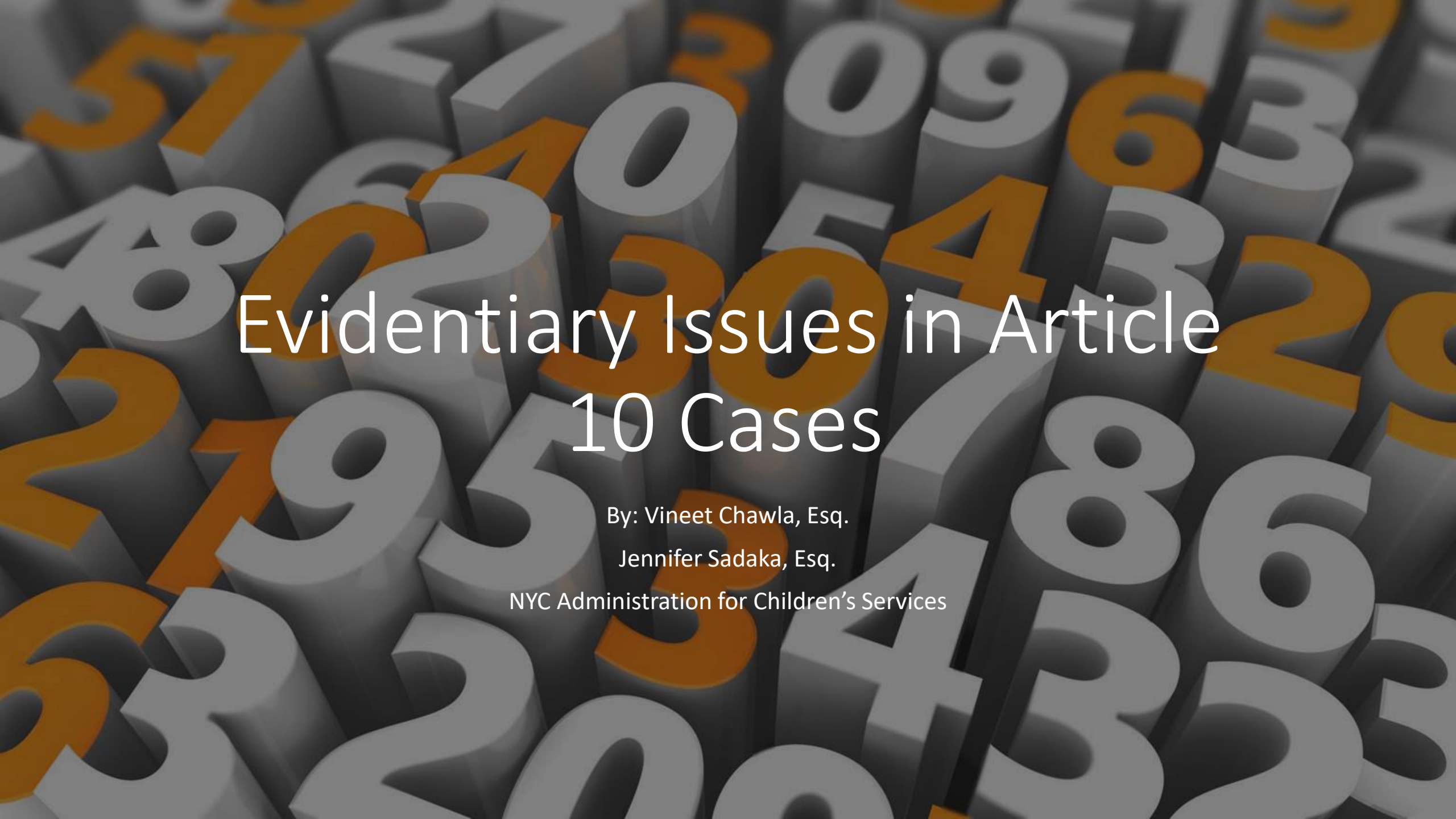

Evidentiary Issues in Article 10 Cases

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CONFRONTATION CLAUSE

What is the Confrontation Clause??

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him**; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Confrontation Clause does not apply to Article 10 cases!

Confrontation Clause

Matter of Q.-L. H., 27 AD3d 738 (2d Dept 2006):

The Family Court must balance the due process rights of an article 10 respondent with the mental and emotional well being of the child. The Family Court properly balanced the respective interests of the parties and, based upon the record, reasonably concluded that the child Y.-L. R. would suffer emotional trauma if compelled to testify in front of the appellant. Because the appellant's attorney was present during the child's testimony and cross-examined her on the appellant's behalf, neither the appellant's due process right nor his Sixth Amendment right of confrontation was violated by his exclusion from the courtroom during the child's testimony.

Guillermo v. Agramonte 137 AD3d 1767 (4th Dept 2016)

Family Court matters are civil in nature and the Confrontation Clause applies only to criminal matters (see Matter of Q.-L. H., 27 AD3d 738, 739, 815NYS2d 601 [2006]).

Confrontation Clause

Matter of Nakiah H, 63 Misc. 3d 1229(A) (Bronx Fam Ct. 2019)

While due process protections are in place for respondents in Family Court proceedings, the right of confrontation is not constitutionally mandated in these and other civil proceedings (*See Matter of Nicole V*, 71 NY2d 112, 117-118, 518 NE2d 914, 524 NYS2d 19 [1987]; *People v Geraci* at 367.) In article 10 specifically, there are a number of evidentiary provisions, such as Family Court Act § 1046 (a) (vi) allowing the admission of the out-of-court statements of children, that demonstrate the legislature's intention to balance the parent's right to due process with the statutory purpose of "protect[ing] children from injury or Is treatment and . . . help[ing to] safeguard their physical, mental, and emotional well-being."

Matter of Ramon F., 173 AD3d 1775 (4th Dept. 2019)

Here, the lower court admitted two documents authored by a non-testifying psychiatrist. The father argued that it was a violation of his right to confront the witnesses against him. The 4th dept disagreed and stated "Although the father's contention is framed in terms of a violation of his right to confront the witnesses against him, "Family Court matters are civil in nature and the Confrontation Clause applies only to criminal matters" (*Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1768, 29 NYS3d 720 [4th Dept 2016]). In addition, while every litigant has a right, guaranteed by the Due Process Clauses of both the Federal and State Constitutions, to confront the witnesses against them (*see generally Matter of Cecilia R.*, 36 NY2d 317, 320, 327 NE2d 812, 367 NYS2d 770 [1975]; *Matter of Ana Maria Q.*, 52 AD2d 607, 607, 382 NYS2d 107 [2d Dept 1976]), "this right is not absolute" in civil actions (*Matter of Raymond Dean L.*, 109 AD2d 87, 88, 490 NYS2d 75 [4th Dept 1985]).

FRYE HEARINGS

Frye Hearings

The **Frye test** asks whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Frye holds that while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. It emphasizes counting scientists votes, rather than on verifying the soundness of a scientific conclusion

Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 442

Frye Hearings – When are they appropriate?

The introduction of **novel** scientific evidence calls for a determination of its reliability, and the ***Frye*** test asks whether accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Here, there was a question as to whether the methodologies employed by plaintiff's experts provided a reliable causation opinion without using a dose-response relationship and without quantifying plaintiff's exposure. There was no particular **novel** methodology at issue requiring a determination whether there was general acceptance. The inquiry here was more akin to whether there was an appropriate foundation for the experts' opinions.
Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 442

A ***Frye*** hearing is necessary only if expert testimony involves "**novel** or experimental matters" (*see People v Byrd*, 51 AD3d 267, 274, 855 NYS2d 505 [1st Dept 2008], *lv denied* 10 NY3d 956, 893 NE2d 446, 863 NYS2d 140 [2008], citing *Parker v Crown Equip. Corp*., 39 AD3d 347, 348, 835 NYS2d 46 [1st Dept 2007]). The application of a generally accepted technique, even though its application in a specific case was unique or modified, does not require a ***Frye*** hearing (*see Byrd*, 51 AD3d 267, 855 NYS2d 505; *Styles v General Motors Corp*., 20 AD3d 338, 799 NYS2d 38 [1st Dept 2005]). The ***Frye*** test concerns only the acceptability and reliability of the scientific technique and not the "adequacy of the specific procedures used to generate the particular evidence to be admitted" (*see Wesley*, 83 NY2d at 422). People v. Garcia, 39 Misc. 3d 482, 484

The question of whether specific contaminants cause physical injury does not present a **novel** scientific theory (*see Nonnon v City of New York*, 32 AD3d 91, 819 NYS2d 705 [2006], *affd* 9 NY3d 825, 874 NE2d 720, 842 NYS2d 756 [2007]). Therefore, the defendants are not entitled to a ***Frye*** hearing (*see* ***Frye*** *v United States*, 293 F 1013 [DC Cir 1923]). Davydov v Board of Mgrs. of Forestal Condominium, 185 A.D.3d 548, 550

State of New Jersey v. Nieves, 2023 WL 5947996

"The evidence supports the finding that there is a real dispute in the larger medical and scientific community about the validity of shaking only SBS/AHT theory, despite its seeming acceptance in the pediatric medical community."

" In determining whether ABT/SBS is generally accepted within the medical and scientific community requires evaluation of two considerations: (1) whether the theory is generally accepted by the biomechanical community and supported by biomechanical testing and (2) whether the theory is generally accepted by the pediatric medical community and supported by clinical data connecting the constellation of symptoms with SBS/AHT."

Motion on Frye Hearing Decision from Queens Criminal Court

People v. Callaghan, Index No. 2348/2018 (Queens Criminal Court 2024)

"Moreover, unlike *Nieves*, the previous rulings in *this* state, found SBS/AHT evidence to be generally accepted – and therefore admissible – based on consensus in the medical community. And the Court in *Nieves* noted specifically that the theory is still generally accepted in the pediatric medical community, however, not in the biomechanical community."

What does New York think??

"The New York courts have specifically held that SBS/AHT is generally accepted in the scientific community. Additionally, SBS/AHT has been consistently recognized by New York courts as an accepted scientific theory, without explicit *Frye* analysis."

People v. Flores-Estrada, 55 Misc.3d 1015 (Kings Cty Sup. Ct. 2017)

Additional NY cases

- *People v Yates*, 290 AD2d 888, 736 NYS2d 798 (3rd Dept 2002)
- *People v Sulayao*, 58 AD3d 769, 871 NYS2d 727 (2nd Dept 2009),
- *People v Thomas*, 46 Misc 3d 945, 998 NYS2d 590 (Westchester County Ct 2014)
- *People v Hershey*, 85 AD3d 1661, 925 NYS2d 314 (4th Dept 2011),
- *People v Kendall*, 254 AD2d 809, 678 NYS2d 182 (4th Dept 1998)
- *People v Van Norstrand*, 85 NY2d 131, 647 NE2d 1275, 623 NYS2d 767 (1995)
- *People v Wong*, 81 NY2d 600, 619 NE2d 377, 601 NYS2d 440 (1993);
- *Matter of Joaquin Enrique C. [Anna Julia F.]*, 79 AD3d 548, 912 NYS2d 219 (1st Dept 2010);
- *Matter of Lou R.*, 131 Misc 2d 138, 499 NYS2d 846 (Fam Ct, Onondaga County 1986)
- *Matter of Damien S.*, 45 AD3d 1384, 844 NYS2d 790 (4th Dept 2007)
- *Matter of Seamus K.*, 33 AD3d 1030, 822 NYS2d 168 (3d Dept 2006);
- *Matter of Antoine J.*, 185 AD2d 925, 587 NYS2d 13 (2nd Dept 1992)

Is this Neglect???

- 4 children ages 8, 10, 14 and 17 years old.

- Petition: Mother went to the hospital for shortness of breath, asthma and influenza. The mother stated she was diagnosed with PTSD and bi-polar disorder. The mother told hospital staff that she does not take medication for these conditions, but instead does .4 grams of cocaine, drinks 2-3 Bud Lites, smokes 12-13 cigarettes, and smokes a blunt of marijuana per day to cope with these conditions. The mother told hospital staff that if she did not use these substances, she would not get out of bed.

- At trial: Mother used .4 grams of cocaine about three evenings per week, along with 2 beers to stay up to work on various research and writing projects, using the substances as a substitute for Adderall. Children were in the home during all of these events, sleeping in the next room. The mother had previously been diagnosed with mental illness and previously overdosed on Bendaryl. The mother would get the children up for school the next morning and get them to school.

Matter of Mykel B., AD3d 2024 NY Slip Op 05794 (2nd Dept., 2024)

Drug use/Impairment

- 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.

Sealed Criminal Cases in Family Court

Sealed Criminal Court records

Matter of Krystal N., 193 AD3d 602 (1st Dept 2021)

"[T]he Family Court properly declined to strike the 911 tapes from the record after his acquittal in Criminal Court because those records were not official recordings relating to respondent's arrest or prosecution and thus were not subject to the sealing statute."

In Re N.J., 2024 NY Slip Op 24318 (Kings Cty. 2024)

"In conclusion, DIRs — like 911 calls — serve broader purposes than "arrest or prosecution," unlike arrest reports, criminal court complaints, DA's Office documents, and court orders in criminal cases."

Matter of V.B. (Nicole A.) 218 NYS3d 341 (2nd Dep’t 2024)

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.

Family Court properly drew the strongest negative inference from the mother's failure to testify at the fact-finding hearing.

Can a Witness testify virtually?

People v. Wrotten 14 N.Y.3d 33 (Court of Appeals 2009)

- court's use of innovative procedures where necessary to carry into effect the powers and jurisdiction possessed by the Court

Haydee F. v. ACS-NY, 2020 NYLJ LEXIS 1700 (Family Court 2020)

- Litigants have a right to a fair trial not a PERFECT trial
- References to NYS statutes involving the UCCJEA (uniform custody and jurisdiction enforcement act) and UIFSA (uniform child support act) and these statutes, also dealing with children, allow an out of state party or witness to be deposed or to testify by telephone, audiovisual means or other electronic means.

CORROBORATION

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

- **Is Corroboration Required? See In re Lydia K.,** 112 AD2d 306 (2nd Dept 1985)
  - 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.

- …**But there was Corroboration anyway**:
  - 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.

- ….**and the subject child recanted**:
  - 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.

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

- **Independently Admissible/Corroboration not required**: A.M.'s statements to medical personnel at 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
- **But..Corroboration anyway**: A.M.'s **specific and consistent** out-of-court statements to the agency caseworker detailing the sexual abuse were sufficiently corroborated
    - 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.
- **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.

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

Person Legally Responsible?

- 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.

Statements to Medical Personnel

- 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.

Corroboration

- 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.

- **Similar 3rd Dep't: Matter of Lawson O. (Andrew O.),** 176 AD3d 1320 (3d Dept 2019)

Derivative Abuse

- 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.

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

Gratification:

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. Also see **Matter of K.B**., 2024 NY Slip Op 05823 (1st Dept., 2024)

Corroboration

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.

Derivative

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.

EXCITED UTTERANCE

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

- 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**.**
- **Later Inconsistent Statement by Child: 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.**
- 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 of neglect 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.**

In the Matter of Kyng T. B. 2025 NY Slip Op 00087 (2nd Dep't 2025)

Here, much of the evidence against the father consisted of **out-of-court statements** made by the mother to a police officer who responded to the mother's 911 call.

Contrary to the father's contention, the mother's out-of-court statements were admissible under the **excited utterance** exception to the hearsay rule. The record reflects that the **mother spoke to the police officer within minutes after the incident and that she was very upset, crying, and in distress.**

The record supports the conclusion that the mother was still under the stress of excitement when she made the statements, and the statements were not made under the impetus of studied reflection (see People v Hernandez, 28 NY3d 1056, 1057; People v Gilliam, 229 AD3d 565, 566; People v Delacruz, 207 AD3d 652, 653; People v Ortiz, 198 AD3d 924, 927).

Matter of Legend C.-F. F. 218 NYS3d 698, 2024 NY Slip Op 05206 (2nd Dep't)

- 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.

Excessive Corporal Punishment & Intent; Conforming Pleadings

In the Matter of Elina M.

- 2nd Dep't dismissed ECP case
- Says father did not "intend" to harm the child: What does this mean?
- Court says it cannot make findings based on allegations not in the petition
- Practice suggestions

Matter of Shayla G., AD3d 2024 NY Slip Op 06042 (2nd Dept., 2024)

- 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.

BEST EVIDENCE RULE

BEST EVIDENCE RULE: what is an original?

Helpful info
@: https://nycourts.gov/judges/evidence

BEST EVIDENCE RULE: what is an original?

In *People v. Torres*, 118 A.D.2d 821, the Court found that the best evidence rule was inapplicable when permitting a witness to testify as to the witness' recollection of certain conversations that were also tape recorded. The Court explicitly states that **"the best evidence rule was inapplicable, and the conversation could be testified to by anyone who heard it."** (*People v. Torres* at 822).