Matter of Naomi NN. V New York State Office of Children & Family Services**, AD3d 2024 NY Slip Op 06635 (3rd Dept., 2024) Ulster County)- confirmed.

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 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 the foster father) witnessed the foster mother's outburst and did not intervene. Ulster County 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.

OCFS 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 ALJ who presided over that hearing 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 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.

Continued…

# Fair Hearing

**Matter of Naomi NN. V New York State Office of Children & Family Services**, AD3d 2024 NY Slip Op 06635 (3rd Dept., 2024) Ulster County)- confirmed.

- The hearing evidence consisted of the connections stage summary, the investigation progress notes prepared by the assigned DSS caseworker or her coworkers, and photographs of the child. The caseworker herself no longer worked for DSS by the time of the hearing and did not testify. 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 child's daycare observed injuries on the child's face in the wake of that incident, and photographs taken of the subject child on April 4, 2019 clearly showed 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 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 testified. 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 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.

Continued…

# Fair Hearing

**Matter of Naomi NN. V New York State Office of Children & Family Services**, AD3d 2024 NY Slip Op 06635 (3rd Dept., 2024) Ulster County)- confirmed.

- 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 (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.

- The 3rd Dept. was 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. 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 existed 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.

# ICPC

**Matter of D.A.**, Misc3d 2024 NY Slip Op 24225 (Family Court, New York County, 2024)

- Extends the holding in Matter of DL v SB (which involved a non-custodial, non-respondent parent seeking custody of their child) to a situation involving placement of a child with a relative pursuant to an order of temporary custody in a separate, parallel Article 6 proceeding as also not falling within the purview of ICPC.

- An award of temporary (or final) custody pursuant to Art. 6 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. 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 Courtin DL v SB distinguished Shaida W., not on the ground that the resource was not a parent, but that the placement was a foster care placement.

- Further, the statute expressly provides that ICPC 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, in Matter of Shaida W., held that this exception does not apply where 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 by the Court of Appeals in Matter of DL v SB.

# Record on Appeal

**Matter of Ahnna N.**, 229 AD3d 882 (3rd Dept., 2024) Chemung County- affirmed the denial of respondent's motion to settle the record on appeal

- The underlying case was about the revocation of suspended judgments.
- In preparation for an appeal, the mother moved in Family Court to settle the record, including in her proposed record several CASA reports generated after the suspended judgment. DSS 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. The court, among other things, denied the mother's motion in a November 2023 order, and the mother appeals.
- 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.“
- "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
- There was no dispute that the CASA reports in question were not offered as evidence during the revocation hearing, which rendered them beyond consideration by the 3rd Dept. on appeal. Also, there was no indication that Family Court relied upon those CASA reports or that such reports necessarily affected the court's final judgment. 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.

# The End

Thank You!